

KING'S BENCH FOR SASKATCHEWAN

Citation: 2024 SKKB 74

Date: 2024 04 25
Docket: QBG-SA-00367-2015
Judicial Centre: Saskatoon

BETWEEN:

LYLE THEODORE ODELEIN

Plaintiff

- and -

ODELEIN FARMS LTD.

Defendant

Counsel:

Robert G. Kennedy, K.C.
Douglas C. Hodson, K.C., and Paul D. Olfert

for the plaintiff
for the defendant

JUDGMENT
April 25, 2024

CURRIE J.

[1] The plaintiff, Lyle Odelein, applies for summary judgment against the defendant, Odelein Farms Ltd. For the reasons set out below, I am dismissing the application and I am granting judgment dismissing the claim.

A. Introduction

[2] This action involves Odelein Farms Ltd. (“Farms”) and its shareholders.

Those shareholders, all with the surname “Odelein”, are Lyle, Eric, Hilda, Selmar and Sandy. Because of the common surname I will refer to the shareholders by their first names.

[3] I described the history of the proceedings in this action in *Odelein v Odelein Farms Ltd.*, 2023 SKKB 86 at paras 3-11:

[3] In this action Lyle Odelein ("Lyle") sues Odelein Farms Ltd. ("Farms") in relation to the farm business that is operated by Farms. This action had been dealt with earlier by a judge of this court, on Lyle's summary judgment application. That judge's decision was appealed by Lyle, and it was dealt with by the Court of Appeal at 2022 SKCA 28. At the outset of the Court of Appeal's decision Justice Ottenbreit summarized the circumstances at paras. 4-11:

[4] Eric and Hilda Odelein operated a family farm near Quill Lake, Saskatchewan. They had three sons: Lyle, Lee and Selmar. All three sons played hockey. As their respective hockey careers began to take off in their teenage years, Lyle and Selmar discussed that, if either of them succeeded as a professional hockey player, they would re-invest their earnings in the farm so that they could farm together at the end of their hockey careers. Lyle eventually established a full-time career in the National Hockey League [NHL]. Selmar did not.

[5] In 2001, while Lyle was still playing hockey in the NHL, the Odeleins incorporated their farming operation and created Farms. The land and equipment previously owned by the members of the family, some of it jointly, was rolled over into Farms in exchange for shares in the corporation. This included land that was owned by Lyle. The transaction was well-documented with a Rollover Agreement and a Sale of Assets Agreement executed for each member of the family who contributed assets to Farms. The Odeleins had the benefit of tax and legal advice for the incorporation and rollover transactions.

[6] The value of the rolled over assets was reflected on Farms' financial records as shareholder loans owing to the initial shareholders, all of whom were members of the Odelein family. For the purposes of this appeal, the relevant shareholder loan owing to Lyle at the time of incorporation was \$819,566.

[7] After the incorporation of Farms, Lyle continued to play professional hockey and he used some of his hockey earnings to purchase, lease or put a down payment on various pieces of farm equipment on behalf of or for Farms. The amount he contributed to Farms pursuant to these transactions totalled \$1,627,975.

[8] After Lyle retired from hockey in 2006, he continued to work on the family farm during the summer months until 2012. When he became engaged to be married to his second wife in the fall of 2011 and it became clear that he would be giving up farming with his brothers, he

requested payment of his shareholder loan account in Farms and attempted to discuss the terms of payment to him over time with his family. Selmar and the rest of the Odelein family members, all shareholders in Farms, disputed his entitlement to repayment. Lyle was told that none of the family members expected to be paid out the balance of their shareholder loans because all of their contributions were intended for the benefit of the family farm. Moreover, the family members reminded Lyle that he had repeatedly told them over the years that he wanted nothing out of the farm.

[9] With regard to Lyle's purchase/lease of farm equipment, Farms alleged that it only allowed Lyle to purchase and lease machinery because he had assured the family that it was a gift to Farms and to "set up the farm" for the benefit of the family. However, Lyle's payments for equipment and leases on behalf of Farms were entered on the books by its accountants as shareholder loans or debts owing by Farms to Lyle. The other shareholders of Farms allege that they were unaware of how the accountants had entered those transactions.

[10] It is uncontroverted that the shareholder loans for Lyle and other family members remained on Farms' books year after year and were reported as such for accounting and tax purposes. The balances thereof fluctuated based on debits and credits to the various shareholder accounts as contributions to and payment from Farms occurred. Over the years, Farms repaid in excess of \$400,000 of Lyle's shareholder loan. By 2016, Farms had also repaid almost all of the shareholder loans owed to the other shareholders.

[11] Lyle claims that Farms owes him \$2,182,322 for the contributions he made to Farms on incorporation and thereafter between 2001 and 2006. When Farms refused to pay to Lyle the amount outstanding in his shareholder loan account, he commenced an action against Farms to recover the money.

[4] The Court of Appeal allowed the appeal and remitted the action back to this court, for the summary judgment application to be determined anew. The application came before me, and the evidence that is before me provides the same information as was related by Justice Ottenbreit in the above excerpt.

[5] In refusing to pay, Farms denies that the shareholder loans shown in the financial statements are truly debts. Its first defence is that the assets and money that Lyle provided to Farms over the years are properly characterized in law as gifts. Farms says that Lyle told Farms that he did not want anything out of the farm, and that he did not expect to be repaid.

[6] In the alternative, Farms says that Lyle's statements that he did not expect to be repaid any such amounts, combined with Farms' reliance on such statements to its detriment, establish the defence of promissory estoppel.

[7] In the further alternative, Farms says that Lyle waived any right to recover his shareholder loan.

[8] In the additional further alternative, Farms says that if a debt exists it is not a demand loan but is to be repaid at a time and on terms agreed to by the shareholders.

[9] Finally, in the alternative, Farms says that if a debt exists, and if it is a demand loan, then Lyle's claim is barred by the effluxion of time under the provisions of *The Limitations Act*, SS 2004, c L-16.1.

[10] Therefore, these issues stand to be determined in this action and thus on Lyle's summary judgment application:

- (a) Was Lyle's contribution of assets and money a gift, or is the shareholder loan a debt that is owed by Farms to Lyle?
- (b) If there is a debt, did Lyle assure Farms that he did not expect to be repaid any such amounts, and did Farms rely on such assurances to its detriment, so that promissory estoppel prevents Lyle from obtaining repayment of the shareholder loan?
- (c) If there is a debt, did Lyle waive any right to obtain repayment?
- (d) If there is a debt, is it to be repaid at a time and on terms agreed to by the parties, or is it a demand loan?
- (e) If there is a debt, and if it is a demand loan, is Lyle's claim barred by the effluxion of time under the provisions of *The Limitations Act*?

[11] Following the Court of Appeal's return of the matter to this court, Lyle's summary judgment application was argued before me. I then issued an unreported decision in which I directed that the application will continue in a hearing for the presentation of the oral evidence of the shareholders of Farms. Those shareholders (all with the surname Odelein) are Lyle, Eric, Hilda, Selmar and Sandra. The hearing is scheduled.

[4] The hearing that is referred to at para. 11 of that decision has been conducted, and the parties have submitted final arguments on the summary judgment application.

B. Issues

[5] As set out in the above excerpt, the issues for determination on this application are:

1. Was Lyle's contribution of assets and money a gift, or is the

shareholder loan a debt that is owed by Farms to Lyle?

2. If there is a debt, did Lyle assure Farms that he did not expect to be repaid any such amounts, and did Farms rely on such assurances to its detriment, so that promissory estoppel prevents Lyle from obtaining repayment of the shareholder loan?
3. If there is a debt, did Lyle waive any right to obtain repayment?
4. If there is a debt, is it to be repaid at a time and on terms agreed to by the parties, or is it a demand loan?
5. If there is a debt, and if it is a demand loan, is Lyle's claim barred by the effluxion of time under the provisions of *The Limitations Act*, SS 2004, c L-16.1?

[6] In my unreported decision (*Odelein v Odelein Farms Ltd.* (27 December 2022) Saskatoon, QBG-SA-00367-2015 (Sask KB)) I said:

[27] The overriding factual question on this application (and in this action) is “What are the circumstances in which Lyle provided land, equipment and money to Farms?” ...

...

[32] There are more detailed questions wrapped up in “What are the circumstances in which Lyle provided land, equipment and money to Farms?”, such as: What did each shareholder understand to be the arrangement (ownership, use) regarding land, equipment and money that was being contributed to Farms? What did each shareholder understand to be the nature and use of the shareholder loan accounts? What was each shareholder's understanding as to how money would be paid out of Farms to shareholders? What discussions led to those understandings?

...

[40] The facts here (falling under the umbrella question “What are the circumstances in which Lyle provided land, equipment and money to Farms?”) are key to determining the issues. A significant factor in determining the facts is the determination of the credibility and

reliability of the shareholders. ...

[41] I am not confident that the evidence that is before me (extensive though it is) permits me to make the credibility and reliability determinations that are necessary to fairly resolve the issues. I must have the benefit of hearing and observing the shareholders as they explain what they did and said and understood, and why.

[7] Accordingly, I begin with a review of the testimony of the witnesses, followed by my determination of the facts. Thereafter I will address the issues.

C. Testimony of the witnesses

1. Lyle Odelein

[8] In his affidavits Lyle has set out a history of the relevant events and discussions, in considerable detail. In cross-examination on his affidavits, however, it became clear that, while he recalls the overall circumstances in the broadest of terms, he does not have a reliable recollection of events or discussions.

[9] Similarly, in his oral testimony before me Lyle provided broad and general characterizations of what occurred at the relevant times, but it was evident that he does not have a reliable recollection of the relevant events or discussions.

(a) Lyle's recollection of overall circumstances

[10] As to the overall circumstances, Lyle recalls that prior to the incorporation of Farms the various family members owned different parcels of farmland, some of the ownership being shared among family members. Likewise, the various family members owned different items of equipment. The family members farmed together in a single operation, pooling their land and equipment, and sharing in the profits each year.

[11] Lyle recalls that the family members had discussed setting up the farm as a multi-generation family farm, to operate as it had been operating, on a permanent

basis. He recalls, as well, that the 2001 incorporation of Farms served not only the aim of addressing his income tax situation, but also this goal of establishing a multi-generation family farm. He recalls that everything was being rolled into a company. For Lyle, an element of the concept of a multi-generation family farm was his intention to return to farming once he had completed his hockey career.

(b) Lyle's recollection of conversations and events

[12] Lyle does not reliably recall, however, specifics of conversations or of various events. His lack of reliable recollection is demonstrated in the following examples.

[13] The following exchange took place in Lyle's cross-examination on his first affidavit (cross-examination transcript pages 13-14):

Q And who is Ralph Lichtman?

A Lichtman.

Q Oh, sorry, Lichtman, and I think it's L-I-C-H-T-M-A-N, and who is he?

A He was the guy that put this thing together.

Q Put what thing together?

A My company and –

Q Odelein Farms?

A Yeah.

...

Q So did you hire Ralph Lichtman?

A Honestly, I don't remember.

Q All right, but he would have been somebody you brought to the table, not your other family members; is that right?

A I don't remember.

[14] The following exchange took place in Lyle's cross-examination on his

first affidavit (cross-examination transcript page 20):

Q Okay. Let's just talk about the incorporation in 2001, and that's when Odelein Farms was created, and you talk about it in your affidavit. Do you have any recollection of those discussion? Do you actually recall anything being discussed with any of your family members at that time?

A Oh, god, it's been 20 years. No.

Q So you don't remember anything you would have discussed with Eric, your dad; Hilda, your mom; or Selmar, your brother?

A No.

[15] In his reply affidavit Lyle recounted events that took place in 2007 in the context of his divorce proceedings, which were taking place in Texas. In the affidavit Lyle detailed his need at that time for information as to his assets, leading to his obtaining letters and an affidavit from Kelly Lutz, in which Mr. Lutz identified Lyle's interest in Farms. Mr. Lutz was an accountant with the Virtus Group. He had been instrumental in the 2001 incorporation and in the creation of the documents relating to the incorporation – and he had been Farms' accountant after the incorporation.

[16] Lyle, in that reply affidavit, referred to the letters from Mr. Lutz (which he had appended to his first affidavit) and he attached to that reply affidavit a copy of Mr. Lutz's affidavit, to which was attached a copy of excerpts from Mr. Lutz's file regarding Farms. In his affidavit Lyle related that Mr. Lutz's affidavit had been filed with the court in Texas, and he explained that these circumstances demonstrated that the resolution of his Texas divorce proceedings took into account the information that had been provided by Mr. Lutz, who had been authorized by Farms to provide the information.

[17] In testifying before me at the hearing, however, Lyle's attention was drawn to those Texas divorce proceedings, and he was shown Mr. Lutz's affidavit. The following exchange took place in cross-examination (hearing transcript pages

T36-T37):

Q Okay. When did you and your first wife Andrea start having marital problems?

A (UNREPORTABLE SOUND). Right towards the end of my -- probably towards the end of my career.

Q Okay. And did she petition for divorce, or did you?

A She did.

Q And when did she do that?

A She filed in '03 during a lockout year, and when I got another contract, she waited till I retired.

Q Okay.

A Yeah.

Q And -- and so things -- things got a little bit more intense in terms of the proceedings in Texas?

A Correct.

Q After 2006.

A Right.

Q And -- and you'll see in your reply affidavit at Tab 9 is an affidavit -- a business records affidavit of Kelly Lutz.

A Yes.

Q Do you recall how that came about?

A No, I can't remember.

Q Do you recall asking him to do it?

A I can't remember. I don't remember.

[18] As to Lyle's recollection of events surrounding the incorporation of Farms, the following exchange took place during cross-examination in Lyle's testimony at the hearing (hearing transcript pages T48-T49):

Q Okay. What do you -- what do you remember?

A Just that all getting together and -- and putting the company together and forming a -- a company.

- Q Okay. What do you remember?
- A Just that everything was going to get rolled into one.
- Q Okay. But when I talk about what you remember, do you remember having a discussion with anybody? Do you recall what was discussed with anybody?
- A Yeah. Everybody would have talked about it.
- Q Okay. What do you recall everybody talking about?
- A It was best for -- for everybody if everybody rolled it in.
- Q Okay. Anything else that you recall when the 2001 incorporation was discussed? Let's start off with your family members. Your dad, your mom, Selmar, Sandy, Lee? I'm going to suggest --
- A No.
- Q -- you have no recollection of any discussions with them?
- A No.
- Q Agreed?
- A Agree.
- Q And do you have any recollection of any discussions with any of your advisors?
- A No.

[19] In cross-examination at the hearing Lyle was shown documents that had been generated and signed at the time of the 2001 incorporation, documents such as Farms' incorporation documents and the rollover agreements. In his first affidavit Lyle had attached such documents and described them in detail, explaining what they were all about. In the cross-examination before me, the following exchange took place (hearing transcript pages T49-T50):

- Q And then it goes on, I'm not going to ask you to read it, but all the way to paragraph 41, you attach all of the rollover agreements and the incorporation documents. Correct?
- A Yes.
- Q And -- and I'm going to suggest to you, Mr. Odelein, that you actually don't recall entering into any of these agreements. Do you?

- A Can you repeat the question, please.
- Q Yes. You do not recall entering into any of these agreements, do you?
- A No.
- Q And, in fact, you did not know then nor do you know now what is in any of these agreements or documents. Agreed?
- A Agreed.
- Q And that when you put your affidavit together, someone wrote out the words of paragraph 32 to 41 explaining what -- whoever wrote it what they thought those agreements meant and said, and you simply signed the affidavit. Agreed?
- A Yes.
- Q And so when you try to explain in your affidavit about what the farms was established for and the rollover agreements say, you personally don't know that at all, do you?
- A No.

[20] In his first affidavit, Lyle detailed that in 2000 he had instructed his broker to liquidate over \$800,000, which Lyle then provided to Eric. In the hearing before me, though, in cross-examination of Lyle the following exchange took place (hearing transcript page T54):

- Q And then paragraph 23 of your affidavit says: (as read)
- Based on that, I gave my dad – I transferred him \$844,890.49.
- That's what your affidavit says, and I tell you, that didn't happen, did it?
- A I can't remember when this – (INDISCERNIBLE).
- Q Well, your dad swore an affidavit saying he never got that amount ever.
- A Then where'd it go?
- Q So do – do you recall any of this back from December of [2000]?
- A I know there was a big cheque wrote, but I don't know what it was for.
- Q Okay. But – but you're not – you're not telling us today that you

gave your dad 844,000 in December [2000]?

A I can't remember. I don't...

Q Okay. And -- and, again, just to be clear, this would be a few months before Odelein Farms Ltd. was incorporated. Agreed?

A Agree.

(c) Conclusion as to Lyle's credibility and reliability

[21] Lyle does not actually recall any detail of his discussions with the other shareholders at the relevant times. The version of those discussions that he has presented in his evidence is based on his attempts to reconstruct what was said. That version, therefore, does not arise from Lyle's memory, and it has been affected by what he knows now and by what has been reconstructed by others.

[22] The effect of this circumstance is that the version of events that has been presented by Lyle is not reliable. I do not conclude that Lyle has been deceptive in presenting that version. Rather, I conclude that he simply does not remember, and that in that context someone on his behalf has tried to help him reconstruct what happened.

[23] In the end, in light of the inconsistencies in Lyle's recitation of what occurred, and because of his stated inability to recall the discussions that are relevant to this action, I do not find Lyle's evidence to be reliable. Except when it comes to the broadest of concepts – such as his general approach that the shareholders intended to set up the farm as a multi-generation family farm – I do not accept Lyle's recollection or characterization of the discussions and events that occurred at the relevant times.

2. Selmar Odelein

[24] Selmar testified in a straightforward and honest manner. He did not evade questions or resist addressing subjects that might be embarrassing for him. In all respects I conclude that he was testifying truthfully.

[25] I have concluded also that Selmar knew what he was talking about in his evidence. When he was asked a question in an area with which he was unfamiliar, he said so (*e.g.*, the area of bookkeeping and preparation of financial records and statements for Farms). Thus I conclude that Selmar's testimony was accurate and reliable. Consequently, I conclude that discussions and events occurred as he related them.

[26] I observe that some of Selmar's affidavit evidence purports to describe what were the understandings and intentions of other shareholders, including Lyle. While Selmar can describe what another person said and did, including what that other person indicated that he or she understood or meant, Selmar cannot state as a fact what that other person understood or meant. It is up to me to determine what were the understandings and intentions of the people involved. This observation applies, as well, to the evidence of Sandy, Eric and Hilda.

[27] Having said that, I further observe that each of Sandy, Eric and Hilda has expressly adopted as her or his own recollection several statements in Selmar's first affidavit that were phrased in terms of "we understood this" and "we meant that". In such instances, the evidence of Selmar as to what "we" understood or meant *is* evidence of what Selmar, Sandy, Eric and Hilda understood or meant.

3. Sandy Odelein

[28] I found Sandy to be an honest and reliable witness. All indications were that she was answering questions as correctly and accurately as she could. I conclude also that she knew what she was talking about and that her evidence is reliable.

[29] Therefore, I conclude that discussions and events occurred as Sandy related them.

4. Hilda Odelein

[30] In her 2019 affidavit and in being cross-examined on the affidavit in 2020, Hilda stated that she recalled events as Selmar described them in his first affidavit, without herself providing detail.

[31] In testifying before me in 2023 Hilda was unable to recall details and was unable to recall even some of the larger steps that had been taken. Many of her answers were in the category of “I think I remember that” and “I recall that vaguely”.

[32] At the hearing before me Hilda had no reliable recollection of the discussions or events. I have before me her affidavit and cross-examination on her affidavit, but her lack of recollection at the hearing left me unable to assess her credibility and reliability, which was the purpose of the hearing. In this circumstance, I observe that Hilda earlier had expressed a recollection of discussions and events as described by Selmar, but I do not place significant reliance on that recollection. Hilda’s evidence is not determinative of my decision.

5. Eric Odelein

[33] Similarly, in his 2019 affidavit and in being cross-examined on the affidavit in 2020, Eric stated that he recalled events as Selmar described them in his first affidavit, without himself providing detail.

[34] In testifying before me in 2023 Eric had only the broadest of recollections of the subject of this action. He did not relate detail of discussions or events. Eric’s lack of recollection at the hearing left me unable to assess his credibility and reliability. As is the case with Hilda, while he earlier had expressed a recollection of discussions and events as described by Selmar, I do not place significant reliance on that recollection. Eric’s evidence is not determinative of my decision.

D. Adverse inference

[35] In the briefs of law that Lyle filed on the initial summary judgment application before me, Lyle asked me to draw an adverse inference against Farms for Farms' failure to introduce any affidavit evidence from Kelly Lutz. Lyle argued that Mr. Lutz's evidence, as to what he was told that the parties intended to achieve in creating Farms, would be relevant to the issues of gift, promissory estoppel and waiver.

[36] It was after hearing that initial summary judgment application that I delivered my unreported decision, in which I directed that the five shareholders testify before me. As I have related, thereafter Lyle applied for an order directing that Mr. Lutz also would testify. In my reported decision referred to above (*Odelein v Odelein Farms Ltd.*, 2023 SKKB 86) I explained why I would not make that order.

[37] In that decision I explained also that I had determined, in my unreported decision, that Mr. Lutz's further evidence is not essential to my determination of any issue. If I had believed that his further evidence was necessary to my determination of an issue on the summary judgment application, I would have directed that he too testify before me.

[38] Mr. Lutz as a potential witness is not in the category that was contemplated by the court in *Murray v Saskatoon (City)* (1951), [1952] 2 DLR 499 (Sask CA). I do not draw an adverse inference with reference to Mr. Lutz.

E. Determination of the facts

[39] Having made these determinations of credibility and reliability, I find that the facts of this matter are as follows.

1. Circumstances surrounding the incorporation of Farms

[40] Prior to the incorporation of Farms, several quarter sections of land were

held by the family members, some of the land holdings being joint holdings. Farming of those quarter sections was conducted as a single operation, the family members pooling their assets for the purpose. As Selmar described the situation in his first affidavit:

19. As noted above, prior to the incorporation of Odelein Farms in 2001, the Odeleins managed a family farming operation, with different assets held in different names without any overarching strategy other than to protect the farm from potential family property issues. No one had any expectation that they would be entitled to draw value from the farming operation without working for it. ...

[41] Prior to incorporation the family members repeatedly discussed establishing a multi-generation family farm, so that the farm could be a source of employment and income for family members through future generations. Sandy described the context of such discussions in cross-examination before me (hearing transcript pages T167-T168):

Q Okay. And in pre-incorporation, who is the we that was discussing it?

A This was a very close, trusting, loving family. They are very informal. When you talk, you -- you make it sound like we were supposed to -- we had directors' meetings in a boardroom because we're some big corporation. It was a family farm, operated and ran by people who truly, truly loved, respected, and trusted each other. So when one of them said something, the others took it at face value that that's what they meant. ... Were there discussions about a dream farm? Yes. ... There were so many conversations about what life would be like after hockey, after everybody was at home on the farm. Everybody was going to have a house in the same yard. Lyle was coming back to farm. There was no worry about -- about who was going to benefit more or less or whatever because he was building this for his future. He was coming back to farm. So you sit and you have conversations about -- and we had many, many conversations. We spent hours, days, months, years together until this happened. ...

[42] The impetus to make the multi-generation family farm a reality was Lyle's tax situation. His financial advisers proposed that, for Lyle's tax-planning

reasons, a corporation should be set up. The proposal dovetailed with the multi-generation family farm concept, and the family members decided to proceed.

[43] That multi-generation family farm concept, as I have said, was to establish a corporation that would provide a farming operation for future generations. The foundation of that farming operation was to be the formal pooling of assets. That is, in establishing the multi-generation family farm the family members continued the arrangement by which they had been conducting a single farming operation, using the pooled land and equipment. A new element was that, in the formal arrangement being put in place, they were committing to leaving those assets in the corporation permanently, for the benefit of their own participation and for the benefit of future generations of the family.

[44] This arrangement fit with Lyle's plans. As long as he was playing professional hockey, he had no need for any payment from the farming operation. He intended to return to the farm after hockey, however. In keeping with the family farm goal that he shared with the other family members, contributing his assets on incorporation helped to set up the farm – not only for future generations but also for himself on his return to farming after retiring from hockey.

[45] So it was that on the incorporation of Farms each family member – each of whom became a shareholder – contributed his or her assets to Farms with no intention of ever taking them back out or being paid the value. Instead, the shareholders were setting up the farm on a permanent basis. This was what they had discussed, and this is what they told one another that they were going to do.

[46] The detail of the incorporation of Farms was planned and documented by the accountants, with input from legal counsel as needed. Primary among those accountants was Kelly Lutz of the Virtus Group. As referred to at para. 3 above (quoting para. 6 of Justice Ottenbreit's summary), the opening amounts of the shareholder loan

accounts arose from the accountants' valuation of each shareholder's contribution of assets to Farms on incorporation.

[47] The shareholders had no understanding of the intricacies of corporate law, or of tax law, or of how corporate financial statements were to be prepared. In the minds of the shareholders those subjects were in the realm of accountants, who used the rules of law, tax and accounting to document and report on the farming activities, hopefully in a manner that would reduce tax payable. In that vein, when Farms and the shareholders received accountants' reports and financial statements they understood that the accountants had done whatever was needed to keep the books in order, but the shareholders did not review such material in any detail – because such material was in the realm of the accountants, whereas the shareholders lived and worked in the farming realm.

[48] As to the information that the accountants used in preparing such material following incorporation, when Farms was incorporated the Virtus Group trained Sandy in using AgExpert software for bookkeeping. This training included Sandy learning how to enter various transactions. She provided the data that she had so recorded to those accountants for them to prepare financial statements and tax returns.

[49] Selmar provided an overview of the farming operation in the early years following incorporation, in his first affidavit:

25. Following incorporation of Odelein Farms, family members continued to be compensated based upon what we contributed each year to the farm. ...

...

28. In determining how we would be paid our compensation, we relied upon accounting and tax advice. In some cases, we were advised to take our salary by way of a debit to our shareholder loan account as this was tax free. To the extent there were debits to the original shareholder loan amounts for Sandy, Eric, Hilda and me, these

payments would have been in lieu of salary and paid to us for work we performed for the farm, and not as repayment of any loan.

29. We had many lean years where the farm lost significant money and we were on the brink of going under. In particular, in the first 5 years (2001-2006) of operations, Odelein Farms lost close to \$2 million. Sandy and I did not draw any salary or dividends from Odelein farms from 2001-2006 (nor did Eric and Hilda). In 2005, we built a new residence for our family on lands owned by Eric and Hilda. Rather than have Odelein Farms pay us salary for 2001-2006 (which would be taxable), we were advised by our accountants to have Odelein Farms pay for the construction costs of the house (by taking out a mortgage) and debit the payment to our shareholder loan account. For the fiscal year ending on July 31, 2005, our shareholder loan account was debited with net draws in the amount of \$467,369.00. This money was used to construct the farm residence on Eric and Hilda's property. Lyle was well aware of this arrangement and fully agreed to Odelein Farms paying for the construction costs of the farm residence. In fact, Lyle signed documents for Odelein Farms in relation to this transaction.

[50] Thus, through the accountants, the shareholders avoided paying income tax on money they had received from Farms, by characterizing those payments as repayment of their shareholder loans. In effect, they declined employment income and instead received debt repayment.

[51] At the time of incorporation none of the shareholders considered the shareholder loan accounts to represent loans in the sense of representing debts that would have to be repaid. While the initial amounts of those accounts were established by the accountants' valuation of each shareholder's contribution to Farms on incorporation, no shareholder expected to get "their" land or equipment (or an equivalent cash value) back. Rather, each shareholder understood and intended that the land and equipment that were contributed to Farms on incorporation would remain in Farms permanently, as the foundation for the multi-generation family farm.

[52] This disconnect between the shareholder loan accounts and the shareholders' understanding is explained by the fact, which I infer from the evidence, that the shareholders did not make a connection between the shareholder loan accounts

and the plan that the contributed assets would remain with Farms without return or repayment. It was for this reason that the accountants' explanation, that the shareholder loan accounts were being set up to reflect the initial asset contributions, did not raise any red flags with the shareholders.

[53] In their evidence Selmar and Sandy at times have referred to their understanding, at the time of incorporation, that the shareholder loan accounts were "just accounting entries". I infer that each shareholder who paid attention to the existence of the shareholder loan accounts understood that the accounts indeed were accounting entries that reflected the contributions of land and equipment, entries that were necessary in the corporate and accounting realm. I infer also, though, that this understanding did not include an understanding of what it *meant* to reflect those contributions in the financial statements. Again, the shareholders were focused on the farm and its operations, to the exclusion of the realm of the accountants. None of the shareholders understood that the shareholder loan accounts represented debts that had to be repaid.

[54] This intention and understanding, as I have said, arose from the family discussions in which the family members developed the concept of setting up a multi-generation family farm. In her evidence, Sandy referred to another factor as well. She referred to a discussion that she had had with Mr. Lutz at the time of incorporation. She described Mr. Lutz telling her that the shareholder loan accounts were just part of establishing a clear starting point for Farms on its incorporation, and she described her understanding at the time that he was saying that the accounts "meant nothing".

[55] Sandy's reference to this discussion with Mr. Lutz first arose during her testimony before me. That being the case, Lyle suggests that she fabricated that discussion at the hearing, since she had not referred to it in any earlier evidence. I conclude that she did not fabricate the discussion. I accept that Sandy did not refer to

that discussion earlier in the proceedings for the reason that it was a detail that had not been elicited from her.

[56] I also conclude, though, that it is unlikely that Mr. Lutz told anyone that the shareholder loan accounts meant nothing. His having said that would be inconsistent with the accountants' later suggestion of characterizing payments to shareholders as payment from the shareholder loan accounts. I conclude, rather, that Mr. Lutz explained that the shareholder loan accounts had been set up to reflect the contributions of assets to Farms, to establish a clear starting point for the corporate finances. I find it likely that Sandy, already of the understanding (from family discussions) that the assets contributed on incorporation would remain with Farms, misunderstood Mr. Lutz to be saying that the accounts were nothing more than that.

[57] I infer that the shareholders did not tell the accountants that the assets that were contributed on incorporation were never to be returned or paid back. I draw this inference from the shareholders' focus on establishing the multi-generation family farm and on the operation of that farm, from the shareholders' unfamiliarity with the realm of accounting and therefore of what would be relevant for the accountants to know, and from the manner in which the accountants prepared the documentation.

[58] Thus it is likely that when the accountants initiated the idea that, instead of shareholders receiving income from Farms, payments to shareholders should be characterized as repayment from their shareholder loan accounts, the accountants were of the understanding that it truly was a matter of debt being repaid – which is what the income tax filings represented to Canada Revenue Agency.

[59] To sum up the circumstances surrounding the incorporation of Farms, I find as fact that, in the context of the incorporation of Farms, each of the five shareholders understood and intended – and communicated that understanding and intention to the other four – that:

- (a) The shareholder was contributing his or her assets to Farms to establish a multi-generation family farm.
- (b) The assets that the shareholder had contributed to Farms would remain with Farms permanently, as the foundation of the multi-generation family farm.
- (c) Specifically, that shareholder could not require a return of the assets that he or she had transferred to Farms in connection with the incorporation.

[60] I find further as fact that, in the context of the incorporation of Farms:

- (a) There was no discussion or understanding or intention among the shareholders about what would be done with the shareholder loan accounts after incorporation. The shareholder loan accounts were beyond the focus of attention of the shareholders. Those accounts were something that was left in the realm of the accountants.
- (b) No shareholder turned his or her mind to how the payment to shareholders, in exchange for contributing to the farm operation, would be dealt with for the purposes of financial statements or income tax filings in future. That determination was something that was left in the realm of the accountants.
- (c) No shareholder believed or intended that a shareholder loan account would have to be paid out to a shareholder as a matter of debt repayment (since such a payment would amount to indirectly returning the assets that had been contributed).

2. Circumstances following the incorporation of Farms

[61] Following the incorporation of Farms, while Lyle continued his professional hockey career he purchased, leased or put a down payment on farm equipment for Farms from time to time. The accountants, in preparing Farms' financial statements and related tax filings, received the details of those transactions from Sandy, and since the equipment was identified as being for Farms the accountants characterized the transactions as leases and purchases by Farms. For that reason they allotted the money that Lyle had paid with respect to those transactions as a credit to his shareholder loan account.

[62] Selmar described the circumstances of those contributions in his first affidavit:

30. In this same time period (2001-2006) Lyle's shareholder loan account increased from \$819,666.00 (at the time of incorporation) to \$2,397,059 as of July 31, 2006. This increase of \$1,577,393 is comprised primarily or entirely of lease payments on equipment acquired by Lyle and, to a lesser extent, equipment purchases made by Lyle for Odelein Farms.

...

33. None of this equipment was equipment that Odelein Farms could afford in light of the corporation's precarious financial situation. ... The only reason we allowed Lyle to make these leases or purchases at the time were his assurances that he was making them on his own account as gifts to the farm, and was "setting up the farm" for all of our benefit. ...

[63] As courts have recognized, affidavit evidence almost inevitably is a combination of the affiant's provision of the facts and the drafting lawyer's crafting of the actual sentences. Clarification often can be obtained through oral testimony. So it was here in relation to Selmar's reference, at para. 33 of his first affidavit, to Lyle arranging the leases and purchases "as gifts". In the course of being cross-examined on that affidavit Selmar provided the following answers (cross-examination transcript

page 77):

Q So every time that Lyle purchased something for the company or anytime that he injected money into the company, he would tell you, don't worry about this; it never has to be paid back?

A That's right.

Q That this is a gift to my family?

A Never even said gift. Don't worry about it. Don't have to pay for it.

[64] The context of Lyle and Selmar having such discussions was that, on those occasions where Lyle advised that he had leased or purchased a piece of equipment for the farm, he was met with objections from Eric and Selmar. Eric and Selmar objected that Farms neither needed more equipment nor could afford to pay for more equipment. Lyle's assurance, in each case, was along the lines of "Don't worry about paying" and "I don't want anything from the farm". In their affidavits and cross-examination answers, Eric, Hilda, Selmar and Sandra all have confirmed that Lyle repeatedly said words to that effect. Selmar has confirmed that Lyle provided this assurance on each occasion.

[65] As was the case with corporate law, tax law and preparation of corporate financial statements, none of the shareholders was familiar with the law pertaining to what constitutes a legal gift. They did understand that, in those early years after incorporation, Lyle was earning large amounts of money (over \$1 million USD in each of several years), and that in those same years Farms was doing poorly financially. The shareholders understood, as well, that they had established a multi-generation family farm, one to which everyone expected Lyle to return to work after he had finished his hockey career.

[66] In the context of the multi-generation family farm, of Lyle's plans to return to farming after hockey, of Farms' poor financial situation at the time, of Lyle's

strong financial situation at the time, and of Lyle's assurance on each occasion, each shareholder understood the circumstance of Lyle contributing these items of equipment (or at least the initial payments on them) to be a matter of Lyle giving the equipment (or the money) to Farms, without any expectation of repayment.

[67] I infer that no shareholder thought about there being any potential legal or accounting significance about Lyle having assured the others that they were not to worry about the money that he had spent on these transactions. I further infer that, consequently, no shareholder advised the accountants that the money that Lyle had spent on those transactions was not something to be paid back.

[68] When the accountants generated annual financial statements that started to show an increase in Lyle's shareholder loan account, the shareholders paid little or no attention to that increase. This was so because – as I have discussed – the shareholder loan accounts were of no significance to the shareholders, in that no shareholder perceived a connection between those accounts as stated in the financial statements and real life. The numbers that mattered to them were the expenses of operating the farm and the revenue that was generated by that operation.

F. Issue 1: Gift or debt

[69] The first issue is whether Lyle's contribution of assets and money to Farms was a gift, or whether the shareholder's loan is a debt that is owed by Farms to Lyle.

[70] There is no dispute as to what constitutes a gift. In *Dyck Estate v Olivier*, 2010 SKQB 384, 361 Sask R 301, Justice Popescul (as he then was) said at para. 31:

[31] An *inter vivos* gift is one that is intended to take effect during the life of the doner. In *Re Bayoff Estate*, 2000 SKQB 23, [2000] 3 W.W.R. 455, Krueger J. at para. 11 set forth the three elements of a perfectly constituted *inter vivos* gift as follows:

1. an intention to donate;
2. acceptance of the gift; and
3. a sufficient act of delivery.

[71] Justice Keene observed in *Weisbrod v Weisbrod*, 2013 SKQB 282, 426 Sask R 179, at para 21:

Some cases have held that in order to support an intention to create an *inter vivos* gift, the evidence needs to be inconsistent with any intention other than that the donor intended to divest himself of the property. See *Kibsey Estate v. Stutsky* (1990), 63 Man. R. (2d) 34, [1990] 2 W.W.R. 632 (Man. C.A.).

[72] Given the facts as I have determined them, I find that the question of a gift must be examined in two contexts: first in the context of Lyle's contributions to Farms on its incorporation, and then in the context of Lyle's contributions to Farms after incorporation.

3. Contributions on incorporation

[73] At the time of incorporation the shareholders knew that they were contributing real assets, with real value, to Farms. They knew also that the accountants were recognizing that fact with documentation that included the creation of the shareholder loan accounts. The shareholders knew that each shareholder loan account was being established in the amount that the accountants had determined equalled the value of assets contributed to Farms by that shareholder.

[74] Furthermore, each shareholder signed an agreement in which it was expressly set out that he or she was *selling* assets to Farms, and Farms was *paying* for the assets, by way of the shareholder loan account.

[75] Above I have set out my finding of fact that, on incorporation, each shareholder intended and understood that all shareholders were contributing assets to Farms on the basis that no shareholder could receive a return of the assets or payment

of their value. Such an intention and understanding indicates an intention to donate, which is the first requirement of a legal gift. The shareholders, however, cannot escape the effect of their having entered into valid, legally-binding written agreements by which they acknowledged that they were selling, not donating, the assets. Those agreements establish that, ultimately, the shareholders did not intend to donate the assets.

[76] Furthermore, while the assets were delivered to Farms there was no acceptance of a gift by Farms. To the contrary, the written agreements establish that Farms accepted a sale of the assets, not a gift of the assets.

[77] The answer to the first part of the first issue is the same with respect to Lyle as it is with respect to the other shareholders. The shareholders' contributions to Farms at the time of incorporation were not gifts. Those parts of the shareholder loan accounts that represent those initial contributions in fact represent debt owed by Farms to those shareholders.

[78] Flowing from that circumstance is the fact that Canada Revenue Agency was not misled when tax filings reported that money that had been received by shareholders from Farms was repayment of a debt. The debt referred to, as I have just said, truly existed.

[79] Lyle's contribution of assets to Farms on incorporation was not a gift. Rather, that part of his shareholder loan account that reflects his initial contribution is a debt that is owed by Farms to Lyle.

4. Contributions after incorporation

[80] The other part of Lyle's shareholder loan account represents the contributions that he made after incorporation, by way of paying money for the lease or purchase of equipment for Farms. I have found as a fact that each shareholder

understood the circumstance of Lyle making those contributions to be a matter of Lyle giving the money (or equipment) to Farms, without any expectation of repayment.

[81] The circumstances of Lyle arranging for the leases and purchases establish his intention to donate his contributions to Farms. Through the acceptance of that circumstance by all of the shareholders, Farms accepted that donation. The requirement of an act of delivery or transfer was completed by way of the contracts and equipment being placed in the name of Farms, and in the equipment being delivered to Farms.

[82] Thus the three requirements of a legal gift are established with respect to Lyle's contributions after incorporation.

[83] Lyle objects, though, that a legal gift cannot be found in these circumstances because his shareholder loan account is a "chose in action", and he cites law (*Weisbrod* at para 29) providing that a chose in action may be gifted only in writing. In fact, Lyle did not gift his shareholder loan account, or a part of it, to Farms. He gifted the money that he applied to the leases and purchases, and he gifted the equipment that he paid for. Neither is a chose in action.

[84] Lyle argues too that the documents demonstrate that, at the time of Lyle's 2007 divorce proceedings, Farms had taken the position that Lyle's shareholder loan account truly was worth the full amount of over \$2.3 million (that is, not an amount reduced by the value of the post-incorporation contributions). In so arguing, Lyle points to the letters (referred to above at para. 16) from Kelly Lutz to the Texas lawyers who were acting in the divorce proceedings. Those letters had been sent with the permission of Selmar and Sandy, who for several years by then had been directing the operations of Farms. Those letters, says Lyle, communicated Farms' position that Lyle's interest in Farms truly was worth \$2.3 million.

[85] In fact, the correspondence to which Lyle points includes a caution as to the questionable net worth of Farms at that time. Furthermore, in response to Lyle's argument Farms has filed the affidavit of Andrea Scott, who was the other party in those Texas divorce proceedings. In her uncontroverted affidavit she says at para. 7:

7. At the time of the Consent Decree, my solicitors were told by Lyle's solicitors that the farm was "underwater" (that is, that its debts exceeded its assets) and that Lyle's shareholder loan was worth nothing. To the best of my recollection, the Consent Decree was negotiated on that basis.

[86] Lyle's argument is not supported by the evidence.

[87] Lyle observes also that a gift, as discussed above, typically could have income tax consequences that would show up on the affected corporation's financial statements and tax returns. Here the financial statements and tax returns do not refer to a gift, but as I have discussed I infer that this is because the accountants were unaware that Lyle's contributions with respect to the equipment were not to be repaid. The accountants were unaware of that circumstance because no one told them of it. The absence of reference to a legal gift in the corporate documents does not indicate that there was no gift in this case.

[88] I have found the required intention, acceptance and delivery to establish a gift. The answer to the second part of the first issue is that Lyle's contribution of assets to Farms after incorporation was a gift.

5. Conclusion as to gift or debt

[89] Lyle's contribution of assets to Farms on incorporation was not a gift. Rather, the part of his shareholder loan account that reflects that initial contribution reflects a debt that is owed by Farms to Lyle.

[90] Lyle's contribution of assets to Farms after incorporation was a gift. The

part of his shareholder loan account that reflects those post-incorporation contributions does not reflect a debt that is owed by Farms to Lyle.

G. Issue 2: Promissory estoppel

[91] The second issue is, if there is a debt, whether Lyle assured Farms that he did not expect to be repaid any such amounts, and whether Farms relied on such assurances to its detriment, so that promissory estoppel prevents Lyle from obtaining repayment of the shareholder loan.

[92] The debt to which this issue applies is the debt that is represented by that part of Lyle's shareholder loan account that reflects his contribution of assets to Farms on incorporation.

[93] There is no dispute as to what constitutes promissory estoppel. Chief Justice Richards said in *Viterra Inc. v Grain Services Union*, 2013 SKCA 93, 368 DLR (4th) 19, at para 41:

[41] The basic features of the doctrine of promissory estoppel are solidly established. In *Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50, the Supreme Court said that the doctrine engages when there is both (a) a representation intended to affect legal rights and be acted upon, and (b) reliance on that representation. Sopinka J. explained the nature of the doctrine as follows at p. 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. In *John Burrows Ltd. v. Subsurface Surveys Ltd.*, [1968] S.C.R. 607, Ritchie J. stated, at p. 615:

It seems clear to me that this type of equitable defence cannot be invoked unless there is some evidence that one of the parties entered into a course of negotiation which had the effect of leading the other to suppose that the strict rights under the contract would not be enforced, and I think that this implies that there must be evidence from which it can be inferred that the first party intended that the legal relations created by the contract would be altered as a result of the negotiations.

This passage was cited with approval by McIntyre J. in *Engineered Homes Ltd. v. Mason*, [1983] 1 S.C.R. 641, at p. 647. McIntyre J. stated that the promise must be unambiguous but could be inferred from circumstances.

1. Representation

[94] As I have set out in my findings of fact, at the time of the incorporation of Farms each of the shareholders contributed his or her assets to Farms with no intention of ever taking them back out or being paid the value, thereby setting up the farm on a permanent basis. This was what they had discussed, and this is what they told one another that they were going to do.

[95] In the previous section of this decision I concluded that the shareholders could not escape the effect of the written agreements into which they entered in conjunction with the incorporation. For this reason I concluded that, in contributing the assets to Farms, the shareholders ultimately did not intend to donate the assets to Farms.

[96] That circumstance, however, did not change the shareholders' mutually expressed intention that Farms would receive and keep the assets permanently. The shareholders' understanding of the shareholder loan accounts was not so nuanced as to affect the shareholders' intention regarding the destiny of the assets that they contributed on incorporation.

[97] The discussions among the shareholders to which I have referred constituted a representation. All five of the shareholders made the same representation on the incorporation of Farms. In each case, that representation was that:

- (a) The shareholder was contributing his or her assets to Farms to establish a multi-generation family farm.
- (b) The assets that the shareholder had contributed to Farms would remain with Farms permanently, as the foundation of the

multi-generation family farm.

- (c) Specifically, that shareholder could not require a return of the assets that he or she had transferred to Farms in connection with the incorporation.

[98] While the shareholders were planning and deciding to proceed with incorporating a multi-generation family farm, they made this representation to each other. Once Farms was incorporated, each shareholder made the representation to Farms as well. Farms received those representations in the context of receiving the shareholders' assets for the operation of the multi-generation family farm – representations that were received by Farms by way of the shareholders, who controlled the actions and decisions of Farms.

[99] The foundation for that operation of a multi-generation family farm was the assemblage of land and equipment contributed by the five shareholders. Each shareholder represented to Farms that, in taking on the operation of the multi-generation family farm, Farms would have the use of those assets permanently, with no obligation to return them or their value.

[100] Each shareholder represented to Farms that he or she would not require return of the contributed assets (or their value), making such representation to induce Farms to undertake the operation of the multi-generation family farm.

2. Reliance

[101] Farms acted in reliance on that representation. Farms took on the operation of the multi-generation family farm. In so doing Farms relied on each shareholder's representation that he or she would not require a return of the contributed assets or their value. It was on the basis of this foundation for the farm's operation that Farms undertook the operation of the multi-generation family farm. Farms would not

have taken on that operation in the absence of the representations. That is clear from the plans and discussions among the shareholders (who, as I have said, controlled the actions and decisions of Farms).

[102] The importance of the representations, and therefore the significance of their being relied on by Farms, is demonstrated in these excerpts from Sandy's cross-examination in the hearing before me (hearing transcript pages T140 and T179):

A ... If I had been told somebody can sue you and pay for -- you know, you'd have to pay them all back, I would not have signed any of this. I -- I would have been fearful that somebody would have demanded their loan back, and it would have had to have been paid back. ... They never told me anybody could sue. They never told me anybody could come and bankrupt your life's work. I just -- I would have chosen a different path if that's what would have happened.

...

Q And -- and I'm suggesting to you, you can agree, disagree, or say I don't know, but I'm suggesting to you that the terms of this rollover agreement is a binding obligation upon Odelein Farms to credit Lyle's shareholders loan account inferentially meaning and pay him back the sum of 890 --

A No, not inferentially meaning.

Q Okay.

A Meaning that there was a dollar value assigned to the assets rolled in. That is it.

Q Okay.

A Not that it was a repayable loan, not that he could call it in and bankrupt us, not that he could change his mind. None of that.

[103] At the time of incorporation and the initial contribution of assets, Farms relied on each shareholder's representation, which effectively was that the foundation for Farms' operation of a multi-generation family farm would not be undermined by a shareholder requiring return of the initially contributed assets or their value.

[104] Farms continued to rely on the shareholders' representations in the years

following its incorporation. In broad terms, Farms reacted to certain circumstances in the context of knowing that the assets that were contributed on incorporation would not have to be returned, or their value paid out. Such circumstances, as described by Selmar in his first affidavit, include expanding the farm's land base and accepting the contracts for equipment that Lyle had arranged to lease or purchase. Had Farms been aware of a potential claim for payment out of a shareholder's shareholder loan account, Selmar explained, Farms would have taken a much more limited approach to expanding land and equipment holdings, since such expansion necessarily involved expanding financial liability.

[105] I have found the required representation by Lyle (and the other shareholders) to Farms, and I have found Farms' reliance on that representation. Each of the five shareholders is estopped from requiring payment out of the part of his or her shareholder loan account that reflects that shareholder's contribution of assets on incorporation.

[106] The answer on this issue is that Lyle is estopped from requiring Farms to pay out that part of his shareholder loan account that represents his contribution at the time of incorporation.

H. Issue 3: Waiver

[107] The third issue is whether, if there is a debt, Lyle waived any right to obtain repayment. Again, this issue applies to the debt that is represented by that part of Lyle's shareholder loan account that reflects his contribution of assets to Farms on incorporation.

[108] There is no dispute that waiver is established where the waiving party had full knowledge of his or her rights, and where the waiving party had an unequivocal and conscious intention to abandon those rights. As Justice Major wrote in

Saskatchewan River Bungalows Ltd. v Maritime Life Assurance Co., [1994] 2 SCR 490 at 499-500:

Waiver occurs where one party to a contract or to proceedings takes steps which amount to foregoing reliance on some known right ... of the other party

Waiver will be found only where the evidence demonstrates that the party waiving had (1) a full knowledge of rights; and (2) an unequivocal and conscious intention to abandon them. ...

[109] At the time of setting up the multi-generation family farm and so incorporating Farms, Lyle knew that he owned the assets that he was transferring to Farms, and he knew that – along with the other shareholders – effectively he was giving those assets to Farms permanently, as part of the foundation for the multi-generation family farm.

[110] In making the representation that I have discussed in the context of promissory estoppel, Lyle took steps amounting to foregoing reliance on his right to return of the assets, or to payment of their value. He expressed an unequivocal and conscious intention to abandon that right.

[111] The elements of waiver are established. Lyle waived his right to require a return of his contributed assets or payment of their value. That waiver applies to his demand for payment out of the part of his shareholder loan account that represents his initial contribution at the time of incorporation.

I. Issue 4: Repayment on terms or demand loan

[112] The fourth issue is whether, if there is a debt, the debt is to be repaid at a time and on terms agreed to by the parties, or whether it is a demand loan. This issue applies to the debt that is represented by that part of Lyle's shareholder loan account that reflects his contribution of assets to Farms on incorporation.

[113] Farms asserts that, if any part of the shareholder loan account represents a debt, that debt is repayable according to an agreement among all of the shareholders that money would be paid out only in proportion to the work that shareholders contributed to the farm.

[114] I find no such agreement. I have found as a fact that, at the time of incorporation, the shareholders did not turn their minds to what would happen with the shareholder loan accounts after incorporation. I have found, as well, that the idea of allocating payment to shareholders by way of shareholder loan accounts – in recognition of their contributions to the farming operation – first arose at the behest of the accountants, sometime after the incorporation.

[115] Furthermore, at the time of incorporation the shareholders' understanding that they would be paid according to their contributions to the farming operation was unrelated, in their minds, to the shareholder loan accounts. That understanding also was unrelated to the assets that they were contributing on incorporation, since they were contributing those assets permanently.

[116] The debt that reflects Lyle's contribution on the incorporation of Farms is not subject to an agreement as to payment over time. It is not necessary for me to explore the extent to which that part of the shareholder loan account is a demand loan, in light of my conclusions above with respect to promissory estoppel and waiver.

J. Issue 5: Limitation period

[117] The fifth issue is whether, if there is a debt that is a demand loan, Lyle's claim is barred by the effluxion of time under the provisions of *The Limitations Act*.

[118] Again, given my conclusions with respect to promissory estoppel and waiver it is not necessary for me to address this issue.

K. Conclusion

[119] Lyle sues for payment out of his shareholder loan account.

[120] Part of that account represents a debt owed to Lyle by Farms. Pursuant to Lyle's representation to Farms, however, Lyle is estopped from requiring Farms to pay out that part. As well, Lyle waived his right to repayment of that part of his shareholder loan account. Lyle is not entitled to payment out of that part of the account.

[121] The other part of Lyle's shareholder loan account represents contributions that he gifted to the corporation. That being the case, Lyle is not entitled to payment out of that part of the account.

[122] Accordingly, Lyle's application for summary judgment is dismissed, and his claim in this action is dismissed. Farms will have the costs of the action under column 2.

"G.M. Currie" J.
G.M. CURRIE