

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

**Complainant:** Vessel Assist Association of America, Inc.

**Complainant’s Counsel:** Rui M. Fernandes  
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**Registrant:** Michael MacKenzie

**Registrant’s Counsel:** Donna L. Kidd Law Corporation  
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**Disputed Domain Name:** vesselassist.ca

**Registrar:** Canadian Domain Name Services Inc.

**Panel:** Robert A Fashler, Denis N. Magnusson (Chair), Hugues G. Richard

**Service Provider:** Resolution Canada

**DECISION**

**Parties**

The Complainant is Vessel Assist Association of America Inc. of Alexandria Virginia, U.S.A. [“Vessel Assist”] The Registrant is Michael MacKenzie of Vancouver B.C. who is the sole proprietor of a B.C. business named Marine Assist International [“Marine Assist”]

**Disputed Domain Name and Registrar**

The disputed domain name is **vesselassist.ca** which was registered on September 10, 2003. The Registrar is Canadian Domain Name Services Inc.

**Procedural History**

The Complainant filed the Complaint with the Provider, Resolution Canada, which found the Complaint in compliance with the CIRA *Domain Name Dispute Resolution Rules* (“Rules”) and the Provider transmitted it to the Registrant.

The Registrant filed a Response.

The parties’ respective nominations of Panel members and the Provider’s nomination of a Chair resulted in a three person panel composed of Robert A Fashler, Denis Magnusson (Chair), and Hugues G. Richard

**Relief Requested**

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

## **Background Facts**

### **The Complainant**

The Complainant was first established in California in 1983. The Complainant first adopted the name Vessel Assist in 1985 and was incorporated under the name Vessel Assist Association of America, Inc. under California incorporation law effective June 1, 1985. The Complainant's business includes the providing of on-the-water assistance, including boat towing, to boat owners. The nature of its business is reflected in the advertising slogan used by the Complainant, "The Boat Owner's Auto Club".

The Complainant registered, in the U.S., a design trademark including the words "Vessel Assist Association of America" in July, 1991. The Complainant also registered, in the U.S., a word trademark consisting of the words "Vessel Assist" in March, 1993. The Complainant registered a further design trademark in the U.S. consisting of a tow boat image marked with the words "Vessel Assist" in September, 1995. The Complainant registered the domain name "vesselassist.com" on April 14, 1998.

By the late 1990's the Complainant was offering its services off the west coast of the U.S. from California to Washington State. By the year 2000 the Complainant was operating in British Columbia.<sup>1</sup>

On September 10, 1999 the Complainant filed an application with the Canadian Intellectual Property Office ["CIPO"] to register the word mark "Vessel Assist" as a trademark. On May 8, 2003 CIPO granted registration of this mark, but the registration included a disclaimer by which the trademark registrant (the Complainant) disclaimed the exclusive right to use the word "vessel" apart from the trademark as registered.

In 2003 Vessel Assist was acquired by The Boat Owners Association of the United States ["Boat U.S."]. After this acquisition Vessel Assist continued to operate under its own name.

### **The Registrant**

In 1986 the Registrant began business as a sole proprietorship in Vancouver under the name Marine Assist International ["Marine Assist"]. From its founding to date Marine Assist has offered "emergency towing and salvage services as well as non-emergency services to commercial and recreational boaters" on the west coast of Canada.

The Registrant registered the domain name "marineassist.ca" effective July 2, 2001.

The Registrant registered the domain name at issue in these proceedings, **vesselassist.ca**, effective September 10, 2003.

### **The Dispute**

The Complainant reports that it discovered the Registrant's registration of the domain name **vesselassist.ca** in the Spring of 2006. The Complainant also discovered at that time that

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<sup>1</sup> Affidavit of Adam Wheeler, Vice-President of Boat U.S., Schedule 1, Complaint.

accessing the Registrant's web site located at **vesselassist.ca** resulted in the user being redirected to the Registrant's web site located at the domain name **marineassist.ca**.

At the web page to which Internet users were automatically redirected Internet users found a web page describing and offering the boat towing and boat rescue services, in waters off the B.C. coast, of the Registrant's Marine Assist business. However at that page Internet users also found on the bottom left corner under the heading "Confusion at Sea" a photograph of a boat with the words "Vessel Assist" very clearly visible on the side of the boat. The boat in the photograph appeared to be identical to boats the Complainant identified as providing its services. Under the same heading the following text also appears: "On a routine tow in the Strait of Georgia we were confronted by a Vessel Assist Association of American boat with a frustrated and misguided crew. The following video clip illustrates the kind of spirit that does nobody any good out on the water". There was also a link to be clicked to access the video. The Complaint noted that at that link: "[t]here is then a video clip, which does not explain the surrounding circumstances of the incident, and during which you cannot understand what the Vessel Assist operators are saying."

In July 2006 the Complainant attempted to deliver a solicitor's "cease and desist" letter to the Registrant at the recorded address for the Registrant. In that letter the Complainant stated its view that the Registrant's registration of the **vesselassist.ca** domain name contravened the CIRA domain name registration Policy as the domain name was confusingly similar to the Complainant's earlier registered Canadian trademark **Vessel Assist**, and that the Registrant should therefore cease using the domain name and should agree to transfer ownership of the domain name to the Complainant.

Not receiving a reply from the Registrant satisfactory to the Complainant, the Complainant filed the Complaint which commenced these proceedings.

### **Eligible Complainant**

An eligible Complainant under the CIRA Policy includes any person who is the owner of a trademark registered in the CIPO, to which trademark the dispute relates, Policy 1.4. The Complainant is the registered owner of the trademark "**Vessel Assist**", registered in the CIPO effective May 8, 2003, before the registration of the domain name **vesselassist.ca** by the Registrant effective September 10, 2003. On this basis the Complainant is an eligible Complainant under the Policy.

### **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

#### Marks in Which Complainant Had and Has Rights

Policy 3.2(c) states a “Mark” includes a trademark registered in the CIPO. As noted the Complainant registered the trademark “**Vessel Assist**” for “Recreational vessel towing services” in the CIPO effective May 8, 2003 which was prior to the Registrant’s registration of the domain name **vesselassist.ca** at issue in these proceedings. That trademark remains on the CIPO register, registered to the Complainant.

The Complaint states that the Complainant began to offer boat towing and rescue services in BC waters “in or about [the year] 2000”. The Response suggests that the Complainant may offer services in B.C. waters beyond recreational vessel towing services. Any services that the Complainant offered in B.C. before the registration of its trademark in 2003, and which it may offer beyond the scope of the services for which its trademark is registered, constitute the use of a common law or unregistered trademark in Canada for those services. Such common law or unregistered trademark is also Mark upon which the Complainant can rely under the Policy. See Policy 3(a).

#### Confusingly Similar

Policy 3.4 defines “Confusingly Similar”:

A domain name is Confusingly Similar to a Mark if the domain name so nearly resembles the Mark in appearance, sound or the ideas suggested by the Mark as to be likely to be mistaken for the Mark.

In assessing similarity, the dot-ca suffix of the domain name is ignored, Policy 1.2. The registered trademark upon which the Complainant bases its Complaint is “**Vessel Assist**” and the domain name without the dot-ca suffix is **vesselassist**. The only differences are the capitalization and space between the two words of the trademark which do not appear in the domain name. There is ample authority in earlier CIRA domain name dispute decisions that minor elements such as capitalization, punctuation, spacing, etc. which differentiate a trademark and a domain name are usually of little relevance in deciding the issuing of confusing similarity. See for example: *Canadian Broadcasting Corporation / Societe Radio-Canada v. William Quon* (CIRA Dispute Resolution Decision # 00006), *Coca-Cola Ltd. v. Amos B. Hennan* (CIRA Dispute Resolution Decision # 00014), *Sleep Country Canada Inc. v. Pitfold Ventures Inc.* (CIRA Dispute Resolution # 00027) and *Reitmans Canada Limited v. Pitfold Ventures Inc.* (CIRA Dispute Resolution # 00032). In this case the domain name is virtually identical and so the domain name is likely to be mistaken for the Mark.

### b) Bad Faith

The 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 obtain. The Complainant submitted argument with respect to the definition of bad faith in Policy 3.7(c) which sets out this circumstance of bad faith:

(c) the Registrant registered the domain name . . . primarily for the purpose of disrupting the business of the Complainant . . . who is a competitor of the Registrant. [emphases added]

### Competitor

To succeed in showing the Registrant's Bad Faith the Complainant must establish that the Registrant is a *competitor* of the Complainant. The Complaint and Response clearly indicate that the Complainant and the Registrant compete in the business of supplying towing services to recreational boats off the coast of B.C.

### Disrupting the Business of the Complainant

Persons who were familiar with the Complainant's Vessel Assist service in the U.S. might have reason to enquire whether the Complainant offered its services in Canadian waters off the coast of B.C. Such persons might research this question by looking for a dot-ca Vessel Assist domain name. Such research would lead to the Registrant's **vesselassist.ca** web site. Accessing that site would result in automatic redirection to the Registrant's **marineassist.ca** web site through which the Registrant offered services in competition with the services offered by the Registrant. There is ample authority, with which this Panel agrees, in earlier decided CIRA domain name dispute cases that using a domain name confusingly similar to a Complainant's trademark with the effect of diverting potential customers to a web site of a competitor of the Complainant constitutes disrupting the business of the Complainant.

### Purpose

Policy 3.7(c) requires the Panel to make a finding about the Registrant's purpose in registering the domain name.

The Registrant's Response states that the Registrant's web site located at **vesselassist.ca** had been under construction since the registration of that domain name. Further, the Registrant states that:

. . . [I]t was and has always been my intention to use this site for non-profit purposes of educating and informing the public on issues such as marine standards and safety and on procedures for assisting disabled vessels for mariners. Much of this educational material and marine assist information is currently on my Marine Assist International website ([www.marineassist.ca](http://www.marineassist.ca)) under the heading "Safety and Standards". . . . I have intended at all material times to move or transfer the educational information under the heading "Safety and Standards" from my Marine Assist International website ([www.marineassist.ca](http://www.marineassist.ca)) to the vesselassist.ca domain name site and have now instructed my webmaster to expedite such transfer . . ."<sup>2</sup>

Whatever the Registrant's intentions about some future use of its **vesselassist.ca** domain name, the fact is he used the disputed domain name for a site which automatically redirected Internet users accessing that site to the Registrant's **marineassist.ca** site. At the latter site the boat towing and rescue service, in B.C. waters, of the Registrant's Marine Assist business were advertised and offered, which services were directly competitive with services offered by the Complainant under its Vessel Assist Mark. Inferences about an actor's intentions can be drawn from the effect of the actor's action, when the effect is a reasonably foreseeable result of the action. It is reasonable to infer that the Registrant's use of the domain name informs us as to the Registrant's purpose in registering that domain name. The Registrant's use of the domain name to divert would-be customers for the Complainant's services to his business indicates his purpose in registering the domain name, that is, to disrupt the business of his competitor, the Complainant.

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<sup>2</sup> Affidavit of Michael MacKenzie, Appendix 1, Response.

### **Primarily**

Policy 3.7(c) requires that the Panel conclude that the Registrant registered the Confusingly Similar domain name *primarily* for the purpose of disrupting the business of the Complainant. Despite the Registrant's submissions about his possible future use of the domain name, his actual use was exclusively for the purpose of diverting would-be customers of the Complainant to his business. His primary purpose was to disrupt the business of the Complainant.

### **c) Legitimate Interest**

#### **Complainant's Burden**

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". The Panel finds that the Complainant has provided such evidence. The basis for that finding is made clear in the following section of these reasons, considering the Registrant's burden with respect to Legitimate Interest.

#### **Registrant's Burden**

The final paragraph of Policy 3.6 states:

Even if the Complainant proves [confusingly similarity] and [bad faith] and provides some evidence of [no legitimate interest], 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 3.6.

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 six specific interests set out in Policy 3.6(a) to (f). The Panel views only three of those subparagraphs as potentially relevant in this case:

**3.6 Legitimate Interests.** The Registrant has a legitimate interest in a domain name if, and only if, before the receipt by the Registrant of notice from or on behalf of the Complainant that a Complaint was submitted:

- (b) the Registrant used the domain name in Canada in good faith in association with any wares, services or business and the domain name was clearly descriptive in Canada in the English or French language of: (i) the character or quality of the wares, services or business; . . . ;
- (c) the Registrant used the domain name in Canada in good faith in association with any wares, services or business and the domain name was understood in Canada to be the generic name thereof in any language;
- (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;

#### **(d) Good Faith Non-Commercial Use**

The Registrant states in his Response that he has instructed his webmaster to change the content of the web site located at the domain name **vesselassist.ca** to use "for non-profit purposes of educating and informing the public on issues such as marine standards and safety". There is no evidence that this instruction was issued before the Registrant became aware of the Complaint and the reasonable inference on the evidence is that this instruction was issued by the Registrant only after the Registrant became aware of the Complaint. Thus, the Registrant has not satisfied the requirement in Policy 3.7 that good faith non-commercial use of the domain name by the

Registrant must be proved to have occurred “*before* the receipt by the Registrant of notice from or on behalf of the Complainant that a Complaint was submitted” [Emphasis added].

**(c), (b) Generic Name, Clearly Descriptive**

In his Response, the Registrant submits that he can show a Legitimate Interest in the domain name **vesselassist.ca** under Policy 3.6(c) as the generic name of his business services, and/or under Policy 3.6(b), as a clear description of his business services. The Panel has considered only the claim under 3(b), clear description, as that consideration is also applicable to any issues which might be raised under 3(c), generic name.

The Registrant submits that his use of the **vesselassist.ca** domain name is clearly descriptive because his vessel assistance services are advertised at the **marineassist.ca** web site to which Internet users are redirected from the web site he created at **vesselassist.ca**. That submission overlooks the presence on the **marineassist.ca** web site of material that the Panel has described above in this decision and repeats here:

[U]nder the heading “Confusion at Sea” a photograph of a boat with the words “Vessel Assist” very clearly visible on the side of the boat [was displayed]. The boat in the photograph appeared to be identical to boats the Complainant identified as providing its services. Under the same heading the following text also appears: “[o]n a routine tow in the Strait of Georgia we were confronted by a Vessel Assist Association of American boat with a frustrated and misguided crew. The following video clip illustrates the kind of spirit that does nobody any good out on the water”. There was also a link to be clicked to access the video. The Complaint noted that at that link: “[t]here is then a video clip, which does not explain the surrounding circumstances of the incident, and during which you cannot understand what the Vessel Assist operators are saying.”

The presence of the above material on the **marineassist.ca** web site to which Internet users were redirected from the site at the **vesselassist.ca** domain name makes any further consideration of whether the Registrant could be seen to be using the disputed domain name, in the words of Policy 3.6(b), “in good faith in association with any . . . services or business [of which] the domain name was clearly descriptive”, unnecessary to arriving at a decision about Legitimate Interest. Use of the domain name to attack a competitor is not good faith use to describe one’s own business services. Thus, the Registrant has not shown that he used the disputed domain name in good faith as the generic name of his business services nor as a clear description of his business services.

**Status of Registered Trademark in Legitimate Interest Defence**

In addition to the foregoing, two of the three Panellists (the "Majority") hold the opinion that the Registrant has failed to prove that the domain name is either clearly descriptive, or understood in Canada as the generic name of, the wares, services or business in association with which the Registrant is using the domain name, for the following reasons.

The Complainant's trade-mark VESSEL ASSIST is registered in the CIPO. A trade-mark cannot be registered in Canada without undergoing thorough examination and the potential for opposition. The process addresses a variety of factors that might render a trade-mark unregistrable, including whether or not it is generic, clearly descriptive or deceptively misdescriptive.

Once a trade-mark passes through examination and issues to registration, it is presumed by law to be valid. See: *Caricline Ventures Ltd. v. ZZTY Holdings Ltd.*, 16 C.P.R. (4th) 484, 2001 FCT 1342; aff'd 22 C.P.R. (4th) 321, 2002 FCA 446. As well, section 19 of the *Trade-Marks Act* provides that:

"...the registration of a trade-mark in respect of any wares or services, unless shown to be invalid, gives to the owner of the trade-mark the exclusive right to the use throughout Canada of the trade-mark in respect of those wares or services."

The Complainant's trade-mark passed through examination. The Registrant did not oppose the application. The trade-mark issued to registration. By law, the registered trade-mark VESSEL ASSIST is presumed valid and the Complainant has the exclusive right to use it throughout Canada in association with the wares and services for which it is registered.

The *Trade-Marks Act* provides a specific method for invalidating a registered trade-mark on the basis that it is clearly descriptive or generic, namely expungement. Invalidity may also be raised as a defence in an infringement proceeding. However, the party seeking a finding of invalidity bears the onus of proving its case. The Registrant has not initiated expungement proceedings in relation to Complainant's trademark.

It is true that Policy 3.6 focuses on the Registrant's use of a domain name rather than the Complainant's use or registration of the same words. However, in the opinion of the Majority, a finding that a registrant's use is generic or clearly descriptive would have the same practical effect, as between the Complainant and the Registrant, as a finding that the Complainant's registered mark is invalid.

In the opinion of the Majority, subsections 3.6 (b) and (c) must be interpreted consistently with the principles of Canadian trade-mark law reviewed above. The Majority finds that the Registrant has failed to prove that its use of **vesselassist.ca** is either clearly descriptive, or understood in Canada as the generic name of, the wares, services or business in association with which the Registrant is using the domain name."

The third member of the Panel, the Chair, believes that this is not a case in which the issue raised by the two-member Majority of the Panel ought to be addressed.

The case addressed by the Majority is one in which the Complainant relies on a registered trademark as his Mark, which registered trademark is arguably clearly descriptive of the wares or services for which the trademark is registered. If the trademark is clearly descriptive it would mean that the CIPO made an error in registering the trademark. The *Trade-marks Act* provides that trademark registrations are only presumptively valid, and that registrations can be expunged by the Federal Court either as a defence to an infringement action or directly by notice of motion to expunge.<sup>3</sup>

The further features of the case raised by the Majority are first, that the Complainant has proved the Registrant's Bad Faith under Policy 3.6(c), registration of the domain name primarily for the

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<sup>3</sup> *Trade-marks Act*, ss. 57, 58, 18(1)(a), 12(1)(b)

purpose of disrupting the business of the Complainant, where that disruption takes the form of the Registrant using the disputed domain name to offer wares or services which compete with the Complainant's wares or services offered under the registered trademark. The second feature is that the Registrant claimed a Legitimate Interest in the domain name under Policy 3.6(b), a claim that he used the domain name in good faith as a clear description of the Registrant's wares or services offered at the domain name.

In the case before us, all Panelists have agreed that because the Registrant featured, on the web site located at the disputed domain name, an attack on the Complainant using the Complainant's trademark to identify it, the Registrant could not claim to be using the domain name simply as a good faith description of his own services. All Panelists agree that this is sufficient to dispose of this case and that the Panel must order the domain name transferred to the Complainant. The Chair believes no further issue need be considered. The Majority believe it wise and necessary to make the observations above on the role of trademark registration in domain name disputes.

The Chair agrees that, practically, on the facts presented in the vast majority of domain name disputes, there will be little or no scope or legal power for a Panel to question the validity of a trademark registration in the context of a dispute under the Policy. However, were it not for the presence on his web site of the Respondent's attack on the Complainant, the present case *might* have fallen within the narrow class of disputes under the Policy in which the validity of the trademark registration for the purposes of the Policy dispute would have to be considered.

The practical impact of the resolution of the issue considered here will be to determine who will bear the burden of taking action in the Federal Court if the validity of the trademark registration is to be challenged in court – the trademark registrant (Complainant) or the domain name Registrant. The Majority conclude that the burden should be on the domain name Registrant – the Registrant should launch a direct attack on the validity of the trademark registration by notice of motion under *Trade-marks Act*, ss. 57, 58. The Chair is not ready to agree with that conclusion on the basis of deciding this case, but thinks it preferable to await a factual case in which the issue must be addressed directly.

The Chair observes that the rights acquired by a trademark registration are not self-enforcing, that is, any other trader who thinks that the trademark registration is invalid, *e.g.* because it is clearly descriptive, is free to use that mark in a manner which would be infringement if the registration turns out to be valid and enforceable. The owner of the trademark registration would then be faced with the question and burden of bringing an infringement action in court, which the other trader could defend with a claim of registration invalidity. In some such cases the trademark registrant may choose not to launch an infringement action. The trademark registrant may fear that the invalidity defence would succeed and his trademark registration would be completely expunged. The trademark registrant might conclude that the better option is not to bring the infringement action – perhaps the other trader's use of the mark, though troubling, can be tolerated as it is geographically or product-line limited, *e.g.*, -- thus leaving the trademark registration on the register to be used to intimidate other traders who might back down when faced with the fact of the subsisting registration.

With respect to the use of marks as domain names, no dot-ca domain name can be used by any trader unless that domain name is registered to the trader under CIRA auspices. If a Panel refuses to consider the substance of a Policy 3.6(b) Legitimate Interest, clear description defence simply on the basis that the Complainant relies on a *registered* trademark, the Panel would appear to be denying traders-other-than-the-trademark-registrant an option always heretofore open to them in jurisdictions with trademark registration statutes, *i.e.*, simply use the mark and leave it to the trademark registrant as to whether the latter will risk a court action over that use. The Panel's decision would force the transfer of the domain name registration to the Complainant which would preclude the now former domain name Registrant from using the domain name. The Chair at least questions whether the Policy was intended to deny the Registrant the option of simply using a contestable mark and leaving the trademark registrant with the burden of bringing a court action – an option inherently available outside the domain name realm. The Chair finds some support for this view in the final paragraph of Policy 4.1 defining the onus on the Complainant to succeed:

“Even if the Complainant proves (a) [Confusingly Similar] and (b) [Bad Faith] and provides some evidence of (c) [no Legitimate Interest], 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 3.6.” [Emphases added]

The Chair wishes to stress the narrowness of observations just made. First, the observations apply to a very narrow set of cases on their facts. Second, the burden of proof on any claim of Legitimate Interest of clear descriptiveness in the face of a registered trademark is on the domain name Registrant, and that is not going to be an easy burden to satisfy. Third, a Panel decision in this form merely keeps the domain name in the hands of the Registrant for the time being. The Panel finding has no effect on the trademark registration itself. The trademark registrant is left with the same options as in parallel circumstances outside the domain name realm. One option will be to bring an infringement action, which if successful will secure the domain name. The other option, if it appears tactically preferable when weighing the prospects of the domain name owner's trademark invalidity defence, will be to tolerate the domain name use and to attempt to continue to enforce the registered trademark otherwise as best as the registrant can.

### **Conclusion**

The Complainant has satisfied the Complainant's burden under the Policy of establishing Confusing Similarity, Bad Faith, and that the Registrant does not have a Legitimate Interest in the domain name. The Registrant has failed to establish under the Policy that he has a Legitimate Interest in the domain name.

### **Order**

For the reasons set out above, the Panel grants the relief requested by the Complainant and orders that the domain name registration for **vesselassist.ca** be transferred to the Complainant.

**Date:** 31 July 2007

**Signed:**

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Robert A Fashler

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Denis N. Magnusson (Chair)

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Hugues G. Richard