COURT OF APPEAL OF
NEW BRUNSWICK

COUR D'APPEL DU
NOUVEAU-BRUNSWICK

104-16-CA

C.B.

APPELLANT

- and -

H.H., E.H. and G.H.

RESPONDENTS

C.B. v. H.H. et al, 2018 NBCA 45

CORAM:
The Honourable Justice Green
The Honourable Justice Baird
The Honourable Justice French

Appeal from a decision of the Court of Queen's Bench:
November 23, 2016

History of Case:

Decision under appeal:
Unreported

Preliminary or incidental proceedings:
N/A

Appeal heard:
September 19, 2017

Judgment rendered:
July 30, 2018

Reasons for judgment by:
The Honourable Justice French

Concurred in by:
The Honourable Justice Green

Separate concurring reasons by:
The Honourable Justice Baird

C.B.

APPELANTE

- et -

H.H., E.H. et G.H.

INTIMÉS

C.B. et H.H. et autres, 2018 NBCA 45

CORAM :
l'honorable juge Green
l'honorable juge Baird
l'honorable juge French

Appel d'une décision de la Cour du Banc de la Reine :
le 23 novembre 2016

Historique de la cause :

Décision frappée d'appel :
inédite

Procédures préliminaires ou accessoires :
s.o.

Appel entendu :
le 19 septembre 2017

Jugement rendu :
le 30 juillet 2018

Motifs de jugement :
l'honorable juge French

Souscrit aux motifs :
l'honorable juge Green

Motifs concordants distincts :
l'honorable juge Baird

Counsel at hearing:

For the appellant:
Timothy M. Hopkins and Geneva C. McSheffery

For the respondent, H.H.:
Jamie J. Feenan

For the respondents, E.H. and G.H.:
Natasha J. MacKay

THE COURT

For the reasons of the majority, the appeal is dismissed, and the cross-appeals are allowed. C.B. is ordered to pay costs to H.H. in the amount of $2,500 for the proceeding in the court below and $2,500 in this Court. C.B. is also ordered to pay one set of costs to G.H. and E.H. also in the amount of $2,500 for the proceeding in the court below and $2,500 in this Court. Baird J.A. would also have dismissed the appeal and allowed the cross-appeals but with different remedies and cost awards.

Avocats à l'audience :

Pour l'appelante :
Timothy M. Hopkins et Geneva C. McSheffery

Pour l'intimé, H.H. :
Jamie J. Feenan

Pour les intimés, E.H. et G.H. :
Natasha J. MacKay

LA COUR

Pour les motifs exposés par les juges majoritaires, l'appel est rejeté et les appels reconventionnels sont accueillis. C.B. est condamnée à verser à H.H. des dépens de 2 500 $ pour la procédure instruite devant la cour d'instance inférieure et des dépens de 2 500 $ pour celle instruite devant notre Cour. C.B. est aussi condamnée à verser à G.H. et à E.H. une seule masse de dépens de 2 500 $ pour la procédure instruite devant la cour d'instance inférieure et des dépens de 2 500 $ pour celle instruite devant notre Cour. La juge Baird est aussi d'avis de rejeter l'appel et d'accueillir les appels reconventionnels. Toutefois, elle accorderait des mesures de redressement différentes et elle adjugerait les dépens autrement.

The judgment of French and Green, JJ.A. was delivered by

FRENCH, J.A.

I. Introduction

[1] This appeal is the unfortunate product of a protracted dispute resulting from the 2012 separation of the parents of two children. The mother and father had cohabited since 1997. Their separation led to an initial application in the Court of Queen's Bench, Family Division which led to, among other things, an order in June 2014 requiring the father to pay child and spousal support. Less than a month later, the father transferred his home and camp to his parents. The mother applied to have the transfer declared void and set aside, contending the transfer had been made with the intent to defeat her claim as a creditor, pursuant to the *Assignments and Preferences Act*, RSNB 2011, c. 115. The mother was ordered to join the father's parents as respondents to her motion. Before it was heard, the father brought a motion to vary the June 2014 support order on the grounds he had since become unable to work because of his major depressive disorder. Before either of these motions was heard, the mother filed another motion, in June 2015, which consolidated her first motion and also sought an order that the father be found in contempt of the support order and to have the father pay half of the $118,000 she claimed he had withdrawn and hid prior to separation.

[2] The motion judge dismissed all of the mother's claims for relief. In particular, the judge found there was consideration for the property transfer and there was no intention to defeat the mother's claim as creditor. The mother appeals the dismissal of her claim to have the transfer set aside. For the reasons that follow, I would dismiss her appeal.

[3] The motion judge also dismissed the father's motion to vary, concluding it was barred by the principle of *res judicata*, and did not determine on the merits his claim that there had been a material change in circumstances since the making of the last order,

as contemplated by s. 118(2) of the *Family Services Act*, S.N.B. 1980, c. F.-2.2 ("*F.S.A.*"). By cross-appeal, the father appeals this determination. I would allow this appeal.

[4] The motion judge did not address the parents' claim for costs for successfully defending the mother's motion to set aside the property transfer and, by cross-appeal, they claim the judge erred in failing to do so. I would allow their cross-appeal.

II. Background

[5] The June 24, 2014 decision rendered in connection with the initial application is an important part of the background to the appeals. First, it resulted in the order the father seeks to vary and the motion judge relied on it when she concluded the father's motion was barred by the principle of *res judicata*. Second, the decision chronicles the parties' circumstances and conduct, including those on which the mother relies in making allegations of serious misconduct and contempt on the part of the father. It also sets out the judge's findings in relation to these allegations, findings which have been repeated and emphasized by the mother, at the hearing of the motions appealed and on appeal, as evidence of impropriety on the part of the father, sometimes accurately and sometimes not. Because of this, and in order to better appreciate the context of these submissions, I find it necessary to set out in some detail the factual and procedural background.

A. *The Application and the June 24, 2014 Order sought to be varied*

[6] When their relationship began, the mother was 24 and the father was 22. Their son was born in February 1997 and they began living together in Sussex in December 1997. Their daughter was born in October 2001. They did not marry and, throughout their relationship, they both worked and kept their finances separate.

[7] Both parties worked throughout their relationship. After graduating high school, the mother worked at Zellers and later Canadian Tire. Her income has varied over the years; it was approximately $19,000 in 2012, the year of separation.

[8] The father is an electrician, having taken four years of training early in the parties' relationship. In his June 24 decision, the application judge concluded the father's training as an electrician, as well as his ability to operate heavy equipment, "has been generally lucrative for him although there have been periods when [he] has had to resort to unemployment insurance for some time". On more than one occasion, he has travelled to western Canada for work. His best years were during the refit of the Point Lepreau Nuclear Generating Station. The father was laid off from that project in June 2012, the month before he and the mother separated, and he received EI benefits for the following year.

[9] Following separation, on July 19, 2012, the legal proceedings initially moved quickly. In her application, the mother claimed the father had an annual income of $256,000 and requested interim child support of $1,830 per month, for the two children, and spousal support of $1,000. In his answer, the father reported he was receiving EI benefits of $485 per week (or $25,220 yearly); he maintained his child support obligation was $186 per month, based on split custody, one child with each parent. Both parties claimed exclusive possession of the home.

[10] On August 23, 2012, the Case Management Master ordered that the primary care of the children remain as it was, one child with each parent, and she ordered access. The Master also ordered that a half-day hearing be scheduled before a judge on a date prior to October 1 "if possible", in order to address both custody and interim exclusive possession of the family home.

[11] It is noteworthy that there was no interim order for either child or spousal support, not even the small amount of child support the father's answer acknowledged he should pay. While it is unclear from the record, this may have been because the matter

was adjourned for custody to be addressed by a judge. Also, at the time, the father was receiving EI and it was expected he would return to work. In any event, the first interim order for child support was made only two months before the hearing of the application on June 17, 2014. No interim order for spousal support was ever made.

[12] Court appearances in late 2012 are relevant to the appeal. On October 17, 2012, the parties appeared for a case conference before a judge – the one who would hear the parties at all subsequent appearances leading up to and including the hearing of the application in June 2014. At this appearance, the parties reached an agreement respecting the family home. Their agreement, reflected in a Consent Order dated October 25, 2012, was that the home would be appraised and the father would pay the mother one half of the appraised value (on or before November 9, 2012). After this, the home would be the "sole property of [the father] free of any claim of [the mother]". This order and the father's failure to pay until after December 19, 2012, feature prominently in the mother's submissions before the motion judge and on appeal.

[13] Also part of the mother's submissions on appeal are the judge's findings resulting from this court appearance in relation to her allegations the father had made an improper use of, and/or was hiding, funds. These allegations are addressed in the application judge's decision of June 24, 2014 when he explains that, at the appearance on October 17, 2012, he heard unconvincing *viva voce* evidence regarding the father's use of such funds, or at least he began hearing such evidence. The examination of a person, who had testified the father had paid him for construction work done on the family home, was not completed. During a break in the examination of this witness the parties concluded their agreement regarding the family home. After the break, they advised the court of their agreement and the examination of the witnesses did not continue; the court appearance/hearing ended. Although the hearing adjourned before it ran its full course, the application judge had heard enough to conclude the father's explanation of the use of funds in question and the evidence of the witness were unconvincing. In fact, in his June 2014 decision, the judge rejected the father's explanation and this evidence weighed heavily in his finding that the father's evidence was not credible. In view of the Master

having ordered a hearing regarding custody etc., it is not clear how it was that such evidence came to be heard and the record is not helpful; presumably, an oral motion for contempt had been made.

[14] On December 3, 2012, the parties were before the court because the father had not paid the mother $68,500, the amount acknowledged to be due under the Consent Order following the appraisal of the family home. In his June 2014 decision, the application judge explained the father was self-represented and "seeking an adjournment of the contempt hearing in progress so that he could find some money to pay [the mother]". The judge also explained: "He told the court that he was having trouble getting a mortgage on the home property because the bank was requiring he first pay off the line of credit". The parties returned on December 19. At this appearance, the father's new counsel advised that the father could not borrow from the bank until the line of credit was eliminated, but the father could borrow from his parents the $68,500 to pay the mother, if a portion of the funds were able to be paid into court. Describing his response to this position, the judge explains "I ordered [the father] to pay $68,500 to [the mother] […] or we would continue with the outstanding contempt hearing. [The father] arranged for that payment from his mother". The father's parents advanced $68,500 to the father and he paid the mother.

[15] The allegations regarding the father's misuse of funds (as initially addressed at the October 17 hearing) and his failure to pay the $68,500 have been relied on by the mother as part of the factual basis for her claims, not only in the application but also in her subsequent motion for contempt and to set aside the property transfers, as well as on appeal. Indeed, as will be seen, the father's conduct in this regard was a factor in the application judge's determination of certain elements of spousal support and his order that he pay solicitor and client costs.

[16] After the father paid the $68,500, the application did not advance further – until October, 2013, when it was ordered to be set down for a one-day hearing. This is not to say all was quiet during the intervening period. There was a brief court appearance in

May 2013, where both parties were ordered to produce income information. Additionally, custody and access issues were a focus of the parties' attention, at least until the father moved to Saskatchewan for work in the summer of 2013. There is little in the record but it is plain there was conflict over allegations of harassment regarding the children and claims access was being frustrated. It was necessary for a Voice of the Child Assessment(s) to be undertaken, as well as third party assistance to encourage access. Nothing further will be said about these disputes since they were not issues in the hearing of the application.

[17] Also following the $68,500 payment in December 2012, the father's parents took steps which they describe as being for the purpose of recording the $68,500 loan they had made to him. First, in March 2013, they were added as joint owners/loss payees on the father's home insurance policy with Aviva Insurance. Second, in May/June their lawyer sent a letter to the father's lawyer, enclosing a draft promissory note in the amount of $68,500 and advising the parents "wish to secure their loan with a collateral mortgage once title to the property is transferred from [the mother] to [the father]". The father signed the promissory note in favor of his parents, but a mortgage was not completed. The father never made any payments under the promissory note. The mother disputes the funds advanced were a loan; she maintains they were the return of a portion of the sum of $118,000 the father had given to his own mother in order to hide that money.

[18] By the summer of 2013, the father's employment insurance benefits had run out and he and the parties' son went to Humboldt, Saskatchewan. He began working as an electrician on September 17, 2013.

[19] On October 23, 2013, counsel for the parties appeared before the application judge for a case conference. The father was in Saskatchewan. On consent, the judge ordered the application be scheduled for a one-day trial and the father "provide income information with respect to his employment in Saskatchewan forthwith or in any

event prior to the opening of the trial". The hearing of the application was scheduled for June 17, 2014.

[20] Since the father had not provided income information respecting his new employment, the mother requested another case conference. In March 2014 the application judge ordered both parties to provide income information and he ordered both parties to bring any outstanding requests for further and better disclosure to the next appearance.

[21] At the next appearance, on April 16, 2014, the first order for interim child support was made. Reflecting the receipt of the father's current income information (he was still in Saskatchewan), the order recites: the parties "stipulated for the purposes of the guidelines, the income of [the mother] is found to be $16,600 per annum, and the income of [the father] is found to be $156,000 from a period commencing in September 2013". The judge ordered the father to pay $9,480 no later than April 30, 2014, plus costs of $1,500. This represented interim child support, from September 1, 2012, and ongoing monthly support was set at $1,185 a month. The father paid $12,165 on April 30, 2014.

[22] On May 31, 2014, the father stopped working in Saskatchewan. He and the parties' son returned to New Brunswick for the hearing of the application.

[23] The live issues at the hearing were limited to the quantum of child and spousal support and the mother's claim for a division of property. They had agreed to a division of some property, including the father's RRSPs (as noted, the home had been addressed 18 months earlier). Regarding spousal support, the judge explained "[t]he parties have acknowledged that [the mother] is entitled to receive a form of spousal support and I agree…".

[24] The judge dismissed the mother's claim to an interest in the camp property and the $118,000 which she maintained the father had hidden prior to separation. He

concluded they had kept their finances separate and the mother had not established any interest in the father's property. He stated:

> It is ironic that the parties have confirmed in so much detail that their financial activities were kept separate and apart one from the other. Based upon the representations of [the father]'s counsel and the admissions of [the mother] it is clear that there is no basis to award [the mother] any portion of [the father]'s estate other than through the RRSPs that the parties have agreed to share. In this circumstance I accept that the definitive case that is mentioned by both counsel, *Kerr v Baranow***,** 2011 S.C.C. 10, (CanLii) […] [para. 87]

[25] For the purposes of child support, the judge determined the father's income by relying on his income tax returns for 2012 and 2013, and his earnings in Saskatchewan for 2014. He determined the father's income to be:

- $121,254 in 2012 (income earned from the Point Lepreau refurbishment and EI),
- $56,520 in 2013 (EI and the income of $38,863 from his employment in Saskatchewan), and
- $156,000 in 2014 (the same income accepted in the April, 2014 interim order).

[26] After determining the child support payable each year from separation, on a split-custody basis, the judge fixed the amount due at $15,724 (less any payments made before June 24). Ongoing monthly child support, based on $156,000, was set at $1,185 commencing July 1, 2014. The judge also ordered that child support was to be re-calculated annually, based on the father's actual income, commencing June 30, 2015.

[27] For the purposes of the *Spousal Support Advisory Guidelines*, the application judge determined the father's income to be $138,500. Explaining how he arrived at this amount, he states:

> [the father's] income is fluctuating between the substantial reward that he had when working at Point Lepreau in 2011 and the reduced amount he earned in 2012. Because it is more reflective of his income for the past 4 to 5 years I will require that the [father's] income for the purposes of support […] be set at $138,500. This is his salary for 2012 added to the salary of 2013, out of the first of those there is $121,254. The salary for 2013 is $156,000 divided by two and rounded to the nearest $500. Counsel for the applicant shall be required to prepare a divorce mate calculation sheet and after submitting it to counsel for the respondent for verification shall file with the court for incorporation of the data in the final order. [para. 79] [Emphasis added.]

[28] On its face, the amount of $138,500 is difficult to reconcile with the calculation described in the decision. The amount of $138,500 is the average of the father's income in 2012 and 2014. It is not, as described, the average of the income in 2012 and 2013. His income for 2012 was $121,254 and for 2013 it was $56,520. For 2014, it was determined to be $156,000. As a consequence, if the intention was to average the father's income for 2012 and 2013, his income for spousal support purposes would be $88,887.31; if the intention was to average all three years, the amount is $111,258.20. There is no expressed rationale for averaging 2012 and 2014, which produces $138,500.

[29] To calculate the spousal support payable, the judge directed the parties to prepare Divorce Mate summaries under the *Guidelines* using income of $138,500, as well as the additional inputs determined by him, including the mother's income, range and duration. The judge rejected the father's submission that income should be imputed to the mother. The judge stated he was doing so based on the father's conduct:

> I recognize that further training might be a financial benefit to this 40-year-old woman. It might result in her obtaining a better position. However, given the conduct of the

> respondent throughout this hearing will not penalize [the mother] for her failure to seek a better paying job. [para. 75]

[30] Also reflecting the father's conduct, the judge determined support should be set at the high end of the range of the *Guidelines*. He stated:

> […] Again, [the father's] conduct throughout this process gives me no hesitation in setting out that the range for the determination of support should be the high range as set out in the guidelines. The term of the support should be 14 years. The claim for such support should be retroactive to the month following the filing of the notice of application or September 1, 2012. [para. 77]

[31] As a final consequence of the application judge's assessment of the father's conduct, he ordered the father pay solicitor-client costs:

> Counsel for [the mother] requested that I award costs of not less than $25,000. With respect I have no basis to accurately or fairly assess whether such an amount would be an appropriate one in this matter. Having said this I am convinced that but for [the father's] subterfuge and his intentional attempts to avoid having this matter resolved fairly and honestly, it would have been accomplished far more quickly and with much less expense and anguish for [the mother]. [para. 89]

[32] While all arrears of child and spousal support were ordered to be paid in full within 30 days, the June 24 order did not quantify spousal support or solicitor-client costs. As noted, the spousal support calculations directed by the judge were yet to be prepared and solicitor and client costs would not be assessed until February 2015.

[33] A written order, issued on September 2, 2014, provided for a monthly spousal support obligation of $2,719, payable for 14 years commencing September 1, 2012, and it set the amount of spousal support due at $59,818, as of June 30, 2014. The ongoing monthly obligation of $2,719 would continue for a further 12 years and 2 months.

[34] Finally, before leaving the June 24, 2014 decision, I will address one final order made by the application judge. It is an order which the mother characterizes, including in her submission on appeal, as a determination by the judge that the father intentionally misled the court regarding the $118,000 he withdrew from his account(s) before separation. This is inaccurate for a number of reasons; however, without a doubt, it reflects the application judge's assessment of the father's representations. The judge made, under Rule 76(4) of the *Rules of Court* – Contempt Proceedings, the following order:

> I do however consider that **[**the father's] statements to the court on December 3, 2012 seeking to avoid paying [the mother] her share of the family home did appear to constitute an attempt to intentionally mislead the court. For that reason, and pursuant to Rule 76(4) I am requiring that [the father] appear before me on a date to be set by the Supervisor of Client Services not more than 60 days hence to explain his conduct. [para. 88]

[35] The judge said the father's statements "did appear to constitute" an attempt to mislead the court and he gave the father an opportunity to explain. Additionally, the judge's reason for believing he may have been misled did not relate, as the mother claims, to the $118,000 at issue in the hearing. The judge concluded he may have been misled because it appeared to him the father had access to approximately $30,000 in December 2012, at the same time the father had represented to the judge he could not pay $68,500 to the mother for the home. This is plain from the judge's decision. The basis for the judge's concern is reflected in the following paragraphs of his decision:

> I note that in passing <u>on December 3, 2012 when [the father] testified he was desperately short of money. He borrowed $31,000 from the line of credit</u>. This resulted in his owing a total of $31,371.76 on the line of credit. From these withdrawals [the father] deposited $16,000 to his tax-free savings account and he used $15,000 to increase the amount in one of his RRSPs.

> On that same date, December 3, 2012, [the father] appeared before me self-represented seeking an adjournment of the contempt hearing in progress so that he could attempt to find some money to pay [the mother]. He told the court that he was having trouble getting a mortgage on the home property because the bank was requiring that he first pay off the line of credit […]. [paras. 53-54]
>
> [Emphasis added.]

[36] Significantly, the judge's basis for his belief, that the father had access to cash when he represented he could not pay the mother as provided in the Consent Order, turned out to be mistaken. The father had access to cash from the line of credit in November/December 2011 – not in December 2012, as the judge suggested. This is evident from another part of the decision where the judge noted that, in December 2011, the father had taken significant advances on the line of credit:

> […] The line of credit balance on the November 2011 statement was $6028.85 and this amount was paid in full by December 3, 2011. There were two withdrawals totaling $31,313 from the line of credit made on December 2 and 3 and recorded on the December 2011 statement. […]
>
> [para. 17]

[37] Also, the mistaken impression was later explained away by the uncontradicted evidence of the father – as the judge's order, directing him to "explain his conduct", contemplates could be the case. This is addressed in an affidavit later filed by the father to dispute the mother's allegation "it was found that [the father]'s statements to the court on December 3, 2012 were an attempt to intentionally mislead the Court" and the father had failed to appear before the judge as he had been ordered (allegations made in her motion for contempt and to set aside the property transfer). As the father explains:

> I state that I did reappear before Justice […] following the trial and he ultimately found that the Court had simply misconstrued the December 3, 2012 statements by noting them down incorrectly as to the date of a certain event that was the subject of the statements. I provided a copy of my banking ledger that showed the transaction in question occurred in December 2011 and not December 2012 as the Court had thought.

There is no dispute this was addressed before the motion judge.

[38] Despite all of this, the mother continued to maintain, even before this Court, that the father had been found to have misled the court on December 3, 2012 and that the application judge had ordered him to answer for his contempt.

B. *The Property Transfer and the Motions Appealed*

[39] In July 2014, the father transferred his home and camp to his parents. Not surprisingly, the mother viewed the transfer, less than a month after the June 24, 2014 order for support, as an attempt to put his assets beyond her reach. This continues to be her position. The father's position is the transfer had nothing to do with avoiding his obligations to the mother. He maintains that following the support order he was unemployed and, after previous unsuccessful attempts to sell his home, the transfer to his parents would allow him to satisfy all his debts – in particular, those due to his parents, the Bank of Nova Scotia and the mother. The line of credit due to the Bank and the debt due to his parents would be satisfied by the transfer of his properties; the significant arrears which had been recently ordered, but not quantified, in favour of the mother would be satisfied by cashing his share of the RRSPs he had agreed to divide with the mother.

[40] The mother applied by ex-parte Notice of Motion to set aside the transfers and for Certificates of Pending Litigation. The application judge directed the mother serve the father and his parents. On October 27, 2014, the judge ordered the parents be joined as respondents to the motion and that "[e]ach of the Respondents is ***entitled*** to file responding documents on or before November 28, 2014". I reproduce this language because the mother has claimed on a number of occasions the parents were "*ordered*" to file responding documents and they failed to do so. The father's parents filed a jointly sworn affidavit on November 20, 2014, which sets out the consideration for the transfer, namely, the satisfaction of the $68,500 loan they had made to the father in December

2012, the repairs of approximately $67,500 they had made to his home (and to a much lesser extent, the camp), and the approximately $50,000 they had paid to the Bank (to pay off the line of credit) and for property taxes, etc. They also claimed costs.

[41] The father filed a Motion to Change, on October 23, 2014, seeking to vary his child and spousal support claiming to be unable to work as a consequence of a major depressive disorder. The mother's position was and is that the father's circumstances have not changed since the June 2014 trial.

[42] The mother filed another Notice of Motion, dated July 16, 2015, claiming (i) a finding of contempt, as a consequence of the father failing to pay support and solicitor and client costs (assessed in February 2015); (ii) an order that the property transfer be declared void and set aside, and (iii) an order that $118,000 "transferred out of a joint account by [the father] prior to separation…be deemed family property" and the father be ordered to pay the mother "$59,000 in satisfaction of the same".

C. *The Motion Judge's Decision*

[43] The hearing of the motions occurred over 5 days (February 10, 11, July 13, 14 and 15, 2016). As a preliminary matter, the mother maintained the issue of the father's contempt should be addressed first, submitting his motion should not be heard while he is in contempt of an existing court order(s). Alternatively, and also as a preliminary matter, she submitted the father's motion should not be heard, claiming it was barred by *res judicata* since it sought to re-litigate issues previously determined by the application judge.

[44] The judge dismissed all of the claims for relief made in the mother's motion. In connection with her claim for a finding of contempt based on the father failing to pay the child and spousal support that arose on June 24, 2014 ($15,272 and $59,818), the judge found these amounts had been substantially paid by October 2014. The father had paid $12,165 on April 30, 2014, following the interim order made on April 16, 2014

(he also paid $440 on August 1, 2014, $440 on August 29, 2014, and on September 23, 2014, a further $1073.17 was taken at source from his EI). As well, he paid $60,000 toward spousal support in October 2014. In connection with the father's failure to meet his ongoing support obligations, the judge noted he had not worked since May 31, 2014, (he was receiving EI), and in October 2014, he had applied for CPP disability benefits. She concluded that by filing his Motion to Change in October 2014, the father demonstrated he wanted to address his ongoing support obligation. In relation to the claim of contempt for having failed to pay solicitor-client costs of approximately $25,000, the judge noted they had not been assessed until February 2015, months after he had filed his motion to vary because he was not able to work. Finally, in dismissing the motion for contempt and the request for the father's incarceration, the judge observed there was no evidence the remedies under the *Support Enforcement Act*, S.N.B. 2005, c. S-15.5, had been exhausted. As noted, the dismissal of the motion for contempt has not been appealed.

[45] In dismissing the mother's motion for an order setting aside the property transfer, the judge found there was consideration for the transfer and no intention to defeat or avoid creditors. This is the decision the mother appeals.

[46] Finally, the motion judge dismissed the mother's claim for a division of the $118,000 withdrawn by the father prior to separation since her claim to these funds had been previously denied by the application judge. At the hearing of the motion, the mother acknowledged the application judge had dismissed her claim. As the motion judge explains, the mother testified "she has no claim to the money and she was uncertain…as to why and on what basis she was making the claim again". A couple of observations are warranted. First, the funds were not transferred out of a joint account, as the mother's motion alleges. Second, she pursued the claim until she acknowledged she knew it had been previously dismissed by the application judge.

[47] The motion judge did not assess or determine the merits of the father's motion to vary; she dismissed it, concluding the issues raised were *res judicata* since he

had previously asserted, at the June 17, 2014 hearing, or he could have asserted, he was unable to work as a consequence of his major depressive disorder. Central to this decision is the judge's finding that evidence of the father's depression was available to him at that time.

[48] The motion judge decided the mother and father should bear their own costs; however, she did not address the father's parents' claim for costs.

III. Grounds of Appeal

[49] The mother's appeal asserts the motion judge made numerous errors in fact and law. In summary, she submits the motion judge failed to consider whether the property transfers were *bona fide*, claiming they were non-arm's length with no or inadequate consideration. In particular, she submits there was no proof (or at least there was contradictory evidence) of the parents spending their own money on repairs and renovations to the properties transferred and further, the judge erred in finding they had spent approximately $67,500 doing so. She submits the judge erred by failing to find the father was intentionally frustrating the enforcement of the judgment against him.

[50] The father's cross-appeal asserts the motion judge erred in her application of *res judicata* and she failed to consider whether there had been a material change in circumstances.

[51] The parents' cross-appeal asserts the judge erred in failing to address their claim for costs, despite dismissing entirely the mother's claim against them.

IV. Analysis

A. *The Mother's Appeal – Assignments and Preferences Act*

[52] It is not difficult to appreciate why the mother formed the opinion, at least initially, that the father transferred his home and camp to his parents with the intention to defeat her claim as a creditor. From her perspective, the road leading to the June 2014 order for support was long and shrouded with the perception that the father had hidden funds and had, with the assistance of his family, sought to avoid paying her anything. The mother's view is summed up by her allegation on the appeal: the father continues to avoid his support obligations with the complicity of his family; the transfer is only the latest manifestation of this conduct. The timing of the transfer, within a month of the order for him to pay substantial spousal and child support, gave the mother cause to be suspicious.

[53] However, after hearing the evidence and determining disputed allegations of fact regarding the circumstances surrounding the transfer, the motion judge was not persuaded the transfer was made with the intent of defeating, delaying or prejudicing the mother as a creditor. To succeed before the motion judge, the mother was required to establish the property transfer: (1) was made at a time when the father was in insolvent circumstances (or was unable to pay his debts in full or knew he was on the eve of insolvency); and (2) was done with the intent to defeat, delay or prejudice his creditors (s. 2(1)) or to give one of his creditors an unjust preference over his other creditors (s. 2(2)). The provisions are as follows:

Unjust preferences	**Préférences injustifiées**
2(1) Subject to the provisions of section 3, every gift, conveyance, assignment or transfer, delivery over or payment of goods, chattels or effects, or of bills, bonds, notes or securities, or of shares, dividends, premiums or bonus in any bank, company or corporation, or of any other property, real or	**2**(1) Sous réserve des dispositions de l'article 3, les donations, transferts, cessions, remises ou paiements, soit d'objets ou de biens personnels, soit de lettres, d'obligations, de billets ou de valeurs, soit d'actions, de dividendes, de primes ou de bonis d'une banque, d'une

personal, made by a person at a time when that person is in insolvent circumstances, or is unable to pay that person's debts in full, or knows that that person is on the eve of insolvency, **with intent to defeat, delay or prejudice that person's creditors**, or any one or more of them, is void, as against a creditor injured, delayed or prejudiced.

2(2) Subject to the provisions of section 3, every gift, conveyance, assignment or transfer, delivery over or payment of goods, chattels or effects, or of bills, bonds, notes or securities, or of shares, dividends, premiums or bonus in any bank, company or corporation, or of any other property, real or personal, made by a person at a time when that person is in insolvent circumstances, or is unable to pay that person's debts in full, or knows that that person is on the eve of insolvency, to or for a creditor **with intent to give that creditor an unjust preference over the other creditors**, or over any of them, is void, as against a creditor injured, delayed, prejudiced or postponed.

[Emphasis added.]

compagnie ou d'une personne morale, soit de tous autres biens réels ou personnels qu'effectue une personne qui se trouve en état d'insolvabilité ou dans l'impossibilité de payer intégralement ses dettes ou qui se sait sur le point d'être insolvable, **avec l'intention de frustrer, de tenir en suspens ou de léser ses créanciers** ou l'un quelconque ou plusieurs d'entre eux sont inopposables aux créanciers frustrés, tenus en suspens ou lésés.

2(2) Sous réserve des dispositions de l'article 3, les donations, transferts, cessions, remises ou paiements, soit d'objets ou de biens personnels, soit de lettres, d'obligations, de billets ou de valeurs, soit d'actions, de dividendes, de primes ou de bonis d'une banque, d'une compagnie ou d'une personne morale, soit de tous autres biens réels ou personnels, effectués à un créancier ou à son profit par une personne qui se trouve en état d'insolvabilité ou dans l'impossibilité de payer intégralement ses dettes ou qui se sait sur le point d'être insolvable **avec l'intention de lui procurer une préférence non justifiée sur les autres créanciers** ou sur l'un quelconque d'entre eux, sont inopposables aux créanciers frustrés, tenus en suspens, lésés ou rétrogradés. [Le caractère gras est de moi.]

[54] In her motion, the mother claims the transfer is contrary to the *Assignments and Preferences Act*, without identifying whether she is relying on either ss. 2(1) or 2(2) or both. However, as she argued on appeal, either provision could apply – in view of the motion judge's finding the $68,500 the parents advanced to the father was a loan, and therefore, they were creditors. That said, the mother has consistently disputed the claim that the father was indebted to his parents and the focus of her submissions before the motion judge related to s. 2(1), a transfer to defeat or prejudice her claim as a creditor. The judge's decision explains her reasons for dismissing the mother's claim

primarily in the language of that section but, in my opinion, it is clear her findings and determinations are applicable to both.

[55] The mother's allegations of error relate largely to the motion judge's assessment of the evidence. Notwithstanding her submissions to the contrary, the motion judge was well aware of the circumstances which the mother maintains are suspect and irrefutable badges of fraud. The judge recognized the obvious relationship between the father and his parents and the suspect timing of the transfer. Importantly, she confronted directly the mother's assertions that the $68,500 advanced to the father was not a loan and that his parents had not "prove[n]" they had undertaken renovations to his home; she also addressed the mother's claim there was no or inadequate consideration for the transfer.

[56] The motion judge found as a fact the father was indebted to his parents for the $68,500 they gave him to pay the mother for her interest in the family home. She did not accept the mother's submission the $68,500 was simply the father's parents returning his own money, which the mother alleges he had hidden with their complicity. Important to the motion judge's finding the parents had loaned the father $68,500 was the *viva voce* evidence of the father's mother, who the judge found to be credible. Her evidence was consistent with the documentary evidence indicating the flow of funds. A few months after the parents advanced the $68,500, they were added as owners/loss payees to the father's home insurance policy and in June 2013, their legal counsel took steps to document the loan. The letter to the father's legal counsel, including the draft promissory note, expressed the intention to secure the note with a collateral mortgage. The mother was justified to emphasize the fact this had not occurred until almost six months after the funds were advanced and also that the father had not made any payments on the note. However, all of this was before the motion judge. Indeed the circumstances surrounding the $68,500 advance were very much a focus of the evidence and submissions in the motion, more so than at the hearing of the application where the father's mother had not testified. Quite simply, the evidentiary record allowed the motion judge's finding that the $68,500 was a loan. There is no palpable error in the judge's analysis.

[57] The judge did not accept the mother's submission that the evidence presented was inadequate to prove the parents had made repairs to the properties, as they claimed to have done, or that the quantum of the repairs was as they claimed. The judge's assessment of the evidence led her to a different conclusion and the mother does not identify a palpable error in this assessment. The judge found there had been a plan to renovate the father's home for sale and his parents had, at their own cost, undertaken considerable renovations, largely while the father was living and working in Saskatchewan. The motion judge accepted the uncontradicted evidence of the father's mother in this regard, including that about $67,500 had been spent. The mother submits the judge erred in finding the evidence of the father's mother credible on this issue. This assertion is without merit. There was simply nothing to contradict this evidence on either the extent of the renovations completed or their cost. In fact, the mother candidly acknowledged she simply did not know what work was done, and that she could not offer any evidence to suggest the work described was not done. Nor do the alleged "inconsistencies" in relation to the timing of when the work was performed preclude the judge's acceptance of this evidence without an exhaustive analysis and rationalization of each piece of evidence. In view of the entirety of this evidence, it was not necessary for the judge to address every minor imperfection before accepting it as credible. The mother has not established the judge erred in finding the parents made significant repairs to the properties, with a value of approximately $67,500.

[58] Finally, while the mother maintains the parents did not pay out the father's line of credit with the Bank on the same day the transfer took place, there is no dispute that his parents had paid this and other amounts within days of the transfer. It was not a stretch for the judge to find that the father's parents paid, as part of the property transfer, the line of credit of approximately $46,000 (which was secured by the home) as well as the outstanding property taxes and transaction fees of approximately $4,000. Her finding that the consideration for the property transfer included the payment of approximately $50,000 is beyond question.

[59] Based on these findings of disputed questions of fact, the motion judge concluded there was consideration for the transfer, which included: the satisfaction/repayment of the $68,500 loan; the recovery of the funds spent to repair the properties (approximately $67,500); and a fresh advance of approximately $50,000 at the time of transfer. Effectively, the consideration accepted by the judge exceeded $180,000. After acquisition, the home was rented by the parents and then sold in the spring of 2016 to the third party tenant. This occurred while the motions were in the process of being heard. Of the $150,000 sale proceeds, the net amount of $140,000 was paid into court, where the proceeds remain today. The parents continue to own the camp property. While the father has stayed at the camp on occasion, the evidence does not support the mother's submission that, despite the transfer of title, it continues to be treated as if it were still owned by the father.

[60] After considering all of the circumstances, including her finding there was consideration for the transfer, the motion judge rejected the mother's claim the transfer was contrary to the *Assignments and Preferences Act*; she concluded there was no intent to avoid or prefer creditors. The broader circumstances include the fact that the father had previously tried to sell the home, but had been unsuccessful, and the transfer to his parents was part of a plan to satisfy his debt to both the bank and his parents and he would satisfy the lump sum support payable to the mother from his RRSPs. The judge stated:

> The Court finds that there was consideration for the assets and that there is no evidence of any intent to frustrate creditors. The Court does not conclude that the transfer of the camp and house from the father to his parents (that was later sold to a third party) was to frustrate payment of his child and spousal support obligations. [para. 71]

[61] The mother submits on appeal the judge's finding there was consideration is inconsistent with the requirements of s. 3(1) of the *Act.* She submits consideration must be a "present actual payment in money" which reasonably reflects the value of the property. The mother's submission seeks to have us treat s. 3(1) as defining consideration

for the purposes of the *Act*. This is not the purpose or intent of s. 3(1). The provision "protects" certain transactions by specifically excluding them from the application of s. 2 – one of the requirements of which is the "present actual payment of money" as consideration. The other requirement is that it be made in good faith. The mother submits that if the requirements of s. 3(1) are not met, effectively, there is no consideration. I disagree. Section 3(1) provides:

Assignments and payments protected

3(1) **Nothing in section 2 applies** to any assignment made under the *Bankruptcy and Insolvency Act* (Canada), nor to any sale or payment made in good faith in the ordinary course of trade or calling to innocent purchasers or parties, nor to any payment of money to a creditor, **nor to any genuine gift, conveyance, assignment, transfer**, or delivery over of any goods, securities or property of any kind as above mentioned, **that is made in consideration of any present actual payment in money made in good faith,** or by way of security for any present actual advance of money made in good faith, or in consideration of any present actual sale and delivery of goods or other property made in good faith, **if the money paid, or the goods or other property sold or delivered, bears a fair and reasonable relative value to the consideration for it**.

[Emphasis added.]

Protection des cessions et des paiements

3(1) **Les dispositions de l'article 2 ne s'appliquent** ni à une cession faite en vertu de la *Loi sur la faillite et l'insolvabilité* (Canada), ni aux ventes ou paiements faits de bonne foi, dans le cadre normal de l'exploitation d'une entreprise ou de l'exercice d'une activité, à des personnes ou parties de bonne foi, **ni au paiement d'une somme à un créancier, ni aux donations, transferts**, cessions ou remises d'objets, valeurs ou biens du genre susmentionné, **qui sont effectués en contrepartie du paiement actuel, effectif et de bonne foi** d'une somme ou en garantie du versement actuel, effectif et de bonne foi d'un acompte ou en contrepartie de la vente et de la livraison actuelles, effectives et de bonne foi d'objets ou autres biens, **s'il existait un rapport juste et raisonnable entre la somme payée, les objets ou les autres biens vendus ou livrés et la contrepartie**.

[Le caractère gras est de moi.]

[62] Essentially, the mother submits s. 3 is not satisfied in this case since there is only a "present actual payment" of approximately $50,000, which does not bear "a fair and reasonable relative value" to the properties conveyed. She maintains the satisfaction of the $68,500 loan and the recovery of the $67,500 spent on renovations are not a "present actual payment in money" and do not amount to consideration.

[63] However, these submissions are of no consequence since the motion judge did not determine the transfer to the parents was a protected transaction under s. 3(1), excluding the application of s. 2. The burden of establishing the transaction was protected by s. 3(1) rested with the father and/or his parents. The judge did not decide s. 2 was rendered inoperative by the application of s. 3(1) and that it was therefore unnecessary to consider the mother's request to set aside the transfer under s. 2. The judge undertook an analysis under s. 2 and dismissed the mother's claim because s. 2 was not satisfied.

[64] More broadly, the mother submits the motion judge erred in her assessment of the circumstances by failing to consider whether the property transfers were *bona fide*. She maintains the judge failed to undertake a full and proper assessment of the badges of fraud, including: the transfer was non-arm's length, for no or inadequate consideration, made in haste and in secret and following an order that imposed a significant obligation which the father could not satisfy.

[65] There is no merit to any of these submissions. The judge determined disputed questions of fact – resolving the disagreement regarding the $68,500 loan, the renovations made by the parents and the timing of the payout of the line of credit. After having done so, she assessed the totality of the circumstances, including the fact that there was consideration for the transfer, and determined the mother did not establish the criteria under s. 2(1) and/or s. 2(2). She was not satisfied there was an intention to delay or prefer creditors. This was not a case where a presumption arose under s. 2(3). That provision creates a presumption that a transaction has been made with the intent to give a preference where it is established that the transaction has the effect of giving a preference. However, the presumption applies only if a proceeding is brought within 60 days of the impugned transfer. There is no suggestion the provision applies in the circumstances. Frankly, even if it did, the practical result of the judge's findings of fact, and her determination there was no intent to prefer, would rebut any such presumption.

[66] The mother's submissions invite the court to re-weigh the evidence without identifying a palpable error (leaving aside whether any such error would be

overriding). The motion judge was aware of all material circumstances identified by the mother. The judge made specific reference to the authorities relied on by the mother and distinguished them on the basis that, in those decisions, there was a transfer to a relative for no meaningful consideration (see *Hayden v. Monteith* (1987) 81 NBR (2d) 273, [1987] N.B.J. No. 815 (C.A. (QL); and *Wuhr-Howe v. Wuhr et al.*, 2000 CanLII 9467 (NB QB)). Indeed, even in the mother's submission on appeal, the numerous additional cases relied upon similarly involve transactions where the circumstances were quite different from those of the present case and where there was no or little meaningful consideration (see *Bank of Montreal v. Vandine*, 1952 CanLII 262 (NBCA); *Turfquip Inc. v. 033478 N.B. Ltd.* (1997), 193 NBR (2d) 165, [1997] N.B.J. No. 414 (QL), aff'ed (1998), 198 NBR (2d) 90, [1998] N.B.J. No. 98 (C.A.) (QL); *Boudreau v. Marler*, [2004] O.J. No. 1543 (ONCA) (QL); *Pilot Insurance Co. v. Foulidis*, [2005] O.J. No. 2799 (ONCA) (QL); *Mutual Trust Co. v. Stornelli*, [1995] O.J. No. 4554 (ONCJ) (QL); and *Re Scantlebury*, [1996] P.E.I.J. No. 108 (C.A.) (QL)). This is not to suggest the presence of consideration is determinative of whether there is an intent to defeat or prefer creditors; however, the absence of consideration is often a compelling factor in establishing such an intent.

[67] In my opinion, there is no merit to the mother's appeal. The motion judge determined the facts, making unassailable findings of credibility in doing so, and after considering all of the circumstances she concluded the property transfer was not made with the intent to defeat or prefer creditors. How a less than full appreciation of the circumstances might strike a casual observer is of no relevance to the issues on appeal.

B. *The Father's Cross-Appeal – Res Judicata and Motion to Vary Child and Spousal Support*

[68] The father maintains his inability to work following the June 2014 order, due to a major depressive disorder, is a change in circumstances and the judge erred in dismissing his motion to vary based on the principle of *res judicata*. I agree the decision reflects error and his motion should have been determined on its merits. The application

of general principles of *res judicata* must give way to the legislated authority to vary support orders. Generally speaking, the statutory power to vary a prior support order is subject to the condition precedent that there has been a change in circumstances. In this case, the *res judicata* analysis was undertaken as though the support order sought to be varied is a final order for all purposes and it did not consider the unique character of support orders.

[69] In her response to the motion to vary, the mother maintained the father was seeking to re-litigate issues which have been previously decided by the application judge. She submitted the application judge rejected the father's oral testimony that depression impaired his ability to work and therefore the issue has been determined. She also submitted that when the father was before the application judge, he could have led corroborating evidence of his depression but he had failed to do so, and that much of the medical evidence he was now seeking to rely on had been available at the time the application was heard. Before the motion judge, the mother relied on *Nelson v. Nelson*, 2013 NBQB 359, 410 N.B.R. (2d) 388, to support her claim the father's motion is estopped by *res judicata*. In *Nelson*, Walsh J. considered principles of *res judicata* in connection with a claim respecting RRSPs. Quoting from Sopinka, *The Law of Evidence in Canada*, Walsh J. explained the principle that any action or issue "which has been litigated and upon which a decision has been rendered cannot be retried…[A] new action was permissible only if there was some new fact which totally changed the aspect of the case, and if that fact was not known before and could not have been known by reasonable diligence".

[70] The motion judge accepted the mother's position; she concluded the "evidence of the father is that he now suffers from major depressive disorder and cannot work" and in "order for the court to make this conclusion it must base its decision on new evidence that was not available at trial". The judge explained:

> I believe no new facts were presented to this Court in relation to the incapacity of the father to work and facts that were presented were known or should have been known by him at the time of what I will call the first trial. If paragraph

> 56 of his decision of the judge made the following comments:
>
> > "…I will not accept [the father's] testimony about his ability to work having been impaired by a medical problem; depression, nerves and a possible ulcer because he has provided no corroboration for this claim".
>
> The evidence of the father is that he now suffers from major depressive disorder and cannot work. In order for the court to make this conclusion it must base its decision on new evidence that was not available at trial. The evidence to support his present case was available to him and known by him during the first trial. Bringing forward corroborating evidence through a Motion to Change would be re-litigating this matter.
>
> […]
>
> It is clear the father knew about his medical condition and that he was diagnosed with major depressive disorder at the first trial. He himself testified that he suffered from depression at that time. He chose not to present any documentary evidence at that time or call any witness to support his claim. The evidence regarding his condition was ascertainable at the time of the first trial not only by Dr. O'Neil but also by Dr. Donihee. The exception to the application of the doctrine of *res judicata* is the awareness of new facts not known at the time of trial or that could not have been know[n] at the time of trial does not apply in this matter. The father knew of his condition and no new facts became known after. Dr. Satya's confirmation of Dr. O'Neil's diagnosis does not change anything. His Motion to Change is dismissed.
>
> [para 77, 78 and 82]
> [Emphasis added.]

[71] Focused on a *res judicata* analysis, the judge accepted the mother's position that nothing new was offered on the motion respecting the father's depression since the medical evidence proffered confirmed his condition existed prior to the June 2014 hearing and, with reasonable diligence, that medical evidence could have been made available at that hearing. On this basis, the judge concluded the new evidence

exception to the application of the principle of *res judicata* did not apply and the claim was barred.

[72] I pause to make two observations regarding *Nelson*. First, at issue in *Nelson* was an order respecting property, to which the principles of *res judicata* apply in the ordinary course. It was not an order that may be varied based on a change in circumstances, such as an order for support or an order respecting custody and/or access. Second, as *Nelson* identifies, an exception to the general application of *res judicata* arises when there are new facts which were not known or could not have been known with reasonable diligence. It appears the focus on this exception overtook the submissions and analysis at the hearing of the motion and this is where got it off track.

[73] While a change in circumstances analysis and a *res judicata* analysis may both require consideration of the last decision or order, including, depending on the case, evidence of what was decided at that hearing, the issue to be determined and the consequential analysis are quite different. The issue raised by the father's motion is whether his claim to be unable to work, as a consequence of his depression (which was first diagnosed in November 2012), is a change in circumstances. The focus of the inquiry is whether the father's claimed inability to work due to his condition, if established, constitutes a change in circumstances since the order sought to be varied. The issue is not, as it may be under a *res judicata* analysis, whether the claim currently made was or could have been adjudicated at the prior hearing. Nor is it whether the medical information/evidence sought to be relied on to prove the father's condition is new and was unavailable (through reasonable diligence) at the time of the last hearing. The distinction is significant.

[74] *Res judicata* is a defence which must be pled and proven. Before the motion judge, the issue was addressed only as *res judicata*, without identifying whether the plea relied on cause of action estoppel or issue estoppel. However, it is clear only issue estoppel might have had any application. A good summary of the principles grounding *res judicata,* and particularly issue estoppel, is provided by Binnie, J. in

Danyluk v. Ainsworth Technologies Inc., [2001] 2 S.C.R. No. 460, [2001] S.C.J. No. 46 (QL). He states:

> The law has developed a number of techniques to prevent abuse of the decision-making process. One of the oldest is the doctrine estoppel *per rem judicatem* with its roots in Roman law, the idea that a dispute once judged with finality is not subject to relitigation: *Farwell v. The Queen* (1894), 22 S.C.R. 553, at p. 558; *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248, at pp. 267-68. The bar extends both to the cause of action thus adjudicated (variously referred to as claim or cause of action or action estoppel), as well as precluding relitigation of the constituent issues or material facts necessarily embraced therein (usually called issue estoppel): G. S. Holmested and G. D. Watson, Ontario Civil Procedure (loose-leaf), vol. 3 Supp., at 21 s. 17 et seq. Another aspect of the judicial policy favouring finality is the rule against collateral attack, i.e., that a judicial order pronounced by a court of competent jurisdiction should not be brought into question in subsequent proceedings except those provided by law for the express purpose of attacking it: *Wilson v. The Queen*, [1983] 2 S.C.R. 594; *R. v. Litchfield*, [1993] 4 S.C.R. 333; *R. v. Sarson*, [1996] 2 S.C.R. 223.
>
> […]
>
> In this appeal the parties have not argued "cause of action" estoppel, apparently taking the view that the statutory framework of the ESA claim sufficiently distinguishes it from the common law framework of the court case. I therefore say no more about it. They have however, joined issue on the application of issue estoppel and the relevance of the rule against collateral attack.
>
> Issue estoppel was more particularly defined by Middleton J.A. of the Ontario Court of Appeal in *McIntosh v. Parent*, [1924] 4 D.L.R. 420, at p. 422:
>
> > When a question is litigated, the judgment of the Court is a final determination as between the parties and their privies. Any right, question, or fact distinctly put in issue and directly determined by a Court of competent jurisdiction as a ground of recovery, or as an answer to a claim set up, cannot

> be re-tried in a subsequent suit between the same parties or their privies, though for a different cause of action. The right, question, or fact, once determined, must, as between them, be taken to be conclusively established so long as the judgment remains.

This statement was adopted by Laskin J. (later C.J.), dissenting in *Angle*, *supra*, at pp. 267-68. This description of the issues subject to estoppel ("[a]ny right, question or fact distinctly put in issue and directly determined") is more stringent than the formulation in some of the older cases for cause of action estoppel (e.g., "all matters which were, or might properly have been, brought into litigation", *Farwell*, *supra*, at p. 558). Dickson J. (later C.J.), speaking for the majority in *Angle*, *supra*, at p. 255, subscribed to the more stringent definition for the purpose of issue estoppel. "It will not suffice" he said, "if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment". The question out of which the estoppel is said to arise must have been "fundamental to the decision arrived at" in the earlier proceeding. In other words, as discussed below, the estoppel extends to the material facts and the conclusions of law or of mixed fact and law ("the questions") that were necessarily (even if not explicitly) determined in the earlier proceedings.

The preconditions to the operation of issue estoppel were set out by Dickson J. in *Angle*, *supra*, at p. 254:

> (1) that the same question has been decided;
> (2) that the judicial decision which is said to create the estoppel was final; and,
> (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[para. 20, 23, 24 and 25]
[Emphasis added.]

[75] The authority to vary a support order, based on a change in circumstances, is provided, in this case, by s. 118(2) of the *Family Services Act*. It provides as follows:

118(2) Where an order for child support or an order for the support of a child at or over the age of majority has been made and the court is satisfied that a change of circumstances as provided for in the regulations respecting orders for child support has occurred since the making of the order under subsection 115(1) or since the making of the last order under this section, if any, in respect of the support of a child or a child at or over the age of majority, the court may, upon the application of any person named in the order or referred to in subsection 115(3) and subject to paragraph 113(2)(*b*), subsections 115(1.1) to (1.6) and the regulations respecting orders for child support, as the case may be,

(a) discharge, vary or suspend any term of the order, prospectively or retroactively,

(b) relieve the respondent from the payment of part or all of the arrears or any interest due thereon, and

(c) make any order for child support or any order for the support of a child at or over the age of majority that the court could make on an application under section 115 for the support of a dependant who is a child or a child at or over the age of majority.

[Emphasis added.]

118(2) Lorsqu'une ordonnance de soutien pour enfant ou pour enfant majeur a été rendue et que la cour est convaincue qu'un changement de situation prévu aux règlements concernant les ordonnances de soutien pour enfant s'est produit depuis qu'elle a rendu l'ordonnance en vertu du paragraphe 115(1) ou la dernière ordonnance en vertu du présent article, le cas échéant, relativement au soutien de l'enfant ou de l'enfant majeur, la cour peut, à la demande de toute personne nommée dans l'ordonnance ou visée par le paragraphe 115(3) et sous réserve de l'alinéa 113(2)*b*), des paragraphes 115(1.1) à (1.6) et des règlements concernant les ordonnances de soutien pour enfant, selon le cas,

a) révoquer, modifier ou suspendre toute condition énoncée dans l'ordonnance, pour l'avenir ou à titre rétroactif,

b) dégager le défendeur du paiement de tout ou partie des arriérés ou des intérêts moratoires y afférents, et

c) rendre toute ordonnance de soutien pour enfant ou pour enfant majeur que la cour pourrait rendre lorsqu'elle est saisie d'une demande en application de l'article 115 pour le soutien d'une personne à charge qui est un enfant ou qui est un enfant majeur.

[Le soulignement est de moi.]

[76] The application of principles of *res judicata* is subject to the exercise of the power to vary under s. 118(2). While this proposition requires little explanation, the Ontario Court of Appeal expressly addressed the intersection of the power to vary support obligations with the principles of *res judicata* in *DiFancesco v. Couto*, [2001]

O.J. No. 4307 (C.A.) (QL). The issue in dispute was a motion to rescind arrears; however, for our purpose, the observations are apposite. As Simmons J.A. explained:

> I do not, however, view the dismissal of an application to rescind arrears as an absolute bar to future rescission of those same arrears, provided there is a change in circumstances sufficient to warrant a variation.
>
> First, I note that the language of the provisions authorizing a variation is very broad. Although the *Divorce Act* stipulates that the change in circumstances necessary to trigger the right to seek a variation must occur after the date of the last variation order, there is no such language limiting the scope of variation available.
>
> Second, **the issues presented on succeeding motions for rescission of arrears lack the identity necessary to give rise to issue estoppel. The first issue for determination on an application for variation of support payments or arrears is whether there has been a change in circumstances sufficient to warrant the variation sought.** Once that threshold is met, the presenting issue is whether rescission is justified in the context of the changed circumstances. The fact that a prior application did not meet the threshold for variation does not, of necessity, determine the issue of whether rescission of those same arrears is justified in the context of subsequent changed circumstances.
>
> In *Setinas v. Setinas* (1984), 39 R.F.L. (2d) 43, 43 C.P.C. 44 (Ont. Prov. Ct.) at para. 18, **Main Prov. Ct. J. made the following comments about the application of issue estoppel to matrimonial litigation, and variation applications in particular**:
>
> > Fundamental to the doctrine of estoppel by record including issue estoppel is that it is in the public interest that there should be an end of litigation: *interest reipublicae ut sit finis litium* . . . **However, it must be borne in mind that matrimonial litigation, as it relates to the issue of ongoing support, both as to enforcement and variation, differs from ordinary litigation. Finality can be achieved only where a support obligation ceases and when all outstanding arrears are either paid**

> **or rescinded. Until that point is reached, s. 21 of the [*Family Law Reform Act*, R.S.O. 1980, c. 152] allows for applications to vary and to rescind. To that extent, the maxim must be modified**. This is not to say that frivolous or vexatious proceedings will be tolerated. The six-month limitation on applications to vary, without leave of the court, an award of costs on a solicitor and client basis and the power in the court to stay or dismiss as an abuse of process are sufficient to dissuade litigants from making such applications.

Setinas involved a question of whether findings made in an enforcement proceeding could give rise to issue estoppel in a subsequent application to vary made pursuant to the *Family Law Reform Act*, R.S.O. 1980, c. 152. **Although not directly applicable here, the comments are instructive in that they address a particular feature of family law legislation, namely the ability to seek a variation of a prior order based on changed circumstances**.

Finally, the requirement that there be a change in circumstances as a precondition to the right to seek a variation protects against abuse and signals that the scope of the variation available is very broad. Once the threshold of changed circumstances is met, the court's discretion to make the order that would have been appropriate, had those circumstances existed in the first instance is engaged. The fact that an order for rescission was inappropriate on an earlier date, may impact on the manner in which the discretion to grant a variation is exercised; for example, where a debtor was recalcitrant in fulfilling his obligations. It does not, however, bar the court's discretionary authority to make the appropriate order, based on the changed circumstances existing when a subsequent application is made.

The determination that issue estoppel does not bar subsequent rescission of arrears following an unsuccessful application to vary, is consistent with decisions relating to variation of orders for custody and access. Those decisions indicate that once the threshold of changed circumstances is met, the court must embark on a fresh inquiry into what is in the best interests of the child, not based on a presumption in favour of the custodial

> parent, but rather based on the findings of the judge who made the previous order, as well as the evidence of the new circumstances. Ultimately, the issue to be determined is the best interests of the child: *Gordon v. Goertz*, [1996] 2 S.C.R. 27, 19 R.F.L. (4th) 177. [paras. 26-32]
>
> [Emphasis added.]

[77] The limits of *res judicata* in connection with support orders was also addressed by the British Columbia Court of Appeal, in *B.G.D. v. R.W.D.*, 2003 BCCA 259, [2003] B.C.J. No. 1098 (QL). The court dismissed an appeal of a judge's decision which concluded that a claim for spousal support was not barred by *res judicata*. In the decision appealed, *Dorken v. Dorken*, 2002 BCSC 1136, [2002] B.C.J., No. 1767 (QL), the judge explained:

> Husband's counsel submits that the plaintiff's claim for spousal maintenance was dismissed by the court in 1991 and is now *res judicata*. He submits that the wife is now estopped from making this claim…
>
> […]
>
> In *Carl Zeiss Stiflung v. Rayner & Keeler Ltd. (No.2)*, [1967] 1 A.C. 853 at p. 935, Lord Guest defined the requirements needed to constitute issue estoppel in the following way:
>
> > ... (1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.
>
> It may well be said that in relation to the Order of Justice Dorgan that the same question, being that of spousal maintenance, was before the court and that the parties to the judicial decision are the same. In determining whether or not the court has jurisdiction to proceed it is necessary to determine whether or not that order said to create the estoppel was final. See: *Gessner v. Gessner* (1990), 24 R.F.L. (3d) 308 (Sask. Q.B.).

> In that regard it is necessary to turn to the provisions of the *Divorce Act*…
>
> […]
>
> In this proceeding the wife sought an order for spousal maintenance under s. 15 of the *Divorce Act*. She was granted both periodic and lump sum maintenance by the order which was made under s. 15.2. Section 17(1) gives the court the power to vary a support order. The issue is whether or not the power to vary survives an order that specifically sets out that after the payments are made, the petitioner's claim for maintenance is dismissed.
>
> **In my opinion the terms of the order do not oust the court's jurisdiction to entertain the present application. Given the provisions of s. 17(1) a spousal support order can never be truly final**. See *Pelech v. Pelech*, [1987] 1 S.C.R. 801.
>
> **As the order is not final the doctrine of res judicata does not apply. For that reason the cases cited by the respondents are not applicable in the circumstances of a spousal support order.** Accordingly, this court has the jurisdiction to hear the application. Whether in the circumstances of this case, the plaintiff is entitled to the relief she seeks is for the judge hearing the application on its merits. The preliminary objection is dismissed with costs to the plaintiff in the cause. [paras. 7-13]

[78] Section 118(2) of the *Family Services Act* is a full answer to any effort to rely on *res judicata*, particularly in the form of cause of action estoppel. The issue of whether the father's depression disables him from employment was not in issue before or determined by the application judge, and therefore issue estoppel has no application, even in connection with collateral issues. This requires further explanation; it is important to be clear on what issues were before and decided by the application judge

[79] It is my opinion the application judge was not asked to determine, and he did not determine, whether the father was unable to work because of his depression. The father did not take that position at the hearing of the application, nor did the judge make

any other determination which would be estopped in a motion to vary based on issue estoppel. The father's position was summarized by the application judge as follows:

> [The father] also said that because of major problems in the mine in Saskatchewan it is not renewing labour contracts for the next year. It might never reopen again and he might never have access to that job. [The father] provided no record of employment to establish why his job terminated. He also did not provide any proof for his assertion that the big mine project was going to be shelved for at least a year.
>
> [The father] said he wanted to return to New Brunswick to be with his current partner. **He has, as a consequence, put his name in for work at several locations but he does not have any indication that he will have a job soon. He acknowledged that a good wage here would be $60,000 per year or less than 40% of his earnings at the job in Humboldt. He also said that if he wanted to remain in the West he probably could get a new job on some other project relatively quickly**.
>
> [The father] also said that the stress and depression he has suffered may have given him an ulcer and **his doctor in New Brunswick has told him that he will not be able to work for at least two months**. He did not have any documentation for this claim nor did he call the doctor to verify this diagnosis. [paras. 40-42]
>
> [Emphasis added.]

[80] While the application judge clearly rejected the father's evidence regarding depression, stress and possible ulcers, this assessment of his testimony came as part of his canvassing the father's evidence as a whole, which he did quite fully (at paras. 46 to 55). This summary of the father's evidence focused mainly on the father's use of the $118,000 he removed from his account before separation and the father's inability to pay the mother $68,500 for the family home. Summarizing this evidence, most of which he rejected, the judge stated:

> While I have not reviewed all of [the father]'s testimony in this fashion I think I've considered sufficient detail to establish that **I do not find** his testimony credible in any material particular with respect to the possession and

> disbursement of funds. Similarly and without going into any detail **I will not accept [**the father's] testimony about his ability to work having been impaired by a medical problem; depression, nerves and a possible ulcer because he has provided no corroboration for this claim. **I will not accept** that [the father] was laid off by his former employer effectively May 31 because of a major problem with the mine that will keep him off the job for as much as a year. Again there is no information to corroborate this statement.
>
> **I do accept** [the father]'s acknowledgement that he could have gainful employment in Saskatchewan or Alberta if he sought it. I conclude that such employment could be at the same or greater salary than that he most recently commanded. I acknowledge there is little or no chance of [the father] receiving a similar income in New Brunswick. Certainly the work at Point Lepreau will never be as lucrative again. I also note that [the father] has never had a problem in moving out West on the three or four occasions when he needed to become gainfully and profitably employed. [paras. 56 and 57]
>
> [Emphasis added.]

[81] Explaining he did not find the father's testimony credible, the application judge stated he did not accept the father's uncorroborated testimony that "his doctor in New Brunswick ha[d] told him that he will not be able to work for at least two months". This comment was from the father's meeting with his New Brunswick doctor on June 11, 2014, after he returned from Saskatchewan and less than six days prior to the hearing. However, the application judge's rejection of the father's testimony that "his ability to work [has] been impaired by a medical problem, depression, nerves and a possible ulcer…", cannot be viewed as a determination of a claim by the father that he is unable to work due to his depression. This was not the issue in the application. The father did not assert his depression disabled him from working. As the application judge's decision expressly recognized, the father admitted the mother was entitled to spousal support. He had been working full time until he returned from Saskatchewan and he testified he had sought work in New Brunswick, which he expected would be in the range of $60,000 a year. The application judge stated he accepted the father's evidence he could find employment out west if he sought it, albeit on a different project. All of this is consistent

with the father's unrefuted submission that he did not put his depression in issue; it arose only when he was questioned on cross examination. It was against this evidentiary background, including the judge's rejecting the father's testimony that he had been laid off from the mine in Saskatchewan but his accepting the father's acknowledgement he could have gainful employment in Saskatchewan or Alberta, that the application judge concluded the father could earn the same or more income than he had earned in Saskatchewan and he imputed income to the father. In summary, the decision on the application cannot be taken as a determination respecting either the father's depression or his ability to work as a consequence of depression. The judge's assessment of the father's testimony regarding the advice of his physician, while relevant to the credibility analysis, was at best an incidental finding.

[82] The adjudication of the father's motion to vary does not involve an inquiry into whether the evidence of his depression, or any evidence, was available at the time of the hearing of the application. The issue is whether there has been a change in the father's circumstances since the June 2014 order. That he had depression was not disputed; he was first diagnosed with it in November 2012. The father's position is that he has worked whilst having a severe depressive disorder and at the time of the last order he expected to return to work. More specifically, based on the claim as it has been framed to this point, the issue is whether, since the June 2014 order, he has become disabled from work, as he claims, by, for simplicity's sake, a worsening of his depression. The father led medical evidence to support the position that his condition had become worse, as he submits is evident from, for example, the suicidal ideation he experienced following the last order. On appeal, he maintains this is the crux of his motion to vary and, in very simple terms, this is the essence of the motion which, in my opinion, must be determined on the merits.

[83] For these reasons, I would allow the father's cross-appeal and direct that his motion be returned and heard with current information regarding, among other things, the father's condition and treatment since the hearing of the application.

[84] As a final issue, the father maintains that, even if his motion to vary was *res judicata*, as determined by the motion judge (or had been otherwise dismissed based on a finding that he could work), the motion judge should nevertheless have varied his child support obligation, as of June 2015, since the application judge ordered that the child support be calculated each year based on actual income. If I had not come to the conclusion his cross-appeal should be allowed and his motion heard, I would have either varied child support as of June 2015, or sent that issue back to be decided. However, in view of the fact his motion will be adjudicated, potentially affecting his child support obligation from the summer of 2014, I see no rational basis for now making a distinct order to vary support post June 2015, based on "actual income" – which would necessarily be subject to the outcome of the motion to vary.

[85] Both the mother and the father have requested that if any matter is to be returned to the Court of Queen's Bench, Family Division for adjudication, it be heard by a different judge. I would leave that to be determined at the Court of Queen's Bench level.

C. *Cross-Appeal of the Parents – Costs*

[86] The parents submit the motion judge erred by failing to address their request for costs against the mother.

[87] The motion judge did not address costs and I can see no obvious reason to stray from the general rule that costs should follow the event. However, as emphasized by the parents' counsel, there is more to it than that.

[88] As noted earlier, in November 2014, the parents responded in detail to the mother's claim regarding the transfers. Attached as exhibits to their affidavit were copies of documents respecting the $68,500 loan, evidence of the payout of the bank on transfer and a list of renovations undertaken to the properties. The judge accepted the circumstances surrounding the transfer were essentially as outlined by them.

Additionally, the motion to set aside the transfer was lengthened and complicated when the mother subsequently filed a new motion, in June 2015, which subsumed the earlier motion but added allegations of contempt and a claimed for an interest in the $118,000 – both of which were unsuccessful.

[89] Moreover, they emphasize the claims of impropriety and bad faith were found to be unsubstantiated. They do not request solicitor and client costs, quite rightly in my opinion; however, it is not possible to ignore the existence of factors of the type which weigh in favour of an order for solicitor and client costs. These include unsubstantiated or unproven allegations of impropriety, which amount to fraud, and/or unfounded, wanton and scandalous charges (see *Caspick v. Caspick* (1990), 106 N.B.R. (2d) 249, [1990] N.B.J. No. 551(C.A.) (QL)). There is little doubt about the mother's strong feelings about what she views as the father's efforts to avoid paying her, with the assistance of his family. However, there is also little doubt that the mother's entrenched views have resulted in exaggerated assertions which are more than mere hyperbole. Many have persisted in spite of prior decisions and clear evidence to the contrary.

[90] For these reasons, I would allow the cross-appeal and award costs to the parents of $2,500 on the dismissal of the mother's motion and $2,500 on their cross-appeal.

V. Disposition

[91] For these reasons, I would dismiss the mother's appeal and allow both cross-appeals. I would order costs payable by the mother to the father of $ 2,500 on the dismissal of her motion, and $ 2,500 on the dismissal of her appeal and for allowing the father's cross-appeal. These amounts may be set-off against unpaid costs ordered in favour of the mother by the application judge. I would order costs payable by the mother to the parents of $ 2,500 on the dismissal of her motion to set aside the property transfer, and $ 2,500 on their cross-appeal of that issue.

[92] The father's motion is to be returned for adjudication, which will no doubt begin with a case conference as soon as possible. In these circumstances, I would order the release of this decision in English, the language of the proceeding, with release in the French language to follow, pursuant to s. 24(2) of the *Official Languages Act*, S.N.B. 2002, c. O-0.5.

The following are the concurring reasons delivered by

BAIRD, J.A.

I. Introduction and Background

[93] I have read the reasons of my panel colleagues, and although we have substantial agreement concerning the result, I differ with respect to the remedy. For the reasons that follow, I would refer this case to the Court of Queen's Bench for an analysis on the question whether, or not, the father met the threshold test of material change.

[94] This is an appeal and two cross-appeals of a motion judge's decision which followed a five-day hearing in 2016. All parties assert the motion judge committed reversible errors in law. Engaged are the provisions of the *Assignments and Preferences Act*, R.S.N.B. 2011, c. 115; the *Family Services Act*, S.N.B. 1980, c. F.-2.2 (*F.S.A.*); Rule 76 of the *Rules*; the *Support Enforcement Act*, S.N.B. 2005, c. S-15.5; the *Federal Child Support Guidelines*, SOR/97-175 as amended (*Guidelines*); the *Spousal Support Advisory Guidelines* (*SSAG*), and the doctrine of *res judicata*. Although this is not an appeal of the final decision rendered in 2014, some limited background information is offered for context.

[95] The mother, C.B., and the father, H.H., cohabited between 1997 and 2012. Following separation, the mother filed a Notice of Application pursuant to the *F.S.A.*, in which she claimed custody of the two children, child and spousal support and exclusive possession of the marital home. On August 23, 2012, the Case Master issued an order requiring both C.B. and H.H. to file financial information as required by the *F.S.A.* and the *Guidelines*. In October 2012, an interim order issued which granted the mother custody of the children and gave her exclusive possession of the home. What followed was a Consent Order in which the father agreed to pay $68,500 for the mother's interest in the marital home. Using funds advanced by his parents, the father paid the agreed amount several weeks after the judge signed the order. On November 9, 2012, the judge

issued an interim order in which he required: "Neither party shall dispose of any of the assets at issue, including motor vehicles, four wheelers, ski-doos, real estate, RRSPs and generally any other assets identified as being in issue between the parties, without the express consent of the other party or further Order of the Court". In June 2013, the father executed a promissory note in which he agreed to reimburse his parents for the funds they advanced him, as noted, at the rate of $600 monthly. The mother submits the note is a sham as it was not executed properly. The father admits he has never made any payments to his parents. In paragraph 7 of his affidavit dated November 28, 2014, he states: "In June of 2013 my Parents [G] and [E.H.] talked to me about drawing up a Promissory Note so they could secure the funds they had lent me. A note was drawn up and sent to my lawyer at the time, Jamie Feenan. I did sign the document and my partner Melissa witnessed it, but it was never officially put in place as my circumstances had changed again...". Between September 14, 2012, and the hearing of the Application in June 2014, there were several court appearances, most of which dealt with issues concerning outstanding financial disclosure.

[96] It was not until June 24, 2014, that a final order issued. The application judge assessed the father's income as follows:

i) 2012 - $121,254;
ii) 2013 - $56,520;
iii) 2014 - $156,000.

The mother's income was assessed as:

i) 2012 - $19,240;
ii) 2013 - $16,638;
iii) 2014 - $16,638.

[97] The application judge ordered the father to pay child support commencing August 2012 in the amount of $896 monthly for the remainder of 2012; $345 monthly for the year 2013; and for 2014 to June 30th, the amount of $1,185 monthly.

[98] The judge found the mother was entitled to spousal support commencing September 1, 2012, to be paid at the high end of the range of the *SSAG*, for a period of fourteen years. For this purpose, the father's income was assessed at $138,500, and the mother's income was assessed at $19,240. Retroactive child support was fixed at $15,724, and retroactive spousal support was calculated to be $59,818, minus any payments made. All remaining assets were divided equally. Whether, or not, the application judge calculated the respective incomes correctly matters not, as this order was not appealed.

[99] What transpired following the rendering of the final order has added to the mother's belief that H.H. intentionally structured his financial affairs, and his life, in order to avoid his support obligations. In July 2014, a few weeks following the final decision, he transferred title to three parcels of land to his parents. The mother submits the transfers were made as a fraudulent attempt to avoid enforcement of the support arrears. Her suspicions in this regard are not without merit, in my opinion, as there was evidence that prior to the separation, the father withdrew $118,000 from a bank account registered in his name and gave the funds to his mother for safekeeping. She later returned them to him. He testified he spent the money over a short period of time on alcohol and gambling. The application judge concluded the mother was not entitled to share the $118,000; however, his reasons reveal he had concerns about the father's conduct and his credibility. There was evidence the father drained his bank accounts, and was not compliant with financial disclosure orders.

[100] As noted, less than 30 days following the application judge's oral decision, the father conveyed his properties to his parents, and, that same month, they retired the remaining line of credit outstanding against one of them. On September 25, 2014, the mother obtained and registered Certificates of Pending Litigation against the properties. In the recital to that order, the application judge writes: "… And Upon Being Satisfied that the evidence discloses [that] the respondent may have acted with respect to the lands in a manner intended to delay and render the enforcement of the order of this

Court…". In October 2014, the judge gave the father and his parents until November 28, 2014, to reply to the mother's allegations the transfers were made to avoid the enforcement of the outstanding court order. They filed a joint affidavit sworn November 20, 2014, requesting the mother's motion be dismissed, the Certificates of Pending Litigation be vacated, and they claimed costs.

[101] On October 23, 2014, shortly following the expiration of the appeal period, the father filed a Motion to Change seeking: an order terminating spousal support, both retroactively and prospectively; a prospective reduction in his child support payments, and a retroactive rescission of the arrears of both spousal and child support. In support, he filed an unsworn financial statement declaring his income would be $80,000 for 2014. An amended Motion to Change was later filed, in which the father reported his income from June 1, 2014, to year end was $24,804, and he sought a reduction of his child support payments retroactive to June 1, 2014. On October 24, 2014, he made a payment of $60,000 towards the arrears; therefore, by November 28, 2014, support arrears totaled $20,646.

[102] In July 2015, the mother filed a motion in which she claimed contempt relief against the father pursuant to Rule 76. She requested an order voiding the property transfers to his parents, and she asserted his motion and amended motion should be dismissed on the basis he was re-litigating matters previously decided. On September 25, 2015, the mother replied to the father's motion. On February 9, 2016, the father replied to the mother's Motion. In a joint affidavit, E.H. and G.H. deposed they invested significant sums in repair and maintenance work on one of the properties conveyed to them, they paid legal fees and property taxes, and they had an expectation of being re-paid. One of the properties was sold for $150,000 and the net proceeds were ordered held in trust by the court.

[103] H.H. did not fully comply with his financial disclosure obligations until the eve of the motion hearing in February 2016. His Income Tax Return, filed the morning of the hearing, recorded his income as $95,000 for 2014. By the time the

motions proceeded to a five-day hearing in February, 2016, the Family Support Orders Service had recorded outstanding arrears of both child and spousal support in the amount of $78,649.83.

II. The Motion Judge's Decision

[104] In November 2016, both motions were dismissed without costs, the Certificates of Pending Litigation were vacated, and the funds paid into court were ordered released to E.H. and G.H. The motion judge concluded: "The Court finds that there was consideration for the assets and that there is no evidence of any intent to frustrate creditors. The Court does not conclude that the transfer of the camp and house from the father to his parents (that was later sold to a third party) was to frustrate payment of his child and spousal support obligations" (para.71). In short, the motion judge found there had been consideration for the transfers, there was no intent to avoid or prefer creditors, and the transfers were not contrary to the *Assignments and Preferences Act.* The motion judge dismissed the request to terminate spousal support, and she declined to vary spousal and child support either retroactively or prospectively, on the basis the father was re-litigating matters previously decided. The motion judge did not determine the father's motion on its merits, finding he introduced evidence which was available to him and could have been considered at the time of the application hearing, and she concluded the issue was *res judicata* on that basis.

III. Grounds of Appeal and Cross-Appeals

[105] C.B. asserts the motion judge made errors in fact and law. In summary, she contends:

1. the motion judge erred in failing to consider whether the property transfers were *bona fide*, on the grounds they were non-arm's length transactions, there was no or inadequate consideration, H.H. continued to avoid his support

obligations with the complicity of his family, and his actions were contemptuous;

2. there was contradictory evidence, or no proof H.H.'s parents spent their own money on the repairs and renovations they made to the properties;

3. the motion judge's failure to find H.H. was intentionally frustrating the enforcement of the judgment against him was an error.

[106] In his cross-appeal, H.H. seeks either a "new hearing" before another "justice", or alternatively, the decision be varied so as to terminate spousal support, to recalculate child support and spousal support arrears retroactively, and to vary child support prospectively. He asserts the motion judge erred in her application of *res judicata*, she failed to consider s. 14(a) of the *Guidelines*, or erred in her consideration of a material change in circumstances when she did not consider his 2015 income for the purposes of reviewing the support obligations, and she should have ordered costs.

[107] E.H. and G.H. cross-appeal asserting they should receive their costs in the court below, and they seek costs on their cross-appeal.

IV. Standard of Review

[108] The standard of review in the context of family law was set out in *Hickey v. Hickey*, [1999] 2 S.C.R. 518, [1999] S.C.J. No. 9 (QL). There, L'Heureux-Dubé J. states:

> Our Court has often emphasized the rule that appeal courts should not overturn support orders unless the reasons disclose an error in principle, a significant misapprehension of the evidence, or unless the award is clearly wrong. These principles were stated by Morden J.A. of the Ontario Court of Appeal in *Harrington v. Harrington* (1981), 33 O.R. (2d) 150, at p. 154, and approved by the majority of this Court in *Pelech v. Pelech*, [1987] 1 S.C.R.

> 801, *per* Wilson J.; in *Moge v. Moge*, [1992] 3 S.C.R. 813, *per* L'Heureux-Dubé J.; and in *Willick v. Willick*, [1994] 3 S.C.R. 670, at p. 691, *per* Sopinka J., and at pp. 743-44, *per* L'Heureux-Dubé J.
>
> There are strong reasons for the significant deference that must be given to trial judges in relation to support orders. This standard of appellate review recognizes that the discretion involved in making a support order is best exercised by the judge who has heard the parties directly. It avoids giving parties an incentive to appeal judgments and incur added expenses in the hope that the appeal court will have a different appreciation of the relevant factors and evidence. This approach promotes finality in family law litigation and recognizes the importance of the appreciation of the facts by the trial judge. Though an appeal court must intervene when there is a material error, a serious misapprehension of the evidence, or an error in law, it is not entitled to overturn a support order simply because it would have made a different decision or balanced the factors differently. [paras. 11-12]

[109] The conclusions reached in *Hickey* have been followed and applied by the Court on numerous occasions. C.B. asserts the motion judge made numerous errors of law in her analysis concerning the badges of fraud and contempt, and she argues there were findings of fact not supported by the evidence. H.H. submits the motion judge erred when she found his motion was *res judicata*. Errors involving questions of law are reviewed on the standard of correctness. Findings of fact are reviewed on the standard of palpable and overriding error. On a pure question of law, an appellate court is free to replace the opinion of the trial judge with its own if there is an error, because the standard of review is correctness. Questions of fact require deference, and questions of mixed fact and law fall along a spectrum, where a correctness standard is applied if there is an extricable question of law and the palpable and overriding standard otherwise applies: *Housen v. Nikolaison*, 2002 SCC 33, [2002] 2 S.C.R. 235, para. 8 (see *Hill v. Pirie Potato Company (1973) Ltd.*, 2018 NBCA 35, [2018] N.B.J. No. 139 (QL), per Larlee J. at para. 8).

[110] In *Vaughan v. Vaughan*, 2014 NBCA 6, 415 N.B.R. (2d) 286, Quigg J.A. observes:

> This Court does not re-try cases, nor does it substitute its views for those of the application judge. In family law matters we take the view that considerable deference must be shown to a judge's decision. Of course, we will intervene when there is an error of law, a significant misapprehension of the evidence or if the decision is clearly wrong. This principle has been restated often in our decisions, among them *LeBlanc v. LeBlanc*, 2013 NBCA 22, 401 N.B.R. (2d) 334; *P.R.H. v. M.E.L.*, 2009 NBCA 18, 343 N.B.R. (2d) 100, at paras. 8 and 9; *Smith v. Smith*, 2011 NBCA 66, 375 N.B.R. (2d) 208, at para. 10; *Doiron v. Wilcox*, 2012 NBCA 70, 393 N.B.R. (2d) 183, at paras. 9 to 11 and *C.M.H. v. J.R.H.*, 2012 NBCA 71, 393 N.B.R. (2d) 154, at para. 8. [para. 7]

[111] I conclude the standard of review in this case is that of correctness, and if there are errors in the motion judge's findings of fact, these will be reviewed on the standard of palpable and overriding error.

V. Analysis

A. *Contempt*

[112] The motion judge correctly found contempt had not been proven for the following reasons:

1. The order to pay solicitor and client costs was not free from ambiguity, as it did not specify a date when the costs would be paid;

2. An order for the payment of money is legally distinguishable from an order for the payment of child and spousal support arrears. See *Dickie v. Dickie* 2007 SCC 8, [2007] 1 S.C.R. 346; and *Lahanky v. Lahanky*, 2012 NBQB 30, 382 N.B.R. (2d) 397;

3. In October 2014, H.H. paid $60,000 towards the accumulated arrears;

4. C.B. had not exhausted all "remedies available under the *Support Enforcement Act*".

[113] In my view, the findings of the motion judge as they relate to contempt are unassailable, and I would not interfere with her reasons in this regard.

B. *Child Support*

[114] The application judge's order contemplated an annual "revision" of child support, consistent with the *Guidelines* (Para.72 of reasons). H.H. submits the motion judge should have revised the child support payments to January 2014, on the basis his actual income in 2014 was $74,473.81, not $156,000 as was imputed by the application judge.

[115] On this issue the application judge states:

> While I have not reviewed all of Mr. [H.H.'s] testimony in this fashion I think I've considered sufficient detail to establish that I do not find his testimony credible in any material particular with respect to the possession and disbursement of funds. Similarly and without going into any detail I will not accept Mr. [H.H.'s] testimony about his ability to work having been impaired by a medical problem; depression, nerves and a possible ulcer because he has provided no corroboration for this claim. I will not accept that Mr. [H.H.] was laid off by his former employer effectively May 31st because of a major problem with the mine that will keep him off the job for as much as a year. Again there is no information to corroborate this statement.
>
> […]
>
> I will concede the child support for the periods from the date of separation to the 1st day of September must be

> based upon the actual incomes that Mr. [H.H.] has outlined. I am not willing to make the same concession for the year 2014. Mr. [H.H.] was gainfully employed at the beginning of the year and earning an amount that I concluded was equal to $156,000 per year. He tells the court that he was laid off on May 31st, that his position at the mill in Saskatchewan will not be available for him for at least one year and that he has been diagnosed with complaints that will incapacitate him for at least two months. He's provided no proof for any of these statements. Conversely, he has told the court he would like to work in New Brunswick at a job that will pay him considerably less than the western jobs because he wants to live in New Brunswick with his current partner. Finally, as noted, he acknowledges he would have no problem acquiring another job out West if he needed it. [paras. 56 and 59]

[116] During the subsequent motion hearing the father introduced medical reports and *viva voce* evidence from two physicians and a family counsellor as proof his health deteriorated following the application judge's decision, and therefore he could not work at that time. The motion judge observed some of the evidence pre-dated the original hearing, was available to the father, and could have been offered. She noted that, as he failed to substantiate his medical complaints at the previous hearing, income was imputed to him pursuant to s. 19 of the *Guidelines*, and the matter would not be revisited. In my view, the motion judge correctly declined to retroactively vary the child support order for the year 2014 on the basis the application judge's order was not appealed. The father's failure to appeal forecloses the possibility of retroactively varying the support order to a period of time that pre-dates the application judge's decision.

[117] We know an order for child support is made in consideration of the payor's sources of income in a calendar year (ss. 15-20 of the *Guidelines*). The father argued his health deteriorated following the hearing of the application, his income dropped dramatically in 2015 and, by consequence, he was entitled to a "revision" of his child support payments. I agree. It is on this basis I conclude the child support order should be reviewed for the year 2015 and I would refer this portion of the motion judge's decision.

[118] H.H. has an ongoing obligation to provide financial disclosure by court order (s. 25 of the *Guidelines*). For the same reasons, I would refer the matter of the retroactive revision of his child support obligations, if any, for 2016. Both parties have the right to seek further reviews of the child support order on an ongoing basis (s. 14 of the *Guidelines*).

C. *Void Transfers*

[119] Before the motion judge, the mother submitted the property conveyances to his parents should be set aside pursuant to the *Assignments and Preferences Act*, and the arrears of child support be "converted" to an enforceable order of the court. The motion judge declined to grant the order, finding there was "consideration for the assets", and there was no evidence of "intent to frustrate creditors". Section 2(3) of the *Act* provides that, if any action or proceeding is brought within 60 days after a transaction with a creditor, and the transaction has the effect of giving the creditor a preference over other creditors, the transaction is presumed to have been made with the intent to give the creditor a preference over other creditors. The mother bore the onus to establish the property conveyances to his parents were made at a time when he was in insolvent circumstances, the parents were given preference as creditors, and the conveyances were done with the intent to avoid a judgment.

[120] The Court's decision in *Canadian Imperial Bank Of Commerce v. G.E. Cox Limited, Cox and Cox* (1985), 66 N.B.R. (2d) 374, [1985] N.B.J. No. 326 (QL), per Hoyt J.A. was applied in *Mawdsley v. Meshen*, 2012 BCCA 91, [2012] B.C.J. No. 377 (QL), where Newbury J.A. examined the evidentiary requirements to support the "badge of fraud". She states:

> For the reasons that follow, it is my view that *Hossay* should not be disturbed and indeed, that given that the broad and uncertain consequences such a change would involve, it would be for the Legislature rather than a court of law to do so. With respect to the question of "intent"

under the *FCA*, it is also my opinion that while a claimant need no longer show a "subjectively dishonest or fraudulent state of mind" on the part of the transferor, the claimant must prove an intention to defeat creditors or others as a matter of fact. Of course, such an intention may be inferred from all the circumstances, and the well-known "badges of fraud" are often resorted to for this purpose, creating a presumption of fraudulent intent. (See *Twyne's Case* (1601) 3 Co. Rep. 80b, 76 E.R. 809.) But the presumption is rebuttable, and merely proving that the effect of the transfer is to hinder or delay creditors or others is not, as a matter of law, sufficient.

[…]

Ballance J. referred briefly to *Abakhan & Associates Inc. v. Braydon Investments Ltd.* 2009 BCCA 521 *("Braydon")*, where this court endorsed the principle that a claimant under the *FCA* need no longer show a "dishonest" or "morally blameworthy" intent on the part of the transferor. All that is required, she observed, is an intention "to place the assets out of the reach of a creditor or other". (Para. 209.) She noted that intention is a question of fact to be determined in each case, but that courts have identified certain hallmarks that may support an inference of fraudulent intent within the meaning of the Act. She quoted this version of the "badges of fraud" formulated in *Frimer v. Lurcher* [1984] B.C.J. No. 728 (S.C.):

> (1) The state of the debtor's financial affairs at the time of the transaction, including his income, assets and debts;
>
> (2) The relationship between the parties to the transfer;
>
> (3) The effect of the disposition on the assets of the debtor, i.e. whether the transfer effectively divests the debtor of a substantial portion or all of his assets;
>
> (4) Evidence of haste in making the disposition;
>
> (5) The timing of the transfer relative to notice of the debts or claims against the debtor;

> (6) Whether the transferee gave valuable consideration for the transfer.
>
> There are other *indicia* or badges of fraud that include continuing to remain in possession following a conveyance and secrecy respecting the transactions. [paras. 23-24].
>
> As well, the trial judge noted that the modern view of the onus of proof in cases of this kind is that where the impugned transaction was made for no consideration, a presumption of fraud arises, but that it is rebuttable by evidence that the transferor did not act in furtherance of an improper purpose. […] [paras. 7 and 41]
>
> [Emphasis in original]

[121] The motion judge turned her mind to these criteria and, in my opinion, her conclusion the *Assignments and Preferences Act* did not apply, on the facts of this case, was correct. She was not satisfied the mother met the conditions for an order voiding the transfers on the basis of fraud. She found the conveyances were made in good faith and for valuable consideration, and not for the purpose of defeating, delaying or prejudicing the mother as a creditor. The motion judge accepted that the father's parents advanced him, by way of a loan, the funds he required to pay her interest in the former marital home, and to pay arrears in support. She accepted that, in addition to the original loan, his parents paid a line of credit of approximately $46,000, and taxes and fees of approximately $4,000. Implicit in her evidence is the mother's belief the father had, in reality, not borrowed money from his parents, and was paying for her interest in the marital home with funds that arguably may have been divided between them. This undercurrent of distrust permeated the proceedings. In the end, the motion judge accepted the evidence of H.H.'s parents, concluding the transfers were *bona fide* and were made for valuable consideration. This finding is devoid of palpable and overriding error that might have justified appellate interference. This is clearly a case where the judge applied the correct law and made credibility and factual findings.

[122] I add here, however, the *F.S.A.* provides that an interim preservation order can withstand a final order. As noted, there was an interim order restraining the parties

from divesting themselves of any of the assets in issue, pending a final decision. Both parties claimed a division of cohabitation property. Cohabitation property was listed in the mother's financial statements, and included real estate, bank accounts, RRSPs, and, generally, all assets acquired by them during cohabitation. As a result of the application judge's decision, the father was obligated to pay significant arrears in both spousal and child support. Arguably, the preservation order could have continued post-trial had it been requested. Section 119 of the *F.S.A.* reads:

In or pending an application under section 115 or section 33 of the *Support Enforcement Act*, or where an order for support has been made, the court may make such interim or final order as it considers necessary for restraining the disposition or wasting of assets that would impair or defeat the claim or order for the payment of support. [Emphasis added.]	Lorsqu'il y a demande en application de l'article 115 ou l'article 33 de la *Loi sur l'exécution des ordonnances de soutien* ou en attendant cette demande ou cette comparution, ou lorsqu'une ordonnance de soutien a été rendue, la cour peut rendre toute ordonnance provisoire ou définitive qu'elle estime nécessaire pour empêcher une aliénation ou une dissipation de biens qui compromettrait la réclamation ou l'ordonnance de soutien ou y ferait échec. [C'est moi qui souligne.]

[123] I observe as well, that s. 116(1)(n) of the *F.S.A.* grants authority to make an order securing the payment of support by a charge against property, or otherwise. This relief was not requested by the mother.

[124] There is an evolving body of jurisprudence concerning the intersection between creditors' rights and support enforcement. In *Schreyer v. Schreyer*, 2011 SCC 35, [2011] 2 S.C.R. 605, Lebel J. commented with respect to the clash between family law and creditors' rights in Canada, writing:

> This appeal concerns a perceived clash between family law and bankruptcy law. The appellant sharply challenges the outcome of the litigation in this case, which results from her separation and divorce from the respondent: she has been denied recovery of an equalization payment owed after the division of the family assets, whereas the respondent has retained ownership of the family farm after being discharged from bankruptcy, as the farm is exempt

> from seizure under Manitoba law. I would uphold the judgment of the Manitoba Court of Appeal, which dismissed the appellant's claim. I find no error in law and would thus dismiss the appeal. However, the result calls for some comments about the interplay of bankruptcy law and family law and about how they can be made to work together rather than at cross-purposes. [para. 1]

[125] Although the case at bar does not involve insolvency, nor bankruptcy rights *per se*, there is an overarching question at play, and that is how do, or how should, creditors' rights intersect in family litigation, particularly when support issues are at stake? In this case, approximately four years passed between the date of separation and the order which set out the payments of support which were assessed retroactively, as noted. A further four years have passed, with the uncertainties which exist concerning the payment of both child and spousal support.

D. *Time Limited Spousal Support*

[126] Once entitlement is found, a judge has the authority to make a time-limited support order when there is evidence the spouse can be fully compensated for the economic disadvantage arising from the relationship, within a specific period of time, and when the court concludes economic self-sufficiency is realistic within that time frame. In this case, the application judge agreed the mother was entitled to spousal support on the basis of both compensatory and non-compensatory factors, and he ordered spousal support to be paid for a period of 14 years. He applied the *SSAG*, and he fixed the monthly payment at the high end of the range. This order was not appealed.

[127] I conclude the motion judge correctly decided not to vary the order retroactively. The application judge's order was not appealed, thereby foreclosing a retroactive variation. In my opinion, the material change of circumstances submission is attenuated when there has been an order for time-limited spousal support. Once a trial judge determines to compensate a dependent spouse on the basis of a time-limited award, he or she is signaling this sum certain will be paid, arguably, without interest over a

period of time, in satisfaction of the criteria set out in s. 115 of the *F.S.A.* In my view, the material change of circumstances argument must "fall on deaf ears", particularly when the award has not been appealed.

[128] There is a difference in the analyses as between claims for retroactive and prospective variations of child and spousal support. Cromwell J. observes this difference in *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269, when he writes:

> While *D.B.S.* was concerned with child as opposed to spousal support, I agree with the Court of Appeal that similar considerations to those set out in the context of child support are also relevant to deciding the suitability of a "retroactive" award of spousal support. Specifically, these factors are the needs of the recipient, the conduct of the payor, the reason for the delay in seeking support and any hardship the retroactive award may occasion on the payor spouse. However, in spousal support cases, these factors must be considered and weighed in light of the different legal principles and objectives that underpin spousal as compared with child support. I will mention some of those differences briefly, although certainly not exhaustively.
>
> [para. 207]

[129] The father sought a retroactive reduction of his spousal support payments which would have reduced the outstanding arrears. In *Earle v. Earle*, 1999 BCSC 283, [1999] B.C.J. No. 383 (QL), Martinson J. concludes termination of arrears is in reality a form of variation, requiring the payor to establish that a long-lasting material change has occurred and there is no prospect for payment in the future. An unexpected material change in circumstances is the starting point. The court must then conduct a holistic analysis, and as stated in *P.M.B. v. M.L.B.*, 2010 NBCA 5, 353 N.B.R. (2d) 323, the recipient must be able to cling to the "faint hope" of payment, unless it is determined there is no prospect of payment at any time in the future. Earle was referred to by the Court in *P.M.B.* The Supreme Court acknowledged this principle in *L.M.P. v. L.S.*, 2011 SCC 64, [2011] 3 S.C.R. 775, at para. 35. Abella and Rothstein J.J. write: "In general, a material change must have some degree of continuity, and not merely be a temporary set of circumstances (see *Marinangeli v. Marinangeli* (2003), 66 O.R. (3d) 40, at para. 49)

[…]". See also *Gray* at paras. 38-39. Even if a court determines there is sufficient evidence to do so, a retroactive variation does not necessarily lead to the rescission of arrears, because the court may decide to suspend the enforcement of them to see if they can be paid in the future. In this case, the father provided no proof of a permanent change in his health or his financial circumstances that would have supported such an order.

[130] It is my view that to simply terminate spousal support payments based on the here and now analysis, in the absence of a finding the material change is permanent, does not meet the objectives of s. 115 of the *F.S.A.* The alternative is to order a review as was discussed in *Arsenault v. Arsenault*, 2002 NBCA 101, 254 N.B.R. (2d) 190 and *Bourque v. Bourque*, 2004 NBCA 60, 274 N.B.R. (2d) 72, to be held within a specified time frame. Once entitlement is found, and a spousal support award is made, a motion to vary is grounded in material change as set out in *Willick v. Willick*, [1994] 3 S.C.R. 670, [1994] S.C.J. 94 (QL); however, in my opinion, this analysis is not helpful, nor is it applicable in those cases where the moving party seeks a retroactive reduction in his or her support payments, which would result in the rescission of arrears, as claimed by the father in this case.

[131] In my view, a court may suspend, not vary or terminate, the payments, until such time as the payor's financial circumstances improve, or child support payments are either reduced or terminated (s. 118(1) of the *F.S.A.*), thus freeing up income for spousal support. The result is fact driven. For termination to occur, the onus rests with the moving party to establish the change upon which they rely is permanent, and there would be no possibility of payment in the future. Whether it was the result of a layoff, or for health reasons, the father provided no evidence that his inability to work was permanent. The suspension of spousal support awards is contemplated in the *SSAG*, and was discussed by this Court in *M.R. v. J.R.*, 2018 NBCA 12:

> The *SSAG* acknowledge an alternative to a straight income driven approach to retroactive orders for spousal support. In the "*Revised User's Guide*" ("RUG"), the authors recognize that in some cases, the court could postpone the enforcement of the arrears or, alternatively, set a date for a

> reconsideration of the arrears. The latter approach is taken when the existing child support obligation expires on a given date in relative proximity, thus permitting the court to address the arrears question. At p. 32, the authors observe that once the child support obligations diminish, then s. 15.3(3) of the *Divorce Act* (and the provincial equivalents) will resuscitate or increase the amount of the spousal support payments and lengthen the duration, so as to balance the competing interests as between child support and spousal support, in recognition of the compensatory and non-compensatory entitlement to spousal support. In my opinion, to simply terminate and/or to retroactively vary the support payments based on income alone does not meet the objectives set out in s. 15. [para. 88]

See also the Department of Justice Canada: *Spousal Support Advisory Guidelines: The Revised User's Guide* (Ottawa: April 2016).

[132] In his cross-appeal, the father submits the motion judge erred when she found he had not met the material change threshold, and that he was re-litigating matters previously determined. I agree with this submission, in part. This was a five-day hearing with significant *viva voce* evidence. The motion judge determined there was insufficient evidence to support a termination of spousal support; however, in doing so, she failed to decide the motion on its merits. Her analysis is silent concerning the question whether, or not, the father's financial and medical circumstances changed following the application judge's decision, and applying s. 118 of the *F.S.A.*, rather than simply dismissing the motion, she could have ordered a review within a specified period of time. Recall, the father filed his motion within days of the application judge's order. It is for this reason I conclude the motion judge did not err when she dismissed the father's motion to terminate or to retroactively vary the spousal support award, and I would dismiss the father's cross-appeal on this ground. I would, however, refer the issue of whether, or not, H.H. experienced a material change in either his medical or his financial circumstances following the application judge's order to a judge of the Court of Queen's Bench as a question of mixed fact and law.

E. *Res Judicata*

[133] As stated by the Supreme Court in *Angle v. Canada (Minister of National Revenue - M.N.R.)*, [1975] 2 S.C.R. 248, 47 D.L.R. (3d) 544 (S.C.C.), the same issue cannot be re-litigated when it has been determined in earlier proceedings. The overriding policy concern is the "finality and conclusiveness of judicial decisions; and …the right of the individual to be protected from vexatious multiplication of suits and prosecutions…" (*Angle* at p. 267).

[134] In *Penner v. Niagara (Regional Police Services Board*), 2013 SCC 19, [2013] 2 S.C.R. 125, LeBel and Abella J.J., dissenting for other reasons, write:

> The foundational importance of finality to the judicial system and the individual parties was emphatically explained by Doherty J. A. in *Tsaoussis (Litigation Guardian of) v. Baetz* (1998), 41 O.R. (3d) 257 (C.A.), at pp. 264-65, leave to appeal refused, [1998] S.C.C.A. No. 518, [1998] 1 S.C.R. xiv:
>
> > Finality is an important feature of our justice system, both to the parties involved in any specific litigation and on an institutional level to the community at large. For the parties, it is an economic and psychological necessity. For the community, it places some limitation on the economic burden each legal dispute imposes on the system and it gives decisions produced by the system an authority which they could not hope to have if they were subject to constant reassessment and variation: J.I. Jacob, *The Fabric of English Civil Justice*, Hamlyn Lectures 1987, at pp. 23-24.
>
> [para. 90]

[135] In *Hill v. Hill*, 2016 ABCA 49, [2016] A.J. No. 180, (QL), Paperny J.A. dealt with the new evidence exception to the doctrine of *res judicata* as follows:

> The doctrine of *res judicata* has developed to maintain respect for the administration of justice. It is a cornerstone of our legal system. The system depends on finality, the

> guiding principle being: "*interest rei publicae ut finis sit litium*"; it is in the interest of the public that litigation come to an end. Public policy dictates that, once the right of appeal has been exhausted, judicial decisions should be conclusive. The law requires that parties to litigation put forward their entire and best case once. Parties should not be called upon a second time to answer the same claim because legal ingenuity has revealed a new or revised version of the case. [para. 27]

[136] Thus, for the father to successfully challenge the motion judge's decision on this issue, he was required to prove the evidence upon which he relied was not available at the time of the hearing, and it would have altered the result. The motion judge concluded the doctrine of *res judicata* applied. She stated:

> I believe no new facts were presented to this Court in relation to the incapacity of the father to work and facts that were presented were known or should have been known by him at the time of what I will call the first trial. At paragraph 56 of his decision the judge made the following comments:
>
> > "… I will not accept [the father's] testimony about his ability to work having been impaired by a medical problem; depression, nerves and a possible ulcer because he has provided no corroboration for this claim".
>
> [para. 77]

[137] The motion judge canvassed the medical evidence and concluded:

> […] The evidence to support his present case was available to him and known by him during the first trial. Bringing forward corroborating evidence through a motion to change would be re-litigating this matter. [para. 78]

[138] With respect, and for the reasons noted, it is my view the doctrine of *res judicata* does not apply. I have stated my reasons for concluding the "revision" of child support, as contemplated in the original order, can proceed, and I have, for different reasons, concluded why the father's motion to vary spousal support both retroactively

and prospectively should fail; however, the issue of the remedy, should it be found the father experienced a material change in his financial or medical circumstances between the date of the application judge's decision and the date of the motion judge's decision is referred as noted.

F. *Cross-Appeal of E.H. and G.H.*

[139] Although they did not file a motion, the father's parents filed a joint affidavit in which they provided an explanation for the transfers of the properties. They were joined as respondents by court order effective October 2014, and they were "entitled" to file responding documents by November 28, 2014. Responding documents are governed by Rule 81 (Form 81F), in which the statutory relief requested is to be particularized, along with the supporting affidavit evidence. They were both represented by counsel for the application hearing as well as the motion hearing. The father's mother testified she and her husband advanced sums of money to their son as a loan, with the expectation of being paid. In essence, they secured a right of preference over the mother as creditors, which they were entitled to do in the absence of an order or a filed Certificate pursuant to s. 124 of the *F.S.A.* to the contrary. This was a common-law relationship; therefore, the rebuttable presumption of an equal sharing of property accumulated during the relationship, set out in the *Marital Property Act*, R.S.N.B. 2012, c. 107, does not apply.

[140] In their cross-appeal, the father's parents seek an order for costs in the court below, as well as on their cross-appeal. Although we are reluctant to interfere with cost awards, the motion judge overlooked the fact they were parties to the proceedings and they had requested costs. Her order did not address their claim. As they were successful, at the very least, they should have been awarded costs, or, if costs were not ordered, the motion judge was required to provide reasons why not. The decision is silent either way. I would order costs to the father's parents in the amount of $750, in the court below, and I would order costs in the amount of $2,000 on their cross-appeal, to be paid by the mother.

G. *Correction to Original Order*

[141] In passing, I observe the original order dated September 3, 2014, was flawed. The paragraph with respect to the payment of spousal support reads:

> The Court finds that for the purposes of calculation of spousal support the Respondent's income is found to be reflective of his past income and determined to be $138,500.00 annually and the Applicant is found to be able to earn $19,240.00 and therefore the Respondent shall pay the Applicant $2,719.00 commencing September 1, 2012 for a period of 14 years or until further order of the Court.
>
> [para. 11]

[142] The order does not specify the frequency of the payments. Clearly this was an oversight, which was not corrected through the slip rule (see Rule 60.03(5) (a)).

[143] The application judge ordered a payment of $2,719 commencing September 1, 2012, with no terms. An ambiguously worded order creates problems with enforcement. The error was noted in the father's brief; however, it was not corrected by the motion judge. I would refer this portion of the order as well.

VI. Disposition

[144] I would dismiss the mother's appeal. I would allow the father's cross-appeal in part. I would refer the issue of retroactive child support commencing January 1, 2015, to the Court of Queen's Bench. I would refer the material change analysis with respect to any variation to the spousal support order from the date of the application judge's decision as noted. I would allow the father's parents' cross-appeal with respect to costs. I would refer paragraph 11 of the application judge's order for correction.

[145] I would award costs to the father in the amount of $2,500 to be paid by the mother. I would award costs to the father's parents in the amount of $2,750 to be paid by the mother. Like my colleagues, I would invoke s. 24(2) of the *Official Languages Act*, S.N.B. 2002, c. O-0.5, and order the release of this decision in the English language with the French version to follow in due course.