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# Federal Court Reminds Litigants to Be Objectively Clear in Settlement Negotiations

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Justice Brown's recent decision in *Betser-Zilevitch v. Nexen Inc.*, 2018 FC 735 ("*Betser*") is a good reminder that parties may settle litigation informally and unexpectedly. The decision's key message is that if a party does not want to be bound unless and until it agrees to all terms that it *subjectively* considers to be essential to a deal, then it must make that *objectively* clear in every settlement communication.

Betser sued Nexen for infringement of a Canadian patent relating to equipment used to inject steam into and extract heavy oil from oil sands. He alleged that Nexen and the other defendants used technology to extract heavy oil at an oil sands project in Alberta that infringed his patents. Nexen counterclaimed for a declaration of invalidity and non-infringement. Betser also owned a United States patent corresponding to the Canadian patent in issue.

The parties exchanged a number of settlement proposals, and in January 2017 Betser made an offer to settle on a few basic terms:

- Betser would grant Nexen a fully paid-up license to make, construct and use the inventions in the two patents at issue.
- Betser would release the defendants from all liability with respect to the claims asserted in his Statement of Claim.
- The parties would discontinue their respective claims and counterclaims.
- Nexen would execute a confidentiality agreement in a form acceptable to Betser, to keep confidential the terms of settlement.
- There also appeared to be a payment clause, which the Court redacted from the decision.

Nexen responded to this offer by indicating that it was "prepared to agree in principle to the settlement terms [proposed]". It advised that it would prepare a draft settlement agreement incorporating those terms, "as well as other standard settlement terms", for Betser's review. Shortly thereafter, when advising the Court (with consent of Nexen) of the status of the action, Betser's counsel wrote "a settlement has been reached, subject to formalization, review and execution by the parties of a formal settlement agreement."

After exchanging several draft settlement agreements, the parties were unable to formalize the settlement. Betser took the position that there was no settlement, and "withdrew" all prior settlement offers. Nexen brought a motion to enforce the terms of settlement.

In finding the parties had indeed settled, Justice Brown quoted from the Federal Court of Appeal's decision in *Apotex Inc. v. Allergan, Inc.*, 2016 FCA 155, noting its warning that "a settlement agreement may be reached quickly without formality and, from a subjective standpoint, sometimes unexpectedly". He observed that the Court may impose a settlement where: (a) *objectively*, the parties mutually intended to create legal relations, (b) there was consideration flowing in return for a promise, (c) *objectively*, the terms of agreement were sufficiently certain, and (d) there is a matching offer and acceptance on all terms essential to the agreement.

Applying the *Allergan* decision, Justice Brown found that "an honest, sensible business person, when objectively considering the parties' conduct" would reasonably conclude that the parties intended to be bound by the offer and acceptance. He rejected Betser's argument that Nexen's "acceptance" was only "in principle", and was conditional upon the preparation, review and execution of a formal settlement agreement. This was particularly so given the almost year-long history of negotiations between the parties.

He also noted that the Court may look to the subsequent conduct of the parties to determine whether there has been an agreement on all essential terms. Here, when Betser wrote to the Court advising of the action's status he did not equivocate: using words he chose, he stated "a settlement has been reached" subject to formalization, and the Court was entitled to rely on that representation. This was convincing evidence of the intent of both parties to create legal relations in the form of a settlement agreement.

When considering whether the parties reached agreement on all essential terms, Justice Brown held that, although while negotiating the actual settlement document both parties attempted to gain additional advantage over and above the terms of settlement, this was not evidence of an absence of agreement on essential terms. The Court looked at the history of the negotiations, and at the points in dispute between the parties to determine whether they were essential to the agreement, or objectively agreed to by the parties.

To the extent that a settlement term in dispute was not essential to agreement, it should be implied if the honest and sensible business person would have agreed to include it. For example, the Court implied a release and licence for officers and directors, since companies operate through people. On the other hand, it declined to imply a right to sell under the licence. The offer included three of the four exclusive rights conferred by the *Patent Act*, but the right to sell was not. However, the Court declined to include the non-essential implied settlement terms into an order, since that would raise what would ordinarily be contractual terms into a Court order with the attendant liability of contempt proceedings for non-compliance.

Betser has appealed the decision.

While both parties in this case may have taken positions during the negotiation of the final settlement agreement that were inconsistent with the offer made by Betser, the case is a good reminder of how the Court will enforce a settlement, even where an offer is accepted "in principle", and subject to the finalization and execution of formal documentation. When negotiating a settlement, parties need to ensure that they are objectively clear in their

intentions. If a party does not want to be bound until all details of the settlement that it considers essential to the deal are finalized, it needs to make that objectively clear in its communications.