

Court File No. 03-CV-24621

**Ontario
SUPERIOR COURT OF JUSTICE**

BETWEEN:

POOL.com INC.

Plaintiff

- and -

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS

**Defendant
(Moving Party)**

AFFIDAVIT OF ROBERT CHRISTOPHER HALL

(sworn September 17, 2003)

I, ROBERT CHRISTOPHER HALL, of the Town of Manotick, in the Province of Ontario, MAKE OATH AND SAY AS FOLLOWS:

1. I am the sole director of the Plaintiff, Pool.com Inc. ("Pool.com") and as such, I have knowledge of the matters hereinafter deposed, except where stated to be based on information and belief, in which case, I verily believe such information to be true.

2. I have been an active participant in the development, governancc, and commercialisation of the global Internet since around 1994.

3. I have reviewed the Affidavit of Daniel E. Halloran, sworn September 5, 2003, and am swearing this Affidavit in support of a response to the Defendant's (ICANN's) motion for an Order staying or dismissing the action on jurisdictional grounds.

- 2 -

A. Background –Current System for the Deletion of Domain Names and the Proposed WLS

4. The Internet's domain name system ("DNS") is the universal system for the identification of individual computers on the global Internet through domain name addresses, which in turn, are linked to numerical addresses, called IP addresses. The top-level of a domain name is signified by the suffix following the last "dot" in a domain name. The second level domain name ("domain name"), which permits the identification of an individual computer on the Internet, includes the unique, alpha-numeric string that precedes the top-level domain. The most prevalent top-level domains in the DNS are the generic top-level domains (e.g. dot-com, dot-net, dot-org, dot-biz, dot-net) and the country-code top-level domains (e.g. dot-ca).

5. A domain name registration grants to the holder of the registration (the "Registrant") an exclusive right to use the domain name for a fixed duration of between one and ten years. The Registrant does not own the domain name, but rather, has a contractual right to control and use the domain name for the duration of a registration.

6. Any individual or company wishing to register a particular domain name in a generic top-level domain must do so through one of a number of competing Registrars, who provide "registration services". Only ICANN-accredited Registrars have the necessary, ICANN-granted status to deal directly with the operator of the relevant Registry, which is operated by a Registry Operator. For example, ICANN's delegee to operate the dot-com and dot-net top-level domain Registries is VeriSign, Inc. ("VeriSign").

7. There are currently over 24 million dot-com and some three million dot-net domain names registered. Not all domain names are created equal and some domain names are clearly more commercially valuable than others. For example, English word names, three-letter domains, and domain names that have generated significant amounts of traffic in the past are

- 3 -

generally more valuable than random strings of letters or numbers. Approximately 10 per cent of all registered domain names have significant commercial value and there are very few new names of commercial value left to be registered. As a result, there is intense competition to register the small proportion of commercially valuable domain names if and when the registrations are deleted from the relevant Registry.

8. Although the Registrant of a domain name may renew a registration an indefinite number of times, a domain name registration expires or lapses when it is not renewed by the Registrant. When this happens, a process is triggered, which culminates in the domain name being "deleted" from the Registry by the Registry Operator.

9. In the dot-com, dot-net, dot-org, and dot-biz Registries, the instant that the domain name is deleted, it becomes available for registration. Since domain names in these Registries are allocated on a first-come, first-served basis, the person on whose behalf a Registrar makes the first request to the Registry Operator to register the deleted domain name will be allocated the domain name.

10. In the dot-com and dot-net Registries, approximately 20,000 domain names a day are deleted and become available for registration. Of this number, there is competition to obtain roughly 10 per cent, or 2000 deleted domain names. Because of the intense competition for a certain number of the unique domain names deleted on a daily basis, these domain names are re-registered almost as soon as they are deleted.

11. A customer wishing to register a deleted domain name can choose from many different service providers, including Registrars, domain name resellers, and back-order service providers ("BOSPs"), like Pool.com, to obtain deleted domain names.

- 4 -

12. BOSPs provide services to obtain deleted domain names as quickly as possible after they are deleted. BOSPs specialise in providing a service that allows access to the Registry in the moments after a domain deletion has occurred. The back-order services provided by BOSPs are provided to customers at a retail level, where BOSPs serve as brokers between customers who wish to register for deleted domain names and Registrars, who are the only parties with the legal status to register domain names with the relevant Registry Operator.

13. On August 23, 2003, ICANN authorised its General Counsel to begin negotiating the terms on which Verisign would be authorised to provide an additional registry service, named the "Wait Listing Service" ("WLS") in the dot-com and dot-net Registries. A copy of the Preliminary Report of the ICANN Board of Directors' meeting held on August 23, 2003 is attached as Exhibit "A" to this Affidavit.

14. While the proposed WLS is functionally equivalent to and a direct alternative to the back-order services currently provided by BOSPs, WLS differs in fundamentally important ways from other back-order services:

- (a) WLS itself is a wholesale service that will only be offered by VeriSign to ICANN-accredited Registrars. The service will be offered by VeriSign, but will be operated, under contract, by SnapNames, which is currently a competitor of Pool.com to provide domain name back-order services;
- (b) Under the WLS, end-users will buy subscriptions for a given dot-com or dot-net domain name through their Registrars;

- 5 -

- (c) A WLS subscription will guarantee that if and when the current registration lapses and is deleted from the Registry by VeriSign, the holder of the subscription may register for the domain name in question;
- (d) The WLS will operate on a first-come, first-served basis; only one WLS subscription may be purchased per domain name; and
- (e) Upon implementation of the WLS, a domain name that is about to be deleted from VeriSign's list of registered domain names will be checked to determine if a WLS subscription has been purchased for the domain name prior to being deleted from the Registry. If a WLS subscription has been purchased, the domain name will be registered to the WLS subscription holder, without ever being deleted and made available for registration to competing Registrars.

15. Therefore, with ICANN's active and direct participation, VeriSign will be afforded preferential access to deleted domain names, in priority to entities like Pool.com. Implementation of the WLS, will in one fell swoop, completely undermine Pool.com's offering of back-order services.

B. The Ontario Action

16. The claims as issued are framed in tort and seek damages and injunctive relief for ICANN's intentional interference with the business and commercial prospects of Pool.com. The action is based on ICANN's active participation in approving the implementation of the proposed WLS for dot-com and dot-net domain names.

17. At the heart of the claims contained in Pool.com's Statement of Claim are ICANN's deliberate actions in relation to its approval of the WLS, its knowledge and duties with

- 6 -

respect to Pool.com, as well as the foreseeable effects that the implementation of WLS will have on the business currently operated by Pool.com in Ontario.

18. The nature of the claims and the plaintiff in the Ontario action are distinct from those in the California action referred to in the Affidavit of Mr. Halloran, which, on its face, is an action alleging breach of contract brought by ICANN-accredited Registrars. Pool.com is not a Registrar and has not entered into any contracts with ICANN that are material to the issues in dispute in this action.

C. Substantial Connection between POOL.COM and this Jurisdiction

19. I am the sole director and one of several beneficial owners of Pool.com, all of whom are Canadians resident in Ontario.

20. Pool.com is a corporation incorporated pursuant to the Ontario *Business Corporations Act*. Pool.com was incorporated in May 2003 to provide a highly specialised service known in the jargon of the industry as a "back-order service." However, Pool.com was engaged in beta testing and other preparations to offer back-order services well in advance of this date.

21. Pool.com currently offers back-order services in relation to dot-com, dot-net, dot-org, and dot-biz domain names. However, over 98 per cent of its business flows from the provision of back-order services in relation to the dot-com and dot-net Registries.

22. Pool.com's principal place of business is located in the City of Ottawa and the bulk of its personnel work out of this office. As the directing mind of Pool.com, I live and work in Ottawa.

- 7 -

23. Pool.com conducts its business primarily through its website at pool.com. This website is operated from web servers physically located in Ottawa. Pool.com has additional electronic mail servers and other servers located in Ottawa necessary for the conduct of its business.

24. Pool.com enters into contracts with customers for the provision of back-order services, which include the parties' express submission to the personal and subject matter jurisdiction of the courts of the Province of Ontario. A copy of a model customer contract is attached as Exhibit "B" to this Affidavit.

25. Furthermore, in order to gain access to the Registry, which it cannot do directly, Pool.com has entered into a number of agreements with accredited Registrars to make the necessary registration requests for the names ordered by Pool.com customers. As of the date of this Affidavit, Pool.com has, to this end, entered into relationships with over 23 Registrars, many of whom are Canadian and based in Ontario. These Registrars use back-end communications software provided by Pool.com to access servers operated by Pool.com, which assists Registrars to be the first to make a request to the Registry for a deleted domain name.

D. Globally Representative Nature of ICANN and Its Substantial Connection to this Jurisdiction

26. Prior to 1998, the global DNS was administered directly by the U.S. Department of Commerce. After extensive consultation with members of the global Internet community, including the Canadian government, Internet industry, and user groups, in 1998, technical administration of the global DNS was privatised. ICANN has been the administrator of the global Internet DNS since that time.

- 8 -

27. The federal government of Canada was actively involved in the creation of ICANN and has both formally and informally recognised ICANN's authority to administer the global DNS. The Canadian government was a charter member and continues to be a member of the Government Advisory Committee of ICANN (GAC), which is one of the most significant committees of the ICANN. The GAC's headquarters are located in Brussels, Belgium. The current President and Chief Executive Officer of the ICANN Board of Directors is Dr. Paul Twomey, who was formerly the Chair of the GAC.

28. In addition, the federal government, ICANN, and the Canadian Internet Registration Authority ("CIRA"), which has its headquarters in Ottawa, Ontario, have entered into agreements that formally recognise each party's respective authority in relation to the administration of the dot-ca country-code top-level domain. Attached as Exhibit "C" to this Affidavit is a copy of the agreements effecting CIRA's appointment as the administrator of the dot-ca domain, including Industry Canada's letter to ICANN, dated October 10, 2000, requesting that ICANN effect the necessary changes to the Internet's "A" root server to accomplish this re-delegation.

29. ICANN, in terms of its structure, operations, and mandate, is a truly global organisation. As stated in an ICANN press release dated September 17, 2003, the Memorandum of Understanding between the U.S. Department of Commerce and ICANN, which has recently been renewed until September 30, 2006, "highlights ICANN's responsibility to ensure the stability of the Internet and foster its globalization. Toward those ends, ICANN will: implement an objective process for selecting new Top Level Domains; implement an effective strategy for multi-lingual communications and international outreach; and develop a contingency plan, consistent with the international nature of the internet, to ensure continuity of operations in the

- 9 -

event of a severe disruption of operations.” A copy of the ICANN press release dated September 17, 2003 is attached as Exhibit “D” to this Affidavit.

30. International interests, including Canadian interests, are both directly and indirectly represented on the GAC, as well as on ICANN’s Board of Directors and its various Supporting Organisations, Advisory Committees, and the Committees and Task Forces of the Board of Directors, through the participation of the international Registrar, Registry, intellectual property owner, and user communities.

31. Furthermore, it is my understanding that ICANN conducts business in Ontario, in Canada, and throughout the world, in the following ways:

- (a) ICANN actively solicits and offers a Registrar-accreditation service in return for annual fees through its www.icann.org website in countries around the world. ICANN, in fact, has accredited a good number of Canadian Registrars, of which, as stated in the Affidavit of Mr. Halloran, at least five are located in Ontario;
- (b) ICANN derives significant revenues from the sale of registrations through Ontario-based Registrars. It is my understanding that approximately 12 per cent of total, world-wide, generic top-level domain registrations are registered through Ontario-based Registrars. Furthermore, it is my understanding that CIRA also pays fees to fund ICANN;
- (c) ICANN promotes the sale of domain name registrations through its accredited Registrars on its www.internic.net website, which is hyperlinked to the www.icann.org website. ICANN also promotes new top-level domains, such as the .biz, .info and .name domains on its websites;

- 10 -

- (d) ICANN has, over the past few years, regularly conducted business in Ontario related to the dot-ca country-code top-level domain operated by CIRA and has entered into agreements with CIRA with respect to the conduct of ICANN business in Canada;
- (e) ICANN's staff and members of its Board of Directors regularly travel to locations throughout the world to conduct business. A schedule of all ICANN Board Meetings as posted on ICANN's Internet website is attached as Exhibit "E" to this Affidavit. The most recent meeting of ICANN's board of directors and associated Supporting Organisations took place in Montréal, Québec in the month of June, 2003;
- (f) ICANN and the World Intellectual Property Organisation have, in the past, held hearings on the Uniform Dispute Resolution Process (UDRP) in Toronto, Ontario; and
- (g) It is my understanding that ICANN has employees and consultants resident in many different parts of the globe. For example, Dr. Twomey, the President and Chief Executive Officer of ICANN, lives and works in Australia. Andrew McLaughlin, a policy consultant to ICANN, lives and works in New York City. Barbara Rossman, another consultant to the ICANN, lives and works from Hawaii. Glen de Saint Gery of the Generic Names Supporting Organization Secretariat of ICANN lives and works in France. Finally, there may well be other ICANN staff who live and work in locations other than Marina Del Rey, California.

- 11 -

32. ICANN business is conducted primarily through meetings of its Board of Directors, which is representative of global interests, including Canadian interests, in the Internet. Over the past five years, two Canadians resident in Ontario have served as members of ICANN's Board of Directors.

E. Bulk of Evidence is Located in Ontario

1. Details of the WLS

33. The WLS' basic premise and business model as currently proposed are fairly well known, and as finally negotiated, will be fully publicised when approved by ICANN. The basic premise of the WLS is not currently and will not, at any eventual trial, be the subject of significant dispute.

2. ICANN's Actions in Relation to the WLS

34. ICANN's actions in relation to the implementation of the WLS have resulted from the decisions of the Board. Documentary evidence relating to these Board decisions and other steps taken through the ICANN's various committees and task forces is publicly and readily available. Attached as Exhibit "F" to this Affidavit is a description of 37 of the relevant documents relating to ICANN's actions to date in relation to the WLS that were accessible from ICANN's website as of the date of this Affidavit.

35. Evidence relating to ICANN's knowledge of the foreseeable and likely effects of the implementation of WLS on Pool.com would be within the knowledge of one or two representatives of ICANN. In this regard, two resident Ontarians served on ICANN's Board of Directors throughout the time frame relevant to this action.

- 12 -

3. Pool.com's Back Order Services

36. Documentary and *viva voce* evidence relating to the planning and implementation of the back-order service provided by Pool.com is located in Ontario. As stated above, Pool.com identifies and enters into contracts for back-order services with customers for specific domain names. Also, as stated above, Pool.com has entered into 23 separate agreements with an equal number of accredited Registrars to make the necessary registration requests for the names ordered by Pool.com customers. Witnesses who may speak to these and other operational aspects of Pool.com's provision of back-order services, and the current, market-driven system and level playing field to obtain deleted domain names, are located in Ontario.

4. Effect of the Proposed WLS on Pool.com's Business

37. With the negotiation, approval and implementation of VeriSign's proposed WLS by ICANN, the current level playing field for deleted domain names will be destroyed and will result in the inability of Pool.com and the other competitors to participate in the market for back-order services. Not only will harm result to Pool.com and end-users in Ontario, Pool.com's customers throughout the world will suffer harm from the monopolistic effects of the implementation of WLS.

38. Much of the documentary and *viva voce* evidence necessary to resolve the issues in the trial of this action relates to the damages suffered by Pool.com in Ontario as a result of the actions of ICANN.

39. Documentary and *viva voce* evidence with respect to the effects of the WLS, as proposed or implemented, on Pool.com's business, may be obtained through sources located in Ontario.

- 13 -

40. Documentary and *viva voce* evidence with respect to the effect of the implementation of WLS on the decisions of end-users to subscribe, or not, to the services provided by Pool.com, is available anywhere where Pool.com has customers, and may be obtained in Ontario. In this regard, certain Registrars, and in particular Network Solutions, Inc., which is an affiliate of VeriSign, has already begun to accept "pre-orders" for "Next Registration Rights", which is Network Solutions' re-sold version of WLS. A copy of an e-mail dating back to the beginning of September 2003, which was received by a recipient in Ontario, is attached as Exhibit "G" to this Affidavit.

F. There is No Clearly More Convenient Forum to Try the Action

41. Based in part on the foregoing, the balance of convenience favours the hearing of the action in the Ontario courts because

- (a) ICANN is a truly global organisation, in terms of its structure, operations, and mandate, and it regularly conducts business in Ontario and throughout the world;
- (b) Pool.com carries on business in Ontario and the location where the effects of ICANN's actions and where it will sustain damages as a result of ICANN's actions, is Ontario; and
- (c) The location where the majority of and key witnesses reside is Ontario and the bulk of the evidence relating to the effects of ICANN's actions and the damages sustained by Pool.com will come from Ontario.

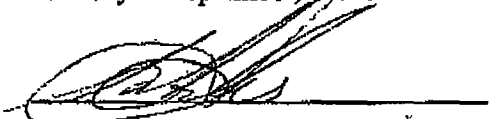
42. Furthermore, the resolution of the issues in dispute between Pool.com and ICANN is not governed by any contract.

- 14 -

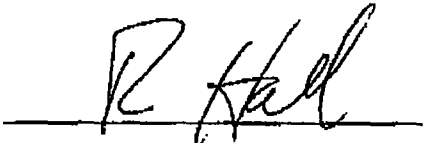
43. The pleading in the proceedings currently before the California courts that is attached to the Affidavit of Mr. Halloran reveals, on its face, that that action does not involve the same parties (save the Defendant, ICANN). The legal issues to be resolved in the California action are governed by a contract between the parties. In contrast, it is my understanding that the Ontario action is predicated on the law of tort.

44. I make this Affidavit in support of Pool.com's response to ICANN's motion to stay the action on jurisdictional grounds.

SWORN BEFORE ME at the City of
Ottawa in the Province of Ontario, this
17th day of September, 2003.



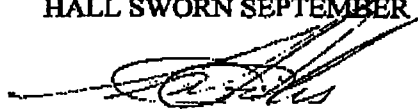
Commissioner for Taking Affidavits *etc.*



ROBERT CHRISTOPHER HALL

MARILYN JEAN HOILES, a
Commissioner, *etc.*, City of Ottawa,
for Osler, Hoskin & Harcourt LLP,
Barristers & Solicitors.
Expires November 18, 2005.

THIS IS EXHIBIT "A" REFERRED TO IN THE
AFFIDAVIT OF ROBERT CHRISTOPHER
HALL SWORN SEPTEMBER 17, 2003



A Commissioner for Taking Affidavits



Special Meeting of the Board
23 August 2002
(Posted 23 August 2002)

The ICANN Board of Directors held a meeting by teleconference on 23 August 2002. Directors Vint Cerf (chairman), Amadeu Abril i Abril, Karl Auerbach, Robert Blokzijl, Ivan Moura Campos, Lyman Chapin (joined meeting while in progress and departed before end), Jonathan Cohen (joined meeting while in progress), Masanobu Katoh, Hans Kraaijenbrink, Sang-Hyon Kyong, Stuart Lynn, Andy Mueller-Maguhn, Jun Murai (joined meeting while in progress), Alejandro Pisanty (joined meeting while in progress), Nii Quaynor, and Linda S. Wilson participated. The Board adopted the following resolutions:

Approval of Minutes

Resolved [02.96] that the minutes of the meeting of the Board held on 13 June 2002 are hereby approved and adopted by the Board as presented.

(The Board approved the above resolution by a 11-0-1 vote, with Mr. Abril i Abril abstaining.)

New TLD Evaluation Process Planning Task Force

Whereas, the Board at its Stockholm meeting in June 2001 adopted the following resolution:

Resolved [01.74], the Board directs the President to form and chair a New TLD Evaluation Process Planning Task Force, for the purpose of recommending to the Board and the broader Internet community, by means of a report to be discussed at ICANN's Montevideo meeting in September 2001:

- (a) a plan for monitoring the introduction of new TLDs and for evaluating their performance and their impact on the performance of the DNS. This assessment should focus in technical, business, and legal perspectives and rely on data gathered as part of the contractual arrangements with the new TLDs as well as other data inputs that can be readily secured; and
- (b) a schedule on which a plan should be executed;

Whereas, the President formed the New TLD Evaluation Process Planning Task Force (NTEPPTF);