

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

Domain Names: cloudflare.ca
Complainant: CloudFlare, Inc.
Registrant: Dave Chandler
Registrar: Namespro Solutions Inc.
Panel: Sharon Groom (Chair), Tim Bourne, Teresa Scassa
Service Provider: Resolution Canada, Inc.

DECISION

A. The Parties

1. The Complainant, CloudFlare, Inc. is a corporation located in San Francisco, California, United States.
2. The Registrant for the domain name is Dave Chandler located in Halifax, Nova Scotia, Canada.

B. The Domain Name and Registrar

3. The disputed domain name is cloudflare.ca. The Registrar for this domain name is Namespro Solutions Inc. The disputed domain name cloudflare.ca was registered on November 2, 2012.

C. Procedural History

4. This is a proceeding under the Canadian Internet Registration Authority (“CIRA”) *Domain Name Dispute Resolution Policy* (Version 1.3) (the “Policy”) and the CIRA *Domain Name Dispute Resolution Rules* (Version 1.4) (the “Rules”).
5. The history of the proceeding as provided by the dispute resolution provider, Resolution Canada, Inc., is that the Complainant filed a complaint against the Registrant with Resolution Canada, Inc. requesting that the current registration of the domain name cloudflare.ca be transferred to CloudFlare, Inc.. The complaint was dated June 10, 2015.

6. Resolution Canada, Inc. served notice of the complaint on the Registrant as required by paragraph 4.3 of the Rules. Service of the complaint was made by email on June 25, 2015.

7. The Registrant was given 20 days to file a response and filed a response on July 31, 2015, which was subsequently amended on August 6, 2015.

8. As the complaint received a response, the case was remitted to a panel consisting of three panellists.

D. Panellist Impartiality and Independence

9. As required by paragraph 7 of the Rules, each panellist has submitted to Resolution Canada, Inc. a declaration of impartiality and independence in relation to this dispute.

E. Canadian Presence Requirements

10. The Complainant, CloudFlare, Inc. is a U.S. company. However it owns a Canadian trademark registration for the mark CLOUDFLARE, registration no. 896,980 which is included in the disputed domain name. The requirement for a Canadian presence has to be met as of the date the complaint is submitted (see paragraph 1.4 of the Policy) and not, as the Registrant asserts, at the date the domain name was registered. Therefore the Complainant meets the Canadian Presence Requirements under paragraph 2(q) of the CIRA *Canadian Presence Requirements for Registrants*, Version 1.3.

F. Factual Background

11. The Complainant provides computer services, namely a service to monitor and control online traffic to computer servers, and computer virus protection services, as well as software for both. The Complainant claims to have provided such services in Canada since at least as early as April 21, 2010 (which is the date of first use claimed in their trademark registration referred to above.) The Complainant also registered the mark CLOUDFLARE in the US and the European Economic Community in 2011.

12. The disputed domain name cloudflare.ca was registered on November 2, 2012. According to the Complainant's evidence (Annex 3), it resolved to a website which showed the word CLOUDFLARE and the statement "Now in Canada".

13. The Registrant states in his response that he helps companies with business development and in the course of his prospecting discovered the Complainant, determined that they were not established in Canada, and so registered the domain name as a tool to encourage them to use his business development services in Canada. As an alternative, his response states that he would have acted on his own to build up his business using the domain name registration.

14. According to the Complainant's evidence (Annex 4), the Registrant contacted them in 2013 offering his services or to sell them the domain name. The price for the sale of the domain name was at one point stated to be \$9000. The Complainant responded with a cease and desist letter in 2014, and thereafter instituted this complaint.

G. CIRA Domain Name Dispute Resolution Policy

15. Paragraph 4.1 of the Policy requires that the Complainant establish 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;
- (b) the Registrant has registered the domain name in bad faith as described in section 3.5; and
- (c) the Registrant has no legitimate interest in the domain name as described in section 3.4.

16. The Complainant must establish points (a) and (b) above on the balance of probabilities and for point (c) it must provide some evidence that the Registrant has no legitimate interest in the domain name.

H. Analysis

Rights to a Mark

17. Under paragraph 3.1(a) of the Policy, the Complainant has to show that it had rights (and continues to have these rights) in a mark that was confusingly similar to the domain name, prior to the date of registration of the disputed domain name.

18. The domain name was registered on November 2, 2012, therefore this is the relevant date for this analysis.

19. The Complainant claims that it had rights in the mark CLOUDFLARE, which is confusingly similar to the domain name, that existed prior to the date the domain name was registered, through the Complainant's use of the mark in Canada. The Complainant has alleged that it used its mark CLOUDFLARE since April 21, 2010 in Canada, and that is the date of first use provided in its Canadian trademark registration. However the Complainant has provided no actual evidence of use of the mark in Canada prior to the registration of the domain name, and even the Canadian trademark application itself was not filed until October 30, 2013, which is after the domain name was registered. Therefore we have no actual evidence of use prior to the registration of the domain name.

20. In addition, the panel has taken judicial notice of the fact that the date of first use in commerce claimed in the US registrations for CLOUDFLARE cited by the Complainant is September 27, 2010, which is later than the alleged Canadian date of first use. It seems unlikely that use would have commenced earlier in Canada than the US, the Complainant's country of residence, especially when the US applications were filed 2 years before the Canadian one. Therefore this casts some doubt on the reliability of the date of first use claimed in Canada.

21. This fact, combined with the lack of any actual evidence of prior use of any kind, leads the panel to the conclusion that the Complainant has not satisfied the onus upon it to establish, on the balance of probabilities, that it had rights in the mark CLOUDFLARE in Canada prior to the registration date of the domain name. As such we find that the Complainant has not satisfied the requirement of paragraph 3.1(a) of the Policy. A similar conclusion was reached in *Scouts Canada v Morland*, CDRP decision no. 276 (Resolution Canada) (January 22, 2015), where the panel found that the complainant in that case, Scouts Canada, had failed to file sufficient evidence to demonstrate that it had rights in a Mark, and therefore the domain name scoutsCanada.ca was not transferred to the complainant.

22. Since we have concluded that the Complainant has not met this threshold issue, we will not go on to determine if the domain name was registered in bad faith and whether the Registrant had any legitimate interest.

I. Conclusion and Decision

23. In conclusion, the panel finds that the Complainant has not demonstrated, on the balance of probabilities, that it had rights in the mark CLOUDFLARE which predated the registration of the domain name.

24. For these reasons the complaint regarding the domain name cloudflare.ca is dismissed.

Dated September 2, 2015

A handwritten signature in black ink, appearing to read "Sharon Groom", written over a horizontal line.

By: Sharon Groom (Chair)

Panel: Sharon Groom, Tim Bourne, Teresa Scassa