

**IN THE MATTER OF A COMPLAINT PURSUANT TO THE CANADIAN  
INTERNET REGISTRATION AUTHORITY (“CIRA”) DOMAIN NAME  
DISPUTE RESOLUTION POLICY (“POLICY”)**

**Complainant:** OCAS Application Services Inc.  
Guelph, ON

**Complainant’s Counsel:** Zaid Katul  
Borden Ladner Gervais L.L.P.  
Toronto ON

**Registrant:** iREx Corp.  
Vineland ON

**Registrant’s Counsel** Zak Muscovitch  
The Muscovitch Law Firm  
Toronto ON

**Disputed Domain Name:** ontariocollege.ca

**Registrars:** BareMetal.com Inc.

**Panel:** Paul Donovan, Sharon Groom, Denis Magnusson (chair)

**Service Provider:** Resolution Canada

**DECISION**

**Parties**

The Complainant is OCAS Application Services Inc. an Ontario corporation whose place of business is in Guelph, Ontario.

The Registrant is iREx Corp. whose administrative and technical contact is listed as Nancy Julia Haroutounian of Vineland Ontario.

**Disputed Domain Name and Registrar**

The disputed domain name **ontariocollege.ca** was first registered by the Registrant on February 14, 2003. The Registrar for the domain name is BareMetal.com Inc.

**Procedural History**

The Complainant filed this Complaint with the Provider, Resolution Canada who found the Complaint in compliance with the CIRA *Domain Name Dispute Resolution Rules* (“Rules”) and transmitted it to the Registrant. The Registrant filed a Response. As the Response made a claim for costs under Policy 4.6, the Complainant filed Further Submissions in reply to that claim as is permitted under the Rules 11.1

The Provider appointed the undersigned Paul Donovan, Sharon Groom and Denis N. Magnusson (chair) as the Panel to decide this matter.

### **Relief Requested**

The Complainant requested that the Panel order that the ownership of the domain name be transferred from the Registrant to the Complainant.

The Registrant asked that the Complainant's request be denied and that the Registrant be awarded costs against the Complainant under Policy 4.6 for an attempt to obtain a transfer of the Registrant's domain name unfairly and without colour of right.

### **Background Facts**

#### **The Complainant**

The Complainant, OCAS Application Services Inc., is an Ontario corporation established in 2001 to provide centralized application-to-college services to 28 Ontario colleges, including all 24 of Ontario's public colleges. Prior to the incorporation of the Complainant these same services were offered by a division of the Ontario Association of Colleges operating under the name "Ontario College Application Service" or "OCAS".

#### **The Registrant**

The Response describes the Registrant as being in the business of acquiring descriptive and generic domain names which it generally uses for web sites for advertisements related to the subject matter of the particular domain names. The Registrant secures revenues from the advertisers.

### **Onus on Complainant**

*Policy 4.1* requires that:

the Complainant must prove, on a balance of probabilities, that:

- (a) the Registrant's dot-ca domain name is Confusingly Similar to a Mark in which the Complainant had Rights prior to the date of registration of the domain name and continues to have such Rights; and
  - (b) the Registrant has registered the domain name in bad faith as described in paragraph 3.7; and the Complainant must provide some evidence that:
  - (c) the Registrant has no legitimate interest in the domain name as described in paragraph 3.6.
- [Emphases added]

#### **(a) Confusingly Similar**

##### **"Confusingly Similar"**

The Complainant asserts that its Mark is its common law trademark "**ontariocolleges.ca**". The Registrant's domain name in dispute in this case is **ontariocollege.ca**. The domain names are identical except for the difference of the plural "colleges" and the singular "college". Under Policy 3.4 the two domain names are Confusingly Similar as the one is likely to be mistaken for the other.

However, to succeed the Complainant must show that the Registrant's domain name was and is confusingly similar with a Mark in which the Complainant had Rights *prior to* the date of the Registrant's registration of the disputed domain name.

### **With Mark in Which Complainant Had and Has Rights**

#### **Principles**

Policy 3.2(a) states that a "Mark" includes any trademark that "has been used in Canada . . . for the purpose of distinguishing the . . . services or business of that person . . . from the . . . services or business of another person". This part of the Policy refers to what are sometimes called "common law" trademarks, that is, trademarks, though not registered under the *Trade-marks Act*, are trademarks in respect of which the user may have acquired some legal rights to exclude others from using that mark under the common law tort of passing off.<sup>1</sup>

The Complainant asserts that its Mark is its common law trademark "**ontariocolleges.ca**". The Complainant registered that Mark as a domain name on March 5, 2002.

While domain names can function as, and be protected in law as trademarks, mere registration of a domain name as such will not secure trademark rights in a domain name. For a domain name registrant to secure common law trademark rights in a domain name, the registrant must have actually used the domain name in association with some goods or services. Such use must generate a trademark reputation associated with the domain name among consumers. The nature of that acquired reputation is that the domain name (now a common law trademark) now points consumers to a particular trade source (the domain name registrant who used the domain name) for the type of goods or services in association with which the domain name was used. It is this reputation that is protected under trademark law. The law permits the owner of such common law trademark to prevent others from using that trademark so as to mislead consumers as to the trade source of the goods or services in association with which the trademark is used.

This aspect of trademark law is captured under the Policy in requiring a Complaint to show not merely a Mark, but to show that it has acquired Rights in such Mark. Policy 3.3(a) states that a Complainant has Rights in a Mark which is a common law trademark if the Complainant has *used* the Mark in Canada. Policy 3.5(b) deems there to have been Use of a Mark in association with services if the Mark has been displayed in the performance or advertising of the services.

When the mark used as a common law trademark is inherently well-adapted to function as a trademark it is reasonable to infer that such mark acquires at least a bit of a trademark reputation virtually from its first use. A mark is well adapted to serving as a trademark if, inherently, it appears to give *no* meaningful information about the goods or services with which it is used, that is, it appears to give no meaningful information about the character, qualities, geographic origins, etc. of the goods or services. The belief is that consumers who encounter such a mark used in association with goods or services will infer that the mark must be used with the intent of

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<sup>1</sup> Such "common law" rights can also be pursued under the *Trade-marks Act*, s. 7(b), (c), which enactment permits the Federal Court to hear and to rule on claims to such "common law" rights, which claims would otherwise be limited to being heard and ruled on only by the courts of each of the provinces.

indicating the trade source of such goods and services as the mark communicates no other meaningful information about the goods and services. Thus, it may be reasonable to say for such marks, as Policy 3.3(a) appears to say, that some mere use of the Mark is sufficient to establish Rights in such Mark.

However, for marks that are not inherently well-adapted to function as trademarks, trademark law stipulates that it is not reasonable to infer that some trademark reputation has been acquired for such marks from some limited mere use of the marks. A mark is not inherently well adapted to function as a trademark if the mark appears to be clearly descriptive of the character or qualities of such goods or services. For such marks, the law requires that they have been so extensively used that it can be proved or reasonably inferred that the mark has actually acquired a “secondary (trademark) meaning” in addition to its inherent primary meaning of descriptiveness.

Decisions under the Policy have consistently ruled that the Policy was not intended to create or to recognize new trademark and trade name rights. Rather, the Policy was intended to protect those trademark and trade name rights recognized under existing law. Thus, when the common law trademark claimed as the Complainant’s Mark is not inherently distinctive<sup>2</sup>, mere use of such mark will not be sufficient to establish that the Complainant has Rights in such Mark under the Policy 3.3(a). To establish such Rights, the Complainant must show that it has used the mark extensively enough that it has acquired secondary meaning in the trademark law sense.

### **This Case**

The Complainant relies on its registered domain name **ontariocolleges.ca** as a common law trademark as its Mark under the Policy.

The mark **ontariocolleges** is clearly descriptive of educational services and/or college admissions services offered by colleges in Ontario. Such educational services and college admissions services are the services in association with which the Complainant has used its mark **ontariocolleges.ca**. Thus, for the Complainant to establish that it has Rights in its **ontariocolleges.ca** Mark prior to the date of the Registrant’s registration of the disputed domain name **ontariocollege.ca** on February 14, 2003, the Complainant must show that it had actually used that Mark prior to February 14, 2003 sufficiently extensively that secondary meaning<sup>3</sup> had been acquired for its claimed **ontariocolleges.ca** common law trademark.

The Complainant registered its domain name **ontariocolleges.ca** as a domain name on March 5, 2002. The Complainant did not begin using that domain name immediately after registration. The chief evidence on behalf of the Complainant is the affidavit of Paul Wemyss, currently Director of Corporate Services for the Complainant. It appears that Mr. Wemyss may not have been in his present office with the Complainant during the critical period in this dispute, that is,

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<sup>2</sup> “distinctive” in the context of trademark law has a specialized meaning -- actually distinguishes the *trade source* of wares or services in association with which it is used from the trade source of the wares or services of others.

<sup>3</sup> “secondary meaning” is a term of art in trademark law, referring to an inherently descriptive mark (the descriptiveness being the primary meaning) having been so used that it has come to have a secondary meaning when used, a meaning of pointing to the trade source of products with which the mark is used (that is the mark has become distinctive in the trademark sense).

between the date of the Complainant's registration of its domain name **ontariocolleges.ca** on March 5, 2002 (which it now relies upon as its Mark in this dispute) and the date of the Registrant's registration of the disputed domain name **ontariocollege.ca** on February 14, 2003. Thus, while Mr Wemyss may not speak from direct personal experience with the Complainant in this critical period, from his present senior executive position he has full access to all of the Complainant's records from that period.

Mr. Wemyss states that the Complainant did not begin to so use its domain name Mark until "the fall of 2002". The Complaint does not indicate when, exactly, use commencing in "the fall of 2002" might be. Other than noting that the domain name began to be used with a web site mounted by the Complainant, the Complaint tells us very little about the nature and content of that web site in the fall of 2002 and early 2003.

Both Complainant and Registrant refer to the evidence of use of the Complainant's domain name during the critical period that can be gathered from the Wayback Machine<sup>4</sup>. The Complainant's reference is not specific, but the Registrant provides what specific information is available from that source. The only two entries for 2002 are for November 25<sup>th</sup> and 28<sup>th</sup>. The web pages associated with those entries are identical, consisting of this message:

"WELCOME TO OCAS

**www.ontariocolleges.ca**

The OCAS web site and applications are temporarily unavailable. Our team is working to resolve this issue and will make it available as soon as possible. Please try again. We apologize for this inconvenience."

On the evidence available, the Panel cannot know what web site use there was prior to or shortly after November 28, 2002. Was there an earlier elaborated web site that had crashed by November 25<sup>th</sup> or had the Complainant not yet managed to mount anything more than the message which appears on the pages recorded in the Wayback Machine?

The first two entries for 2003 for the Complainant's domain name on the Wayback Machine are for February 8<sup>th</sup> and February 14<sup>th</sup> (the latter is also the date of the Registrant's registration of the disputed domain name). The page attached to the February 8<sup>th</sup> date is identical to the pages attached to the earlier November 25 and 28, 2002 entries. The page attached to the February 14<sup>th</sup> entry (also the date of the Registrant's registration of the disputed domain name), however, shows an elaborated web page offering much information about college educational services and college application processes.

The other evidence of the Complainant's use of its **ontariocolleges.ca** domain name in the critical period is the Complainant's displaying the domain name prominently on the covers of the "Ontario College Guide" published in 250,000 copies and a companion guidebook published in 400,000 copies both "starting in the fall of 2002". There is no evidence submitted as to when, exactly, for these publications circulation starting in "the fall of 2002" might have been. We do know that Complainant is relying on use of a Mark which was a domain name and we might infer that successful use of the domain name by would-be college applicants (the relevant group of consumers for trademark reputation purposes) could be relevant to the development of a

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<sup>4</sup> <http://www.archive.org/web/web.php>

trademark reputation attached to the Complainant's unregistered trademark. From the evidence of the Wayback Machine, that domain name may not have linked to a useful web site until as late as February 14, 2003, the critical date of the Registrant's registration of the disputed domain name.

### **Conclusion on Mark in Which Complainant Had Rights**

The burden of proof on showing that the Complainant had, prior to the Registrant's registration of the disputed domain name, Rights (through acquired secondary meaning) in a Mark (the descriptive claimed common law trademark **ontariocolleges.ca**) is on the Complainant. The Panel finds that the Complainant has failed to discharge that burden.

The finding that the Complainant has not proved that it had Rights in a Confusingly Similar Mark prior to the date of the Registrant's registration of the disputed domain name is sufficient to dispose of the Complaint in the Registrant's favour. However, as both Complainant and Registrant invested effort in addressing the remaining issues, that is, Legitimate Interest and Bad Faith, the Panel offers the following comments on those issues.

#### **b) Bad Faith**

CIRA *Policy 3.7* has a restrictive definition of what can constitute the Registrant's necessary Bad Faith in registering the domain name. That definition states that there will be Bad Faith, "*if, and only if*" one or more of three specific circumstances exist.

The first of these bases of Bad Faith, in Policy 3.7(a), is a showing that the Registrant registered the domain name primarily for the purpose of profiting by selling the registration to the Complainant. The Registrant submitted evidence that before launching this complaint the Complainant had approached the Registrant with a request that the Registrant sell the domain name registration to the Complainant. The Registrant refused to sell. The Complainant has failed to prove that the Registrant registered the domain name primarily for the purpose of profiting from the sale of the domain name to the Complainant.

The second of the three bases of Bad Faith, in Policy 3.7(b), is a showing that the Registrant's registration was part of a pattern of registering domain names in order to prevent persons with Rights in Marks from registering the Marks as domain names. The Complainant attempts to prove a pattern of such behaviour by referring to a few of the Registrant's domain name registrations that might be seen as infringing others' Rights in Marks. However, the examples are both few and unpersuasive as the domain names are *prima facie* generic or descriptive and the possible claims by others to Rights in confusingly similar Marks are speculative and problematic. The Complainant has failed to establish this ground of Bad Faith.

The third of the possible bases of Bad Faith, in Policy 3.7(c), is that the Registrant registered the domain name primarily for the purpose of disrupting the business of the Complainant who is a competitor of the Registrant. The Complainant points to decisions under the Policy in which a Registrant who has used a web site to advertise the products or businesses of competitors of the Complainant can be seen as itself a competitor of the Complainant for the purposes of Policy

3.7(c). However, even if it is accepted that the Registrant is acting as a competitor of the Complainant in this respect, the Complainant has not met the burden of showing that the Registrant registered this domain name primarily for the purpose of disrupting the business of the Complainant. The domain name in dispute has strong inherent generic and descriptive potential. The Registrant has a demonstrated history of registering domain names with generic and descriptive potential and using those domain names for web sites on which it sells advertising rights for advertisements related to the subject matter of the particular domain names. In these circumstances it is not reasonable to infer that the Registrant registered this domain name primarily for the purpose of disrupting the business of this particular Complainant.

In summary, the Complainant's failure to establish the Registrant's Bad Faith as defined by the Policy would itself have been sufficient cause to dismiss the Complaint.

### **c) Legitimate Interest**

Under Policy 4.1(c) the Complainant has the burden of providing some evidence that "the Registrant has no legitimate interest in the domain name as described in paragraph 3.6". Further, Policy 4.1 provides that whatever the Complainant is able to prove in the Complaint, if the Registrant proves that it has a Legitimate Interest in the domain name, the Registrant will prevail in the Complaint.

Policy 3.6 stipulates that the Registrant has a Legitimate Interest in a domain name "if, and only if", the Registrant has one or more of the specific interests set out in Policy 3.6. Policy 3.6 further states that the Registrant must have established one of those specific interests before the first receipt by the Registrant of "notice" from the Complainant that a complaint has been filed.

The Registrant first had such notice when the formal Complaint in this dispute was received by the Registrant on or about April 9, 2009.

The Wayback Machine first shows a web site, linked to the Registrant's disputed domain name **ontariocollege.ca**, which has features, material and links described in ordinary language by **ontariocollege** as of February 2, 2006. A snippet from the Registrant's web page at the domain name from the Wayback entries follows:

**Welcome**

**August 15, 2006**

ontariocollege.ca is your resource for education information. Whether you're preparing for the SATs, researching higher education options, or just trying to find out how to spell "antidisestablishmentarianism," we've got you covered. Try one of the links on our menu, or if you don't see what you're looking for, use the searchbox at the top of the page.

Before April 9, 2009 (the date of first notice to the Registrant under Policy 3.6) the Registrant had mounted a web site at its domain name which had links to "colleges, universities and related services" (the quotation is from the Complaint, describing the nature of the Registrant's web site). The Response asserts that the Registrant thus had a Legitimate Interest in the disputed domain name under Policy 3.6(b). That provision indicates that a Registrant has a Legitimate Interest in a domain name if "the Registrant has used the domain name in Canada in good faith in association with any . . . services or business and the domain name was clearly descriptive of . . .

the character or quality of the . . . services or business”. Policy 3.6 further provides that “use” of the domain name includes use to identify a web site. Thus, before the Registrant received notice from the Complainant, the Registrant had established a Legitimate Interest in the disputed domain name under Policy 3(b).

Apart from any other elements of this dispute, the Registrant’s showing that it had a Legitimate Interest in the domain name as of April 9, 2009, the date of notice of the Complaint to the Registrant, would resolve the Complaint in the Registrant’s favour.

### **Conclusion**

The Complainant has failed to satisfy the burden of proof in establishing any of Confusing Similarity with a Mark in which the Complainant Had Rights, Registrant’s Bad Faith, and that the Registrant had no Legitimate Interest in the registered domain name.

### **Order**

For the reasons set out above, the Panel dismisses the Complaint, refuses to grant the relief requested by the Complainant and makes no order that the registration of the domain name be transferred to the Complainant.

### **Registrant’s Claim of Bad Faith of Complainant (“Reverse Domain Name Hijacking”)**

Policy 4.6 states that if the Registrant is successful in resisting the Complaint and can show on the balance of probabilities that the Complaint was commenced “unfairly and without colour of right”, the Registrant can claim from the Complainant a contribution to the Registrant’s costs in preparing the Response. The Complainant can be ordered to pay up to \$5,000 to defray the costs of the Registrant.

### **Colour of Right**

The two essential elements for showing a colour of right appear to be:

- an honest, though mistaken, belief in one’s right, and
- some factual basis upon which that belief was reasonably based.

A central question is whether the Complainant had an honest, though mistaken belief that it had acquired Rights in its Mark prior to February 14, 2003 when the Registrant registered the disputed domain name. The Mark on which the Complainant relied was its domain name **ontariocolleges.ca** which it claimed as a common law trademark. This Mark was registered as a domain name on March 5, 2002. To show that it had acquired Rights in the Mark as a common law trademark, the Complainant had to show that the Mark had actually been used, and mere registration of the domain name is not use. Further, as the Mark was inherently descriptive of services offered by the Complainant, the Complainant had to show that it had so used the Mark that secondary meaning had been acquired for this Mark among the relevant group of consumers of its services.

The Complainant conceded that it had not begun to use its Mark in association with a web site until “the fall of 2002”. Further, the Complainant knew that the Wayback Machine (on which

the Complainant relied for evidence of its use) recorded a use of the Mark with a web site no earlier than November 25, 2002. As well, the Complainant knew that the Wayback Machine showed that the content of the Complainant's web site located at the Mark throughout 2002 and in 2003 to February 8<sup>th</sup> (just 6 days before the critical date of the Registrant's registration of the disputed domain name), while prominently featuring the Mark itself on the page, was limited to a message that the site was not yet working as intended and therefore could not usefully engaged by the relevant consumers, would-be applicants to the Complainant's colleges.

The Complainant also relied on the use of its Mark prominently on the covers of the "Ontario College Guide" and a companion guidebook published by the Complainant in 250,000 and 400,000 copies respectively, both "starting in the fall of 2002". We do not know exactly when "in the fall of 2002" distribution of these publications began, how many copies had been distributed prior to the critical date of February 14, 2003 and to whom the copies had been distributed.

The Panel has emphasized evidence pointing to the Complainant not starting to use its Mark until the last week of November, 2002 (the Complainant who bears the burden of proof on this issue has not proved that such use began before then). This means that the period during which the Complainant actually used its Mark prior to the Registrant's registration of the disputed domain name was about 11 weeks. The potential for such use to generate a trademark reputation for the Mark among the relevant consumer group (would-be applicants to the Complainant's member colleges and to other Ontario colleges) may have been qualified by the fact that the Mark, which was and is a domain name, did not link to a fully functioning web site, perhaps until the day on which the Registrant registered the disputed domain name.

The minimum period during which an inherently descriptive trademark must be used before trademark distinctiveness has been acquired for such mark varies greatly with the particular circumstances of the trademark and the use. The minimum period varies with such factors as the degree of descriptiveness of the mark, the volume of distribution of goods or services in association with the mark within the period, and the scope and intensity of distinctiveness supporting steps such as advertising and other promotion of the mark within the period. While emphasizing the variability of time-to-trademark-distinctiveness, the Panel notes that 11 weeks is much toward the short end of periods of use from which the successful acquisition of secondary meaning has been inferred in decided trademark cases.

However, in the rapid-paced age of the Internet we may have to recognize that the minimum periods of use from which we might reasonably infer the acquisition of trademark distinctiveness may have shortened, and perhaps dramatically so. If that is so, it would tend to support the Complainant having an honest belief that it had acquired Rights in its Mark before the Registrant registered the disputed domain name and it having a factual basis upon which reasonably to found such belief.

The Panel acknowledges that there may have been a further factor causing the Complainant to have an honest belief that a relatively short period of use of its Mark would be sufficient for it to have acquired trademark distinctiveness in its descriptive Mark. The Complainant does represent "28 Ontario colleges including all 24 of Ontario's public colleges". The reference to

“all 24 of Ontario’s public colleges” appears to be a reference to all colleges formed under and regulated by the *Ontario Colleges of Applied Arts and Technology Act, 2002*<sup>5</sup> and predecessor legislation. In fact, the Complainant’s current web site describes all 28 member institutions as “Ontario’s 28 public colleges”.<sup>6</sup>

In Ontario, post-secondary education is dominated by two types of public institution – “universities” and “colleges”, where the latter refers to the Complainant’s member institutions. This is further emphasized as Regulations under the *Business Names Act*<sup>7</sup>, which requires registration of the name of a business if that business is to operate in Ontario, state:

A name shown in a [business name] registration must not include in any language the word "college", "institute" or "university", if the use of the word would suggest that the registrant is a post-secondary educational institution, unless the Minister of Colleges and Universities gives written consent to the use of the word.<sup>8</sup>

The Complaint notes that since 2002 the Complainant has received an average of over 150,000 applications annually for entry into the Complainant’s member colleges. In the circumstances it may not have been unnatural for the Complainant’s member colleges to think, ‘in Ontario “college” practically means us’ and so to think that use of the domain name **ontariocolleges.ca** for a relatively short time would be enough to secure trademark distinctiveness in that domain name as a common law trademark.

However, reference to the Complainant’s members is not the only use of the word “college” in Ontario and dictionaries in use by Ontarians define “college” as a common word capable of referring to entities in Ontario other than the Complainant’s members. Ontario legislation effectively concedes this in the enactment of the *Private Career Colleges Act, 2005*<sup>9</sup>, which applies to institutions other than the Complainant’s members. That legislation does, however, further constrain the use of the word “college” in Ontario.

The *Private Career Colleges Act, 2005* defines “private career college” very widely as including any “educational institution or other institution, agency or entity that provides one or more vocational programs to students for a fee”, *excluding* any public educational institution formed under other legislation such as the Complainant’s members. The Act further provides that “No person shall make use of the term "private career college" or any derivation or abbreviation of the term in any advertising relating to an educational institution or other institution, agency or

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<sup>5</sup> S.O. 2002, c. 8, Sched. F

<sup>6</sup> This appears to reflect that the 4 ‘extra’ colleges are public institutions formed outside the *Ontario Colleges of Applied Arts and Technology Act, 2002*, but formed under public legislation nevertheless, such as the Ridgetown campus of the University of Guelph which offers programs and diplomas agriculture, horticulture, environmental management and veterinary technology and Campus d'Alfred, part of the Ontario Agricultural College and the University of Guelph which offers diploma programs in the French language in Agricultural Technology, Environment Management and Food, Nutrition and Risk Management.

<sup>7</sup> *Business Names Act*, R.S.O. 1990, c. B.17

<sup>8</sup> **ONTARIO REGULATION 122/91, S. 11. RESTRICTIONS RESPECTING NAMES**

<sup>9</sup> S.O. 2005, c. 28.

entity unless the person is registered [under the Act]”<sup>10</sup> [emphasis added]. To register the private career college must provide its business name, and the Act further provides:

If applicable [that is, if the name includes the word “college”], evidence that an application has been made to the Minister of Training, Colleges and Universities for an approval to use the term "college" or "institute", or its French equivalent, under the *Business Corporations Act*, *Corporations Act* or the *Business Names Act* or evidence that such an approval has been given.<sup>11</sup>


In summary, in considering whether to make this Complaint under the Policy the Complainant could well have honestly believed that the word “college” in Ontario was used overwhelmingly to refer to certain post-secondary educational institutions, and that in law the Complainant’s members were the only such institutions in Ontario. The outline of the law and practice governing the use of “college” above provides a factual basis upon which such honest belief could reasonably be founded. That honest belief could lead to the belief that a short period of use of the domain name **ontariocolleges.ca** would make that domain name trademark distinctive of the Complainant. That would found the honest belief, reasonably though mistakenly based on fact, that the Complainant had a Mark in which it had Rights prior to the critical date of the Registrant’s registration of its confusingly similar domain name.

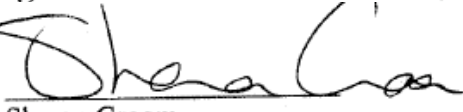
Once the Complainant has an honest belief, reasonably but mistakenly inferred from facts, that it had Rights in a Confusingly Similar Mark prior to the Registrant’s registration of the disputed domain name, the Complainant could honestly have seen the further issues of Legitimate Interest and Bad Faith as at least being arguable.

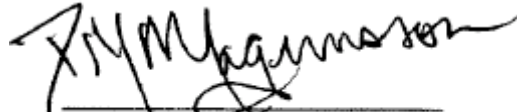
### **Conclusion and Order on Registrant’s Claim of Bad Faith of Complainant (“Reverse Domain Name Hijacking”)**

The Panel concludes that the Registrant has not proved on the balance of probabilities that the Complainant filed this Complaint without colour of right. Therefore the Panel declines to order an award of costs under Policy 4.6.

May 15, 2009

  
Paul Donovan

  
Sharon Groom

  
Denis N. Magnusson (chair)

<sup>10</sup> *Private Career Colleges Act, 2005*, s. 11.

<sup>11</sup> *Private Career Colleges Act, 2005*, s. 3(1)8.