

**THE COMPETITION TRIBUNAL**

**IN THE MATTER OF** the *Competition Act*, R.S.C. 1985, c. C-34, as amended.

**AND IN THE MATTER OF** an Application by Brandon Gray Internet Services  
Inc. for relief pursuant to sections 75, 103.1 and 104 of the *Competition Act*  
R.S.C. 1985, c. C-34, as amended.

B E T W E E N:

BRANDON GRAY INTERNET SERVICES INC.

Applicant

- and -

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

Respondent

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**REPRESENTATIONS OF THE RESPONDENT IN  
RESPONSE TO APPLICATION FOR LEAVE PURSUANT  
TO SECTION 103.1 OF THE *COMPETITION ACT***

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TO APPLICATION FOR LEAVE PURSUANT TO SECTION  
103.1 OF THE *COMPETITION ACT***

**Part I – Facts**

**A. Overview**

1. The Respondent, the Canadian Internet Registration Authority (“CIRA”), is a not-for-profit corporation, which by agreement with the Government of Canada and the University of British Columbia, manages the dot-ca domain space. CIRA’s functions include accrediting Registrars who then provide and maintain dot-ca domain names to “Registrants”. The Applicant, Brandon Gray Internet Services Inc. (“Brandon Gray”), was a Registrar which was certified by

CIRA, pursuant to an agreement with CIRA. The term of the Applicant's certification, and the contract with CIRA, expired.

2. The Applicant seeks leave to apply for an order under section 75 of the *Competition Act* (the "*Act*") that CIRA "accept and/or continue to accept Brandon Gray as a customer of CIRA on their usual trade terms".

3. CIRA opposes the Application. Brandon Gray has failed to satisfy the grounds upon which leave might be granted under subsection 103.1(7) of the *Act*. Brandon Gray has failed to file sufficient, if any, credible evidence to establish that its business is directly and substantially affected by a practice referred to in section 75 of the *Act* or that such conduct could be subject to an order of the Tribunal. The Tribunal has made it clear in past cases that evidence of a "substantial affect" must go beyond mere speculation.

4. The Tribunal should exercise its discretion to refuse leave as CIRA's decision not to renew its Agreement with CIRA is one that has no bearing on the maintenance or encouragement of competition in Canada. For these reasons, Brandon Gray's application for leave should be dismissed with costs.

## **B. The Relevant Facts**

### **1) History of the Dot-ca Domain Space and CIRA**

5. The domain system serves as the "phone book" for the Internet, and is what makes the Internet accessible to users around the world.

*See Affidavit of Larry Coker, affirmed January 13, 2011 ("Coker Affidavit"), para. 6, Tab 1.*

6. Since its inception in 1987, John Demco of the University of British Columbia operated and managed the dot-ca domain space and its registration with the Internet Assigned Numbers Authority ("IANA"), predecessor to the Internet Corporation for Assigned Names and Numbers ("ICANN").

*Umbrella Agreement between UBC, Government of Canada and CIRA, Exhibit C, Coker Affidavit, Tab 1C.*

7. By 1997, the growth of the Internet and electric commerce caused the Internet community in Canada to begin contemplating a change. Interested parties recognized the need to liberalize the policies and procedures for the dot-ca domain space in order to maximize the public benefit of the domain space. It was also recommended that a private, not-for-profit corporation be set up to take over the administration of the dot-ca domain space.

**Umbrella Agreement between UBC, Government of Canada and CIRA,  
Exhibit C, *Coker Affidavit*, Tab 1C.**

8. On December 30, 1998, CIRA was incorporated as a not-for-profit corporation with the intention of managing the dot-ca domain space.

**Federal Corporation Information Report for CIRA, Exhibit B, *Coker Affidavit*, Tab 1B.**

9. On May 9, 2000, CIRA, the University of British Columbia and the Government of Canada entered into an Umbrella Agreement that stated that “the .ca domain space should be developed as a key public resource for social and economic development for all Canadians”. In the Umbrella Agreement, the Government of Canada reiterated CIRA’s designation as the manager of the dot-ca domain space.

**Umbrella Agreement between UBC, Government of Canada and CIRA,  
Exhibit C, *Coker Affidavit*, Tab 1C.**

10. On October 10, 2000, the Government of Canada advised IANA that CIRA had been formally designated as the dot-ca delegate.

**Letter, Government of Canada to IANA, October 10, 2000, Exhibit C,  
*Coker Affidavit*, Tab 1C.**

11. CIRA’s functions include managing the dot-ca domain space (which includes, registering dot-ca domain names), developing and implementing domain name policy, facilitating dot-ca dispute resolution, accrediting Registrars, and running a “WHOIS” service for dot-ca domains and representing CIRA as a member of the ICANN and other international organizations.

**Printout from CIRA’s website, Exhibit B, *Coker Affidavit*, Tab 1B.**

**Umbrella Agreement between UBC, Government of Canada and CIRA,  
Exhibit C, *Coker Affidavit*, Tab 1C.**

## 2) Dot-ca Domain Space: How it Works

### a) Registrants

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

*Brandon Gray Internet Services Inc. v. Canadian Internet Registration Authority*, 2011 ONSC 610 at para. 3 (S.C.J.). [Tab 2]

13. Registrars are individuals or organizations certified by CIRA to facilitate the registration, transfer, renewal and modification of registration data for Registrants. Brandon Gray has failed to provide evidence as to the number of certified Registrars.

*Brandon Gray Internet Services, supra* at para. 3. [Tab 2]

14. 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. 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. Once the Registrant enters into a Registrant Agreement directly with CIRA, it can begin using it for a website, email or other Internet services.

*Brandon Gray Internet Services, supra* at para. 4. [Tab 2]

15. To become a CIRA Certified Registrar, a person 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 Article 1.1(2)) a party to the Agreement to apply to be certified as a Registrar.

*Registrar Agreement, Version 1.3, Exhibit D, Coker Affidavit, Tab 1D.*

16. Contrary to Brandon Gray’s assertion, 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.

**Registrar Agreement, Version 1.3, Exhibit D, Coker Affidavit, Tab 1D.**

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

Annual Re-certification. Unless the Registrar is not in compliance with any provision of this Agreement (including, without limitation, the applicable Certification Requirements), the Registrar **may** be re-certified annually by CIRA as a registrar... [emphasis added]

**Registrar Agreement, Version 1.3, Exhibit D, Coker Affidavit, Tab 1D.**

18. Article 1.2(2) provides that failure to be re-certified 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.

**Registrar Agreement, Version 1.3, Exhibit D, Coker Affidavit, Tab 1D.**

**Registrar Agreement, Version 1.3, Exhibit D, Coker Affidavit, Tab 1D.**

19. Article 7 of the Registrar Agreement provides for termination in a number of circumstances. Among other things, CIRA may, in its sole discretion, terminate the Agreement or suspend the Registrar’s certification in the event that the Registrar breaches any term of the Agreement; engages in behaviour which CIRA reasonably determines to be detrimental to CIRA, the Registry, or any Registrant, Registrar, or third party; or disrupts or abuses CIRA’s Registry Services, as determined by CIRA in its sole discretion, acting reasonably.

**Registrar Agreement, Version 1.3, Exhibit D, Coker Affidavit, Tab 1D.**

*b) Resellers*

20. Often Registrars will use “resellers”, as did Brandon Gray in the present case, to provide further access to customers interested in domains. Resellers will act on behalf of Registrars to

find and obtain clients for Registrars. Resellers are selected solely by a Registrar, pursuant to arrangements entered into by the Registrar and reseller alone.

*Croker Affidavit, para. 9, Tab 1.*

*Brandon Gray Internet Services, supra at para. 7. [Tab 2]*

21. CIRA has no contractual relationships with resellers, and in many cases is not even aware of their existence. In fact, the Registrar Agreement does not even provide for use of resellers by Registrars. Resellers are not certified by CIRA, do not have access to CIRA's Registry, and must process registrations through their Registrar.

*Croker Affidavit, para. 8, Tab 1.*

*Brandon Gray Internet Services, supra at para. 7. [Tab 2]*

22. Brandon Gray has filed no evidence suggesting that CIRA is or was aware of the contents of the contracts which Brandon Gray claims to have with its resellers, or whether CIRA's decision not to renew the certification of Brandon Gray as a Registrar would cause a breach of such contracts. Further, Brandon Gray has provided no evidence that CIRA would have knowledge of the particulars, including the parties, to any contracts for reselling that Brandon Gray had entered into.

### **3) History of Brandon Gray As Registrar**

23. On May 19, 2004, Brandon Gray entered into a Registrar Agreement with CIRA.

*Coker Affidavit, para. 9, Tab 1.*

*Registrar Agreement, Version 1.3, Exhibit D, Coker Affidavit, Tab 1D.*

24. Prior to the events which led to the proceedings in the Ontario Superior Court, further described below, Brandon Gray's last certification was set to expire on August 24, 2010. Pursuant to Article 1.2(1) of the Agreement, Brandon Gray was required to file an application for recertification and pay the recertification fee by July 25, 2010. It did not do so.

*Brandon Gray Internet Services, supra at para. 14. [Tab 2]*

25. On August 6, 2010, CIRA sent a letter by email to Brandon Gray advising it that, upon expiry of its current certification term (August 24, 2010), it had determined not to accept recertification of Brandon Gray as a CIRA certified Registrar. CIRA advised Brandon Gray that this decision was made because of its close association with Domain Registry of Canada



(“DROC”), the business name under which 1446513 Ontario Limited carries on business. The letter advised, among other things, that Brandon Gray’s close association with DROC had been an on-going source of concern for CIRA; that CIRA regularly received concerns and/or complaints about DROC’s activities; that DROC had recently begun sending misleading “renewal” notices to dot-ca domain name holders as well as holders of domain names in other registries; that DROC’s behaviour suggested that it may have obtained access to CIRA’s confidential “WHOIS” information; that Brandon Gray’s association with DROC appeared to constitute a violation of Article 3.1(u) of the Registrar Agreement; and that CIRA no longer trusted Brandon Gray to abide by the obligations in its Registrar Agreement. CIRA offered to facilitate a sale of Brandon Gray’s dot-ca business to another Registrar.

**Letter, CIRA to Brandon Gray, August 6, 2010, Exhibit E, *Coker Affidavit*, Tab 1E.**

26. CIRA’s position during the proceedings before the Ontario Superior Court of Justice was that there are many linkages between DROC (a “reseller” as described in paragraphs 20 and 21 above, using Brandon Gray as the Registrar), Domain registry of America (“DROA”) (also a reseller), and Brandon Gray. While Brandon Gray acknowledges CIRA’s position, it never actually denies this association. The latter therefore raises doubts as to Brandon Gray’s ability to abide by the terms of the Registrar Agreement.

***Coker Affidavit*, paras. 26-27, Tab 1.**

27. On August 10, 2010, Brandon Gray advised that it intended to commence legal proceedings against CIRA and to seek emergency injunctive relief. Subsequently, the parties reached an agreement pursuant to which CIRA agreed to extend the expiry date to September 7, 2010, on the condition that Brandon Gray agree that the extension was without prejudice to CIRA’s rights in the matter, including without prejudice to its contractual rights and also without prejudice to any determination CIRA has taken to date, or may make in the future, not to re-certify Brandon Gray. The expiry date was further extended to September 10, 2010, October 30, 2010 and January 27, 2011.

***Brandon Gray Internet Services, supra* at para. 15. [Tab 2]**

***Coker Affidavit*, para. 18. Tab 1.**

**Letter, E. Di Ioro to CIRA, August 10, 2010, Exhibit F, *Coker Affidavit*, Tab 1F.**

**Letter, P. Doody to E. Di Iorio, October 20, 2010. Exhibit I, Coker Affidavit, Tab 1I.**

28. On August 31, 2010, Brandon Gray commenced an action against CIRA in the Ontario Superior Court of Justice for, *inter alia*, damages in the sum of \$10,000,000 for breach of contract, bad faith, breach of fiduciary duty, intentional and unlawful interference with economic relations, inducing breach of contract, breach of duty of good faith, irreparable harm to business reputation and profits, loss of business and loss of business opportunity. The Applicant also sought an order compelling CIRA to recertify the Applicant as a Registrar of the dot-ca internet domain Registry.

**Statement of Claim, August 31, 2010, Exhibit G, Coker Affidavit, Tab 1G.**

29. Subsequently, Brandon Gray brought a Motion seeking an interim, interlocutory, permanent injunction prohibiting CIRA from, among other things, refusing and/or failing to recertify Brandon Gray as a Registrar. Brandon Gray also sought an order immediately compelling CIRA to recertify the Plaintiff as a Registrar.

**Notice of Motion dated October 5, 2010, Exhibit H, Coker Affidavit, Tab 1H.**

30. The Motion was heard on October 15, 2010 and decision rendered on January 27, 2011. While not binding on the Tribunal, the Ontario Superior Court of Justice dismissed Brandon Gray's motion finding, among other things, that:

- (a) CIRA's failure to recertify Brandon Gray did not constitute a restrictive trade practice;
- (b) CIRA did not owe Brandon Gray a duty of fairness or any fiduciary duty;
- (c) CIRA had not induced a breach of contract;
- (d) There was insufficient evidence of irreparable harm; the evidence was unclear and speculative; Brandon Gray failed to provide any proof of the rather significant speculation related to the effect of CIRA's actions on Brandon Gray's business; no business records, contracts or financial statements were produced by Brandon Gray; and

- (e) The balance of convenience favoured dismissing the request for an injunction as it was not in the interests of either the parties or the court to continue a hostile commercial relationship.

*Brandon Gray Internet Services, supra* at paras. 84-87, 94-104. [Tab 2]

31. Brandon Gray claims that it required the proceeding in the Ontario Superior Court of Justice to enable it to be heard by the Tribunal. However, it took almost five months from the time it was advised by CIRA of its intention not to renew its certification before it applied for leave to the Tribunal.

*Coker Affidavit, paras. 23, Tab 1.*

Letter, CIRA to Brandon Gray, August 6, 2010, Exhibit E, *Coker Affidavit, Tab 1E.*

Notice of Application pursuant to section 103.1, filed January 20, 2011.

#### **4) There Is No Evidence Of Brandon Gray Being Substantially Affected**

32. Larry Coker, the Senior Systems Administrator of Brandon Gray, has sworn that the overall effect of the termination of Brandon Gray's Registrar Agreement by CIRA will be devastating upon Brandon Gray. If CIRA fails to supply Brandon Gray with the Registry, the company will suffer an irreparable loss of confidence, loss of goodwill and loss of market share and revenue and Brandon Gray's employees, along with its resellers and Registrants, will suffer irreparable financial harm because this would shut down Brandon Gray's dot-ca operations and make it impossible for Brandon Gray to operate in its chosen industry. Upon scrutiny, there is no evidence to support those assertions.

*Coker Affidavit, paras. 33-36, Tab 1.*

33. Brandon Gray has provided no evidence of the specific impact on its employees, such as the number of employees that would have to be terminated, or on its resellers, such as the number of contracts at risk.

34. Brandon Gray is in the business of managing the registration of domain names into numerous registries. Brandon Gray claims that it was managing 125,155 domain names, only 3,552 of which are in the dot-ca domain. The dot-ca domains (the only domains affected by CIRA's refusal to recertify Brandon Gray) make up less than 3% of the total domains managed by Brandon Gray. The remaining domains are comprised of dot-com, dot-org and other domains

such as dot-biz, dot-net, dot-info, etc. If Brandon Gray does not obtain leave and/or is not successful in its application under section 75 of the *Act*, it will still be able to operate in the registry of all the other domains.

*Coker Affidavit*, paras. 4, 11, Tab 1.

35. Brandon Gray claims that the non-renewal of its certification will create an immediate inability of Brandon Gray to fulfill the needs of its resellers and registrants. Brandon Gray provides no evidence to support this allegation. But more importantly, it does not provide any reason as to why it would not be able to become itself a reseller (over whom CIRA would have no authority or control) for another Registrar thereby allowing it to provide certain services to its resellers and registrants.

36. Further, Mr. Coker was clearly speculating when he swore in his affidavit that many of the dot-ca domain Registrants also have other domain names, including dot-com and dot-net domain names, which Brandon Gray manages, and that if the dot-ca domain Registrants are transferred to other Registrars, most, if not all, of the other domains would also be transferred to the new Registrars. Brandon Gray has not provided any information as to how many Registrants own both a dot-ca domain name and another domain name.

*Coker Affidavit*, paras. 12, 35, Tab 1.

**See also *Brandon Gray Internet Services*, *supra* at para. 39, where she noted that Mr. Coker, under cross-examinations, testified he did not know how many Registrants owned both a dot-ca domain name and another domain name. [Tab 2]**

37. In fact, Brandon Gray has produced no documents which would have enabled the Tribunal to assess if the Applicant was directly and substantially affected in its business:

- (a) Brandon Gray has not provided a list of all its Registrants, including those Registrants dot-ca domain and other domains managed by the Applicant;
- (b) Brandon Gray has not provided any documents listing and totaling all of the Registrants which Brandon Gray manages in respect of domains other dot-ca;
- (c) Brandon Gray has not provided any documents indicating its revenue from its management of dot-ca domain Registrants and other domain Registrants;

38. The Applicant has produced no financial records or any documentary evidence which speak to its financial situation, let alone any records which establish the extent of the financial harm which it will suffer if it is not re-certified:

- (a) Brandon Gray has not produced the financial statements for Brandon Gray including the balance sheet and the expenses and the revenue for the last fiscal period and the most recent reporting date;
- (b) Brandon Gray has not produced a list of its assets and liabilities;
- (c) Brandon Gray has not produced the fee its charged to its Registrants for each domain name;
- (d) Brandon Gray has not produced the fee paid by resellers to it for each domain name;
- (e) Brandon Gray has not produced the form of the contact, and the actual contracts, which it has with resellers;
- (f) Brandon Gray has not produced the number of Registrants it deals directly with and through a reseller;
- (g) Brandon Gray has not produced the total revenue that it receives on an annual basis from Registrants who deal directly with it for dot-ca domain names and for registrants who deal directly with it for all other domain names;
- (h) Brandon Gray has not produced the revenue which it receives from its Resellers for dot-ca domain names and for all other domain names on an annual basis;
- (i) Brandon Gray has not provided whether it has any other source of revenue other than the revenue from the resellers and the Registrants associated with registering domain names.

**See also *Brandon Gray Internet Services, supra* at para. 41, where she found that “[n]either of Brandon Gray’s witnesses have any knowledge of Brandon Gray’s financial affairs... Mr. Coker testified that while he would ‘assume’ that books and records exist that reflect the financial affairs of**

Brandon Gray, he did not know how they would be accessed. He also testified that ne neither had access to documents indicating the revenue of the plaintiff from its management of .ca, .com, .net and other domain Registrants, nor did he have access to the company bank account. He freely admitted that he knew ‘nothing of the financial affairs of the company.’”  
[Tab 2]

## Part II – Issues

39. The only issue before this Tribunal is whether Brandon Gray has satisfied the test for leave under subsection 103.1(7) of the *Act*. CIRA submits that the answer is no.

## Part III – Submissions

### A. Brandon Gray’s Evidence is Insufficient

#### 1) The Test for Leave

40. The Federal Court of Appeal has held that in order to grant leave under section 103.1 of the *Act*, the Tribunal must be satisfied that the leave application is:

- (a) supported by sufficient credible evidence to give rise to a *bona fide* belief that the applicant may have been directly and substantially affected in the applicant’s business by a reviewable practice; and
- (b) that the practice in question could be subject to an order.

*Competition Act*, R.S.C. 1985, c. C-34, as am., s. 103.1 [Tab 1]

*Barcode Systems Inc v. Symbol Technologies Canada ULC*, 2004 Comp. Trib. 1, [2004] C.C.T.D. No. 1; affd 2004 FCA 339, [2004] F.C.J. No. 1657, at para. 16 (C.A.). [Tab 3]

*National Capital News Canada v. Canada (Speaker of the House of Commons)*, 2002 Comp. Trib. 41, [2002] C.C.T.D. No. 38 at para. 14. [Tab 4]

#### 2) There is No Evidence of a Direct or Substantial Effect on Brandon Gray

##### a) *Must Assess Effect on Entire Business*

41. For the first criterion of the leave test, it is well established that the substantial effect on a business is measured in the context of the entire business/enterprise and not only one sector or segment of the overall business.

*Sears Canada v. Parfums Christina Dior Canada Inc.*, 2007 Comp. Trib. 6, [2007] C.C.T.C. No. 3, at paras. 16-21 [Tab 5]

See also *Broadview Pharmacy v. Wyeth Canada Inc.*, 2004 Comp. Trib. 22, [2004] C.C.T.C. No. 24, at para. 21 [*Wyeth Canada Inc.*]; *Paradise Pharmacy Inc. v. Novartis Pharmaceuticals Canada Inc.*, 2004 Comp. Trib. 21, [2004] C.C.T.D. no. 22; *Broadview Pharmacy v. Pfizer Canada Inc.*, 2004 Comp. Trib. 23, [2004] C.C.T.D. No. 23 [*Pfizer Canada Inc.*]. [Tabs 6 to 8]

42. As per its own evidence, Brandon Gray is in the “business of registering, renewing, managing and transferring dot-ca, dot-com, dot-org and other domains on behalf of Registrants”. Hence, Brandon Gray’s entire business as a Registrar of domain names is the business under consideration for purposes of subsection 103.1(7) of the *Act*. The tribunal cannot merely assess Brandon Gray’s business in the dot-ca domain.

*Sears Canada, supra* at paras. 22-27. [Tab 5]

43. While not defined in the *Act*, the Tribunal has concluded that “substantial” in the context of an application for leave in subsection 103.1(7) carries the meaning “important” and “significant”.

*Sears Canada, supra* at paras. 28-31. [Tab 5]

See also *Canada (Director of Investigation and Research) v. Chrysler Canada*, [1989] C.C.T.D. No. 49 at 18 (QL) (“*Chrysler Canada*”). [Tab 9]

44. A review of the Tribunal’s decisions under subsection 103.1(7) reveals that an applicant must show “sufficient credible evidence” of the substantial affect. Thus, evidence of loss cannot be speculative or undocumented.

See e.g. *Wyeth Canada Inc.*, *supra* at para. 21 (and two other sister cases).[Tab 8]

45. The Tribunal has found in previous cases that the following financial loss, caused by the Respondent, and submitted by the applicant with supporting evidence, met the threshold for “important and significant” affect,

- (a) Evidence that the company was in receivership and that it had laid off 50% of its employees;

*Barcode Systems Inc. (Comp. Trib.)*, *supra* at para. 16. [Tab 3]

- (b) Evidence of a 46% decrease in the company's sales;

*Allan Morgan and Sons Ltd. v. La-Z-Boy Canada Ltd.*, 2004 Comp. Trib. 4, [2004] C.C.T.D. No. 4 at paras. 17-21. [Tab 10]

See also *Paradise Pharmacy Inc.*, *supra* at para. 20. [Tab 7]

- (c) Evidence of a loss of 72.6% of the company's sales;

*Chrysler Canada*, *supra* at paras. 16-18. [Tab 9]

- (d) Evidence that 50% of the company's revenue were dependent on the terminated services.

*B-Filer Inc. v. Bank of Nova Scotia*, 2005 Comp. Trib. 38, [2005] C.C.T.D. No. 37 at para. 54. [Tab 11]

46. On other hand, in *Wyeth Canada Inc.* and *Pfizer Canada Inc.*, the Tribunal found that the fact that the pharmaceutical products which ceased to be supplied by the Respondents represented only 5% and 11% respectively of the applicant's sales of this category of products (not total sales) did not satisfy the threshold. Further, a loss of 11% of total revenue did not constitute a substantial affect either.

*Wyeth Canada Inc.*, *supra* at paras. 11 , 21. [Tab 6]

*Pfizer Canada Inc.*, *supra* at paras. 8 and 20. [Tab 8]

47. Thus, a loss in revenue must range between 50% and 100% of the entire business to be considered a substantial affect.

*b) No Evidence by Brandon Gray*

48. Brandon Gray has failed to provide any credible evidence that it will be directly and substantially affected by its non-renewal as a Registrar by CIRA.

49. Brandon Gray has provided no evidence of the impact of its non-renewal on its employees and its resellers, or its financial situation.

See also *Brandon Gray Internet Services*, *supra* at para. 41, where she finds that Mr. Coker knew nothing about the financial affairs of the company. [Tab 2]



50. Based on Brandon Gray's own evidence, the dot-ca domains form less than 3% of its entire business. Therefore, absent any other evidence, the Tribunal has to presume that Brandon Gray's total loss of revenues would be less than 3%, well below the minimal threshold for substantial affect established by the Tribunal.

51. Brandon Gray makes bald and unsubstantiated statements that many of the dot-ca domains Registrants it manages also have other domains, including dot-com and dot-net domains, which it manages. It claims that if it is no longer a CIRA Registrar that it will not only lose its dot-ca registrants but many of its other domains because once the dot-ca domain Registrants are transferred to other Registrars, most, if not all, of the other domains would also be transferred to the new Registrars, as the Registrants would not want to have more than one Registrar managing their domains. Yet, Brandon Gray provides no evidence to substantiate these speculations.

52. Brandon Gray further claims that its registrants will suffer irreparable harm. CIRA denies this unsupported claim. As per the Registrar Agreement, upon the expiration of its certification, CIRA did advise Brandon Gray's Registrants that they must transfer their dot-ca domain registrations to another CIRA certified Registrars as per section 7.11. Registrants were then free to choose a new Registrar.

53. Further, Brandon Gray contends that its reputation has already been substantially adversely affected, as prospective Resellers have resorted to using other Registrars instead of Brandon Gray for their domain services. However, Brandon Gray not only fails to provide any evidence of this alleged shift, it has not submitted any evidence that this shift is the result of CIRA's decision not to renew Brandon Gray's certification.

54. In light of the above, Brandon Gray fails to meet the first criterion of the test for leave and prove that it has been directly and substantially affected (which was also found by the Ontario Superior Court of Justice on the injunction motion).

### **3) Brandon Gray Cannot Meet the Test Under Section 75**

55. Should the Tribunal disagree with CIRA's position on the first branch of the test for leave, CIRA submits that Brandon Gray also fails the second branch of the test for leave.

56. Subsection 75(1) provides that:

75. (1) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that

(a) a person is substantially affected in his business or is precluded from carrying on business due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms,

(b) the person referred to in paragraph (a) is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market,

(c) the person referred to in paragraph (a) is willing and able to meet the usual trade terms of the supplier or suppliers of the product,

(d) the product is in ample supply, and

(e) the refusal to deal is having or is likely to have an adverse effect on competition in a market,

the Tribunal may order that one or more suppliers of the product in the market accept the person as a customer within a specified time on usual trade terms unless, within the specified time, in the case of an article, any customs duties on the article are removed, reduced or remitted and the effect of the removal, reduction or remission is to place the person on an equal footing with other persons who are able to obtain adequate supplies of the article in Canada.

*Competition Act, supra, s. 75(1). [Tab 1]*

57. The Tribunal must be satisfied that there is sufficient credible evidence with respect to every one of the conjunctive statutory conditions under section 75 of the *Act*. If even one of the elements is not met, the application must fail.

*Barcode Systems Inc. (F.C.A.), supra at para. 18. [Tab 3]*

58. It is clear that a section 75 order could not be issued for, as described above, Brandon Gray has failed to meet the first element of section 75, namely provide credible evidence that it will be substantially affected in its business or is precluded from carrying on business.

59. Second, Brandon Gray has failed to establish the second element of section 75, namely that it is unable to obtain adequate supply of the product due to insufficient competition among suppliers of the product in the market.

60. In fact, Brandon Gray could become a reseller (over whom CIRA would have no authority or control) and therefore obtain its supply to the Registry via another Registrar or even another reseller. Brandon Gray has presented no evidence to show why it could not become a reseller of another Registrar and therefore continue to provide the same service it has in the past.

61. Third, Brandon Gray has failed to prove that it is willing and able to meet the usual terms of the supplier of the product.

62. Absent additional evidence on Brandon Gray's association with DROC and DROA and Brandon Gray's reputation, which CIRA submits is nothing but exemplary, the Tribunal cannot conclude that Brandon Gray has or is willing to meet the usual term of the supplier. Further, it should be noted that Brandon Gray failed to deny that it had been the subject of complaints, all of which may have been in contravention of the Registrar Agreement and therefore the terms to abide by as a Registrar.

63. Finally, Brandon Gray cannot establish the fifth element of section 75, namely that the refusal to deal is having or is likely to have an adverse effect on competition in a market. Although Brandon Gray baldly states that the termination of CIRA's relationship with Brandon Gray will result in reduced competition in the dot-ca industry and that competition in the market will be adversely affected, it does not provide one shred of evidence to support these claims. It does not provide the size of the market or the number of Registrars in the dot-ca domain or the other domains.


64. In addition, there is no evidence to establish that Brandon Gray does not compete with Registrars in other domains. In fact, Brandon Gray's evidence establishes the opposite. More than 97% of Brandon Gray's business is in other dot-ca domains.

65. Brandon Gray has failed to satisfy the requirements for obtaining leave to commence an application under section 75 of the *Act*. In light of the lack of credible evidence relating to a substantial effect on Brandon Gray's business or an adverse effect on competition in the market, CIRA requests that the Tribunal exercise its discretion and refuse leave.

## Part IV – Order Sought

66. CIRA requests that the Tribunal dismiss this leave application with costs.

ALL OF WHICH is respectfully submitted this 14<sup>th</sup> day of February, 2011.

  
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## Part V – Authorities

### APPENDIX A - STATUTES, REGULATIONS AND BYLAWS

1. *Competition Act*, R.S.C. 1985, c. C-34, as amended, ss. 75, 103(1), and 104

### APPENDIX B - AUTHORITIES

2. *Brandon Gray Internet Services Inc. v. Canadian Internet Registration Authority*, 2011 ONSC 610 (S.C.J.)
3. *Barcode Systems Inc v. Symbol Technologies Canada ULC*, 2004 Comp. Trib. 1, [2004] C.C.T.D. No. 1; affd 2004 FCA 339, [2004] F.C.J. No. 1657 (C.A.).
4. *National Capital News Canada v. Canada (Speaker of the House of Commons)*, 2002 Comp. Trib. 41, [2002] C.C.T.D. No. 3
5. *Sears Canada v. Parfums Christina Dior Canada Inc.*, 2007 Comp. Trib. 6, [2007] C.C.T.C. No. 3
6. *Broadview Pharmacy v. Wyeth Canada Inc.*, 2004 Comp. Trib. 22, [2004] C.C.T.C. No. 24
7. *Paradise Pharmacy Inc. v. Novartis Pharmaceuticals Canada Inc.*, 2004 Comp. Trib. 21, [2004] C.C.T.D. no. 22
8. *Broadview Pharmacy v. Pfizer Canada Inc.*, 2004 Comp. Trib. 23, [2004] C.C.T.D. No. 23
9. *Chrysler Canada v. Canada (Director of Investigation and Research*, [1989] C.C.T.D. No. 4
10. *Allan Morgan and Sons Ltd. v. La-Z-Boy Canada Ltd.*, 2004 Comp. Trib. 4, [2004] C.C.T.D. No. 4
11. *B-Filer Inc. v. Bank of Nova Scotia*, 2005 Comp. Trib. 38, [2005] C.C.T.D. No. 37