

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

POOL.com INC.

Plaintiff
(Responding Party)

- and -

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS

Defendant
(Moving Party)

**FACTUM OF THE DEFENDANT/MOVING PARTY
Re: Defendant's Motion to Stay or Dismiss the Action
on Jurisdictional Grounds**

PART I ~ NATURE AND OVERVIEW OF THE MOTION

1. This is a motion brought by the defendant, Internet Corporation for Assigned Names and Numbers ("ICANN"), for an order staying or dismissing the action on jurisdictional grounds.

Notice of Motion dated January 23, 2004 ("Notice of Motion")
Moving Party's Motion Record, Tab 1 at 1 - 3

2. Pool.com's action can be summarized as follows: ICANN is a not-for-profit corporation that, by a delegation from the United States government administers certain aspects of the Internet domain name system (the system pursuant to which Internet addresses are created, for example, www.cnn.com). In August 2000, ICANN decided that it would take steps to authorize VeriSign Inc. (the company that controls the ".com" and ".net" domain names) to offer a new domain name service with respect to the

".com" and ".net" domain (i.e. the "Wait List Service" or "WLS"). Pool.com is in the business of providing services to companies that attempt to obtain ".com" and ".net" domain names for consumers. In this action, Pool.com alleges that VeriSign's new service, the WLS, will harm Pool.com's business and that ICANN intentionally interfered with Pool.com's business by authorizing VeriSign to offer the WLS. This allegation is made notwithstanding that ICANN made the decision regarding the WLS in August 2002, nine months before Pool.com was even incorporated. In essence, Pool.com's claim is that ICANN intentionally and wrongfully harmed Pool.com's economic interest by authorizing VeriSign to implement the Wait List Service.

Statement of Claim
Moving Party's Motion Record, Tab 8 at 466 - 472

3. In summary, it is ICANN's position on this motion that:
 - (i) this Court lacks jurisdiction *simpliciter* over the action as ICANN has not attorned to the jurisdiction, ICANN has no physical presence in Ontario and there is no "real and substantial connection" between Ontario and either ICANN or the subject-matter of the action. Among other things, ICANN is a corporation incorporated under the laws of the State of California that acts pursuant to authority granted it by the United States Department of Commerce, has no presence in Ontario or other connections to Ontario, does not carry on business in Ontario and none of the acts complained of or events relevant to the action occurred in Ontario;

- (ii) in the alternative, this Court should exercise its discretion to decline to take jurisdiction over the action as California, and not Ontario, is the most appropriate forum for this action. Among other things:
 - (A) virtually all of the relevant evidence and witnesses are in California,
 - (B) at the core of this action are ICANN's obligations under certain agreements (to which Pool.com is not a party). Whether these agreements have been breached by ICANN, as alleged by Pool.com, will be decided pursuant to the laws of California and not the laws of Ontario, and
 - (C) there are two parallel actions against ICANN currently proceeding in the Central District of California which raise, amongst other things, the identical issue raised in this action (i.e. whether ICANN acted lawfully in authorizing the WLS). These outstanding California actions raise the substantial risk of contradictory and inconsistent decisions if this action is permitted to proceed in Ontario.

4. In essence, ICANN disputes the jurisdiction of the Ontario Courts because ICANN has no connection whatsoever to either Pool.com or to Ontario. From a practical standpoint, the only connection between Pool.com's claims and Ontario is that Pool.com is a corporation incorporated in Ontario with a registered office in Ottawa and thereby claims that it will sustain damages in Ontario if the WLS is implemented.

PART II ~ THE FACTS

The Parties

5. ICANN is a not-for-profit corporation organized under the laws of the State of California. Pursuant to delegation from the United States Department of Commerce, ICANN is responsible for administering certain aspects of the Internet's domain name system (the "DNS") and the U.S. Department of Commerce retains general oversight responsibility for ICANN's activities.

Affidavit of Daniel Halloran, sworn September 5, 2003
("Halloran Affidavit"), paras. 3 and 17
Moving Party's Motion Record, Tab 2 at 6 and 9 - 10

6. Pool.com is an Ontario corporation engaged in the business of operating a "backorder" service for registered and soon-to-be-deleted Internet domain names. Pool.com was incorporated on May 12, 2003, more than two years *after* VeriSign first proposed the WLS and approximately nine months *after* the ICANN Board of Directors approved a resolution authorizing ICANN to negotiate contractual amendments with VeriSign to allow VeriSign to implement the WLS. Pool.com has no relationship whatsoever with ICANN.

Halloran Affidavit, para. 27
Moving Party's Motion Record, Tab 2 at 12 - 13

The Internet's Domain Name System (DNS)

7. In order to understand the nature of Pool.com's action, it is relevant to understand (i) how the Internet and, specifically, the Internet's DNS operates, and (ii) ICANN's authority and responsibilities with respect to the administration of the Internet's DNS.

(a) The Internet and the DNS

8. The Internet is a network of computers and computer networks that allows computers around the world to communicate with each other quickly and efficiently over a variety of physical links. Individual computers connected to the Internet have, and identify each other, by a unique numerical identifier known as an Internet Protocol ("IP") address. For example, an IP address might be 192.234.223.142, which is the address for the City of Ottawa's website.

Halloran Affidavit, paras. 9, 10
Moving Party's Motion Record, Tab 2 at 8

9. Because IP numerical addresses are long and difficult to remember, the IP address system has been overlaid by a more "user-friendly" system of "domain names". The system associates a "domain name" with the IP number. For example, the domain name for the City of Ottawa's website host computer is "city.ottawa.on.ca".

Halloran Affidavit, para. 11
Moving Party's Motion Record, Tab 2 at 8

10. Internet domain names consist of a string of "domains" separated by periods. The "top-level" domains, or "TLDs" are found to the right of the last period and include, among others, ".com", ".gov" and ".net", which are also known as generic TLDs, or "gTLDs".

Halloran Affidavit, para. 12
Moving Party's Motion Record, Tab 2 at 8

11. There are approximately 250 different TLDs which are administered and operated by different entities around the world. Some TLDs are country code specific,

such as ".uk" for the United Kingdom and ".ca" for Canada. The country specific domains are known as "ccTLDs".

Halloran Affidavit, para. 13
Moving Party's Motion Record, Tab 2 at 8

12. ICANN is not involved in the administration of the domain names. Instead, the domain names for TLDs are maintained, monitored and controlled by various companies, each called a "registry" or "registry operator". A company can become a registry operator only if authorized or "accredited" to act as such by ICANN. There is one registry for each TLD. A registry operates like a phone book, keeping a comprehensive listing of each registered domain name and its corresponding IP address. VeriSign is the registry or registry operator for the ".com" TLD.

Halloran Affidavit, para. 14
Moving Party's Motion Record, Tab 2 at 9

13. Individuals seeking to register domain names do not deal with ICANN or registry operators but, instead, deal with independent companies that are accredited by ICANN to act as "registrars". It is the "registrars" that, in turn, deal with the appropriate registry on these individuals' behalf to register the domain names. Registrars are companies that sell rights to register domain names to the public and co-ordinate the registration of the domain names in the DNS with the appropriate registry. Currently, approximately 170 registrars worldwide are engaged in dealing with customers and, in turn, requesting that various registry operators make registrations of domain names in the TLDs they operate.

Halloran Affidavit, para. 15
Moving Party's Motion Record, Tab 2 at 9

(b) ICANN' Role in the DNS

14. Pursuant to authority granted by the United States Department of Commerce and recognition by other governments ICANN is responsible for coordinating the technical management of the Internet DNS.

Halloran Affidavit, para. 18
Moving Party's Motion Record, Tab 2 at 10

15. The registry operators are accredited by ICANN to operate a specific Registry and, in that regard, pursuant to a Registry Agreement entered into between ICANN and the registry operator, the basic obligations of a registry operator of a gTLD are to maintain a database of domain names within the particular TLD (such as .com or .net) it operates and to respond to millions of queries from computers seeking to translate those domain names to IP numbers. As said, the registry operator of the .com and .net gTLDs is VeriSign.

Halloran Affidavit, paras. 19, 35
Moving Party's Motion Record, Tab 2 at 10 and 15

16. Whereas ICANN has responsibilities with respect to the administration of the gTLDs, ICANN's role in the coordination of the country specific TLDs, the ccTLDs, is limited to the delegation of ccTLDs to responsible trustees for the respective local Internet community, and ensuring global interoperability. For example, the delegee of the Canadian ccTLD, the .ca registry, is the Canadian Internet Registration Authority ("CIRA") located in Ottawa, Ontario. ICANN plays no role in the administration of Canadian .ca domain names. (Neither CIRA nor the .ca registry are, in any way, relevant to the issues in this action.)

Halloran Affidavit, paras. 20-21
Moving Party's Motion Record, Tab 2 at 10 - 11

Supplementary Affidavit of Daniel E. Halloran, sworn September 23, 2003 ("Supplementary Halloran Affidavit"), para. 6(d)
Moving Party's Motion Record, Tab 3 at 111

(c) How Internet domain names are registered in gTLDs

17. When an individual or company wishes to register or attempt to register a specific domain name (in a gTLD), it contacts an ICANN-accredited registrar. It advises the registrar of the domain name that it wishes to register. Upon receiving the information, the registrar contacts the appropriate registry to inquire as to whether the domain name is available or is currently registered by someone else. If the domain name is not currently registered by someone else, the registrar will be able to register the domain name on behalf of its customer. If the domain name is currently registered by someone else, the registrar will not be able to register that domain name on behalf of its customer.

Halloran Affidavit, para. 26
Moving Party's Motion Record, Tab 2 at 12

(d) Registrar Accreditation Agreement – How registrars become accredited by ICANN

18. In order to become a gTLD registrar, a company must be accredited by ICANN. Registrars wishing to be accredited apply to ICANN on their own initiative; ICANN does not solicit registrar accreditations. ICANN accredits registrars by entering into identical agreements with each of them (the "Registrar Accreditation Agreements"), under which a corporation is granted permission to register domain names for the public in specifically named gTLDs.

Halloran Affidavit, para. 22, Exhibit B
Moving Party's Motion Record, Tab 2 at 22 and 32 - 63

Supplementary Halloran Affidavit, paras. 5, 6(a)
Moving Party's Motion Record, Tab 3 at 109 - 110

19. Each Registrar Accreditation Agreement contains a provision which states that the Registrar Accreditation Agreement is deemed to have been entered into in California and also contains a provision (clause 5.6) that the jurisdiction and exclusiv venue for any litigation which arises between the registrar and ICANN concerning the Registrar Accreditation Agreement is in Los Angeles, California.

Halloran Affidavit, para. 23
Moving Party's Motion Record, Tab 2 at 23

20. Each Registrar Accreditation Agreement also contains an express exclusion of obligations to non-parties to the agreement. Specifically, clause 5.10 of the Registrar Accreditation Agreement states:

"No Third-Party Beneficiaries. This Agreement shall not be construed to create any obligation by either ICANN or Registrar to any non-party to this Agreement, including any Registered Name Holder."

Halloran Affidavit, para. 24
Moving Party's Motion Record, Tab 2 at 12

(e) Deleted Domain Names

21. Domain names may be registered for a limited period of time. A domain name registration grants to the registration holder an exclusive right to use the domain name for a fixed term between one and ten years.

Halloran Affidavit, para. 32
Moving Party's Motion Record, Tab 2 at 32

Hall Affidavit, para. 5
Responding Party's Motion Record

22. If a domain name registration is not renewed by the registered holder before its term expires, the domain name may be deleted from the registry and, following certain automatic renewal and grace periods, the domain name becomes available for registration by the person who first requests registration. In the larger gTLDs such as .com and net, more than 800,000 domain names are deleted per month.

Halloran Affidavit, paras. 32, 33
Moving Party's Motion Record, Tab 2 at 10

Affidavit of Robert Christopher Hall, sworn
September 17, 2003 ("Hall Affidavit"), paras. 8-9
Responding Party's Motion Record

23. Currently, several registrars offer services to persons wishing to register deleted domain names after they become available for re-registration. These registrars generally program their software systems to transmit continuous automated "add" domain name commands to the registry in an effort to be the first registrar to request the domain name following its deletion.

Halloran Affidavit, para. 33
Moving Party's Motion Record, Tab 2 at 14

24. Under the current system, it is virtually impossible to guarantee a customer that it will obtain the rights to a particular domain name which is deleted from the registry. Customers who want to register a deleted or soon-to-be-deleted domain name under the current system need to sign up and, in many cases, the customers pay multiple registrars to try to register the deleted domain name on their behalf.

Halloran Affidavit, para. 34
Moving Party's Motion Record, Tab 2 at 14 - 15

Hall Affidavit, paras. 7-12
Responding Party's Motion Record

ICANN has no presence in Ontario and does not conduct business in Ontario

25. ICANN operates from its offices and facilities located in Marina Del Rey, which is in Los Angeles County, California. Until very recently, ICANN had no other offices or facilities anywhere in the world. In January 2004, ICANN opened a two-person office in Brussels.

Halloran Affidavit, para. 4
Moving Party's Motion Record, Tab 2 at 6

Third Supplementary Halloran Affidavit sworn March 11, 2004
("Third Supplementary Halloran Affidavit"), para. 24
Moving Party's Motion Record, Tab 5 at 216

26. ICANN does not have a presence in Ontario and does not conduct any business in Ontario. In fact, ICANN does not engage in any activities in Ontario.

Halloran Affidavit, para. 5
Moving Party's Motion Record, Tab 2 at 7

Supplementary Halloran Affidavit, para. 2
Moving Party's Motion Record, Tab 3 at 108

27. Neither ICANN nor its employees carry out any of ICANN's functions in Ontario. In particular:

- (a) ICANN does not have employees in Ontario. ICANN carries out its responsibilities and administrative functions from California;
- (b) ICANN does not have any consultants from Ontario;
- (c) ICANN employees do not travel to Ontario for business;
- (d) ICANN has not held any "hearings" in Ontario or been involved in any hearings in Ontario;

- (e) ICANN does not have offices in Ontario;
- (f) ICANN has not held any meetings in Ontario;
- (g) ICANN has no assets or real estate in Ontario (or at all in Canada);
- (h) ICANN is not registered to do business in Ontario (or in any other Canadian province);
- (i) ICANN does not have a bank account in Ontario (or at all in Canada); and
- (j) any websites maintained by ICANN, with respect to its Internet-coordination activities, are operated from web servers physically located in Los Angeles County, California. These websites are merely passive informational websites.

Halloran Affidavit, paras. 6, 7
Moving Party's Motion Record, Tab 2 at 7

Supplementary Halloran Affidavit, paras. 3, 4, 5, 6(e), 6(f), 6(g)
Moving Party's Motion Record, Tab 3 at 109 - 110

28. ICANN does not conduct business in a traditional sense; it does not sell anything and does not provide services to consumers for a fee. Contrary to Pool.com's suggestion, ICANN does not "solicit" business and it does not "promote the sale" of anything, including domain names. ICANN does not derive any profit from the registration of individual domain names or from any of its activities.

Supplementary Halloran Affidavit, para. 2, 6(a), 6(c)
Moving Party's Motion Record, Tab 3 at 108 - 111

Hall Affidavit, para. 31
Responding Party's Motion Record

29. In his Affidavit, Mr. Hall suggests that because there are Ontario-based accredited registrars, ICANN carries on business in Ontario. This statement is

incorrect. ICANN is located in California and has a passive website that can be accessed by Internet users anywhere in the world (including Ontario). A company can only become accredited as a registrar by coming to California to do business with ICANN there. Specifically, a company seeking to become an ICANN – accredited registrar must (and the few accredited Ontario-based registrars did): (a) go to the passive informational web site that ICANN operates in California; (b) send a hard-copy application to ICANN in California; (c) sign a Registrar Accreditation Agreement and forward it to ICANN for completion in California (all Registrar Accreditation Agreements are signed last by ICANN in California); and (d) enter a Registrar Accreditation Agreement that explicitly states that it is deemed to be made at Los Angeles, that disputes (between ICANN and the registrar) will be resolved in Los Angeles, and that with respect to all litigation involving ICANN, jurisdiction and exclusive venue for such litigation shall be Los Angeles. ICANN's administrative functions are carried out in California and not, for example, in Ontario.

Supplementary Halloran Affidavit, para. 5
Moving Party's Motion Record, Tab 3 at 109 - 110

30. ICANN has entered into Registrar Accreditation Agreements with five Ontario-based companies on terms identical to those ICANN has entered into with all other registrars. As said, the agreements were entered into in California. ICANN plays absolutely no role in the domain name registrations that take place through these or any other accredited registrars and is not involved in any domain name registration sales activities.

Halloran Affidavit, para. 25
Moving Party's Motion Record, Tab 2 at 12

Supplementary Halloran Affidavit, para. 6(b)
Moving Party's Motion Record, Tab 3 at 110

31. Contrary to Pool.com's assertion, ICANN does not conduct any business (in Ontario or elsewhere) in connection with the ".ca" ccTLD. ICANN plays no role in CIRA's administration of the ".ca" ccTLD and ICANN does not involve itself in CIRA's operations.

Supplementary Halloran Affidavit, para. 6(d)
Moving Party's Motion Record, Tab 3 at 111

Hall Affidavit, para. 31(d)
Responding Party's Motion Record

Pool.com and its business

32. Pool.com is not an ICANN-accredited registrar, has not entered into any agreements with ICANN, and does not have any relationship with ICANN. Rather, Pool.com is a broker engaged in the business of operating a "backorder" service for registered and soon-to-be-deleted domain names in the ".com" and ".net" gTLDs of the Internet's DNS. Pool.com acts as a middleman between retail customers that wish to order specific domain names and registrars by operating through a network of ICANN-accredited registrars in competing to acquire deleted domain names for its customers. Pool.com has only one employee.

Halloran Affidavit, paras. 27, 28
Moving Party's Motion Record, Tab 2 at 12 - 13

Hall Affidavit, para. 11-12,
Responding Party's Motion Record

Transcript of the Cross-Examination of Robert Christopher Hall on March 15, 2004 ("Hall Cross-Examination"), pp. 28-29, qq. 178-183
Moving Party's Motion Record, Tab 6 at 356 - 357

33. Although Pool.com was incorporated in Ontario, Pool.com's business is not geared towards Canadians or residents of Ontario. Indeed, Pool.com conducts its business over the Internet entirely in U.S. dollars. On its website, Pool.com explicitly states: "[A]ll prices, fees, and bids are in U.S. dollars".

Halloran Affidavit, para. 30, Exhibit "C"
Moving Party's Motion Record, Tab 2 at 13, 64 - 72

34. Pool.com's own evidence demonstrates that it does not conduct its business "in Ontario", but primarily conducts its business world-wide over the Internet. In this regard, Mr. Hall confirmed on his examination that Pool.com's business is conducted over the Internet; its services are accessed by its customers through the Internet; its customers are located worldwide, including in California; and Pool.com deals with registrars in many different countries worldwide, including in the United States.

Hall Cross-examination, p. 31-33, qq. 200-212, p. 34-35, qq. 216-222, p. 44, qq. 269-270
Moving Party's Motion Record, Tab 6 at 359 - 363 and 372

35. In an attempt to show it carried on business in Ontario, Pool.com claimed in Mr. Hall's Affidavit to have relationships with "over 23 registrars, many of whom are Canadian and based in Ontario". Pool.com refused to produce copies of these agreements and only produced copies following an Order of this Court that it do so, issued on a contested motion. Pool.com then produced 17, and not 23, agreements. Of these, only two (not "many") are with registrars with Ontario offices (one of the two is not carrying on the business of a Registrar and is a sister company to Pool.com), and these registrars do not have businesses that cater to Ontario residents. None are with