File No. CT-2011-001
Registry Document No.

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

REPLY SUBMISSIONS OF THE APPLICANT PURSUANT TO SECTION 103.1 OF THE *COMPETITION ACT*

DATED at the City of Vaughan, in the Regional Municipality of York, Province of Ontario, this 22nd day of February, 2011.

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REPLY SUBMISSIONS OF THE APPLICANT PURSUANT TO SECTION 103.1 OF THE *COMPETITION ACT*

1. The Applicant repeats and relies upon all of the Statement of Grounds, Materials Facts and allegations made in its Applications.

2. The Respondent will not suffer any prejudice if leave is granted. In fact, if leave is granted by the Competition Tribunal, and the Applicant were to lose at the section 75 Hearing, the Respondent has acknowledged that it will not suffer harm. The Respondent has, therefore, not suffered, or will not suffer, any harm hereafter, as the Respondent has failed to demonstrate that it will or may suffer, or that it has to date suffered, any harm whatsoever.

3. In its Representations, the Respondent discusses the Motion brought by the Applicant in the Ontario Superior Court of Justice, the decision of which was released on January 27, 2011. The Respondent states that the Court had dismissed the motion; however, the Respondent fails to point out that despite the fact that the Applicant was not ultimately successful on all elements of the test for granting an injunction, the Applicant had successfully made out at least the first part of the test for an injunction - namely, that there is a serious question to be tried in relation to whether or not the Respondent breached its agreement with the Applicant. Most of the Applicant's argument was ultimately directed toward, and principally concerned with, the issue of whether the Applicant had met the first part of the test for an injunction.

4. Although the Applicant agrees that the Superior Court decision is not binding on the Competition Tribunal, The Honourable Madam Justice Gilmore's decision illustrates that the

Respondent's actions may in fact result in a Trial Judge, or Tribunal in this matter, determining that the Respondent had in fact breached its agreement with the Applicant. Accordingly, only if the requested leave is granted will the Competition Tribunal have the opportunity to evaluate whether or not said breach has occurred and/or whether or not the Respondent's actions or practices could be the subject of an Order under section 75 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the "Act").

5. Over the years, the Applicant has been re-certified every year and has had no problems with its re-certification process. The re-certification process has been fairly automatic. The Applicant has never had to undergo any burdensome procedure. Besides filing the annual application and paying the required fee, in accordance with the Registrar Agreement, the Applicant has been re-certified without any difficulty. The parties have always proceeded on the basis that the Respondent would not terminate the Registrar Agreement unless it had just cause to do so.

6. The Applicant, however, was blindsided by the Respondent when, without warning or prior notice, in or around August 9, 2010, the Applicant, received a letter, dated August 6, 2010, from the Respondent, advising of its decision to refuse the Respondent's re-certification as a certified Registrar. The Applicant was only given the option of either selling its dot-ca business to another certified Registrar or having its business effectively shut down on the termination date of August 24, 2010. It was only after the Applicant's lawyer had written a letter to the Respondent on August 10, 2010 indicating that litigation was imminent and that the Applicant would be bringing a Motion to request an injunction that the Respondent had agreed to extend

the termination date to September 7, 2010, which was then extended to September 10, 2010 and further extended to October 31, 2010. Accordingly, in order to prevent the Respondent from refusing to supply its product, being the Registry, to the Applicant on the termination date of October 31, 2010, the Applicant had no choice but to commence an action against the Respondent and bring a Motion for injunctive relief in the Ontario Superior Court of Justice.

7. The Respondent states in its Representations that it took the Applicant five months from the time it was advised by the Respondent of its intention not to renew its certification before it applied for leave. However, the length of time it took the Applicant to apply to the Competition Tribunal for leave has no bearing on whether or not the Applicant should be granted leave. Even so, the Applicant did apply for leave to the Competition Tribunal within a reasonable time. In fact, immediately after the Applicant was advised by the Respondent of its intention not to renew, the Applicant brought its Motion, which was heard shortly after the said Motion materials were filed with the Court, in order to try to prevent the Respondent from terminating its relationship with the Applicant. The Applicant felt that the injunction sought from the Superior Court of Justice was necessary to enable this Application to be heard by the Competition Tribunal. Further, the Applicant was able to secure a Motion date within a very short time frame after serving and filing its Motion Record; for this reason, the Applicant brought its Motion following which it applied to the Competition Tribunal for leave.

8. Contrary to the Respondent's allegations that the Applicant's evidence is insufficient, the Applicant submits that it has provided sufficient credible evidence in its Application materials. If the Competition Tribunal, however, determines that the Applicant's evidence is insufficient then,

in addition to the cases cited in its Applications, the Applicant also relies on *Robinson Motorcycle Ltd. v. Fred Deeley Imports Ltd.*, 2005 Comp. Trib. 6, where the Competition Tribunal found that in granting leave under section 103.1(7) of the Act, the Competition Tribunal must only be satisfied that the Respondent's practices "could" be the subject of an Order under section 75 of the Act. Accordingly, this is a low threshold.

Robinson Motorcycle Ltd. v. Fred Deeley Imports Ltd., 2005 Comp. Trib. 6, at par. 6.

9. With respect to the evidence, the Applicant, along with the Respondent, has clearly demonstrated that the Respondent's failure and/or refusal to supply the Applicant with the dot-ca internet domain name registration system (the "Registry") has caused the Applicant's dot-ca business to be entirely shut down.

10. The Respondent in its Representations states that the Applicant's dot-ca domains only make up less than 3% of the total domains managed by the Applicant; however, this allegation is illusory. The Respondent is the only entity in Canada that is responsible for the management, administration and overseeing of dot-ca domains. There is therefore no availability of an alternative supply of the Registry. The fact is that on account of the Respondent's failing and/or refusing to supply the Registry to the Applicant, the Applicant is in fact losing 100% of its dot-ca business and as a result, the Applicant is precluded from working in or providing any services whatsoever in the dot-ca industry.

11. Every year since the Applicant has been a certified Registrar in the Registry, there has been a significant increase in the number of domain holders that the Applicant has provided services for. In the last year alone, the Applicant has been providing services for 3,552 domain

holders in the Registry, and each domain holder pays an annual fee of $40.00 to the Applicant. Consequently, by entirely ousting the Applicant out of the dot-ca industry, the Applicant has already incurred and/or will incur a loss in revenue in the amount of $142,080.00. Since every year the number of clients that the Applicant has been providing its services to has been growing, the Applicant's losses will be greater and greater every year that the Applicant is not a certified Registrar.

12. Further, in addition to the loss of revenue which the Applicant has already incurred and will continue to incur, the Respondent's refusal to deal has brought, and will continue to bring, about a loss of confidence, a loss of goodwill, a loss of market share and a loss of Resellers and Registrants. The Applicant supplies helpful, reliable and predictable internet services to its Resellers and Registrants, and the Applicant has always met each Reseller's and Registrant's needs and/or requirements. The Applicant requires the Registry in order to be able to continue to meet these needs and/or requirements. Termination of supply of the Registry by the Respondent has already created an immediate inability by the Applicant to fulfill the needs of its Resellers and Registrants. This has caused, and will continue to cause, immediate damage to the relationships the Applicant has built with its Resellers and Registrants over the last six-and-a-half years.

13. Contrary to paragraph 63 of the Respondent's Representations, the Respondent's refusal to deal will have an adverse effect on competition in the market. The preceding paragraphs clearly demonstrate that the Applicant has been competitive in the dot-ca industry for over six years. By refusing to deal, the Applicant will be precluded from carrying on its business as a

result of there being no availability of an alternative supply of the Registry. As a result, the Applicant will be unable to obtain another supply of the Registry, and the Applicant will be entirely shut out of the dot-ca industry. The result of the Respondent's refusal to deal with the Applicant will therefore not only have an adverse effect on the Applicant, its Resellers and Registrants, but it will have an adverse impact on competition in the market, as the termination of the Respondent's relationship with the Applicant will result in reduced competition in the dot-ca industry.

14. Further, the Applicant repeats that the Applicant has not only lost its dot-ca Registrants but many of its other domain Registrants because once all of 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, and those without a dot-ca domain will lose confidence in the Applicant as a Registrar.

15. The Applicant further submits that the Respondent's refusal to deal will also negatively impact the Applicant's Resellers and Registrants and irreparably harm its customer relationships, its business and its reputation. For instance, on January 28, 2011, the day the Respondent had terminated the Applicant's Registrar Agreement, the Respondent had sent emails to all the Resellers advising them that they must choose and select other certified Registrars, that they must contact their new Registrars of choice and initiate the transfer of their registration(s) from the Applicant to their new Registrar and that prior to transferring their domain names they must contact the Respondent and request the Authorization code for their domain names. Any domains

which are not transferred to a new Registrar by July 28, 2011 will be suspended by the Respondent.

16. These abrupt, sudden and unexpected transfers are now compelling the Resellers to work with new Registrars who they know nothing about and who they may not even trust or want to work with. Most, if not all, of the Resellers have very little information as to who will be registering, renewing and managing their domains, even though much, if not most, of their businesses rely upon these domains.

17. Further, the Applicant repeats that in light of the level of spam currently propagating in the internet and with users' privacy at risk, it is unlikely that the Resellers will receive or read the Respondent's notification, and as a result, the Resellers will misguidedly try to continue their business relationships with the Applicant, except the Applicant is now unable to provide the services that it has been contracted to perform for its former clients.

18. In addition, following the transfers, the new Registrars will then provide DNS services to the Resellers and Registrants, so none of the Resellers' and Registrants' existing information will be migrated from the Applicant's servers. The Resellers and Registrants will be forced to re-enter all of their information into a new system, which they will not be familiar with. As a result, the Resellers will have to invest a great deal of time and money in re-entering information into a new system. Following the transfers, there will also be a manual migration of data, which will cause all of the Resellers' and Registrants' sites and emails to go offline. This will undoubtedly cause the Resellers and Registrants a loss of business.

19. The Respondent's allegations in paragraph 24 of its Representations wherein the Respondent claims that the Applicant was required to file an application for re-certification and pay the fee by July 25, 2010 but that it has failed to do so is absolutely misleading. In fact, at all material times since 2004, the Respondent had been sending automatic annual renewal notices to the Applicant in or around June of every year, along with withdrawing the required funds from the Applicant's account when they were due. In 2010, however, the Respondent failed to send a renewal notice to the Applicant, and at no point did the Respondent withdraw any funds from the Applicant's account, even though the funds were available for withdrawal.

20. At no time before receiving the Respondent's letter on August 9, 2010, did the Applicant understand that the Respondent was not prepared to re-certify the Applicant as a certified Registrar. The Applicant was always of the mind that the Applicant's certification would be re-certified automatically, as it has been every year.

21. As such, the Applicant repeats and relies upon all of the Statement of Grounds, Materials Facts and allegations made in its Applications and requests that the Respondent be required to accept the Applicant as a customer on its usual trade terms.

DATED at the City of Vaughan, in the Regional Municipality of York, Province of Ontario, this 22nd day of February, 2011.

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