

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Karen I. Simonsen
Mr. Justice David J. Kroft
Madam Justice Anne M. E. Turner

BETWEEN:

<i>JUNE MARY ANN POLOWY</i>)	<i>D. A. Mayer</i>
)	<i>for the Appellant</i>
)	
<i>(Petitioner) Respondent</i>)	<i>A. L. Bennet</i>
)	<i>for the Respondent</i>
<i>- and -</i>)	
)	<i>Appeal heard:</i>
<i>TERRANCE RICHARD KELLY</i>)	<i>September 29, 2025</i>
)	
<i>(Respondent) Appellant</i>)	<i>Judgment delivered:</i>
)	<i>March 10, 2026</i>

On appeal from *Polowy v Kelly*, 2024 MBKB 117 [*Polowy*]

SIMONSEN JA

[1] In this family proceeding, Terrance Richard Kelly (the respondent) appeals the dismissal of his motion for summary judgment (the summary judgment motion). He had sought summary judgment dismissing the claim of June Mary Ann Polowy (the petitioner) for an accounting and equalization of assets, including pensions, on the basis that the petition was filed outside the limitation period.

[2] The parties were in a common-law relationship for approximately sixteen years. The petitioner's claim for an accounting and equalization of

assets by a common-law partner under *The Family Property Act*, CCSM c F25 [FPA] was not filed within three years after the parties' separation, as required by section 19.1(3)(b) of the FPA (attached as an appendix to these reasons). That limitation period also applies to the petitioner's claim for division of pensions (see FPA, ss 1(2)(d), 9(2)(d); *The Pension Benefits Act*, CCSM c P32, s 31(2)(a) [PBA]).

[3] The motion judge rejected the petitioner's assertion that there was an agreement between the parties that operated to oust the limitation period. However, he found the equitable doctrine of promissory estoppel to be applicable, concluding that the respondent was estopped from relying on the limitation period due to the parties' good faith negotiations, both before and after the passing of the limitation period. On the basis of his conclusion regarding promissory estoppel, the motion judge dismissed the summary judgment motion.

[4] The respondent contends that the motion judge erred in his application of the principles of promissory estoppel.

[5] The petitioner maintains that the motion judge made no error regarding promissory estoppel (she does not challenge his finding that there was no agreement between the parties that rendered the limitation period inoperable).

[6] In any event, the petitioner says that the appeal is moot because, since the dismissal of the summary judgment motion, a report of an associate judge on a reference for an accounting and valuation of the parties' assets and liabilities under the FPA has been prepared and become an order of the Court of King's Bench. According to the petitioner, that order, which provides for

an equalization payment to her, renders moot the issue of whether the respondent is estopped from relying on the limitation period in respect of her claim for an accounting and equalization of assets.

[7] The respondent submits that the reference to the associate judge, to which he consented, was conditional upon the outcome of this appeal, such that “there is no valid argument that can be made in favour of mootness”.

[8] For the reasons that follow, I would conclude that this appeal is not moot.

[9] I would also conclude that the motion judge misapprehended the evidence before him. That misapprehension led him to make a palpable and overriding error in determining that the question of the applicability of promissory estoppel did not raise a genuine issue requiring a trial and that a trial was not necessary.

[10] In deciding the summary judgment motion, the motion judge also erred in law by not applying the correct principles governing promissory estoppel.

[11] In the end, I would set aside the motion judge’s decision regarding promissory estoppel. I would direct that the issue of whether the petitioner’s claim is barred by the limitation period be determined at a trial.

The Motion Judge’s Reasons

[12] At the outset of his reasons, the motion judge identified the law on summary judgment, referencing the leading Supreme Court of Canada decision in *Hryniak v Mauldin*, 2014 SCC 7 [*Hryniak*]. He also appreciated

the guidance regarding summary judgment provided by this Court in *Dakota Ojibway Child and Family Services et al v MBH*, 2019 MBCA 91 [*Dakota*].

[13] The motion judge turned to the application of the principles enunciated in those cases to the matter before him and concluded (*Polowy* at para 11):

I am of the view that this case is particularly well suited to a motion for summary judgment. The material facts, for the most part, are not in dispute. The issues of credibility are highly limited and the use of summary judgment will clarify a significant issue in the litigation. Put another way, if the issue of the limitation date with respect to property issues is not resolved at this early stage, the parties will face a trial on the threshold issue of whether or not there ought to be a property accounting under [the FPA], and then additional proceedings to undertake that accounting. After that, a further trial may be required to resolve the issue of common-law support which is inextricably linked to the issue of property. The issue raised in the summary judgment is a clearly defined issue that will greatly reduce the costs of litigation to both parties no matter the ultimate disposition of the summary judgment motion.

[emphasis added]

[14] The motion judge identified that the limitation period under section 19.1(3)(b) of the *FPA* had expired before the petition was filed. He found that the extension provision in section 19.1(4)(b) of the *FPA* (also included in the appendix attached to these reasons) was inapplicable, as it “only include[d] circumstances beyond the control of the person” and “both parties were represented by experienced and competent counsel and there is no evidence of such circumstances” (*Polowy* at para 14).

[15] The motion judge went on to deal with the arguments raised by the petitioner in response to the limitation defence. He explained that the

petitioner had argued not only that the respondent was barred from relying on the limitation period on the basis of promissory estoppel, but also that the limitation provision was ousted because the parties had entered into an agreement to proceed with a family property accounting. More specifically, according to the motion judge, the petitioner alleged an “overall” (*ibid* at para 20) agreement based on the following series of agreements (*ibid*):

- a) as to the commencement and closing dates to be used for an accounting;
- b) to complete an accounting to determine the date of separation values of assets and debts and to calculate the equalization payment;
- c) to obtain pension calculations;
- d) to provide supporting documents to show the date of separation values of assets;
- e) as to the values of various personal property in the possession of the petitioner;
- f) to accept the respondent’s position regarding the exclusion of certain assets from the accounting; and
- g) to divide the parties’ pensions based on previously agreed valuation dates.

[16] The motion judge determined that “there was no clear and defined agreement as alleged” and that “[t]here may have been contingent agreements and understandings . . . but there was no stand-alone agreement which in and of itself would oust the provisions of [the *FPA*]” (*Polowy* at para 21). He stated (*ibid* at para 22):

What is characterized as an agreement by the parties agreeing on the valuation of certain items is not an agreement in and of itself,

but rather is a contingent agreement which is in practice a single step in a long process of reviewing the parties' respective assets and debts and assigning values to same, all with a view towards establishing a net payment for the value of those assets from one party to another. Until that equalization payment is determined, there cannot be said to have been an agreement unless the parties have expressly and clearly provided for same.

[17] He further found, with respect to the allegation that there was an agreement to divide the parties' pensions, that the agreement had "more to do with the manner in which the respective pension credits would be accounted for" (*ibid* at para 23).

[18] The motion judge ultimately determined (*ibid*):

To accept that an agreement as to the parties' respective valuation dates, namely the date of cohabitation and the date of separation, along with an agreement on the value of certain assets is a stand-alone agreement, is to ignore the practicality and established practice of undertaking a complex family property negotiation and accounting.

[19] In then addressing promissory estoppel, the motion judge cited the decision of this Court in *Campbell v Campbell*, 1995 CanLII 11048 (MBCA) in support of his conclusion "that the equitable remedy of estoppel exists in the Province of Manitoba" (*Polowy* at para 24). The motion judge also relied on *Brar v Roy*, 2005 ABCA 269 [*Brar*], stating that, in that case, promissory estoppel was held to apply in circumstances where offers to settle were being exchanged immediately prior to the passing of a limitation date—such that the defendant was estopped from relying on the limitation period as a bar to the plaintiff's claim.

[20] The motion judge also addressed several older trial-level authorities where promissory estoppel had been found to preclude reliance on a limitation period or at least to raise a genuine issue for trial (see *Feldman v Bendle Glass Co (1975) Ltd*, 2016 ABQB 219 [*Feldman*]; *Montcap Financial Corporation v Schyven*, 2011 ONSC 4030 [*Montcap*]; *Singh v Frontier Airlines*, 1982 CanLII 4026 (MB Co Ct) [*Singh*]).

[21] As for the facts, the motion judge explained that the parties separated on August 4, 2018 and that, by early 2019, they had both retained counsel and settlement discussions commenced. He found that the parties agreed on the values of certain assets, but not others; agreed that their pensions would be divided at source as part of an accounting; continued to request and receive various items of financial disclosure through 2020 and 2021; and attended a four-way meeting with their counsel in April 2021 (the April meeting).

[22] The motion judge then stated (*Polowy* at para 30):

The uncontradicted evidence is that the respondent acknowledged that an equalization payment would be owed to the petitioner. The issue was the quantum of that equalization payment.

[23] The motion judge went on to indicate that, after the April meeting, “[t]he parties continued to exchange working copies of a spreadsheet identifying the status of the accounting including the parties’ respective positions on assets already addressed” (*ibid* at para 31). The three-year limitation period, on which the respondent now relies, passed on August 4, 2021. Notwithstanding, both parties continued to negotiate without any reference to the limitation date.

[24] The motion judge found that, “[f]rustrated by a lack of progress with respect to the issue of common-law support, the petitioner filed her petition on February 11, 2022” (*ibid* at para 36). The petition included a claim under the *FPA*.

[25] The motion judge articulated his conclusion regarding promissory estoppel as follows (*Polowy* at paras 37-38):

When one considers the actions of the respective parties, it is abundantly clear that neither party was acting such that they expected the operation of a limitation date under [the *FPA*]. There was certainly no notice of an intention to rely on a limitation date defence, either before or after the date passed. They continued to negotiate and exchange offers to settle. It is noteworthy that the limitation date passed while the respondent was considering an offer to settle and that after that offer to settle was ultimately rejected, the respondent provided a counteroffer.

Whether intentional or not, I find that, on a balance of probabilities, the respondent’s conduct prior to the passing of the limitation date and after was such that one could reasonably conclude that the respondent did not intend to rely on the limitation date. Further, I find the petitioner relied on the respondent’s conduct and that the reliance was reasonable. I am also mindful of the limited means of the petitioner as compared to the respondent both in terms of income and property which must be a factor in considering an equitable remedy. One party ought not be unjustly enriched by another’s reasonable reliance on their conduct.

[emphasis added]

[26] Given the motion judge’s conclusion that promissory estoppel applied to bar the respondent from relying on the limitation period, he dismissed the summary judgment motion.

[27] The motion judge concluded by directing counsel “to forward their draft order for a reference to the associate judge for a focussed family property accounting by September 1, 2024, failing which a case conference is to be set as soon as practicable” (*ibid* at para 42).

Mootness

[28] The leading case regarding the doctrine of mootness is *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342, 1989 CanLII 123 (SCC) [*Borowski*]. In *Borowski*, Sopinka J, writing for the Court, explained that the doctrine applies when a decision by a court “will not have the effect of resolving some controversy which affects or may affect the rights of the parties” (at 353). He stated that “[i]f the decision of the court will have no practical effect on such rights, the court will decline to decide the case” (*ibid*). Further, a case will become moot if events subsequent to the initiation of the action result in there no longer being a live controversy between the parties (see *ibid* at 354-56).

[29] Justice Sopinka added, however, that is not the end of the issue, as a court has discretion to hear a moot appeal in certain circumstances. Considerations in the determination of whether a court should exercise its discretion include whether there is an adversarial context, judicial economy, and consideration of the traditional role of the court and intrusion into the role of the legislative branch (see *ibid* at 358-62).

[30] In the present case, after the motion judge rendered his decision on the summary judgment motion on July 30, 2024, the respondent indicated an intention to appeal and sought a stay pending appeal. The stay motion was heard on October 23, 2024 (the stay motion). On the stay motion, the

respondent submitted that unnecessary time and expense would be involved in proceeding with a family property accounting, should the motion judge's decision on summary judgment be overturned on appeal. The motion judge expressed concerns about the strength of the appeal and about delay that would result from not proceeding with the accounting in a case where the parties had already been separated for more than six years. Therefore, he dismissed the stay motion. Having done so, the motion judge, also at the hearing on October 23, 2024, signed the order dismissing the summary judgment motion as well as a consent order (pronounced on October 1, 2024) directing a reference to the associate judge for an accounting and valuation of the assets and liabilities of the parties pursuant to the *FPA*.

[31] With the order dismissing the summary judgment motion now signed, the respondent filed his notice of appeal with this Court on November 22, 2024.

[32] On February 12, 2025, the associate judge issued his report on the reference (see *Polowy v Kelly*, 2025 MBKB 23). That report provides an accounting, determines an equalization payment payable to the petitioner in the amount of \$116,674.50 based on equal division and indicates that pensions will be divided at source. Because there was no opposition to confirmation of that report, it became a court order on March 19, 2025 (see MB, *King's Bench Rules*, Man Reg 553/88, rr 54.06(3), 54.09 [*KB Rules*]).

[33] According to the petitioner, the fact that there is now an order determining an equalization payment for the family property as well as division of pensions renders moot the issue of the limitation period regarding

a claim for such an equalization payment and division—that is, a decision on this appeal will not affect the rights of the parties.

[34] The respondent argues that, although the valuations of property, including pensions, were determined by the associate judge, the issues of shareability remain. He says that his agreeing to, and proceeding with, the reference was always intended to be subject to the outcome of this appeal.

[35] In my view, while it is true that there is an unopposed report of an associate judge regarding family property, addressing an accounting and equalization, as well as pensions, the record makes clear that the parties' consent to the order directing a reference to the associate judge and their participation in the process before him were subject to the outcome of this appeal.

[36] At the conclusion of his reasons on the summary judgment motion, the motion judge indicated that the property reference was to move ahead. It was in the context of this direction that the respondent provided his consent to proceed with the reference. Again, on October 23, 2024, at the hearing of the stay motion, the motion judge made clear that a reference was to move ahead without delay, while recognizing that the respondent was appealing the summary judgment and that a reference might, depending on the outcome of the appeal, involve unnecessary time and expense.

[37] Furthermore, after the associate judge's report was issued but before it became an order, the parties attended a case conference on March 12, 2025, and, in his memorandum regarding that case conference, the motion judge stated: "The Associate Judge's Report with respect to family property has

issued. However, the shareability of all property, including pensions, remain the subject of the ongoing appeal”.

[38] Based on all of the above, I am satisfied that the understanding amongst the parties and the motion judge was that all proceedings before the associate judge, and his report, were subject to the outcome of this appeal. That is, effectively, their agreement was that the order resulting from the unopposed report would be stayed pending the outcome of the appeal. As such, there remains a live controversy between the parties about whether the claim for family property, including pensions, is barred by the limitation period.

[39] For these reasons, I would conclude that this appeal is not moot.

Standard of Review

[40] The applicable standard of review on summary judgment is well-established. The decision to grant or deny a motion for summary judgment is discretionary, reviewable on a deferential standard, and will only be set aside if there is a material error as to the law or the facts, or if the decision is so clearly wrong as to be unjust (see *Wong v Dyker Law Corporation*, 2024 MBCA 8 at para 14). A question as to whether there is a genuine issue requiring a trial is one of mixed fact and law, reviewable on a standard of palpable and overriding error unless there is an extricable error in principle, in which case the standard of review is correctness (see *ibid*; *Hryniak* at para 81).

[41] Whether the motion judge erred in his statement of the principles of promissory estoppel is a question of law reviewable on a standard of

correctness. Assuming that he correctly identified the law, the standard of palpable and overriding error applies to the question of whether he misapplied the law to the facts before him, subject to any extricable legal error that is reviewed for correctness (see *Christen v Canada (Attorney General)*, 2023 FCA 101 at para 19; *Grasshopper Solar Corporation v Independent Electricity System Operator*, 2020 ONCA 499 at para 45, leave to appeal to SCC refused, 39386 (18 February 2021), 39387 (18 February 2021); *Brar* at paras 32, 39).

The Law

Summary Judgment

[42] Rule 20.03(1) of the *KB Rules*, which is applicable in family proceedings (see rr 70.02, 70.18.1), prescribes when summary judgment is to be granted:

Granting judgment	summary	Prononcé du jugement sommaire
20.03(1) The judge must grant summary judgment if he or she is satisfied that <i>there is no genuine issue requiring a trial</i> with respect to a claim or defence.		20.03(1) S'il est convaincu qu'une demande ou une défense <i>ne soulève pas de question litigieuse justifiant la tenue d'un procès</i> , le juge rend un jugement sommaire.

[emphasis added]

[43] In *Hryniak* at para 49, Karakatsanis J described the circumstances in which there will be no genuine issue requiring a trial:

There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a

motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

[44] The legal onus is on the moving party to establish, on a balance of probabilities, that there is no genuine issue requiring a trial (see *Dakota* at paras 77-79).

[45] Under rule 20.03(2), also applicable in family proceedings, judges are entitled to assess credibility and weigh evidence on summary judgment:

Powers of judge

20.03(2) When making a determination under subrule (1), the judge must consider the evidence submitted by the parties and he or she may exercise any of the following powers in order to determine if there is a genuine issue requiring a trial:

- (a) weighing the evidence;
- (b) *evaluating the credibility of a deponent*;
- (c) drawing any reasonable inference from the evidence;

unless it is in the interests of justice for these powers to be exercised only at trial.

Pouvoirs du juge

20.03(2) Pour prendre sa décision sous le régime du paragraphe (1), le juge prend en compte les éléments de preuve présentés par les parties et peut, sauf si l'intérêt de la justice commande que ces pouvoirs ne soient exercés qu'au procès, exercer les pouvoirs qui suivent pour décider si une véritable question litigieuse justifie la tenue d'un procès :

- a) apprécier la preuve;
- b) *évaluer la crédibilité d'un déposant*;
- c) tirer des conclusions raisonnables de la preuve.

[emphasis added]

The Legislation—Limitation Periods

[46] The petitioner and the respondent agree, as do I, that the petitioner’s claim for an accounting and equalization of assets is governed by the three-year limitation period in section 19.1(3)(b) of the *FPA*. That section also applies to rights under a pension plan, as they are included as family assets under the *FPA* (see ss 1(2)(d), 9(2)(d)).

[47] However, the respondent argued before the motion judge, and very briefly before this Court, that the limitation period in section 31(3.3) of the *PBA* (which also prescribes a time limit of three years post-separation) governs the claim for division of his pension. (Section 31(3.3) of the *PBA* is included in the appendix attached to these reasons, together with sections 31(3.2) and 31(3.4) of the *PBA*). The motion judge determined that section 31(3.3) was not applicable because it “only appl[ied] to short term relationships” (*Polowy* at para 15).

[48] In the context of the parties’ sixteen-year common-law relationship, I share the motion judge’s view. Section 31(3.3)(a) of the *PBA* applies to an application for division of pensions made under section 31(2.2) of that Act—and section 31(3.2)(b) prescribes that such an application can only be brought by a common-law partner who has cohabited with the pension member, or former pension member, for at least one year but less than three years.

Promissory Estoppel

[49] Before outlining the law regarding promissory estoppel, by way of preliminary comment, I note that, on this issue, the case law presented to the motion judge and this Court had significant limitations. Before both courts,

the petitioner relied on *Brar*, a 2005 decision of the Alberta Court of Appeal, and several trial-level decisions, some of which are twenty to thirty years old and many of which, in my view, do not address the principles of promissory estoppel in a considered fashion (see *Axcess Mortgage Fund Ltd v 1177620 Alberta Ltd*, 2018 ABQB 626; *Feldman*; *Montcap*; *Darby v Maier*, 1995 CanLII 895 (BCSC); *Barber v Barber* (1990), 69 Man R (2d) 317, 1990 CanLII 11255 (MBQB); *Singh*). The respondent tendered no authorities.

[50] The primary decision in this area is *Maracle v Travellers Indemnity Co of Canada*, [1991] 2 SCR 50, 1991 CanLII 58 (SCC) [*Maracle*]. The plaintiff was the owner of a commercial building that was destroyed by fire. During the course of settlement negotiations, the defendant insurance company (the insurer) admitted liability for the entire amount claimed in respect of equipment and stock-in-trade and paid those moneys into court. The parties could not, however, reach agreement with respect to an amount for the building. The insurer later wrote to the plaintiff on a “without prejudice” basis, offering to settle the entire claim, including the building claim. The settlement proposal went unaccepted, following which the limitation period expired. After the expiration of the limitation period, the plaintiff filed a claim in respect of the building coverage. The Court of Appeal found that the doctrine of promissory estoppel was an effective answer to the limitation period defence and the insurer appealed (see *Maracle v Travellers Indemnity Co of Canada* (1989), 62 DLR (4th) 570, 1989 CanLII 4095, (ONCA), rev’g (1987), 31 CCLI 42, 1987 CanLII 9911 (ONSC)). In allowing the insurer’s appeal, Sopinka J, for the Supreme Court, began with the following general principles, including the importance of intention (*Maracle* at 57):

The principles of promissory estoppel are well settled. The party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, in reliance on the representation, he acted on it or in some way changed his position.

[51] Justice Sopinka added that an admission of liability is relevant, but not sufficient on its own, to invoke the application of promissory estoppel (*ibid* at 58-59):

In my view, while an admission of liability is clearly one of the factors from which a court may infer as a finding of fact that a promise was made not to rely on the limitation period, it is not an alternate basis of promissory estoppel.

...

An admission of liability is frequently made in the course of settlement negotiations. This is often a preliminary step in order to clear the way to enter into a discussion as to quantum. Indeed, when an offer to pay a stated amount is made by one party to the other, an admission of liability is usually implicit. In this type of situation, the admission of liability is simply an acknowledgment that, for the purpose of settlement discussions, the admitting party is taking no issue that he or she was negligent, liable for breach of contract, etc. There must be something more for an admission of liability to extend to a limitation period. The principles of promissory estoppel require that the promisor, by words or conduct, intend to affect legal relations. Accordingly, an admission of liability which is to be taken as a promise not to rely on the limitation period must be such that the trier of fact can infer from it that it was so intended. There must be words or conduct from which it can be inferred that the admission was to apply whether the case was settled or not, and that the only issue between the parties, should litigation ensue, is the issue of quantum. Whether this inference can be drawn is an issue of fact. If this finding is in favour of the plaintiff and the effect of the admission in the circumstances led the plaintiff to miss the

limitation period, the elements of promissory estoppel have been established.

[emphasis added]

[52] *Maracle* has been cited countless times since its pronouncement. In Manitoba, regard may be had to the labour arbitration decision in *Manitoba Association of Health Care Professionals v Nor-Man Regional Health Authority Inc*, 2010 MBCA 55 [*MAHCP*], rev'd on other grounds, 2011 SCC 59. In *MAHCP*, Freedman JA, after referring to *Maracle*, again focused on the intention to affect legal relations, stating that although intent and basic knowledge necessary to form that intent on the part of a promisor are necessary ingredients of promissory estoppel, intent does not require a direct statement to that effect, but can be based on an inference drawn from the evidence.

[53] Most recently, the Supreme Court considered promissory estoppel in the insurance case of *Trial Lawyers Association of British Columbia v Royal & Sun Alliance Insurance Company of Canada*, 2021 SCC 47 [*Trial Lawyers*]. After reviewing the reasons of Sopinka J in *Maracle*, Moldaver and Brown JJ, for a six-member majority, wrote (*Trial Lawyers* at para 15):

The equitable defence therefore requires that (1) the parties be *in a legal relationship* at the time of the promise or assurance; (2) the promise or assurance be *intended* to affect that relationship and to be acted on; and (3) the other party in fact *relied* on the promise or assurance. It is, as we will explain, implicit that such reliance be to the promisee's detriment.

[emphasis in original]

[54] Following on this, it is also difficult to see how unintentional conduct can meet the requirement, articulated in many estoppel cases, that the promise (or conduct or representation) “be clear, unequivocal, precise and unambiguous” (see e.g. the post-*Trial Lawyers* decision in *AlumaSafway Inc v The International Association of Heat & Frost Insulators and Asbestos Workers, Local 119*, 2022 SKCA 99 at para 77(c)).

[55] That being said, and as noted above, an assurance need not be direct—the evidence may still be clear enough to allow a judge to infer the necessary intention (see *Trial Lawyers* at para 30). See also, for e.g., *Murphy Oil Co v Commercial Petroleum and Hydraulic Service Ltd*, 2004 CanLII 48670 (ONSC), aff’d 2005 CarswellOnt 4363 (ONCA), where the judge inferred that the defendant intended to convey that liability was not an issue and that it would not rely on the limitation period (see para 13).

[56] But there are also many decisions going the other way. An illustrative example is *Taylor-MacLeod Estate v MacLeod*, [1992] 34 ACWS (3d) 507, 1992 CarswellPEI 31 (PESC) [*Taylor-MacLeod*]. In that case, counsel for the plaintiff did not explicitly request, nor did the defendant’s lawyer explicitly grant, an extension of time. Accordingly, the judge looked to the “correspondence and actions of counsel” (*ibid* at para 9) to determine whether a factual basis existed to support a finding of promissory estoppel. After reviewing the principles in *Maracle*, the judge reasoned that correspondence from the defendant’s counsel “was intended to facilitate settlement and was not intended to lull the plaintiff into a false sense of security nor to induce him to preclude his rights under the *Fatal Accidents Act*” (*Taylor-MacLeod* at para 16).

[57] In the end, the case law recognizes that a determination of whether the doctrine of promissory estoppel applies is highly fact-specific and requires a careful assessment of the evidence (see *Berscheid v Government of Manitoba*, 2022 MBCA 12 at para 73; Halsbury’s Laws of Canada (online), *Equitable Doctrines*, “Waiver or Estoppel: Impact of Waiver or Estoppel” (VI.3(1)) at HLM-56 “Waiver or Estoppel Precluding Reliance on Expiry of Time Period” (2021 Reissue)).

[58] Generally, however, settlement discussions between parties will not lead to an inference that a defendant has waived a limitation defence. Graeme Mew, Debra Rolph & Daniel Zacks, *The Law of Limitations*, 4th ed (Toronto: LexisNexis, 2023) at 297-98, offers the following succinct comment on estoppel and settlement negotiations:

As a general principle, settlement discussions between parties should not give rise to an inference that a defendant has waived limitation defences to which it would otherwise be entitled.

[59] A recent example of appellate commentary on this point is found in *Goertz v Co-operators General Insurance Company*, 2025 SKCA 36 [Goertz], leave to appeal to SCC requested, where Bardai JA, for the Court, after reviewing both *Maracle* and *Trial Lawyers*, noted that an admission of liability made in the course of settlement negotiations is not sufficient to extend a limitation period, adding (*Goertz* at para 39):

The rationale behind this rule is that if settlement discussions alone functioned to extend a limitation period, no one would be able to safely discuss their dealings. A hope that the dispute might be settled by negotiation does not extend the limitation period.

[citations omitted]

Analysis and Decision

The Record

[60] Although the motion judge correctly identified the law regarding summary judgment, my view is that he made a palpable and overriding error of mixed fact and law in determining that there was no genuine issue requiring a trial as to whether the doctrine of promissory estoppel applied. This error stemmed from his misapprehension as to the state of the record, in particular, his findings that “[t]he material facts, for the most part, are not in dispute” and that “[t]he issues of credibility are highly limited” (*Polowy* at para 11). There were important facts in dispute and significant credibility issues. As I will explain, this misapprehension is both palpable and overriding (see *Loeppky et al v Taylor McCaffrey LLP et al*, 2023 MBCA 101 at para 48).

[61] Eight affidavits were before the motion judge, from both parties and their former lawyers. Communications between the parties were conducted through their lawyers, in writing—except the April meeting. Although the respondent, in his affidavit, suggests that many of the communications were “without prejudice” and thus not admissible, neither party, on appeal, touched upon this concern, apparently proceeding on the basis that an exception to settlement privilege applied (see *Meyers v Dunphy*, 2007 NLCA 1, which reviewed several exceptions to settlement privilege, including, generally, where a “compelling or overriding interest of justice requires it” (at para 27(5)).

[62] While I will not parse all eight affidavits in detail, I am satisfied that the two sides were diametrically opposed as to what agreements or understandings were in place. The respondent, for his part, denied that there

was ever an agreement between the parties to share or divide property. The petitioner says the opposite.

[63] The affidavits of the parties' respective former lawyers were also fundamentally different. The affidavit of the lawyer who represented the respondent from March 2019 to March 2024 (respondent's counsel) reads, in part:

2.6 There were exchanges of financial disclosure. However:

2.6.1. – there was no agreement on property division, common-law partner support, or any other issue[.]

[64] The lawyer for the petitioner from January 2019 to June 2021 (petitioner's counsel) (different than counsel on appeal, who took over the file sometime between June 2021 and November 1, 2021 (current counsel)), while admitting that the parties "had not agreed to the value of all assets", swears:

31. From my perspective, the parties had agreed to divide and account to the other for the value of their assets. They were actively carrying out that agreement.

[65] The parties have different views as to what was discussed at the April meeting (which took place on April 19, 2021). The respondent contends that those discussions were part of a negotiation that is typical in a case such as this. The petitioner says that the purpose of the meeting was to ascertain the value of assets and debts for the accounting she and the respondent had agreed to complete for the purpose of calculating the amount of the equalization payment to be paid by the respondent. In my view, for the motion judge to arrive at a determination as to what was discussed at the April meeting, there were credibility issues to be addressed, which were not. Even

if the motion judge had attempted to assess credibility, he had limited tools with which to do so, particularly because no cross-examinations were conducted on any of the affidavits.

[66] The present case is unlike cases where credibility has been appropriately assessed in the context of summary judgment. For example, in *Funk et al v Wyatt Dowling Insurance Brokers et al*, 2023 MBCA 45, cross-examinations on affidavits were conducted, and detailed credibility findings were made by the motion judge. In that case, the motion judge examined a wide variety of materials and cogently explained his findings on credibility (see also, for further examples, *Smith v City of Winnipeg*, 2025 MBCA 15; *Bibeau et al v Chartier et al*, 2022 MBCA 2).

[67] Furthermore, I question the sufficiency of the record with respect to the key period from April 19, 2021 until after the limitation period had expired in August 2021. The only specific evidence regarding that period is correspondence between the lawyers:

- a) A letter from petitioner's counsel to respondent's counsel dated April 26, 2021, providing details of, and her further position on, the values of certain assets and an updated comparative family property statement.
- b) An email from respondent's counsel to petitioner's counsel dated May 26, 2021, indicating that she had only just forwarded the letter dated April 26, 2021 to her client.
- c) An email from respondent's counsel to current counsel dated November 1, 2021, advising that she understood that current counsel

was now acting for the petitioner. Respondent's counsel also indicated that she had sent several emails to petitioner's counsel the prior week and that she would "follow" (sic) those to current counsel once she had heard from her. Respondent's counsel also stated that she had "instructions to make an all-inclusive offer to bring this matter to a close."

[68] Petitioner's counsel also says, in his affidavit, that he followed up with respondent's counsel in June 2021, but that correspondence is not attached to any of the affidavits.

[69] From the record, it is not clear which lawyer was acting for the petitioner during the period from June 2021 to August 4, 2021 when the limitation period expired. It seems that it may have been petitioner's counsel in light of a comment in the petitioner's affidavit that, as of November 1, 2021, she had "recently retained" current counsel. Current counsel did not provide an affidavit on the summary judgment motion.

[70] In my view, the lack of clarity with respect to the period from April 2021 to August 4, 2021, particularly given that there were no cross-examinations on affidavits, raises questions as to the sufficiency of the record to make determinations as to the intention of the respondent and detrimental reliance on the part of the petitioner, both of which are required for promissory estoppel.

[71] Thus, the motion judge palpably misapprehended the evidence in finding that the material facts, for the most part, were not in dispute and that the issues of credibility were highly limited. He never explained why this was so. Furthermore, this misapprehension was overriding, that is, it resulted in

the motion judge not dealing with credibility issues at all, which he had an obligation to do (see Donald JM Brown, *Civil Appeals* (December 2025) at s 13:34, online: (WL Can) Thomson Reuters Canada; *Bluenose Fisheries Limited v Tabusintac Fish Market Ltd* (1987), 77 NBR (2d) 285 at para 6, 1987 CanLII 7270 (NBCA)). The motion judge's misapprehension of the evidence also led him to not take a hard look at the sufficiency of the record and err in concluding that it allowed him to find the facts necessary to determine whether the doctrine of promissory estoppel applied.

[72] Reinforcing the need for a trial is the motion judge's finding, relevant to his conclusion regarding promissory estoppel, that it was "uncontradicted" that the respondent acknowledged that an equalization payment would be owed to the petitioner (*Polowy* at para 30). As I have explained, there was much disagreement between the parties. Furthermore, it strikes me as somewhat difficult to reconcile this finding with some of the factual findings the motion judge made when addressing whether there was an agreement that would operate to oust the limitation period.

[73] Regarding proportionality, which is also to be considered in determining whether there is a genuine issue requiring a trial, it is understandable that the motion judge did not want the parties to have to proceed to a trial on the limitation issue and, if the property claim was allowed to proceed, to have an accounting regarding that property and then, potentially, a further trial on common-law support. However, these concerns, while appropriate, do not justify a conclusion not reasonably available on the record.

[74] In all, the motion judge erred in mixed fact and law in determining that the issue of promissory estoppel could properly be decided, that is, the necessary facts could be found, on the record that he had before him on summary judgment. In my view, he should have concluded that the question of the applicability of promissory estoppel required a trial.

[75] A final comment. While it is undoubtedly regrettable from the perspective of proportionality that the issue of promissory estoppel is now to be decided at trial, the associate judge's report has been completed and trial dates have already been set for May 2026 regarding the issue of common-law partner support. It is also worth noting that, in the petitioner's brief filed before the motion judge, she asked for a trial as an alternate outcome, stating:

[I]f the court is unable to make the necessary findings of fact due to issues of credibility or otherwise, or is unable [to] apply the law to the facts based upon the evidence available in this forum, [the petitioner] respectfully submits that the motion of [the respondent] to dismiss her claims cannot be determined summarily, and the issue should be referred to trial.

The Law

[76] As noted at the outset of these reasons, in my view, the motion judge erred by not applying the correct law regarding promissory estoppel. Although judges are presumed to know the law, in this case, the motion judge did not outline the governing principles of promissory estoppel, nor did he cite the leading Supreme Court cases in *Maracle* and *Trial Lawyers*. (*Maracle* was mentioned in some of the authorities the petitioner had submitted to him).

[77] More particularly, the motion judge did not identify and apply the law as it relates to the requirement for intention. Instead, he appears to have

either lost sight of the requirement for intention with his comment “intentional or not” (*Polowy* at para 38), or applied an objective test to the determination of intention with his statement that the respondent’s conduct was “such that one could reasonably conclude that [he] did not intend to rely on the limitation date” (*ibid*). Either way, the motion judge erred in law by applying the wrong principles.

[78] As an aside, I also note that the motion judge considered the conduct of the parties “prior to the passing of the limitation date and after” (*ibid*) in his consideration of promissory estoppel. While evidence of conduct that occurs after the expiry of the limitation date is rarely of evidentiary value, it may possibly still be used, in appropriate circumstances, to assist in the assessment of what has occurred earlier.

[79] I will now address, and dismiss, some other more specific legal arguments raised by the parties about promissory estoppel.

[80] First, the respondent suggests that promissory estoppel does not apply because the *FPA* includes both a limitation provision and a specific provision for extension of the limitation period (see ss 19.1(3)-(4)). He questions whether promissory estoppel remains available where that legislated extension provision exists. He has provided no authority on the point. The petitioner has submitted *Brar* in support of her position that “[a] rule of common law or equity is not repealed by a statute which does not mention it. Explicit language would be required in the legislation to exclude the application of estoppel.”

[81] There is considerable authority for the view that statutes, including those that prescribe limitation periods, do not generally change or oust

common law rights in the absence of a clear direction to that effect (see *R v Bharwani*, 2025 SCC 26 at para 60; Ruth Sullivan, *The Construction of Statutes*, 7th ed (Toronto: LexisNexis, 2022) at 531; *R v DLW*, 2016 SCC 22 at para 21; see also *Brar* at paras 33-35 regarding the continued application of principles of estoppel to general limitations legislation in Alberta).

[82] Interestingly, the decision in *Macdonald v Macdonald*, 1996 CanLII 1360 (BCSC) [*Macdonald*] appears to suggest that the discretion to extend time *assists* in the application of promissory estoppel. In *Macdonald*, the plaintiff missed a six-month limitation in the *Wills Variation Act*, RSBC 1979, c 435. After citing *Maracle*, Harvey J noted (*Macdonald* at para 54):

In my opinion, the case and textual authority favours the position that estoppel is available as an argument whenever a limitation period is relied upon regardless of the source. *It is admittedly easier to use the estoppel argument where the statute gives the court discretion to extend the limitation period.* However, the absence of such statutory jurisdiction in the *Wills Variation Act*, in my opinion, does not preclude the court from exercising its equitable jurisdiction in considering the remedy of estoppel.

[emphasis added]

The above paragraph was subsequently cited in *Chan v Lee (Estate)*, 2004 BCCA 644 at para 29 [*Chan*].

[83] Given the above authorities, I would conclude that the principles of promissory estoppel continue to apply, where otherwise appropriate, despite the enactment of section 19.1(4)(b) of the *FPA*.

[84] That being said, I note that, in *Chan*, the Court declined to decide the issue of whether general limitations legislation (as opposed to the British

Columbia *Wills Variation Act*, RSBC 1996, c 490, which was under consideration) provides a complete code, thereby precluding the application of principles of estoppel (see also *Meszaros v 464235 BC Ltd*, 2021 BCSC 2012 at para 38; *1043325 Ontario Ltd v CSA Building Sciences Western Ltd*, 2016 BCCA 258 at para 44; *Tolentino v Gill*, 2012 BCSC 1383 at paras 11-12). I need not address that question in order to resolve the specific issue raised by the respondent in this case.

[85] The respondent's second argument relates to the legal requirements for promissory estoppel. He contends that the motion judge erred by concluding that promissory estoppel applied in the absence of a finding of blameworthy conduct on his part. I have already outlined the applicable law, which prescribes structured requirements for promissory estoppel that do not include the concept of blameworthy conduct.

[86] Turning to an argument advanced by the petitioner, she notes that the respondent failed to give notice that the limitation period was expiring and that it was his intention to rely on it—seemingly suggesting that the respondent's silence was a basis for invoking the doctrine of promissory estoppel. (The motion judge also stated that “[t]here was certainly no notice of an intention to rely on a limitation date defence, either before or after the date passed” (*Polowy* at para 37). The petitioner further suggests that the parties' fiduciary relationship is an additional factor supporting a finding of promissory estoppel.

[87] As stated in Halsbury's Laws of Canada (online), *Estoppel*, “Elements of the Estoppel: Promise or Assurance That Legal Relations are to Be Affected” (V.3(2)(b)) (2024 reissue): “While it is possible to make or

imply a promise or assurance through silence, such assurances rarely satisfy the requirement of clarity and unambiguity” (at HES-223 “Methods of Communicating the Promise or Assurance”). Halsbury’s also notes that, if there is a duty to speak, silence might constitute a promise or assurance (see HES-226; see also *Ryan v Moore*, 2005 SCC 38).

[88] To my knowledge, there is no established legal principle that defendants generally, or lawyers acting on their behalf, have a legal duty to give notice to the opposing side that a limitation period is expiring. The parties on this appeal did not submit any authorities suggesting otherwise.

[89] In *0678786 BC Ltd v Bennett Jones LLP*, 2020 ABQB 585 at para 24, which is relied upon by the petitioner, the Court found that a duty to speak could arise from a fiduciary relationship:

An estoppel by representation can arise by a party’s silence when that party has a duty to speak: *Ryan v Moore*, 2005 SCC 38 at para 76. Relevant to whether such a duty arises is whether there is a fiduciary relationship between them: *Ryan*, at para 77. The representation may be inferred from conduct: *Wolff v Canada (AG)*, 2017 BCCA 30 at para 21.

[90] Leaving aside the fact that the above extract speaks to estoppel by representation as opposed to promissory estoppel, the existence of a fiduciary relationship is a question of fact to be determined by examining the specific facts and circumstances (see *Galambos v Perez*, 2009 SCC 48 at para 48).

[91] The weight of authority would suggest that there is no fiduciary duty when spouses are separated (see Mark Vincent Ellis, “Fiduciary Duties in Canada” (February 2026) at s 6:22, online: (WL Can) Thomson Reuters Canada; *Ladner v Wolfson*, 2011 BCCA 370 at para 41; *Horner v Horner*,

2004 CanLII 34381 at para 56 (ONCA)). Regardless, even if such a duty were to exist, the motion judge in this case never adverted to the issue of fiduciary duty and made no finding in that regard.

Decision

[92] For the above reasons, I would set aside the motion judge's decision on promissory estoppel and direct that that issue be decided at a trial.

The Motion Judge's Conclusions Regarding an Agreement and Section 19.1(4)(b) of the *FPA*

[93] The petitioner has not appealed the motion judge's finding that there was no agreement between the parties that would oust the limitation period or his conclusion that the extension provision of the *FPA*, section 19.1(4)(b), was not applicable. However, because the motion judge's decision on the summary judgment motion cannot stand due to his errors regarding promissory estoppel, and a more complete record will now be available at a trial, I am of the view that the issues of whether there was an agreement and the applicability of section 19.1(4)(b), which are connected to the ultimate question of whether the petitioner's claim is barred by the limitation period, should also be decided at trial.

[94] To be clear, while I am of the view that all of the interrelated issues should be dealt with at trial, this does not mean that the motion judge erred in his decisions regarding an agreement or section 19.1(4)(b) of the *FPA* (see *Bellingham v Bellingham*, 99 Man R (2d) 184, 1994 CanLII 17076 (MBQB)). Rather, those questions, together with the issue of promissory estoppel, remain open to be decided by the trial judge.

Costs

[95] Both parties seek costs in the event of success on the appeal. Although the petitioner has been successful in that the summary judgment motion remains dismissed, she is unsuccessful to the extent that the motion judge's conclusion that the respondent is estopped from relying on the limitation period is set aside. Although the respondent has been successful in that the motion judge's conclusion that promissory estoppel applies is set aside, he did not prevail in his position that promissory estoppel is not applicable, the petitioner's claim is barred by limitations, and his summary judgment motion should be allowed. In light of this divided success, neither party shall have costs in this Court. Costs in the Court below related to the summary judgment motion shall be decided by the trial judge.

Conclusion

[96] For the foregoing reasons, I would conclude that the appeal is not moot. I would also conclude that the motion judge misapprehended the state of the record, which led him to err in concluding that it allowed him to decide the necessary facts and that there was no genuine issue requiring a trial. In reaching his conclusion, the motion judge also erred in law by failing to articulate and apply the proper principles governing promissory estoppel.

[97] I would allow the appeal to the extent of setting aside the motion judge's decision regarding promissory estoppel and directing that the issue of whether the petitioner's claim is barred by the limitation period be determined at a trial. This will include a consideration by the trial judge of whether there was an agreement between the parties that operated to oust the limitation

period, whether promissory estoppel applies and whether an extension can be granted under section 19.4(1)(b) of the *FPA*.

[98] Neither party shall have costs on the appeal.

Simonsen JA

I agree: _____ Kroft JA

I agree: _____ Turner JA

APPENDIX

The Family Property Act, CCSM c F25, ss 19.1(3)(b), 19.1(4)(b):

Limitation period after termination of common-law relationship

19.1(3) Subject to subsection (4), no application for an accounting and equalization of assets under this Act may be made

(b) where the common-law partners did not register their common-law relationship under section 13.1 of *The Vital Statistics Act*, after three years from the date on which the common-law partners began to live separate and apart.

Extension of time for common-law partner

19.1(4) The court may extend a limitation period referred to in subsection (3) by such length of time as it considers appropriate if a person fails to make an application within the limitation period because of

(b) circumstances beyond the control of the person.

Prescription après la dissolution de l'union de fait

19.1(3) Sous réserve du paragraphe (4), la demande de reddition de comptes et de compensation des éléments d'actif prévue par la présente loi ne peut être présentée :

b) lorsque les conjoints de fait n'ont pas fait enregistrer leur union de fait sous le régime de l'article 13.1 de la *Loi sur les statistiques de l'état civil*, plus de trois ans après la date à laquelle ils ont commencé à vivre séparés l'un de l'autre.

Prorogation de délai accordée au conjoint de fait

19.1(4) Le tribunal peut proroger le délai de prescription prévu au paragraphe (3) et fixer la nouvelle échéance qu'il estime indiquée si une personne a omis de présenter une demande dans ce délai :

b) soit en raison de circonstances indépendantes de sa volonté.

The Pension Benefits Act, CCSM c P32, ss 31(3.2), 31(3.3), 31(3.4):

Application for court order

31(3.2) A common-law partner may apply to the Court of King's Bench for an order requiring a member's pension or a member's or former member's pension benefit credit to be divided under subsection (2), if

(a) the applicant and the member or former member are common-law partners referred to in clause (3)(b);

(b) they cohabited with each other for at least one year but less than three years while neither of them was married, and their relationship was never registered under section 13.1 of *The Vital Statistics Act*; and

(c) their last common habitual residence was in Manitoba.

Limitation period

31(3.3) The application under subsection (3.2) must be made

(a) within three years after the common-law partner and the member or former member last began to live separate and apart; or

(b) within six months after the grant of letters probate of the member's or

Ordonnance de la Cour du Banc du Roi

31(3.2) Un conjoint de fait peut présenter une requête à la Cour du Banc du Roi afin qu'elle rende une ordonnance imposant, en application du paragraphe (2), le partage de la pension d'un participant ou de son crédit de prestations de pension ou de celui d'un ancien participant dans le cas suivant :

a) le requérant et le participant ou l'ancien participant sont des conjoints de fait visés à l'alinéa (3)b);

b) ils ont vécu ensemble pendant au moins un an mais moins de trois, aucun d'entre eux n'était marié pendant ce temps et leur union n'a jamais été enregistrée en vertu de l'article 13.1 de la *Loi sur les statistiques de l'état civil*;

c) leur dernière résidence habituelle commune se trouvait au Manitoba.

Prescription

31(3.3) La requête visée au paragraphe (3.2) est présentée à la plus rapprochée des dates suivantes :

a) dans les trois ans suivant la date à laquelle le conjoint de fait et le participant ou l'ancien participant se sont séparés pour la dernière fois;

former member's will or of letters of administration;

whichever occurs first.

b) dans les six mois suivant la date à laquelle sont octroyées les lettres d'homologation du testament du participant ou de l'ancien participant ou les lettres d'administration.

Court may order division

31(3.4) Upon being satisfied that the application meets the requirements of subsections (3.2) and (3.3), the court may order the member's pension or the member's or former member's pension benefit credit, as the case may be, to be divided under subsection (2).

Ordonnance de partage

31(3.4) Une fois qu'elle est convaincue que la requête est conforme aux exigences des paragraphes (3.2) et (3.3), la Cour peut ordonner le partage de la pension du participant ou de son crédit de prestations de pension ou de celui de l'ancien participant, selon le cas, sous le régime du paragraphe (2).