Federal Court  Cour fédérale

Date: 20201005

Docket: T-917-17

Citation: 2020 FC 983

Montreal, Quebec, October 5, 2020

PRESENT: Mr. Justice Gascon

BETWEEN:

SSE HOLDINGS, LLC and SSE IP, LLC

Plaintiffs

and

LE CHIC SHACK INC.

Defendant

PUBLIC JUDGMENT AND REASONS

I. Overview

[1] In 2017, the Plaintiffs, SSE Holdings, LLC and SSE IP, LLC [together, Shake Shack] brought an action for trademark infringement against the Defendant, Le Chic Shack Inc. [Chic Shack]. In 2019, as the matter was progressing towards trial, the parties agreed to enter into a Court-assisted mediation governed by Rules 387 to 389 of the *Federal Courts Rules*, SOR/98-106 [Rules]. A mediation session presided by Prothonotary Steele – who also acts as the case

management judge in this proceeding – took place on December 18, 2019 [Mediation Session]. Shake Shack is of the view that, at the end of the Mediation Session, the parties had an agreement to settle the action. Chic Shack disagrees and denies that any settlement was reached at the mediation or afterwards.

[2] On June 8, 2020, Shake Shack brought a motion to enforce what it argues are the terms of the alleged settlement [Motion]. In its Motion, Shake Shack seeks an order from the Court: 1) declaring that, during the Mediation Session, the parties entered into a binding transaction agreement to put an end to the present litigation; 2) that the parties prepare in good faith a formal settlement and license agreement on the basis of a term sheet dated December 20, 2019 [Term Sheet]; 3) that the Court remains seized of this matter in the event there is a disagreement on the drafting of the formal agreement; 4) vacating the dates set aside for the trial of this matter in November 2020; 5) awarding the costs of the Motion to Shake Shack; and 6) granting such further and other relief as to this Court may seem just.

[3] The issue before the Court is whether the parties had agreed to settle.

[4] The Motion proceeded before me by video conference on August 13, 2020. After hearing the submissions of the parties, I reserved judgment on the Motion. On August 20, 2020, I dismissed Shake Shack's Motion, with reasons to follow. These are my reasons for dismissing the Motion.

[5] For the reasons detailed below, Shake Shack's Motion fails for lack of supporting evidence. Further to my review of the parties' written and oral submissions and materials, I am not satisfied that Shake Shack has presented clear and convincing evidence sufficient to satisfy the Court, on a balance of probabilities, that a settlement agreement on the terms alleged by Shake Shack has been reached by the parties at the end of the Court-assisted Mediation Session. Three main evidentiary findings lead me to this conclusion. First, in a direction dated December 23, 2019, Prothonotary Steele expressly stated that the mediation was "adjourned at the request of the parties" [December 2019 Direction], and neither the parties nor the mediator took any of the steps prescribed by Rule 389 when "a settlement of all or part of a proceeding is reached" at a dispute resolution conference. Second, Shake Shack has failed to persuade me that the parties have reached an agreement on all essential elements of the transaction contemplated by them during the Mediation Session. More specifically, viewed objectively, the size of the exclusivity zone where Chic Shack could continue to use its trademark was an essential element on which there was no agreement. Third, the terms upon which Shake Shack claims that a settlement has allegedly been reached, as summarized in the Term Sheet, differ from the evidence provided by one of its own representatives contemporaneously with the end of the Mediation Session. Moreover, the Term Sheet does not conform with how the elements of the alleged transaction were later presented to Prothonotary Steele by counsel for Shake Shack in January 2020.

II. Background

A. *The parties*

[6] Shake Shack operates and licenses SHAKE SHACK restaurants in the United States and internationally, and owns assets such as the SHAKE SHACK word and design marks. SHAKE SHACK restaurants are modern day "roadside" burger stands serving premium burgers, hot dogs, crinkle-cut fries, shakes, frozen custard, beer and wine. It is not disputed that Shake Shack has been successful in the United States and internationally over the last 15 years and that SHAKE SHACK has become an iconic brand (especially with the younger generations). Despite the fact that there is still no permanent SHAKE SHACK restaurant in Canada, Shake Shack claims that its brand nonetheless quickly became known in Canada.

[7] LE CHIC SHACK is a restaurant located in Quebec City. It was founded around June 2012 by Mr. Evan Price and his sister Ms. Alexandra Lucy Price. Mr. and Ms. Price are both members of the Price family, who is involved in a number of local businesses in the Quebec City area. There is currently only one LE CHIC SHACK restaurant, located in the old part of Quebec City, in the same building as the Musée du Fort (owned by the Price family), across from the legendary Château Frontenac. LE CHIC SHACK restaurant offers premium gourmet burgers, made of high quality, locally sourced, fresh ingredients. Chic Shack has been using the trademark LE CHIC SHACK in Canada in association with restaurant services since 2012. The type of restaurant and offering of LE CHIC SHACK is similar to the SHAKE SHACK restaurants.

B. ***Procedural history***

[8] Shortly after a successful SHAKE SHACK pop-up event in Toronto in January 2017, Chic Shack sent a cease and desist letter threatening Shake Shack with litigation.

[9] In June 2017, Shake Shack responded by initiating the present proceeding. As of the date of its Statement of Claim, Shake Shack had secured its trademark registration for SHAKE SHACK whereas Chic Shack's trademark applications were still pending. Shake Shack thus alleged trademark infringement pursuant to section 20 of the *Trademarks Act*, RSC 1985, c T-13 [TMA], depreciation of goodwill pursuant to section 22 and passing off pursuant to paragraph 7(b). Chic Shack obtained its trademark registrations for LE CHIC SHACK and LE CHIC SHACK & Design in July 2017 and September 2019, respectively. As a result, Shake Shack amended its Statement of Claim to challenge the validity of these registrations.

[10] In its action, Shake Shack is seeking a declaration that the use of the trademark LE CHIC SHACK by Chic Shack depreciates the value of its SHAKE SHACK trademark and creates confusion. Shake Shack also requests that a permanent injunction be issued to prevent Chic Shack from using its trademark, as well as damages (or an accounting of profits).

[11] In defense to the Statement of Claim, Chic Shack alleges that the SHAKE SHACK brand had not achieved the level of recognition that would be required to claim prior rights as of 2012. In its defense and counter-claim, Chic Shack seeks a declaration that the registration for SHAKE SHACK based on a declaration of use filed in 2017 is invalid in view of the prior pending

applications for LE CHIC SHACK. Chic Shack also seeks a permanent injunction preventing Shake Shack from using the SHAKE SHACK marks in Canada.

[12] In sum, this is a trademark case where both parties have registered trademarks they agree are confusing when used in association with similar restaurants. The main issue on the merits will be who has prior and valid rights. For the purpose of this Motion, there is no need to review the parties' respective trademarks and allegations in any further detail.

[13] In July 2019, the Court ordered that the trial would take place in Quebec City for a duration of five (5) days, starting on November 23, 2020. In a direction issued on July 30, 2019, Prothonotary Steele established a schedule fixing the time frame for completing the pre-trial steps in the proceeding. This direction also provided that a pre-trial conference and mediation would be held in Montreal for a duration of one (1) day. Prothonotary Steele eventually confirmed, on September 10, 2019, that the mediation would be convened on December 18, 2019, specifying that the representatives of the parties to the mediation needed to have full settlement authority.

C. *The Mediation Session*

[14] On December 10 and 11, 2019, the parties exchanged and filed under seal their respective mediation briefs.

[15] On December 18, 2019, Prothonotary Steele led the Mediation Session. In attendance on behalf of Shake Shack were Mr. Ronald Palmese, Jr., Shake Shack's General Counsel and Corporate Secretary, and Mr. Michael Kark, Shake Shack's Chief Global Licensing Officer,

together with Shake Shack's counsel, Mr. Guay and Mr. Dupont. Mr. Price represented Chic Shack, and he was accompanied by Chic Shack's counsel, Mr. Lauzon and Ms. Hébert-Tremblay.

[16] In its pre-mediation brief, Shake Shack stated, under its views on mediation, that its management's position has always been that it should not have to give any money to a business that they and consumers see as a copycat, and that Shake Shack preferred to pay legal fees instead. Shake Shack was however willing to explore some form of co-existence with Chic Shack, and it entered the mediation committed to find a reasonable business solution satisfactory to both parties.

[17] In its pre-mediation brief, Chic Shack notably laid out the bases upon which it would consider a negotiated settlement. These included four distinct possible options, described as follows: 1) Shake Shack simply buys out Chic Shack at a price that reflects past investments, developed goodwill and expansion potential; 2) Chic Shack phases out the use of LE CHIC SHACK, adopts a new mark and is properly compensated; 3) Chic Shack's radius for exclusive expansion is defined and the compensation varies with the degree of the geographical limitations imposed; or 4) Shake Shack abandons all plans for an eventual Canadian expansion.

[18] There is some dispute between the parties as to what was said and done during the Mediation Session, but here is a summary of how the day unfolded.

[19] Initially, the mediation appeared to crawl along at a snail's pace, but discussions picked up around mid-day. Shake Shack made the first concrete offer, proposing: 1) to pay Chic Shack's legal fees (estimated at [redacted]) and 2) that the parties would co-exist without any restriction across

Canada, letting the free market decide how successful they are in Canada. Chic Shack's first response to Shake Shack's proposal was that: 1) it preferred to define an exclusivity zone of 50 or 100 kilometers [kms] around its existing location in Quebec City, where Shake Shack could not open any restaurants (i.e., no co-existence between Chic Shack and Shake Shack in the zone), and 2) Chic Shack was looking for financial compensation for abandoning its expansion projects elsewhere. At that point in time, however, Chic Shack did not propose any specific monetary terms.

[20] Later in the afternoon, Mr. Price suggested that the parties had made good progress with settlement discussions, and he proposed to suspend the mediation and to continue the discussions in the following weeks. Mr. Palmese expressed his frustration with Mr. Price's suggestion and asked him to make an actual proposition with a number. Following a short break, Chic Shack made the following proposal: 1) an exclusivity zone of 100 kms for Chic Shack around its existing location in Quebec City; 2) a [redacted] upfront payment to compensate Chic Shack's legal fees; and 3) a [redacted] payment for each SHAKE SHACK restaurant opened in Canada (with no limit in time or on the number of restaurants).

[21] Shake Shack came back with the following counter-offer on the monetary terms: a [redacted] lump-sum payment or a [redacted] upfront payment coupled with a [redacted] payment for each of the first 10 SHAKE SHACK restaurants opened in Canada. As part of its counter-offer, Shake Shack also proposed not to enter Quebec City for five (5) years. However, Chic Shack was unwilling to entertain any offer that included a sunset on the geographical limitations of the exclusivity zone, no matter how that zone would be defined.

[22] In order to resolve the trademark issues raised in the litigation but also in the oppositions in the Trademarks Office, Shake Shack also proposed, in general terms and as part of its counter-offer, to acquire Chic Shack's trademark rights and trade name, and to license those back exclusively to Chic Shack (with minimal control provisions), in order to allow Mr. Price and Ms. Price to continue their existing operations. According to Mr. Palmese, this aspect of the counter-offer (i.e., the structure of the future arrangement between the parties) was accepted by Mr. Price.

[23] Shake Shack claims that the parties had then reached an agreement on how the settlement transaction would be structured in terms of Shake Shack acquiring Chic Shack's trademark rights and licensing those back. The discussions continued on the financial component of the deal and the geographical limitations of the exclusivity zone. While Mr. Price again suggested that the parties should call it a day and pick up the discussions after the Christmas holidays, Mr. Palmese insisted that the parties continue their discussions as, in his words, they were getting "very close to a meeting of the minds".

[24] According to Shake Shack, the parties eventually reached an agreement on the monetary aspect of the deal (having already agreed earlier on the structure of the transaction) when Shake Shack accepted Mr. Price's latest counter-offer, namely: 1) a [redacted] upfront payment and 2) a [redacted] payment (indexed annually) for each of the first 10 SHAKE SHACK restaurants opened in Canada.

[25] Shake Shack maintains that the parties' representatives then shook hands to confirm their agreement on the financial terms as well as the structure of the deal (i.e., acquisition and license

back of Chic Shack's trademark rights within an exclusivity zone), and agreed that their counsel would follow up within 48 hours (before the holidays) to reiterate the settlement terms in writing, as well as to confirm the exact radius of the exclusivity zone. According to Mr. Palmese, the parties agreed on the principle that the exclusivity zone would be greater than just Quebec City but, its representatives not being familiar with the area, Shake Shack wanted to see the 100 kms radius on a map and confirm it with their team in New York. Mr. Price and Chic Shack disagree with this assessment of the discussions on the issue of the exclusivity zone.

[26] I pause to note that this chronology of the discussions emanates from the written testimonies filed by the parties in this Motion. At no point during the Mediation Session did either of the parties put the contents of their discussions or the proposed terms of an agreement in writing, nor did a party share any written terms of agreement with the other. Similarly, at the end of the Mediation Session, no written document was prepared and exchanged between the parties, until the Term Sheet (to which I shall return) was drafted by counsel for Shake Shack on December 20, 2019 and sent to counsel for Chic Shack.

[27] Shortly after the end of the Mediation Session, Prothonotary Steele issued her December 2019 Direction. This direction read as follows:

> The mediation commenced on December 18, 2019 is adjourned at the request of the parties.
>
> Given that the session was adjourned given time constraints, the parties are encouraged to pursue their discussions beyond the Court's process. The Court wishes to commend the parties for their efforts, and their respective counsel for their assistance, throughout the mediation. The Court remains at the parties' disposal should they wish to resume the mediation at any time.
>
> (emphasis added)

[28] Following the adjournment of the mediation, Prothonotary Steele issued a further order on December 24, 2019 regarding amendments to the schedule for the pre-trial steps and filings in the action. Similarly, on February 5, 2020, another order was issued regarding additional revisions to the timetable leading up to the trial.

[29] Further to two letters received from counsel for each party on January 20 and 21, 2020 (to which I shall also come back later), Prothonotary Steele presided a confidential case management conference on January 27, 2020 to discuss the settlement agreement claimed to have been reached at the Mediation Session by Shake Shack. No further orders or directions were however issued by Prothonotary Steele regarding the adjourned mediation, neither after this case management conference nor later in the course of the proceeding.

D. *The Rules on Court-assisted mediations*

[30] The Mediation Session was a Court-assisted dispute resolution conference organized under the Rules. Neither of the parties disputes this. Prothonotary Steele's Direction of July 30, 2019 leaves no doubt on this point.

[31] The provisions of the Rules dealing with "Dispute Resolution Services" and governing the Mediation Session are found at Rules 386 to 391. It is useful to reproduce in their entirety those portions that are relevant for the purpose of this Motion. They read as follows:

DISPUTES RESOLUTION SERVICES	**SERVICE DE RÈGLEMENT DES LITIGES**

Order for dispute resolution conference

386 **(1)** The Court may order that a proceeding, or any issue in a proceeding, be referred to a dispute resolution conference, to be conducted in accordance with rules 387 to 389 and any directions set out in the order.

[…]

Interpretation

387 A dispute resolution conference shall be conducted by a case management judge or prothonotary assigned under paragraph 383(c), who may

(a) conduct a mediation, to assist the parties by meeting with them together or separately to encourage and facilitate discussion between them in an attempt to reach a mutually acceptable resolution of the dispute;

[…]

Confidentiality

388 Discussions in a dispute resolution conference and documents prepared for the purposes of such a conference are confidential and shall not be disclosed.

Notice of settlement

389 **(1)** Where a settlement of all or part of a proceeding is reached at a dispute resolution conference,

(a) it shall be reduced to writing and signed by the parties or their solicitors; and

Ordonnance de la Cour

386 (1) La Cour peut ordonner qu'une instance ou une question en litige dans celle-ci fasse l'objet d'une conférence de règlement des litiges, laquelle est tenue conformément aux règles 387 à 389 et aux directives énoncées dans l'ordonnance.

[…]

Définition

387 La conférence de règlement des litiges est présidée par un juge responsable de la gestion de l'instance ou le protonotaire visé à l'alinéa 383c), lequel :

a) s'il procède par médiation, aide les parties en les rencontrant ensemble ou individuellement afin de susciter et de faciliter les discussions entre elles dans le but de trouver une solution au litige qui convienne à chacune d'elles;

[…]

Confidentialité

388 Les discussions tenues au cours d'une conférence de règlement des litiges ainsi que les documents élaborés pour la conférence sont confidentiels et ne peuvent être divulgués.

Avis de règlement

389 **(1)** Si l'instance est réglée en tout ou en partie à la conférence de règlement des litiges :

a) le règlement obtenu est consigné et signé par les parties ou leurs avocats;

(b) a notice of settlement in Form 389 shall be filed within 10 days after the settlement is reached.	**b)** un avis de règlement, établi selon la formule 389, est déposé dans les 10 jours suivant la date du règlement.
Report of partial settlement	**Règlement partiel**
(2) Where a settlement of only part of a proceeding is reached at a dispute resolution conference, the case management judge shall make an order setting out the issues that have not been resolved and giving such directions as he or she considers necessary for their adjudication.	**(2)** Si l'instance n'est réglée qu'en partie à la conférence de règlement des litiges, le juge responsable de la gestion de l'instance rend une ordonnance dans laquelle il fait état des questions litigieuses pendantes et donne les directives qu'il estime nécessaires pour leur adjudication.
Notice of failure to settle	**Avis de non-règlement**
(3) Where no settlement can be reached at a dispute resolution conference, the case management judge shall record that fact on the Court file.	**(3)** Si l'instance n'est pas réglée à la conférence de règlement des litiges, le juge responsable de la gestion de l'instance consigne ce fait au dossier de la Cour.
[…]	[…]

[32] Rule 387 thus expressly provides that a mediation set up under the Rules is conducted by the mediator to assist the parties "in an attempt to reach a mutually acceptable resolution of the dispute" (emphasis added). Rule 388 ensures that the mediation process is confidential. In filing their submissions and evidence in the context of this Motion, both Shake Shack and Chic Shack have indeed invoked Rule 388 in respect of the discussions and documents prepared for the purpose of the mediation. Finally, Rule 389 sets up a specific process to be followed when a settlement of a proceeding is reached in the context of such mediations. Whether the settlement is total or partial, Rule 389(1) imposes the obligation ("shall") to reduce the settlement to writing and to have it signed by the parties or their counsel. For its part, Rule 389(2) adds another requirement where the settlement reached is only partial: in such a case, "the case management judge shall make an order

setting out the issues that have not been resolved" and giving directions that he or she deems necessary.

[33] In the present case, Prothonotary Steele did not make any order pursuant to Rule 389(2) and no settlement was reduced to writing and signed by the parties or their counsel pursuant to Rule 389(1). In addition, I observe that Prothonotary Steele did not confirm the existence of any agreement reached in the Court-assisted mediation process she had presided, even if she was invited to do so by Mr. Guay, counsel for Chic Shack, in his January 20, 2020 letter addressed to her [January 2020 Letter].

III. Evidence on the Motion

[34] On this Motion, the evidence provided by Shake Shack consisted of two affidavits each supported by numerous documents attached as exhibits. One was signed by Mr. Palmese [Palmese Affidavit] while the other was from Mr. Kark [Kark Affidavit]. Both were signed on June 3, 2020. In response, Chic Shack filed an affidavit signed by Mr. Price on July 6, 2020 [Price Affidavit], as well as a prior affidavit he had submitted in the course of this action. Mr. Price was cross-examined on his affidavit on July 17, 2020 [Price Cross-examination], and a video of the cross-examination was provided to the Court. Neither Mr. Palmese nor Mr. Kark were cross-examined on their respective affidavits.

[35] Further to my detailed review of this evidence, here is a summary of what, in my view, the testimonies and documents establish as far as the mediation is concerned.

A. *Shake Shack*

[36] The main elements established by Mr. Palmese in his affidavit show that:

1. Mr. Palmese's "gut feeling" was that Mr. Price was trying to leverage Chic Shack's alleged expansion plans to get a larger payout from Shake Shack (Palmese Affidavit at para 43);

2. The first offer made by Shake Shack included a monetary dimension (to pay Chic Shack's legal fees estimated at [redacted]) as well as a territory dimension (the right for each party to co-exist without any restriction across Canada) (Palmese Affidavit at para 46);

3. The response from Chic Shack, as conveyed by Prothonotary Steele, specified that: 1) Chic Shack preferred to define an exclusivity zone of 50 kms or 100 kms around its existing location in Quebec City where Shake Shack could not open any restaurants (as opposed to a co-existence between Chic Shack and Shake Shack anywhere); and 2) Chic Shack was looking for a financial compensation for abandoning its expansion projects and for the value to Shake Shack of the Canadian market (Palmese Affidavit at para 47);

4. Mr. Palmese felt that Mr. Price approached the mediation by "playing games" (Palmese Affidavit at para 48);

5. The first formal offer from Mr. Price included: 1) an exclusivity zone for Chic Shack of 100 kms around the existing location of LE CHIC SHACK restaurant in Quebec City; 2) a [redacted] upfront payment to compensate Chic Shack's legal fees; and 3) a [redacted] payment for each SHAKE SHACK restaurant opened in Canada (with no limit in time or in the number of restaurants) (Palmese Affidavit at para 57);

6. A few offers and counter-offers were exchanged, "all building on the three elements of Chic Shack's first formal offer" (Palmese Affidavit at para 58);

7. Mr. Palmese specifically indicated that he made a counter-offer "on the monetary terms" when he referred to Shake Shack's offer of a [redacted] lump-sum payment or a [redacted] upfront payment coupled with a [redacted] payment for each of the first 10 SHAKE SHACK restaurants opened in Canada. Mr. Palmese then also proposed not to enter Quebec City for five (5) years (Palmese Affidavit at paras 59-60);

8. Mr. Palmese referred to Chic Shack refusing to include a sunset on the geographic restriction imposed by the exclusivity zone (Palmese Affidavit at para 60);

9. Mr. Palmese stated that, assuming the parties "could work through the other settlement terms", Shake Shack would be agreeable to this perpetual restriction (namely, not to enter the area around Quebec City with no time limit) (Palmese Affidavit at para 60);

10. Mr. Palmese expressly stated that "[h]aving reached an agreement with Chic Shack on how the transaction would be structured in terms of Shake Shack acquiring Chic Shack's

trademark rights and licensing those back, the rest of the discussion focused on the financial components of the deal and, to a lesser extent, the exact geographical definition of the exclusivity zone […]" (Palmese Affidavit at para 63);

11. Mr. Palmese specified that Mr. Price's counter-proposal was on the "monetary terms" when the latter offered a [redacted] upfront payment and a [redacted] payment (indexed annually) for each of the first 20 SHAKE SHACK restaurants opened in Canada (Palmese Affidavit at para 64);

12. Mr. Palmese said at one point, late in the afternoon, that the parties were getting "very close to a meeting of the minds", thus indicating that no such meeting of the minds had yet occurred (Palmese Affidavit at para 65);

13. Mr. Palmese stated that the parties had finally reached an agreement on "the monetary aspect of the deal […]: a) [redacted] upfront payment [and] b) [redacted] payment (indexed annually) for each of the first 10 SHAKE SHACK restaurant [sic] opened in Canada" (Palmese Affidavit at para 67). No mention was made of the territorial restriction or exclusivity zone at that point in time;

14. Mr. Palmese referred to an "agreement on the financial terms as well as the structure of the deal (i.e., acquisition and license back of the trademark rights within an exclusivity zone)" but not to an overall deal (Palmese Affidavit at para 68);

15. Mr. Palmese also mentioned that the parties' attorneys also agreed that, from a trademark law perspective, some parameters had to be defined to avoid any confusion in the consumers' minds between the CHIC SHACK and SHAKE SHACK restaurants, considering that confusingly similar trademarks were held by two very distinct entities. According to Mr. Palmese, the parties agreed that the exact wording would be determined by the lawyers in the course of drafting the formal license agreement following the Mediation Session. There were apparently no further discussions between the parties on this issue throughout the mediation (Palmese Affidavit at para 62);

16. Mr. Palmese indicated that the parties agreed to work through the possibility of opening additional restaurants in the exclusivity zone within the following 48-hour timeframe, taking into account the overall settlement terms (Palmese Affidavit at para 69);

17. Mr. Palmese affirmed that the exact radius of the exclusivity zone was not agreed upon and needed to be confirmed. He acknowledged that Chic Shack was asking for 100 kms but added that Shake Shack wanted to see it on a map and to confirm (Palmese Affidavit at para 68);

18. Mr. Palmese indicated that Mr. Kark and himself had reviewed the Term Sheet and confirmed that "it was in line with [their] recollection and understanding of what was agreed-upon" (Palmese Affidavit at para 74);

19. After the exchange of emails between counsel on December 20, 2019 and in January 2020 (which I will address in a moment), Mr. Palmese suspected that Mr. Price might have had a "change of heart" (Palmese Affidavit at para 78);

20. At no point did Mr. Palmese suggest or state that a geographical restriction to the exclusive use of Chic Shack's trademark was secondary or non-essential.

[37] I find that the Palmese Affidavit was comprehensive, clearly drafted and well nuanced in its statements. Throughout his written testimony, Mr. Palmese carefully distinguished the various phases of the discussions between the parties, as well as the main dimensions of the contemplated transaction: monetary terms, structure of the deal, and exclusivity zone. In the absence of cross-examination, there are no reasons to question Mr. Palmese's credibility.

[38] Turning to the Kark Affidavit, Mr. Kark essentially adopted Mr. Palmese's recollection of the events that punctuated the Mediation Session and the 48 hours that followed (Kark Affidavit at para 19). Mr. Kark further indicated that, immediately after leaving the Court's premises at the end of the Mediation Session, he sent an email to Shake Shack's CEO, CFO and Chief Development Officer, to report having reached an "agreement in principle" with Chic Shack on the terms set out in his email. This 7:48 pm email of December 18, 2019 sent by Mr. Kark and attached to his affidavit [Kark Email] is a key document. It is worth citing in its entirety as it expressed Mr. Kark's understanding of the alleged agreement, contemporaneously with the end of the Mediation Session. The Kark Email read as follows:

> It's been a hell of a day!
>
> Here is where we ended with an agreement in principle.
>
> [redacted] upfront
> ([redacted] per first 10 shacks)

> We own his mark and license it back and he can operate in Quebec City (100 km radius) as long as he operates Le Chic Shack. He can only open additional locations in this area radius and no where else in Canada.
>
> Still a few details to work through but generally I think we ended up in a great place.
>
> After his attorney fees he doesn't walk with much…and we will end up paying less and over a longer period than we would have paid to litigate.
>
> Sincere appreciation and respect to Mr P who brought his game face today. This could have ended a lot of different ways (none of them beneficial) had Ron not driven the entire room the way he did. He may have missed his calling as a litigator?
>
> Now we need to go get a deal done and capitalize on this frozen tundra (-16c here tonight)!

[39] In my view, this Kark Email, written in plain and concise terms immediately after the Mediation Session, deserves significant weight. In the case of inconsistency with the narrative contained in the written testimonies of Mr. Palmese and Mr. Kark in their affidavits, I shall prefer the evidence coming from this document.

[40] Further to the Mediation Session, counsel for the parties had several exchanges on December 20, 2019 and in January 2020 with respect to the agreement alleged to have resulted from the Mediation Session. All of these exchanges were attached as exhibits to the Palmese Affidavit in Mr. Palmese's discussion of the events following the mediation. As will be seen later in these reasons, it is important to describe those various emails and letters in detail. This evidence is as follows:

A. Mr. Lauzon (counsel for Chic Shack) first wrote to Mr. Dupont (counsel for Shake Shack) around 9:46 am to inform him that he was leaving on vacation at noon that day and to inquire

as to when he could expect to hear back from Shake Shack, noting that the remaining points were fairly minor [RP-16 Email];

B. In his 10:57 am email of December 20, 2019 to Mr. Lauzon [RP-17 Email], Mr. Dupont responded that a "one-pager" term sheet "avec les principaux points de l'entente" was forthcoming, and he indicated that he would send it "pour qu'on puisse au moins confirmer que nous avons une entente de principe" (emphasis added). He also referred to Shake Shack intending to pay the lump-sum amount before December 25 and that he would need some information in order for Shake Shack to issue the cheque;

C. In his 11:05 am email of December 20, 2019 to Mr. Dupont [RP-18 Email], Mr. Lauzon simply said "OK, merci !" to the previous email;

D. In his 11:07 am email of December 20, 2019 to Mr. Lauzon [RP-19 First Email], Mr. Dupont indicated that he would send the "key points" as soon as he gets approval from his client. He further stated that he would be able to start preparing a draft agreement "[a]ssumant que nous sommes tous sur la même longueur d'ondes pour les key points" (emphasis added);

E. In another subsequent 12:07 pm email of December 20, 2019 to Mr. Lauzon [RP-19 Second Email], Mr. Dupont referred to the "key points" that Shake Shack retained from the mediation, mentioned that "nous avons diminué le 100 kms à 50 kms" and that "cela ne fait probablement pas de différence dans les faits" (emphasis added). He added: "Je présume que ce n'est pas un problème" (emphasis added). He further stated that « Shake Shack aurait besoin que nous confirmions notre entente de principe aujourd'hui » (emphasis in original). Furthermore, this RP-19 Second Email contained, in capitalized, bold letters, the following heading note: « SOUS TOUTES RÉSERVES – DISCUSSIONS DE RÈGLEMENT »;

F. In his 2:07 pm email of December 20, 2019 to Mr. Dupont [RP-20 Email], Mr. Lauzon, responded that "les "key points" contiennent de nouveaux éléments qui méritent sérieuses réflexions", and that Chic Shack would come back after the holidays;

G. In his 2:49 pm email of December 20, 2019 to Mr. Lauzon [RP-21 Email], Mr. Dupont tried to get Chic Shack's conditional confirmation of the monetary terms and banking information so that Shake Shack could process the upfront payment before the end of its fiscal year, subject to finalizing the written agreement after the holiday season. Mr. Dupont said: "Pouvez-vous au moins confirmer que le point 5 relatif au paiement correspond bien à ce qui a été discuté, le tout conditionnel à finaliser les autres termes au retour des vacances?" (emphasis added);

H. In his 3:49 pm email of December 20, 2019 to Mr. Dupont [RP-22 Email], Mr. Lauzon replied that his instructions were to wait after the holidays and that there was notably a "deal breaker" in the key points sent by Shake Shack that, in Chic Shack's view, had not been discussed;

I. On January 8, 2020, Mr. Lauzon sent an email to counsel for Shake Shack containing Chic Shack's detailed response to the Term Sheet [RP-23 Email]. In that response, Chic Shack indicated, among other things, that it was willing to limit the exclusivity zone to a radius of

> 50 kms, but that making its license "valid as long as Le Chic Shack is owned by Mr. Evan Price and Lucy Price" was a "definite deal breaker". Chic Shack notably asked that the license be valid "as long as Le Chic Shack or any of its sub-licensees use the trademark in the defined territory". Chic Shack also materially modified the monetary terms as the initial proposal did not reflect "the actual business potential of an expansion in Canada"; the monetary terms were increased to a payment of [redacted] upfront in addition to [redacted] (indexed annually) for each of the first 50 SHAKE SHACK restaurants opened in Canada, for a total which was several times higher than what was discussed at the Mediation Session.

[41] The Term Sheet forwarded by Mr. Dupont in the RP-19 Second Email is another important document as it contains the terms of the alleged agreement upon which Shake Shack is asking the Court to order the parties to prepare a formal settlement and license agreement. The Term Sheet expressly listed seven (7) key points. For ease of reference, I reproduce them *verbatim* below:

> 1. Shake Shack acquires Le Chic Shack's entire rights in LE CHIC SHACK tradename and trademarks, including LE CHIC SHACK & Design.
>
> 2. Shake Shack licenses back LE CHIC SHACK tradename and trademarks, including LE CHIC SHACK & Design:
>
> a. Exclusive license; no sub-license
>
> b. Limited geographically to a radius of 50kms around the existing location
>
> c. Valid as long as Le Chic Shack is owned by Mr. Evan Price and Lucy Price
>
> d. [redacted]/ year
>
> 3. Shake Shack undertakes not to open any Shake Shack restaurants within a radius of 50kms around the existing Le Chic Shack restaurant, as long as the aforementioned license is in force
>
> 4. Le Chic Shack agrees on some measures to ensure there is no confusion caused with Shake Shack (no reference whatsoever to Shake Shack, no use of the Shake Shack trade dress, no use of Shake Shack's menu items or similarly named items, etc.)

> 5. Payment:
>
> a. [redacted] payable by December 24, 2019 (we will need Le Chic Shack's info ASAP)
>
> b. [redacted] [redacted] (indexed annually according to CPI starting in 2021) payable within 30 days of the opening of each of the first 10 SHAKE SHACK locations in Canada (as the case may be)
>
> 6. Discontinuance of litigation (claim and counterclaim), and withdrawal of all opposition and S. 45 proceedings in the Trademarks Office. Le Chic Shacks [sic] undertakes not to oppose any future trademark applications by Shake Shack.
>
> 7. Standard provisions usually found in a settlement agreement (including confidentiality, mutual release, etc.) and a trademark license agreement (including control, etc.)

[42] The last document from Shake Shack's evidence that needs to be mentioned is the January 2020 Letter addressed to Prothonotary Steele, also attached to the Palmese Affidavit as Exhibit RP-24. In that letter, Mr. Guay informed Prothonotary Steele of the situation and sought her assistance and guidance to resolve it. The letter referred to the mediation "adjourned on December 18, 2019" and requested the Prothonotary's "continued assistance in that regard", noting that Mr. Price should be held to honor "the settlement terms entered into at the mediation". The January 2020 Letter stated that the parties had "agreed on all essential elements of a settlement agreement", including five (5) points. It is again important to reproduce the exact language used by counsel in this January 2020 Letter. The essential elements of the alleged agreement were described as "including":

> 1. The Plaintiffs [i.e., Shake Shack] acquire the Defendant's [i.e., Chic Shack] rights in the LE CHIC SHACK name and trademark;
>
> 2. The Plaintiffs license back those rights exclusively to the Defendant so that it can continue its operations;

> 3. An exclusivity zone is defined around the Defendant's restaurant where the Defendant can operate and the Plaintiffs cannot operate or license SHAKE SHACK restaurants (i.e., no co-existence between the parties in the same region, contrary to what was first explored);
>
> 4. The Plaintiffs agree to make the following payments to the Defendant:
>
> a. Lump-sum of [redacted] payable immediately, and
>
> b. [redacted] (indexed annually) for the opening of each of the first 10 SHAKE SHACK locations in Canada (as the case may be); and
>
> 5. The parties would need to agree on some parameters to ensure there is no confusion between LE CHIC SHACK and SHAKE SHACK.

[43] The January 2020 Letter then went on to affirm that there "was a meeting of the minds on all essential terms of a settlement such that a binding contract was created". It is implicit that what counsel considered as the essential terms agreed upon were the five (5) points listed immediately above in his letter. The January 2020 Letter further said that the "only secondary elements that were left outstanding because of time constraints were: 1. The exact radius of the exclusivity zone; 2. Whether the Defendant is limited to its current operation or can open LE CHIC SHACK restaurants under the license; and 3) the drafting of a formal settlement and license agreement with the standard provisions usually found in such an agreement". The January 2020 Letter finally referred to the Term Sheet sent on December 20, 2019, which counsel presented as being meant to "confirm the essential elements that were agreed to during the mediation" and to "resolve the outstanding issues by proposing a 50km radius and not imposing limits on the Defendant's capacity to open additional restaurants within that exclusivity zone".

B. *Chic Shack*

[44] Turning to Chic Shack, the main elements established by Mr. Price in his affidavit and his cross-examination are as follows:

A. Mr. Price agreed with Mr. Palmese's description of how the mediation unfolded ("le déroulement de la séance de médiation"), but not how Mr. Palmese interpreted and qualified the events (Price Affidavit at para 3). In his cross-examination, Mr. Price confirmed his agreement with the sequence of events described by Mr. Palmese ("la mécanique") but specified that he did not express his agreement with the account or contents of such events (Price Cross-examination at p 52);

B. As early as 2017, in a letter sent on June 12, 2017, counsel for Chic Shack had indicated a willingness to accept that Shake Shack could open restaurants outside the province of Quebec, but that Chic Shack would need to be fairly compensated by Shake Shack in monetary terms (Price Affidavit at para 41);

C. Mr. Price testified that at no point did any party suggest to put anything in writing at the end of the Mediation Session and that no party said it would be desirable to summarize the terms of an alleged agreement or put what had been discussed on paper (Price Affidavit at para 5 and Price Cross-examination at p 82);

D. Mr. Price however acknowledged on cross-examination that the parties did not subject their consent to an agreement in writing;

E. Mr. Price did not indicate that he agreed to the terms of agreement as these were singled out and formulated by Shake Shack;

F. Mr. Price never said or suggested that the territorial limitation of the exclusivity zone was a minor or secondary element;

G. Mr. Price indicated that, at the Mediation Session, he did not have the opportunity to discuss all the points he deemed necessary for a global agreement (Price Affidavit at para 4);

H. At the Mediation Session, Mr. Price was preoccupied by another matter involving his CO2 Solutions company, for which he was scheduled to go to Court the day after the mediation. However, he did not divulge that to Shake Shack;

I. When he received the Term Sheet on December 20, 2019, Mr. Price quickly noticed at least one new element that had never been discussed during the mediation, namely a link between the duration of the proposed license and the ownership of LE CHIC SHACK restaurant by his sister and him (Price Affidavit at para 28). Mr. Price also noted that the right for Chic Shack to operate in the exclusivity zone was linked to the "operation" of Chic Shack in the

Kark Email, but was now linked to the "ownership" of Chic Shack by his sister and him in the Term Sheet (Price Affidavit at paras 59-61);

J. Mr. Price also referred to new conditions having been added in the Term Sheet as well as changes compared to the state of discussions at the end of the Mediation Session (Price Affidavit at paras 66 ff);

K. Mr. Price testified that any agreement with Shake Shack needed to include an exclusivity zone where Chic Shack would be entirely free to operate and where Shake Shack would have no presence (Price Affidavit at para 43);

L. Mr. Price indicated that the definition of the exclusivity zone was "very important" to Chic Shack, as reflected in the third option for settlement described in Chic Shack's mediation brief (Price Affidavit at para 45);

M. Mr. Price expressly linked the monetary terms to the size of the exclusivity zone: « En d'autres mots, plus [Chic Shack] était disposée à accepter une plus petite zone exclusive, plus la compensation financière devait être élevée et toute modification à la taille de cette zone dans le cours de discussions amènerait automatiquement des changements à d'autres paramètres faisant partie d'une entente éventuelle » (Price Affidavit at para 46 and Price Cross-examination at pp 68-69);

N. According to Mr. Price's recollection, Shake Shack had indicated that they agreed to an exclusivity zone of 100 kms at the Mediation Session (Price Affidavit at para 50). Mr. Price's "understanding" was that Chic Shack would be totally free to open and operate Chic Shack restaurants in this exclusive area, through any business structure (Price Affidavit at para 51 and Price Cross-examination at pp 76-78);

O. Mr. Price testified that a reduction of the exclusivity zone from 100 kms to 50 kms would include numerous local markets in Quebec and represented a 75% reduction in the total geographic coverage of the zone (Price Affidavit at para 53);

P. According to Mr. Price, limits to sub-licenses and openings of restaurants in the exclusivity zone, as well as the steps to be taken to ensure non-confusion between the trademarks, were not discussed in the Mediation Session (Price Affidavit at paras 64, 66, 75 and Price Cross-examination at pp 88-92);

Q. Mr. Price indicated that, when he left the Mediation Session, the 100 kms radius was one of Chic Shack's conditions, an element which was part of the deal ("un élément qui faisait partie de l'ensemble" – Price Cross-examination at pp 64-65);

R. Mr. Price understood that Shake Shack might want to validate the 100 kms, but he said he had established that the 100 kms was one of Chic Shack's conditions. He testified that the "rayon qui était associé à – aux différents "moments" – montants, c'était cent kilomètres (100 km), en quittant la… la… séance de médiation" (Price Cross-examination at pp 67-68). In Mr. Price's view, it was clearly 100 kms at the end of the Mediation Session, and the size of the exclusivity zone was clearly linked to the monetary amounts;

S. Mr. Price testified that Chic Shack had intentions to open new LE CHIC SHACK restaurants, but that he did not express it at the Mediation Session. He added that, to his recollection, there were no discussions about that at the Mediation Session and that he was expecting to discuss that further, as the mediation itself had been adjourned and suspended (Price Affidavit at para 36 and Price Cross-examination at pp 83-84);

T. On cross-examination, Mr. Price expressly denied having said that changing the name of his restaurant was not very dramatic or important (Price Cross-examination at p 81);

U. Mr. Price explained in detail how Chic Shack arrived at its revised offer on the monetary terms on January 8, 2020 (Price Affidavit at paras 85 ff).

[45] I also find that the Price Affidavit was detailed and nuanced on its statements. I should add that I have looked at and listened carefully to the cross-examination of Mr. Price on his affidavit, and find that Mr. Price was not evasive or hesitant and that he came across as a credible, forthcoming and helpful witness.

IV. Preliminary Issues

[46] Before turning to the merits of Shake Shack's Motion and to the assessment of the evidence, some preliminary matters must first be addressed.

A. *The Palmese and Kark Affidavits*

[47] Chic Shack challenges certain paragraphs of the Palmese Affidavit and, to a lesser extent, the Kark affidavit, on the basis that they contain arguments, legal conclusions as well as opinions. More specifically, Chic Shack claims that the two affidavits contain inadmissible opinion evidence on the notoriety or success of the SHAKE SHACK brand, and the alleged resemblance between the SHAKE SHACK and LE CHIC SHACK brands. Chic Shack also

submits that some paragraphs contain inadmissible statements on Mr. Palmese's state of mind or perception of what happened at the Mediation Session. In addition, Chic Shack maintains that the affidavits include improper legal conclusions because Mr. Palmese and Mr. Kark use words such as "agreement", "agree" or "meeting of the minds" throughout their testimonies. Chic Shack argues that the impugned paragraphs or portions thereof should be struck from the two affidavits or, alternatively, that the Court should exercise its discretion to give them no weight or probative value (*Abi-Mansour v Canada (Attorney General)*, 2015 FC 882 at paras 30-31).

[48] I do not agree and I am not convinced by Chic Shack's arguments on this front.

[49] Regarding affidavits filed before this Court, Rule 81 provides that the alleged facts shall be confined to facts within the deponent's personal knowledge and must be delivered "without gloss or explanation" (*Canada (Attorney General) v Quadrini*, 2010 FCA 47 [*Quadrini*] at para 18). Moreover, the Court may strike or disregard all or parts of affidavits where they are abusive or clearly irrelevant, or where they contain opinions, arguments or legal conclusions (*Quadrini* at para 18; *Cadostin v Canada (Attorney General)*, 2020 FC 183 at para 36). The general rule is that a lay witness may not give opinion evidence but may only testify to facts within his or her knowledge, observation and experience (*White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23 [*White Burgess*] at para 14; *Toronto Real Estate Board v Commissioner of Competition*, 2017 FCA 236 [*TREB*] at para 78). Expert evidence is an exception to this general rule barring opinion evidence. The main rationale for excluding lay witness opinion evidence is that it is generally not helpful to the decision maker and may be misleading (*White Burgess* at para 14). It is not disputed that neither Mr. Palmese nor Mr. Kark are experts in the technical

sense, and neither the Palmese Affidavit nor the Kark Affidavit were indeed entered as expert opinion evidence. Both Mr. Palmese and Mr. Kark were therefore lay witnesses.

[50] The SCC has recognized that "[t]he line between 'fact' and 'opinion' is not clear" (*Graat v The Queen*, [1982] 2 SCR 819, 144 DLR (3d) 267 at p 835). The courts have thus developed some freedom to receive lay witnesses' opinions when the witness has personal knowledge of the observed facts and testifies to facts within his or her observation, experience and understanding of events, conduct or actions. In that respect, the Federal Court of Appeal [FCA] recently stated that opinion from a lay witness is acceptable "where the witness is in a better position than the trier of fact to form the conclusions; the conclusions are ones that a person of ordinary experience can make; the witnesses have the experiential capacity to make the conclusions; or where giving opinions is a convenient mode of stating facts too subtle or complicated to be narrated as facts" (*TREB* at para 79). As such, when a witness has personal knowledge of observed facts such as a company's relevant, real world, operations, the evidence may be accepted by a court or an administrative decision maker even if appears to contain or is opinion evidence (*TREB* at para 80; *Pfizer Canada Inc. v Teva Canada Limited*, 2016 FCA 161 at paras 105-108).

[51] In my view, the Palmese Affidavit and the Kark Affidavit are essentially factual. They contain proper evidence which falls within the boundaries of what the case law mentioned above has recognized as acceptable lay opinion evidence. I am satisfied that the information provided by Mr. Palmese and Mr. Kark in their respective affidavits comes from their personal experience and participation in the Mediation Session as duly-authorized representatives of Shake Shack. In

their affidavits, they testified to facts within their observation, experience and understanding of the events, conduct or actions. In addition, even though some of the statements solely reflect their own perception or reading of the exchanges at the Mediation Session, I find that the information provided in the Palmese Affidavit and the Kark Affidavit is relevant and helpful to this Motion.

[52] Furthermore, I am not persuaded that the terms used by Mr. Palmese and Mr. Kark in their testimonies amount to legal conclusions on the existence of the alleged agreement. Words such as “agree” or “meeting of the minds” are ordinary words reflecting their views and understanding of the events at the Mediation Session. They establish their personal perception of the events, and I do not read them as offering legal opinions or conclusions on the issue at stake in this Motion, namely whether the parties legally entered into a settlement agreement. This is for the Court to determine and decide.

[53] For all those reasons, I see no ground to strike the paragraphs identified by Chic Shack or to give them no probative value in my assessment of the evidence in this case.

B. ***Settlement privilege***

[54] Chic Shack also argues that, in the Palmese Affidavit, Mr. Palmese improperly referred to and relied on a document subject to settlement privilege, namely an email relating to settlement discussions between the parties subsequent to the Mediation Session. This is the email dated February 5, 2020 from counsel for Chic Shack, in which Mr. Lauzon made a new offer of settlement in response to the previous exchanges between the parties. It was filed as Exhibit RP-

26 to the Palmese Affidavit [RP-26 Email]. Counsel for Chic Shack takes particular exception with the RP-26 Email and submits that its remoteness to the events surrounding the Mediation Session makes it irrelevant to the issue at stake on this Motion.

[55] I do not agree with Chic Shack. It is well established that the settlement privilege requires the presence of three conditions: a litigious dispute in existence or within contemplation; a communication made with the express or implied intention that it would not be disclosed to the court in the event negotiations failed; and a communication made with the purpose to attempt to effect a settlement (*Kirkbi AG v Ritvik Holdings Inc.*, [2002] FCJ No 793 at para 175). However, there is an exception to the rule of settlement privilege where the communication subject to privilege is not used as evidence of liability for the conduct which is the subject of negotiations or of weak cause of action, but is used for other purposes. In those circumstances, the privilege does not bar production in court (Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 4th ed, Markham: LexisNexis Canada Inc, at para 14.343; *Sabre Inc v International Air Transport Assn*, [2009] OJ No 903 at paras 20-21). More specifically, where a dispute arises as to the existence of a settlement agreement, it is necessary for the Court to have access to documents exchanged by the parties or their counsel in order to resolve the conflict (*Bauer Nike Hockey Inc. v Tour Hockey*, 2003 FCT 451 (FC) at paras 18-20). In such circumstances, the documents are entered into evidence to determine whether the parties effectively reached a settlement, not for the actual contents of the document.

[56] This is the case here, as Shake Shack does not rely on the impugned document to establish the liability of Chic Shack in the underlying action or the strength of its position, but

instead as evidence that the parties had entered into a binding settlement agreement at the end of the Mediation Session. I agree with Chic Shack that, given its date several weeks after the end of the Mediation Session, the RP-26 Email may seem less relevant to events that happened on December 18, 2019 than other documents on the record. The RP-26 Email does not directly relate to the transaction claimed to have happened at the end of the Mediation Session and arguably articulated terms of a new offer and exposed a new basis for an eventual settlement of this action. However, since it follows the exchanges between counsel regarding the alleged transaction at the center of this Motion, I am satisfied that it can be admitted into evidence. The issue is not to assess the contents of the RP-26 Email and the new terms of settlement then offered by Chic Shack, but to determine whether this correspondence sheds any further light on the existence or absence of an agreement at the end of the Mediation Session. Just as the emails immediately following the Mediation Session on December 20, 2019 and in January 2020 are relevant to assist in establishing this point, so is this RP-26 Email which is a continuation of the exchanges. The new offer made on that day is not the object of this Motion, but I am not persuaded that the document has no relevance in informing the Court on the existence of a prior agreement between the parties. The RP-26 Email will therefore not be stricken from the record.

C. *Failure to cross-examine*

[57] The last preliminary matter relates to a submission made by Shake Shack relating to the Palmese and Kark Affidavits. Shake Shack submits that Chic Shack's decision not to cross-examine Mr. Palmese and Mr. Kark has consequences, and that their evidence stands uncontradicted (*Harley-Davidson Motor Company Group LLC v Manoukian*, 2013 FC 193

[*Manoukian*] at para 37). If, by saying so, Shake Shack implied that the Palmese and Kark Affidavits should be taken by the Court at face value, I do not agree.

[58] I accept that a party's failure to cross-examine a witness may prevent that party from trying to impugn the credibility of such witness. This is what the *Manoukian* decision cited by Shake Shack stands for. However, a failure to cross-examine does not mean that the Court has to accept a witness' evidence without any reservation and does not magically confer additional or irrefutable probative value to this witness' evidence. Nor does it improve or magnify the sufficiency of the testimonial evidence offered. The Court must still assess the affidavit evidence to determine its probative value and weigh it in the context of the balance of the evidence on the record (*Bath v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 8549 (FC) at para 12).

[59] In this case, I am satisfied that Chic Shack is not trying to impugn the credibility of Mr. Palmese and Mr. Kark. It simply submits that the evidence adduced by Shake Shack through the Palmese and Kark Affidavits and their supporting exhibits is insufficient to establish, on a balance of probabilities, that the parties entered into a binding settlement agreement at the end of the Mediation Session. It is up to the Court to determine whether the evidence provided in the Palmese and Kark Affidavits, along with the rest of the evidence on the record, is sufficient to meet the balance of probabilities standard, and to assess whether this evidence is supported or contradicted by other evidence in the record. The sole fact that Mr. Palmese and Mr. Kark were not cross-examined does not increase the weight of their affidavit evidence.

V. Analysis

A. *Jurisdiction of the Court*

[60] It is now trite law that the Court may decide contractual issues that are incidental to a matter that is otherwise within its statutory jurisdiction, including whether the parties have reached a settlement agreement (*Salt Canada Inc. v Baker*, 2020 FCA 127 [*Salt Canada*] at paras 14-20; *Apotex Inc. v Allergan, Inc.*, 2016 FCA 155 [*Apotex*] at paras 12-14). The Court "has jurisdiction when the contract law issue before [it] is part and parcel of a matter over which [it] has statutory jurisdiction, there is federal law essential to the determination of the matter, and that federal law is valid under the constitutional division of powers" (*Apotex* at para 13). The subject matter of Shake Shack's action, namely trademark infringement, is clearly within the jurisdiction of the Court (*Federal Courts Act*, RSC 1985, c F-7 at section 20; TMA at section 55).

[61] The Court and the FCA have indeed confirmed on several occasions that this Court has jurisdiction to determine whether a settlement agreement has been reached in the context of intellectual property-related disputes, and to enforce such settlement (*Apotex* at paras 12-14; *Domaines Pinnacle Inc. c Beam Suntory Inc.*, 2015 FC 680 at paras 20-23, aff'd 2016 FCA 212 [*Pinnacle*]). No party challenges the jurisdiction of the Court to determine whether there has been a settlement of this action.

B. *Legal framework and principles*

(1) The principle of complementarity

[62] Shake Shack submits that, since the present dispute and mediation are most closely connected to the province of Quebec, and since federal legislation is silent on contractual issues, the *Civil Code of Quebec*, CQLR, c C-1991 [CCQ] applies. Shake Shack further adds that the principles established by the civil law govern this Motion, despite the fact that the Rules provide for specific conditions and requirements to be followed in the context of Court-assisted mediations. This statement needs to be slightly nuanced.

[63] It is well established in Canadian law that, to interpret a concept of private law not defined in a federal statute, the courts must turn to the private law of the province where the federal law applies. This principle of complementarity of provincial civil law with federal law is now codified in section 8.1 of the *Interpretation Act*, RSC 1985, c I-21. This provision reads as follows:

8.1 Both the common law and the civil law are equally authoritative and recognized sources of the law of property and civil rights in Canada and, unless otherwise provided by law, if in interpreting an enactment it is necessary to refer to a province's rules, principles or concepts forming part of the law of property and civil rights, reference must be made to the rules, principles and concepts in force in the province at the time the enactment is being applied.	**8.1** Le droit civil et la common law font pareillement autorité et sont tous deux sources de droit en matière de propriété et de droits civils au Canada et, s'il est nécessaire de recourir à des règles, principes ou notions appartenant au domaine de la propriété et des droits civils en vue d'assurer l'application d'un texte dans une province, il faut, sauf règle de droit s'y opposant, avoir recours aux règles, principes et notions en vigueur dans cette province au moment de l'application du texte.

[64] The principle of complementarity has been repeatedly applied by the federal courts. In *Canada (Attorney General) v St-Hilaire*, 2001 FCA 63 [*St-Hilaire*], the FCA laid it out, recognizing the "suppletive" nature of civil law when federal law is silent. In that case, the FCA acknowledged that Parliament's silence on a matter involving civil and property rights of an individual should be interpreted "as an acquiescence in the application of the principle of legal asymmetry that characterizes Canadian federal law" (*St-Hilaire* at para 58, Décary J.A. dissenting on another point). Justice Décary however also added that, when Parliament legislates on a matter that falls within its jurisdiction, it may derogate from civil law (*St-Hilaire* at para 30).

[65] In *Pinnacle*, the FCA reiterated that, when the events giving rise to a dispute arise in Quebec, and "because federal law is silent on the subject", the applicable law is the CCQ (*Pinnacle* at para 26). In a more recent case, *Canada v Raposo*, 2019 FCA 208, the FCA has clarified the situations where suppletive provincial law may be displaced and set aside. In that matter, Justice De Montigny, speaking for a unanimous court, stated the following at para 43:

> [43] As mentioned above, section 8.1 of the *Interpretation Act* recognizes the duality of Canadian legal traditions and expressly enshrines the principle of the complementarity of provincial private law in the interpretation of federal legislation. Section 8.2 facilitates the comprehension of bijural texts. It provides that in the event that a provision uses civil law or common law terminology, the civil law terminology will apply in Quebec and the common law terminology will apply in the other provinces. The appellant is correct in pointing out that both of these provisions explicitly give Parliament the option to make provincial law inapplicable (by using the words "unless otherwise provided by law"). However, the appellant has not persuaded me that this result can be achieved implicitly; in addition, the provisions of the C.C.Q. do not appear to me to be "inconsistent" with section 272.1 of the ETA, or, for that matter, with the principles of tax neutrality and fairness. […]

[66] The principle of complementarity thus establishes a presumption that Parliament does not implicitly intend to exclude the application of suppletive provincial legislation in relation to private law, and must do so expressly (*ABB Inc. v Canadian National Railway Company*, 2020 FC 817 at para 25). However, when Parliament does provide for a specific enactment of federal legislation, and is not "silent" on a matter, there is no need to resort to such suppletive private law (*Le Groupe Maison Candiac Inc. c Canada (Procureur général*), 2020 CAF 88 at para 72).

[67] It is therefore recognized that Parliament can derogate from the civil law when it legislates on a subject that falls within its jurisdiction. In this case, Rule 389 sets up a specific process to be followed when a settlement of a proceeding is reached in the context of a Court-assisted mediation governed by the Rules on Dispute Resolution Services. Whether the settlement is total or partial, Rule 389(1) imposes a specific obligation to reduce the settlement to writing and to have it signed by the parties or their counsel. Furthermore, Rule 387 expressly establishes that the mediation process is anchored in the consent of <u>each party</u> to the process, not only on the consent of one of them. Rule 387(a) refers to a process aimed at finding a solution which is "a mutually acceptable resolution of the dispute" (in French, « une solution qui convienne à chacune d'elles »), indicating that, at its very core, a mediation implies and requires the consent of both parties.

[68] In light of those Rules, this is not a situation where it can be said that the federal law is completely silent on the issue at stake in this Motion, and that the Quebec civil law can simply fill the gap in ignorance of the requirements expressly set out in the Rules. True, Quebec's civil law frames the context of this mediation. But the civil law principles do not operate in a vacuum and cannot serve to brush aside the Rules when the Rules explicitly add certain requirements to the civil

law requirements. The Rules are part of federal legislation and are not simply overtaken by the principles of Quebec civil law when, as is the case here, specific requirements have been added for settlement agreements considered in the context of Court-assisted mediations.

[69] Whether the failure to abide by Rule 389 is sufficient, in and of itself, to dismiss a settlement agreement allegedly reached under the Court's Dispute Resolution Services will be for another day. In this case, for the reasons detailed below, Shake Shack's Motion fails on the evidence. However, at the very least, the presence of Rules 387 and 389 is certainly a factor that colors the analysis and that needs to be taken into account in the Court's overall assessment of the circumstances and in its application of the civil law principles regarding settlement agreements. Stated differently, the Court cannot ignore the requirements of the Rules.

(2) Principles governing the existence of an agreement

[70] Shake Shack and Chic Shack both agree on the civil law requirements that apply to determine whether a settlement agreement has been reached in Quebec. These are found in particular under articles 1385 to 1396 of the CCQ regarding the conditions for the formation of contracts. An agreement to settle an action is a contract. Furthermore, a transaction is a nominal contract, specifically defined at article 2631 CCQ as "a contract by which the parties prevent a future contestation, put an end to a lawsuit or settle difficulties arising in the execution of a judgment, by way of mutual concessions or reservations."

[71] The relevant provisions of the CCQ read as follows:

BOOK FIVE
OBLIGATIONS

TITLE ONE
OBLIGATIONS in GENERAL

[…]

CHAPTER ii
CONTRACTS

[…]

DIVISION III
FORMATION OF CONTRACTS

§ 1. – Conditions of formation of contracts

I. – General provision

1385. The contract is formed by the only exchange of consent between persons capable of contracting, unless the law also requires compliance with a particular form as a necessary condition for its formation, or that the parties make the formation of the contract to a solemn form.

It is also of his essence that he has a cause and an object.

II. – Consent

1.– Exchange of consents

[…]

1387. The contract is formed when the offeror receives the acceptance and at the place where this acceptance is received, whatever the means used to communicate it and even when the parties have agreed to reserve their

LIVRE CINQUIÈME
DES OBLIGATIONS

TITRE PREMIER
DES OBLIGATIONS EN GÉNÉRAL

[…]

CHAPITRE DEUXIÈME
Du CONTRAT

[…]

SECTION III
DE LA FORMATION DU CONTRAT

§ 1. – Des conditions de formation du contrat

I. – Disposition générale

1385. Le contrat se forme par le seul échange de consentement entre des personnes capables de contracter, à moins que la loi n’exige, en outre, le respect d’une forme particulière comme condition nécessaire à sa formation, ou que les parties n’assujettissent la formation du contrat à une forme solennelle.

Il est aussi de son essence qu’il ait une cause et un objet.

II. – Du consentement

1.– De l’échange du consentement

[…]

1387. Le contrat est formé au moment où l’offrant reçoit l’acceptation et au lieu où cette acceptation est reçue, quel qu’ait été le moyen utilisé pour la communiquer et lors même que les

agreement on certain secondary elements.	parties ont convenu de réserver leur accord sur certains éléments secondaires.
2.– Offer and acceptance	2.– De l'offre et de l'acceptation
1388. Is an offer to contract, the proposal which includes all the essential elements of the envisaged contract and which indicates the will of its author to be bound in the event of acceptance.	**1388.** Est une offre de contracter, la proposition qui comporte tous les éléments essentiels du contrat envisagé et qui indique la volonté de son auteur d'être lié en cas d'acceptation.
[…]	[…]
1394. Silence does not constitute acceptance, unless it results otherwise from the will of the parties, the law or special circumstances, such as customs or previous business relationships.	**1394.** Le silence ne vaut pas acceptation, à moins qu'il n'en résulte autrement de la volonté des parties, de la loi ou de circonstances particulières, tels les usages ou les relations d'affaires antérieures.
[…]	[…]
TITLE TWO **NOMINATE CONTRACTS**	**TITRE DEUXIÈME** **DES CONTRATS NOMMÉS**
[…]	[…]
CHAPTER XVII **TRANSACTION**	**CHAPITRE DIX-SEPTIÈME** **DE LA TRANSACTION**
2631. The transaction is the contract by which the parties prevent a future dispute, terminate a lawsuit or settle the difficulties which arise during the execution of a judgment, by means of concessions or reciprocal reservations.	**2631.** La transaction est le contrat par lequel les parties préviennent une contestation à naître, terminent un procès ou règlent les difficultés qui surviennent lors de l'exécution d'un jugement, au moyen de concessions ou de réserves réciproques.
It is indivisible as to its object.	Elle est indivisible quant à son objet.

[72] These provisions emphasize that a contract, including a transaction, is formed by the sole exchange of consents (article 1385 CCQ), which corresponds to the common law requirement of

a “meeting of the minds” (*Quebec (Agence du revenu) v Services Environnementaux AES inc.*, 2013 SCC 65 [*AES*] at para 32). I observe that article 1378 CCQ further provides that a contract is an “agreement of wills”.

[73] Pursuant to article 1388 CCQ, a proposed contract must include all the “essential elements” of the intended agreement. But the silence of the offeree does not imply acceptance of an offer (article 1394 CCQ).

[74] The CCQ does not require any particular form for transactions. I agree with Shake Shack that a transaction is formed as soon as the parties agree on the essential elements thereof, even if the parties decide to reserve agreement as to certain secondary elements (and even if they never reach an agreement on these secondary elements) and/or to subsequently confirm their agreement in writing.

[75] However, other requirements may also arise, when legislation or regulations create special requirements for certain types of contracts, such as the need for an agreement to be in writing (*Apotex* at para 40). As noted by the Supreme Court in *AES*, whereas, as a rule, the formation of a contract does not depend on the adoption of a particular form, some agreements are often required by law to be in writing (*AES* at para 32). It is notably the case for contracts that are highly regulated, such as consumer contracts. The existence of possible formal requirements for contracts is indeed contemplated at article 1385 CCQ, which expressly provides that a contract is formed by the only exchange of consent between persons capable of

contracting, "unless the law also requires compliance with a particular form as a necessary condition for its formation" (emphasis added). Evidently, in this case, Rule 389 comes to mind.

[76] In their written and oral submissions, the parties referred extensively to the *Apotex* decision, where the FCA discussed the requirements for a settlement agreement. I pause to signal that the summary of the requirements for a settlement agreement made by the FCA in *Apotex* were restricted to common law jurisdictions (*Apotex* at para 16). On their part, the requirements applicable in Quebec must take into account the relevant articles of the CCQ. That said, the principles applicable in Quebec for the formation of a settlement agreement and flowing from the CCQ are not too dissimilar from the requirements articulated by the FCA in *Apotex*.

[77] As reaffirmed in *Apotex*, for an agreement to be reached, it is not required that the parties agree on all the elements; it is only required that they agree on the essential ones (Apotex at para 30). This notion of essential terms is central to the law concerning settlement agreements, and it is echoed at article 1388 CCQ. It is indeed quite central to the outcome of this case. I should add that a settlement agreement must be on all elements that are essential to both parties, and not only to the party claiming the existence of an agreement (*Taillefer c Taillefer*, 2017 QCCS 1255 [*Taillefer*] at para 74).

[78] To decide whether there is a binding settlement agreement and what terms of the agreement are essential, the Court must apply an objective standard, not a subjective one. The matter is fact-specific, and a determination is to be made on a case-by-case basis. In other words, the Court must find on the evidence before it that, objectively viewed, the parties had a mutual

intention to create a contract. As stated in *Apotex*, the test is "whether a reasonable bystander observing the parties would conclude that both parties, in making a settlement offer and in accepting it, intended to enter into legal relations" (citations omitted) (*Apotex* at para 22). The Court is to look at the specific facts in light of the practical circumstances of the case and determine whether an "honest, sensible business[person] when objectively considering the parties' conduct would reasonably conclude that the parties intended to be bound or not by the agreed-to terms" (citations omitted) (*Apotex* at para 32). An objective assessment implies an assessment of the actual conduct of the parties, as opposed to the parties' intentions (*Apotex* at para 48). The words and acts of those involved, judged by an objective standard, allow to measure whether there was an actual agreement to the matter at issue.

[79] Similarly, to determine whether there is an agreement on the "essential" terms, the Court must adopt an objective standpoint, undertake an evidence-based factual inquiry and consider the subject matter of the dispute objectively to determine whether the parties reached an agreement on all essential elements. Here again, the Court has to put itself in the shoes of a reasonable businessperson and assess whether there was something essential on which there was disagreement and still needed to be finalized. The test remains the same: whether an "honest, sensible business[person] when objectively considering the parties' conduct would reasonably conclude" that an element was essential (*Apotex* at para 32).

[80] The fact that a further document may be required to formalize the agreement between these parties is not an impediment to finding that a settlement document is a binding contract, if the terms in the document contain agreement on all of its essential terms. I finally underline that

the subsequent conduct of the parties can shed light on whether there has been agreement on essential terms (*Apotex* at para 39).

[81] In light of the CCQ provisions and the case law concerning the formation of contracts, the applicable requirements for concluding to the existence of a settlement agreement can be summarized as follows: 1) for there to be a binding settlement contract, there must be a matching offer and acceptance on all terms essential to the agreement; 2) the acceptance must be unequivocal; 3) as for any other agreements, there must be considerations flowing both ways; 4) the terms must be sufficiently certain; 5) there can be an offer and acceptance so as to create a binding contract even where there is no written agreement or where the parties contemplate the execution, at a later date, of a formal document evidencing the terms of the agreement; 6) on-going negotiations as to a more formal document do not necessarily mean that an offer or acceptance has been repudiated; 7) the Court must assess the evidence objectively, whether it is on the existence of the agreement, the certainty of its terms or their essential character.

[82] Before turning to the analysis of the evidence, I make three final observations on the legal framework and the case law.

[83] First, all the cases referred to by Shake Shack regarding decisions issued by the courts and confirming a settlement agreement were preceded by detailed written exchanges between the parties and the absence of doubts regarding the existence of an agreement. This is not the case here, as no written document has been prepared and exchanged by the parties during or at the end

of the Mediation Session, and the very existence of an agreement on all essential elements is disputed by Chic Shack.

[84] Second, I am unaware of any case, and counsel for Shake Shack has not identified any, where, in the context of a Court-assisted mediation, a court has concluded to the existence of a settlement agreement which had not been confirmed, directly or indirectly, by the mediator involved. In short, this case forays into uncharted territory. In its submissions, Chic Shack cited the *Taillefer* case where a similar attempt was made, but the court declined to approve a transaction allegedly arrived at in the context of a court-assisted mediation. That case involved a settlement conference before the Quebec Superior Court which had not worked out. In that decision, even though there was a draft written agreement setting out the elements of the settlement, the court was not persuaded, further to its detailed review of the evidence (including the acts of the mediator), that there was an agreement on all essential elements to the transaction and that a settlement agreement meeting the requirements of article 2631 CCQ had been concluded.

[85] Third, in its written submissions, Shake Shack relied on *LeddarTech Inc. c Phantom Intelligence Inc.*, T-2180-15, 18 septembre 2019 [*LeddarTech*] in support of the proposition that the Court has jurisdiction to confirm that a settlement has validly been entered into by the parties in the context of a Court-assisted mediation, and to enforce that settlement if necessary. I fail to see how this case can be of any assistance to Shake Shack. In that matter, Justice Annis expressly stated that both parties had signed a confidential settlement agreement along the terms that had been agreed upon at the mediation, and that they had sought the Court's assistance to confirm the

agreed-upon settlement agreement. In addition, the defendant in that case had itself proceeded to implement the agreement, having made a first payment in accordance with the terms of the settlement agreement (*LeddarTech* at page 2). It was a case where a "transaction" had clearly occurred and had been confirmed through a written settlement agreement.

[86] The factual context of the present case could hardly be farther from what the Court had before it in *LeddarTech*. The relevance of a precedent rapidly atrophies as the similarity of the factual frameworks involved decreases. This is precisely the situation here. The *LeddarTech* precedent is of no help to Shake Shack and fades to mere irrelevance since the facts in that case so significantly differ from the matter now before the Court.

B. ***The evidence does not support Shake Shack's Motion***

[87] Against this background, and further to my careful review of the evidence, I find that Shake Shack has not presented clear and convincing evidence sufficient to satisfy me, on a balance of probabilities, that a settlement agreement has been reached by the parties at the end of the Court-assisted Mediation Session. The combination of three main factors lead me to this conclusion. First, the actions of the mediator and the conduct of the parties in the Court-assisted mediation process point to the conclusion that no settlement agreement had been reached at the end of the Mediation Session. Second, the evidence on the record does not support a conclusion that an agreement acceptable to Chic Shack has been concluded, or that it covered all essential elements of a transaction contemplated by both parties. More specifically, viewed objectively, the size of the exclusivity zone where Chic Shack could continue to use its trademark was an essential element on which there was no agreement. Third, according to Shake Shack's own

evidence, the terms upon which Shake Shack claims that it had an agreement in principle at the end of the Mediation Session have morphed over time, taking two different incarnations in the Term Sheet and then in the January 2020 Letter.

[88] Each of these points will be dealt with in turn.

[89] I pause to underline that, as the Supreme Court stated in *F.H. v McDougall*, 2008 SCC 53 [*McDougall*], there is only one standard of proof in civil cases in Canada, and that is proof on a balance of probabilities (*McDougall* at para 46). In that decision, Justice Rothstein, for a unanimous court, said that the only legal rule in all cases is that "evidence must be scrutinized with care by the trial judge" to determine whether it is more likely than not that an alleged event occurred (*McDougall* at para 45). Evidence "must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test" (*McDougall* at para 46). This, evidently, applies to the type of evidence needed to establish the existence of a settlement agreement. On this Motion, the evidence does not allow me to conclude that, on a balance of probabilities, it is more likely than not that a settlement agreement had been reached by Shake Shack and Chic Shack at the end of the Mediation Session.

(1) The Court-assisted mediation process

[90] In this proceeding, the parties have elected to hold their settlement discussions within the framework of a Court-assisted mediation governed by Rules 386 to 391. Prothonotary Steele's Direction of July 30 3019 leaves no doubt that the mediation was operating under those Rules.

[91] Having opted to proceed under those Rules, the evidence relating to the Court-assisted process and how it unfolded inform about the existence or absence of a settlement agreement. This evidence is part of the factors that the Court needs to take into account in its assessment of the overall circumstances of this case. In other words, the Court cannot ignore the framework within which the Mediation Session and the settlement discussions were taking place, the requirements of the Rules and the actions (or lack thereof) taken by the mediator and the parties in the context of the applicable Rules.

[92] I should point out that dispute resolution mechanisms typically operate under a given set of procedural rules. It is true for the conventional adversary process of adjudication before a trial judge, as it is for alternative models of judicial adjudication such as arbitration, mediation or other forms of settlement. In the judicial context, these rules are meant to ensure that the adjudication processes are fair and just for all parties involved. They cannot be taken lightly.

[93] Shake Shack and Chic Shack could have elected to hold their settlement discussions privately, outside of the Court process. Of course, had they done so, the Rules and the actions of the mediating third party would have played no role in the assessment of the existence of an agreement. But, here, the parties have decided to select a particular mechanism set out in the Rules, and the existence or absence of an agreement must be considered under the particular light of those Rules and the reality of this Court-assisted context.

[94] Two elements related to the Court-mediated process are particularly relevant to the issue that I have to decide: the conduct of the mediator, and the conduct of the parties in light of the

Rule 389 requirements. Both point towards the conclusion that no agreement settling the dispute between Shake Shack and Chic Shack had been reached at the end of the Mediation Session.

[95] First, let's look at the conduct and actions of Prothonotary Steele. In this case, the parties are not alone, and the relevant evidence is not limited to what each party has done and testified about. What the mediator chosen by the parties to preside over the Mediation Session has done, and not done, is also highly relevant to the issue that the Court is asked to determine, and is certainly part of the evidence that I need to consider in my assessment.

[96] In her December 2019 Direction, Prothonotary Steele clearly "adjourned" (i.e., suspended) the mediation. She mentioned it twice in her direction. She further indicated to the parties that she remained at their disposal "should they wish to resume the mediation at any time" (emphasis added). The text of the December 2019 Direction is crystal clear: the mediation was not closed or considered completed or deemed terminated by the mediator. It was rather adjourned and suspended. In other words, the matter was not settled.

[97] Shake Shack submits that, somehow, the tone of the December 2019 Direction suggests that the parties were just unable to formalize the agreement in writing as Mr. Price was scheduled to take his train, although it was hoped, given the progress made, that it would be unnecessary to require further intervention from Prothonotary Steele. I disagree with this proposed reading. The words used by Prothonotary Steele in her direction are unambiguous and could not be more limpid. With respect, they leave no room for interpretation: the mediation was "adjourned", meaning that it was not completed.

[98] There can hardly be an agreement between the parties when the judge in charge of the mediation adjourns it (i.e., postpones it to a later date).

[99] Furthermore, the conduct and the actions taken by Prothonotary Steele after the December 2019 Direction and since the adjournment of the Mediation Session also indicate that, from her perspective, no settlement agreement, whether partial or total, had occurred. A partial success would have imposed upon her an obligation under Rule 389(2), but the evidence on the record establishes that nothing was done on that front.

[100] In the same vein, even if she was approached by counsel for Shake Shack about the mediation and the alleged settlement agreement (in the January 2020 Letter), there is no evidence that the mediator acknowledged, directly or indirectly, the existence of any form of agreement between the parties. In fact, no further orders and directions were issued by Prothonotary Steele, and she has not asked the parties to put any agreement in writing. Stated differently, nothing in the conduct of the mediator after the Mediation Session demonstrates or even allows to infer that a settlement agreement had ever been reached by the parties.

[101] A silence is not just an absence of noise or sound. A silence is something in itself; it speaks with its own voice. As the adage goes, sometimes silence says more than a thousand words. Here, the evidence on the mediator’s silence since the end of Mediation Session speaks volume about the absence of any form of settlement agreement between the parties.

[102] Shake Shack's Motion is asking the Court to intervene and adjudicate an issue that, through its own Court-assisted dispute resolution process, the Court has already concluded, at least implicitly, that no agreement had intervened between the parties. I do not have to comment on whether the Court could or would be well-advised to intervene and essentially circumvent its own mediation process, and have one of its judges homologate a settlement agreement that another judge, acting pursuant a specific process provided by the Rules, has in fact concluded was non-existent. It is not necessary for me to do so in this case. But, I cannot turn a blind eye on the context in which this Motion takes place and Shake Shack's request to homologate a settlement agreement arises. It is in the context of a Court-assisted mediation where the parties are not alone in their discussions. The parties do not agree on what actually happened and their views differ on whether a meeting of minds actually occurred. But, here, in addition, we also have a mediator whose silence on the existence of an agreement and direction to "adjourn" the mediation are both pregnant with meaning. In my view, this evidence deserves significant weight.

[103] A second point relates to the conduct of the parties in light the applicable Rules. As stated above, the requirements of Rule 389(1) were not followed in this case. Had there been a partial or total settlement of the proceeding, there was an obligation, under Rule 389, to put that in writing and to have it signed. The evidence on the record shows that, at no point in time, Shake Shack (or Chic Shack for that matter) took steps to reduce the settlement allegedly reached at the Mediation Session to writing and to have it signed by the parties or their counsel.

[104] At the risk of repeating myself, this evidence showing that the parties have not followed the mandatory requirements established by the Rules to confirm the existence of a total or partial settlement agreement in the context of this Court-assisted mediation is certainly another factual element which informs on whether an agreement existed or not at the end of the Mediation Session. Here, it does not support Shake Shack's position.

[105] As the Supreme Court said in *McDougall*, when assessing whether the evidence is sufficient to meet the standard of the balance of probabilities, regard should also be had to "inherent probabilities or improbabilities" flowing from the specific factual circumstances. In light of the circumstances, and in particular the adjournment declared by the mediator, her silence since the Mediation Session, and the absence of any steps taken under Rule 389 in this Court-assisted mediation, this is a situation where there is an inherent improbability that the alleged settlement agreement occurred (*McDougall* at para 47). These circumstances related to the particular context of this mediation constitute evidence contributing to establish that it is more likely than not that the event alleged by Shake Shack did not occur (*McDougall* at para 48).

(2) No agreement to settle, and no agreement on all essential terms

[106] I now turn to the second factor leading me to find an absence of sufficient evidence supporting the existence of the alleged settlement agreement. Further to my careful examination of the evidence, I am not satisfied that it supports the existence of a meeting of the minds between the parties, generally or on all essential terms of a settlement agreement. The evidence on the record does not demonstrate, on a balance of probabilities, that an agreement acceptable to Chic Shack had been concluded at the Mediation Session, or that it covered all essential elements

of a transaction contemplated by both parties. More specifically, viewed objectively, the size of the exclusivity zone where Chic Shack could continue to use its trademark was an essential element on which there was no agreement.

[107] True, the Palmese and Kark Affidavits describe in detail how, in these representatives' views, the parties spent the Mediation Session and apparently reached a "handshake agreement". But, there are numerous other pieces of evidence failing to support the acquiescence of Chic Shack to a settlement agreement on the terms set out in the Term Sheet, let alone to a settlement agreement covering all essential elements. These include: 1) the testimony of Mr. Price who, while agreeing to the sequence of events described by Mr. Palmese, denied having agreed to the terms of a settlement; 2) the written testimony of Mr. Palmese which illustrated the close link between the various principal features of the contemplated agreement; 3) the Kark Email sent less than two (2) hours after the end of the Mediation Session to Shake Shack's CEO, in which Mr. Kark reported having reached an "agreement in principle" with Chic Shack, on terms which differ from those in the Term Sheet; 4) the Term Sheet setting out "key points" which encompassed the exclusivity zone; and 5) the emails exchanged between Mr. Lauzon, counsel for Chic Shack, and Mr. Dupont, counsel for Shake Shack, less than 48 hours after the end of the Mediation Session, where uncertainty about the very existence of an agreement and its terms transpired from the exchanges, most eloquently from the emails of Shake Shack's own counsel.

(a) ***No agreement to settle***

[108] I have reviewed the voluminous evidence filed by the parties and I do not agree that Shake Shack has met its burden on the existence of an agreement. Viewing this evidence

objectively from the standpoint of a businessperson – not subjectively –, the correspondence and the exchanges between the parties do not constitute an offer to settle and an acceptance of such offer by Chic Shack. Properly characterized, they are successive offers coming from each side showing that progress towards a deal was being made. But no agreement had yet been achieved.

[109] Shake Shack submits that, when we combine 1) the testimonies of Mr. Palmese and Mr. Kark; 2) the testimony of Mr. Price; 3) the Kark Email and 4) the emails exchanged by counsel on December 20, 2019, it is clear that the parties had agreed on everything that is not minor or secondary. I disagree. My review of the evidence leads me to the opposite conclusion.

[110] In the context of a mediation, as expressly prescribed by Rule 387, the settlement must be a "mutually acceptable resolution of the dispute". At its very root, a mediation is anchored upon an agreement and meeting of the minds between the parties, as opposed to an adjudication by a third party. I find that there is no clear and convincing evidence demonstrating that the alleged agreement was an acceptable solution for Chic Shack or satisfied it, or that Mr. Price had acquiesced to an alleged agreement. As admitted by counsel for both parties at the hearing, I am aware of no precedent where the Court has confirmed an agreement allegedly reached under a Court-assisted dispute resolution process, against the wish of one of the parties.

[111] I first consider the evidence from Mr. Price. In determining whether there is an agreement, the Court must examine all the relevant circumstances, including the conduct of the parties involved in the claimed transaction. In this case, the testimony and behaviour of Mr. Price do not, objectively, reflect the conduct of a person who has accepted an alleged agreement and

has denied it afterwards. It instead reflects the situation of a person who has never acquiesced to the agreement alleged by Shake Shack. Mr. Price said that his understanding, at the end of the Mediation Session, was that “on était encore dans un processus liquide, si je peux dire, un processus en mouvance” (Price Cross-examination at p 83). The mediation was suspended, not completed, and Mr. Price expected that there would be much more discussions, as well as further reflections by Chic Shack.

[112] I find no clear and convincing evidence in the conduct of Mr. Price at the Mediation Session or afterwards that would support his acquiescence to an agreement. There is no evidence emanating from Chic Shack such as the acceptance of a payment, a change of behaviour in the conduct of its business, or a concrete action implementing or accepting the alleged terms of agreement. The evidence emanating from Mr. Price or flowing from his actions or behaviour following the end of the Mediation Session does not suggest or support a conclusion that he would have agreed to a solution “acceptable” to Chic Shack to resolve the dispute.

[113] In sum, the evidence does not objectively show an offer and unequivocal acceptance of a settlement agreement by Chic Shack at the end of the Mediation Session. Just as there was no evidence of an agreement in the conduct or evidence coming from the mediator, there is none coming from Mr. Price or Chic Shack. I emphasize that Mr. Price only accepted Mr. Palmese’s recitation of the sequence of events at the Mediation Session, but disagreed with Mr. Palmese’s assessment of the contents of the discussions.

[114] It may be that Mr. Price's mind was not fully turned to the Mediation Session on December 18, 2019, given the financial difficulties experienced by one of his corporations at that time. The fact that this concern was never raised during the Mediation Session or that it was not even communicated to Chic Shack's own counsel may be deplorable as it most likely impacted the conduct of the mediation. But I fail to see how this can be used to infer some form of agreement by Chic Shack to the settlement agreement claimed by Shake Shack.

[115] In addition, the conduct and the exchanges between counsel after the Mediation Session do not reflect the existence of an agreement allegedly arrived at the end of the mediation either. Quite the contrary. Far from confirming the existence of an agreement, the December 20, 2019 exchanges between counsel instead reflect a situation where the parties did not agree that a settlement had been reached. The most compelling evidence on this front is the evidence coming from Shake Shack itself, through its counsel. The emails sent by Shake Shack's own counsel on December 20, 2019 (described in detail above) contain numerous statements expressing not an affirmation that an agreement actually existed but instead queries and questions to seek confirmation from counsel for Chic Shack that an agreement actually existed.

[116] A review of the RP-17 Email, the RP-19 First Email, the RP-19 Second Email and the RP-21 Email shows that, over a period of about three (3) hours on December 20, 2019, counsel for Shake Shack sent no less than four different emails in which, each time, he repeatedly used language exhibiting doubts and uncertainty about the very existence of an agreement. Words and statements included: "on puisse au moins confirmer", "assumant que", "je présume", "ne fait probablement pas problème" and again « pouvez-vous au moins confirmer » (emphasis added).

These are not words of someone who considers that an agreement exists. These words are much more compatible with the situation of someone who wonders whether or not the agreement actually exists, and who is looking for a confirmation that it does. This confirmation, this meeting of the minds, never came to fruition, from either Chic Shack or its counsel. Moreover, the RP-19 Second Email transmitting the Term Sheet was prefaced with the heading note: « SOUS TOUTES RÉSERVES – DISCUSSIONS DE RÈGLEMENT ». If this RP-19 Second Email was purportedly a confirmation of the already existing agreement, then such a heading was unnecessary. In fact, the heading directly contradicts what the email was arguably meant to confirm, namely an actual agreement, not discussions of settlement.

[117] No matter how generously I can read these emails, they do not express any certainty of an agreement having been reached. Far from it. They instead amount to evidence pointing in the opposite direction and indicating that Shake Shack itself, through its counsel, was unsure as to the existence of an agreement and its actual terms.

[118] This evidence once again supports a conclusion that no agreement had been concluded at the end of the Mediation Session and that no agreement on the terms summarized by counsel for Shake Shack in the Term Sheet or the January 2020 Letter had been reached. I pause to mention that, in my view, it cannot be implied from the RP-18 Email, where Mr. Lauzon simply says "OK, merci !" to a previous correspondence, without more, that he thereby confirmed an agreement on the terms of a settlement or an acquiescence to receive the monetary payments.

[119] I remind once again that, contrary to most precedents referred to by Shake Shack, there is no written document or even draft written document reflecting an alleged agreement containing the terms of an alleged meeting of the minds between the parties. There is no documentary evidence of an agreement, nor evidence showing that, by their statements or conduct, Mr. Price and Chic Shack agreed to a settlement. In fact, in the Kark Email, Mr. Kark even refers to an agreement in principle which is not yet completed, as Shake Shack "need[s] to go get a deal done".

[120] The only evidence on the record suggesting the existence of an agreement is the perception of Shake Shack's representative, Mr. Palmese, about the consent of Mr. Price. I accept that Mr. Palmese may have had that viewpoint. However, apart from Mr. Palmese's (and Mr. Kark's) own perception and belief, there is no evidence on the various components of the chain of events he claims to have led to the conclusion of an alleged agreement between the parties. No matter how strongly convinced Mr. Palmese and Mr. Kark may be, the Court needs more than their own impressions and beliefs about Mr. Price's acceptance to conclude to a meeting of the minds between the parties. In light of the contrary evidence mentioned above, I find this insufficient as there is no other compelling evidence of the consent attributed to Mr. Price regarding a "handshake agreement".

[121] I can understand that Mr. Palmese and Mr. Kark may feel some frustration after having gone through the mediation process in the hope of an agreement and a settlement of Shake Shack's action. I also acknowledge that they may have reasons to be displeased with how the mediation proceeded and ended. But it takes more than discontent with the other party's behavior

or a profound one-sided conviction of an agreement to conclude to the existence of a settlement agreement.

[122] At this juncture, I just say a quick word on the Kark Email, as I will discuss it in more detail later in these reasons. Suffice it to mention that the "agreement in principle" it describes is on terms which materially differ from those contained in the Term Sheet that Shake Shack is asking the Court to enforce. If Shake Shack had argued that a settlement agreement had been reached by the parties on the terms specifically described by Mr. Kark as components of the "agreement in principle" (namely, the two dimensions of the monetary terms; the acquisition and license back of LE CHIC SHACK trademark; the right for Chic Shack to operate in a 100 kms radius from Quebec City; and the right to open additional locations within that radius), the assessment of the evidence on the existence of a settlement agreement might have been different. But this is not what Shake Shack is doing here. It is claiming the existence of a settlement agreement on terms other than the Kark Email. Shake Shack's reliance on the Kark Email as support for its allegation of an agreed-upon settlement agreement is therefore meritless.

[123] In light of the foregoing, I thus find that, when considered in its totality, there is no clear and convincing evidence establishing, on a balance of probabilities, that a settlement agreement was reached at the end of the Mediation Session.

(b) ***No agreement on all essential terms***

[124] I also find that the evidence does not allow me to conclude, on a balance of probabilities, that there was an agreement on all essential terms of a settlement to end the parties' dispute

(*Apotex* at paras 52-53). Here, it suffices to look at the evidence regarding the exclusivity zone and the modalities under which Chic Shack would be allowed to operate in this geographic area. I am of the view that, objectively, this was one of the important or essential elements of the transaction contemplated by the parties, and that there was no agreement on it at the end of the Mediation Session or further to the Term Sheet. For the sake of clarity, I specify that, what I refer here as the "exclusivity zone" has two interconnected dimensions: the geographic limitation of the zone (or the radius) and the nature of the operations Chic Shack is exclusively allowed to conduct in that zone.

[125] I preface my analysis by stressing again that we are in the context of a settlement agreement further to a mediation. Essential elements must be viewed and assessed from the perspective of both parties, and elements will only be non-essential if they happen to be secondary for both parties (*Taillefer* at para 74). The fact that one element may be perceived as secondary by the party seeking to enforce the agreement is not sufficient to conclude that, objectively, it was not essential to the transaction.

[126] In its submissions, Shake Shack reduces the elements "essential" to the settlement agreement to the following: 1) Chic Shack continues to operate its existing LE CHIC SHACK restaurant in Quebec City; 2) Shake Shack is allowed to enter the Canadian market; and 3) Shake Shack pays a certain sum of money to Chic Shack. Shake Shack claims that the exact territory where Chic Shack could operate and the definition of the exclusivity zone are not essential ingredients to the agreement between the parties. A review of the evidence does not support that. The overwhelming evidence, from Mr. Price and from Shake Shack itself, instead shows that, at

every step of the process, the definition of the exclusivity zone was a central and essential feature of all settlement discussions for Chic Shack, along with the monetary aspects and the "structure" of the transaction. It may be that, at the mediation, there was a particular emphasis on the monetary aspects (and that this appeared to be Shake Shack's main area of concern), but the definition of the exclusivity zone and the operational features associated with it were always a key part of the equation.

[127] I do not dispute that there is consistency in the evidence regarding the monetary terms discussed and agreed upon at the Mediation Session. Indeed, Shake Shack's own documents (the Kark Email, the Term Sheet and the January 2020 Letter) do not vary on this front. But the evidence demonstrates that the monetary terms did not exist in isolation, and that the contemplated settlement agreement did not boil down to a binary set of figures.

[128] As stated above, I must undertake an evidence-based factual analysis to determine whether there was a meeting of the minds on the essential terms and conditions giving rise to the alleged transaction. Objectively, I find that, in a trademark infringement case such as this one, the territorial restrictions on the use of a trademark are an essential element of a transaction where a party agrees to a monetary compensation in exchange for agreeing to a limited use of its trademark. In the context of a trademark infringement, an issue relating to the scope of the geographical limitations to be placed on a party is significant, not minor.

[129] Shake Shack claims that Mr. Price did not give an indication that the radius of the exclusivity zone could have an impact on the financial terms. I disagree and find that the

evidence does not support such a claim. Further to my review of the evidence, I am instead satisfied that the monetary terms were always tied to the exclusivity zone.

[130] Mr. Price has consistently established a link between the exclusivity zone and the monetary terms. Mr. Price participated in the preparation of Chic Shack's mediation brief. In that brief, Chic Shack, when outlining its third option for a settlement, clearly associated the radius for exclusive expansion to the monetary terms and indicated that the compensation would vary with the degree of the geographical limitations imposed. In Chic Shack's third option, the radius of the exclusivity zone was the first element mentioned and it was at least as essential as the monetary compensation. A plain reading of the option shows that the two elements are interdependent and inversely proportional. This was confirmed by Mr. Price in his affidavit and on cross-examination when he talked in terms of communicating vessels. The radius was of variable geometry because it fluctuated with the monetary compensation.

[131] What was effectively discussed throughout the Mediation Session was a proposal close to this third option, where the monetary compensation was clearly not the only essential ingredient.

[132] On cross-examination, Mr. Price admitted that he had already made up his mind prior to the mediation that he would concede all of Canada to Shake Shack with the exception of Quebec City, and maybe the whole province of Quebec depending on Shake Shack's plans. It may be that Mr. Price had made up his mind on this point prior to the Mediation Session, but Mr. Price always made it clear that the exclusivity zone, regardless of how it would be defined, was an

essential element of any settlement agreement, and that it was interdependent with the monetary terms.

[133] The evidence is in fact much more compatible with the statements made by Mr. Price who testified in his affidavit and in his cross-examination that no agreement had been reached as essential terms such as the geographic limitation of the exclusivity zone were still under discussion. In Mr. Price's view, the agreed-upon radius for the exclusivity zone was clearly 100 kms at the end of the Mediation Session. This was modified by Shake Shack in the Term Sheet. On cross-examination, Mr. Price was asked whether he had agreed to limit the exclusivity zone to 50 kms at the Mediation Session, and he clearly said no. He added that, in the RP-23 Email, Chic Shack came back on numerous points, including the radius. Mr. Price expressly confirmed on cross-examination that, in the end, he did not accept the 50 kms condition in a vacuum, but that he eventually agreed to this concession in exchange for other elements, found in Chic Shack's counter-offer of January 8, 2020.

[134] Even the evidence coming from Shake Shack strongly supports the conclusion that the territory was always an essential element of the contemplated transaction. A reading of the Palmese Affidavit, the Kark Email and the Term Sheet confirms that.

[135] Further to my review of the Palmese Affidavit, I find that, in his recitation of the offers and counter-offers at the Mediation Session, Mr. Palmese carefully distinguished the various proposals in terms of their actual scope. Some related solely to the "monetary terms", while others included also the territorial dimension (i.e., the exclusivity zone) or also dealt with the

"structure" of the arrangement between the parties (i.e., the acquisition and licensing back of Chic Shack's trademark). The offers and counter-offers were revolving around those three elements. Mr. Palmese referred to a partial agreement covering only the financial terms and the structure. At no point did Mr. Palmese suggest or state that a geographical restriction to the exclusive use of Chic Shack's trademarks was secondary or non-essential. In my view, it cannot be inferred from the Palmese Affidavit that the geographic restrictions linked to the exclusivity zone could be divorced from the other settlement terms.

[136] The Kark Email further leaves no doubt that the size of the exclusivity zone was one of the limited components of the "agreement in principle", and did not fall in the "details" to be subsequently resolved. It was therefore an essential element of the contemplated transaction. The elements singled out by Mr. Kark and which formed part of the "agreement in principle" include the two monetary terms, the structure of trademark ownership with a license, a territory of a 100 kms radius from Quebec City where Chic Shack can operate, the fact that the duration of the license is linked to the operation of Chic Shack (not the ownership), and the possibility for Chic Shack to open additional locations within the area radius. At no point did Mr. Kark indicate or suggest in his email that the territorial restrictions were secondary to the monetary terms, or were non-essential. On the contrary, they were listed among the main features of the agreement in principle, on the same footing as the monetary terms. I note that Mr. Kark's mention that Chic Shack could open additional locations within the 100 kms area is consistent with Mr. Price's "understanding" to that effect. Even though Mr. Price apparently only raised the possibility of opening up additional CHIC SHACK restaurants within the exclusivity zone at the very end of

the Mediation Session, this point was nonetheless part of the "agreement in principle" summarized by Mr. Kark.

[137] Shake Shack's contention to the effect that the territorial limitation was not an essential term is thus contradicted by this document written by one of its representatives contemporaneously with the end of the Mediation Session. True, Mr. Kark refers to "still a few details to work through", but those details clearly do not include the territorial limitation, which is described right above this statement, among the limited discrete points forming part of the "agreement in principle" he outlines. Far from being a detail or a minor concern to be ironed out, the territorial limitation was instead among the main features of the agreement in principle.

[138] Turning to the Term Sheet, it provides a list of "key points" which include, among other things, the monetary terms, the structure of the license arrangement between the parties and the exclusivity zone (albeit "diminished" in dimension as flagged by counsel for Shake Shack in the RP-19 Second Email). All those elements are presented as "key points", and none bears the label of "secondary" or "minor", or is classified in a separate category. No distinction was made in the Term Sheet between what was subsequently qualified by Shake Shack's counsel as essential or secondary in the January 2020 Letter. The Term Sheet instead placed all key points on the same level, implicitly indicating that they were all essential elements of the transaction allegedly concluded by the parties at the end of the Mediation Session. I agree with counsel for Chic Shack that "key points", objectively, are the equivalent of essential elements. As are the components of an "agreement in principle".

[139] In sum, Shake Shack's own evidence does not support its assertion that the territorial limitation is "objectively a secondary element". Mr. Palmese does not say so, nor do the Kark Email or the Term Sheet. The argument put forward by Shake Shack, to the effect that the exclusivity zone would somehow be secondary or non-essential, is dented by its own evidence.

[140] I must look at the evidence objectively, from the standpoint of a reasonable businessperson, not subjectively (*Apotex* at paras 70-71). Viewed in that way, I am not convinced that the scope of the geographic restrictions upon Chic Shack can be considered as minor or secondary. They are at the heart of any settlement Chic Shack was considering. It was a substantial part of the consideration that Chic Shack was to receive under the contemplated settlement agreement. I am also satisfied that the monetary terms and the exclusivity zone are objectively interconnected and act as communicating vessels. As they are interdependent, one cannot be considered essential while the other is not. Furthermore, a reduction of the radius of the exclusivity zone from 100 kms to 50 kms (as contemplated in the Term Sheet) is objectively significant, as it implies a reduction of the actual exclusivity area by 75%.

[141] Objectively viewed, the owner of a trademark wants to prohibit an owner of an allegedly confusing trademark from using it in a certain area and to restrain the use of such trademark. A reasonable businessperson, viewing the matter objectively, would appreciate that, in any settlement, the owner of a trademark in the position of Chic Shack would want clarity about the exact limit of the geographical area where he or she can continue to operate and that the extension or contraction of such area would have an impact on the monetary compensation for

agreeing not to use its trademark. Objectively viewed and objectively assessed, the scope of the restrictions upon Chic Shack was an essential term.

[142] I find that at no time was there a matching offer and acceptance on all essential terms. Indeed, most of the parties' communications, objectively viewed, instead show disagreement over the scope of the exclusivity zone to be imposed on Chic Shack, on both the geographical limitation of the zone and the extent of Chic Shack's activities in it (i.e., the number of restaurants it can operate). In this case, uncertainty remained about essential provisions of a complex settlement at the end of the mediation. As in *AIC Limited v Infinity Investment Counsel Ltd.* (1998), 147 FTR 233 [*AIC Limited*], cited by Chic Shack, what was at most achieved at the end of the Mediation Session was a "preliminary agreement" or a "contract to make a contract" (*AIC Limited* at para 41). The evidence demonstrates that there remained considerable uncertainty with respect to at least one key essential term, the exclusivity zone. When a contract is incomplete because essential provisions intended to govern the contractual relationship have not been settled or agreed upon, there is no contract, but an agreement to make an agreement (*AIC Limited* at para 40).

[143] I make one final comment about the RP-16 Email of December 20, 2019, in which Mr. Lauzon, counsel for Chic Shack, referred to "fairly minor" outstanding items and which Shake Shack often cited in support of its position. In my view, this email is not sufficient to tip the balance. First, the impugned words were used prior to Mr. Lauzon's receipt of the Term Sheet, which modified the Kark Email. Second, in his cross-examination, Mr. Price said he could not figure out what elements would be minor ones and disagreed with his own counsel's

qualification of any remaining points being qualified as such. Third, I am to determine the essentiality of the elements of the settlement agreement on an objective basis, not on the basis of subjective views expressed by counsel or by the parties.

[144] Given my conclusion on the essential character of the exclusivity zone and the absence of agreement on this point, I do not have to deal with the disputed issues regarding other elements of the contemplated settlement agreement, such as the duration of Chic Shack's license and its link to the operation or ownership of Chic Shack, the possibility to grant sub-licenses, or changes that Chic Shack would have to do to ensure that there is no confusion between the parties' trademarks. The parties disagree on whether those other elements are essential or not. I will just signal that, at first glance, they also objectively appear to be directly related to Chic Shack's operations and to have a material impact on the conduct of its business.

[145] I have scrutinized the evidence with care and, for all the above reasons and on the evidence before me, I am not satisfied that Shake Shack has demonstrated, on a balance of probabilities, the existence of a settlement agreement on all essential elements.

(3) Changes in the terms of any alleged agreement

[146] The third element that leads me to find an absence of sufficient evidence supporting the existence of an alleged agreement results from Shake Shack's own documents prepared in relation to the purported agreement. According to this evidence, the terms upon which Shake Shack claims that it had an "agreement in principle" at the end of the Mediation Session (i.e., the

Kark Email) have morphed over time, taking two different incarnations in the Term Sheet and then in the January 2020 Letter.

[147] I can do no better than use the words of Justice Rothstein in *AIC Limited*: "[w]hen a party comes before the Court and asks for an order to enforce a settlement agreement, its position is seriously undermined when the evidence discloses, and the plaintiff concedes, that there is more than one version of the purported agreement" (*AIC Limited* at para 43). This is even more so when that evidence all originates from the moving party and the changes are not minor details. This is the situation here.

[148] With respect, the Term Sheet as well as the January 2020 Letter, while purporting to reflect the alleged agreement between the parties, are significantly at odds with the understanding that Mr. Kark had of an agreement in principle at the end of the Mediation Session, set out in the Kark Email he contemporaneously sent to Shake Shack's CEO at the end of such session. Put another way, the evidence from Shake Shack itself reflects that the agreement alleged to have been reached at the end of the Mediation Session has been changed to something materially different. What is more, Shake Shack has modified elements that it had itself identified as essential. None of the modified terms appears to be to the benefit of Chic Shack.

[149] Therefore, even if one was to assume that there was a binding original settlement agreement at the end of the Mediation Session, it appears that Shake Shack considered its terms to be malleable. With its Term Sheet and with its January 2020 Letter, both of which amended

essential elements allegedly agreed upon at the Mediation Session by Mr. Kark, Shake Shack effectively repudiated any original agreement that might have arguably existed. I am not disputing the fact that Shake Shack is entitled to modify the terms of a settlement agreement it wishes to conclude. However, it cannot claim to have an agreement at the end of the Mediation Session, and seek to have it enforced by the Court, when it itself decides to unilaterally change its terms, to the obvious detriment of Chic Shack.

[150] In its evidence, Shake Shack has submitted three crucial documents evidencing the existence and terms of an alleged settlement agreement. They are the Kark Email dated December 18, 2019, the Term Sheet dated December 20, 2019, and the January 2020 Letter dated January 20, 2020.

[151] The Kark Email explicitly referred to an "agreement in principle" composed of four (4) main elements: the monetary terms; the acquisition and license back of LE CHIC SHACK trademark; the right for Chic Shack to operate in a 100 kms radius from Quebec City; and the right to open additional locations within that radius. Everything else was "details to work through", of which there were "few".

[152] For its part, the Term Sheet contained seven (7) "key points": the acquisition of Chic Shack's trademarks by Shake Shack; the licensing back to Chic Shack with no sub-license, an exclusive radius of 50 kms, and a term valid as long as Chic Shack is owned by Mr. Price and his sister; an exclusivity zone of 50 kms for Chic Shack; some measures to ensure the absence of confusion between the parties' trademarks; the monetary terms; a discontinuance of litigation;

and standard provisions for the relevant agreements to be signed. The Term Sheet contains no mention of the number of restaurants Chic Shack is allowed to open in the exclusivity zone. I observe again that the Term Sheet contains no reference to elements being essential or secondary, and instead puts all items under the same qualifier of “key points”.

[153] Turning to the January 2020 Letter, it first sets out five (5) points, described as the “essential elements” of the settlement agreement allegedly arrived at in December 2019: the acquisition of Chic Shack’s trademarks; the license back to Chic Shack to allow it to continue its operations; an undefined exclusivity zone around Chic Shack’s Quebec City restaurant; the monetary terms; and some parameters to ensure the absence of confusion between the parties’ trademarks. Other elements are then identified as “secondary elements” said to have been left outstanding after the Mediation Session. They are: the exact radius of the exclusivity zone; the number of restaurants Chic Shack is allowed to open under the license; and the drafting of the relevant agreements.

[154] A reading of these three documents emanating from Shake Shack can only lead to one conclusion: they contain several discrepancies and contradictions. More particularly, the Term Sheet and the January 2020 Letter are at odds with the Kark Email on key elements. They illustrate that, according to Shake Shack’s own documents, the terms of an alleged settlement agreement are a moving target and are at best uncertain.

[155] The December 20, 2019 one-pager Term Sheet, allegedly drafted to reflect what was agreed upon at the Mediation Session, flies in the face of elements contained in the agreement in

principle put on paper in the Kark Email. While some of the key points contained in the Term Sheet were simply a new iteration of what had been summarized in the Kark Email (such as the monetary terms or the sale and license back structure), others were not. First, the area radius where Chic Shack can operate and open additional locations shrunked and was reduced by half, going from 100 kms to 50 kms. Second, the right to operate in the area radius under a license which was to be valid until Mr. Price "operates" Chic Shack, was now linked to an ownership requirement. This is what Mr. Lauzon referred to as a "deal breaker" in the RP-20 Email. Third, the Term Sheet contained not only elements that were not agreed upon (such as the 50 kms radius of the exclusivity zone or the validity of the license based on a notion of ownership) but also terms that, according to some evidence, were not discussed at the Mediation Session (such as the measures to avoid confusion between the parties' trademarks). As pointed out by Mr. Price in his testimony, the changes brought about by the Term Sheet are not details but are materially different from the original claimed agreement set out in the Kark Email.

[156] At the hearing, Shake Shack's counsel suggested that the distinction between "operate" and "own" is semantic and essentially referred to the implication of Mr. Price in Chic Shack's business. I am not convinced by this argument. Words matter, especially in the context of a settlement agreement aimed at defining the future relationships between confusing trademarks, and a difference in wording can be material even if the change may appear small or simple (*Apotex* at para 84). Viewed objectively, the change to an "ownership" requirement was significant. Moreover, according to the testimony of Mr. Price, this issue of "operating" or "owning" Chic Shack was never discussed at the Mediation Session.

[157] In light of the foregoing, it cannot be said that the circulation of the key points two days after the end of the Mediation Session simply constituted an exercise in papering a deal on all essential terms which the parties had already agreed to. Rather, the Term Sheet, and the subsequent iterations described in the January 2020 Letter, became means by which the scope of the restrictions imposed upon Chic Shack were expanded compared to what was originally set out in the Kark Email.

[158] I underline once again that Shake Shack is not asking the Court to enforce the alleged agreement as it was summarized in the Kark Email. It relies on an agreement set out in the Term Sheet which is something different and, from Chic Shack's standpoint, something less than what was described as the "agreement in principle" in the Kark Email. From an objective standpoint, there is no question that the terms of settlement have a materially different scope in the two documents.

[159] I concede that, in its response to paragraph 5 of the Term Sheet dealing with monetary terms (RP-23 Email), Chic Shack did not expressly link its new monetary demands to the size of the reduced exclusive territory. Instead, it justified it by its further review of the economic premises and business scenarios contemplated by Shake Shack. But the proverbial "change of heart" by Mr. Price on the monetary aspects compared to what had been discussed and agreed at the Court-assisted mediation on this specific point may be understandable, as the Term Sheet turned the tables on several points and brought about new elements in the agreement allegedly reached by the parties. In sum, the Term Sheet presented to Chic Shack terms of settlement that, on their face, significantly altered the proposals discussed at the Mediation Session.

[160] Turning to the January 2020 Letter, it is particularly troubling as elements belonging to the "agreement in principle" laid out in the Kark Email or identified as "key points" in the Term Sheet were suddenly reincarnated as secondary details. This is the case for the exact radius of the exclusivity zone, and for the ability of Chic Shack to open other restaurants in the exclusivity zone under its license. Furthermore, whereas the exclusivity zone was an arithmetic measure in both the Kark Email and the Term Sheet, it became a concept in the January 2020 Letter, with its exact geographic dimension being relegated to the group of secondary elements. Conversely, the changes needed to avoid confusion between the parties' trademarks, while not mentioned in the Kark Email and arguably part of the "details" to be worked through, gained "essential" status in the January 2020 Letter (as they did in the Term Sheet).

[161] There is therefore an obvious dissonance between the terms of agreement as understood by Mr. Kark and the terms summarized by counsel in the Term Sheet and the January 2020 Letter. Put another way, the terms upon which Shake Shack is asking the Court to confirm an alleged agreement are not those upon which Shake Shack's representative said there was an agreement of principle at the end of the Mediation Session. A party cannot claim to have an agreed-upon settlement agreement on terms that are not sufficiently certain, that it itself considers variable and that it alters in its own documents.

[162] This evidence coming from Shake Shack does not persuade me that, on a balance of probabilities, a settlement agreement on clear and unequivocal terms had been reached between the parties. Quite the contrary.

(4) Conclusion on the evidence

[163] For all the reasons detailed above, taking these three factors together and considering the evidence as a whole and objectively, I do not find that, on a balance of probabilities, the parties had reached an agreement on all essential elements of a settlement at the end of the Court-assisted Mediation Session. On this Motion, Shake Shack is asking the Court to step in and exercise its adjudicative function, and effectively to override a process governed by another dispute resolution mechanism of the Court. Shake Shack is thus asking the Court to do something exceptional – for which there is no precedent –, and the evidence had to be there to support it. Here, the evidence falls well short of the mark.

C. *Some final remarks*

[164] I acknowledge that Mr. Price may not have been as prepared for the Mediation Session as Shake Shack's representatives might have wished. Or that he may not have been as keen to settle as Shake Shack's representatives apparently were, preoccupied as he was with the difficulties and the legal process involving another of his corporations. I also understand that, in the circumstances, Shake Shack may have found Chic Shack's position and approach to the mediation to be unprofessional.

[165] I further accept that Mr. Palmese and Mr. Kark had every reason to be annoyed and irritated with the new monetary requests formulated by Chic Shack on January 8, 2020, in the RP-23 Email. Those requests were, objectively, a material departure from what had been the agreed-upon financial terms of the contemplated transaction throughout the last part of the Mediation Session (no matter whether these terms are measured in Canadian or American dollars). Some could say that, by changing its position so drastically on the monetary terms, Chic

Shack was tiptoeing the sideline of impropriety and misconduct. However, I do not agree that Mr. Price's behaviour showed disregard or disrespect for the Court-assisted mediation process. Similarly, nothing in the evidence allows me to conclude that Mr. Price could be said to have entered the mediation in bad faith. Notwithstanding Mr. Palmese's own impressions, I am not satisfied that the evidence supports the attribution of despicable mercantile intentions to Mr. Price, or that Chic Shack could be said to have been solely animated by the desire to leverage the abandonment of "bogus expansion plans" to justify a larger payout from Shake Shack.

[166] The fact that Shake Shack did not obtain a successful mediation on the terms it was hoping for was understandably frustrating and disappointing for its representatives and its counsel, but that does not mean that Chic Shack approached the mediation with ill-advised intentions or dishonesty. There is no evidence to support those insinuations. In addition, the fact remains that the contemplated settlement agreement was not just about the monetary terms. Chic Shack's about-face on the financial terms, while perhaps regrettable, cannot serve to justify the homologation of a settlement agreement that includes other essential elements on which no agreement has been reached.

VI. Conclusion

[167] For the reasons detailed above, I find that the parties have no agreement to settle this litigation and Shake Shack's Motion is therefore dismissed.

[168] At the hearing, counsel for Shake Shack expressed the view that costs could be the subject of further submissions. Considering the outcome of this Motion, I do not find that further submissions on costs are necessary and I am satisfied that Chic Shack is entitled to its costs.

[169] Chic Shack is asking for costs on a solicitor-client basis, payable forthwith. I do not agree that this is a situation where I should exercise my discretion to award costs on a solicitor-client basis. Enhanced costs, such as solicitor-client costs, are generally awarded "where there has been reprehensible, scandalous or outrageous misconduct connected with the litigation" (Salt Canada at para 61). I do not find that the conduct of Shake Shack on this Motion rises to this high threshold, and Chic Shack has not presented any evidence or made any compelling argument to support its extraordinary request.

[170] Chic Shack's costs will therefore be calculated on the basis of the middle-range of Column III of Tariff B, as costs usually are. That said, in lieu of taxation, the parties shall consult each other in order to agree as to the amount of costs. If they cannot agree, they shall contact the Court Registrar within 14 days of the date of these reasons, and a short conference call will be convened for the purpose of fixing a lump-sum amount of costs inclusive of disbursements.

JUDGMENT in T-917-17

THIS COURT'S JUDGMENT is that:

1. The Plaintiffs' motion is dismissed.

2. The Defendant is granted costs, calculated on the basis of the middle-range of Column III of Tariff B.

"Denis Gascon"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-917-17
STYLE OF CAUSE:	SSE HOLDINGS, LLC and SSE IP, LLC v LE CHIC SHACK INC.
PLACE OF HEARING:	HEARING HELD BY VIDEO CONFERENCE IN MONTREAL, QUÉBEC
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APPEARANCES:

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