

**FILED / PRODUIT**

Date: January 20, 2011

CT- CT-2011-001

Chantal Fortin for / pour  
REGISTRAR / REGISTRAIRE

OTTAWA, ONT.

# 2

**THE COMPETITION TRIBUNAL**

File No.

Registry Document No.

**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

**NOTICE OF APPLICATION FOR INTERIM RELIEF PURSUANT TO SECTION 104  
OF THE *COMPETITION ACT***

**TAKE NOTICE THAT:**

1. The Applicant, Brandon Gray Internet Services Inc. ("Brandon Gray") hereby applies to the Competition Tribunal for an Interim Order, pursuant to section 104 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the "Act"), that the Respondent, Canadian Internet Registration Authority also known as Autorité Canadienne pour les Enregistrements Internet also

known as CIRA also known as ACEI ("CIRA"), accept and/or continue to accept Brandon Gray as a customer of CIRA on their usual trade terms, forthwith upon issuance of said Order.

**AND TAKE NOTICE THAT:**

2. The person against whom an Order is sought is the Respondent, CIRA. Its address is:

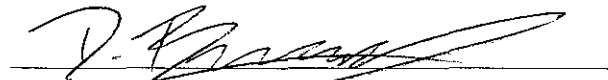
350 Sparks Street, Suite 306  
Ottawa, Ontario  
Canada, K1R 7S8

3. The Applicant requests that this Application proceed in English.

4. The Applicant requests that documents be filed in paper form.

5. The Applicant will rely on the Statement of Grounds and Material Facts attached hereto and on the Affidavit of Larry Coker, affirmed on January 13, 2011, and such further and other material as counsel may advise and the Competition Tribunal may permit.

**DATED** at the City of Vaughan, in the Regional Municipality of York, Province of Ontario, this 13<sup>th</sup> day of January, 2011.



**BRANDON GRAY INTERNET SERVICES INC.**

**by ROTUNDO DI IORIO QUAGLIETTA, LLP**

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**AND TO: CANADIAN INTERNET REGISTRATION AUTHORITY**  
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## **STATEMENT OF GROUNDS AND MATERIAL FACTS**

### **MATERIAL FACTS**

#### ***The Parties***

1. The Applicant, Brandon Gray, is a corporation duly incorporated pursuant to the laws of the Dominion of Canada maintaining its head office in the Town of Markham, Ontario. Since its incorporation in 2004, Brandon Gray has continuously been in the business of registering, renewing, managing and transferring dot-ca, dot-com, dot-org and other domains on behalf of Registrants (persons, corporations, etc. listed in the internet domain name registration systems as the registrants, or holders, of domain names).

2. The Respondent, CIRA, is a corporation duly incorporated pursuant to the laws of the Dominion of Canada, without share capital, that, among other things, manages the dot-ca domain space, develops and implements domain name policy, accredits Registrars and runs a WHOIS service for dot-ca domains. CIRA 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 dot-ca internet domain name registration system (the "Registry").

#### ***Description of the dot-ca Industry***

3. A domain name is a name used to identify a computer on the internet. The Domain Name System ("DNS") is a comprehensive directory that connects the names with the numerical

addresses of computers on the internet. The dot-ca is the domain extension used to designate Canadian domain names on the internet.

4. On May 9, 2000, the University of British Columbia and the Government of Canada entered into an Umbrella Agreement which provided that the dot-ca domain space should be developed as a key public resource for social and economic development for all Canadians. In that Umbrella Agreement, the Government of Canada declared that CIRA was designated as the manager of the dot-ca country code top level domains ("ccTLD"). Soon thereafter, on October 10, 2000, the Government of Canada advised the Internet Corporation for Assigned Names and Numbers ("ICANN") that it had formally designated CIRA as the government's designee to be the dot-ca delegate.

5. After entering into the Umbrella Agreement, CIRA had developed new policies for administration of the dot-ca ccTLD, which policies consisted of a system for the provision of registration services by numerous competitive Registrars, Canadian Presence Requirements that provide that Registrants and Registrars in the dot-ca ccTLD have a substantial, bona fide connection with Canada, and rules with respect to the registration of dot-ca domain names with CIRA. Every Registrar therefore has to meet with the Canadian Presence Requirements, and if the Registrars have met with these Requirements, they could be certified and re-certified annually as a Registrar.

#### ***Brandon Gray's Admittance and Growth in the dot-ca Industry***

6. On or about June 3, 2004, Brandon Gray and CIRA entered into a Registrar Agreement (the "Agreement"). The Agreement authorized Brandon Gray to be certified as a Registrar of the Registry. As a Registrar, Brandon Gray was entitled to, among other things, register dot-ca or

sub-domain names and provide related services on behalf of Registrants and Resellers, the latter of which includes individuals, corporations, trusts, partnerships, etc., that purchase domain names and other internet services, such as webhosting and email hosting, with the intention of reselling them rather than consuming or using them.

7. In order to be certified as a Registrar, every new applicant is asked to complete an expression of interest form, which is later reviewed for validity and accuracy by the Channel Manager of CIRA and its team at CIRA. If the form is valid and accurate, an application would then be sent to the applicant to be completed by that applicant, after which a telephone interview would then be conducted with the applicant. Thereafter, the Channel Manager would make a recommendation and move forward with certification or not. This is the process that every new potential Registrar has to undergo in order to be certified as a Registrar, and this was the process that Brandon Gray had to undertake in order to be certified as a Registrar in 2004.

8. After becoming certified as a Registrar, Brandon Gray then entered into a series of agreements with the Resellers and Registrants. Since 2004, Brandon Gray has been successfully registering, renewing, managing and transferring dot-ca domains on behalf of over 75 Resellers and is now the Registrar for 125,155 domains, for which 3,552 are listed in the Registry.

9. Many of the dot-ca Registrants also have other domains, including dot-com and dot-net domains, which Brandon Gray manages.

10. Brandon Gray's natural geographic market includes all the Canadian provinces. Brandon Gray has spent over six (6) years marketing and developing its client base throughout Canada, and over the years, Brandon Gray has been spending its time simplifying its management system to assist the Resellers and Registrants and to alleviate the burdens of the internet on the Resellers

and Registrants. Brandon Gray's Resellers and Registrants have become familiar with and have come to expect a certain level of expertise and service from Brandon Gray for all of their dot-ca domain needs.

11. Brandon Gray's revenue is solely determined by the number of Resellers and ultimately the services that it provides to the Resellers and Registrants in the Registry.

12. Pursuant to the Agreement, certification as a Registrar is valid for one (1) year; however, over the years, Brandon Gray has been re-certified every year and has had no problems with its re-certification process. The re-certification process has been fairly automatic. Brandon Gray has never had to undergo any burdensome procedure. Besides filing the annual application and paying the required fee, in accordance with the Agreement, Brandon Gray has been re-certified without any difficulty. The parties have always proceeded on the basis that CIRA would not terminate the Agreement unless it had just cause to do so.

13. Pursuant to paragraph 7.6 of the Agreement, CIRA may, in its sole discretion by giving notice thereof to the Registrar, terminate or suspend the Agreement only in specified circumstances, which circumstances consist of the following:

- a) The Registrar fails to meet the Certification Requirements or the Re-certification Requirements, as applicable (including their Canadian Presence Requirements for Registrars) at any time during the Term;
- b) The Registrar provides false or misleading information to CIRA;
- c) There are insufficient funds prepaid by the Registrar in CIRA's Deposit Account to be applied in payment of any Fees;
- d) The Registrar fails to pay when due any amount payable to CIRA under this Agreement;
- e) The Registrar breaches any other term of this Agreement, including, without limitation, any of the Registry PRP or the terms and conditions of the Legal



Notice and fails, in CIRA's reasonable opinion, within five (5) Business Days after the receipt of a notice from CIRA, to remedy such breach;

- f) The Registrar or any partner, director, officer, or controlling shareholder of the Registrar is convicted of an offence under the *Criminal Code* (Canada);
- g) The Registrar or any partner, director, officer, or controlling shareholder of the Registrar engages in any conduct or practice that in the reasonable opinion of CIRA is detrimental or harmful to the good name, Trade-marks (as defined in Section 14.1), goodwill or reputation of CIRA or the Registry, and the Registrar continues, repeats or fails to cease and desist from such conduct, to CIRA's satisfaction, within ten (10) Business Days after CIRA gives notice of such conduct to the Registrar or such additional period as may be stated in the notice;
- h) The Registrar, in its capacity as a Registrant, breaches any agreement with CIRA;
- i) Except as permitted under Section 2.3(3) above, the Registrar requests any transaction with respect to a Domain Name Registration which has not been authorized by the particular Registrant;
- j) The Registrar disrupts or abuses CIRA's Registry services, as determined by CIRA in its sole discretion, acting reasonably;
- k) The Registrar engages in advertising or representations to the public or other behaviour which CIRA, acting reasonably, determines are false, misleading or detrimental to CIRA, the Registry, or any Registrant, registrar, or third party;
- l) Where the Registrar is also a Registrant, the Registrar applies to register a Domain Name as agent for, or on behalf of, a third party in any manner whatsoever which contravenes Section 3.1 (s), (t) or (u) of this Agreement;
- m) Where the Registrar is also a Registrant, the Registrar in its/his/her capacity as a Registrant, breaches Section 3.1(j) of the Registrant Agreement with CIRA;
- n) Where the Registrar is a Member, the Registrar in its/his/her capacity as a Member breaches any Registry PRP applicable to Members; or
- o) The Designation by the government of Canada of CIRA to manage, operate and control the Registry is terminated or CIRA is no longer recognized at the international level as having the exclusive authority to operate the Registry.

### ***CIRA's Refusal to Deal***

14. Until recently, Brandon Gray had enjoyed an excellent relationship with CIRA. This changed when, on August 9, 2010, without warning or prior notice, Larry Coker, Senior Systems Administrator of Brandon Gray, received a letter, dated August 6, 2010, from CIRA, advising of

its decision to refuse Brandon Gray's re-certification as a CIRA certified Registrar. Brandon Gray 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 Brandon Gray's lawyer had written a letter to CIRA on August 10, 2010 indicating that litigation was imminent and that Brandon Gray would be bringing a Motion to request an injunction that CIRA 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.

15. Despite repeated attempts by Brandon Gray and its lawyers to confirm the reasons for said termination, CIRA had refused to provide a valid explanation as to why it has made the unilateral decision to cease its relationship with Brandon Gray.

16. In order to prevent CIRA from refusing to supply its product, being the Registry, to Brandon Gray on the termination date of October 31, 2010, Brandon Gray had no choice but to commence an action against CIRA in the Ontario Superior Court of Justice, bearing Court File No. CV-10-0100675-00.

17. Shortly thereafter, Brandon Gray brought a Motion for, *inter alia*, an order immediately compelling CIRA to re-certify Brandon Gray as a Registrar of the Registry and for an interim, interlocutory and permanent injunction prohibiting CIRA and anyone acting on its behalf, without further Court order, from

- (i) directly or indirectly breaching, cancelling, lapsing, forfeiting or surrendering its Registrar Agreement and/or contract with the Plaintiff;

(ii) directly or indirectly refusing and/or failing to re-certify and/or renew the Plaintiff's registration as a Registrar of the Registry; and

(iii) directly or indirectly discontinuing its relationship with Brandon Gray.

18. The Motion was returnable on October 15, 2010, and the Court has not yet released its decision. CIRA has, however, agreed to extend the expiry date of Brandon Gray's certification as a Registrar until the Court has released its decision with respect to the Motion. The Competition Tribunal has the jurisdiction to review the decisions of CIRA and declare that they are restrictive trade practices reviewable by the Competition Tribunal. The injunction sought from the Superior Court of Justice is necessary to enable this Application to be heard by the Competition Tribunal.

19. CIRA has still failed to itemize or communicate any complaints to Brandon Gray, even after it had served its Motion Record on September 9, 2010. CIRA, therefore, failed to provide a valid explanation as to why it has made the decision to cease its relationship with Brandon Gray.

20. In its Motion Record, CIRA suggests that it has received hundreds of complaints regarding the conduct of Internet Registry of Canada ("IROC"), Domain Registry of America ("DROA") and Domain Registry of Canada ("DROC"), but at no point in its materials did CIRA ever mention that these complaints amounted to a breach which ultimately led to CIRA's decision to terminate the Agreement. In fact, until Brandon Gray was served with the Motion Record, CIRA had never advised or notified Brandon Gray that there had been any complaints against Brandon Gray. CIRA even acknowledges that when it receives a complaint about a Registrar, it normally addresses that complaint with the Registrar, by telephone or by email; yet, CIRA has never communicated a single complaint to Brandon Gray.

21. CIRA suggests that Brandon Gray, IROC, DROA and DROC are associated corporations, and that IROC, DROC and DROA were in the past involved in illegal or unethical conduct; however, at no point in time did CIRA ever communicate or converse with Brandon Gray to ask it whether there was an association or an affiliation with these companies. Even if there is, or ever was, an association between Brandon Gray and these corporations, DROC's, DROA's and/or IROC's conduct has nothing to do with Brandon Gray. CIRA has never asked Brandon Gray to not use DROC as a Reseller, and at no point in time did CIRA ever contact Brandon Gray to ask it to disassociate itself with or from DROC or DROA.

22. CIRA not only suggests that Brandon Gray, IROC, DROA and DROC are associated corporations, but alleges that DROC has been soliciting dot-ca holders by sending misleading "renewal notices" to not just holders of domain names in other registries, but to dot-ca holders as well. In the six or seven years that Brandon Gray has been certified as a Registrar, CIRA, however, was only able to find in its system one (1) solicitation by Brandon Gray of other dot-ca domain holders.

23. CIRA also suggests that Brandon Gray is not highly respected in the internet community. CIRA's statements are based on a Google internet search containing negative comments relating to Brandon Gray. This is not a reliable source of information. It certainly ought not to be used by CIRA to oust Brandon Gray from its industry. Anyone can write and post comments on the internet, especially competitors. It is, in fact, possible for one person or entity to write hundreds of comments using false names. If Brandon Gray has been referred to in those comments, a Google search would then produce those results.

24. Further, in its Motion Record, CIRA had included a list of complaints. However, most, if not all, of the alleged complaints included in the subject lines are very misleading, as they are very general in nature and do not even provide details relating to the alleged complaints. The allegations with respect to the complaints against DROC are illusory and inaccurate. For instance, CIRA refers to two copies of Renewal Notices; however, the first Renewal Notice was sent to DROC's Customer at the time, which was carried out in strict compliance with CIRA's regulations. The second Renewal Notice was sent to a Customer of DROC's who had, just prior to receiving the notice, transferred to another Registrar. That former Customer did not provide any notice to DROC and as a result, DROC had no way of knowing that the Customer had transferred to another Registrar. DROC has always sent Renewal Notices to its Customers, and only to its Customers, which CIRA knew, or ought to have known.

25. None of the circumstances specified in the Agreement giving CIRA the ability to terminate or suspend the Agreement or its relationship with Brandon Gray were ever present, and at no time, even after serving its Motion Record, or after presenting oral arguments at the Motion, did CIRA provide a valid reason or explanation as to why it has made the unilateral decision to refuse to supply its product to Brandon Gray.

26. At all material times, Brandon Gray has been providing services on behalf of its Resellers and Registrants in accordance with the Agreement and in full compliance with CIRA's rules and regulations. All activities carried out by Brandon Gray in the Registry were performed with no improper purpose. CIRA has, therefore, failed to show any cause as to why it has made the unilateral decision to terminate its relationship with Brandon Gray.

*Substantial Detrimental Effect*

27. The overall effect of the termination of Brandon Gray's Registrar Agreement by CIRA will be devastating upon Brandon Gray. If CIRA fails to supply Brandon Gray with the Registry, Brandon Gray will be precluded from continuing with its business due to its inability to obtain another Registry.

28. If CIRA terminates its relationship with Brandon Gray, Brandon Gray's employees, Resellers and Registrants will suffer irreparable harm because said termination will shut down Brandon Gray's dot-ca operations, make it impossible for Brandon Gray to operate in its chosen industry, as there is no other Registry available, and will cause severe financial harm to Brandon Gray, its employees, Resellers and Customers.

29. Brandon Gray supplies helpful, reliable and predictable internet services to its Resellers and Registrants, and Brandon Gray has always met each Reseller's and Registrant's needs and/or requirements. Brandon Gray requires the Registry in order to be able to continue to meet these needs and/or requirements. Termination of supply of the Registry by CIRA would create an immediate inability by Brandon Gray to fulfill the needs of its Resellers and Registrants. This would cause immediate damage to the relationships Brandon Gray has built with its Resellers and Registrants over the last six-and-a-half years. More specifically, this would bring about a loss of confidence, a loss of goodwill, a loss of market share and revenue and a loss of Resellers and Registrants.

30. Many of the dot-ca domain Registrants managed by Brandon Gray also have other domains, including dot-com and dot-net domains, which Brandon Gray manages. If CIRA refuses to re-certify Brandon Gray and ultimately terminates its relationship with Brandon Gray,

Brandon Gray will not only lose its dot-ca registrants but many of its other domains because once 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.

31. The effect of CIRA's failure to supply the Registry to Brandon Gray will deal an astounding blow to Brandon Gray's business. If CIRA terminates its relationship with Brandon Gray, Brandon Gray would not only lose its dot-ca Registrants, but it will lose many of its other domains, which will result in Brandon Gray's ouster from this industry. This will shut down Brandon Gray's operations, make it impossible for Brandon Gray to operate in its chosen industry, as there is no other Registry available, and will cause severe financial harm to Brandon Gray, its Resellers, Registrants and employees, for which damages will not be an adequate remedy.

32. Brandon Gray's Resellers and Registrants have become familiar with and have come to expect a certain level of expertise and service from Brandon Gray for all of their dot-ca domain needs. CIRA's refusal to deal will result in Brandon Gray's being unable to fulfill its ongoing business and professional obligations and relationships with its Resellers and Registrants. CIRA's refusal to deal will, therefore, negatively impact Brandon Gray, its Resellers and Registrants and irreparably harm its customer relationships, its business and its reputation. Even a short interruption of supply by CIRA would lead to irreparable harm for Brandon Gray.

33. Brandon Gray's reputation has already been substantially adversely affected, as prospective Resellers have resorted to using other Registrars instead of Brandon Gray for their

domain services. Brandon Gray credits this shift to other Registrars directly to Reseller uncertainty resulting from CIRA's refusal to deal with Brandon Gray.

33. If the Registry is no longer available to Brandon Gray, Brandon Gray's Resellers, and ultimately its Registrants, will be notified by CIRA by email of CIRA's intention to transfer their domain names, without their consent, to another Registrar. In light of the level of spam currently propagating in the internet and with users' privacy at risk, however, it is unlikely that the Resellers will receive or read CIRA's notification, and as a result, the Resellers will misguidedly try to continue their business relationships with Brandon Gray, except Brandon Gray will be unable to provide the services that it has been contracted to perform for its former clients.

34. Even if some of the Resellers do read the notification with respect to transferring their domain names, these sudden and unexpected transfers would compel the Resellers to work with new Registrars who they know nothing about and who they may not even trust or want to work with. The Resellers would 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.

35. As Brandon Gray has spent years simplifying its management system to assist the Resellers and to alleviate the burdens of the internet on the Resellers, the other Registrars may have more convoluted and complex systems, which the Resellers do not need and which systems will most likely confuse the Resellers.

36. 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 Brandon Gray'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.

37. 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 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.

38. If CIRA fails to re-certify Brandon Gray and ultimately terminates its relationship with Brandon Gray, Brandon Gray will be substantially affected in its business as it will be precluded from carrying on its business as a result of there being no availability of an alternative supply of the Registry. Accordingly, Brandon Gray will be unable to obtain another supply of the Registry, and as a result, Brandon Gray will be shut out of its industry.

39. Brandon Gray has always met and complied with CIRA's usual trade terms over the past six (6) years that Brandon gray has been a certified Registrar, and at all material times, Brandon Gray is, and always has been, ready and willing to meet all of CIRA's usual trade terms.

40. There is an ample supply of the Registry available, but that the supply is only available from CIRA.

41. In its Motion Record, CIRA maintained that the concern for granting an injunction would become even more critical after October 12, 2010 because more responsibility would be given to Registrars and because of this there will be less oversight by CIRA. The only thing changing will be, or that may have changed since then is, CIRA's business rules, so after October 12, 2010, a Registrant who wished to change information or transfer to a new Registrar or Registrant, will no longer be asked by CIRA to confirm that it wants to change the information or to transfer; instead, CIRA will advise the Registrar after the fact. CIRA will therefore be relying upon its Registrars to ensure that they have received a valid request from a valid Registrant before any changes are made in CIRA's system. CIRA, however, acknowledged that even after the changes were to be implemented on October 12, 2010, CIRA will have no trouble running the old system so that Brandon Gray can fall under the old system as opposed to the new system.

42. If the Interim Order is granted, and Brandon Gray were to lose at the section 75 Hearing, CIRA has acknowledged that it will not suffer harm, as the process to transfer Brandon Gray's Registrants and Resellers to another Registrar is easy, straightforward and of very little cost to CIRA. Furthermore, as the October 12, 2010 date has already passed, CIRA has not suffered, or will not suffer, any harm hereafter, as CIRA has not been able to show that it would suffer, or that it has to date suffered, any harm.

**BASIS FOR APPLICATION PURSUANT TO SECTION 104 OF THE ACT**

43. In this Application, Brandon Gray seeks an Interim Order pursuant to section 104 of the Act, which states as follows:

“(1) Where an application has been made for an order under this Part, other than an interim order under section 100 or 103.3, the Tribunal, on application by the Commissioner or a person who has made an application under section 75 or 77, may issue such interim order as it considers appropriate, having regard to the principles ordinarily considered by superior courts when granting interlocutory or injunctive relief. Terms of interim order

(2) An interim order issued under subsection (1) shall be on such terms, and shall have effect for such period of time, as the Tribunal considers necessary and sufficient to meet the circumstances of the case.

Duty of Commissioner

(3) Where an interim order issued under subsection (1) on application by the Commissioner is in effect, the Commissioner shall proceed as expeditiously as possible to complete proceedings under this Part arising out of the conduct in respect of which the order was issued.

44. In *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (“*RJR MacDonald*”), at paragraph 35, the Supreme Court of Canada set out the following three-part test that must be met in an application for interlocutory relief:

- (1) Is there a serious question to be tried?
- (2) Will the applicant suffer irreparable harm if the injunction is not granted?
- (3) Which party will suffer the greater harm from granting or refusing an injunction pending a decision on the merits?

45. In *RJR MacDonald*, at paragraph 59, the Supreme Court held that with respect to the second part of the test, irreparable harm refers to the nature of the harm rather than the magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision; where one

party will suffer permanent market loss or irrevocable damage to its business reputation; or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined.

46. In order to meet the third part of the test, the Supreme Court held in *RJR MacDonald*, at paragraph 62, that on an application for an injunction, a determination must be made with respect to which of the two parties will suffer the greater harm from the granting or refusal of the order to restrain the impugned conduct.

47. In *Great Lakes Harvestore Systems Ltd. v. A.O. Smith Engineered Storage Products Co.*, [1998] O.J. No. 873 (C.J.), at paragraph 10, the Ontario Court of Justice found that since there was a serious question of a possible complete loss of the Plaintiff's position in its industry and that the reputation of the Plaintiff with its customers would be at stake, the Plaintiff would suffer irreparable harm if the injunction was not granted.

48. In *City of London v. Talbot Square Ltd.*, [1978] 22 O.R. (2d) 21, at paragraph 18, the Divisional Court held that:

"Interlocutory injunctions are granted with a view to preserving the status quo, to assuring that the subject-matter of the litigation is not destroyed or irreversibly altered before trial, and to protect the right of the plaintiff as set up in the action from being defeated by some act of the defendant before trial."

49. In *Quinlan's of Huntsville Inc. v. Fred Deeley Imports Ltd.*, 2004 Comp. Trib. 28 ("*Quinlan's*"), at paragraph 26, the Competition Tribunal held that the loss of sales and goodwill could constitute irreparable harm.

50. Further, in *Quinlan's*, at paragraph 27, the Competition Tribunal suggested that if products are in ample supply, then the balance of convenience will favour the granting of an injunction.

51. The evidence on this Application demonstrates that:

- i) CIRA's decision to terminate its relationship with Brandon Gray and not re-certify it as a Registrar will shut down Brandon Gray's dot-ca operations, make it impossible for Brandon Gray to operate in its chosen industry, will put its reputation at stake and will cause severe financial harm to Brandon Gray for which damages will not be an adequate remedy. As CIRA has the exclusive jurisdiction and responsibility within Canada for the operation, management and control of the dot-ca domain name registration system, there is no availability of an alternative supply of the Registry. In light of this, Brandon Gray will suffer irreparable harm if an injunction is not granted;
- ii) If CIRA terminates the Agreement and refuses to re-certify Brandon Gray as a Registrar, Brandon Gray will be unable to secure a replacement dot-ca internet domain name registration system to carry on its business as there is no alternative supply of the Registry available to Brandon Gray. Consequently, Brandon Gray will lose its entire dot-ca client base, along with many of its other domains;
- iii) Brandon Gray will suffer the greater harm should an Interim Order not be granted by this Competition Tribunal than would CIRA if one was not granted, given the nature of the case, the conduct of CIRA and the risk of irretrievable loss to Brandon Gray; and

iv) If the Interim Order were granted and Brandon Gray were to lose at the section 75 Hearing, CIRA will not suffer any harm.

52. CIRA's actions in refusing to deal with Brandon Gray are activities described in section 75 of the Act, and it is appropriate in all the circumstances that the Competition Tribunal order CIRA to accept and/or to continue to accept Brandon Gray as a customer of CIRA on their usual trade terms.

53. Brandon Gray relies upon the Affidavit of Larry Coker, affirmed January 13, 2011.

**DATED** at the City of Vaughan, in the Regional Municipality of York, Province of Ontario, this 13<sup>th</sup> day of January, 2011.



**BRANDON GRAY INTERNET SERVICES INC.**  
c/o ROTUNDO DI IORIO QUAGLIETTA, LLP  
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File No.

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.**NOTICE OF APPLICATION FOR INTERIM  
RELIEF PURSUANT TO SECTION 104  
OF THE *COMPETITION ACT*****ROTUNDO DI IORIO QUAGLIETTA, LLP**

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