

IN THE MATTER OF A COMPLAINT PURSUANT TO
THE CANADIAN INTERNET REGISTRATION AUTHORITY
DOMAIN NAME DISPUTE RESOLUTION POLICY

DOMAIN NAME: seedcheck.ca
COMPLAINANT: Seed Check Technologies Inc.
REGISTRANT: Ron Mantyka
PANELISTS: Harold Margles (Chair), Bradley J. Freedman,
James E. Redmond

DECISION

I. Parties

1. The Complainant is Seed Check Technologies Inc., a company incorporated under the Canada Business Corporations Act, with a place of business at Leduc, in the Province of Alberta, Canada. The Registrant is Ron Mantyka, presently residing in Saskatoon, Saskatchewan, Canada.

II. Procedural History

2. The Complainant commenced this proceeding under the CIRA Domain Name Dispute Resolution Policy (the “Policy”) and the CIRA Domain Name Dispute Resolution Rules version 1.2 (the “Rules”), by a Complaint dated July 5, 2004.

3. The service provider, British Columbia International Commercial Arbitration Centre (“BCICAC”), determined that the Complaint was in administrative compliance with the Policy and the Rules, and sent a copy of the Complaint to the Registrant on July 19, 2004. The Registrant requested an extension for delivery of his Response to August 25, 2004,

which was granted by the BCICAC pursuant to Rule 5.4. The Registrant delivered his Response in compliance with the Policy and Rules on August 25, 2004.

4. The Complaint and the Response were delivered by the Parties themselves. Neither party is represented by counsel.

5. On September 23, 2004, the BCICAC named James E. Redmond and Bradley J. Freedman as panelists, and Harold Margles as Chair of the Panel. Each of the panelists has delivered the required Statement of Impartiality and Independence.

6. The Panel finds that it was properly constituted in accordance with the Policy and the Rules, and that all technical requirements for the commencement and maintenance of this proceeding were met.

III. Facts

7. As set out in the Complaint, the Complainant was incorporated on July 22, 2002, and since that date has carried on business as a seed-testing laboratory. The Registrant, Mr. Mantyka, was one of three co-owners of the business, and was a director, President and General Manager of the Complainant. On July 22, 2002, Mr. Mantyka registered the domain name "seedcheck.ca" in his name.

8. On or about May, 2004 differences arose as between Mr. Mantyka and the other two shareholders and directors of the Complainant. It is alleged by the Complainant that Mr. Mantyka was removed as President and as a director of the Complainant on May 31, 2004, and that, despite demands from the Complainant, he refused to transfer the domain name to the Complainant. The Complainant alleged that Mr. Mantyka kept control of the domain name for the purpose of disrupting the Complainant's business, and that he had no legitimate interest in the domain name. Mr. Mantyka alleged malice on the part of the Complainant as part of an attempt to acquire his assets without compensation, that he has a legitimate interest in the domain name, and that the Complainant is acting in bad faith.

9. Following a review of the evidence and submissions of the Complainant and the Registrant, the Panel, in order to assist it in determining this matter, requested further submissions and evidence from each of the Complainant and the Respondent. By a Direction dated September 28, 2004, the panel invited the Complainant to provide further argument and documentary evidence as it considered appropriate in support of its contention that the Complainant has common law trade mark rights in "Seedcheck" and that such rights existed before July 22, 2002 and continued in the Complainant thereafter, and invited the Respondent to provide a reply to the Complainant's argument and evidence.

10. The Complainant submitted a Response to the Panel's Direction, dated October 5, 2004. It alleged that the other two directors and shareholders relied upon Mr. Mantyka to register the domain name "seedcheck.ca" to the Complainant and were not aware that he had registered it in his personal name, and again alleged bad faith on Mr. Mantyka's part. The Complainant stated that the business was conducted under the name Seed Check Technologies Inc. since July, 2002 and that the Complainant used the domain name "seedcheck.ca" to conduct its business until June, 2004 when Mr. Mantyka changed the passwords and denied them access. The Complainant alleges breach of trust on his part.

11. The Registrant's Response to the Panel's Direction provides little assistance on the question of whether Rights in a Mark existed prior to July 22, 2002. One sentence in the Response has caused the Panel some concern. The Registrant says, in part: "The Registrant submits the Complainant has acknowledged no existing rights to a Seed Check trademark prior to July 22, 2002...", which seems to be intended to repeat the Registrant's prior contention that no such rights existed prior to that date. However, the sentence continues "... (Complainant) does satisfy the requirements set out in..." the Policy provisions requiring the Complainant to show that Rights to a Mark existed prior to the date of registration of the domain name. On its face the sentence is contradictory, containing both an argument that the Complainant has not shown any Rights to a Mark prior to July 22, 2002, and conceding that it did have such rights. One could speculate that there may be a typographical error omitting the word "not" in the second part of the sentence, but the Panel cannot engage in speculation. However the Panel has concluded that because the sentence in question takes two opposing

positions within the one sentence, it is ambiguous and of no assistance to the Panel in deciding the case, and that the Panel must look at all of the other evidence and submissions of the parties to determine if it has been shown that the Complainant had Rights to the Mark "Seedcheck" prior to the date of registration of the domain name."

IV. Reasons

12. Paragraph 3.1 of the Policy provides:

3.1 Applicable Disputes. A Registrant must submit to a Proceeding if a Complainant asserts in a Complaint submitted in compliance with the Policy and the Resolution Rules 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; (emphasis added)

...

13. Paragraph of 4.1 of the Policy provides:

4.1 Onus. To succeed in the Proceeding, 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

....

14. Paragraphs 3.2, 3.3 and 3.5 of the Policy define the terms "Mark", "Rights", and "use" or "used". Under paragraph 3.2, a "Mark" includes a trademark or a trade name that has been used in Canada by a person, or the person's predecessor in title, for the purpose of distinguishing the wares, services or business of that person or predecessor from the wares, services or business of another person. Under paragraph 3.3, a person has "Rights" in a Mark if, *inter alia*, the Mark has been used in Canada by that person or that person's predecessor in title. Under paragraph 3.5, the provisions pertinent to this case are subparagraphs (b) and (c) which provide that a Mark is deemed to be in "use" or "used" in

association with services if the Mark is used or displayed in the performance or advertising of those services, or in association with a business if the Mark is displayed in the operating, advertising or promoting of the business.

15. In this case, the preponderance of evidence supports a finding that, assuming but without deciding that “Seedcheck” constitutes a Mark, the Complainant has failed to establish on a balance of probabilities that it had Rights in such Mark prior to the date of registration of the domain name. In its complaint, the Complainant alleges that “Seed Check Technologies Inc. was incorporated July 22, 2002 and since that date carried on business under that trade name ...”. The Registrant registered the domain name on July 22, 2002, the same date as the Complainant was incorporated. The Complainant has tendered no evidence showing use of the trade name “Seedcheck” by it or any predecessor in title so as to establish any rights in the trade name “Seedcheck” prior to July 22, 2002, the date of registration of the domain name. The Complainant does state in its response to the panel’s Direction that it operated “under Seed Check Technologies Inc. since July 2002 ...”, but the Complainant also acknowledges that “... the name seedcheck was not in formal existence until its (the Complainant’s) incorporation.” The Panel does not consider that this is sufficient evidence to satisfy the onus on the Complainant to show, on a balance of probabilities, that it had established Rights in the Mark “Seedcheck” prior to the registration of the domain name on July 22, 2002.

16. In view of this finding, the Panel need not and does not decide whether the Registrant registered the domain name in bad faith, or whether the Registrant has any legitimate interest in the domain name, nor whether, as alleged by the Complainant, the Registrant has appropriated to himself property of the Complainant. Because the Complainant has failed to overcome the preliminary hurdle of establishing that it had Rights in a trademark or trade name as at the date of registration of the domain name, the allegations and counter allegations of the parties must fall to be decided in another forum. Indeed, from the submissions of the Registrant it appears that some court proceedings are already under way.

17. In his Response to the Complaint, the Registrant requested the payment of costs. The Panel has concluded that, given all the circumstances of the case, it cannot be said that the

Complaint was commenced by the Complainant for the purpose of attempting, unfairly and without colour of right, to cancel or obtain a transfer of the registration which is the subject of this proceeding, as required under Paragraph 4.6 of the Policy for an award of costs to the Registrant. The Panel therefore declines to award any costs to the Registrant.

V. Order

For these reasons, the Panel orders that the Complaint be dismissed.

Dated this 28th day of October, 2004.

Harold Margles, (Chair)

Bradley J. Freedman

James E. Redmond