

**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

registrars located elsewhere in Canada. The remainder are with registrars located around the world, including in California, Australia, Israel, Tennessee, Massachusetts, Bahamas, Hong Kong, Florida, Barbados, New York, Japan, Arkansas and Colorado.

Hall Affidavit, paras. 20, 22-25
Responding Party's Motion Record

Second Supplementary Affidavit of Daniel Halloran sworn January 21, 2004 ("Second Supplementary Halloran Affidavit"), paras. 2-9
Moving Party's Motion Record, Tab 4 at 114-117

36. Although the merits of Pool.com's action are not relevant to this motion, it is significant that 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's action is founded upon actions taken by ICANN well in advance of Pool.com's incorporation in Ontario and the commencement of its business. Pool.com's director and self-described "directing mind", Robert Hall, admitted on his cross-examination that:

- (i) he was aware of and spoke in favour of the implementation of the WLS at an ICANN Public Forum held on June 27, 2002;
- (ii) he was aware in August, 2002 that the ICANN Board of Directors had passed a resolution authorizing ICANN to negotiate contractual amendments with VeriSign to allow it to offer the WLS; and
- (iii) he was aware prior to Pool.com's incorporation that ICANN had authorized negotiations to allow VeriSign to implement the WLS.

Halloran Affidavit at para. 52
Moving Party's Motion Record, Tab 2 at 20

Hall Affidavit at paras. 1 and 22
Responding Party's Motion Record

Hall Cross-Examination, Exhibit "1" and pp. 9 – 15, qq. 70 – 96, p.
16, qq. 102 – 103, p. 23, qq. 148 - 150
Moving Party's Motion Record, Tab 6 at 337 – 344 and 351

The Wait List System ("WLS")

37. At the core of Pool.com's action is a new service proposed to be offered by VeriSign, the .com and .net registry operator. In 2001, VeriSign proposed offering a "wait list service" (the "WLS") at the registry level for domain names in the .com and .net gTLDs. The proposed WLS has not, as yet, been implemented.

Halloran Affidavit, paras. 35, 38
Moving Party's Motion Record, Tab 2 at 15 - 16

38. The WLS would operate by permitting ICANN-accredited registrars, acting on behalf of customers, to place reservations for currently registered domain names in the .com and .net gTLDs. Only one reservation would be permitted for each domain name and each reservation would last for a one-year period. Reservations would be accepted on a first come, first served basis with an opportunity for renewal. VeriSign would charge the registrar a fee, which would be no higher than \$24.00 for each one-year reservation. Registrars' fees to their customers would be established by the registrars, and not VeriSign.

Halloran Affidavit, para. 35
Moving Party's Motion Record, Tab 2 at 15

39. Under the proposed WLS, when a domain name becomes deleted from the registry, VeriSign would check to determine whether the name is reserved. If so, VeriSign would register the name to the customer with the reservation. If no reservation

exists, the name would be returned to the pool of names, universally available for registration through all registrars on a first come, first served basis.

Halloran Affidavit, para. 35
Moving Party's Motion Record, Tab 2 at 15

40. Unlike under the current system for re-registration of deleted domain names, under the WLS a customer would simply have to sign up with any one registrar to be placed on the waiting list. This would guarantee the customer the right to be next in line to acquire the domain name should it be deleted.

Halloran Affidavit, para. 37
Moving Party's Motion Record, Tab 2 at 16

Hall Affidavit, para. 14
Responding Motion Record

41. The WLS system has not yet been implemented. VeriSign's proposed WLS has been the subject of review and discussion since 2001 when it was first proposed. On March 10, 2002, a group of ICANN's accredited registrars issued a position paper opposing the WLS and urging ICANN to prevent its implementation. On August 23, 2002 the ICANN Board of Directors at a meeting held by teleconference approved a resolution authorizing the President and General Counsel of ICANN to negotiate appropriate revisions to VeriSign's Registry Agreement to allow for the WLS to be offered by VeriSign. On September 12, 2002, certain registrars filed a request for reconsideration of the ICANN Board's decision. On May 20, 2003, ICANN's Reconsideration Committee determined that the registrars' request lacked merit and recommended that the ICANN Board take no action on it and, after further consideration, the ICANN Board confirmed its decision of August 23, 2002.

Halloran Affidavit, paras. 35, 38-39
Moving Party's Motion Record, Tab 2 at 15 – 16

Hall Affidavit, Exhibit "A"
Responding Party's Motion Record

The Pool.com Action

42. Pool.com's action is entirely based on tort and the allegation that ICANN has unlawfully and intentionally interfered with Pool.com's economic interests by authorizing the WLS. Among the types of relief claimed by Pool.com, are an interim and permanent injunction preventing the implementation of the WLS, a declaration that the authorization of the WLS by ICANN is invalid, a declaration that the conduct of ICANN with respect to the WLS is an "intentional and wrongful interference with the trade and commercial prospects" of Pool.com and a substantial amount of general, special, punitive and exemplary damages.

Statement of Claim, para. 1
Moving Party's Motion Record, Tab 8 at 466

43. The only illegal or unlawful action of ICANN complained of in Pool.com's Statement of Claim is an alleged breach by ICANN of its obligations under the Registrar Accreditation Agreements (to which Pool.com is *not* a party) by, among other things, failing to establish a "consensus" for the WLS, and failing to seek an Independent Review Panel determination as to whether a consensus for the WLS has been achieved.

Statement of Claim, para. 10
Moving Party's Motion Record, Tab 8 at 469 - 470

Halloran Affidavit, para. 50
Moving Party's Motion Record, Tab 2 at 19

Other pending proceedings in California which raise the same issues raised in this action

(i) Registersite.com, et al. v. ICANN, et al.

44. On March 1, 2004, eight registrars filed a suit in the Central District of California (the "*Registersite.com* lawsuit") based solely on a dispute over VeriSign's proposed WLS. Both ICANN and VeriSign are named as defendants in the action. The plaintiffs essentially allege that ICANN should not permit VeriSign to implement the WLS because it will harm competition and their businesses. In essence, it is alleged that ICANN acted in an unlawful manner by agreeing to negotiate with VeriSign the basis upon which VeriSign could offer WLS. Amongst other relief, the plaintiffs are seeking preliminary and permanent injunctions against ICANN.

Third Supplementary Halloran Affidavit, para. 3, Exhibit "A"
Moving Party's Motion Record, Tabs 5 and 5A at 209 and
219 - 276

45. The *Registersite.com* lawsuit alleges that ICANN has committed various unlawful acts by authorizing VeriSign to implement the WLS, including that ICANN has breached the Registrar Accreditation Agreements with the eight plaintiffs.

Third Supplementary Halloran Affidavit, para. 4
Moving Party's motion Record, Tab 5 at 209 - 210

46. All of the unlawful acts alleged by Pool.com in this action are also alleged in the *Registersite.com* lawsuit.

Third Supplementary Halloran Affidavit, para. 4
Moving Party's Motion Record, Tab 5 at 209 - 210

47. All the plaintiffs in the *Registersite.com* suit that have operational websites point to Pool.com and therefore use Pool.com for their deleted domain name registration services.

Third Supplementary Halloran Affidavit, paras. 5-16
Moving Party's Motion Record, Tab 5 at 210 - 213

48. Of the eight registrars that are plaintiffs in the *Registersite.com* lawsuit in California, the six that offer deleted domain name services appear to do so solely through affiliation with Pool.com. According to the "Affiliates Program" page on Pool.com's website, Pool.com pays its affiliates a 10% commission for all successful back-order transactions.

Third Supplementary Halloran Affidavit, para. 17
Moving Party's Motion Record, Tab 5 at 213

49. While Pool.com is not an accredited registrar, the interests it is pursuing in this action are being advanced in the *Registersite.com* lawsuit by plaintiffs with which Pool.com has a contractual relationship and which are accredited registrars. All the *Registersite.com* plaintiffs which offer deleted domain name services appear to do so solely through affiliation with Pool.com. That is, if an individual wants to use the back-order service provided by any of these plaintiffs, they are automatically diverted to Pool.com's site and it is Pool.com that operates the back-order service.

Third Supplementary Halloran Affidavit, para. 19
Moving Party's Motion Record, Tab 5 at 214

50. Because of the apparent close relationship between Pool.com and the plaintiffs in the *Registersite.com* lawsuit, Pool.com's rights and interests are already being represented by its affiliates in the *Registersite.com* lawsuit. In the

Registersite.com lawsuit, the California Court is going to consider WLS and, among other things, whether ICANN (and VeriSign) acted lawfully in authorizing WLS. If Pool.com's lawsuit in Ontario is permitted to proceed, ICANN will be forced to defend two lawsuits in two jurisdictions dealing with the lawfulness of its actions regarding WLS. This will cause significant difficulty for ICANN (from both a financial and business point of view) and there is a substantial risk of contradictory and inconsistent judgments if both lawsuits are permitted to proceed.

Third Supplementary Halloran Affidavit, para. 20
Moving Party's Motion Record, Tab 5 at 214

(ii) VeriSign v. ICANN

51. On February 26, 2004, another WLS lawsuit was filed in the Central District of California. VeriSign has sued ICANN and has alleged, in essence, that ICANN has improperly restricted VeriSign's ability to offer and implement the WLS and other VeriSign "services". That is, whereas the *Registersite.com* and *Pool.com* plaintiffs have alleged that ICANN has acted unlawfully by agreeing to negotiate with VeriSign on the basis upon which VeriSign could offer WLS and by taking steps towards the authorization of WLS, VeriSign has alleged that ICANN has no right to restrict or otherwise be involved in VeriSign's offering of WLS.

Third Supplementary Halloran Affidavit, para. 21, Exhibit "B"
Moving Party's Motion Record, Tabs 5 and 5B at 215 and 279 - 321

52. VeriSign's WLS claims and Pool.com's WLS claims involve related issues that could lead to inconsistent decisions. VeriSign's claim is premised on its belief that VeriSign does not need ICANN's authorization before it implements the WLS. Pool.com's claim is premised on a belief that ICANN must authorize WLS before it is

implemented and that ICANN has taken and continues to take steps towards authorizing WLS that are in violation of ICANN's legal obligations. Therefore, the California court in the *VeriSign* action has been asked to adjudicate an issue that is central to Pool.com's claim.

Third Supplementary Halloran Affidavit, para. 22
Moving Party's Motion Record, Tab 5. at 215

PART III ~ ISSUES AND LAW

Issues

53. This motion raises two issues:
- (a) Does this Court have jurisdiction *simpliciter* over ICANN or over this action?
 - (b) If this Court does have jurisdiction, should this Court exercise its discretion to decline jurisdiction on the basis that California, and not Ontario, is the *forum conveniens* for this action?

Nature of Pool.com's Action

54. Prior to engaging in an analysis of jurisdiction *simpliciter* or *forum non conveniens*, it is essential to properly characterize the nature of Pool.com's action. The Court's task on this motion is not to decide the merits of the claim, but to find the case for or against assuming jurisdiction in Pool.com's Statement of Claim and in the evidence presented on this motion.

Incorporated Broadcasters Ltd. v. Canwest Global Communications Corp. (2003), 63 O.R. (3d) 431 at 435 and 450 – 452 (C.A.)

55. The only cause of action pleaded by Pool.com is "intentional and wrongful interference with the trade and commercial prospects" of Pool.com. In other words, Pool.com's entire claim is based on the tort of unlawful interference with economic relations. Assuming without conceding that the law of the alleged tort is Ontario law, to establish the tort of unlawful interference with economic relations Pool.com must prove that:

- (a) ICANN intended to injure Pool.com;
- (b) ICANN interfered with Pool.com's business by illegal or unlawful means;
and
- (c) as a result of ICANN's wrongful interference, Pool.com suffered an economic loss.

Lineal Group Inc. v. Atlantis Canadian Distributors Inc. (1998), 42 O.R. (3d) 157 at 159 (C.A.)

Reach M.D. Inc. v. Pharmaceutical Manufacturers Assn. of Canada (2003), 172 O.A.C. 202 at 211-212 (C.A.)

56. The "illegal or unlawful means" element of the tort refers to an act that the defendant "was not at liberty to commit" or to conduct of the defendant that is "forbidden by law". The only "illegal or unlawful means" pleaded by Pool.com in its Statement of Claim is ICANN's alleged breach of or failure to observe its contractual obligations under the Registrar Accreditation Agreements (which, as noted above, is governed by the laws of California) in taking steps to enable the WLS.

Statement of Claim, para. 10
Moving Party's Motion Record, Tab 8 at 469 - 470

John G. Fleming, *The Law of Torts*, 9th ed. (LBC: Sydney, 1998),
at 767-768

Linda Rainaldi, ed., *Remedies in Tort*, Vol. 3 (looseleaf)
(Toronto, Carswell, 1987) at 24-47 to 24-48

*Reach M.D. Inc. v. Pharmaceutical Manufacturers Assn. of
Canada, supra* at 212

57. Whether ICANN's actions with respect to WLS were "illegal", "unlawful" or "forbidden" will be determined according to the laws of the State of California, and not according to the laws of Ontario. In other words, the laws of the State of California will necessarily apply to determine whether ICANN did, as alleged by Pool.com, breach its contractual obligations under the Registrar Accreditation Agreements.

Davidson Tisdale Ltd. v. Pendrick, [1998] O.J. No. 5308 at paras.
24-25 (Div. Ct.) (Q.L.)

58. It is equally relevant to note what this action is not about. This action is not about the merits of the WLS or whether the WLS will create a monopoly. This action is not connected in any manner with the five ICANN-accredited registrars located in Ontario; indeed, not one of those registrars is a party to this action. This action is not about ICANN's role as the administrator of the DNS in an international sense. Rather, the action as framed in the Statement of Claim is simply about whether, by authorizing the WLS, ICANN breached its Registrar Accreditation Agreements and thereby, (according to Pool.com) illegally interfered with Pool.com's business, causing it losses.

The Ontario Courts do not have jurisdiction *simpliciter*

59. Rule 17.02 of the *Rules of Civil Procedure* which provides for service of originating process *ex juris* is procedural in nature and does not confer jurisdiction.

Muscutt v. Courcelles et al. (2002), 60 O.R. (3d) 20 at 36-37
(C.A.)

60. The Court has jurisdiction *simpliciter* over an action against an out-of-province defendant in three circumstances:

- (i) where the defendant consents;
- (ii) where the defendant has a physical presence in Ontario; or
- (iii) where there is a "real and substantial connection" between Ontario and either the defendant or the subject-matter of the claim.

None of these three circumstances exists in this case.

Muscutt et al. v. Courcelles et al., supra at 28-29 and 33

Incorporated Broadcasters Ltd. v. Canwest Global Communications Corp., supra at 449

(i) ICANN has not attorned to the jurisdiction of the Ontario Courts

61. ICANN has not consented to be subject to the jurisdiction of Ontario and has not attorned to the jurisdiction.

(ii) ICANN does not have a physical presence in Ontario

62. Presence-based jurisdiction is impossible on the facts at hand since ICANN does not carry on business or any activities in Ontario and has absolutely no physical presence here. In this regard, the relevant facts are set out at paragraphs 25-31 herein.

(iii) No real and substantial connection with Ontario

63. The real and substantial connection test was proposed by the Supreme Court of Canada to protect against a defendant being pursued in a jurisdiction which has little or no connection to it or to the transaction at issue. Mr. Justice Dickson, writing for the Court, explained:

"It seems to me that the approach of permitting suit where there is a real and substantial connection with the action provides a reasonable balance between the rights of the parties. It affords some protection against being pursued in jurisdictions having little or no connection with the transaction of the parties."

Morguard Investments Ltd. v. De Savoye, [1990] 3 S.C.R. 1077 at 1108

64. In a recent case involving the enforcement of a foreign judgment, Mr. Justice Major for the majority of the Supreme Court of Canada described the application of the test in the following manner:

"The 'real and substantial connection' test requires that a significant connection exist between the cause of action and the foreign court. Furthermore, a defendant can reasonably be brought within the embrace of a foreign jurisdiction's law where he or she has participated in something of significance or was actively involved in that foreign jurisdiction. A fleeting or relatively unimportant connection will not be enough to give a foreign court jurisdiction. The connection to the foreign jurisdiction must be a substantial one." (emphasis added)

Beals v. Saldanha, [2003] 3 S.C.R. 416 [reported version not yet available, see instead: [2003] S.C.J. No. 77 (Q.L.) at para. 32]

65. The leading Ontario case regarding whether the Ontario Courts should assume jurisdiction over an out-of-province defendant in a tort action is the Ontario Court of Appeal's recent decision in *Muscutt v. Courcelles*. The factors that are to be examined to determine whether the "real and substantial" test has been satisfied, are as follows:

- (a) the connection between Ontario and the claim;
- (b) the connection between Ontario and the defendant;
- (c) the unfairness to the parties in assuming or not assuming jurisdiction;
- (d) the involvement of other parties to the action;

- (e) the Ontario court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis;
- (f) whether the action is interprovincial or international in nature; and
- (g) principles of comity and standards of jurisdiction, recognition and enforcement prevailing elsewhere.

Muscutt et al. v. Courcelles et al., supra at 45-53

Incorporated Broadcasters Ltd. v. Canwest Global Communications Corp., supra at 449

66. Each of these factors should be considered and weighed together. No single factor is determinative of whether a real and substantial connection exists.

Muscutt et al. v. Courcelles et al., supra at 45-53

Incorporated Broadcasters Ltd. v. Canwest Global Communications Corp., supra at 447-449

67. The application of each of the foregoing factors is considered below in the context of this action.

(a) The connection between Ontario and Pool.com's claim

68. The action and Ontario have virtually no connection whatsoever. The only connection between Ontario and Pool.com's claim is that Pool.com is incorporated in Ontario and has an office in Ontario and contends that it will thereby sustain (but has not yet sustained) business losses in Ontario if the WLS system is implemented.

69. In contrast:

- (i) none of the events and conduct of ICANN that are in issue in the action and which form the basis for Pool.com's claim occurred in

Ontario. Indeed, the events that Pool.com complains about took place prior to Pool.com being incorporated and, therefore, prior to even Pool.com being in Ontario; and

- (ii) the actionability of the alleged "unlawful and illegal means" pleaded by Pool.com as satisfying the requisite element of the tort of unlawful interference with economic interests (namely, the alleged breach by ICANN of the Registrar Accreditation Agreements will be judged according to the laws of the State of California, not the laws of Ontario.

Davidson Tisdale Ltd. v. Pendrick, supra at paras. 24-25

70. It is well established that the mere fact that a plaintiff resides in Ontario and may suffer income loss or damage in Ontario is not sufficient to establish a real and substantial connection with Ontario and does not constitute a sufficient basis for the Ontario Courts assuming jurisdiction.

Muscutt et al v. Courcelles et al., supra at 45

See also the following four "sister cases" to *Muscutt v. Courcelles*, argued at the same time as *Muscutt v. Courcelles*: *Lemmex v. Bernard* (2002), 60 O.R. (3d) 54 at 63 (C.A.); *Gajraj v. DeBernardo* (2002), 60 O.R. (3d) 68 at 72 (C.A.); *Sinclair v. Cracker Barrel Old Country Store Inc.* (2002), 60 O.R. (3d) 76 at 81 (C.A.) and *Leufkins v. Alba Tours Inc.* (2002), 60 O.R. (3d) 84 at 92 (C.A.)

Elawar v. Fédération des Clubs Montonegistes du Quebec Inc. et al (2001), 57 O.R. (3d) 232 at 238 (S.C.J.)

ECS Educational Services Canada Ltd. v. Al Nahyan, [2000] O.J. No. 211 (S.C.J.) at paras. 28-29, *aff'd* (2000), 3 C.P.C. (5th) 76 (Ont. C.A.)

Marren v. Echo Bay Mines Ltd. (2003), 13 B.C.L.R. (4th) 177 at 183 (B.C.S.C.)