



## **MEDIATION RESOLUTION DOES NOT AUTOMATICALLY LEAD TO BINDING AND ENFORCEABLE SETTLEMENT AGREEMENT**

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The Federal Court of Canada recently dismissed a motion for an order for judgment in accordance with the terms of an alleged settlement of an action reached during a mediation session presided over by the Court. [*Gutter Filter Company, L.L.C v. Gutter Filter Canada Inc.*, 2011 FC 234, February 28, 2011, Zinn, J.]

### **The Facts**

In 2007, the Plaintiff initiated an action before the Federal Court of Canada seeking the expungement of the registered trade-name and trade-mark GUTTERFILTER which had been previously obtained by the Defendants. The Defendants counterclaimed for trademark infringement on the basis of their existing trademark registration. Parallel litigation also was commenced in the United States District Court, in the Western District of Michigan.

In 2009, during the course of litigation, the parties attended a mediation session which was presided by a Prothonotary of the Federal Court. Late in the day, the parties came to a mutual understanding, which was confirmed in written "Minutes of Settlement". The Minutes of Settlement were handwritten, signed by the parties and contained the following:

"1. THE DEFENDANTS SHALL PAY THE SUM OF FIFTY THOUSAND DOLLARS (\$50,000) TO THE PLAINTIFF TO SETTLE THIS ACTION.

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2. THE PLAINTIFFS [*sic*] WILL CEASE USING THE NAME AND MARK GUTTERFILTER AFTER A SUBSTANTIAL PAYMENT HAS BEEN RECEIVED FROM THE DEFENDANTS.

3. THE PARTIES WILL ENTER INTO COMPREHENSIVE MINUTES OF SETTLEMENT INCLUDING THE USUAL AND STANDARD TERMS, DEFAULT PROVISIONS, AND DISMISSAL ORDER OF ALL ACTIONS WITHOUT COSTS.

4. THIS MEDIATION IS ADJOURNED PENDING FURTHER NEGOTIATIONS."

(emphasis added)

It was only five months later that the Defendant forwarded to the Plaintiff "comprehensive Minutes of Settlement". However, by that time, the parties were no longer on speaking terms. Plaintiff rejected the "comprehensive Minutes of Settlement" and advised that it was terminating the settlement discussions. No further meeting was held between the parties as the Plaintiff was not amenable to participating in an additional mediation session.

In 2010, Plaintiff obtained a default judgment in the US action against the Defendants and was awarded damages and attorney fees.

In early 2011, in light of the impasse, the Defendants filed a motion for an order for judgment in accordance with the terms of settlement set out in the mediated "Minutes of Settlement". The Plaintiff contested the motion on the grounds that the Minutes of Settlement were not a binding settlement agreement as there was no agreement on the essential terms of the proposed settlement.

### The Federal Court Judgement

The parties submitted diametrically opposed views of the result of mediation: the Defendants argued that the settlement document is a valid and binding contract, whereas the Plaintiff argued that the terms of the settlement agreement were not certain enough to make them enforceable.

The Court agreed with the Plaintiff that, in order to be enforceable, the terms of a settlement agreement must be certain. In the present case, at paragraphs 3 and 4 of the "Minutes of Settlement", the parties intended to further negotiate and sign "comprehensive Minutes of Settlement" to settle all of their disputes. The Court noted that a further document was therefore required by the parties to formalize the agreement reached at mediation and during further negotiations. The fact that the parties intend to settle a dispute is not determinative of the enforceability of this

settlement. However, the Court found that the “Minutes of Settlement” could be binding upon the parties if it contains all of the essential terms of the agreement.

The Court proceeded to review the contents of the “Minutes of Settlement”. He noted that as concerns the settlement funds, these could be paid over time, but there was neither an agreement between the parties as to the duration of this period of time, nor as to the definition of “substantial payment”. Upon reviewing the case law on the meaning of the word “substantial”, the Court concluded that it bears no special legal meaning or clear definition. Citing the Australian case of *Tillmanns Butcheries Pty Ltd. v. Australasian Meat Industry Employees’ Union and Others* (1979), 42 FLR 331 (FCA), at 348: “the word substantial is not only susceptible of ambiguity: it is a word calculated to conceal a lack of precision.”

The Court concluded that the making of a “substantial payment” is an essential term of the condition of the settlement, as it is what triggers the cessation of the use of the impugned trademark GUTTERFILTER in issue, which is at the heart of the dispute between the parties. Further, there was no evidence of the parties’ intentions as to the quantum of the “substantial payment”. Consequently, the Court ruled that the mediation session did not result in an enforceable agreement to settle the litigation given the uncertainty of the terms set out in the “Minutes of Settlement”. For these reasons, the Court dismissed the Defendants’ motion, with costs.

## Conclusion

For clients and counsels who are actively involved in litigating intellectual property matters, it is not a rare occurrence for negotiations to take place either in the months and days preceding a trial, or even during a trial! A memorandum of agreement is usually written down and signed by the parties; sometimes, the litigation is stayed pending the signature of a final document that will contain all of the essential terms of settlement, as well as other practical provisions to assist the parties in respecting and enforcing the agreement.

In this particular case, it appears that only an agreement in principle that was reached during the mediation session, thus it was found not to be binding or enforceable. Parties and their counsel should therefore ensure that, even if an agreement to settle litigation is not in its final form, there should be a clear and documented indication on file as to whether all or part of the terms of the agreement are immediately binding and enforceable, in order to avoid expending time, effort and money in trying to determine *ex post facto* the intention of the parties.

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