

**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*, 9<sup>th</sup> 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. (5<sup>th</sup>) 76 (Ont. C.A.)

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

*Negrych v. Campbell's Cabins (1987) Ltd.*, [1997] 8 W.W.R. 270 at 272-273 (Man. Q.B.)

71. In the particular circumstances of this case, ICANN submits that Pool.com's residence in Ontario and its claims that it will sustain damages in Ontario thereby should be accorded only *de minimis* weight, if any at all. Where the damages claimed by a plaintiff are solely for economic loss (as is the case here), and there is no physical component to the damages which raises any meaningful nexus between the tort and the jurisdiction and, thus, the damages effectively "travel" with the plaintiff, the applicable jurisprudence disregards the significance of a plaintiff's place of residence, especially where the plaintiff's residence is the result of the plaintiff's whim or convenience.

*Murray v. Canada (Attorney General)* (2003), 340 A.R. 215 at 226 (Alta. Q.B.) at 226

*Muscutt v. Courcelles*, *supra* at 45-46

*Elawar v. Fédération des Club Motoneigistes du Quebec Inc.*, *supra* at 238

72. It is submitted that because Pool.com was incorporated in Ontario and began engaging in its business after ICANN was authorized to negotiate the necessary contract amendments to allow VeriSign to offer the WLS service and Pool.com's "directing mind" and the sole officer and director was aware of this nine months prior to Pool.com's incorporation, the fact that Pool.com alleges that it will sustain economic loss in Ontario should be disregarded in considering whether there is a real and substantial connection between the claim and Ontario. To illustrate this point, it is self-evident that if Pool.com were to now move its office to Quebec, or if Pool.com had been

incorporated in Quebec rather than in Ontario, there would be nothing stronger connecting the alleged tort to Ontario, than to Quebec.

73. This action deals with the steps taken by ICANN, a California corporation, with its offices in California, in authorizing VeriSign, a Delaware corporation with its principle place of business in California to offer the WLS service. There is simply no real argument to suggest that this action has connections to Ontario.

74. In summary, the only basis for Pool.com's contention that it will suffer damages in Ontario is its address, and that is not sufficient to establish the requisite connection with this jurisdiction. Since this action's connection to Ontario is unsupported by the facts and the evidence presented, it is submitted that this factor weighs against this Court assuming jurisdiction.

**(b) No connections between Ontario and ICANN**

75. If the defendant has done anything within the jurisdiction *that bears upon the claim advanced by the plaintiff*, or has engaged in any conduct that might constitute personal subjection or submission to the jurisdiction of the Ontario Courts, the case for assuming jurisdiction is strengthened. In this regard, it is submitted that there are no relevant connections between ICANN and Ontario and that this is a strong argument against any finding of a real and substantial connection to Ontario.

*Muscutt et al v. Courcelles et al., supra at 46-47*

76. ICANN has not done anything in Ontario that bears upon Pool.com's claim, nor is this alleged by Pool.com. None of ICANN's actions in connection with the WLS that form the basis for Pool.com's claim took place in Ontario.

77. As detailed earlier in this factum, ICANN does not have any physical presence in Ontario (see paras. 25 – 27).

78. Also as detailed earlier in this factum, ICANN does not carry on any business in Ontario (see paras. 26 – 31).

79. Pool.com essentially argues that there is a substantial connection between ICANN and Ontario because: (i) ICANN plays a role in administering the Internet DNS, (ii) the Internet is a "global" resource, and (iii) ICANN has therefore subjected itself to all the global jurisdictions where the Internet is accessed, including Ontario.

Hall Affidavit, paras. 26-32  
Responding Party's Motion Record

80. It is critical to appreciate that Pool.com's action is based on steps taken by ICANN in connection with its authority but has absolutely nothing to do with ICANN doing something over the Internet or engaging in internet activity.

81. If Pool.com's argument is accepted by this Court, the second factor of the "real and substantial connection" test will be rendered virtually meaningless. The consequence of accepting Pool.com's argument will be that, in any fact scenario involving the Internet, every defendant who engages in any activity that is related in any way to the Internet will be subject to any jurisdiction where the Internet is available.

82. This inevitable and undesirable consequence of Pool.com's argument was highlighted by the British Columbia Court of Appeal in *Braintech v. Kostiuk*, a widely cited Internet defamation case, where it was recognized that:



"It would create a crippling effect on freedom of expression if, in every jurisdiction the world over in which access to the Internet could be achieved, a person who posts fair comment on a bulletin board could be hauled before the courts of each of those countries where access to this bulletin could be obtained."

*Braintech, Inc. v. Kostiuik* (1999), 171 D.L.R. (4<sup>th</sup>) 46 at 61 (B.C.C.A.), leave to appeal to S.C.C. denied [1999] S.C.C.A. No. 236 at 60

83. Although Pool.com is attempting to characterize this action as an "Internet jurisdiction case" in order to establish the requisite connecting factors with Ontario, this is not the case. It is not alleged by Pool.com in this action that ICANN has "done" anything over the Internet or engaged in any "conduct" over the Internet which amounts to using the Internet essentially as a "highway" to enter into Ontario. ICANN's involvement with the Internet and activities *in relation to* (rather than over) the Internet are therefore peripheral to the jurisdiction analysis.

84. Although there is not yet an extensive body of Canadian jurisprudence relating to the Internet and the circumstances in which a Canadian Court will take jurisdiction over a foreign defendant involved with the Internet, as outlined below, it is evident that a defendant's mere conduct on the Internet is not sufficient to establish jurisdiction over a foreign defendant. "Something more" is required.

85. This Court has recognized that the Internet is an entity without conventional geographic boundaries:

"The Internet, in reality a network of networks, has created a whole new territory independent of conventional geography. The conceptual location of this electronic interactivity available to us through our computers is oft referred to as "cyberspace" [note omitted]. Unlike a "real" territory with fixed borders, the Internet is constantly growing and at a phenomenal rate."

*Easthaven, Ltd. v. Nutrisystem.com Inc.* (2001), 55 O.R. (3d) 334 at 341-342 (S.C.J.) (citing *Pro-C Ltd. v. Computer City Inc.* (2000), 7 C.P.R. (4th) 193, [2000] O.J. No. 2823 at para. 1) (S.C.J.)

86. Only certain activities over the Internet justify taking personal jurisdiction over a foreign defendant. The British Columbia Court of Appeal in *Braintech, Inc. v. Kostiuk* took guidance from U.S. caselaw (*Zippo Manufacturing Company v. Zippo DotCom, Inc.* 952 F.Supp. 1119 (W.D. Pa. 1997) and considered the nature and quality of the foreign defendant's commercial activity conducted over the Internet. "Passive" posting of information on a website by a defendant was found not sufficient to establish jurisdiction over the defendant. Further, the Court held that in order to take jurisdiction over a foreign defendant, evidence that the defendant "had a commercial purpose that utilized the highway provided by the Internet to enter" a particular jurisdiction was required.

*Braintech, Inc. v. Kostiuk, supra* at 60-62

*Zippo Manufacturing Company v. Zippo DotCom, Inc.*  
952 F.Supp. 1119 (W.D. Pa. 1997)

87. Mr. Justice Nordheimer in *Easthaven, Ltd. v. Nutrisystem.com Inc.* also took guidance from U.S. caselaw. In assessing whether the Ontario Courts could assume personal jurisdiction over a foreign defendant in connection with a matter involving the Internet, he applied the three-part test for taking specific jurisdiction articulated in *Panavision International v. Toeppen*, 141 F.3d 1316 (9th Cir. 1998) and also took guidance from other statements in that decision:

"The decision in *Panavision* is helpful, however, because it does expressly address the issue albeit in the context of American procedure and legal concepts. The court in *Panavision* observed that personal jurisdiction could be founded on either general jurisdiction or specific jurisdiction. The court held that general

jurisdiction could be found in such a case only if the person was domiciled in the jurisdiction or his activities there were 'substantial' or 'continuous and systematic'. In terms of specific jurisdiction, the court adopted a three-part test as follows, at p. 1320:

(1) The nonresident defendant must do some act or consummate some transaction with the forum or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby involving the benefits and protections of its laws; (2) the claim must be one which arises out of or results from the defendant's forum-related activities; and (3) the exercise of jurisdiction must be reasonable.

The court then referred to its earlier decision in *Cybersell, Inc., v. Cybersell, Inc.*, 130 F.3d 414 (9<sup>th</sup> Cir. 1997) and made the following observation at p. 1321:

... we carefully reviewed cases from other circuits regarding how personal jurisdiction should be exercised in cyberspace ... In each case where personal jurisdiction was exercised, there had been "something more" to "indicate that the defendant purposefully (albeit electronically) directed his activity in a substantial way to the forum state." (emphasis added)

*Easthaven, Ltd. v. Nutrisystem.com Inc.*, *supra* at 342-343

*Panavision International v. Toeppen*, 141 F.3d 1316 (9<sup>th</sup> Cir. 1998)

*Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9<sup>th</sup> Cir. 1997)

88. University of Ottawa Law Professor and leading Internet lawyer Micha I Geist recommends that a "targeting test" be applied to determine whether jurisdiction should be assumed in an Internet case. The test would require the court to be satisfied before assuming jurisdiction over a foreign defendant for conduct over the Internet that, among other things, the defendant "targeted" or "expressly aimed" its alleged tortious conduct at the plaintiff or forum state:

"... a targeting analysis would seek to identify the intentions of the parties and to assess the steps taken to either enter or avoid a particular jurisdiction. Targeting would also lessen the reliance on

effects-based analysis, the source of considerable uncertainty, since the Internet-based activity can ordinarily be said to create some effects in most jurisdictions."

Michael Geist *Internet Law in Canada* 2nd ed. (Toronto, Captus Press Inc. 2001), *supra* at 67-70 :

89. The U.S. Courts have seen the emergence of a "targeting" type test. The California Court of Appeals for the Ninth Circuit articulated a targeting test as follows:

"In *Calder*, the Supreme Court held that a foreign act that is both aimed at and has effect in the forum state satisfies the purposeful availment prong of the specific jurisdiction analysis. To meet the effects test, the defendant must have (1) committed an intentional act, which was (2) expressly aimed at the forum state, and (3) caused harm, the brunt of which is suffered and which the defendant knows is likely to be suffered in the forum state. See *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316, 1321 (9th Cir. 1998). Subsequent cases have struggled somewhat with *Calder*'s import, recognizing that the case cannot stand for the broad proposition that a foreign act with foreseeable effects in the forum state always gives rise to specific jurisdiction. We have said that there must be 'something more,' but have not spelled out what that something more must be. See *Panavision*, 141 F.3d at 1322.

We now conclude that 'something more' is what the Supreme Court described as 'express aiming' at the forum state. See *Calder*, 465 U.S. at 789. Express aiming is a concept that in the jurisdictional context hardly defines itself. From the [\*\*11] available cases, we deduce that the requirement is satisfied when the defendant is alleged to have engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state.

...

The presence of individualized targeting is what separates these cases from others in which we have found the effects test unsatisfied. In *Cybersell*, for example, there was no showing that the defendants even knew of the existence of the plaintiffs, let alone targeted them individually. See 130 F.3d at 420. See also *Gordy*, 95 F.3d at 833 (distinguishing certain cases holding that no personal jurisdiction existed under *Calder* on the ground that in those cases targeting was lacking)." (emphasis added)

*Bancroft & Masters Inc. v. Augusta National Inc.* 233 F. 3d 1082 (U.S. App. 2000)

90. One common element in all of the foregoing cases is that the courts could always point to some type of "conduct" in cyberspace; conduct that they found to indicate a submission to Ontario or the relevant U.S. jurisdiction. In the situation at hand, there is simply no conduct by ICANN in cyberspace that is complained of or that could be complained of. As outlined in more detail above (see paras. 27-30), ICANN only has a passive informational website and does not solicit or conduct any business on the Internet, or at all. A company wishing to become an ICANN accredited registrar must "go" to California to deal with ICANN there.

91. It is clear that there can be no finding that ICANN is subject to an Ontario court by virtue of ICANN's involvement with the Internet and, in particular, ICANN's acts in connection with the WLS:

- (i) ICANN has not purposefully availed itself of the benefits of Ontario law.
- (ii) While ICANN's activities and, more particularly, its acts connected with the WLS, have the potential to indirectly affect users of the Internet in every jurisdiction worldwide, as acknowledged by Pool.com, their effect is not felt to any greater extent in Ontario than in any other jurisdiction.
- (iii) ICANN's activities in connection with the implementation of the WLS that Pool.com complains of were in no way purposefully or expressly aimed at Ontario.
- (iv) ICANN's activities in connection with the WLS were not targeted at the plaintiff (which did not even exist at the time ICANN's board

passed the resolution authorizing the WLS negotiations with VeriSign). At best, any effect on Pool.com of ICANN's authorization of the WLS is "random" or "attenuated".

- (v) ICANN has not engaged in any conduct over the Internet that has amounted to it "entering" Ontario or submitting itself to the jurisdiction.

Hall Cross-Examination, pp. 60 - 61, qq. 356 - 7  
Moving Party's Motion Record, Tab 6 at 388 - 389

**(c) Unfairness to the parties if this Court assumes jurisdiction or does not assume jurisdiction**

92. The concept of fairness in determining jurisdiction should be considered from the point of view of both the plaintiff and the defendant. It is important to consider fairness to the plaintiff and to balance this against fairness to the defendant.

*Muscutt v. Courcelles, supra* at 47-48

93. ICANN submits that it would be significantly unfair to it if this Court were to assume jurisdiction with respect to this action, for the following reasons:

- (i) Because ICANN's actions that Pool.com complains of did not occur in Ontario and ICANN has no connection to Ontario and also because ICANN's Registrar Accreditation Agreements provide that they are to be litigated in California, ICANN's reasonable expectations would be that any dispute relating to its actions in connection with the WLS would be litigated in California.
- (ii) ICANN is currently defending two actions in California which put squarely in issue the identical issue raised in Pool.com's action;

namely, the lawfulness of ICANN's actions in connection with the WLS. It would be unfair to require ICANN to litigate the identical issue in two different jurisdictions, thus exposing it to the risk of contradictory and inconsistent decisions. The twin goals of avoiding multiplicity of proceedings and inconsistent results are relevant considerations for the Court to take into account on a jurisdiction motion.

- (iii) If ICANN is required to litigate the lawfulness of its actions in connection with the WLS in Ontario, it will be required to incur the additional (and otherwise unnecessary) expense of retaining expert(s) to adduce evidence of California law, given that the issue of whether ICANN breached the Registrar Accreditation Agreements must be determined in accordance with California law.

*Muscutt v. Courcelles, supra* at 48

Halloran Affidavit, para. 53(d)

Moving Party's Motion Record, Tab 2 at 21

94. Pool.com has not tendered any evidence of any unfairness to it that would result if this Court does not assume jurisdiction. In any event, mere inconvenience to a plaintiff is not sufficient to constitute unfairness. The simple fact that Pool.com would be precluded from advancing its claim in Ontario, and would be required to bring it in another jurisdiction (California), does not establish the type of unfairness referred to in the applicable caselaw.

*Leufkins v. Alba Tours International Inc., supra* at 94

*Lemmex v. Bernard, supra* at 64-65

*Gajraj v. DeBernardo, supra* at 73

95. Accordingly, considerations relating to unfairness weigh against Ontario assuming jurisdiction.

**(d) The involvement of other parties to the suit**

96. The involvement of other parties in the action is not a relevant factor in this case, since there are no other parties.

**(e) The court's willingness to recognize and enforce an extra provincial judgment rendered on the same jurisdictional basis**

97. This factor requires a consideration of whether this Court would recognize and enforce the judgment of a foreign court against an Ontario defendant that assumed jurisdiction in the reverse circumstances. A negative response weighs against assuming jurisdiction.

*Lemmex v. Bernard, supra* at 66-67

98. It is submitted that if the facts of this case were in reverse, given the lack of a real and substantial connection to the foreign jurisdiction, Ontario Courts would likely consider that an Ontario defendant should not be compelled to defend such an action in a foreign court.

*Lemmex v. Bernard, supra* at 66-67

*Braintech, Inc. v. Kostiuk, supra*

**(f) Whether the case is inter-provincial or international in nature**

99. Ontario courts recognize that the assumption of jurisdiction is more easily justified in interprovincial cases than in international cases. This is because considerations underlying the rules of comity apply with greater force between units of a



federal state than they do between two states and there are various factors arising from the Canadian judicial structure that foster consistency and uniformity between provinces and which minimize the risk of unfairness arising from the assumption of jurisdiction in interprovincial cases. Amongst other things, there is less need to worry about sovereignty or the difficulty of applying "foreign" law where the act in question occurred in another province, rather than in another country.

*Muscutt et al. v. Courcelles et al., supra* at 49-51

*Spar Aerospace Ltd. v. American Mobile Satellite Corp.* (2002),  
220 D.L.R. (4<sup>th</sup>) 54 at 75-76 (S.C.C.)

*Beals v. Saldanha, supra* at paras. 30-32

100. The fact that this is an "international" case weighs against this Court assuming jurisdiction, particularly because California law must be applied to determine whether ICANN's actions in connection with the WLS were unlawful, as alleged by Pool.com.

**(g) Comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere**

101. In international cases, international standards as well as the rules governing assumed jurisdiction and the recognition and enforcement of judgments in the location where the defendant is situated, are helpful in determining whether the real and substantial connection test has been met.

*Muscutt et al. v. Courcelles et al., supra* at 51

102. The Court of Appeal for Ontario has held that under international standards, there are only limited circumstances in which damages sustained within a jurisdiction as a result of a wrong committed elsewhere are accepted as a basis for

assumed jurisdiction. The Court of Appeal for Ontario has also held that, in the United States, the "minimum contacts" doctrine requires an act or conduct on the part of the defendant that amounts to personal subjection to the jurisdiction; without more, damage sustained in the jurisdiction does not satisfy the doctrine and does not permit jurisdiction to be assumed.

*Muscutt et al. v. Courcelles et al, supra* at 51-53

*Lemmex v. Bernard, supra* at 67

*Gajraj v. DeBernardo, supra* at 75

*Sinclair v. Cracker Barrel Old Country Store, Inc., supra* at 83

*Leufkens v. Alba Tours International Inc., supra* at 95-96

103. It is submitted that this factor also weighs against this Court assuming jurisdiction over this action, since assumed jurisdiction would accord neither with the laws of California, nor with international standards. It is submitted that it is virtually certain that California courts would not recognize or enforce an Ontario judgment in this action, unless ICANN were to voluntarily attorn to Ontario's jurisdiction. Given that a judgment of this Court would likely not be enforceable in California, there would be little or no advantage in allowing Pool.com to litigate its claims here.

*Lemmex v. Bernard, supra* at 67

*Gajraj v. DeBernardo, supra* at 75

*Sinclair v. Cracker Barrel Old Country Store, Inc., supra* at 83

*Leufkens v. Alba Tours International Inc., supra* at 95-96

*Bank of Montreal v. Jack Kough*, 612 F.2d 467 (9<sup>th</sup> Cir. 1980)  
at 3-5

*Panavision International v. Toeppen, supra*

*Cybersell, Inc. v. Cybersell, Inc., supra*

104. Moreover, it is submitted that it would be contrary to interests of comity if the Ontario courts were to assume jurisdiction over ICANN which is a not-for-profit corporation that was organized so as to carry out the delegation of authority from the Department of Commerce of the United States government. This is of even greater significance since it is the Department of Commerce of the United States government that retains jurisdiction to oversee all activities of ICANN.

**(iv) Conclusion**

105. It is respectfully submitted that based on the facts and the case law regarding jurisdiction *simpliciter*, this Court does not have jurisdiction over ICANN and the subject matter of this action.

**Forum non conveniens – California, and not Ontario, is the more appropriate forum**

106. In the alternative, if this Court determines that it has jurisdiction *simpliciter* over this action, ICANN submits that the natural and proper forum for this action is California, and not Ontario and, as a result, this Court should decline to exercise its jurisdiction over this action.

107. In all cases where an issue of *forum non conveniens* is raised, the test is "whether there clearly is a more appropriate jurisdiction than the domestic forum chosen by the plaintiff in which the case should be tried". The choice of the appropriate forum is designed to ensure that the action is tried in the jurisdiction that has the closest connection with the action and the parties. In this case, because ICANN was served *ex juris*, the burden is on Pool.com to establish that Ontario is the appropriate forum.

*Frymer v. Brettschneider* (1994), 19 O.R. (3d) 60 (Arbour J.A.) at 79, 84-85 (C.A.)

108. The convenient forum test is discretionary.

*Incorporated Broadcasters Ltd. v. Canwest Global Communications Inc.*, *supra* at 452

109. The Courts have developed a list of several factors that may be considered in determining the most appropriate forum for the action, including:

- (a) the location of the dispute and the jurisdiction in which the factual matters arose;
- (b) the applicable law and difficulty and cost of proving foreign law;
- (c) the location in which the majority of witnesses reside and the location of key witnesses;
- (d) the location where the bulk of the evidence will come from;
- (e) the residence or place of business of the parties;
- (f) loss of jurisdictional advantage – whether declining jurisdiction would deprive the plaintiff of a legitimate juridical advantage in the domestic court;
- (g) the avoidance of a multiplicity of proceedings; and
- (h) the need to have the judgment recognized in another jurisdiction.

Each of these factors is considered in the context of the case below. The factors must be weighed together and none is individually determinative.

*Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, *supra* at 81

*Muscutt et al. v. Courcelles et al.*, *supra* at 34-35

*Incorporated Broadcasters Ltd. v. CanWest Global Communications Corp., supra at 453-456*

**(a) Location of the dispute and jurisdiction in which the factual matters arose**

110. None of the factual matters on which this action is based arose in Ontario.

Rather, they are most closely connected with California:

- (i) There is no evidence that any of the actions taken by ICANN and its Board of Directors in connection with the WLS were taken in Ontario.
- (ii) ICANN's administrative functions are all carried out from its offices in California and ICANN's actions in connection with the WLS occurred in California or at ICANN Board of Directors meetings, none of which took place in Ontario.
- (iii) The WLS was proposed by VeriSign, a company with its principal office and place of business in California.
- (iv) The August 23, 2002 ICANN Board of Directors meeting at which a resolution was passed authorizing the President and General Counsel of ICANN to conduct negotiations with VeriSign to make contract revisions that would allow WLS to be offered by VeriSign occurred by teleconference.
- (v) The contract amendment negotiations in connection with the WLS were between ICANN and VeriSign both of which are California corporations and/or corporations with principal offices in California.

- (vi) The Registrar Accreditation Agreements which Pool.com alleges were breached by ICANN are entered into by the parties in California and are governed by California law.
- (vii) Prior to implementation of the WLS, the U.S. Department of Commerce must approve any modification to the agreements between ICANN and VeriSign relating to the offering of the WLS.
- (viii) The significant technical and operational tasks of implementing the WLS will be undertaken by VeriSign, a company with its principal office and place of business in California.

Supplementary Halloran Affidavit, paras. 6(e), 7  
Moving Party's Motion Record, Tab 3 at 110-111

Halloran Affidavit, paras. 35, 40  
Moving Party's Motion Record, Tab 2 at 15-17

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

**(b) The applicable law and difficulty and cost of proving foreign law**

111. As noted earlier, the success of Pool.com's action depends on it establishing that ICANN used "illegal or unlawful means" in approving the WLS. In particular, Pool.com's action will necessarily fail if it is unable to establish that in authorizing the WLS ICANN breached its Registrar Accreditation Agreements. These questions are necessarily to be determined pursuant to the laws of California.

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

112. ICANN is a not-for-profit corporation with limited resources. Litigating questions governed by California law in the Ontario Courts will render this case unduly expensive and burdensome for ICANN, requiring, amongst other things, the filing of

expert evidence to establish the applicable California law. This factor therefore significantly favours California as the *forum conveniens*.

Halloran Affidavit, para. 53(c) and (d)  
Moving Party's Motion Record, Tab 2 at 21

113. The financial resources of a defendant are a relevant consideration in the *forum non-conveniens* analysis.

*Incorporated Broadcasters Ltd. v. Canwest Global Communications Corp.*, *supra* at 456

**(c) The location in which the majority of witnesses reside and the location of the key witnesses**

114. It is ICANN's evidence that the majority of the anticipated witnesses in this action, and certainly the key witnesses, will be the current and former staff of ICANN, all of whom are resident in California. They will speak to ICANN's obligations under the Registrar Accreditation Agreements, to ICANN's role and responsibilities in connection with the Internet DNS and with respect to the authorization and implementation of the WLS. Further, the vast majority of people involved in the WLS reside in California. The key ICANN employees involved in negotiations with VeriSign regarding the WLS (Louis Touton, Dan Halloran and John Jeffrey) all live in California. None of the witnesses who were materially involved in the approval of WLS reside in Ontario.

Halloran Affidavit, para. 53  
Moving Party's Motion Record, Tab 2 at 20 - 21

Supplementary Halloran Affidavit, para. 7  
Moving Party's Motion Record, Tab 3 at 111-2

Transcript of Cross-examination of Dan Halloran (March 15, 2004), pp. 41-42, qq. 155-162  
Moving Party's Motion Record, Tab 7 at 462 - 463

Hall Cross-examination, p. 85, q. 460, pp. 87-88, qq. 475-478  
Moving Party's Motion Record, Tab 6 at 413 and 415 - 416

115. Pool.com asserts that it will require witnesses to speak to the following issues:

- (i) ICANN's knowledge of the effects of the WLS on Pool.com;
- (ii) evidence relating to the planning and implementation of Pool.com's services;
- (iii) evidence relating to the effects of the WLS on Pool.com's business; and
- (iv) evidence with respect to the effects of the implementation of the WLS on the decisions of end-users to subscribe to the services offered by Pool.com.

With respect to (i) above, one would expect that any such witnesses will be ICANN representatives. With respect to (ii) and (iii), Pool.com has not identified who the appropriate witness(es) will be or how many witnesses it expects to call and, in fact, has not filed any evidence to contradict the view expressed by ICANN's witness that Pool.com would need to call only one or two witnesses. As Robert Hall is Pool.com's sole director and "directing mind", was Pool.com's sole officer up until January, 2004 and has acknowledged that he has a good understanding of the effect the WLS will have on Pool.com's business, it is reasonable to expect that he is likely to give evidence on these matters. With respect to (iv), Pool.com's affidavit acknowledged that such evidence is available "anywhere that Pool.com has customers" and Pool.com has acknowledged that it has customers in California.

Hall Affidavit, paras. 35, 38-40  
Responding Party's Motion Record



Hall Cross-examination, pp. 2-3, qq. 1-16, p. 29, qq. 185 - 187  
Moving Party's Motion Record, Tab 6 at 330 - 331 and 357

**(d) The location where the bulk of evidence will come from**

116. The bulk of the evidence that will be adduced in this action will go to the three elements that Pool.com is required to prove to establish the tort of intentional interference with economic relations. First, Pool.com must tender evidence to establish that ICANN intended to injure Pool.com. It is reasonable to expect that evidence of ICANN's knowledge of Pool.com and intentions with respect to Pool.com will most likely be obtained through oral and documentary evidence of ICANN. Virtually all, if not all, of ICANN's relevant documents are located in California and ICANN's witnesses are resident in California.

Halloran Affidavit, paras. 53(a) and (b)  
Moving Party's Motion Record, Tab 2 at 20

117. Second, Pool.com must establish that ICANN interfered with Pool.com's business by illegal or unlawful means, namely by breaching its Registrar Accreditation Agreements. This will be the most significant and critical element of the evidence. None of the events relating to ICANN's authorization of or negotiations with respect to the WLS occurred in Ontario and the bulk of the documents and other evidence relevant to this issue are in California.

118. Third, Pool.com will be required to prove that as a result of ICANN's wrongful interference Pool.com suffered business losses. While the bulk of this evidence with respect to damages will be in the possession of Pool.com and its

representatives, it is submitted that it is unlikely that more than one (i.e. Mr. Hall) Pool.com witness would be required to adduce such evidence.

**(e) Residence or place of business of the parties**

119. ICANN is domiciled in California and Pool.com is domiciled in Ontario. Pool.com has customers in California and therefore conducts business in California.

**(f) Loss of juridical advantage**

120. Pool.com has not tendered any evidence of any potential loss of juridical advantage if this action is not tried in Ontario.

**(g) Avoidance of a multiplicity of proceedings – whether related or similar proceedings exist elsewhere**

121. Where "parallel" actions are proceeding in two different jurisdictions, courts in the subject forum should generally decline jurisdiction on the basis of *forum non conveniens* to allow all of the actions to be dealt with in the more appropriate forum. The rationale for this is to avoid a multiplicity of proceedings, to avoid the attendant risk of inconsistent or conflicting decisions and to avoid the additional inconvenience and expense of two sets of proceedings being pursued concurrently in two different countries, where the same facts will be in issue and the testimony of the same witnesses will be required. Parallel actions are considered to be actions that involve the same issues even if different relief is sought. Although "parallel actions" generally involve the same parties, there is Canadian authority for declining jurisdiction on the basis of parallel proceedings in two different jurisdictions arising out of the same event and involving the same defendants, but not the same plaintiffs.

*Negrych v. Campbell's Cabins (1987) Ltd., supra* at 276-277 ("parallel proceedings" involved same defendants, but not the same plaintiffs)

*Westec Aerospace Inc. v. Raytheon Aircraft Co.* (1999), 173 D.L.R. (4<sup>th</sup>) 498 at 504-507 (B.C.C.A.) *aff'd* [2001] 1 S.C.R. iv.

*Blinds to Go Inc. v. Harvard Private Capital Holdings Inc.*, [2003] N.B.J. No. 8 at paras. 36-43 (Ct. Q.B.) (Q.L.); appeal allowed in part on other grounds at [2003] N.B.J. No. 333 (C.A.) (Q.L.) at paras. 32-42 (parties in both proceedings not the same, but have common interests)

*Multiactive Software Solutions Inc. v. Advanced Service Solutions Inc.*, [2003] B.C.J. No. 945 at paras. 8, 25-29 (B.C.S.C.)

122. The *Registersite.com* and *VeriSign, Inc.* actions (outlined above in paras. 44-52) raise issues identical to those raised in Pool.com's action and therefore there is a substantial risk of contradictory judgments if the Pool.com action is permitted to proceed in Ontario. The nature of Pool.com's business and "affiliate" relationship with all of the plaintiffs in the *Registersite.com* action that have operational back-order services and the fact that Pool.com's interests are therefore being represented in the *Registersite.com* action weigh even further in favour of this Court declining jurisdiction.

**(h) The need to have the judgment recognized in another jurisdiction**

123. Obviously, in the event that any of the relief sought by Pool.com in this action were granted by this Court, Pool.com will have to have this Court's order or judgment recognized and enforced by a California court against ICANN in California. Given that this matter would ultimately be brought before the California courts in any event, it is submitted that in order to avoid multiple proceedings, California should be chosen as the more appropriate forum for the trial of the action.


**PART IV – ORDER SOUGHT**

124. The defendant respectfully requests that this action be dismissed and, in the alternative, stayed, with costs ordered payable to it forthwith on a substantial indemnity basis.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Date: May 25, 2004

  
MATTHEW T. GOTTLIEB

  
ANDREA L. BURKE

Counsel to the Defendant/Moving Party

## **SCHEDULE "A"**

### **LIST OF CASES**

1. *Incorporated Broadcasters Ltd. v. Canwest Global Communications Corp.* (2003), 63 O.R. (3d) 431 (C.A.)
2. *Lineal Group Inc. v. Atlantis Canadian Distributors Inc.* (1998), 42 O.R. (3d) 157 (C.A.)
3. *Reach M.D. Inc. v. Pharmaceutical Manufacturers Assn. of Canada* (2003), 172 O.A.C. 202 (C.A.)
4. *Davidson Tisdale Ltd. v. Pendrick*, [1998] O.J.No. 5308 (Div. Ct.) (Q.L.)
5. *Muscutt v. Courcelles et al.* (2002), 60 O.R. (3d) 20 (C.A.)
6. *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077
7. *Beals v. Saldanha* [2003] 3 S.C.R. 416 [reported version is not yet available; copy included in Brief is [2003] S.C.J. No. 77 (Q.L.)]
8. *Lemmex v. Bernard* (2002), 60 O.R. (3d) 54 (C.A.)
9. *Gajraj v. DeBernardo* (2002), 60 O.R. (3d) 68 (C.A.)
10. *Sinclair v. Cracker Barrel Old Country Store Inc.* (2002), 60 O.R. (3d) 76 (C.A.)
11. *Leufkins v. Alba Tours Inc.* (2002), 60 O.R. (3d) 84 (C.A.)
12. *Elawar v. Fédération des Clubs Montonegistes du Quebec Inc. et al* (2001), 57 O.R. (3d) 232 (S.C.J.)
13. *ECS Educational Services Canada Ltd. v. Al Nahyan*, [2000] O.J. No. 211 (S.C.J.) aff'd (2000), 3 C.P.C. (5<sup>th</sup>) 76 (Ont. C.A.)
14. *Marren v. Echo Bay Mines Ltd.* (2003), 13 B.C.L.R. (4<sup>th</sup>) 177 (B.C.S.C.)
15. *Negrych v. Campbell's Cabins (1987) Ltd.*, [1997] 8 W.W.R. 270
16. *Murray v. Canada (Attorney General)* (2003), 340 A.R. 215 (Alta. Q.B.)
17. *Braintech, Inc. v. Kostiuk* (1999), 171 D.L.R. (4<sup>th</sup>) 46 (B.C.C.A.)
18. *Easthaven, Ltd. v. Nutrisystem.com Inc.* (2001), 55 O.R. (3d) 334 (S.C.J.)
19. *Zippo Manufacturing Company v. Zippo DotCom, Inc.* 952 F.Supp. 1119 (W.D. Pa. 1997)
20. *Panavision International v. Toeppen*, 141 F.3d 1316 (9<sup>th</sup> Cir. 1998)
21. *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9<sup>th</sup> Cir. 1997)
22. *Bancroft & Masters Inc. v. Augusta National Inc.* 233 F. 3d 1082 (U.S. App. 2000)

23. *Spar Aerospace Ltd. v. American Mobile Satellite Corp.* (2002), 220 D.L.R. (4<sup>th</sup>) 54 (S.C.C.)
24. *Bank of Montreal v. Jack Kough*, 612 F.2d 467 (9<sup>th</sup> Cir. 1980)
25. *Frymer v. Brettschneider*, (1994) 19 O.R. (3d) 60 (C.A.)
26. *Westec Aerospace Inc. v. Raytheon Aircraft Co.* (1999), 173 D.L.R. (4<sup>th</sup>) 498 (B.C.C.A.) at 504-507 aff'd [2001] 1 S.C.R. iv.
27. *Blinds to Go Inc. v. Harvard Private Capital Holdings Inc.*, [2003] N.B.J. No. 8 (Ct. Q.B.) (Q.L.); appeal allowed in part at [2003] N.B.J. No. 333 (C.A.) (Q.L.)
28. *Multiactive Software Solutions Inc. v. Advanced Service Solutions Inc.*, [2003] B.C.J. No. 945 (B.C.S.C.)

**SCHEDULE "B"**  
**LIST OF AUTHORITIES**

1. John G. Fleming, *The Law of Torts*, 9<sup>th</sup> ed. (LBC: Sydney, 1998) (extract)
2. Linda Rainaldi, ed., *Remedies in Tort*, Vol. 3 (looseleaf)  
(Toronto, Carswell, 1987) (extract)
3. Michael Geist *Internet Law in Canada* 2nd ed. (Toronto, Captus Press Inc.  
2001) (extract)

POOL.com INC.

and

INTERNET CORPORATION FOR ASSIGNED  
NAMES AND NUMBERS  
Defendant

Plaintiff

Court File No: 03-CV-24621

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Ottawa

**FACTUM**

(Defendant's motion to stay  
or dismiss action on jurisdictional grounds

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File No. 201779

May 25, 2004

**BY EMAIL AND BY COURIER**

Y. Monica Song  
Osler, Hoskin & Harcourt LLP  
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Suite 1500  
Ottawa, ON K1P 6L2

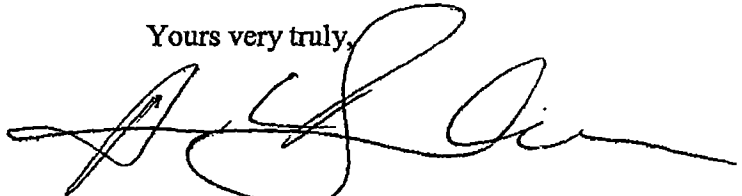
Dear Ms Song:

**ICANN ats POOL.COM Inc.**

Enclosed under cover of this letter and hereby served upon you is the ICANN factum in respect of the jurisdictional motion.

A bound copy of the factum, as well as the revised ICANN Motion Record (revised to include all Halloran Affidavits as well as the transcripts and Statement of Claim) will be delivered to you by overnight courier. It is our intention to replace the existing ICANN motion record in the Court file with the revised and updated motion record that you will receive tomorrow.

Yours very truly,

A handwritten signature in black ink, appearing to read 'A. L. Burke', with a long horizontal flourish extending to the right.

Andrea L. Burke

ALB/jk  
Enclosure

Tor #: 1381215.1