

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Business Development Bank of Canada v.
MacIntyre*,
2026 BCSC 1128

Date: 20260618
Docket: S255082
Registry: Vancouver

Between:

Business Development Bank of Canada

Plaintiff

And

Keith Robert MacIntyre and Big Bear Software Inc.

Defendants

And

Business Development Bank of Canada

Defendant by Counterclaim

Before: The Honourable Justice Fowler

Reasons for Judgment

Counsel for the Plaintiff and Defendant by
Counterclaim, Business Development Bank
of Canada:

L.K.L. Li

The Defendant, Keith Robert MacIntyre,
appearing in person and as representative
for Big Bear Software Inc.:

K.R. MacIntyre

Place and Dates of Trial/Hearing:

Vancouver, B.C.
January 15–16, 2026
April 2, 2026

Place and Date of Judgment:

Vancouver, B.C.
June 18, 2026

Table of Contents

INTRODUCTION	3
BACKGROUND FACTS.....	3
PLEADINGS	4
APPLICATION FOR SUMMARY TRIAL	5
Evidence of the Loans.....	6
Loan 9	6
Loan 10	7
Loan 11	8
Loan 13	10
Loan 14	11
Loan 15	12
Loan 16	13
Loan 17	14
Loan 18	15
Summary of the Nine Loans	16
Analysis of Postponement of Loan Principal Repayments and Disbursement of New Loans	17
Evidence of MacIntyre	19
LEGAL FRAMEWORK.....	22
Suitability for Summary Trial.....	22
Lenders Duty of Care and Negligence	24
Unconscionability at Common Law	26
When Are Guarantors Released?	29
Equitable Estoppel	30
ANALYSIS.....	33
Suitability for Summary Trial.....	33
Has the Plaintiff Proven Default of the Loans and Guarantees	34
Big Bear and MacIntyre's Defences	35
Did BDC owe Big Bear and MacIntyre a duty of care?	35
Were the Loans and Guarantees Unconscionable Transactions?	38
Promissory Estoppel.....	42
CONCLUSION.....	43

Introduction

[1] The underlying claims brought by the Business Development Bank of Canada (“BDC”) against Big Bear Software Inc (“Big Bear”) and Keith MacIntyre (“MacIntyre”) are actions in debt for the recovery of funds dispersed to MacIntyre pursuant to multiple loan agreements.

[2] BDC has applied for summary judgment against Big Bear and against MacIntyre pursuant to his personal guarantees (“Guarantees”).

[3] The summary trial application was heard over several days alongside applications by third parties, Attorney General of Canada and His Majesty the King in the Right of the Province of British Columbia, to set aside or strike claims made by MacIntyre against them. In reasons reported at *Royal Bank of Canada v. MacIntyre*, 2026 BCSC 587, I set aside third party notices and struck a notice of civil claim filed by MacIntyre.

[4] Ultimately, during the hearing I adjourned the summary trial application of BDC to permit MacIntyre an opportunity to file additional affidavit evidence. I did this to ensure that the hearing was fair to MacIntyre, who is self-represented. MacIntyre was under the misunderstanding that statements made in his response to civil claim and his counterclaim could be considered by me at the summary trial as if they were evidence.

[5] MacIntyre filed an additional affidavit and BDC was permitted to file an affidavit in response.

Background Facts

[6] BDC is a financial institution wholly owned by the Government of Canada and operating pursuant to the *Business Development Bank of Canada Act*, S.C. 1995, c.28.

[7] Big Bear was incorporated in Alberta in 2003 and was registered as an extra provincial company in British Columbia in 2011. Big Bear ceased carrying on business in BC on July 14, 2025.

[8] During the relevant time, MacIntyre had business and residential addresses in Westbank and Penticton, B.C. MacIntyre describes himself as a businessperson and entrepreneur, and the principal or president of Big Bear. MacIntyre deposed in his affidavit # 3 that he is the sole shareholder and directing mind of Big Bear.

[9] Most of the significant facts are not disputed.

[10] Between October 2018 and September 2024, BDC made nine loan offers to Big Bear (the “Loans”), which Big Bear accepted. Each of the Loans were accompanied by the personal guarantee of MacIntyre. Each Loan was for a different sum and was accompanied by standard terms and conditions. However, there were some terms and conditions unique to each loan, for example, the interest rate and the amount of the loan that could be repaid without indemnity.

[11] Big Bear had a history of borrowing money from BDC. The relevant loan agreements for this summary trial commence at Loan 9 and end with Loan 18. No Loan 12 was referred to in these proceedings. When Loan 9 was accepted Big Bear had outstanding loans with BDC of \$83,350.

Pleadings

[12] On July 7, 2025, the BDC filed a notice of civil claim (“BDC NOCC”) against MacIntyre and Big Bear seeking judgment in the amount of \$318,174.43, representing the total amount in default and indebted to BDC under nine loan agreements. BDC also seeks interest based on the rates established by the terms of the different loan agreements. BDC claims against MacIntyre personally pursuant to Guarantees executed by MacIntyre and attaching to each of the Loans.

[13] On August 22, 2025, the defendant MacIntyre filed a counterclaim against BDC, in which he seeks damages for economic loss “including but not limited to the

loss of their business, personal assets, and significant emotional, personal duress (depression, anxiety) and loss of enjoyment of life (decline in health, loss of relationships)". In the counterclaim, he also seeks a dismissal of BDC's claim against him.

[14] On August 25, 2025, MacIntyre and Big Bear filed a response to civil claim ("RTCC"). In the RTCC the defendants plead that the Loans advanced by BDC were unconscionable, that BDC was negligent in approving the Loans, and that the Loans constituted loan-cycling whereby BDC was approving loans to Big Bear that they knew were being used to pay down other BDC loans.

[15] After filing the RTCC, also on August 25, 2025, both defendants MacIntyre and Big Bear filed another counterclaim against BDC, that is identical to the counterclaim filed by MacIntyre alone on August 22, 2025. Although the counterclaim is filed by both defendants, the relief sought refers to the defendant, MacIntyre and his personal losses, but no corporate losses.

[16] In the counterclaim, the defendants claim that the Loans advanced by BDC were unconscionable as BDC knew the defendant (expressed in the singular), was in a state of financial distress. In addition, it is claimed that BDC was negligent in approving loans to Big Bear.

[17] On September 10, 2025, BDC filed a response to the counterclaim in which it pleads that the Loans were not unconscionable transactions, that the defendants were always free to reject loan offers and the relationship between BDC and the defendants was a purely commercial relationship of creditor and debtor from which no duty of care or fiduciary duty arose.

Application for Summary Trial

[18] Most of the evidence on this summary trial application is in the form of loan offers, agreements and personal guarantees, as well as transaction ledgers for each of the Loans. The reliability of this evidence is not contested by MacIntyre, and so most of the significant facts are not disputed.

[19] BDC also does not challenge the credibility or reliability of MacIntyre's evidence that is relevant to the summary trial, with the exceptions noted in the summaries below.

[20] The evidence that MacIntyre relies upon to advance his counterclaim, and which he relied upon for the third party notices concerning the impacts of government policies in response to the Covid-19 pandemic and the reasons why his business failed, is challenged. However, I find this evidence is largely, if not entirely, irrelevant to what I must decide on this summary trial application.

Evidence of the Loans

Loan 9

[21] On October 11, 2018, Big Bear applied to BDC for financing for the following project: "Managing cash flow after rapid increase in business, hiring key employees"

[22] On October 23, 2018, BDC offered to lend Big Bear the sum of \$155,000 at an interest rate of BDC's floating base rate plus a variance of 3.5%. Interest was to be calculated and compounded monthly. In March 2020, the variance was reduced to 3.25%.

[23] Big Bear accepted the offer and all terms and conditions of the loan on October 23, 2018.

[24] MacIntyre signed a personal guarantee on October 23, 2018.

[25] This loan was characterized by BDC as an Expansion Loan. At the time this loan was offered Big Bear had outstanding loans with BDC of \$83,350.

[26] In January 2023, MacIntyre requested postponement of principal payments for this loan, and others which are detailed below. In his application for postponement, MacIntyre provided details of a new "custom GPS device" specifically for ski hills called skiKrumb, designed to keep track of children on a ski hill. MacIntyre outlined that the devices were currently being manufactured, that there were supply chain issues with the batteries, but that manufacturing was back on

schedule, and he was projecting to generate \$250,000 – \$350,000 in gross revenue. MacIntyre also outlined other sources of revenue he was predicting of about \$200,000 and revenue projections for the next ski season with just one ski hill were between \$750,000 and \$1 million.

[27] Importantly, at no point in his application for postponement did MacIntyre identify the Covid-19 pandemic as the reason for his business encountering financial difficulties. On January 24, 2023, BDC approved postponement of principal repayments for this loan for seven months.

[28] In January 2024, BDC approved postponement of principal repayments for a further six months after MacIntyre identified continuing “short term cash flow issues” arising from delays in negotiating contracts with ski hills for the skiKrum devices and delays in obtaining funding from other investors.

Summary Loan 9

Disbursed October 25, 2018 – \$155,000

Total interest payments made up to May 16, 2025 – \$59,932.91

Total Annual Administration Fees and NSF - \$2,240

Total paid towards loan principal – \$116,300

Total paid for loan to May 16, 2025 – \$178,472.91

Amount of principal repaid – \$114,565.11

Balance owing May 16, 2025 – \$40,434.89

Loan 10

[29] Also on October 23, 2018, BDC offered to lend Big Bear \$10,000 at an interest rate of BDC’s floating base rate plus a variance of 1.0%.

[30] Big Bear accepted this offer, and MacIntyre signed a personal guarantee, on October 23, 2018.

[31] Loan 10 was described by BDC as an “Advisory Services” and “Advisory Implementation” loan. Acceptance of Loans 9 and 10 meant that Big Bear’s indebtedness to BDC had increased from \$83,350 to \$248,350.

[32] Both Loans 9 and 10 required repayments of the principal over a period of 60 months. Because of an initial postponement of the repayment of the principal for one year, both loans had a maturity date in September 2024. Interest was payable monthly commencing the month following the first advance of the loans.

[33] As with Loan 9, principal repayments were further postponed for seven months in January 2023, and for another six months in January 2024.

Summary Loan 10

Disbursed October 25, 2018 - \$10,000

Total interest payments – \$2,799

Total Annual Administration Fees and NSF – \$ 1,040

Total paid towards principal – \$7,600

Total paid for loan – \$11,439.00

Amount of principal repaid – \$7,411.97

Balance owing May 16, 2025 – \$2,588.03

Loan 11

[34] Less than a year later, on September 27, 2019, Siobhan McManus, senior account manager at BDC in Kelowna (“McManus”), in an email to MacIntyre confirmed their discussion about a further loan of \$120,000. MacIntyre responded to

the email with “120k floating. Looks good! This leadership conference is fabulous so far.”

[35] Ultimately, BDC made a formal offer to lend Big Bear another \$120,000 at an interest rate of BDC’s floating base rate plus a variance of 2.53%, which was later reduced to 2.28%. This loan was described by BDC as Working Capital and “Liquidity for Growth”.

[36] The offer made it clear that the offered loan amount was in addition to “the existing CDN dollar loan(s) on which \$229,430 is outstanding.” Therefore, during the period between October 2018 and September 2019, Big Bear’s debt with BDC had been reduced by approximately \$19,000 from \$248,350 to \$229,430. Acceptance of Loan 11 meant that Big Bear then owed BDC \$349,000.

[37] The offer indicated an initial seven-month postponement of principal payments. The loan principal was payable over 60 months commencing on April 24, 2020, with a stated maturity date of March 24, 2025. The payment schedule for Loan 11 indicates that the principal payments did not in fact start until October 2020.

[38] On September 27, 2019, MacIntyre signed electronically on behalf of Big Bear to accept this loan offer. MacIntyre signed his personal guarantee for this loan at the same time.

[39] Principal repayments for this loan, as with Loans 9 and 10, were postponed for seven months in January 2023, and again in January 2024 for a further six months.

Summary Loan 11

Disbursed October 2, 2019 – \$120,000

Total interest payments – \$37,905.60

Total Annual Administration Fees and NSF – \$ 1,925

Total paid towards principal – \$76,000

Total paid for loan – \$115,830.60

Amount of principal repaid – \$76,303.51

Balance owing May 16, 2025 – \$43,696.49

Loan 13

[40] Less than six months later, on March 10, 2020, BDC emailed MacIntyre: “Keith, Good news – you are again eligible for an express loan. Let me know if this suite [sic] you or if it needs any changes and we can authorize as soon as you like.” To which MacIntyre responds: “Thank you, this would be helpful! Always happy with a principal payment delay :)”

[41] This loan for \$25,000 was also described as working capital and “Liquidity for Growth” at an interest rate of BDC’s floating base rate plus a variance of 2.00% per year.

[42] The offer makes it clear that this loan was in addition to “the existing CDN dollar loan(s) on which \$324,810 is outstanding”. This is approximately \$25,000 less than what was owed in September 2019. Therefore, when Loan 13 was dispersed Big Bear once again owed over \$349,000.

[43] Repayment of the principal was postponed initially for nine months. The first principal payment date was December 23, 2020, and every month after that until the maturity date of November 23, 2025.

[44] MacIntyre accepted this offer and signed on behalf of Big Bear on March 10, 2020¹. The documents indicate that MacIntyre electronically signed the guarantee for this loan twenty minutes after McManus electronically signed the offer.

¹ The document indicates that it was signed electronically by Keith Macintyre [sic] on 2020-03-11 at 01:09 GMT

[45] This Loan's principal repayments were postponed in January 2023 for seven months and then again for six months in January 2024.

Summary Loan 13

Disbursed March 16, 2020 - \$25,000

Total interest payments - \$6,880.47

Total Annual Administration Fees and NSF - \$925

Total paid towards principal - \$15,420.56

Total paid for loan - \$23,266.03

Amount of principal repaid - \$14,810.82

Balance owing May 16, 2025 - \$10,189.18

Loan 14

[46] On September 23, 2021, BDC emailed MacIntyre an offer for a pre-authorized working capital loan of \$80,000. The principal repayments were postponed for 12 months before being repayable over the next 60 months.

[47] At the time of making this loan offer, Big Bear had \$265,383 of outstanding loans with BDC. Acceptance of Loan 14 left Big Bear with outstanding loans to BDC of \$345,000, meaning that between September 2019 (Loan 11) and September 2021 (Loan 14), Big Bear had reduced its overall indebtedness to BDC by approximately \$4,000.

[48] MacIntyre responded enthusiastically: "Yes, I am doing well. Much better than last year. I don't see that offer in the online portal. That is certainly a good offer and I am interested. I was looking at my other loans. I know that -09 has no prepayment penalty and -10 I can prepay 15%. Do you know what the terms are for the other ones? – 01, - 03, -11, -13 Thanks ;)"

[49] On September 29, 2021, MacIntyre, on behalf of Big Bear, accepted this loan at an interest rate of the BDC floating rate plus 0.27%. MacIntyre signed a personal guarantee the same day.

[50] As with the other loans, principal repayments were postponed twice more for this loan: seven months in January 2023 and for six months in January 2024.

Summary Loan 14

Disbursed October 5, 2021 - \$80,000

Total interest payments - \$18,526.44

Total Annual Administration Fees and NSF - \$810

Total paid towards principal - \$21,340.85

Total paid for loan - \$40,677.29

Amount of principal repaid - \$19,474.34

Balance owing May 16, 2025 - \$60,525.66

Loan 15

[51] Between June 1 and 3, 2022, BDC and MacIntyre exchanged emails about another offer for a pre-authorized working capital loan, this time for \$50,000. Ultimately, MacIntyre accepted the offer stating; “Yes, I think I will go ahead with this. Looks like more growth is on the horizon. A very interesting new project upcoming with a First Nations group, among other things.”

[52] The offer dated June 3, 2022, confirmed that this loan was in addition to \$290,369.72 outstanding on existing loans. With the acceptance of this loan Big Bear had outstanding loans to BDC of approximately \$340,000, meaning that in the just over eight months between Loans 14 and 15, Big Bear reduced its overall indebtedness to BDC by \$5,000.

[53] The terms and conditions of this loan included an interest rate of the BDC floating base rate plus a variance of 0.00% per year. The loan agreement was signed on behalf of Big Bear by MacIntyre on June 3, 2022. He also signed his personal guarantee the same day. Principal repayments were initially postponed for just under 12 months, with payments to commence on May 23, 2023, and continuing for the next 60 months.

[54] As with the other loans, principal repayments for this loan were postponed for an additional six months in January 2024.

Summary Loan 15

Disbursed June 7, 2022 - \$50,000

Total interest payments - \$10,266.18

Total Annual Administration Fees and NSF - \$510

Total paid towards principal - \$11,666.82

Total paid for loan - \$22,443.00

Amount of principal repaid - \$10,452.46

Balance owing May 16, 2025 - \$39,547.54

Loan 16

[55] On August 11, 2022, McManus emailed MacIntyre about a pre-authorized working capital loan for \$25,000, also with an interest rate of the floating base rate plus a variance of 0.00%. MacIntyre responded, “that works for me, thanks”.

[56] At the time of this loan offer, two months after Loan 15, Big Bear had outstanding loans with BDC of \$324,896.40. Acceptance of this loan meant that Big Bear owed BDC \$349,000 – the same amount it owed to BDC in September 2019.

[57] The principal repayments were to be postponed for an initial 12 months before principal being repayable over the next 60 months. At the time of the loan offer the BDC floating base rate was 6.8%.

[58] MacIntyre accepted the loan on behalf of Big Bear the next day and signed a personal guarantee at the same time.

[59] Principal repayments for this loan were postponed for an additional six months in January 2024

Summary Loan 16

Disbursed August 23, 2022 - \$25,000

Total interest payments - \$4,782.09

Total Annual Administration Fees and NSF - \$545

Total paid towards principal - \$4,583.66

Total paid for loan - \$9,910.75

Amount of principal repaid - \$3,800.65

Balance owing May 16, 2025 - \$21,199.35

Loan 17

[60] BDC emailed MacIntyre on July 25, 2023, with an offer for a pre-authorized working capital loan of \$50,000 for Big Bear, with an interest rate of the floating base rate plus a variance of 3.33% per year. MacIntyre responded the same day to the emailed offer by email stating: "Yes, that looks good! I approve".

[61] I observe that this loan was offered and accepted during the seven-month period of postponement of principal repayments for Loans 9, 10, 11, 13, and 14 that was approved by BDC in January 2023. In addition, at the time of making the offer, Big Bear already had \$299,939.40 in outstanding loans with BDC. Therefore,

acceptance of this offer meant that Big Bear once again owed BDC \$349,000 – the same amount Big Bear owed to BDC in September 2019.

[62] As with Loan 16, principal repayment was postponed for the first 12 months before being repayable over the next 60 months. At the time of this loan offer the BDC floating base rate had increased to 9.3%.

[63] MacIntyre signed the loan agreement on behalf of Big Bear on July 25, 2023, and a personal guarantee the same day.

Summary Loan 17

Disbursed July 26, 2023 - \$50,000

Total interest payments - \$8,614.72

Total Annual Administration Fees and NSF - \$290

Total paid towards principal - \$5,002.18

Total paid for loan - \$13,906.90

Amount of principal repaid - \$3,013.00

Balance owing May 16, 2025 - \$46,987.00

Loan 18

[64] On September 3, 2024, Kelsey Moody, a Client Support Coordinator at the BDC Virtual Business Centre emailed an offer to loan Big Bear \$55,000 at an interest rate of the floating base rate plus a variance of 3.261% per year.

[65] The amount Big Bear had in outstanding loans with BDC at the time of this offer was \$290,795.21. Acceptance of this loan meant that Big Bear owed BDC \$345,000 - \$4,000 less than Big Bear owed BDC in September 2019.

[66] In addition, this offer was made just a couple of months after principal repayments had finished being postponed for the six-month period that had commenced in January 2024, for Loans 9, 10, 11, 13, 14, 15, and 16.

[67] On September 3, 2024, MacIntyre accepted the terms of this loan on behalf of Big Bear and signed his personal guarantee the same day.

Summary Loan 18

Disbursed September 5, 2024 - \$55,000

Total interest payments - \$2,002.76

Total Annual Administration Fees and NSF - \$105

Total Paid towards principal - \$4,074.50

Total paid for loan - \$6,182.26

Amount of Principal repaid - \$1,993.71

Balance owing May 16, 2025 - \$53,006.29

Summary of the Nine Loans

Total Amount Disbursed - \$570,000

Total Interest Payments - \$151,710.17

Total Admin Fees - \$8,390

Total Paid Towards Principal - \$261,988.57

Total Amount of Principal Repaid - \$251,825.57

Total Balance owing - \$318,174.43

Analysis of Postponement of Loan Principal Repayments and Disbursement of New Loans

[68] Loans 9 and 10 (\$165,000) were disbursed in October 2018 with the repayment of the principal postponed for 12 months until October 2019. In September 2019 Big Bear's interest only payment to BDC for Loans 9 and 10 was \$1,317.08.

[69] In October 2019 Loan 11 (\$120,000) was disbursed with principal repayments postponed for 12 months. Therefore, at the time principal repayments for Loans 9 and 10 started, Big Bear borrowed another \$120,000.

[70] In October 2019, Big Bears monthly payment for interest and principal repayments, had increased to \$4,213.16

[71] In March 2020 Loan 13 (\$25,000) was disbursed with principal repayments postponed for 9 months. By March 2020 Big Bear's payment to BDC was \$4,650.70. By October 2020, when principal payments for Loan 11 started, monthly payments had increased to \$6,476 approximately.

[72] In October 2021 Loan 14 (\$80,000) was disbursed with principal repayments postponed for 12 months. By October 2021, Big Bear was making monthly principal repayments on Loans 9, 10, 11 and 13, as well as interest payments on Loan 14. My review of the records indicates that in November 2021, Big Bear's monthly payment to BDC was \$7,077.31.

[73] In June 2022, Big Bear borrowed another \$50,000 (Loan 15) with principal repayments postponed for 12 months. In August 2022, Big Bear borrowed another \$25,000 (Loan 16) again with principal repayments being postponed for 12 months.

[74] Within two months of August 2022, principal repayments recommenced for Loan 14, meaning that by October 2022, Big Bear's total monthly payment to BDC for Loans 9, 10, 11, 13, 14, 15 and 16 was \$8,888.36.

[75] In January 2023 principal repayments were postponed on Loans 9, 10, 11, 13, and 14 for 7 months, until approximately July 2023. Principal repayments were also being postponed on Loans 15 and 16 pursuant to the original terms of the loans. Therefore, by February 2023 monthly interest only payments for all the Loans to BDC were \$2,570.86 but the total amount owing was now \$297,739.59.

[76] In July 2023, at around the time principal repayments were due to recommence for Loans 9, 10, 11, 13 and 14, and start for Loan 15, and shortly before they would start for Loan 16, Big Bear borrowed another \$50,000 from BDC (Loan 17), with principal repayments postponed for 12 months. In August 2023, Big Bears payment to BDC for interest and principal on the outstanding loans (interest only on Loan 17) had increased to \$10,869.38 and the total amount owing was now \$337,498.01.

[77] In January 2024, principal repayments for Loans 9, 10, 11, 13, and 14, were again postponed but this time for six months. Principal repayments for Loans 15 and 16 were postponed also for six months. Principal repayments for Loan 17 were being postponed pursuant to the original loan agreement until July 2024. Therefore, in February 2024, Big Bears interest only payment to BDC was now \$2,774.50 with a balance owing on all the Loans reduced to \$298,793.06.

[78] In July 2024 (the last month of interest only payments for all Loans except Loan 17) Big Bear's payment to BDC was \$3,456.53. By August 2024 Big Bear's monthly payment had increased to \$11,218.78.

[79] Within a couple of months of principal repayments recommencing on all the outstanding Loans, in September 2024, Big Bear borrowed another \$55,000. The total outstanding to BDC at the beginning of October 2024 was \$331,798.59. Monthly payments for interest and principal were now \$12,434.39.

[80] The last month of payments to BDC before Big Bear defaulted on the Loans was December 2024, by which point the total monthly payment to BDC for interest and principal was \$12,134.69.

[81] As of January 2025, when defaults started the outstanding amount owed to BDC was \$307,031.95.

Evidence of MacIntyre

[82] MacIntyre filed four affidavits in this proceeding.

[83] Much of the evidence he provides addresses the filing of third party notices, including evidence in support of his belief that actions taken in Public Health Orders issued pursuant to the *Public Health Act*, S.B.C. 2008, c. 28 were based on flawed pandemic data modelling. MacIntyre attributes the insolvency of Big Bear to pandemic related public health restrictions.

[84] In respect of the BDC Loans specifically MacIntyre does not dispute that the Loans were dispersed, he personally guaranteed the Loans, Big Bear defaulted on the Loans and the amount claimed by BDC is owed by Big Bear and himself as guarantor of the Loans.

[85] MacIntyre provided copies of emails that indicate that the senior account manager, Chris Spence (“Spence”), notified MacIntyre on March 27, 2025, that Loans 10, 16 and 18 were in arrears, and that Loans 09, 11, 12², 14, 15 and 17 had \$19,847 of principal, interest and arrears fees payments due within a few days. Spence notified MacIntyre that if the defaults on his account were not satisfied by April 6, 2025 “the Bank will be obliged to demand full payment of your loan”³.

[86] Within a few minutes of this email being sent, MacIntyre notified Spence that Big Bear “unfortunately has no possible way to repay these loans. Nor myself personally. Can we schedule a time early next week to discuss?”

[87] The emails confirm that Spence and MacIntyre agreed to talk by telephone the following Friday, April 4, 2025. MacIntyre deposes that they did talk for over eight

² The reference to loan 12 in the correspondence from Mr. Spence appears to be an error – it seems likely that it should have referred to loan 13.

³ This part of the email refers to “loan” in the singular without identifying which of the nine loans.

minutes and that Spence agreed to “work with [MacIntyre] to resolve the debt if [he] remained in communication.”

[88] I note at this point, that in the reply affidavit of Spence filed February 11, 2026, Spence states that he has no notes or clear recollection of the telephone call on April 4, 2025, but based on MacIntyre’s email of March 27, 2025, in which MacIntyre confirms that neither MacIntyre or Big Bear could repay the Loans, Spence doubts there was any discussion about “resolving the debt.”

[89] Given that neither Big Bear or MacIntyre has pleaded in their amended response to civil claim or the counterclaim that there was an agreement to resolve the payment of the debt that could amount to a defence of equitable or promissory estoppel, this discrepancy in the evidence does not need to be resolved.

[90] In early May 2025, MacIntyre emails Spence to ask him to send the final balances and the interest paid in 2025 for each of the Loans. Within a few days Spence sends MacIntyre the “year-end info for each of your loans”.

[91] As indicated earlier, BDC filed its NOCC on July 7, 2025. On July 14, 2025, MacIntyre wrote to Spence as follows:

Hi Chris, when we talked on the phone you indicated that as long as I communicated with you and your requests that we would find a way to work through this.

I was awaiting next step from you, but today I received a notice of civil claim?

I was hoping that we’d have some opportunity to discuss next steps before the nuclear route.

This obviously makes things very difficult for me as I am in the process of winding up the business and working with a bankruptcy trustee on a settlement.

This is going to force me to take a different set of next steps.

I’m a bit confused.

[92] MacIntyre also provided an email confirming that McManus approved a postponement of principal payments in April 2020, although it is not clear for which loans. On August 28, 2020, McManus emailed MacIntyre “Postponement

Questions”. MacIntyre deposed that he was unable to respond to these questions “due to financial and government restriction duress”.

[93] In June 2021, McManus notified that he was eligible for a \$50,000 “pre-authorized working capital loan.” MacIntyre responded that he was a “bit surprised considering my financial statements ... I’m good for now, I got the HASCAP loan and that’s got me covered as I ramp back up into higher revenue work :)” McManus wrote back, “Yes, the express loans can be surprising. I’m glad you are covered. This probably won’t expire for 6-8 months so there if you need. Glad things are ramping back up. We are all ready to get back to ‘normal’.”

[94] MacIntyre attached to his affidavits financial statements for Big Bear for 2019 – 2023. Big Bear has a year end of December 31. MacIntyre attests that he provided Big Bear’s financial statements to BDC annually.

[95] In 2018, Big Bear, on revenues of \$1,088,869, realized a gross profit of \$211,123. Revenues substantially increased to nearly \$1.7 million in 2019 with a gross profit of \$411,989 and retained earnings after payment of a \$30,000 dividend of \$29,468. By 2020, revenues had fallen by 50% to \$869,593, with a loss of \$206,814 and a year end deficit of \$246,213 after payment of a \$22,000 dividend. Revenues fell again in 2021 to \$728,697, however costs also fell resulting in a gross profit of close to \$65,000, but a loss of \$170,000 after expenses, including management salaries of \$121,000.

[96] Revenues in 2022 were down again to \$584,801. However, direct costs were also down, so Big Bear had a gross profit of over \$110,000, and a net loss of over \$47,000 after other expenses, for example management salaries. While revenues were substantially reduced in 2023 to \$225,000, gross profit had increased to \$190,000, although again, after deducting expenses, including professional fees and management salaries, Big Bear realized a net loss for 2023 of \$120,373.

[97] Big Bears retained earnings or deficit were as follows:

2018 - \$56,279 deficit

2019 - \$29,568

2020 - \$246,213 deficit

2021 - \$300,813 deficit

2022 - \$348,129 deficit

2023 - \$468,502 deficit

[98] MacIntyre attests that BDC relied upon his business as a marketing asset, featuring him as a ‘success story’ speaker in February 2020. In addition, in March 2020, as a regional business leader, he was invited to meet with BDC’s national director for technology industries.

[99] In July 2023, MacIntyre completed a Statement of Personal Affairs document for BDC in which he disclosed personal assets of approximately \$690,000, predominately his personal residence, and debts, including a mortgage on his residence, lines of credit and credit cards of \$626,623. He disclosed that his current occupation was the CEO of Big Bear with an annual salary of \$120,000.

[100] In addition, MacIntyre attached to his affidavit a Highly Affected Sectors Credit Availability Program (“HASCAP”) business banking loan agreement with the Royal Bank for a fixed rate term loan of \$250,000 amortized over 10 years with a fixed interest rate of 4.00%. I understand that the loans disbursed under this program were guaranteed by BDC, not personally. It is not clear from the evidence how much MacIntyre withdrew from this credit approval.

Legal Framework

Suitability for Summary Trial

[101] Pursuant to R. 9-7(15) of the *Supreme Court Civil Rules*, a court may grant summary judgment in favour of any party on an issue or generally, unless the court is unable to find the facts necessary or if it would be unjust to decide the issues.

[102] At a summary trial the court “tries the issues raised by the pleadings on affidavits”; that “a triable issue or arguable defence will not always defeat a summary trial application”; and “cases will be decided summarily if the court is able to find the facts necessary for that purpose, even though there may be disputed issues of fact and law”, that is unless the court is of the opinion that it would be unjust to decide the issues on the application: *Gichuru v. Pallai*, 2013 BCCA 60 at paras. 30–31.

[103] Considering whether it would be unjust to proceed summarily, a court should consider, “the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings and any other matters which arise for consideration on this important question.”: *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.), at page 215, 1989 CanLII 229 (B.C.C.A.).

[104] These comments in *Inspiration Management Ltd.* foreshadowed the conclusions of Madam Justice Karakatsanis in *Hryniak v. Mauldin*, 2014 SCC 7:

[4] [...] In my view, a trial is not required if a summary judgment motion can achieve a fair and just adjudication, if it provides a process that allows the judge to make the necessary findings of fact, apply the law to those facts, and is a proportionate, more expeditious and less expensive means to achieve a just result than going to trial.

[5] To that end, I conclude that summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims.

[105] The parties are expected to come to the summary trial prepared to prove their claim, or defence. The summary trial process cannot be frustrated by one party failing to take the steps necessary to put themselves in the best possible situation: *Gichuru* at para. 32.

[106] At a summary trial, the plaintiff retains the onus of proof of establishing the claim and the defendant, even if not the applicant, retains the burden of establishing any defence raised.

[107] MacIntyre argues that the Loans advanced by BDC were unconscionable, that BDC was negligent in approving the Loans, and that the Loans constituted loan-cycling whereby BDC was approving loans to Big Bear that they knew were being used to pay down other BDC loans.

[108] Both defendants, MacIntyre and Big Bear, make the same claims in a counterclaim against BDC. Although the counterclaim is filed by both defendants, the relief sought refers to the defendant, singular, and MacIntyre's personal losses, and not any corporate losses, alleged to have resulted from the actions of BDC.

[109] In the counterclaim, the defendants claim that the Loans advanced by BDC were unconscionable as BDC knew the defendant (expressed in the singular), was in a state of financial distress. In addition, it is claimed that BDC was negligent in approving loans to Big Bear.

[110] As I understand the submissions of MacIntyre, his defence to BDC's claim is that because of Big Bear's financial state, BDC should never have lent Big Bear the money. Additionally, given MacIntyre's personal financial circumstances they should never have accepted his personal guarantee for the Loans. I take this to mean that MacIntyre is submitting that BDC owed him a duty of care which they breached by approving the Loans and Guarantees. I also understand MacIntyre to be arguing that the Loans and Guarantees were unconscionable.

[111] I will now address the law in respect of these issues.

Lenders Duty of Care and Negligence

[112] Absent a special relationship or exceptional circumstances, a lender does not owe a borrower a duty of care:

Generally speaking, the relationship between a financial institution lender and its customer borrower is a purely commercial relationship of creditor and debtor. Absent any special relationship or exceptional circumstances such as would give rise to a fiduciary duty (which is not pleaded by Mrs. Pierce), the courts have consistently held that the lender owes no duty to the borrower in connection with the making of the loan. In particular, the bank owes no duty to its customer to advise the customer not to undertake the loan: see *Bertolo*

v. Bank of Montreal, (1986), 1986 CanLII 150 (ON CA), 57 O.R. (2d) 577, 33 D.L.R. (4th) 610 (C.A.), and *Bank of Montreal v. Duguid* (2000), 2000 CanLII 5710 (ON CA), 47 O.R. (3d) 737, 185 D.L.R. (4th) 458 (C.A.).

Pierce v. Canada Trustco Mortgage Co., [2005] O.J. No. 1886 (QL), 2005 CanLII 15706 (ONCA), at para. 27.

[113] The relationship of lender to borrower is a commercial relationship where each party seeks to secure its own interests: *0895625 B.C. Ltd. v. Ascent Developments Corp.*, 2014 BCSC 1722 at para. 46.

[114] An ordinary lender and borrower relationship “does not involve or give rise to a fiduciary duty on the part of the lender towards the borrower”: *Baldwin v. Daubney* (2006), 83 O.R. (3d) 308 (C.A.), 2006 CanLII 32901 (ONCA) at para. 15, leave to appeal to S.C.C. refused.

[115] The onus of proving a duty of care rests on the borrower. Even if a borrower can establish that they did not qualify for the loans when they were made to them, the mere approval of a loan does not induce the borrower to accept it or provide a guarantee for repayment: *Canada Trustco Mortgage Co. v. Regis and Velma Renard*, 2006 BCSC 1609 at para. 91.

[116] Furthermore, a bank is under no duty to advise a customer not to take out a loan: *Business Development Bank of Canada v. Rideout*, 2012 NLTD(G) 44 at para. 34 citing *Bertolo v. Bank of Montreal*, (1986), 1986 CanLII 150 (ONCA), 57 O.R. (2d) 577, and *Bank of Montreal v. Duguid* (2000), 2000 CanLII 5710 (ONCA), 47 O.R. (3d) 737.

[117] A lender does not have to advise a customer of concerns about the viability of a project or to monitor the use of borrowed funds. As stated by Madam Justice Ross in *Healey v. Royal Bank of Canada et al*, 2003 BCSC 342:

In the absence of a fiduciary relationship, the courts have consistently held that the relationship between a bank and its customer borrower is purely commercial. Thus there is no special relationship, it owes no duty of care, no duty to warn, or duty to analyze or to advise its customer of concerns with respect to the financial viability of the project: *Bellopede v. North Shore CU*, 2001 BCSC 1093 (sub nom. *Bel Mar*

Developments Inc. v. North Shore Credit Union); *Westminster Savings and Credit Union v. 442391 BC Ltd.*, 2000 BCSC 633.

[118] To similar effect, a commercial lender does not owe a duty to its borrower to ensure that borrowed funds are used in any particular way: *Wilkinson v. Wilkinson*, 2014 BCSC 1108.

[119] Only in limited circumstances can a lender be found to be in a fiduciary position with a borrower: *430707 B.C. Ltd. v. Royal Bank*, 2004 BCSC 350 at para. 40:

[40] In *Med Finance Co. S.A. v. Bank of Montreal*, [1994] B.C.J. No. 1723, at para. 127, Edwards J. of this court adopted as authoritative the test set out by the British Columbia Court of Appeal in *Maryk et al. v. Bank of Montreal* (1991), 85 D.L.R. (4th) 514 at 531:

... in my opinion, a fiduciary relationship did not arise between the bank and the appellants. Fiduciary relationship is discussed extensively in *LAC Minerals Ltd. v. International Corona Resources Ltd.* (1989), 61 D.L.R. (4th) 14 ... All judges agreed that relationships in which a fiduciary obligation had been imposed seemed to possess three general characteristics:

- (1) The fiduciary has scope for the exercise of some discretion or power.
- (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
- (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

[...]

It is rare that it is required in the context of an arms length commercial transaction.

[Bold in original.]

Unconscionability at Common Law

[120] In *Vanguard Mortgage Investment Corporation v. Dietterle*, 2022 BCSC 1512, Madam Justice MacNaughton carefully summarises the principles governing unconscionability:

[85] The doctrine of unconscionability is meant to protect those who are vulnerable in the contracting process from loss or improvidence in a bargain: *Uber Technologies Inc. v. Heller*, 2020 SCC 16 at para. 60 [*Uber*].

[86] The doctrine of unconscionability has two elements: an inequality of bargaining power, stemming from some weakness or vulnerability affecting the claimant, and an improvident transaction.

[87] In *Uber*, the Court expressly rejected the more stringent four-part test for unconscionability that had been adopted in earlier cases and was urged on it by Uber. The four-part test required proof that the transaction was “grossly unfair”, that there was no independent advice, that the imbalance in bargaining power was “overwhelming”, and that the stronger party intended to take advantage of the vulnerable party. The Court held that the four-part test raised the traditional threshold for unconscionability and unduly narrowed the doctrine: *Uber* at paras. 80-82.

[88] The Court said that an inequality of bargaining power exists where one party cannot adequately protect their interests in the contracting process. The Court explained at para. 67 that there were no rigid limitations on the types of inequality. The inequality might arise from personal or situation circumstances.

[89] The Court gave examples of inequality of bargaining power in order to assist in “organizing and understanding” prior cases of unconscionability. It said that a common example of inequality of bargaining power arises in what it characterized as the “necessity” cases. In those cases, the weaker party is so dependent on the stronger that serious consequences would flow from not agreeing to the contract: *Uber* at para. 69-70. A second common example is where only one party could understand and appreciate the full import of the contractual terms, thus creating “cognitive asymmetry”.

[90] However, the Court said that regardless of the type of impairment involved, what matters is whether the evidence discloses a bargaining context: “...where the law’s normal assumptions about free bargaining either no longer substantially hold true or are incapable of being fairly applied”: *Uber* at para. 72.

[91] The second requirement of unconscionability, an improvident bargain, refers to a bargain that unduly advantages the stronger party or unduly disadvantages the weaker party. Improvidence is measured contextually at the time the bargain was formed. The question is whether the potential for undue advantage or disadvantage as a result of the inequality of bargaining power has been realized. Proof of a manifestly unfair bargain may support an inference that one party was unable to adequately protect their interests: *Uber* at paras. 74-79.

[92] As the Court explained, a bargain may be improvident where the weaker party has been unduly disadvantaged by terms that they did not fully understand.

[93] An undue advantage may only be evident when the terms are read in light of the surrounding circumstances at the time of contract formation, such as market price, the commercial setting or the positions of the parties: *Uber* at para. 75.

[94] Where the weaker party did not understand or appreciate the meaning and significance of important contractual terms, the focus is on whether they have been unduly disadvantaged by the terms they did not understand or

appreciate. The terms are unfair when, given the context, they flout the “reasonable expectation” of the weaker party. This is an objective standard but with regard to context: *Uber* at para. 77.

[95] Independent legal advice is relevant only to the extent that it ameliorates the inequality of bargaining power experienced by the weaker party. It can assist a weaker party in understanding the terms of a contract, but may not ameliorate a weaker party’s desperation or dependence on a stronger party: *Uber* at para. 83.

[96] Pursuant to the two-part test for unconscionability articulated in *Uber*, the Court said that unconscionability can be established without proof that the stronger party knowingly took advantage of the weaker: *Uber* at para. 84. Requiring proof that the stronger party knowingly took advantage improperly focuses the inquiry on the state of mind of the stronger party, rather than the protection of the more vulnerable: “...a weaker party, after all, is as disadvantaged by inadvertent exploitation as by deliberate exploitation”: *Uber* at para. 85.

[97] In determining whether there was an inequality of bargaining power, the court considers a number of factors at set out in *Murray v. Affordable Homes*, 2007 BCSC 1428 at para. 31:

- a) the relative intelligence and sophistication of the plaintiff;
- b) whether the defendant was aggressive in the negotiation;
- c) whether the plaintiff sought or was advised to seek legal advice; and
- d) Whether the plaintiff was in necessitous circumstances which compelled them to enter the bargain.

[121] More recently in *Pearce v. 4 Pillars Consulting Group Inc.*, 2021 BCCA 198, Justice Griffin for the Court similarly summarized the doctrine of unconscionability, as discussed in *Uber*:

[200] The doctrine of unconscionability has two elements. First, the party claiming unconscionability must prove there was inequality of bargaining power between the parties. Second, the party must show the contractual term at issue is improvident: *Uber* at paras. 62–65.

[201] Inequality of bargaining power exists where one party is unable to protect their interests in the contracting process: *Uber* at para. 66. Although differences in wealth, knowledge or experience can be relevant, there is no set class of inequities that will result in a finding of inequality. Importantly, the inequities do not need to be so serious as to negate the party’s capacity to enter a valid contract: *Uber* at para. 67.

[202] Examples of inequality are seen in “necessity” cases, where the weaker contracting party is dependent on the stronger party and would accept almost any terms. Other examples include “where a party is vulnerable due to financial desperation” or where there is a “special relationship of trust and confidence”. Unconscionability may be established

even where the circumstances of duress or undue influence are absent: *Uber* at paras. 69–70.

[203] Another common example of inequality in bargaining power is where only one party could understand and appreciate the importance of the contractual term at issue. For example, the contract may contain dense or difficult to understand terms, which a layperson would have difficulty understanding (so called “cognitive asymmetry”): *Uber* at 71.

[204] The second element of unconscionability, an improvident bargain, requires either an undue advantage to the stronger party or an undue disadvantage to the weaker party. This is measured at the time the contract was entered into—if some subsequent development renders a previously fair contract unfair, the disadvantaged party will not be able to escape it through the doctrine of unconscionability: *Uber* at para. 74.

[205] Assessing whether a bargain is improvident is determined in the context of all surrounding circumstances at the time the contract is entered into, including the flaw in the bargaining process: *Uber* at paras. 75, 79. The question for the court is “whether the potential for undue advantage or disadvantage created by the inequality of bargaining power has been realized.” For example, where a person is in desperate circumstances (and thus almost certain to benefit from a contract, even an unfair one), the inquiry focuses on whether the stronger party has been unduly enriched, such as where the contract price significantly departs from the market price: *Uber* at paras. 75–76.

[206] Where the weaker party did not understand or appreciate the significance of the contractual term, the focus is on whether they have been unduly disadvantaged: *Uber* at para. 77.

[207] It is not necessary to establish that the stronger bargaining party knowingly took advantage of the weaker in order for the doctrine to apply: *Uber* at para. 84. Parenthetically, the concurring judgment of Brown J. considered the elimination of at least constructive knowledge on the part of the strong party as an element of the doctrine to be an expansion of the scope of unconscionability: at paras. 164 and following.

When Are Guarantors Released?

[122] In *Bank of Montreal v. No.249 Seabright Holdings Ltd.*, 2014 BCSC 1094, Justice Burnyeat addressed when a guarantor will be relieved of their obligations:

[97] In order to relieve a guarantor of his or her obligations, a lender must act in bad faith and materially alter the risk of the guaranteed obligations without the knowledge and consent of the guarantors. Guarantors must establish more than a merely irregularity in the dealings of the institution with them. Guarantors must establish that what was done or not done was prejudicial and a variation of the “principal contract”. The Court will only interfere if the principal contract is varied without the guarantor’s consent in a manner not obviously to the benefit of the guarantor. An alteration of the principal contract not material to the risk of a surety so that it cannot prejudice

the surety or a departure from the terms of the principal contract which is necessarily beneficial to the surety will not relieve the surety from liability. If a creditor impairs the value of security held in respect of a guarantee, then the surety is entitled to be discharged to the extent of the prejudice. In these regards, see *Pax Management Ltd. v. CIBC*, [1992] 2 S.C.R. 998 and *Bank of Montreal v. Wilder*, [1986] 2 S.C.R. 551.

Equitable Estoppel

[123] Although not pleaded in the amended response to civil claim or the counterclaim, MacIntyre's submissions and affidavit evidence suggests that in a telephone call on April 4, 2025, Spence, account manager at BDC, agreed to work with MacIntyre "to resolve the debt."

[124] I have already identified the conflict in the evidence about this phone call, particularly Spence's observation that it was very unlikely that there was any agreement to resolve the debt as MacIntyre had already indicated there was no possible way for either him or Big Bear to repay the Loans.

[125] However, for completeness I will set out the elements of equitable estoppel, specifically promissory estoppel, and other forms of estoppel.

[126] In *Hinds v. Latham*, 2025 BCSC 2129, Justice Veenstra summarised the principles of different variants of estoppel:

[76] Three different forms of estoppel were raised in the course of the parties' submissions.

[77] The principles governing promissory estoppel were recently and concisely summarized by the Supreme Court of Canada in *Trial Lawyers Association of British Columbia v. Royal & Sun Alliance Insurance Company of Canada*, 2021 SCC 47, [2021] 3 S.C.R. 490 [TLABC]:

[15] Promissory estoppel is an equitable defence whose elements were stated by Sopinka J. for this Court in *Maracle*, 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 [promisee] must establish that, in reliance on the [promise], he acted on it or in some way changed his position. [Emphasis added.]

The equitable defence therefore requires that (1) the parties be *in a legal relationship* at the time of the promise or assurance; (2) the

promise or assurance be *intended* to affect that relationship and to be acted on; and (3) the other party in fact *relied* on the promise or assurance. It is, as we will explain, implicit that such reliance be to the promisee's detriment.

[16] Promissory estoppel seeks to protect against the "inequity of allowing the other party to resile from his statement where it has been relied upon to the detriment of the person to whom it was directed" (*Fort Frances v. Boise Cascade Canada Ltd.*, 1983 CanLII 47 (SCC), [1983] 1 S.C.R. 171, at p. 202). In the insurance context, estoppel arises most commonly where an insurer, having initially taken steps consistent with coverage, then denies coverage because of the insured's breach of a policy term or its ineligibility for insurance in the first place. To prevent the insurer from denying coverage, the insured will attempt to show that the insurer is estopped from changing its coverage position based on its prior words or conduct.

[17] Although the nuances of the relationship between promissory estoppel and other forms of estoppel were not argued before us in this appeal, we observe that Trial Lawyers' arguments may be better framed as supporting estoppel by representation rather than promissory estoppel (see *Ryan v. Moore*, 2005 SCC 38, [2005] 2 S.C.R. 53, at para. 5; *Page v. Austin* (1884), 10 S.C.R. 132, at p. 164). While the latter doctrine prevents the promisor from reneging on an assurance to alter the parties' legal relationship, the former doctrine prevents a promisor from denying the truth of a prior representation (see, generally, B. MacDougall, *Estoppel* (2nd ed. 2019), at §§ 5.33 to 5.45). Given the similarities between the doctrines, however, we resolve this appeal applying only the principles of promissory estoppel upon which Trial Lawyers relies, while noting that similar reasoning would apply if the claim were grounded in estoppel by representation.

[78] As is apparent from the *TLABC* case, there is often significant overlap between the different forms of estoppel. In *Ryan*, the Court compared and contrasted the principles governing estoppel by convention and estoppel by representation. At para. 59, Justice Bastarache summarized the principles governing estoppel by convention as follows:

- (1) The parties' dealings must have been based on a shared assumption of fact or law: estoppel requires manifest representation by statement or conduct creating a mutual assumption. Nevertheless, estoppel can arise out of *silence* (impliedly).
- (2) A party must have conducted itself, i.e. acted, in reliance on such shared assumption, its actions resulting in a change of its legal position.
- (3) It must also be unjust or unfair to allow one of the parties to resile or depart from the common assumption. The party seeking to establish estoppel therefore has to prove that detriment will be suffered if the other party is allowed to resile from the assumption since there has been a change from the presumed position.

[79] With respect to the shared assumption, Justice Bastarache explained:

[61] The crucial requirement for estoppel by convention, which distinguishes it from the other types of estoppel, is that at the material time both parties must be of “a like mind” (*Troop v. Gibson*, [1986] 1 E.G.L.R. 1 (C.A.), at p. 5; *Hillingdon London Borough v. ARC Ltd.*, [2000] E.W.J. No. 3278 (QL) (C.A.), at para. 49). The court must determine what state of affairs the parties have accepted, and decide whether there is sufficient certainty and clarity in the terms of the convention to give rise to any enforceable equity: *Troop*, at p. 6; see also *Baird Textile Holdings Ltd. v. Marks & Spencer plc*, [2002] 1 All E.R. (Comm) 737, [2001] EWCA Civ 274, at para. 84.

[62] While it may not be necessary that the assumption by the party raising estoppel be created or encouraged by the estopped party, it must be shared in the sense that each is aware of the assumption of the other (*John v. George*, [1995] E.W.J. No. 4375 (QL) (C.A.), at para. 37). Mutual assent is what distinguishes the estoppel by convention from other types of estoppel (Bower, at p. 184). The courts have described communications complying with this requirement as “crossing the line”. In *The “August Leonhardt”*, at pp. 34-35, Kerr L.J. held that

[a]ll estoppels must involve some statement or conduct by the party alleged to be estopped on which the alleged representee was entitled to rely and did rely. In this sense all estoppels may be regarded as requiring some manifest representation which crosses the line between representor and representee, either by statement or conduct. It may be an express statement or it may be implied from conduct, e.g. a failure by the alleged representor to react to something said or done by the alleged representee so as to imply a manifestation of assent which leads to an estoppel by silence or acquiescence. Similarly, in cases of so called estoppels by convention, there must be some mutually manifest conduct by the parties which is based on a common but mistaken assumption...

There cannot be any estoppel unless the alleged representor has said or done something, or failed to do something, with the result that — across the line between the parties — his action or inaction has produced some belief or expectation in the mind of the alleged representee, so that, depending on the circumstances, it would thereafter no longer be right to allow the alleged representor to resile by challenging the belief or expectation which he has engendered. To that extent at least, therefore, the alleged representor must be open to criticism. [Emphasis added.]

See also *The “Vistafjord”*, at p. 350. Thus, it is not enough that each of the two parties acts on an assumption not communicated to the other (*The “Indian Grace”*, at p. 10). Further, the estopped party must have, at the very least, communicated to the other that he or she is

indeed sharing the other party's (*ex hypothesi*) mistaken assumption (*John*, at para. 81; *Bower*, at p. 184).

[80] With respect to the second and third requirements, Justice Bastarache explained:

[73] Once the party seeking to establish estoppel shows that he acted on a shared assumption, he must prove detriment. For the plea to succeed, it must be unjust or unfair to allow a party to resile from the common assumption (*Wilken*, at p. 228). It is often said that the fact that there will have been a change from the presumed legal position will facilitate the establishment of detriment: "This is because there is an element of injustice inherent within the concept of the shared assumption — one party has acted unjustly in allowing the belief or expectation to 'cross the line' and arise in the other's mind": *Wilken*, at p. 228.

[74] This final requirement of estoppel has been described as proving that it would be "unjust", "unconscionable" or "unfair" to permit a party to resile from the mutual assumption (see, e.g., *Bower*, at p. 181; *John*; *The "Indian Grace"*; *The "Vistafjord"*). However, it may be preferable to refrain from using "unconscionable", in order to avoid confusion with this last concept which has developed a special meaning in relation to inequality of bargaining power in the law of contracts (where we speak of unconscionable transactions, for instance) (see *Litwin Construction*, at p. 468).

[81] Estoppel by representation is similar, except that rather than a shared assumption, it arises from a representation. In *Ryan*, Justice Bastarache explained:

[76] Where there is no shared assumption, as in the present case, there can be no estoppel by convention, no matter how unjust the other party's conduct may appear to be. However, in some circumstances, the party seeking to establish estoppel may be able to rely on estoppel by representation, an alternative here advocated by the respondent. The added difficulty in such a case is that an estoppel by representation cannot arise from silence unless a party is under a duty to speak. ...

[Underlined and italicized emphasis in original.]

Analysis

Suitability for Summary Trial

[127] The first question is whether it is appropriate to deal with this matter on a summary trial basis.

[128] As indicated earlier in these reasons, there are few disputes as to the facts. The terms of the Loans and Guarantees are proven by documents, including

transaction ledgers showing when interest and principal payments were made for each of the Loans. MacIntyre does not challenge the reliability of any of this documentary evidence.

[129] Although there is a dispute in the evidence about what was discussed between MacIntyre and Spence during a phone call on April 4, 2025, I am satisfied that this would only be relevant to whether MacIntyre could establish a form of estoppel, which has not been pleaded in any event.

[130] BDC also does not challenge the credibility or reliability of MacIntyre's evidence that is relevant to this application for a summary trial. The evidence that MacIntyre relied upon to advance his counterclaim and third party notices concerning the impacts of Government policies in response to the Covid-19 pandemic and the reasons why his business failed is challenged.

[131] I am also satisfied that it would not be unjust to proceed summarily based on affidavits. If this matter were to proceed as a conventional trial, it is inevitable that the bulk of the relevant evidence would be the very same documents that are before me on this summary trial application. For the same reason I do not see that discoveries would meaningfully assist in providing better evidence.

[132] The matter is not unduly complex. The amount involved, albeit significant to the parties, is an amount that would likely be exceeded by the litigation costs of a conventional trial. A summary trial now will permit a timely resolution of the issues.

[133] I am therefore satisfied that it is appropriate to proceed with the summary trial.

Has the Plaintiff Proven Default of the Loans and Guarantees

[134] I agree with the submissions of BDC that the evidence clearly establishes that MacIntyre signed the loan agreements and Guarantees, the Loans were dispersed to Big Bear, in January and February 2025 Big Bear defaulted on the Loans, and on March 27, 2025, MacIntyre was put on notice that if the payments on all the Loans

were not brought up to date by April 6, 2025, BDC would demand full repayment of all of the Loans. The evidence establishes that after payments on the Loans in December 2024, no further payments were made by Big Bear.

[135] Therefore, default on the Loans has been proven.

[136] I am also satisfied that the appropriate demands for payment have been made in compliance with the terms of the Loans and the Guarantees.

[137] The onus now shifts to the defendants to establish a defence that would relieve them of liability.

Big Bear and MacIntyre's Defences

Did BDC owe Big Bear and MacIntyre a duty of care?

[138] As stated earlier in these reasons, the defendants claim that BDC should not have provided the Loans to Big Bear because the Loans were not commercially viable. The defendants essentially claim that BDC was negligent in not ensuring the long term viability of Big Bear and the liquidity of MacIntyre before making the loan offers and approving the Guarantees.

[139] The evidence clearly establishes that MacIntyre did not have the financial resources to personally guarantee the Loans. In July 2023, MacIntyre's personal assets, based on the Statement of Personal Affairs he provided to BDC, was approximately \$60,000. When Big Bear accepted Loan 17 on July 25, 2023, for a working capital loan of \$50,000, Big Bear owed BDC \$349,000.

[140] I have carefully analysed the timing of the Loans and the postponements of principal repayments. There is a recurring pattern of Big Bear borrowing more money in anticipation of, or when, principal repayments were due. For example, principal repayments for Loans 9 and 10 started in October 2019, meaning monthly payments to BDC increased from \$1,317 per month to \$4,213 per month. Big Bear's response was to borrow another \$120,000 with principal repayments postponed to October 2020.

[141] By October 2022, Big Bear's total monthly payment to BDC had increased to close to \$9,000. By August 2022, presumably in anticipation of this increase to their monthly payments, Big Bear borrowed another \$75,000.

[142] As another example, in January 2023 principal repayments were postponed for all outstanding Loans for seven months. This meant that in February 2023 the monthly payment was now just over \$2,500. By July 2023, Big Bear's monthly payment for interest and principal on all outstanding Loans was scheduled to increase to almost \$11,000. Big Bear responded by borrowing another \$50,000 on July 26, 2023.

[143] This pattern continued in January 2024: principal repayments for most Loans were postponed for six months, reducing monthly payments to BDC to just under \$2,800. By July 2024 the monthly interest only payment was \$3,456. In August 2024 the monthly interest and principal combined payment was approximately \$11,200. Big Bear responded by borrowing another \$55,000 on September 5, 2024.

[144] Looking at this pattern or cycle, particularly in combination with Big Bear's financial statements, I am satisfied that it is clear Big Bear was postponing principal repayments then borrowing more money, because the company was in financial distress. Principal postponements followed by borrowing more money, was inevitably going to lead to precisely what happened by December 2024: monthly payments to BDC had increased to close to \$12,500, which Big Bear could not pay, and then the inevitable default on the Loans.

[145] However, while this pattern of postponement and increased borrowing tell one story, MacIntyre was telling BDC another story.

[146] In September 2021 MacIntyre advised BDC that "he was doing well" and "much better than last year". In June 2022, MacIntyre advised BDC that there was more growth on the horizon, including a "very interesting new project ... with a First Nations group". In January 2023, when Big Bear sought postponement of principal repayment for multiple loans, MacIntyre told BDC that a new business venture was

projected to earn revenues of between \$750,000 and \$1 million during the next ski season (presumably meaning late 2023 into 2024). In January 2024, MacIntyre advised BDC that he was continuing to experience “short term cash flow issues” arising from delays in contract negotiations and obtaining funds from other investors.

[147] The fact that it may have been unwise, in retrospect, for BDC to offer loans to Big Bear, and for BDC to accept MacIntyre's Guarantees, BDC never forced Big Bear to accept the loan offers and continue to borrow money. BDC was entitled to accept MacIntyre's expressions of optimism about the prospects for Big Bear.

[148] If Big Bear and MacIntyre suffered harm, it is not because BDC made loan offers, but because Big Bear and MacIntyre continued to accept these offers, and because MacIntyre's projections for Big Bear's financial success proved to be wrong.

[149] Absent a special relationship, or circumstances that give rise to a fiduciary duty, the relationship between a financial institution lender and its borrower is a purely commercial one, in which the bank owes no duty to advise its customer not to take a loan. More specifically, the mere approval of a loan by a bank does not induce the borrower to accept the loan or to provide a guarantee: *Canada Trustco Mortgage Co.* at para. 91.

[150] MacIntyre does not plead in the RTCC or the counterclaim that BDC owed either him or Big Bear a fiduciary duty. In any event, there is no evidence that BDC was given the responsibility to look out for the best interests of MacIntyre or BDC (*Baldwin* at para. 15). There is no evidence of a special relationship of trust and confidence between BDC and MacIntyre. The relationship was always one of debtor and creditor.

[151] Even if it had been properly pleaded, there is no evidence from which I could find that BDC owed a fiduciary duty to either MacIntyre or Big Bear.

[152] MacIntyre and Big Bear plead that BDC should be held to a higher standard of care and accountability because BDC is a Crown Corporation. However, the

appropriate standard of care is only relevant if BDC owed MacIntyre and Big Bear a duty of care. For the reasons stated, there is no evidence of a special relationship between BDC and Big Bear and MacIntyre, or exceptional circumstances, from which I can conclude that BDC owed a duty of care.

[153] The evidence establishes an ordinary commercial relationship between BDC, the lender, Big Bear, the borrower, and MacIntyre, the guarantor. Therefore, I find that BDC owed no duty of care to either Big Bear or MacIntyre.

Were the Loans and Guarantees Unconscionable Transactions?

[154] The doctrine of unconscionability has two elements: an inequality of bargaining power and an improvident or reckless transaction.

[155] In respect of inequality of bargaining power, I must look to the evidence to determine whether the “law’s normal assumptions about free bargaining either no longer substantially hold true or are incapable of being fairly applied.” As stated in *Uber*, at para. 67:

[67] There are no “rigid limitations” on the types of inequality that fit this description (McCamus, at p. 429). Differences in wealth, knowledge, or experience may be relevant, but inequality encompasses more than just those attributes (McInnes, at pp. 524-25). Professor McInnes describes the diversity of possible disadvantages as follows:

Equity is prepared to act on a wide variety of transactional weaknesses. Those weaknesses may be *personal* (i.e., characteristics of the claimant generally) or *circumstantial* (i.e., vulnerabilities peculiar to certain situations). The relevant disability may stem from the claimant’s “purely cognitive, deliberative or informational capabilities and opportunities”, so as to preclude “a worthwhile judgment as to what is in his best interest”. Alternatively, the disability may consist of the fact that, in the circumstances, the claimant was “a seriously volitionally impaired or desperately needy person”, and therefore was specially disadvantaged because of “the contingencies of the moment”. [Emphasis in original; footnotes omitted; p. 525.]

[156] Furthermore, inequality of bargaining can arise in situations where a party is so dependent on the other party and “vulnerable due to financial desperation, or

where there is ‘a special relationship in which trust and confidence has been reposed in the other party’”: *Uber*, at para. 70.

[157] Improvidence is assessed contextually and measured at the time the contract is formed. Where, as here, it is alleged that MacIntyre and Big Bear, were in desperate circumstances, the emphasis should be on whether the stronger party has been unduly enriched.

[158] The difficulty in this case is that MacIntyre has presented very little evidence about any discussions that occurred around the time the loan offers were made by BDC and were then accepted by MacIntyre. The evidence does show that in October 2018, MacIntyre, as president of Big Bear, completed an application for financing from BDC. The form indicates that the borrower is seeking financing for “managing cash flow after rapid increase in business, hiring key employees”. Some days later Loan 9 was offered, accepted by Big Bear, and guaranteed by MacIntyre.

[159] The evidence does not identify other applications for financing, but rather a series of offers by BDC for further financing, which throughout MacIntyre was free to accept or reject. In fact, in June 2021, MacIntyre was advised that “he was eligible for a pre-authorized working capital loan” and he was encouraged to contact BDC if he wished to discuss it. MacIntyre responded that he was surprised that he qualified given his financial statements and refused the offer, stating “I’m good for now.”

[160] The Loan offers are all standard form offers providing all the information a borrower would reasonably want to know: the amount of the loan; the amount outstanding on other loans; the interest rate and how it is calculated; the repayment terms, for example whether principal repayment is postponed; pre-payment privileges; and the nature of any security requirements. The terms of the Loans are not negotiated but rather contain standard terms which BDC offers, and MacIntyre was free to either accept or not.

[161] Likewise, the guarantees are also standard form agreements, not the product of any negotiation, which MacIntyre was again free to either accept or not.

[162] The evidence indicates that offers were made by BDC by email, which MacIntyre either accepted or rejected, as he did in June 2021. He was occasionally asked if he wanted to discuss the loan offer, but there is little, if any evidence, of what if anything was ever discussed before the Loans were accepted. Frequently, MacIntyre sent short responses. For example, before accepting Loan 11, BDC asked MacIntyre if they can make any changes to the offer, and he responded, “Looks good!”. Again, before accepting Loan 13, BDC asked MacIntyre if the offer “needs any changes”, to which he responds, “Good to go”.

[163] Before accepting Loan 14, MacIntyre told BDC that he was “doing well, much better than last year.” He then asked for information about prepayment penalties on other outstanding Loans. In June 2022 MacIntyre told BDC that there was more growth on the horizon and that he “will go ahead with this (Loan 15)”. When asked if BDC should authorize the Loan now, he responds “sure!”.

[164] In January 2023, when seeking postponement of principal repayments for multiple Loans, MacIntyre provided details of the reasons the business had encountered financial difficulties, contract termination by his largest client, and his plan to get the business back on track, a new phase of software development and new long-term contracts. Postponement was approved.

[165] In July 2023, in response to an offer to discuss a working capital loan, MacIntyre responded “Yes that looks good! I approve”.

[166] In January 2024, MacIntyre again seeks postponement of principal repayment for multiple Loans. He identified the reasons for postponement, delays in contract negotiations and receiving funds from investors, and his plans going forward, including signing more sales contracts and consulting projects. Postponement was approved.

[167] Although, the evidence does establish that Big Bear’s finances were becoming increasingly challenging from 2020 onwards, up until January 2024, MacIntyre appeared to be confident that he could turn the business around.

Although there was some financial distress, I cannot conclude based on the evidence I have reviewed that MacIntyre was in ‘desperate circumstances’ such that he would have made any agreement with BDC. Rather, it is most plausible that MacIntyre believed, as many entrepreneurs do, that with the right financial support Big Bear would ultimately succeed.

[168] Invariably, BDC would offer to discuss the loan offers, occasionally MacIntyre would ask some questions, but frequently he would accept the loan as proposed.

[169] Apart from the structural inequality that is inherent in the relationship between a lender and a borrower, one party has money, the other party needs money, it cannot be said that MacIntyre could not adequately protect his interests, was so desperate that he would agree to anything or so disadvantaged that he did not freely enter into or negotiate the loan agreements.

[170] The evidence shows that MacIntyre was a sophisticated businessman. He had a long term relationship with BDC and was familiar with the terms of his loans. For example, he knew how to apply to postpone principal repayments. He knew to ask about the conditions governing loan prepayment. He was also assisted by professional accountants and had an ongoing relationship with another chartered bank.

[171] Finally, there is no evidence that leads me to conclude any of the Loans were improvident bargains. MacIntyre had years of experience dealing with BDC. The terms of the Loans, including the interest rates and amortization periods, were all commercially reasonable. MacIntyre continued to borrow money because he believed that Big Bear’s success was ‘just around the corner’.

[172] There is no doubt that as the years progressed from 2019 onwards, Big Bear’s financial health declined markedly. But like many businesspeople, MacIntyre presented detailed information to BDC about how he was going to turn the business around. Ultimately, he was unable to turn the business around, while also meeting the obligations he had assumed when he signed the loan agreements and the

Guarantees. The fact his business failed, and he defaulted on his Loans, does not mean the Loans were improvident bargains for Big Bear or MacIntyre at the time the Loans were accepted and guaranteed.

[173] Improvidence is assessed or measured at the time the contract was formed. While the evidence certainly supports the conclusion that when Loans 17 and 18 were secured, Big Bear was considerably closer to failing than succeeding, had the investments and contracts that MacIntyre wrote about in his principal postponement request of January 2024 been forthcoming, Big Bear may well have succeeded. The fact that the Loans were an increasingly desperate attempt at ensuring the success of Big Bear, does not mean they were improvident bargains at the time the loan agreements were signed.

[174] In conclusion, the evidence is substantially short of supporting a finding that the Loans were unconscionable transactions.

Promissory Estoppel

[175] Although not pleaded, MacIntyre suggests in his submissions and in his request to adjourn the summary trial to obtain discovery evidence, that BDC made a promise about ‘working out’ or ‘resolving the debt’ and that he relied on this promise, somehow, to his detriment.

[176] As discussed earlier in these reasons the evidence of MacIntyre and Spence of what was discussed on April 4, 2025 about how to manage the debt is inconsistent: MacIntyre suggests there was an agreement to ‘resolve the debt’; Spence has no memory of that and doubts it is accurate because MacIntyre had already said that neither he nor Big Bear could pay the debt.

[177] Even were I to accept MacIntyre’s evidence of what was discussed on April 4, it does not come close to establishing a ‘promise’ or ‘representation’ that is clear and unambiguous. There is also no evidence about if or how MacIntyre relied upon the promise or representation to his detriment.

[178] The elements of any variant of estoppel have not been established by the evidence.

Conclusion

[179] I am satisfied that I can find the facts necessary to resolve the issues raised on this summary trial and that it would not be unjust to do so.

[180] I am satisfied that the plaintiff, BDC, has proven its debt claim as against Big Bear. In addition, I am satisfied that BDC has proven that MacIntyre is personally liable for that debt pursuant to his personal Guarantees. BDC is therefore entitled to judgment against the defendants, Big Bear and MacIntyre, jointly and severally in the amount of \$318,174.43 plus interest pursuant to the terms of each Loan, being BDC's Floating Base Rate in effect from time to time, plus:

3.25% for Loan 9;

1.00% for Loan 10;

2.28% for Loan 11;

2.00% for Loan 13;

0.27% for Loan 14;

0.00% for Loan 15;

0.00% for Loan 16;

3.33% for Loan 17; and

3.261% for Loan 18;

[181] All interest to be calculated and compounded monthly, from and including May 16, 2025, to the date of payment.

[182] Given my conclusions in respect of BDC's claim on this summary trial, the counterclaim must be dismissed.

[183] BDC seeks an order for costs and legal fees, on a solicitor-client basis, pursuant to the terms of the Loans and Guarantees or in the alternative costs to be determined by the Court. I have not heard submissions from either BDC or MacIntyre on the appropriate order for costs. However, given the success of BDC on this summary trial application, and the clear language of the loan agreements and Guarantees, I am inclined to make the order as requested by the plaintiff. However, given that MacIntyre is self-represented and has not had an opportunity to address costs, he will be permitted to set down through the registry a hearing for one hour before me to address costs only.

"The Honourable Justice Fowler"