Pre-Existing Legal Relationships in Promissory Estoppel Ought Not to Be Understood So Restrictively

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The requirements to raise a promissory estoppel are variously expressed, but a common element to all formulations is the need for a "pre-existing legal relationship" between the parties to the estoppel. What constitutes a "pre-existing legal relationship" is not well-defined, however, and within the scholarship and jurisprudence on promissory estoppel some views on the topic are more restrictive than others. This article identifies questions raised by two of these restrictive interpretations, the first of which is advanced by the Supreme Court of Canada in Trial Lawyers Association of BC v Royal & Sun Alliance Insurance Company of Canada, and the second by K R Handley, a former Justice of the New South Wales Court of Appeal, in his extrajudicial scholarship on the topic. Highlighting these questions is intended to call attention to the respective shortcomings of these restrictive approaches, and to establish the groundwork for a new framework for understanding legal relationships in the context of promissory estoppel, which I will propose in a future article.

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Dr. Maharaj: "I am grateful to my friend Professor Bruce MacDougall for his thoughtful input on the finer points of estoppel. Any remaining errors and omissions are of course my own."

I. Introduction

Promissory estoppel is variously defined, but an element common to many formulations is the need for a pre-existing legal relationship between the parties to the estoppel (i.e., the promisor and the promisee).[1] What this means in practice and what will count as a pre-existing legal relationship for the purposes of raising promissory estoppel is, however, unclear. There is very clear disagreement on the matter, and several possible positions may be adopted. In this paper I will set out two of these potential positions that favour restrictive interpretations of the pre-existing legal relationship requirement, and thus restricted scope for promissory estoppel, in order to question the underpinnings of each.

The first of these two positions is apparent in the Supreme Court of Canada's recent decision in *Trial Lawyers Association of British Columbia v Royal & Sun Alliance Insurance Company of Canada,* (hereinafter *Trial Lawyers*).[2] This position equates a pre-existing legal relationship with a direct (and/or contractual) relationship as between the promisee and promisor, and perhaps a contractual relationship specifically between the parties to the estoppel (i.e., a direct contractual relationship). The second position is advanced by K R Handley, author of *Estoppel by Election and Conduct* and former judge of the New South Wales Court of Appeal. This position is that only a Right-Duty relationship in the Hohfeldian sense qualifies as a

1 B. MacDougall, *Estoppel*, 2nd ed (LexisNexis, 2019) at paras 5.96–5.99.

2 *Trial Lawyers Association of British Columbia v Royal & Sun Alliance Insurance Company of Canada*, 2021 SCC 47 [*Trial Lawyers*].

pre-existing legal relationship for the purposes of raising a promissory estoppel.[3]

This paper will raise more questions than it provides answers to with respect to the justification or rationale for either position, but in the circumstances, I believe this to be appropriate for two reasons. First, there does not appear to be significant support for either position in principle or authority which puts the onus on the proponents of each position. And second, this article is intended as a precursor to a larger work in which I will build on the criticisms outlined in this article and outline an alternative.

II. Direct Connections and Contractual Relations

The parties to the alleged estoppel in the *Trial Lawyers* case were a plaintiff in a motor vehicle accident case, Bradfield, and the defendant's insurer, RSA.[4] In the circumstances, the plaintiff alleged that RSA was estopped from denying coverage under the defendant's motor vehicle policy even though the defendant, Devecseri, had been in breach of their policy at the time of the accident.[5] The plaintiff alleged that RSA was estopped from denying coverage under the policy on the basis that the facts indicating the defendant had been in breach of their policy conditions were discoverable by all parties from the outset, and that RSA had allowed the litigation to continue for three years before taking an off-coverage position. These facts in concert were alleged by the plaintiff to give rise to an implied promise

3 K.R. Handley, *Estoppel by Conduct and Election*, 2nd ed (Sweet & Maxwell/Thomson Reuters, 2016) at paras 13-035–13-036.

4 *Trial Lawyers* at para 18.

5 *Trial Lawyers* at para 12.

that RSA would not deny coverage.[6] The facts in question pertained to the defendant's consumption of alcohol prior to the accident. RSA was apparently ignorant of this fact, but could easily have learned of it soon after the accident, if only RSA had obtained a copy of the coroner's report indicating the presence of alcohol in the defendant's system at the time of the crash.[7] In fairness to the Supreme Court, the argument advanced by the Trial Lawyers Association of British Columbia (TLABC), who had been granted public interest standing to continue the appeal after the actual plaintiff (Bradfield) had settled his claim with RSA, would have been better presented as estoppel by representation rather than promissory estoppel, and I do not disagree with the Court's ultimate conclusion that the promissory estoppel argument must fail overall.[8] As indicated above, however, I disagree with the Court's view that TLABC's promissory estoppel argument ought to fail (in part) because the plaintiff and RSA did not have a pre-existing legal relationship that sufficed to ground promissory estoppel.[9] I also regard the Court's remarks on this point as superfluous and unnecessary to justify the outcome of its analysis, but having been made by the highest court in the country, they ought to be addressed.

The Court's position on the nature of the pre-existing legal relationship requirement appears between paragraphs 37 and 45 of

6 *Trial Lawyers* at para 14.

7 *Trial Lawyers* at para 2. Even RSA appears to concede that the relevant information was easily discoverable soon after the accident; ("... the parties agreed that a coroner's report, available shortly after the accident — and approximately three years before RSA took an off-coverage position — would have provided RSA with evidence of the breach.").

8 *Trial Lawyers* at paras 18–19, 54.

9 *Trial Lawyers* at paras 41–43, 54.

the majority opinion, delivered by Moldaver and Brown JJ. In a concurring minority opinion, Karakatsanis J. also appears to accept this position.[10] The majority position as to what counts as a pre-existing legal relationship is not particularly clear. This is perhaps because the definition is taken for granted in light of existing jurisprudence[11] and because of the majority's focus on explaining that the connection between Bradfield and RSA could not constitute such a relationship. One can nonetheless infer what the Court considers to be a qualifying pre-existing legal relationship for the purposes of promissory estoppel from these remarks, and in particular from the distinction the majority draws regarding the connection between the original plaintiff, Bradfield, and RSA on the one hand, and the connection between RSA and the defendant/insured, Devecseri, on the other.

In the latter connection, the following remarks stand out in particular: [12]

> Promissory estoppel generally requires that the promisor and promisee already have a legal relationship … Trial Lawyers says that Mr. Bradfield, as a third-party claimant relative to Mr. Devecseri's insurance policy, was in a legal relationship with RSA by virtue of s. 258 of the *Insurance Act*.
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> …
>
> Trial Lawyers submits that this statutory language creates the requisite legal relationship allowing Mr. Bradfield to assert a right of coverage as against RSA, both on his own behalf and by "stand[ing] in the shoes" of Mr. Devecseri's estate (A.F., at para. 102). We agree that s. 258 creates a legal relationship between Mr. Bradfield and

10 *Trial Lawyers* at paras 54–55.

11 *MacDougall* at para 5.98.

12 *Trial Lawyers* at paras 41–43.

> RSA. It grants third-party claimants under an insurance policy a cause of action directly against an insurer, thereby bypassing the insured. **In this way, and to that extent, it ousts the common law rule of contractual privity which would otherwise bar a third-party claimant from suing an insurer on an insurance contract to which the claimant is not a party. Absent s. 258, the third-party claimant's ability to recover funds from an insurer would be "entirely dependent upon the extent to which the insured [here, Mr. Devecseri's estate] chooses to or is able to enforce its contractual rights…**
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> …
>
> We are, however, far from persuaded that Trial Lawyers accounts correctly for the nature of this relationship or of the rights and responsibilities flowing therefrom, and their implications for the estoppel analysis. **This is because the precise nature of this legal relationship, as determined by the statutory text, permits a claimant to sue the insurer only "upon recovering a judgment" against the insured.** On the facts of this case, this restriction is significant because RSA abandoned its defence of Mr. Devecseri in 2009, three years before Mr. Bradfield obtained his cross-claim judgment against RSA. This is the first obvious difficulty with Trial Lawyers' position: it relies on conduct by RSA that predates the existence of the relevant legal relationship.
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> [**Emphasis added**]

The foregoing remarks suggest that the majority views the connection between Devecseri and RSA as the only extant legal relationship in the circumstances of this case. They acknowledge that the Ontario *Insurance Act* has the potential to modify this situation in some respects. In the event that an insurer provides a defence, and the plaintiff nonetheless recovers a judgment against the defendant/insured, the plaintiff may bring an action against the insurer directly to recover damages owing (from the defendant) from monies payable under the defendant's contract of insurance pursuant

to the provisions of the *Act*. However, this modification is explained simply as an exception to privity that allows the plaintiff to intrude into the relationship between insurer and insured, and not described as a legal relationship in and of itself.

What is more, the majority specifically rejects the possibility that any qualifying legal relation can exist as between the plaintiff and the insurer prior to judgment, [13] and go so far as to describe any attempt to make an insurer responsible to the injured plaintiff for the way in which the insurer conducts itself following the occurrence of a prima facie insured event and prior to judgment, as an 'absurd attempt to piggy back onto the relationship between insurer and insured'. [14] This suggests that the majority does not accept that a qualifying legal relationship for the purposes of promissory estoppel can arise by virtue of mutual but separate connections between the parties to the estoppel (i.e., the promisor and the promisee) and a third party. To put it more specifically, the majority dismisses the possibility that a qualifying legal relationship may exist between a plaintiff and a defendant's insurer by virtue of their mutual but distinct connections to the defendant/insured as victim and tortfeasor and insured and insurer. This is the case at least until the plaintiff's claim has crystalized into judgment and s.258 of the Ontario *Insurance Act*, and others of its type, apply to grant the plaintiff a direct cause of action against the insurer.

One can summarize the foregoing by saying the majority's position is that the connection between the parties to an alleged promissory estoppel must be direct if it is to count as a qualifying pre-existing legal relationship. Alternatively, or in addition, one could

13 *Trial Lawyers* at para 43.

14 *Trial Lawyers* at paras 37–38.

also summarize the majority position by saying that the connection between the parties to the alleged promissory estoppel must be contractual in nature. The majority's remarks suggest as much given that RSA's "Power" (in the Hohfeldian sense discussed below) as the insurer to affect the defendant/insured's legal interests and its power to affect the plaintiff's legal interests by denying or granting each of them the ability to insist on payment under the defendant Devecseri's motor vehicle policy, by taking an off-coverage position because of Devecseri's breach of the policy, or by waiving that breach, differ only in terms of their source. RSA's Power vis-à-vis Devecseri as the insured clearly arises by virtue of the insurance contract between them, whereas RSA's Power to create a right of recovery or cause of action in the plaintiff arose only by virtue of the *Insurance Act*. In substance though, apart from their source, there is little if anything to distinguish RSA's Power vis-à-vis either plaintiff or defendant, and it is RSA's Power vis-à-vis these parties that defines its putative relationship with either one of them for the purposes of any estoppel and thus the majority's discussion of legal relationships. As such, despite the majority's attempt to distinguish between RSA's connection to Devecseri and the plaintiff by referring to the reciprocal obligations owed by Devecseri and RSA which did not exist between RSA and the plaintiff, [15] it appears that the majority position is that the nature or category of relationship counts for the purposes of the applicability of promissory estoppel quite apart from the way in which the power/relationship may allow one party to affect the other in substance. Certainly, the presence of other reciprocal (and presumably contractual) obligations has never been a requirement for the application of promissory estoppel in the past, and it does not appear plausibly connected to the application of promissory estoppel

15 *Trial Lawyers* at para 37.

in the present either. If the majority is correct, however, it simply raises yet more questions than their position answers.

Having now explained that the majority position in *Trial Lawyers* with respect to the nature of pre-existing legal relationships is that they must be direct as between the promisee and the promisor (the parties to the estoppel), and/or characterized by the existence of mutual/reciprocal obligations and thus apparently contractual in nature, I can now identify and explain the questions these positions raise. The first of these pertains to the majority's apparent insistence that the connection between the promisor and promisee be direct, and the second relates to the majority's apparent insistence that the relationship be contractual in nature.

The majority's rejection of indirect relationships for the purposes of promissory estoppel in *Trial Lawyers* raises certain questions not only as a matter of principle but also with respect to the Court's own prior decisions. The first of these questions is: what difference in principle does it make whether the relationship between the parties to the estoppel arose from direct contact between them or of their mutual volition, rather than indirectly through the agency of a third party, or simply without the active participation of the promisee at all? I have no answer to this question myself, for I cannot see why the promisee's involvement (or lack thereof) in the creation of the relevant relationship ought to be significant.

What is more, I cannot see how the rejection of indirect relationships, or insistence that the parties' relationship arise from direct contact between them, can be reconciled with the Supreme Court's earlier decision in *Mt. Sinai,* where the Court sustained the Quebec Court of Appeal's decision to the effect that a government minister could be promissorily estopped from denying the grant of a hospital permit pursuant to legislation that delegated the relevant

authority to the minister.[16] The majority in *Mt. Sinai* admittedly justified this outcome on a different basis, but there is no suggestion at all in *Mt. Sinai* that the power or discretion delegated to a minister to grant a permit could not be subject to promissory estoppel, or that the relationship between the applicant healthcare provider and the Province could not qualify for the purposes of promissory estoppel being raised, simply because the legislation giving rise to the power or discretion was not created with the applicant healthcare provider's involvement. Furthermore, McLachlin CJ and Binnie J in the minority went so far as to say, "[i]f this were a private law case I would agree that the elements of promissory estoppel are present…", and only demurred from full support for the QCCA's conclusion on promissory estoppel because the stature of the decision maker as the minister and the policy behind the particular statutory provision precluded the application of 'public law estoppel' in this case.[17]

It otherwise did not seem to matter to the majority or minority in that case how exactly the minister's power arose. And I cannot identify any reason in principle as to why the source of the relevant power ought to matter anymore in the context of the interaction between the plaintiff in *Trial Lawyers* and RSA than it would have in *Mt. Sinai*. Both powers arose by statute, the only difference is that the promisor in the former case was a private actor and the promisor in the latter case was effectively the state, but where additional considerations applied to restrict the potential application of

16 *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)*, 2001 SCC 41 at paras 39–40 [*Mt. Sinai*].

17 *Mt. Sinai* at paras 46–48.

promissory or 'public law' estoppel in *Mt. Sinai*, no such factors appear in RSA's case. [18]

The possibility that pre-existing relationships must be characterized by the existence of reciprocal or mutual obligations, and presumably contractual in nature, to count for the purposes of promissory estoppel, raises the following question: if the relationship must be contractual, how is promissory estoppel not simply a rule of contract variation? The short answer might be that promissory estoppel is now simply a mechanism for contract variation and is not in fact an independent equitable doctrine. If that is the case, it must mean that Canadian contract law accepts detriment as a substitute for consideration for the purposes of making an otherwise bare promise enforceable, or at least that it does so within the context of an otherwise valid subsisting contractual relationship.

I take no position on whether acceptance of detriment as a substitute for consideration would be a good or bad thing, especially given that detriment is already accepted as an alternative to consideration by our largest common law neighbour, the United States. [19] However, I would question whether such a change was fully thought out by the majority in *Trial Lawyers*, and whether it would be broadly accepted given the general reticence courts in Canada have demonstrated with respect to similar changes to the consideration requirement for contractual variation. [20] If observers conclude that

18 *Mt. Sinai* at para 48.

19 S.L. Martin, "Kill the Monster: Promissory Estoppel as an Independent Cause of Action" (2016) 7:1 *William & Mary Business Law Review* at p 4.

20 *NAV Canada v Greater Fredericton Airport Authority Inc.*, 2008 NBCA 28; *Rosas v Toca*, 2018 BCCA 191; *Khan v Shaheen Investment Inc.*, 2022 ONSC 3033. Two major attempts have been made in this respect, namely *Greater Fredericton* in New Brunswick and *Rosas v Toca* in

such a change was not fully thought out or intended, I suggest that the majority's remarks in *Trial Lawyers* with respect to privity, and the importance of mutuality of obligations between promisor and promisee, should not be accorded any weight with respect to the requirements for a qualifying pre-existing legal relationship. Whether these remarks by the majority in *Trial Lawyers* will have any ongoing significance is still to be seen.

III. Right-Duty Relations Only: Right or Wrong?

As mentioned above, K R Handley, author of *Estoppel by Election and Conduct* and former judge of the New South Wales Court of Appeal, has taken the position that only a Right-Duty relationship in the Hohfeldian sense qualifies as a pre-existing legal relationship for the purposes of raising a promissory estoppel. [21] Much like the majority's position on pre-existing legal relationships in *Trial Lawyers* discussed in the preceding section, Handley's position also raises more questions than it answers in principle and in light of existing authority. To make sense of these concerns I will first explain Hohfeld's schema of jural relations, and then turn to the questions Handley's position raises.

A. Hohfeld's Schema

Wesley Newcomb Hohfeld's work titled *Fundamental Legal Conceptions* disambiguates the term "right" and establishes a framework for understanding the various senses in which the term "right" is used, and the situation of the opposite party (or parties)

British Columbia, but neither has gained much traction outside of their province of origin, or even full acceptance within their province.

21 Handley at paras 13-035–13-036.

affected by these various categories of right.[22] This framework is encapsulated in the following table that pairs each sense of the term right with its "jural correlative" that describes the situation of the party opposite the holder of the right ("Right Holder"), and thus defines the legal relationship between each pair.

Jural Correlatives

Right	Privilege	Power	Immunity
Duty	No Right	Liability	Disability

The top line of each of the above tables contains the four distinct senses in which Hohfeld argued the term "right" was used.[23] These concepts can be described or thought of as the beneficial or positive aspect of a pair.[24] The bottom line of the first table contains the concept regarded by Hohfeld as the opposite position from the term above it.[25] By contrast, the bottom line of the second table contains the concept that must necessarily describe the position of some opposite party (Party B) if Party A is to have the benefit of the concept immediately above it.[26] For example, if Party A is to have a Power then some person (i.e., Party B) must have a Liability (i.e., be liable to being affected by said Power).[27] Of the four relationships above the

22 W.N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Yale University Press, 1964).

23 Hohfeld at pp 35–36.

24 Hohfeld at pp 35–64.

25 Hohfeld at pp 35–64.

26 Hohfeld at pp 35–64.

27 Hohfeld at pp 50–51.

most relevant for present purpose are: Right-Duty, Immunity-Disability, and Power-Liability.

There are clearly a number of senses in which the term "right" can be understood, but in Hohfeld's schema, the term Right is narrowly defined as being equivalent to a "claim" in the sense of being some assertion that necessarily demands or requires action or abstention from some other person. [28] Duty is the correlative of Right in this sense, because in order for any such claim to be meaningful or valid it must, it seems, be mirrored by a coextensive obligation that requires the opposite party to act, or to refrain from acting, in accordance with the claim of the Right Holder. [29]

Such an obligation may clearly be either positive or negative, but must in any event be mandatory. [30] This aspect of Duty is essential to the Hohfeldian conception of Right ("claim rights"), which it helps to define, and helps to distinguish this sense of the general term "right" from what may be called "liberty rights", which Hohfeld describes as Privileges. [31] Privileges, such as the "right to free speech", differ from Rights proper in Hohfeld's schema in the sense that no other party is obliged to assist a party with said "right of free speech" (Party A) to speak, or to refrain from interfering with Party A's exercise of free speech. [32] One can, for instance, speak over Party A freely, even though Party A's "right to free speech" (that is their Privilege to speak

28 Hohfeld at pp 36–38.

29 Hohfeld at p 38.

30 Hohfeld at p 38.

31 Hohfeld at pp 38, 42–43.

32 Hohfeld at pp 38–41. Hohfeld gives an odd example to do with eating shrimp, but I think the example of speech makes the case more clearly.

freely) may be defeated.[33] Correspondingly, Party A is at liberty to keep trying to speak because their Privilege of free speech means that they are not under any Duty not to speak, and others who may oppose Party A's speech are in a position of "No Right" vis-à-vis Party A's speech because they cannot seek to prevent Party A's speech or sanction it through the legal system. By contrast, a property-holder's Right to the possession of their property cannot be defeated by contrary action (such as a party speaking over Party A) in the same way.[34] Any other party must comply with the property-holder's claim to possession by abstaining from interference with the property.[35]

This particular Right is clearly negative in the sense of not requiring a third party to take steps to protect the property-holder's interest, but it is nonetheless mandatory in the sense that it is a claim with which others must comply and which they cannot treat with indifference like a hypothetical rude conversationalist speaking over another and disregarding their liberty right or "Privilege" of free speech. Power and Immunity differ from the narrow sense in which Right is defined above, in that neither requires of the opposite party any action or inaction. They do not give rise to a corresponding enforceable duty on the part of the Right-Holder's opposite.[36] Power refers to an ability to affect the legal interests of the opposite party unilaterally, examples of which include the ability to convey property interests without the active participation of the other party, to make another party one's agent or to revoke that status, and even the ability to make a contractual offer which creates a power in the offeree to

33 Hohfeld at pp 38–41.

34 Hohfeld at p 38.

35 Hohfeld at pp 38–39.

36 Hohfeld at pp 7–8.

accept and thereby create new Rights and Duties where none had existed before.[37]

Another more immediately relevant example of a Power in the Hohfeldian sense from the *Trial Lawyers* decision discussed above, is the ability RSA had to waive the defendant/insured Devecseri's policy breach in *Trial Lawyers* and to thereby allow Devecseri's estate to maintain a right to coverage under his policy that it would otherwise not have had, which is for all intents a Hohfeldian Power because it was within RSA's control and allowed RSA to unilaterally affect a change in Devecseri's legal interests. Immunity is effectively the inverse of Power in that it entails no specific ability to affect the legal interests of another, but instead allows the Right-Holder freedom from the control or Power of another as regards some legal interest. Legislation that renders certain property exempt from the claims of creditors, for instance, creates an immunity on the part of the party whose property can no longer be seized to satisfy the claims of their creditors.[38] So too, do limitations statutes whose fundamental purpose is to allow a party to resist attempts by others to exercise a Power they may have otherwise had to bring a suit against them.

B. The Problems with Handley's Position

If the view that the parties' pre-existing legal relationship must be contractual in order for promissory estoppel to arise appears unsustainable in light of the discussion in Section II above, Handley's view that the relationship must fall specifically within the Hohfeldian category of Right-Duty does not fare any better. Handley argues that until the 1980s, promissory estoppel had only ever applied to Right-Duty relations as defined by Hohfeld, and that as a matter of

37 Hohfeld at pp 51–52, 55.

38 Hohfeld at pp 7–8.

precedent that is all it should apply to.[39] Whether this assertion is factually correct is open to question, as noted by Robertson, but regardless of its accuracy up until the 1980s, the law has evidently since moved on.[40]

What is more, even if the jurisprudence had not moved on prior to the 1980s, this would not indicate that there is or was no principled reason as to why promissory estoppel could not have applied to jural relations other than Right-Duty prior to then. All that alleged fact would indicate is that the jurisprudence may not yet have had the occasion to do so. There is also no obvious reason in principle as to why a promissory estoppel could not arise from a promise or assurance made in the context of another Hohfeldian jural relation such as a Power-Liability relationship as opposed to a Right-Duty relationship, and there are notable instances of this having occurred in Canada, Australia, and England. One such notable example is the British Columbia Court of Appeal's decision in *Granville Savings and Mortgage Corp. v. Sharet Investors Ltd*. ("*Sharet*"),[41] which appears to fall into the Power-Liability category of Hohfeld's schema, and coincidentally appears analogous to the relations present in *Trial Lawyers*.

The circumstances of *Sharet* involved two parties (a first and second mortgagee) that had competing security interests in the same property, namely the land and hotel belonging to their common debtor.[42] The second mortgagee took steps to enforce its security

39 Handley at para 13-036.

40 A. Robertson, "Three Models of Promissory Estoppel" (2013) 7 *Journal of Equity* at pp 233–235.

41 *Granville Savings and Mortgage Corp. v Sharet Investors Ltd.*, (1988) BCJ No 2712, 1988 CarswellBC 1459 [*Sharet*].

42 *Sharet* at paras 1–2.

interest in the land and obtained an order nisi of foreclosure and the appointment of a receiver manager for the hotel.

The second mortgagee also discussed the matter of proceeds from the hotel operation with the first mortgagee, and the first mortgagee's right to seek the appointment of their own receiver and to assert priority over funds generated by the hotel and collected by the receiver.[43] As a consequence of these discussions, the second mortgagee undertook to grant the first mortgagee priority over the funds from the hotel operation collected by the receiver on the understanding that the first mortgagee would not take legal action to establish their priority over the funds.[44] Subsequently, all funds collected by the receiver were held in an account pending determination of entitlement to the funds. That determination was the subject of this case.[45] In the circumstances, the Court unanimously held that a promissory estoppel arose in favour of the first mortgagee who had refrained from taking steps to assert their priority over the funds.[46] The Court's rationale for this conclusion was expressed as follows by Anderson JA, who accepted the first mortgagee's position with respect to an estoppel having been raised, and rebuffed the second mortgagee's reply that promissory estoppel was inapplicable because of the absence of a legal relationship between the parties:[47]

> In my opinion, there was a pre-existing legal relationship between the first mortgagee and the second mortgagee. That relationship was, in my opinion, that at all times, assuming that the second mortgagee was entitled to all the funds held by the receiver, that the

43 *Sharet* at paras 1–2.

44 *Sharet* at para 2.

45 *Sharet* at paras 1–2.

46 *Sharet* at para 2.

47 *Sharet* at para 2.

> first mortgagee could at any time pursuant to its first mortgage by appointment or by court order obtain the appointment of its own receiver and obtain priority over the funds. In those circumstances it cannot be said that there was not a pre-existing legal relationship between the parties.
>
> It follows from the above that a promise was made by the second mortgagee to the first mortgagee and the first mortgagee is entitled to rely on that promise and receive priority over the funds in the hands of the receiver. I would allow the appeal and order that the receiver pay over all such funds to the first mortgagee.

It is notable that the parties to the estoppel in *Sharet*, like the parties to the alleged estoppel in *Trial Lawyers*, were connected via their separate and distinct relations with a third party: their common debtor. It is also notable that the relationship between the first and second mortgagee, which the BCCA accepted as sufficient for the purposes of establishing a promissory estoppel, was neither contractual nor of the Right-Duty variety. Instead, it is evident that relations between the first and second mortgagees was one of Power-Liability because throughout the period of the receivership the first mortgagee had the ability to unilaterally affect the legal relations or interests of the second mortgagee by taking steps to appoint their own receiver for the administration of the debtor's property and to thereby displace the priority of the second mortgagee's claim to the funds generated by the debtor's hotel.[48]

In addition to *Sharet*, if provincial appellate authority is not enough to dismiss Handley's position at least as far as Canada is concerned, there is also the Supreme Court's decision in *Mt. Sinai* mentioned above.[49] As I noted when contrasting *Mt. Sinai* with the

48 *Sharet* at para 1.

49 *Mt. Sinai*.

Court's decision in *Trial Lawyers,* the important aspect of the relationship between promisor and promisee in *Mt. Sinai,* which could have attracted the application of promissory estoppel but for the *sui generis* public law context, was the (promisor) minister's power delegated under statute to grant or withhold the relevant hospital permit from the (promisee) applicant healthcare provider.[50] It follows that the nature of this relationship in Hohfeldian terms must be Power-Liability, much like the relationship in *Sharet*. Of course, one may counter that Handley is simply not concerned with Canada and does not purport to be describing our law. However, examples of promissory estoppel applying to pre-existing legal relationships belonging to Hohfeldian categories of jural relation other than Right-Duty also exist in Australia and England, including *The Commonwealth of Australia v Verwayen* [51] (limitation defence - Immunity-Disability), *The Commonwealth v Clarke* [52] (limitation defence - Immunity- Disability), *Robertson v Minister of Pensions*[53] (discretion to determine pension eligibility - Power-Liability), and *Anaconda Nickel Limited v Edensor Nominees Pty Ltd & Gutnick*[54] (power to withdraw from agreement subject to satisfactory due diligence report - Power-Liability).

Given the foregoing, I ask: how exactly can Handley's position be sustained? If it were correct, then one would have to conclude that *Anaconda v Edensor* was wrongly decided simply because it involved

50 *Mt. Sinai* at paras 76, 96, 100.

51 *The Commonwealth of Australia v Verwayen* (1990) 170 CLR 394 (Australia).

52 *The Commonwealth v Clarke* [1994] 2 VR 333 (Australia).

53 *Robertson v Minister of Pensions* [1949] 1 KB 227 (United Kingdom).

54 *Anaconda Nickel Limited v Edensor Nominees Pty Ltd & Gutnick* (2004) 50 ACSR 679 (Australia) [*Anaconda*].

a promisor providing an assurance with respect to the exercise of power arising from a contract, rather than a right arising from a contract.[55] For myself, I cannot grasp what possible difference the Hohfeldian classification of a 'contractual right' could make to the applicability of promissory estoppel in principle, but it is for proponents of Handley's position to provide such an explanation. I simply question whether they can explain how the distinction between Right and Power in that case, or Right and any other Hohfeldian category, is in fact one with a difference as far as promissory estoppel is concerned.

IV. Conclusion

In this paper I have set out to question the correctness of the views described above with respect to what may count as a pre-existing legal relationship for the purposes of promissory estoppel. One may ask what is gained by raising such questions without suggesting any potential answers. My purpose herein has been to highlight the deficiencies of the majority view in *Trial Lawyers*, and the alternative view propounded by K R Handley and others with respect to the Right-Duty categorization of jural relations, as a precursor to expounding my own view of the pre-existing legal relationship requirement in a piece to follow this one. In the meantime, I hope that interested parties do not interpret the pre-existing relationship requirement as strictly as either of these camps would suggest. If nothing else, I have explained that there are good reasons not to.

55 *Anaconda* at paras 5–8; Robertson at pp 234–235.