

**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.