IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Brink v. Xos Services (Canada), Inc.,* 2025 BCSC 2002

Date: 20251010
Docket: S255937
Registry: New Westminster

Between:

Kim Brink

Appellant

And

Xos Services (Canada), Inc., EMV Automotive USA Inc., and Xos Inc.

Respondents

Before: The Honourable Justice Dion

On appeal from: An order of the Supreme Court of British Columbia, dated April 8, 2025 (*Brink v. Xos Services (Canada), Inc.,* 2025 BCSC 658, S255937).

Reasons for Judgment

In Chambers

Counsel for the Appellant:	J.L. Koschinsky
Counsel for the Respondents:	C.A. Hamill
Place and Date of Hearing:	New Westminster, B.C. August 6, 2025
Further Written Submissions of the Appellant:	September 12, 2025
Further Written Submissions of the Respondents:	September 12, 2025
Place and Date of Judgment:	New Westminster, B.C. October 10, 2025

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Introduction

[1] The Appellant, Kim Brink (“Ms. Brink”), appeals from a decision of an Associate Judge who dismissed her application for summary judgment of a settlement agreement in relation to her prior employment with the Respondents. The Associate Judge found that no enforceable settlement agreement had been reached by the parties.

Background

[2] There is no dispute as to the facts. Ms. Brink is the former Chief Revenue Officer of the respondents, Xos Services Canada. Inc. (formerly Electrameccanica Vehicles Corp.) and EMV Automotive USA Inc. (“Xos” or the “Respondents”). She commenced her employment with the Respondents in 2022 and ceased her employment with them on April 24, 2024. The parties entered arbitration on July 17, 2024. Thereafter, Ms. Brink and the Respondents entered settlement discussions.

[3] Ms. Brink says a settlement agreement was reached.

[4] The Respondents say that Ms. Brink made a counteroffer which was not accepted. Therefore, no settlement agreement was reached.

[5] The amount of money at issue is considerable.

[6] On August 5, 2024, the Respondent's counsel sent the following to Ms. Brink's legal counsel:

> a) EMV will pay Ms. Brink a lump sum of $441,667 USD, less applicable deductions;
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> b) EMV will pay Ms. Brink a lump sum of $10,768 USD in lieu of continuation of benefits for a period of 12 months; and
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> c) Ms. Brink will execute a form of release acceptable to EMV, which will include confidentiality and non-disparagement provisions.

[7] The offer was open until September 13, 2024, at 4:00 pm, at which time it would be immediately revoked.

[8] Ms. Brink's counsel responded on September 3, 2024, as follows:

> We have instructions to accept your clients offer provided that the:
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> - form of release is mutually acceptable (would you be able to provide us with a draft for review?); and
> - payments are made in a tax effective manner. In this regard, Ms. Brink requests that amount TBD be paid directly as legal (we can provide an invoice without narrative) and the balance paid as a 1099 (no withholdings at source).
>
> Please let us know if this is acceptable to your client or if you have any questions or would like to discuss.

[9] A "1099" refers to a tax form in the United States which is used to report various kinds of non-employment income. The Respondents submit that it often refers to payments made to independent contractors which are not subject to employment source deductions, such as taxes. They further submit there was no basis upon which to pay the $441,667, which they refer to as the severance payment, as a 1099, since Ms. Brink was an employee, not a contractor.

[10] In response, Respondent's counsel replied on September 5, 2024, and advised Ms. Brink's counsel that:

> We are confirming the payment details with our client and will get back to you once we have instructions. We will also prepare a draft release for your review.

[11] Ms. Brink's counsel made repeated follow up efforts about the draft release for review. On September 26, 2024, counsel for Xos called Ms. Brink's counsel on the telephone to advise that Xos was experiencing cash flow issues and could no longer make the terms of settlement agreement work.

[12] On November 15, 2024, Ms. Brink's counsel forwarded a hyperlink to Respondents' counsel, which title suggested Xos's financial situation improved for the better, and they asked for a response.

[13] On November 21, 2024, Xos' counsel advised Ms. Brink's counsel that:

> We finally heard back from our client and were instructed by them to advise as follows:
>
> - The Company is still in a precarious financial position. Approximately 50% of the employees were let go in October 2024, and cash and cash equivalents are now below the $9.2M reported on the Q3 earnings call. Production volumes for Q4 have been reduced for cash management reasons. The Company is a going concerns, (sic) but has limited cash which is it (sic) conservatively managing.
> - Notwithstanding the Xos' initial offer, our instructions are now to offer to Ms. Brink $140,000, on substantially the same terms and conditions as previously presented (release, confidentiality, non-disparagement, etc).
> - We are instructed to advise that Xos is unable to consider other offers due to its current cash position.

The Application Below

[14] On November 28, 2024, Ms. Brink filed the Notice of Civil Claim. On January 15, 2025, she filed an application for summary judgment pursuant to Rule 9-6 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009. The summary judgment application was heard on February 28, 2025 by the Associate Judge.

[15] The Associate Judge determined that the tax treatment of the payment of the settlement funds was a fundamental term that Xos had not agreed to, therefore, no settlement had been reached between the parties. The order of the Associate Judge, indexed at 2025 BCSC 658 (the "Decision"), was issued on April 8, 2015.

Issue on Appeal

[16] The only issue I must decide is whether the Associate Judge erred in law and/or principle in determining that the settlement agreement was not enforceable because the tax issue, found to be an essential term, had not been determined.

Position of the Parties

[17] The Respondents say that there was never a binding agreement because Ms. Brink made a counteroffer with respect to the tax treatment which they never accepted.

[18] Ms. Brink says that the essential terms of the settlement agreement had been agreed to and that at no time prior to their Response to Civil Claim did Xos take any issue with the proposed tax treatment or suggest that the request for tax favourable treatment amounted to a counteroffer.

Discussion

Standard of Review

[19] The parties submit that the standard of review is correctness as the decision below finally disposed of the matter in dispute. I agree that some questions, namely a question of law, a final order or a ruling that raises questions vital to the final issue in the case, are reviewed by way of a rehearing on the merits, in which case the judge can substitute its own decision for that of the Associate Judge. No deference is owed to the lower courts' decision. See *NGC Management Ltd v. Lengara Ventures Inc.,* 2019 BCSC 273 at para. 32 and *Ralph's Auto Supply (B.C.) Ltd v. Ken Ransford Holding Ltd.,* 2011 BCSC 999 at para. 7

Did the Associate Judge Err in Deciding There Was No Enforceable Settlement Agreement Because the Tax Deduction Issue Had Not Been Resolved?

I. Legal Framework

[20] The enforcement of settlement offers in this province has been guided by the leading decision of our Court of Appeal in *Fieguth v. Acklands Ltd*., 1989 CanLII 2744 (BC CA) [*Fieguth*]. As in the case at bar, *Fieguth* involved a

terminated employee and the parties' legal counsel agreed on an amount for settlement of the plaintiff's claim for wrongful dismissal.

[21] In *Fieguth*, Defendant's counsel sent plaintiff's counsel a cheque for the settlement amount less the tax deductions, and a form of release to be executed by the former employee. The plaintiff objected to the tax deductions but did not complain about the release. The employee filed an action for wrongful dismissal and damages were awarded at trial on the finding that there was no binding settlement having been reached because there was no agreement on the deduction of taxes.

[22] The Court of Appeal, in upholding the settlement, made a number of key findings, which the Appellant summarizes at para. 16 of their written submissions, as follows:

> a. The first question is whether the parties had agreed on the essential terms of the settlement;
> b. Where the settlement involves cash – the essential term is the amount agreed to be paid;
> c. In terms of the release, a settlement implies that there is a promise to furnish a release;
> d. Discussions around the terms of the release will not rescind the settlement agreement;
> e. On the issue of withholding of taxes, in the absence of an agreement to not withhold taxes, taxes would have to be withheld; and
> f. Subsequent disputes within the framework of a settlement should be resolved by the court or common sense.

[23] The principles set out in *Fieguth* are often cited with approval including by the Saskatchewan Court of Appeal when they had occasion to consider the same issue in *Graham Construction and Engineering Inc. v. Great Sandhills Terminal Marketing Centre Ltd*., 2008 SKCA 16 [*Graham Construction*].

[24] Though a construction case, *Graham Construction* provides helpful guidance on the development of the law since *Fieguth*. The issue in *Graham Construction* was whether the parties had agreed to the essential terms of a settlement. The Court determined that the formulation of documentation was an issue that flowed from the settlement relating solely to the performance of the settlement - not whether a settlement had been reached. The fact that the board of directors were to approve the terms of a release (but had not done so) did not change the underlying terms of settlement: at paras. 41 to 44

[25] Ms. Brink argues therefore, that *Graham Construction* stands for the proposition that once essential terms of a settlement have been reached, any dispute about performance of it should be resolved by the parties. If they are unable to resolve the performance issue, they can resort to the courts, however that does not negate the fact that a settlement had been reached.

[26] Ms. Brink says the dollar amount was reached. The question of how the payment would be made, is ancillary to the actual settlement. She made a request – the how – whether the payment could be made by way of a 1099 instrument. She made no demand about how the funds could be paid, including no demand that the funds be paid net of withholding tax. According to Ms. Brink, there are a multitude of ways to manage tax issues in an employment fund. She suggested an option which the Respondent never said they could not do.

[27] The Respondents rely on *Lacroix v. Nanaimo Regional General Hospital Society*, 2000 Carswell BC 680 [*Lacroix*], to argue that tax treatment may be a fundamental term of a wrongful dismissal settlement. In *Lacroix*, the plaintiff alleged that an oral settlement agreement had been formed and that the defendants agreed to pay her the funds without tax withholdings. The Court found there was no agreement; the disadvantageous tax treatment of the payment to the plaintiff was a fundamental term that the parties had not finally negotiated: at paras. 1, 9, 21 and 31.

[28] The Respondent further says that the employer in *Lacroix* faced the same concerns as Xos in the case at bar, which resulted in the Court's conclusion that the tax treatment of the settlement was a fundamental term. In both cases, the employer's request would, at least in the short term, have the effect of reducing the tax payment to the taxing authority and would "expose the employer to liability and penalty." The Respondents also argue that Ms. Brink did not simply seek a tax-favourable structure; s*he specifically requested a 1099 payment*, which, like the treatment requested in *Lacroix*, would have prevented source deductions altogether. On this basis, the Respondents submit that *Lacroix* demonstrates that considering tax treatment to be an issue of implementation rather than a fundamental term of the settlement would be contrary to the surrounding commercial context: paras. 18-21.

[29] The Appellant says that the facts in *Lacroix* are patently different, and it is readily distinguishable. In *Lacroix*, the parties engaged in oral settlement discussions that were subject to approval by the hospital board. No actual agreement was reached between the parties. The Appellant further argues that while there was a discussion around the amount to be paid to the plaintiff, it was clear that the plaintiff wanted the funds to be paid to her net of taxes while the defendant was concerned about the tax liability associated with not withholding taxes. This, Ms. Brink argues, is not the same as the present case because the parties did reach a settlement agreement and there was no demand that the settlement funds be paid net of taxes – just a *request* that in implementing the terms of the settlement that they be paid in a tax favourable manner with a suggestion for how that could be accomplished. She further argues that she never demanded that the settlement funds be paid net of taxes nor was that ever a condition of the settlement agreement.

II. Analysis and Conclusion

[30] Turning to the first question *Fieguth,* whether a contract was reached at all. In answering this question, it is necessary to determine if all essential terms have been agreed upon. In my view, the parties reached the essential terms of the contract. After arbitration, the Respondents offered to pay Ms. Brink a global settlement amount of USD$452,435 which included benefits. She accepted that offer. A release was forthcoming from the Respondents.

[31] Both parties agree that Ms. Brink made a request to use a 1099 payment instrument. Ms. Brink says she made a request not a demand. In the Respondent's written statement of argument, at para. 25, they say that Ms. Brink "simply did not seek a tax-favourable structure; she specifically requested a 1099 payment." That, they submit, would have prevented source deductions altogether, like the situation in *Lacroix*.

[32] The Respondents submit that the language used by the Appellant in accepting the monetary amount, followed by the words "provided that the", amounts to a counteroffer. While these words were not necessary and have caused confusion, I do not agree they, and what follows those words amount to a counteroffer.

[33] The words “provided that the” come before,

- form of release is mutually acceptable (would you be able to provide us with a draft for review?); and
- and payments are made in a tax effective manner. In this regard, Ms. Brink requests that amount TBD be paid directly as legal fees (we can provide an invoice without narratives) and that balance paid as a 1099 (no withholding at source).

[34] While I agree that Ms. Brink asked that the “balance be paid out as a 1099 (no withholding at source)”, she also requested the payment amount to be determined be paid as legal fees as well. Ms. Brink asked whether the two requests were acceptable to Xos, if there were any questions or whether they would like to discuss.

[35] Two days later, on September 5, 2025, Respondents’ counsel advised Ms. Brink’s counsel that they were confirming *payment details* and would get back to them once they had instructions. The Respondents also agreed to prepare a draft release for Ms. Brink’s review. [Emphasis added.]

[36] In my view, the Respondents’ counsel confirming *payment details* can only be read to mean how the payment would be made. The essential term, the settlement amount, had already been agreed to. In the same correspondence, the Respondents agreed to furnish a draft release which is implied once a settlement is reached.

[37] There is no contrary evidence that the parties were not in full agreement on September 3, 2024, that Ms. Brink would be paid USD$452,435, that the details as to the payment were being sought and that a release would be forthcoming from the Respondents.

[38] Therefore, the answer to whether there was agreement by the parties on the essential terms – is yes, the parties were in agreement that Ms. Brink would be paid a global amount of USD$452,435 and a draft release was forthcoming.

[39] After September 5, 2024, Ms. Brink continually followed up about the release. It was not until September 26, 2024, that the Respondents took the

position that cash flow issues meant they could no longer make the terms of the settlement agreement work.

[40] The Respondents argue that the Appellant's argument that they could not afford to pay the settlement amount offered on August 26, 2024 is irrelevant to whether there was a binding agreement. They say, at para. 28 of their written statement of argument, that:

> Ms. Brink argues that Xos cannot afford to pay the Severance Payment it offered on August 26, 2024. These allegations are irrelevant to whether there was a binding settlement agreement. The conditional language used in the Counteroffer, the subsequent November Offer, the logical surrounding context, and the applicable law all demonstrate the contrary.

[41] The reference to the "subsequent November Offer" is the correspondence from November 21, 2024, wherein the Respondents' counsel wrote to Ms. Brink's counsel, and said, among other things,

- Notwithstanding the Xos' initial offer, our instructions are now to offer to Ms. Brink $140,000, on substantially the same terms and conditions as previously presented (release, confidentiality, non-disparagement, etc).
- We are instructed to advise that Xos is unable to consider other offers due to its current cash position.

[42] Between confirming that they were seeking instructions on "payment details" and the November Offer, there was no communication from the Respondents that they were ever of the view that the acceptance to the global dollar amount and a request for a tax favourable treatment by Ms. Brink on September 3, 2024, amounted to a counteroffer until they filed their Response to Civil Claim.

[43] I am satisfied the essential terms of the settlement agreement were reached – the dollar amount to be paid and that a release in favour of Xos would be provided. The only issue that remained after September 5, 2024 was how the terms would be implemented, that is, how the funds would be allocated.

[44] I agree with the Appellant that *Lacroix* is distinguishable on the basis that it was an oral agreement that had to be confirmed by the hospital board and it had not been. It does not apply to this case.

[45] This is where I respectfully find that the Associate Judge fell into error when she found the tax issue was a fundament term of the settlement. She determined, at para. 18 of the Decision, that:

> [18] In my view, the plaintiff has not met her burden of proving that the parties reached a settlement agreement. Considering *Feiguth* and *Graham Construction*, I take the plaintiff's requirement of a mutually acceptable form of release to be an element of performance rather than an essential term in the formation of an agreement. However, the tax treatment of the settlement payment was a condition of fundamental importance to both parties. As an employee, the plaintiff was typically taxed at a rate of around 32% which, if applicable to the settlement funds, would result in a tax deduction of up to $143,300. The plaintiff sought the full settlement amount with no source deductions. The defendants offered to pay the settlement amount less applicable deductions, to avoid any negative implications for them. This is a significant gap that cannot be overlooked or resolved by resorting to common practice, as was discussed in *Fieguth*.

[46] The Respondent's offer on August 5, 2024, of "a lump sum of $441,667USD, less applicable deductions", was made without any specific reference to what those applicable deductions would be. Ms. Brink accepted the settlement amount, and requested the payments be made in a tax effective manner, followed by suggestions of how that could be done. Her suggestion of how to achieve payment in the most cost-effective manner included by way of direct payment of legal fees. Whichever approach is used to achieve tax cost effectiveness, does not affect the settlement dollar amount, offered and accepted.

[47] Both parties were clearly of the view that deductions and/or taxes had to be dealt with. Neither party were firm nor made any demand of what that would look like. Tax treatment is an implementation issue, not an essential term. It cannot be said that parties, in every settlement agreement, must come to agreement on final and specific tax treatment in each case in order to reach a binding agreement on a settlement amount.

[48] There was no counteroffer by Ms. Brink. She accepted the dollar amount. She requested a draft release. She made suggestions about how she could benefit from a tax effective payout. Respondents' counsel sought to confirm payment details and offered to send a draft release. The Respondents did not raise the tax issue at all, let alone take the position that in the absence of agreement not to withhold the tax, they would withhold it, which they could have done. Instead, they said cash flow issues prevented them from meeting the terms

of the settlement, offering her about one-third of what they initially offered, on a take-it or leave-it basis.

[49] In this case, we have two parties, represented by counsel, who after arbitration, came to a comprehensive and binding settlement agreement on the monetary amount.

Contract Formation Generally

[50] I asked counsel for their views on two cases that rely on *Fieguth*: *Lacroix v. Loewen*, 2010 BCCA 224 [*Loewen*] and *Kuo v. Kuo*, 2017 BCCA 245 [*Kuo*]. I agree with the Respondents that the issues in these two cases are in relation to whether the conduct of parties after forming a settlement agreement amounted to repudiation of the respective settlement agreement, whereas the issue on appeal is whether a settlement agreement was ever formed.

[51] While it is not necessary that I refer to *Loewen* and *Kuo* since I have already determined above that there is an enforceable settlement agreement, I find it useful to refer to the comments of our Court of Appeal on the broader issue of contract formation generally.

[52] In *Loewen*, the issue was whether a settlement of a claim for damages suffered in a motor vehicle accident included both a tort claim and a claim for benefits under Part 7 of the *Insurance (Vehicle) Regulation*, B.C. Reg. 447/83, under the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231. The chambers judge held there was a settlement of the tort claim which ICBC repudiated by insisting the settlement included the Part 7 claims.

[53] Chief Justice Finch, writing for the majority, allowed the appeal, finding there was an enforceable settlement of both tort and Part 7 claims. He began his discussion of the principles of contract formation:

> [35] The principles of contract formation are set out in Fridman, The Law of Contract (Toronto: Thomson Carswell, 2006) at 15:
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> > … the test of agreement for legal purposes is whether parties have indicated to the outside world, in the form of the objective reasonable bystander, there intention to contract and the terms of such contract.
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> > The law is concerned not with the parties' intentions but with their manifested intentions. It is not what an individual party believed or understood was the meaning of what the other party said or did that is the criterion of agreement; it is whether a reasonable man in the

> situation of that party would have believed and or understood that the other party was consenting to the identical terms…:
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> the parties will be found to have reached a meeting of the minds, in other words be ad idem, where it is clear to the objective reasonable bystander, in light of all the material facts, that the parties intended to contract and the essential terms of that contract can be determined with a reasonable degree of certainty.
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> [Emphasis in original.]
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> [36] The correct interpretation in such a case is to analyze the evidence to determine whether it is clear to the objective reasonable bystander, in light of all the material facts, that the parties intended to contract and whether the essential terms of that contract can be determined with a reasonable degree of certainty. Not only must there be an offer and acceptance, but the evidence must be capable of demonstrating that there is an agreement *on all essential* terms. In this case, a correct analysis would have led the judge to consider the evidence and determine whether it showed, objectively, that the parties intended a tort settlement, or a tort and Part 7 settlement, or whether the evidence was incapable of supporting either conclusion. To answer the first *Fieguth* question, the trial judge had to be able to determine the *entire* scope of the settlement.

[54] In light of *Loewen*, it would be clear to the objective reasonable bystander, in light of all the material facts, that the parties intended to contract and that the essential terms – the dollar amount and the release - of the contract were determined with a reasonable degree of certainty. There is no question about that here. There was an offer on August 5, 2024. There was an acceptance on September 3, 2024. On September 5, 2024, the payment details were being confirmed, and a draft release was being prepared.

[55] In *Kuo*, our Court of Appeal applied *Feiguth* in the context of tax treatment in the settlement of an estate matter where the tax considerations did not form part of the terms of settlement. The parties reached an agreement on the transfer of assets. The Plaintiff included a section in a release that the parties would be responsible for any tax liabilities with respect to the transfer of property. The defendants objected, arguing that the language regarding the tax liabilities in the release was a repudiation of the settlement agreement.

[56] The Court of Appeal found a settlement agreement to be valid despite the parties having not agreed to the tax treatment. More specifically, the defendant, did not repudiate the settlement agreement by including in a draft release a term imposing capital gains tax consequences on the other parties, followed by months of silence.

[57] Writing for the Court, Madam Justice Dickson, summarized the applicable legal framework,

> [37] There is a strong public interest in favour of resolving lawsuits by agreement. As Abella J. observed in *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37 at para. 11, "[s]ettlements allow parties to reach a mutually acceptable resolution to their dispute without prolonging the personal and public expense and time involved in litigation". As a result, the policy of the courts is to promote settlement and to enforce settlement agreements: *Catanzaro v. Kellogg's Canada Inc.*, 2015 ONCA 779. This judicial policy contributes to the effective administration of justice: *Kelvin Energy Ltd. v. Lee*, [1992] 3 S.C.R. 235, at 259, citing *Sparling v. Southam Inc.* (1988), 66 O.R. (2d) 225 (Ont. H.C.).
>
> [38] When a dispute arises, the first question is whether the parties have agreed on all essential terms of the purported settlement: *Fieguth* at 70. The usual principles of contract formation apply. The court must analyse the evidence to determine whether, in all the circumstances, it is clear to the objective, reasonable bystander that the parties intended to contract, and whether the essential terms of that contract can be determined with a reasonable degree of certainty: *Lacroix v. Loewen*, 2010 BCCA 224 at paras. 35-36. If they have, unless otherwise agreed, an obligation to furnish a release is implied: *Fieguth* at 69-70.
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> [39] After a settlement agreement has been reached, the next stage is its completion: *Fieguth* at 70. Unless the agreement is terminated, the parties must fulfill their obligations, express and implied. Termination by repudiation occurs when a party evinces an intention not to be bound by the agreement and the innocent party elects to accept the repudiation: *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 at para. 40. A fundamental breach of a primary obligation may also constitute a repudiation because it deprives the other party of substantially the whole mutually intended benefit of the agreement and thus amounts to a refusal to perform: *Mantar* at para. 11; *Doman Forest Products Ltd. v. GMAC Commercial Credit Corp. - Canada*, 2007 BCCA 88 at para. 109.
>
> [40 An intention not to be bound by an agreement may be evinced by words or conduct: *Guarantee Co.* at para. 40. Depending on the circumstances, this may include silence in response to a request for performance when and after the request is made. In some circumstances, a repudiation may be ongoing, which, unless the agreement is affirmed, provides the innocent party with a continuing right to accept it. However, regardless of how it manifests, the refusal to perform must be clear and unequivocal to amount to a repudiation: *Dosanjh v. Liang*, 2015 BCCA 18 at paras. 43-44; *Doman Forest Products* at paras. 108-109.
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> [41] It is rare for subsequent conduct to amount to a repudiation of a settlement agreement: *Fieguth* at 72. For example, while insisting upon an excessive release may evidence an unwillingness to be bound, the mere proffer of such a release does not necessarily have this effect. On the contrary, as Chief Justice McEachern explained in *Fieguth* at 70, 72:
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> > … [Unless otherwise agreed] either party is entitled to submit whatever releases or other documentation he thinks appropriate.

> Ordinary business and professional practice cannot be equated to a game of checkers where a player is conclusively presumed to have made his move the moment he removes his hand from the piece. One can tender whatever documents he thinks appropriate without rescinding the settlement agreement. If such documents are accepted and executed and returned then the contract, which has been executory, becomes executed. If the documents are not accepted then there must be further discussion but neither party is released or discharged unless the other party has demonstrated an unwillingness to be bound by the agreement by insisting upon terms or conditions which have not been agreed upon or are not reasonably implied in these circumstances.
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> ***
>
> It should not be thought that every disagreement over documentation consequent upon a settlement, even if insisted upon, amounts to a repudiation of a settlement. Many such settlements are very complicated, such as structured settlements, and the deal is usually struck before the documentation can be completed. In such cases the settlement will be binding if there is agreement on the essential terms. When disputes arise in this connection the question will seldom be one of repudiation as the test cited above is a strict one … It will be rare for conduct subsequent to a settlement agreement to amount to repudiation.

[58] The Respondents evinced their intention not to be bound by the settlement agreement on September 26, 2024, when they said they could not afford to pay the settlement amount. The innocent party, Ms. Brink, did not elect to accept that repudiation. There is no termination of the settlement agreement by repudiation.

Aggravated and Punitive Damages

[59] Ms. Brink seeks an unspecified amount in aggravated and punitive damages.

[60] Punitive damages are warranted when there has been egregious conduct by a defendant that goes beyond negligent acts or omissions. The purpose of punitive damages is to punish a defendant for their behaviour that caused the loss to a plaintiff. Punitive damages may also serve as a deterrent to the conduct so as to attempt to prevent it from occurring in the future: *Puhalsky v. Barrows*, 2025 BCSC 1586, para. 111.

[61] When the Court's sense of decency is offended by a defendant that engaged in behaviour that is oppressive, high-handed, and malicious, punitive damages may be awarded to act as a future deterrent against the defendant and

anyone else who may wish to act in a similar manner: *Puhalsky*, at para. 12, relying on *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at para. 196, 1995 CanLII 59 (S.C.C.). See also: *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 at paras. 94 and 116.

[62] In my view, the Respondent's treatment of Ms. Brink, a senior executive manager, was oppressive, high-handed and malicious. In good faith, she resolved employment claims with her former employer for what is, by any measure, a significant settlement amount. Both parties were represented by very good legal counsel.

[63] The Respondents acted unilaterally in their attempt to repudiate the settlement agreement in offering three-quarters less than they had agreed to. Their conduct required Ms. Brink to bring this action, where they raised, what I have determined to be meritless legal defence.

[64] In these circumstances, I award Ms. Brink punitive damages in the amount of CDN$5,000.

Special Costs

[65] Ms. Brink seeks special costs. She submits that where a party refuses to comply with the terms of a settlement agreement reached, an award of special costs is justified: *Hartjes v. Hietbrink*, 2005 BCSC 1572.

[66] In *Hartjes*, the judge was satisfied that the terms of the settlement agreement had always been clear and that the plaintiffs had negotiated in good faith. The judge also found that the position taken by the defendant was without merit and her refusal was unreasonable and reprehensible when she failed to complete the agreement as the terms were clear and unambiguous.

[67] Here, I find that the settlement was reached, in good faith, and that the position taken by the Respondent was without merit. Their refusal to complete the settlement agreement was based not on an unaccepted counteroffer. It was based on their view, post-acceptance by Ms. Brink of the essential terms, that they could not afford to pay the settlement amount. There was nothing unclear in the settlement agreement with Ms. Brink.

[68] Our Court of Appeal has held that it is an error in principle to assess special costs on a rough-and-ready basis and in the absence of evidence of the actual legal costs incurred, such as a draft Bill of Costs: see *Herbison v. Canada (Attorney General),* 2014 BCCA 461, at paras. 35-38. I have no evidence of the actual legal costs incurred. Therefore, if the parties are unable to come to an agreement on the amount of special costs, they may set a hearing down to have those costs assessed.

Conclusion

[69] Based on the forgoing, I grant the appeal. The decision the Associate Judge issued on April 8, 2025 is set aside.

Orders

[70] The following orders are made,

1. Judgement in the amount of USD$452,435 to the Appellant.

2. Punitive damages against the respondents in the amount of CDN$5,000 to the Appellant.

3. If the parties are unable to agree, they may set down a hearing to assess special costs.

4. Pre-judgment interest is ordered from September 3, 2024, to the date of this judgement pursuant to the *Court Order Interest Act*, RSBC 1996, c. 79.

"Dion J."