

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

Dispute Number: DCA-1938-CIRA
Domain Name: <reginalutheranhome.ca> and <theedengroupofcompanies.ca>
Complainant: Eden Care Communities Management, Inc.
Registrant: Kevin Douglas Klassen
Registrar: Promo People Inc.
Panel: The Honourable Neil Anthony Brown, Q.C. (Chair), Michael Erdle, FCI Arb, C. Arb., C., Med., and
Peter L. Michaelson, Esq., FCI Arb., C.Arb.
Service Provider: British Columbia International Commercial Arbitration Centre

DECISION

OVERVIEW

1. This matter concerns a dispute between the Complainant and the Registrant regarding the registration of and use of the domain names <reginalutheranhome.ca> and <theedengroupofcompanies.ca> (“the disputed domain names”).
2. The British Columbia International Commercial Arbitration Centre (“BCICAC”) is a recognized service provider to the CIRA Domain Name Dispute Resolution Policy (“the Policy”) of the Canadian Internet Registration Authority (“CIRA”).
3. This is a proceeding under the CIRA Domain Name Dispute Resolution Policy (the “Policy”), in accordance with the CIRA Dispute Resolution Rules (the “Rules”).
4. The Complainant claims that the Registrant registered the disputed domain names in breach of the Policy and asks for an order that they should be transferred to it, which the Registrant denies.

THE PARTIES

1. The Complainant in this proceeding is Eden Care Communities Management Inc. of B-107 Albert Street, Regina, SK S4R 2N3, Canada (“the Complainant”).
2. The Registrant in this proceeding is Kevin Douglas Klassen of 3504 Green Moss Lane, Regina SK S4V 1L5, Canada (“the Registrant”).

REGISTRATION OF THE DISPUTED DOMAIN NAMES

The disputed domain names were registered by the Registrant on October 2, 2017. The Registrar of the disputed domain names is Promo People Inc.

PROCEDURAL HISTORY

According to the information provided by BCICAC:

- (a) The Complainant filed a Complaint with respect to the disputed domain names in accordance with the Policy on December 4, 2017.
- (b) The Complaint was reviewed and found to be administratively compliant. By letter and confirmatory email dated December 5, 2017, BCICAC as service provider confirmed administrative compliance of the Complaint to the parties and, as Notice in accordance with Rules 2.1 and 4.3, forwarded a copy of the Complaint to the Registrant together with its Schedules.

- (c) The Registrant filed his Response, in compliance with the Policy and the Rules, with the Centre on December 12, 2017.
- (d) The Registrant's Response was delivered to the Complainant on December 13, 2017.
- (e) The Registrant's Response contains a claim for costs, as permitted by Paragraph 11.1 of the CIRA Rules and the Complainant filed its Response to the claim for costs on December 18, 2017.
- (f) On December 21, 2017, BCICAC appointed The Honourable Neil Anthony Brown, Q.C. (Chair), Michael Erdle, FCI Arb., C. Arb., C. Med., and Peter L. Michaelson Esq., FCI Arb., C. Arb. as panelists. Each of the panelists has signed an Acceptance of Appointment as Arbitrator and Statement of Independence and Impartiality.
- (g) The Panel has reviewed all of the material submitted by the Complainant and is satisfied that the Complainant is an eligible Complainant under the Policy and the Rules by virtue of the incorporation of the Complainant as a corporation in Canada.

FACTS

The facts set out below are taken from the Complaint and the Response, together with related exhibits. Where there are factual matters in dispute they are dealt with elsewhere in this decision.

The Complainant is a company that was incorporated in Canada on February 4, 2011 and it in turn operates a group of other companies and various facilities and programs in the city of Regina in Saskatchewan. The facilities and programs are the Regina Lutheran Home, Eden Suites, The Community Day and Wellness Center, Milton Heights, Broadway Terrace, Saplings Early Learning Child Care Centre, Eden Care at Home and the Regina Lutheran Hospital Chaplaincy. As part of its activities, the Complainant relies on two trademarks, REGINA LUTHERAN HOME and EDEN CARE COMMUNITIES.

The Registrant is a resident of Regina. He states that he is a member of the Regina Lutheran Home's Family Resident Council. Carrie Klassen, the Registrant's spouse, was the Chairperson of that Council. He also states that his mother-in-law is a resident of one of the Complainant's facilities. The Registrant has taken an interest in the various activities of the Complainant and he prepared a report, dated July 13, 2017, analysing those activities and raising various questions about their management.

As part of his interest in the above matters, the Registrant registered the disputed domain names on October 2, 2017. Both of the disputed domain names resolve to a website related to another domain name of the Registrant, namely <reginalutheranhome.com>, which carries at the present only limited information to which reference will be made later in this decision.

A dispute has arisen between the parties concerning the disputed domain names and their use. The Complainant maintains that the "primary intention" of the Registrant is to "depreciate the goodwill of the Complainant and to use the Disputed Domain Names as collateral in an effort (to) extort money from the Complainant."

The Registrant denies this, maintains that he has every right to register and use the domain names as he has and that he has been motivated by concern for the residents of the facilities and good faith.

CONTENTIONS OF THE PARTIES

A. THE COMPLAINANT

The Complainant submits as follows:

I. CANADIAN PRESENCE REQUIREMENTS

The Complainant satisfies the Canadian presence requirement of paragraph 1.4 the Policy as the Complainant is a corporation pursuant to The Non-Profit Corporation Act 1995 (Saskatchewan) and a registered charity pursuant to the Income Tax Act (Canada). Complainant operates the facilities and programs in Regina, Saskatchewan.

2. THE REGISTRAR

The Registrar of record in respect of the disputed domain name registrations is Promo People Inc.

3. THE COMPLAINANT'S RELEVANT TRADEMARK RIGHTS AND THEIR USE BY THE COMPLAINANT IN ITS BUSINESS

The Complainant relies on two trademarks, REGINA LUTHERAN HOME ("the RLH mark") and EDEN CARE COMMUNITIES ("the Eden Mark").

Each of the marks is a trade name of the Complainant and hence a "Mark" within the meaning of paragraph 3.2(a) of the Policy.

The Complainant submits evidence of the use of the RLH mark since 1963 and of the Eden Mark since 2011, both being prior to the registration of the disputed domain names on October 2, 2017.

The Complainant also claims common law trademark rights in REGINA LUTHERAN HOME since at least as early as 1963. The Registrant does not dispute Complainant's use of or rights to this mark.

The Complainant also claims common law trademark rights in EDEN CARE COMMUNITIES since at least as early as 2011.

The Complainant also relies on Applications made in Canada for registered trademarks for REGINA LUTHERAN HOME, REGINA LUTHERAN HOME and DESIGN, and EDEN CARE COMMUNITIES. These applications were filed after the domain names were registered.

4. GROUNDS ON WHICH THE COMPLAINT IS MADE

Confusingly similar

The disputed domain name <reginaluthcranhome.ca> is confusingly similar to the Complainant's RLH mark because it is identical to the Complainant's RLH mark.

The disputed domain name <theedengroupofcompanies.ca> is confusingly similar to the Complainant's Eden Mark because it includes the distinctive term "Eden" and clearly refers to the Complainant.

No Legitimate Interest

The Registrant has no legitimate interest in the disputed domain names.

The Complainant is required to produce some evidence that the Registrant has no legitimate interest in the disputed domain names. In that regard the Complainant submits that there is no factual basis on which the Registrant could bring himself within the criteria for a legitimate interest set out in paragraphs 3.4 (a), (b), (c), (e) or (f) of the Policy. Accordingly, if the Registrant is to have a legitimate interest in the domain names, it must be by virtue of paragraph 3.4(d), relating to using a domain name in good faith in association with a non-commercial activity including, without limitation, criticism, review or news reporting.

First, the Complainant submits that the Registrant has not acted in good faith. The Complainant relies on correspondence from the Registrant (Schedule S to the Complaint) and other indicia of bad faith (Schedule R to the Complaint).

Secondly, the Claimant submits that the Respondent registered the disputed domain names for a purpose that goes beyond that of criticism as his primary intention was to depreciate the goodwill of the Complainant and to use the domain names in an effort to extort money from the Complainant.

In support of those propositions, the Complainant relies on the allegations of bad faith conduct to deny the Registrant's legitimate interest in the domain names.

In any event the Registrant could have registered a different domain name for criticism. Instead, he acted with malice and in bad faith. His actions were not good faith criticism as under paragraph 3.4(d).

Bad Faith

Paragraph 3.5 of the Policy defines bad faith but other matters may be relied on as well as the specified indicia. In that regard the Complainant relies on the fact that the Registrant registered the domain names primarily to disrupt the Complainant's business and to extort money from the Complainant.

That the domain names never resolved to active websites suggests that the Registrant may have been motivated by the potential resale of the domain names.

The Registrant has indicated that he intends to post potentially defamatory information about the Complainant, its board of directors and its CEO, as is seen from Schedule R to the Complaint.

The Registrant has also registered two other domain names reflecting the name of the Complainant's CEO.

Thus, the Registrant has acted in bad faith and was ultimately seeking financial gain beyond the cost of registering the domain names and was intending to attempt to sell the domain names to the Complainant.

Prior decisions

The Complainant also relies on several prior domain name decisions that are set out in the Complaint.

5. THE REGISTRANT'S RESPONSE TO THE COMPLAINT

A. Are the Domain Names in Question Confusingly Similar?

The domain name "TheEdenGroupOfCompanies.ca"

While the Registrant's domain name "TheEdenGroupOfCompanies.ca" and the Complainant's legal name share the same word "Eden", the word "Eden" is by itself a very common name that on its own is not confusing. It is probably not even available to trademark in Canada.

Based on Google searches by the Registrant, the Registrant does not believe that any person searching the internet for the Complainant's websites will be confused by the existence of the Registrant's domain "TheEdenGroupOfCompanies.ca".

The Registrant's websites have an "Under Construction" greeting page. A copy of this page is attached to the Response as Schedule 2. The prominent message included on the greeting page includes the following directive:

"If you would like to visit the Eden Group and their web pages regarding the RLH please visit ... <http://web.edencarecommunities.com/property/regina-lutheran-home>".

Once temporary legal restrictions have been removed, the snapshots of the home page of the Registrant's website that "TheEdenGroupOfCompanies.ca" would be re-directed to are attached to the Response as Schedule 3.

The website also carries the following prominent message:

"... this website has no affiliation with the Eden Care Communities Inc. or the Regina Lutheran Home itself. If you would like to visit that company's web pages please "click here"."

That hyper-link takes interested readers to the Complainant's website via the internet address <http://web.edencarecommunities.com>.

The Registrant does not believe that the Registrant's domain name "TheEdenGroupOfCompanies.ca" is Confusingly Similar to any internet search that a 3rd party would utilize in an attempt to visit any of the Complainant's corporate websites or web pages. If by remote chance that was to happen, the Registrant believes that the resulting messages on the Google search results and the greeting message on the Registrant's website's homepage will allow for the errant party to quickly access the Complainant's corporate web pages.

The domain name "ReginaLutheranHome.ca"

The Registrant agrees that the <reginalutheranhome.ca> domain name is confusingly similar to the REGINA LUTHERAN HOME mark as the operating name of the Complainant's senior care home facility located in Regina, Saskatchewan.

However, the Registrant submits that he has undertaken adequate measures to ensure that any errantly arriving 3rd party to the Registrant's web pages will not be confused and can be redirected effortlessly to the Complainant's website.

The Registrant believes that these good faith efforts to redirect errant searches mitigate any possible damages to the Complainant arising from the Registrant's ownership of the domain name "ReginaLutheranHome.ca".

B. Does the Registrant have Legitimate Interest in the Domain Names?

The Registrant acknowledges that he does not meet the requirements for "legitimate interest" other than those in paragraph 3.4(d).

The Registrant submits that he does meet the requirements of section 3.4(d) in that he has used and intends to use the domain name in Canada in good faith in association with a non-commercial activity including, without limitation, criticism, review or news reporting.

The Registrant submits that the legitimate interest arises from good faith intentions to use the Disputed Domains/website only for a non-commercial activity of criticism or review of the Complainant's activities and/or news reporting of issues related to the Complainant in the local media.

In very detailed submissions, the Registrant says this interest relates to concerns raised by the Regina Lutheran Home's Family Resident Council (the "Council"), of which he is a member and his spouse is a former Chairperson, and from a financial report (the "Report") he prepared and delivered it to the Council on July 13, 2017. The Report was also delivered to the Complainant, the Saskatchewan Provincial Government, the media, and several other 3rd-parties that the Registrant believed would be interested.

The Complainant (via its CEO or legal counsel) delivered four written correspondences relaying their general thoughts and concerns about the accuracy of the report, and about statements included in the report that they allege were defamatory to their CEO, their Director of Finance, their independent external auditors, and their tax lawyers. Each time, the Registrant or the Council delivered a response that attempted to explain or elaborate on the areas of concern held by the Complainant.

The Registrant made several offers of executing a confidentiality agreement so that the Registrant could complete a detailed analysis of the Complainant's non-public financial data and management reports. The end goal of the Registrant's review of this data was so that the Report could have any material errors (if any) corrected. The Registrant made the offer to complete this analysis for zero compensation as the Registrant's only goal was to ensure that the Report was 100% materially accurate.

Discussions between the Registrant and the Complainant over their differences regarding the Report came to an end with the criminal complaint made by the Complainant on September 22, 2017.

A description of the correspondences between the Registrant and the Complainant over the past several months can be found with the Registrant's official written statement made to the City of Regina Police Department made on October 14, 2017. The statement was made as part of the complaint brought to the Police's attention by the Complainant in late September 2017.

The Registrant felt it was necessary to register the disputed domain names and launch the related websites to keep the unanswered questions raised by the Report, in the public eye, with the end goal that the media and/or concerned government officials of the Saskatchewan Government would take heed of all the issues it raised.

The Registrant has continued to interest the local media in this matter.

As further support and evidence of the Registrant's Legitimate Interest in the domain names, he attaches a letter from his spouse, the prior Chairperson of the Council that describes the issues between the Council and the

Complainant, and why it is critical that the ownership of the domain names in question remains with the Registrant. The Registrant says he has registered the disputed domains and taken on the responsibility of creating and maintaining the websites in question to “continue to shine a needed light on the outstanding issues that still exist” between the Council and the Complainant.

All of the Registrant’s work to-date has been completed without any financial compensation whatsoever. He says: “The end goal of the Council and the Registrant is the further enhancement of the lives of loved ones living at the Regina Lutheran Home. With all of the volunteer efforts expended to-date by the Registrant, it should be clear to the Centre that the Registrant most definitely has a good-faith Legitimate Interest in the disputed domain names.”

C. Did the Registrant Register any Domain Name in Bad Faith?

The Registrant did not register the domain names in question for any of the purposes listed in Section 3.5 of the Policy.

With respect to the purported acts of bad faith specifically listed in the Complaint, the Registrant disagrees with the Complainant’s statements as follows:

“(a) the Registrant acquired the Registrations primarily for the purpose of disrupting the business of the Complainant and to extort money from the Complainant.”

The Registrant says he has taken reasonable efforts to ensure that any person at the Registrant’s website whose goal was actually to visit the Complainant’s websites is redirected as easily as possible. Prominent messages state that the Registrant’s website has no affiliation with the Complainant and redirect searchers to the Complainant’s websites by hyperlink.

The Registrant insists there have been no attempts to extort any monies by the Registrant. The Registrant says he intends to utilize the websites in perpetuity for the sole purpose of bringing public attention to the outstanding issues that arose out of the Report issued to the Council as well as other more recent concerns of the Council. As evidence of that intent, the Registrant refers to portions of the website disclosed in Schedules 3 and 11 to the Response and the emails sent to the Complainant’s legal counsel and Board of Directors attached as Schedule 6 to the Response.

Registrant believes that the Complainant is being disingenuous with their complaint in general regarding the Domains being registered in bad faith. On September 22, 2017, the Registrant sent a series of two emails to the legal counsel and to each Director of the Complainant to notify them of the Registrant’s original intent with the creation of the websites. The second of the two emails shows the good faith of the Registrant when the Registrant notifies the Complainant that all public comments presented for posting by outside viewers of said websites will first be provided to the Complainant for review/approval before any public comments are posted on the said websites. The Registrant states in the email that “I (the Registrant) want to ensure that both sides to any story are presented to the readers of my web pages and those testimonials”.

(b) the Registrant is not making a legitimate fair use of the Disputed Domain Names. The Disputed Domain Names redirect internet traffic to the “www.reginalutheranhome.com” website. The fact that the Disputed Domain Names were never active websites acquired the Registrations primarily for the purpose of disrupting the business of the Complainant and to extort money from the Complainant (sic).”

The Registrant decided to redirect all traffic from his various websites relating to the Complainant, to one central location at <ReginaLutheranHome.com>. Many of the Council’s concerns and issues with the Complainant are interrelated to each other and the Registrant believes that it makes sense to consolidate all of the information and issues onto one central website.

The Registrant has never had any intention to disrupt the Complainant’s business and as described throughout the Response, the Registrant believes that the Registrant has taken reasonable efforts to ensure that people wishing to visit the Complainant’s websites are redirected to those actual websites as quickly and effortlessly as possible.

The Registrant reiterates that he has no intention to extort monies from the Complainant.

“(c) the Registrant has indicated that he intends to post potentially defamatory information about Eden Care Communities, its board of directors, and its CEO, Mr. Alan Stephen (refer to Schedule R). It is plausible that the Disputed Domain Names were registered and acquired for the purpose to use such domain names as tools to extort money from the Complainant (refer to Schedule S).”

The Registrant states that he created his websites to document facts and materials relating to the Registrant’s dealings with the Council, the Eden Group, and its CEO. “All information will detail only true facts ...” He denies any intention to post defamatory information.

The Registrant says he has requested that the Complainant identify specific statements that the Complainant alleges are defamatory. To-date, the Complainant refuses to provide evidence of such statements despite having almost five months to provide said statements.

The Registrant denies any intent to utilize the domain names for the purpose of extortion. He says the “extortion” letter referred to in the Complaint relates to a request for compensation for the Registrant having to “waste” his own personal time writing frequent detailed and time-consuming replies to the Complainant’s frequent generalized complaints regarding the Report.

The Registrant first asked for “financial compensation” for the Complainant wasting the Registrant’s time answering frivolous generalized complaints and threats on September 19, 2017, in a formal Law Society of Saskatchewan complaint the Registrant had filed against the Complainant’s legal counsel.

“(d) the Registrant has registered the following domain names (www.alanstephen.com; www.alanstephen.ca), which are the legal names of the CEO of the Eden Group of Companies, Alan Stephen, and were simply registered to redirect to www.reginalutheranhome.com.”

One of the biggest issues existing between the Registrant and the Complainant is the pending civil lawsuit that the Complainant is in the process of filing against the Registrant. On August 28, 2017, the Complainant notified the Registrant that one of the main items of that civil lawsuit was the issue regarding the Registrant’s republication in the Report of an October 23, 2010, news story by the SudburyStar.com relating to the CEO of the Complainant.

The Registrant disagrees with the implication that the Complainant’s mere filing of formal written complaints/statements to the Institute of Professional Accountants of Ontario and to the Regina City Police are proof that the Registrant was guilty of acting in bad faith with respect to the domain names.

The Registrant states that the formal complaint filed with the Institute of Professional Accountants of Ontario and the Regina City Police by the Complainant was just part of a series of obstacles that the Complainant has attempted to put in front of the Registrant so that the Registrant would be discouraged from making public any additional information regarding any of the outstanding issues that remain between the Council and the Complainant. The Registrant denies all of the allegations in those complaints and says he has provided full answers to them to the Institute of Professional Accountants of Ontario and the Regina City Police

D. Bad Faith of Complainant

The Registrant states that the Complainant has filed the Complaint in an attempt to silence the Registrant in the Registrant’s attempt to keep in the public eye, all of the outstanding issues still existing between the Council and the Complainant.

The Registrant asks that the Complainant be required to reimburse the Registrant for certain costs related to the Registrant preparing for and writing the Response.

The Registrant engaged legal counsel to receive advice regarding issues surrounding the Complainant’s domain name claims/complaints. The total cost of the Registrant’s legal services regarding the Complainant’s domain name complaints was CA \$599.00 (a copy of the receipt for this bill is attached as Schedule 23 to the Response).

The Registrant believes that the Complainant filed the Complaint hoping that the time and potential legal cost to prepare the Response would further discourage the Registrant from fully defending the Registrant’s ownership of the Disputed Domains. The Registrant saved some “out-of-pocket” money by writing/preparing the Response himself, but that does not mean there was no “cost” to the Registrant in preparing the Response.

The Registrant's best estimate is that he spent approximately 25 hours preparing the Response. The Registrant asks the Centre to award the Registrant an hourly reimbursement rate of \$150.00, with the total cost to the Registrant for the time to prepare therefore totalling \$3,750.00.

The total reimbursement of costs that the Registrant is asking the Centre to award is \$4,349.00. **(This concludes the section of the decision dealing with the parties' contentions).**

DISCUSSION OF THE ISSUES

1. CANADIAN PRESENCE REQUIREMENTS

Paragraph 1.4 of the Policy provides that a complainant initiating a complaint must satisfy the Canadian Presence Requirements for Registrants in respect of the domain name that is the subject of the proceeding.

Paragraph 2 (d) of the Requirements confers Canadian presence on:

"... (d) A corporation under the laws of Canada or any province or territory of Canada."

The unchallenged evidence is that the Complainant is a corporation pursuant to The Non-Profit Corporation Act 1995 (Saskatchewan).

The Complainant has therefore satisfied CIRA's Canadian Presence Requirement for Registrants in respect of the disputed domain names and has standing to bring the Complaint.

2. REGISTRATION OF THE DISPUTED DOMAIN NAMES

- (a) The Registrant registered the disputed domain names on October 2, 2017 and the registrar of the domain names is Promo People Inc.
- (b) The Registrant of the domain names is Kevin Douglas Klassen.

3. GENERAL

The purpose of the Policy, as stated in paragraph 1.1, is to provide a forum in which cases of bad faith registration of .CA domain names can be dealt with relatively inexpensively and quickly.

Paragraph 3.1 of the Policy provides that

"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;
- (b) the Registrant has no legitimate interest in the domain name as described in paragraph 3.4; and
- (c) the Registrant has registered the domain name in bad faith as described in paragraph 3.5."

The Panel will now deal with each of the three elements.

CONFUSINGLY SIMILAR

As the Complainant correctly submits, it is required to prove that the disputed domain name is confusingly similar to a Mark in which the Complainant had rights prior to the date of registration of the disputed domain name and continues to have such Rights. The Complainant must therefore show that it has rights to a mark, that it had those rights before the domain name was registered, that it still has them and that the disputed domain name is confusingly similar to the marks on which it relies to establish that proposition.

The first question that arises is whether the Complainant has a “mark” on which it can rely for the purpose of this proceeding. The term “mark” is defined in the Policy as “a trade-mark, including the word elements of a design mark, or a trade name that has been used in Canada by a person,... for the purpose of distinguishing the wares, services or business of that person or predecessor or a licensor of that person... from the wares, services or business of another person; ...”.

The Complainant has adduced evidence which the Panel accepts, to support its proposition that it has two trade names, REGINA LUTHERAN HOME (“the RLH mark”) and EDEN CARE COMMUNITIES (“the Eden Mark”). The Complainant has given evidence of the use of the RLH mark since 1963 and of the Eden Mark since 2011, both being prior to the registration of the disputed domain names which was on October 2, 2017. The Panel accepts that evidence and finds accordingly.

The Complainant also claims common law trademark rights in REGINA LUTHERAN HOME since at least as early as 1963. In support thereof, the Complainant submits evidence of longstanding and continuous use of the mark.

The Complainant also claims common law trademark rights in EDEN CARE COMMUNITIES since at least as early as 2011. In support thereof, the Complainant submits evidence of longstanding and continuous use of the mark.

The Panel accepts the evidence given with respect to both of the claimed common law trademarks and finds that they have both been proven.

Accordingly, both REGINA LUTHERAN HOMES and EDEN CARE COMMUNITIES are “mark(s)” in which the Complainant had Rights prior to the date of registration of the Domain Name and continues to have such Rights.

The Registrant has not challenged any of those formal matters.

Nor has he challenged that the <reginalutheranhome.ca> domain name is confusingly similar to the REGINA LUTHERAN HOME mark and the Panel so finds.

He does, however, submit that the <thedengroupofcompanies.ca> domain name is not confusingly similar to the EDEN CARE COMMUNITIES mark.

Pursuant to paragraph 3.3 of the Policy, a domain name will be found to be confusingly similar with a mark if it so nearly resembles the same in appearance, sound or in the ideas suggested so as to be likely to be mistaken for the mark. The test to be applied when considering “confusingly similar” is one of first impression and imperfect recollection and the “dot-ca” suffix should be excluded from consideration (see *Coca-Cola Ltd. v. Amus B. Hennau*, BCJAC Case No. 00014).

It will be noted that the Policy requires a comparison to be made between the domain name and the trademark and not with anything else. Having regard to that principle, the Panel finds that the disputed <thedengroupofcompanies.ca> domain name is confusingly similar to the Complainant’s EDEN CARE COMMUNITIES mark. That is so because an objective bystander, asked to make a comparison between the domain name and the trademark, would note that the term Eden is the first and dominant part of the mark and that the domain name may well be invoking the companies or facilities conducted in Regina and known collectively as the Eden Care Communities, two of which carry the name Eden as part of their names, Eden Suites and Eden Care at Home. The words “groupofcompanies” therefore does not differentiate the domain name from the mark and may exacerbate the potential confusion, as it is reasonable for internet users interested in the Complainant to contemplate it as a group of companies.

Accordingly, the Panel finds that the disputed domain names are, respectively, confusingly similar to the Complainant’s two marks, as they so nearly resemble the marks in appearance, sound and in the ideas suggested so as to be likely to be mistaken for the marks in which the Complainant had Rights prior to the registration date of the disputed domain names and in which it continues to have such Rights.

The Complainant has thus made out the first of the three elements that it must prove.

NO LEGITIMATE INTEREST IN THE DOMAIN NAME

Under the Policy, there is a positive obligation on the Complainant which is described as an “onus”, which is that the Complainant must provide some evidence that “... (c) the Registrant has no legitimate interest in the domain name *as described in paragraph 3.4 (emphasis added)*.” Each of the sub-paragraphs of paragraph 3.4 describes a situation which, if made out, would give the Registrant a legitimate interest in the domain name. The obligation on the Complainant is therefore to show some evidence that the Registrant cannot make out any of the successive tests in the sub-paragraphs of 3.4.

The Panel then has to decide whether the evidence as a whole shows on the balance of probabilities that the Registrant has a legitimate interest in the domain name. That is so because the final paragraph of 4.1 states that:

“Even if the Complainant ... provides some evidence of (c), the Registrant will succeed in the Proceeding if the Registrant proves, on a balance of probabilities, that the Registrant has a legitimate interest in the domain name as described in paragraph 3.4.”

It is clear from the Policy that if the Registrant claims that it has a legitimate interest in the domain name, it may try to bring itself within any of the specified criteria, but it may also rely on any other fact or argument it wishes to rely on to show that it has a legitimate interest and the Panel must then decide if the registrant has made out its case on the balance of probabilities.

The first task of the Panel is therefore to see if the Complainant has provided “some evidence” that the Registrant has not brought himself within any of the specific criteria in paragraph 3.4.

Here, there must be a distinction made between the provisions of paragraph 3.4(d) and the other sub-paragraphs of paragraph 3.4. That is because the Complainant’s position is that it is clear the Registrant cannot establish a legitimate interest under sub-paragraph 3.4(a), (b), (c), (e) and (f). The Registrant agrees with that submission as he submits that

“The only circumstance described in the before mentioned Paragraph 3.4 that relates to the Registrant is the one described in Paragraph 3.4(d) of the Policy:...”

In any event, the Panel has considered the Complainant’s case on each of these sub-paragraphs and finds that the Complainant has provided “some evidence” that the Registrant does not qualify as having a legitimate interest under any of these paragraphs on the facts as they are known and the Registrant has not sought to show that they do confer such a legitimate interest.

It thus remains to be seen if the provisions of sub-paragraph 3.4(d) give rise to a legitimate interest.

Sub-paragraph 3.4(d)

This sub-paragraph provides that a legitimate interest will arise when

“(d) the Registrant used the domain name in Canada in good faith in association with a non-commercial activity including, without limitation, criticism, review or news reporting;...”

The Complainant says that the Registrant’s motivation in registering and using the domain names was to depreciate the goodwill of the Complainant and to use the domain names as collateral in an effort to extort money from the Complainant. The Registrant says that he comes within “criticism” and maintains that he at all times acted in good faith.

Sub-paragraph 3.4(d) of the Policy casts a wide net, as it enables a panel to look not only at the way the domain name has been used, but how it has been used “in association with” the criticism at issue. The paragraph also has a provision at the end providing that: ‘In paragraph 3.4(d) “use” by the Registrants includes, but is not limited to, use to identify a web site.’ Applying those provisions to the present case, the Panel finds that it is entitled to look at the overall presentation by the Registrant in his various submissions and communications and it has done so.

The Panel is therefore in a position to reach some conclusions on whether that material is, first, criticism and, secondly, expressed in good faith.

The question must first be resolved; however, what is criticism, as the word is used in paragraph 3.4 (d)?

The Panel intends to follow the approach taken by the panel in the decision cited by the Complainant, *Carleton University Students' Association Inc. v. Justin Essiambre* (CIRA 00153, 2010), that to qualify as criticism under 3.4(d), the criticism should be a "legitimate, objective form of criticism of the Complainant's services...".

To that test, the Panel would add that its understanding is that the panel in *Carleton* was intending to convey the notion of criticism as it usually understood, meaning passing judgement, even severe judgement and faultfinding, but adding the additional requirement that the criticism must be legitimate and objective. Thus, the criticism should not be illegitimate, meaning that it should not be abuse masquerading as criticism and it should not be lacking in objectivity. Such a working definition, the Panel believes, meets the twin objectives of giving a broad scope to freedom of speech without allowing domain names to be used for behaviour on the internet which would generally be regarded as unacceptable or inappropriate.

At this point, the Panel wishes to emphasise that such a working definition, properly applied, restricts only the extent to which a domain name may be expressed and used and in no way restricts freedom of speech. That is so because the issue of criticism giving rise to a legitimate interest only arises if a panel has already found, as in the present case, that the domain name is identical or confusingly similar to a complainant's trademark; the entire problem can be avoided by using a domain name that is not the same as or confusingly similar to a trademark.

The Panel wishes to add two additional comments before deciding whether the material at issue is valid criticism under paragraph 3.4(d). The first comment is that it is not necessary or desirable for the panel to analyse in its decision all of the material and to pass judgment on it as if it were a court of law. Such issues may eventually have to be decided by a court of law with wider powers than this panel and many of the questions raised so far may have to be resolved by that means. The role of the Panel is to rule on the point taken by the Registrant, namely that it has engaged in protected criticism and to do so, as the Policy itself states, "relatively inexpensively and quickly."

The second additional comment is that where, as will be so in some cases and is so in the present case, some of the material in question is criticism as described above and some of it is not, a panel may make an assessment of whether the substance, taking the material as a whole, and on balance, is criticism.

With that background the Panel's conclusion is that although some parts of the material may, properly expressed, have amounted to legitimate and objective criticism, a lot of it does not, and the Panel is not satisfied on the balance of probabilities that the Registrant has shown that it has used the domain names in good faith in association with "criticism" within the meaning of paragraph 3.4(d).

The Panel is unable to find that the Registrant's material as a whole meets the required test, for several reasons.

The Registrant relies heavily on a 60 page letter (including attachments) dated July 13, 2017, and sometimes referred to as a Report, which is the result of investigations he made into the Complainant's various facilities and activities and appears to be part of a personal campaign against the Complainant and its management and directors. The Report certainly contains criticism, in the strict sense of the word, but in substance and taken as a whole it goes beyond that. In substance, it is an attack on Complainant's management and directors. The content of the Report as a whole is not criticism but is, in substance, a long assertion by the Registrant that the Complainant is obliged to account to him, in the terms that the Registrant lays down, for all of its deliberations and decisions. This theme of demanding information, even on matters of policy and strategy, is repeated in later materials to the extent that the Registrant has, rather than criticise the Complainant, virtually demanded access to all of its internal workings and processes, demands that go, in the opinion of the Panel, beyond legitimate and objective criticism. Indeed, there is little if any in the way of objectivity in the materials presented to the Panel.

Much of the material related to the former employment of the CEO of the Complainant, Mr. Alan Stephen, some 10 years previously, a matter that could only have, at best, peripheral significance to the running of the Complainant's facilities in 2017 and scarcely a matter of legitimate criticism of the Complainant at the present. The Registrant's argument seems to be that if Mr. Stephen had been dismissed in 2007, it would reflect adversely on the Complainant to have employed him in 2017. However, the Registrant himself notes that this matter is:

“not really relevant when assessing the business soundness of the Eden Group’s new ventures/commitments entered into during the past couple of years.”

Undeterred by the fact that the issue is “not really relevant”, the Registrant has continued to focus on it to the extent that it has come perilously close to being a vendetta and culminating in the Registrant registering another domain name <alanstephens.ca> to pursue the issue. The Panel mentions this as a significant illustration of the point that a great deal of the material emanating from the Registrant is lacking in objectivity and in the particular case in point, irrelevant and not easily coming within the generally accepted meaning of criticism. Moreover, on the Registrant’s assertion that it is not relevant and yet is pursued, it tends to suggest that the issue is not being raised in good faith but with some other motivation.

Again, the Panel has to note that the disputed domain names are thus not being used for a purpose that is legitimate criticism of the Complainant.

Accordingly, the Panel finds that the Registrant has not made out the case that he has used the domain names in association with criticism.

Good faith

Under sub paragraph 3.4(d), the Registrant must also show that in using the domain names for criticism he did so in good faith in association with the criticism.

The Panel is not satisfied that the Registrant used the domain names in good faith in association with the criticism. That is so because:

- (a) There is no compelling reason for the Registrant having registered domain names that in one case was identical to the relevant trademark of the Complainant and in another case was confusingly similar to the relevant trademark. If it were the case that the Registrant was motivated solely by a desire to engage in legitimate criticism, his domain names could have reflected that fact, as is frequently done.
- (b) The whole undertaking engaged in by the Registrant was persistent and unrelenting and, as has already been noted, seems to have been more akin to asserting the Registrant’s entitlement and rights and attacking the Complainant under the guise of objective criticism;
- (c) The personalisation of the issues concerning Mr. Stephen suggests again that there was some motive behind the Registrant’s actions other than the well-being of the Complainant’s facilities and those who use them;
- (d) The repeated claims for compensation suggest that this was or became a motivation in itself;
- (e) The Registrant’s preparedness to make untrue statements to the potential witness, Mr. Nadorozny that he, the Registrant, was a member of a board of directors seeking to fill a position for which Mr. Stephen was being considered and to make the same untrue statement to a journalist, the avowed purpose of which was to encourage those persons to make statements they might otherwise have not;
- (f) Finally, but very importantly, the Panel is concerned about the final demand made by the Registrant which was conveyed in a letter dated 20 September 2017, from the Registrant to the Complainant’s legal counsel. That 5 page letter contains a proposal by the Registrant to settle the dispute or ‘Close this File Right Here’ in return for an apology from the Complainant, the terms of which are set out, and the payment of CA \$2,500 to the Registrant. The proposal included the Registrant’s “never updating the Council or any other third-party of the Eden Group of Companies financial results going forward indefinitely.” In other words, Registrant was prepared to abandon the entire project on which he had embarked for an apology and \$2500. It should be noted that when the apology and the payment were not forthcoming the Registrant registered the domain names only shortly thereafter, so the offer that he made has considerable probative value. Moreover, there is no suggestion in the letter that the \$2500 was as compensation or some sort of reimbursement of costs or expenses; it was on its terms simply the price that the Registrant would accept in return for going away. This casts serious doubt on the Registrant’s motivation in registering the domain names in October and using them as he did and tends to suggest that he did not register and use them in good faith.

REGISTRATION IN BAD FAITH

The Panel also has to consider whether the disputed domain name was registered in bad faith. In that regard, the Panel agrees with the submission of the Complainant that, consistent with the decision in *Canadian*

Broadcasting Corporation/ Sociétés Radio-Canada v. William Quon, CIRA Dispute Number 00006 (April 8, 2003), pp.13-14, surrounding circumstances may be considered in assessing whether the disputed domain name has been registered in bad faith. In the present case, the surrounding circumstances are the activities of the parties from the beginning of the dispute.

By clause 3.1 of the Policy, the Complainant is obliged to prove that:

“(c) the Registrant has registered the domain name in bad faith as described in paragraph 3.5.”

The Panel’s view is that the facts of the case do not bring it within any of the criteria specified in paragraph 3.5 for finding bad faith.

Bad Faith in general

It should be noted, however, that bad faith registration may be shown by conduct other than the conduct specified. This is made clear by Section 3.5 providing as it does, that “(f) for the purposes of paragraphs 3.1(c) ... any of the following circumstances, *in particular but without limitation*, if found by the Panel to be present, shall be evidence that a Registrant has registered a domain name in bad faith:...”(emphasis added). This provision is included, as bad faith conduct may take many forms and it is frequently used to find bad faith registration.

The Panel has examined all of the evidence carefully and has conclude that it shows on the balance of probabilities that the Registrant registered the domain name in circumstances that can fairly be described as bad faith within the generally accepted meaning of that expression.

The Panel refers to and repeats the matters referred to above and showing in its opinion a lack of good faith and finds that the Registrant registered the disputed domain names in bad faith.

The Complainant has thus made out the third of the elements that it must establish.

CONCLUSION AND DECISION

The Panel finds that the constituent elements of the Policy have been made out and that the Complainant is entitled to the relief it seeks. The Panel will therefore order that the disputed domain names be transferred to the Complainant.

COSTS

In the Response the Registrant makes an application for an order that the Complainant reimburse him for costs relating to the Response. The claim includes \$599.00 for obtaining legal advice and he also asks for costs for time spent preparing the Response.

He includes the following claim:

“As an independent retail securities trader, missing part of the trading day on December 7th and all of the trading day on December 8th without a doubt, “cost” me money in missed opportunities to trade the capital markets.”

The total claimed is itemised as follows:

Time Needed to Draft and Finalize the Response (in hours) 25.0
Hourly Rate Assumed \$150.00
Sub-Total \$3,750.00
Out-of-Pocket re: Legal Fees \$599.00
Total Reimbursement Amount Being Sought \$4,349.00

The Complainant opposes this application.

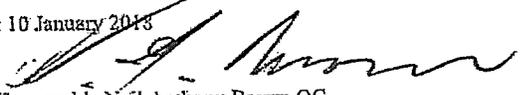
Under paragraph 4.6 of the Policy, the Panel has the power to award costs if the Panel finds that the Complaint has been brought in bad faith, i.e. bad faith in the Complainant. The Panel finds that the Complaint has not been brought in bad faith.

The Registrant's application is therefore rejected.

ORDER

The Panel directs that the registration of the Domain Names <reginalutheranhome.ca> and <theedengroupofcompanies.ca> be transferred from the Registrant to the Complainant.

Date: 10 January 2013


The Honourable Neil Anthony Brown QC
Chair


Michael Erdle Esq., FCI Arb, C. Arb., C. Med.
Panelist


Peter L. Michaelson Esq., FCI Arb, C. Arb.
Panelist