THE DEVIL IS IN THE DETAILS… EXCEPT WHEN IT COMES TO THE CONDITIONS FOR HAVING A BINDING AGREEMENT

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By offering and accepting the terms of an agreement without seeing the final draft agreement, you might well be sealing the deal without keeping control over the details. The Federal Court of Canada recently reminded both deal-makers and litigants of the dangers of negotiating a settlement agreement without vigilance. The Court provided a clear overview of key elements in determining whether or not an agreement has been reached, which are crucial to avoid the precipitous conclusion of an agreement before it is intended.

FACTS

In January 2013, Maoz Betser-Zilevitch ("**Betser**") filed an action against Nexen Inc. and CNOOC Canada Inc. (collectively, "**Nexen**") for infringement of its Canadian patent which covered equipment used to inject steam and extract oil from oil sands†. The parties negotiated a settlement agreement over eleven months‡. On February 2017, Nexen finally accepted one of Betser's offers "in principle". Betser then sent a letter to the Federal Court advising that a "settlement had been reached, subject to formalization, review and execution by the parties of a formal settlement agreement"§.

Unfortunately, the parties never agreed upon a formal written settlement agreement after the exchange of several drafts. In June 2017, Betser advised Nexen that there was no agreement, that all prior offers were withdrawn, and that all offers made by Nexen were refused. This led to Nexen filing a motion for a declaration that a settlement had been reached and to identify the terms of the settlement**.

DECISION

The Federal Court determined that a binding settlement agreement had, in fact, been concluded. The Court reminded the considerations in C*ommon Law* relating to finding a binding settlement agreement as set out in *Apotex Inc. v. Allergan, Inc.*††: there must be (1) an objective, mutual intention to create legal relations, (2) consideration flowing in return for a promise‡‡, (3) objectively and sufficiently certain settlement terms and (4) a matching offer and acceptance on all terms essential to the agreement. In applying this test, the Court decided that "an honest, sensible

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† *Maoz Betser-Zilevitch v Nexen Inc. and CNOOC Canada Inc. 2018 FC 735, para 3-4.*
‡ *Id., para. 7.*
§ *Id., para. 8.*
** *Id., para. 12.*
†† *2016 FCA 155 ("Allergan").*
‡‡ *It is important to note that consideration is a criteria in Common Law, but is not under Quebec's Civil Law.*

business person would understand that there was an intention to create legal relations and a contract in the form of a binding settlement agreement"[§§], and that ending the litigation constituted consideration.

In their attempt to prove that no settlement agreement had been reached, Betser claimed that an acceptance "in principle" does not amount to an acceptance since it was conditional upon the preparation, review and signature of a formal agreement, which would include additional terms and conditions. Nonetheless, the Court reminded the parties that "requiring additional documentation to formalize a settlement is not an impediment to finding that a written exchange constitutes a binding contract"[***]. In this case, the mere acceptance of an offer on all essential terms of a contract, even if it was solely "in principle", constituted a valid offer and acceptance, and therefore led to the conclusion that there was a valid binding agreement. The post-settlement conduct of confirming the agreement with the Federal Court by letter constituted convincing proof that an agreement was reached.

The Court also concluded that there was an agreement on all essential terms of the contract. Betser held that ongoing negotiations on various terms and conditions, notably on the extent of the negotiated licence and release, demonstrated that there was an absence of agreement on the essential terms. However, the Court decided that the offer made by Betser and accepted by Nexen was complete. The judge held that the other terms and conditions raised by Betser were either not in the offer made by Betser and agreed to by Nexen, were non-essential to the agreement or were not implied from the agreement. The Court also warned the parties that "attempting to get more than was previously agreed does not constitute evidence that there was no agreement or even disagreement at the time the settlement agreement was concluded"[†††].

When applied to the specific covenants discussed by the parties, the decision had a substantial impact on the scope of the licence and release negotiated by the parties. For example, the licence and release were considered by the Court as covering both Canadian and U.S. corresponding patents, although Betser was arguing that the U.S. patent was intended to be excluded from the agreement. On the other hand, the licence was limited to the rights to make, construct and use the patented invention. The Court ruled that the right to sell, which was not mentioned in the offer, was not included in the licence agreement granted to Nexen. Also, the Court deemed that the release applied only to claims that were asserted in the initial Betser's Statement of Claim, and not claims that were assertable, as was argued by Nexen. Theses conclusions were all drawn from the specific terms of the offer that were drafted by Betser and agreed to by Nexen. Notably, the parties never argued that the terms of the offer were the result of inattention, or that its acceptance resulted from a misreading of the terms.

AN IMPORTANT REMINDER

The Court's decision in this case reminds parties to be wary of their communications during the negotiation of their agreements. As soon as it can be objectively determined that there is an agreement on the essential terms of a contract, it could possibly be deemed to be legally binding on the parties, even if one party subjectively intends otherwise.

In order to avoid the unintended conclusion of an agreement, the Court reminded its previous comments in *Allergan*: "If a party does not want to be bound until it has agreed to all terms it

[§§] *Maoz Betser-Zilevitch v Nexen Inc. and CNOOC Canada Inc.* préc. Note 1, para. 30.
[***] *Id.*, para. 32.
[†††] *Id.*, para. 64.

subjectively considers essential to the deal, in every offer it communicates it must make that wish objectively clear"[‡‡‡]. In doing so, parties can rest assured that contracts are not prematurely concluded with the omission of important terms and conditions which could have dire consequences on all parties involved.

Further comments and negotiations between parties might follow in the next months as a Notice of Appeal of the decision of the Federal Courtwas filed on September 12, 2018. To be continued…!

[‡‡] *Prec., note 5, at para 53.*