



## CANADIAN INTERNATIONAL INTERNET DISPUTE RESOLUTION CENTRE

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Via Emails:

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January 4, 2019

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Arb

Attention: Ms. Andee Hill, Global Domains Division

Kirsti Gill

Peter Hebb, FTI

Dear Ms. Hill:

Walley

Lightbody, Q.C.

#### **RE: Application for New Uniform Domain Name Dispute Resolution Policy (UDRP) Dispute-Resolution Service Provider, 2<sup>nd</sup> UDRP Provider in North America**

Professor

Bradford Morse

We would like to thank the Internet Commerce Association (“ICA”) and their general counsel, Mr. Muscovitch, for their submission to ICANN dated 21 December 2018, including the following positive feedback on the Canadian International Internet Dispute Resolution Centre\* (the “CIIDRC”): *“We are familiar with the CIIDRC’s work through its BCICAC arm in connection with .ca domain name disputes under the Canadian Internet Registration Authority’s CDRP program and have found it to be a competent and qualified administrator for domain name disputes. The CIIDRC’s application did not appear to substantially depart from the current baseline for expectations of DRPs [dispute resolution providers] ....”*

Richard Olson

Andrew Scott

Marvin Storrow,

Q.C. C. Arb

We also noted the comments directed to ICANN regarding the issue of whether there should be contractual arrangements between ICANN and DRPs. We have not taken a formal position on this question, but are familiar with ICANN’s Status Report dated July 19, 2013, which includes the following discussion: *“One of the most common requests that ICANN has received regarding UDRP providers is to implement a contract across providers that will require uniformity in proceedings. ICANN has carefully considered whether the introduction of contracts is feasible or useful in the scope of UDRP proceedings, and has determined that contracts would be a cumbersome tool to assert to reach the same outcome that exists today. Just as UDRP providers are approved by ICANN, ICANN can always revoke its approval if a provider is found to no longer meet the standards that supported its approval. For example, if a UDRP provider is found to be acting in violation of the UDRP, or if the provider has Supplemental Rules that are in conflict with the UDRP and the Rules, and the UDRP provider failed to remedy that conflict, there is nothing in either of those situations that precludes ICANN from revoking approval. Imposing a contractual*

*relationship could actually make it more difficult for ICANN to take corrective action. Here, the UDRP and the Rules set forth all of the expected actions of the UDRP provider; a contract would only be repetitive in this case.”*

The submission from the ICA also expressed concern about “forum shopping”. Again, we would like to reference ICANN’s Status Report from 2013: “A frequent concern raised regarding UDRP providers is the potential for “forum shopping,” or that UDRP complainants will seek out providers that they believe will provide a better result. The provision of contracts, however, will not stop complainants from filing UDRP disputes with their preferred providers. In fact, one of the expected benefits of the diversity of UDRP providers is to provide further choice to all who may invoke the UDRP, including issues of geography and language. UDRP providers are expected to perform to the standards set forth in the UDRP. So long as those standards are used, and the provider is adhering to the UDRP, the choice is appropriate to leave to a complainant as to which UDRP provider it wishes to use.”

A full copy of the ICANN Status Report from 2013 can be found here:

<https://www.icann.org/en/system/files/files/uniformity-process-19jul13-en.pdf>

*Other issues raised by the ICA about DRPs generally:* We defer to ICANN to consider the various comments made by the ICA related to DRPs and arbitrators. However, we are committed to working with ICANN and other DRPs to ensure the highest level of administrative adjudication, transparency and consistency in applying the rule of law to domain name disputes.

As for additional points raised by the ICA regarding the CIIDRC application, we are grateful for the constructive feedback and will take these comments into serious consideration. In the meantime, we would like to respond to a number of specific comments made by the ICA.

### *Part 3: Training and Educational Measures:*

*Blog page:* CIIDRC is committed to having our panelists adhere to the highest professional standards. A blog on CIIDRC's website would allow for discussion of current issues related to UDRP disputes, but it will be made clear that panelists are not permitted to discuss pending or ongoing cases.

*Yearly Conferences:* the CIIDRC has committed to this.

*Broad Consultation with other DRPs:* If our application is approved by ICANN, CIIDRC will participate in broad consultation with other DRPs and stakeholders to discuss the potential merits of creating a 'Consensus View' handbook that applies across all DRPs.

CIIDRC fully supports the view that a DRP has an obligation to not just administer domain name disputes, but to also actively work to improve the effectiveness of the UDRP through development of policy and case law interpretation resources.

*Statistics (Part 9):* CIIDRC will provide statistics to the ICANN designated officer.

*Publication (Part 10): Search CIIDRC decisions:* Decisions will be published on the CIIDRC website and the following search functions will be offered:

- by date of decision;
- by domain name;
- by complainant's name;
- by respondent's name;
- by panelists' name.

*Appendix B (Qualifications): Undisclosed Panelists profiles:* Our application to ICANN included panelist profiles with a description of their qualifications. We carefully screen potential panelists. Our impartial and professional panelists have earned a highly-regarded reputation in international and domestic legal circles. A copy of the panelist profiles is attached to this submission.

*Appendix B (Code of Ethics): Panelists also acting as advocates for Complainants and Respondents:* We suggest that ICANN is situated to address this concern. However, we would also note that it is common practice in the ADR world for arbitrators, mediators, and panelists to act as counsel in matters where they are not serving as arbitrators, mediators or panelists. All CIIDRC panelists will be required to sign a Statement of Independence and Impartiality (please see Schedule G to the Supplemental Rules) to ensure the neutrality and fairness of the process. Please note that applicable ethical requirements established by the Law Society of British Columbia (and other similar regulatory organizations in Canada) also deal with conflicts of interest. In addition, our parent organization, the British Columbia International Commercial Arbitration Centre or BCICAC, brought in new Rules for Panelists effective January 1, 2019, which impose a greater degree of accountability and clearer procedures for addressing any failures to meet more stringent ethical guidelines.

*Fee Procedure:* The CIIDRC's parent organization, BCICAC, has more than 16 years of experience administering CDRP disputes. In 2014, after extensive consultation with its two DRPS (BCICAC being one of them), the Canadian Internet Registration Agency (CIRA) updated its Rules to allow a Complainant to defer making a deposit of Panel Fees until after the deadline for the Registrant's Response. This measure streamlined the process and eliminated unnecessary refund procedures.

In accordance with CDRP Rule 14.2, "A Panel fee must be paid to the Provider within five (5) days from the date the Provider directs that payment be made. If the fee is not received, the Provider shall provide the Complainant with an additional ten (10) day extension of time to pay the fee, and shall indicate the deadline for payment in writing to the Complainant. Should payment not be made by this deadline, the Provider shall have the option, in its sole discretion, to terminate the Proceeding with no refund to the Complainant." This method has worked well to date.

In a case where a Respondent files their response and the Complainant fails to deposit funds for the Panel within 10 days without reasonable explanation, the proceeding will be terminated.

*Credit card payments:* CIIDRC will consider accepting payments by credit cards.

*Annex B (Board of Directors):* A complaints procedure will be in place and our Rules Committee is in the process of completing our rules regarding complaints. They will be issued for public consultation in due course.

*Supplemental Rules:* We are pleased that the ICA has reviewed the CIIDRC's proposed Supplemental Rules and notes that they "... do not appear to depart from the UDRP Rules ...". The CIIDRC has worked diligently to ensure that its rules conform to the UDRP Rules.

*Supplemental Rules (Panelist Appointment) Panelist rotation:* CIIDRC is committed to a fair mechanism for panelist appointments. For more than a quarter of a century, CIIDRC's parent organization (BCICAC) has provided quality service when it comes to the appointment of arbitrators for the benefit of Complainants, Responders, and Panelists.

Regarding the ability of the Complainant to see the list of proposed nominees from the Respondent, the CIIDRC believes that its rules comply with the UDRP Rule 6 (d): "*Unless it has already elected a three-member Panel, the Complainant shall submit to the Provider, within five (5) calendar days of communication of a response in which the Respondent elects a three-member Panel, the names and contact details of three candidates to serve as one of the Panelists. These candidates may be drawn from any ICANN-approved Provider's list of panelists.*" We do not share the ICA's concern regarding the unfairness of this procedure for the following reason – in a proceeding where the Complainant elects to have the dispute heard before a three-member Panel, the Respondent has the privilege of viewing the Complainant's nominees before the Respondent decides on its nominees.

*Schedule D – Written Notice of Complaint:* The CIIDRC believes that its Notice of Complaint conforms to the UDRP rules. In addition, the Respondent's consent to transfer one or more domain names to the Complainant will result in the completion of the proceedings without the need for a Panel to render a decision.

*General Concern:* Regarding a concern mentioned by the ICA that there may not be enough cases to support a new DRP, we believe their following comment in this regard is speculative and actually reinforces our view that there is little downside to adding CIIDRC as an UDRP provider: "*Although the addition of a fifth DRP is not a substantial expansion but an incremental one, it is nevertheless the case that by adding DRPs one by one over time, at some point the expansion will be relatively substantial*" [emphasis added].

As the number of new gTLDs has grown from 22 in 2012 to over 1,200 in 2016 (an increase of more than 545% in four years), it can be expected that there will be an increase in the number of disputes requiring the assistance of an additional DRP. CIIDRC is prepared to undertake this role.

In any event, even if it were to be true that there are not many domain name cases to occupy the CIIDRC's attention, the impact would only be felt by CIIDRC and our panelists, not by ICANN or members of the Internet community.

As others have observed, there is only one UDRP provider in the Western hemisphere (ADR Forum in the United States). In contrast, within Europe there are two UDRP providers, with offices in Geneva (WIPO) and in Prague (CAC). Asia has five offices offered by ADNDRC, and in the Middle East, there is the Arab Centre for Domain Name Dispute Resolution ("ACDR"). It is apparent that the Western Hemisphere does not offer the same degree of choice as other parts of the world. We believe the Internet community in North and South America deserves more than one option.

Further, we believe as international commerce expands there will be more disputes between businesses in Europe, Asia, and the United States. Vancouver is ideally situated between Europe and Asia. Canada itself is generally viewed as a committed upholder of the rule of law and as an independent adjudicator of international commercial disputes. We believe that a DRP based in Vancouver, Canada will reduce costs for Complainants and Responders and be viewed as an impartial adjudicator consistently and fairly applying the rule of law to domain name disputes.

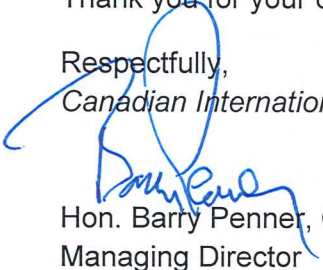
We agree with the ICA that *“the UDRP is no small enterprise, but rather a massive one that is mandated to carefully and fairly adjudicate disputes involving trademark owner rights and the rights of registrants to fairly and lawfully register and use domain names.”* That is why we believe that the addition of a second DRP in the Western Hemisphere will be beneficial in providing an efficient and impartial process for resolving domain name disputes.

Our vision is to serve the Internet community by providing a neutral, fair, and efficient one-stop platform for management of domain name disputes. CIIDRC is fully committed to abiding by ICANN’s future modifications that could enhance uniformity among providers. CIIDRC intends work with ICANN in a constructive way to improve and enhance the UDRP system. We are also committed to establishing a close collaboration with the existing UDRP Providers to preserve consistency and address any conflicting policies.

We believe that CIIDRC would be a timely addition to the list of ICANN providers, helping to better serve the needs of the Internet community.

Thank you for your consideration of our application.

Respectfully,  
*Canadian International Internet Dispute Resolution Centre*



Hon. Barry Penner, Q.C.  
Managing Director

Encls: CIIDRC Panelist’s Profiles