

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

BRANDON GRAY INTERNET SERVICES INC.

Plaintiff

- and -

CANADIAN INTERNET REGISTRATION AUTHORITY also known as AUTORITÉ
CANADIENNE POUR LES ENREGISTREMENTS INTERNET also known as CIRA
also known as ACEI

Defendant

STATEMENT OF DEFENCE

1. The Defendant admits the allegations contained in paragraphs 2, 4, and the first sentence of paragraph 10 of the Statement of Claim.
2. The Defendant has no knowledge of the allegations contained in paragraph 8, the second sentence of paragraph 14, and paragraph 22 of the Statement of Claim.
3. Except as is specifically hereinafter admitted, the Defendant denies the balance of the allegations in the Statement of Claim, namely the allegations in paragraphs 3, 5, 6, 7, 9, the last two sentences of paragraph 10, paragraphs 11, 12, 13, the first sentence of paragraph 14, paragraphs 15, 16, 17, 18, 19, 20, 21, 23, and denies that the Plaintiff is entitled to the relief sought in paragraph 1 of the Statement of Claim.

CIRA

4. The Defendant, the Canadian Internet Registration Authority ("CIRA"), is a not for profit corporation incorporated pursuant to the laws of Canada. Pursuant to an agreement among the University of British Columbia, CIRA and Her Majesty the Queen in Right of Canada, entered in on May 9, 2000 (the "Umbrella Agreement"), CIRA

agreed to manage, operate and control the dot-ca domain space. The parties also agreed that the dot-ca domain space should be developed as a key public resource for social and economic development for all Canadians.

5. CIRA's functions include managing the dot-ca domain space on the Internet (which includes, amongst other matters, registering dot-ca domain names), developing and implementing domain name policy, facilitating dot-ca dispute resolution, accrediting registrars, running a WHOIS (described below) service for dot-ca domains and representing CIRA in international organizations.

Registrars

6. Persons who wish to register a dot-ca domain name ("Registrants") do not deal directly with CIRA. Instead, they must deal with a "Registrar".

7. Registrars are individuals or organizations certified by CIRA to facilitate the registration, transfer, renewal and modification of registration data for Registrants. CIRA currently has approximately 150 certified Registrars, offering different services.

8. Only CIRA Certified Registrars may apply to CIRA for the registration of domain names in the dot-ca Registry and request modifications and other transactions with respect to dot-ca domain name registrations (e.g. transfers, renewals, etc.) pursuant to agreements, policies, rules and procedures set by CIRA and agreed to by the certified Registrars. A Registrant requests a dot-ca domain name from the certified Registrar who then verifies that the domain name has not been registered by anyone else. If it is available, the Certified Registrar registers the domain name with CIRA on behalf of the Registrant. CIRA, once it approves the registration request, then adds the domain name to the registry database and the Registrant can begin using it for a website, email or other Internet services.

9. CIRA maintains a look-up directory which permits queries to the dot-ca Registry database to determine the availability of dot-ca domain names or to view the registration details of those who have registered a dot-ca domain name (the "WHOIS").

10. Registrars have access to a broader content of the Registry and WHOIS, which amongst other things, allows them to learn the identity of the Registrants (customers) of other Registrars.

11. To become a CIRA Certified Registrar, an applicant must enter into a Registrar Agreement with CIRA, which outlines the rights and obligations of a Registrar and CIRA on certification. The Registrar Agreement, among other things, authorizes (in Section 1.1(2)) a party to the agreement to apply to be certified as a Registrar.

12. A successful certification application requires that applicants:

- (a) meet certain minimum qualifications, described in CIRA's Policy on Certified Registrar Application Process and CIRA's Policy on Canadian Presence Requirements for Registrars;
- (b) follow the application process; and
- (c) be accepted by CIRA as a CIRA Certified Registrar.

Registrants

13. The holder of rights in respect of a domain name is a "Registrant". When registering a domain name with CIRA, a Registrant enters into a Registrant Agreement with CIRA. All of CIRA's obligations and rights in respect of Registrants are set out in the Registrant Agreement, which includes, at Article 10.5, an "entire agreement" clause.

Resellers

14. Often Registrars will use "resellers" to provide further access to customers interested in domains. Resellers are selected solely by a Registrar, pursuant to arrangements entered into by the Registrar and reseller alone.

15. CIRA has no contractual relationships with resellers, and has no obligations at law towards resellers or employees of Brandon Gray.

Brandon Gray

16. On May 19, 2004, the Plaintiff (“Brandon Gray”) entered into a Registrar Agreement with CIRA. Article 13.1 of that agreement provided that CIRA shall have the right, at any time, to amend the terms and conditions of the agreement and that the amendment shall be binding and effective 30 days after CIRA gets notice of such amendment to the Registrar. There has been a number of interim versions. On October 30, 2008, CIRA introduced the current Registrar Agreement which is binding on all Registrars, including Brandon Gray.

17. On August 24, 2004, following its application for certification, Brandon Gray was certified by CIRA as a Registrar.

18. Certification as a Registrar is, pursuant to Article 1.2 of the Agreement, valid for a term of one year from the original certification date. The Agreement does not provide for an automatic renewal of certification at the end of any certification term. Article 1.2(1) of the Agreement provides that a Registrar “may” be recertified by CIRA annually for a further one year period if the Registrar files an application for recertification and pays the appropriate recertification fee 30 days prior to the anniversary of the Registrar’s original certification date (“the anniversary date”).

19. Article 1.2(2) of the Agreement provides that failure to be recertified by CIRA on or prior to the anniversary date will result in the automatic termination of the Registrar Agreement and the cancellation of the Registrar’s certification.

20. Article 7.1 of the Registrar Agreement provides that its term commences on the date of its execution and continues until the anniversary date, and shall be renewed pursuant to Article 7.2 unless otherwise terminated as set out in the Agreement. Article 7.2 of the Agreement provides that the term of the Agreement shall be automatically extended for successive periods of one year commencing on the anniversary date upon recertification of the Registrar by CIRA in accordance with Article 1.2.

21. Brandon Gray was recertified as a Registrar in 2005, 2006, 2007, 2008, and 2009, after submitting to CIRA its application for recertification and paying the then

current recertification fee. Brandon Gray's certification as a Registrar was scheduled to expire on August 24, 2010.

The Reputation of Brandon Gray and its Resellers

22. Contrary to the allegations contained in paragraph 5 of the Statement of Claim, Brandon Gray is not at all "highly respected in the Internet community". Brandon Gray is the subject of numerous criticisms and complaints by the Internet community, many of which are freely accessible on the Internet, which give it a very bad reputation in the Internet community.

23. Furthermore, some of its resellers, including 1480455 Ontario Incorporated, which operated under the business name "Internet Registry of Canada" ("IROC"), Domain Registry of America Inc. and Domain Registry of America Limited, corporations incorporated under the laws of Ontario (collectively referred to hereinafter as "DROA"), and Domain Registry of Canada ("DROC") have engaged in activities which are inappropriate for any business and highly unethical.

24. IROC had one director, Peter Kuryliw, who was involved in the management of Brandon Gray

25. In 2004, Daniel Klemann, one of the principals of IROC, was found guilty of charges under the *Competition Act* for misleading representations in the form of mail solicitations which appear to be invoices sent on behalf of the Government of Canada or officially sanctioned agency registering domain names in Canada, to individuals and organizations whose domain names were about to expire. As a result of these charges, Mr. Klemann and IROC were prohibited from engaging or participating in any activity involving the making of representations for the purpose of soliciting business for five years without first obtaining a positive written opinion from the Competition Bureau.

26. DROA, which shares office space with Brandon Gray, had or has one director, Peter Kuryliw. In 2003, the United States Federal Trade Commission brought a complaint for a permanent injunction and other relief against DROA for engaging in deceptive and unfair acts or practices in violation of s.5(a) of the *Federal Trade Commission Act*, alleging that DROA engaged in a direct mail marketing campaign to

U.S. consumers, with what appeared to be renewal notices or invoices from the consumers' current Registrars, advising them that the domain names were about to expire, requesting payment for "renewal" of the domain name registration, and soliciting them to transfer their domain name registrations from their current Internet domain name registrar. This practice is commonly referred to as "domain slamming". In 2003, DROA and the Federal Trade Commission agreed to a settlement pursuant to which DROA was ordered, among other things, to refrain from making any false or misleading statement, including but not limited to any representation that the transfer of a domain name is a renewal; and to restrain from failing to disclose in a clear and conspicuous manner any cancellation of processing fees imposed prior to the effective date of any transfer or renewal.

27. DROC has or had one director, Simon Benlolo.

28. In 2004, Simon Benlolo was convicted, along with Alan Benlolo and Elliot Benlolo, his brothers, of 10 counts of misleading advertising, contrary to s.52(1) of the *Competition Act*. They had sent pieces of mail that falsely appear to be bills or invoices from Bell Canada or Yellow Pages when, in fact, they were solicitations to have the recipient's business details appear in Internet-based directories operating under the names "yellowbusinesspages.com" and "yellowbusinessdirector.com".

29. In 2004, James Tetaka, the technical services manager of DROC (which shares office space with Brandon Gray), and Peter Kuryliw, were convicted of false or misleading representations contrary to s.52 of the *Competition Act* which involved targeting Canadian businesses and non-profit organizations with a deceptive mailout for an Internet directory, sending what appeared to be invoices from an existing service provider, such as Bell Canada or the Yellow Pages, requiring recipients to pay, when in fact they were not customers.

30. IROC, DROA, DROC, and Brandon Gray are linked in many ways. DROC, DROA, and Brandon Gray share office space. The senior systems administrator of Brandon Gray performs technical services for DROA and DROC. DROC, DROA and Brandon Gray share the same IP network address block, DNS and email exchange, and

webhosting. DROC and DROA have required their customers to sign legal agreements which have the effect of uniting Brandon Gray and each of those companies.

31. CIRA received hundreds of complaints since at least 2002 regarding the conduct of IROC, DROA, DROC, and/or Brandon Gray. The vast majority of those complaints related to dot-com domain names, not managed by CIRA, and complained that the notices being sent by those parties, regarding the Registrants' domains, were deceptive, misleading or fraudulent.

32. In 2010, CIRA received complaints from individuals regarding notices by DROC with regard to dot-ca domain names. Those complaints were that Registrants had been misled, by notices which appeared to be an invoice issued by a government agency; that the WHOIS domain registration data had been misused to send marketing renewal scams; and that notices were sent every year even though several requests to not be mailed or emailed had been sent by the Registrar. These complaints strongly criticized and expressed disapproval of CIRA, for having allowed and/or failed to stop the practices of Brandon Gray.

33. The activities of DROC, IROC, and DROA, set out above and contained in the complaints made to CIRA, were direct or indirect activity of Brandon Gray which had the effect of bringing the Registry into disrepute and interfering with CIRA's operations. Consequently, these activities were a breach of Article 3.1(u) of the Agreement.

34. Contrary to the allegation in paragraph 6 of the Statement of Claim, the Plaintiff was not entitled to register .ca names on behalf of Resellers or provide Resellers with all associated services. Article 2.2(1) of the Agreement provides that applications for the registration of a domain name shall only be made by the Registrar on behalf of its Registrants, not Resellers. Article 1.1(4) of the Agreement entitles the Registrar to apply to CIRA to register a .ca domain name or sub-domain name on behalf of persons who are Registrants. To the extent that the Plaintiff registered .ca domain names or sub-domain names on behalf of Resellers, or provided Resellers with associated services to them, other than pursuant to a registrant agreement, it was in breach of the Agreement. Such a breach would entitle CIRA, pursuant to Article 7.1(e) of the Agreement, to terminate the Agreement.

CIRA's Decision Not to Re-Certify

35. Pursuant to Article 1.2(1) of the Registrar Agreement, Brandon Gray was required to file an application for recertification and pay the recertification fee by July 25, 2010.

36. It did not do so.

37. On August 6, 2010, as a result of the complaints it had received in respect of Brandon Gray, IROC, DROC, and DROA, and their effect upon the reputation of CIRA and the Registry, CIRA sent to Brandon Gray a letter by email, which was a valid method of communication in accordance with Article 15.6 of the Agreement, advising that, upon expiry of its current certification term (August 24, 2010), it had determined not to accept re-certification of Brandon Gray as a CIRA certified Registrar.

38. Brandon Gray had no right to be recertified. The decision by CIRA to not recertify Brandon Gray was one which CIRA was contractually entitled to make.

39. CIRA's primary goal, and a fundamental obligation under the Umbrella Agreement, is to manage the dot-ca domain in the public interest.

40. Furthermore, CIRA is entitled to determine which potential Registrars it will do business with.

41. The Agreement provides that upon the expiry of Brandon Gray's certification, the Agreement terminates and Brandon Gray ceases to be a Registrar.

42. The Agreement provides, in Article 15.10, that it constitutes the entire agreement between the parties, that it supersedes all prior agreements, understandings, negotiations and discussions, whether oral or written; and that there is no condition, warranty, representation or other agreement between the parties in connection with the subject matter of the Agreement, whether oral or written, express or implied, statutory or otherwise, except as specifically set out in this Agreement.

43. The Agreement also provides, in Article 15.11, that a waiver of any breach or non-compliance under the Agreement is not effective unless in writing and signed by the

party to be bound by the waiver, and that no waiver will be inferred from or implied by any failure to act or delay in acting by a party in respect of any default, breach or non-observance or by anything done or omitted to be done by the other party.

44. Article 3.1(u) of the Agreement provides that the Registrar shall not engage in any direct or indirect activity which is designed to bring, or may have the effect of bringing, the Registry into disrepute or which interferes with CIRA's operations.

45. CIRA was not in a fiduciary relationship with Brandon Gray.

46. CIRA did not owe a duty of good faith to Brandon Gray.

47. CIRA at all times acted appropriately, reasonably, and in good faith.

48. Contrary to the allegations contained in paragraph 15 of the Statement of Claim, CIRA was not aware of the contracts between the Plaintiff and its resellers, or that, by not recertifying Brandon Gray, the resellers of Brandon Gray would terminate and/or surrender their contracts with the Plaintiff.

Damages

49. The damages claimed by the Plaintiff are excessive. The termination of Brandon Gray's certification as a Registrar will not shut down its operations or cause it irreparable harm.

50. In addition to the .ca registry regulated by CIRA, Brandon Gray sells its services to register domain names in the .com, .org, .biz, .co.uk, .org.uk, .net, .info, .ws, and .tv domains, and other domains. The .ca domains, the only domains affected by CIRA's refusal to re-certify, make up less than three per cent of the total domains managed by Brandon Gray. Brandon Gray is free to carry on its business in other areas and other domains.

51. In any event, Articles 8.3 and 8.4 of the Agreement provide that CIRA's aggregate liability to Brandon Gray, including for all breaches by CIRA of the Agreement, shall be limited to the total amount of all certification fees and recertification fees paid by the Registrar to CIRA, and that in no event, whether as a result of breach

of contract, tort liability or otherwise, shall CIRA be liable to the Registrar for any special, indirect, incidental, exemplary, punitive or consequential damages or for economic loss or resulting from loss of use, lost business revenues, lost profits or third party damages.

52. The total amount of all certification fees and recertification fees paid by Brandon Gray to CIRA since 2004 is approximately \$7,000.

53. Wherefor the Defendant submits that this claim be dismissed with costs.

DATE: October 7, 2010

BORDEN LADNER GERVAIS LLP

Barristers and Solicitors
World Exchange Plaza
1100 – 100 Queen Street
Ottawa ON K1P 1J9

Peter K. Doody (*LSUC# 22423S*)
Nadia Effendi (*LSUC# 49004T*)
(613) 237-5160 telephone
(613) 230-8842 facsimile

Lawyers for the Defendant

TO: **ROTUNDO DI IORIO QUAGLIETTA, LLP**

Barristers and Solicitors
BDC Building
3901 Highway No. 7
Suite 400
Vaughan, ON L4L 8L5

Enzo Di Iorio
David Brand
(905) 264-7800 telephone
(905) 264-7808 facsimile

Lawyers for the Plaintiff

BRANDON GRAY INTERNET SERVICES INC
Plaintiff

– and –

CANADIAN INTERNET REGISTRATION AUTHORITY
Defendant

Court File No. . CV-10-0100675-00

ONTARIO SUPERIOR COURT OF JUSTICE

Proceeding Commenced at NEWMARKET

STATEMENT OF DEFENCE

BORDEN LADNER GERVAIS LLP

Barristers and Solicitors
1100 – 100 Queen Street
Ottawa ON K1P 1J9

Peter K. Doody (*LSUC# 22423S*)
Nadia Effendi (*LSUC# 49004T*)
(613) 237-5160 telephone
(613) 230-8842 facsimile

Lawyers for the Defendant

Facsimile No. for Mr. Enzo Di Iorio/David Brand: 1-(905) 264-7808

(File: 335404-000056)