

**IN THE MATTER OF A COMPLAINT PURSUANT TO THE CANADIAN INTERNET REGISTRATION
AUTHORITY DOMAIN NAME DISPUTE RESOLUTION POLICY**

Complainant:	David Chambers
Complainant authorized representative:	Ronald J. Lindhold
Registrant:	Concrete Specialists Ltd.
Panel:	Barry C. Effler
Service Provider:	British Columbia International Commercial Arbitration Centre
BCICAC File Number:	DCA-1403-CIRA

DECISION

The Parties, Domain Names and Registrar

1. The Complainant is David Chambers, a resident of the Province of Alberta, Canada.
2. The Registrant is Concrete Specialists Ltd., a corporation carrying on business in the Province of Alberta, Canada.
3. The Domain Names at issue in this dispute are AlbertaFoundationAndConcreteLifting.ca and AlbertaFoundationConcreteLifting.ca.
4. The Registrar is GODADDY DOMAINS CANADA, INC.
5. The Domain names were registered by the Registrant on August 23, 2010.

Procedural History

6. The procedural history of this matter was set out in a letter from the British Columbia International Commercial Arbitration Centre to the Panel herein dated July 17, 2012:

The British Columbia International Commercial Arbitration Centre (the "Centre") is a recognized service provider pursuant to the CIRA Domain Name Dispute Resolution Policy of the Canadian Internet Registration Authority (CIRA).

On June 14, 2012 the above-named Complainant filed a Complaint pursuant to the CDRP and the Rules.

The Complaint was reviewed and found to be compliant. By letter and email dated June 15, 2012, BCICAC as Service Provider so advised the parties and forwarded a copy of the Complaint to the Registrant.

The Registrant has not provided a Response. As permitted given the absence of a Response, the Complainant has elected under Rule 6.5 to convert from a panel of three to a single arbitrator.

The Centre hereby appoints you, Barry C. Effler, LL.B., LL.M., C. Arb. (Fellow), as sole arbitrator in the above-referenced matter.

7. As required by paragraph 7.1 of the Rules, the Panellist has declared to BCICAC that he can act impartially and independently in this matter as there are no circumstances known to him which would prevent him from so acting.
8. The Panel is not aware of any other legal proceeding or other arbitration in relation to the Domain Name that would give rise, under paragraph 13.2 of the Rules, to a need to stay or terminate the progress of this proceeding.

Eligibility of Complainant

9. The Panel has reviewed the material submitted by the Complainant and is satisfied that the Complainant is an eligible complainant under paragraph 1.4 of the Policy, because he meets the Canadian Presence Requirements as a Canadian citizen.

Relief Requested

10. The Complainant requests that the Domain Names in dispute be transferred from the Registrant to the Complainant.

Applicable Law

11. As directed by paragraph 12.1 of the Rules, the Panel will render its decision based upon the rules and principles of the laws of Ontario, and the laws of Canada.

Facts

12. The Complainant is the sole shareholder and President of a corporation incorporated on January 30, 1987 in the Province of Alberta, named Alberta Foundation and Concrete Lifting Ltd.
13. No evidence was submitted that there are any Trade-marks registered by the Complainant or Alberta Foundation and Concrete Lifting Ltd.

Discussion and Findings

14. Policy paragraph 4.1 sets forth the onus on a complainant. It provides, in relevant part, as follows:

4.1 **Onus.** *To succeed in the Proceeding, the Complainant must prove, on a balance of probabilities, that:*

(a) *the Registrant's dot-ca domain name is Confusingly Similar to a Mark in which the Complainant had Rights prior to the date of registration of the domain name and continues to have such Rights; and*

(b) *the Registrant has registered the domain name in bad faith as described in paragraph 3.5;*

and the Complainant must provide some evidence that:

(c) *the Registrant has no legitimate interest in the domain name as described in paragraph 3.4.*

15. The Complainant is not the owner of a registered Canadian trade-mark for ALBERTFOUNDATIONANDCONCRETELIFTING or ALBERTAFUNDATIONCONCRETELIFTING, so he cannot rely upon any trade-mark. Instead, the Complainant must prove that he has rights in a trade name that was a "Mark" prior to the date on which the Domain Names were registered.

16. The Policy provides a definition of the term "Mark" (but as amended no longer defines Rights):

3.2 **Mark.** *A "Mark" is:*

(a) *a trade-mark, including the word elements of a design mark, or a trade name that has been **used** in Canada by a person, or the person's predecessor in title, for the purpose of distinguishing the wares, services or business of that person or predecessor or a licensor of that person or predecessor from the wares, services or business of another person; ... (emphasis added)*

17. The relevant definition of "Mark" requires that a trade-mark be "used". The term "use" is no longer defined in the Policy.

18. Despite the amendments to the Policy, a complainant who relies upon an unregistered trade-mark or trade name as a "Mark" and asserts "Rights" in that Mark must continue to prove that

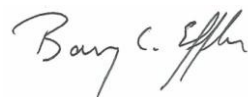
the trade-mark or trade name was in “use” or was “used” by that complainant or its predecessor or by a licensor before the disputed domain names was registered.¹

19. The Complainant cannot meet this test. The Complainant is the sole shareholder of Alberta Foundation and Concrete Lifting Ltd. He and the corporation are separate legal entities. Alberta Foundation and Concrete Lifting Ltd. may be able to make a case that the name used by the corporation since 1987 would meet the test. That will be up to a future panel to decide if that corporation submits a complaint regarding the Domain Names in dispute herein.
20. Under the circumstances, it is neither necessary nor appropriate for the Panel to address any other issues.

Order

21. For the reasons set forth above, the Panel dismisses the Complaint and declines to make any order with respect to the Domain Names.

Dated: July 7, 2012



Barry C. Effler , Sole Panellist

¹ A more lengthy analysis regarding “use” of a Mark is set out in *Forest Laboratories Canada Inc. v. Netnic Corporation*, CIRA Dispute no. 00187 <http://cira.ca/assets/Uploads/Final-Decision-DCA-1368-CIRA-Forestlaboratories-Forestlabs2.pdf>. That analysis is the basis for this analysis and I have borrowed some of the language from that decision.