Reference: *Brandon Gray Internet Services Inc. v. Canadian Internet Registration Authority*, 2011 Comp. Trib. 1
File No.: CT-2011-001
Registry Document No.: 17

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 AECI
(respondent)

Decided on the basis of the written record.
Presiding Judicial Member: Simpson J. (Chairperson)
Date of Reasons and Order: March 4, 2011
Reasons and Order signed by: Madam Justice Sandra J. Simpson

REASONS FOR ORDER AND ORDER DISMISSING AN APPLICATION FOR LEAVE UNDER SECTION 103.1 OF THE COMPETITION ACT

I. INTRODUCTION

[1] Brandon Gray Internet Services Inc. ("Brandon Gray") applies to the Competition Tribunal, pursuant to section 103.1 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the "Act"), for leave to bring an application under section 75 for an order directing the respondent, the Canadian Internet Registration Authority ("CIRA"), to accept Brandon Gray as a customer on the usual trade terms.

II. THE RELEVANT FACTS

[2] Brandon Gray is a corporation with its head office in the Town of Markham, Ontario. Since 2004, it has been in the business of registering, renewing, managing and transferring dot-ca, dot-com, dot-org and other domains on behalf of its clients (the "Registrants").

[3] CIRA is a not-for-profit corporation which, by agreement with the Government of Canada and the University of British Columbia, manages the dot-ca domain space. CIRA certifies individuals and organizations as "Registrars". Only CIRA certified Registrars may apply to CIRA for the registration of domain names in the dot-ca registry and request modifications and other transactions with respect to dot-ca domain name registrations.

[4] In 2004, Brandon Gray entered into a Registrar Agreement with CIRA and Brandon Gray was re-certified as a Registrar on an annual basis until 2010. On August 9, 2010, Brandon Gray received a letter from CIRA advising it that CIRA would not accept re-certification of Brandon Gray. CIRA referred in this letter to Brandon Gray's close association with the Domain Registry of Canada ("DROC"), noting that this association had been an on-going source of concern for CIRA. CIRA wrote that it had regularly received concerns and complaints about DROC's activities and that DROC had sent misleading renewal notices to holders of domain names in other registries and dot-ca holders. Counsel for Brandon Gray responded to this letter and CIRA eventually agreed to extend the termination date to October 31, 2010.

[5] On August 31, 2010, Brandon Gray commenced legal proceedings against CIRA before the Ontario Superior Court of Justice. In its statement of claim, Brandon Gray is seeking damages and an order compelling CIRA to re-certify Brandon Gray as a Registrar. Brandon Gray also brought a motion for an interim, interlocutory and permanent injunction prohibiting CIRA from refusing to recertify Brandon Gray's registration as a Registrar. CIRA agreed to extend the expiry date of Brandon Gray's certification as a Registrar until the Court decided the motion. On January 27, 2011, the motion was dismissed by Justice Gilmore of the Ontario Superior Court of Justice.

[6] On January 20, 2011, Brandon Gray filed an application with the Competition Tribunal for leave to bring an application under section 75 of the Act (the "Application"). An affidavit of January 13, 2011, affirmed by Mr. Larry Coker, the Senior Systems Administrator of Brandon Gray, was filed in support of the Application (the "Coker Affidavit").

[7] The Coker Affidavit says that CIRA's refusal to deal with Brandon Gray as a Registrar will be devastating for the company. This is allegedly so because many of the dot-ca domain

name Registrants managed by Brandon Gray also have other domains, including dot-com and dot-net domains, which Brandon Gray manages. According to Larry Coker, Brandon Gray would not only lose its dot-ca Registrants but many of its other domain Registrants because once the dot-ca domain Registrants are transferred to other Registrars, most of the other domains would be transferred to new Registrars, as the Registrants would not want to have more than one Registrar managing their domains.

[8] CIRA opposes the application for leave. It submits that there is no evidence to show that Brandon Gray will be substantially affected if it ceases to be a Registrar. In that regard, it notes that : (i) the dot-ca domains make up less than 3% of the total domains managed by Brandon Gray; (ii) Brandon Gray has not provided any information about how many Registrants own both a dot-ca domain name and another domain name; (iii) Brandon Gray has not provided any documents indicating its revenue from its management of dot-ca domain Registrants and other domain Registrants; and (iv) Brandon Gray has produced no financial records or any documentary evidence which speak to its financial situation.

[9] CIRA also argues that a section 75 order could not issue because Brandon Gray has failed to provide sufficient credible evidence with respect to the elements of section 75.

III. ANALYSIS

[10] Subsection 103.1(7) of the Act sets out the test for leave on an application under section 75 of the Act. It reads:

103.1(7) The Tribunal may grant leave to make an application under section 75 or 77 if it has reason to believe that the applicant is directly and substantially affected in the applicants' business by any practice referred to in one of those sections that could be subject to an order under that section.	**103.1**(7) Le Tribunal peut faire droit à une demande de permission de présenter une demande en vertu des articles 75 ou 77 s'il a des raisons de croire que l'auteur de la demande est directement et sensiblement gêné dans son entreprise en raison de l'existence de l'une ou l'autre des pratiques qui pourraient faire l'objet d'une ordonnance en vertu de ces articles.

[11] *National Capital News Canada v. Milliken*, 2002 Comp. Trib. 41, paragraph 14, sets out the test for granting leave under subsection 103.1(7). It says that the Tribunal must determine whether the leave application is supported by sufficient credible evidence to give rise to a *bona fide* belief that the applicant may have been directly and substantially affected in the applicant's business by a reviewable practice and that the practice in question could be subject to an order.

[12] This test was subsequently adopted by the Federal Court of Appeal in *Barcode Systems Inc. v. Symbol Technologies Canada ULC*, [2004] FCA 339. Rothstein J., as he then was, stressed that all the elements of the reviewable practice must be considered on an application for

leave. At paragraphs 18, 20 and 23, he said:

> The elements of the reviewable trade practice of refusal to deal that must be shown before the Tribunal may make an order are those set out in subsection 75(1). These elements are conjunctive and must all be addressed by the Tribunal, not only when it considers the merits of the application, but also on an application for leave under subsection 103.1(7).
> […]
> Subsection 103.1(1) requires that the application for leave be accompanied by an affidavit setting out the facts in support of the application under subsection 75(1). That affidavit must therefore contain the facts relevant to the elements of the reviewable trade practice of refusal to deal set out in subsection 75(1). It is that affidavit which the Tribunal will consider in determining a leave application under subsection 103.1(7).
> […]
> The threshold at the leave stage is low, but there must be some evidence by the applicant and some consideration by the Tribunal of the effect of the refusal to deal on competition in a market.

[13] Brandon Gray has not met the test. Specifically, it has provided no evidence dealing with whether the alleged refusal to deal is likely to have an adverse effect on competition in a market pursuant to paragraph 75(1)*(e)* of the Act. All that appears is the following bald statement of belief in para. 43 of the Coker Affidavit:

> Brandon Gray has been competitive in the dot-ca industry for over six (6) years. The result of CIRA's refusal to deal with Brandon Gray will therefore not only have an adverse effect on Brandon Gray, its Resellers and Registrants, but I verily believe that it will have an adverse impact on competition in the market, as the termination of CIRA's relationship with Brandon Gray will result in reduced competition in the dot-ca industry.

[14] Given this conclusion, it is not necessary to consider whether the applicant has met the test with regard to the other elements of section 75 or the requirement that it be substantially and directly affected under section 103.1.

FOR THIS REASON THE TRIBUNAL ORDERS THAT:

[15] This Application is dismissed with costs to be awarded as a lump sum amount. If the parties have not agreed on an amount by the end of April 2011, the respondent is to prepare a bill of costs and approach the Tribunal's Registry for directions.

DATED at Ottawa, this 4th day of March 2011.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Sandra J. Simpson

COUNSEL:

For the applicant

Brandon Gray Internet Services Inc.

Enzo Di Iorio
David Brand

For the respondent

Canadian Internet Registration Authority also known as Autorité canadienne pour les enregistrements Internet also known as CIRA also known as AECI

J. Bruce Carr-Harris
Nadia Effendi