

IT.CAN NEWSLETTER/BULLETIN

Canadian IT Law Association

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Part 1 of this newsletter is prepared by Professors [Teresa Scassa](#), [Chidi Oguamanam](#) and Stephen Coughlan of the Law and Technology Institute of [Dalhousie Law School](#). Part 2 of this newsletter is prepared by Professors [Pierre Trudel](#) and [France Abran](#) of the L.R. Wilson Chair in Information Technology and Electronic Commerce Law, Université de Montréal.

Les auteurs de la première partie du présent bulletin sont les professeurs [Teresa Scassa](#), [Chidi Oguamanam](#) et Stephen Coughlan de l'Institut de droit et de technologie de la [Faculté de droit de l'Université de Dalhousie](#). Les professeurs [Pierre Trudel](#) et [France Abran](#) de la Chaire en droit des technologies de l'information et du commerce électronique L.R. Wilson de la Faculté de droit de l'Université de Montréal ont rédigé la seconde partie du présent bulletin.

Part 1

Administrative Law

May v. Ferndale Institution (2005 SCC)

The appellants are prison inmates serving life sentences for murder and manslaughter. On the basis of a computer software reclassification device—security reclassification scale—(SRS) that assessed the security/risk rating of the appellants, they were determined to fall within medium security rating. Consequently, they were involuntarily moved from minimum security facility to medium security without any allegation of fault or misconduct. Dissatisfied, the Appellants applied to BC provincial superior court for *habeas corpus* and *certiorari* seeking to be transferred back to minimum security facility. They also demanded the scoring matrix for the SRS but were told by the respondent that it was not available. The Chambers judge affirmed the jurisdiction of the provincial court in reviewing federal inmates' transfer but dismissed the application on the basis that the transfer had not been made arbitrarily. Dismissing, the inmates' appeal, the Appeal Court opined that the Chambers judge should have declined jurisdiction in regard to *habeas corpus* since the Appellants adduced no reasonable excuse for not pursuing judicial review in a Federal Court. Before the hearing of their appeal at the Supreme Court, the Appellants brought a motion for

submission of new evidence—a scored copy of SRS and a current version of the scoring matrix.

The Supreme Court held (upholding the appeal) that inmates have the option to challenge the legality of administrative decision of Corrections Officers affecting their residual liberty either in provincial court via *habeas corpus* or in a Federal Court by way of judicial review. However, according to the Court, the “correctional authorities may change how a sentence is served, including transferring an inmate to higher security institution, without necessarily violating principles of fundamental justice” (para. 82) so long as such decision is made in a manner that “strikes the proper balance between the interests of the inmates and that of the state in the protection of the public” (para. 83).

The Court found that “the applicable statutory duty of disclosure in respect of the transfer decisions is “substantial and extensive” (para. 100). Continuing, it held that “the duty to disclose the SRS generated information used in making the transfer decision is substantial. Therefore, if the scores generated by the computerized tool played a role [as was the case] in the transfer decisions, its scoring matrix should have been disclosed” (para 112). The Court found that the Respondent concealed crucial information and its dealing with the Appellants on this count fell not only below applicable statutory (*Corrections and Conditional Release Act*) but also Charter standards in relation to the principles of fundamental justice. Admitting the new evidence, the Court declared the transfer null and void for want of jurisdiction and ordered the affected Appellant be returned to minimum security prison.

Copyright Law

The Federal Court of Appeal has rendered its decision in *Kraft Canada Inc. c. Euro Excellence Inc.* In this case, Kraft Canada sued a Canadian distributor of Toblerone and Cote d'Or chocolate bars for copyright infringement. The distributor had, at one

time, been the authorized distributor of these bars in Canada. When the distribution agreement came to an end, he continued to import and distribute the chocolate bars through unauthorized channels. The bars were genuine Toblerone and Cote d'Or chocolate bars, but they were effectively "grey goods" in Canada.

Because of the very limited recourse in trademark law against grey marketing activities, Kraft chose to sue in copyright. The argument was that the bars bore logos which were protected by copyright law, and the importation and sale of the bars bearing these logos violated s. 27(2) of the *Copyright Act*. The defendant in response made several challenges to the validity of the copyrights, and further argued that s. 27(2) did not apply. The challenges to the validity of the copyrights were unsuccessful at the trial level, and the Federal Court of Appeal made short work of them as well, essentially finding that the trial judge had committed no errors.

Copyright in the Toblerone design trademark was registered by Kraft Foods Schweiz in 2002, and copyright in the Cote d'Or design trademarks was registered in 2002 by Kraft Foods Belgium. Kraft Canada Inc. entered into a licence agreement with these two companies whereby each granted KCI an exclusive licence to produce, reproduce or adapt the works in Canada, and to "use and publicly present the Works in association with the manufacture, distribution or sale in Canada of confectionary products" (clause 2.01).

Section 27(2)(e) of the *Copyright Act* provides that it is an infringement of copyright for any person to "import into Canada for the purpose of doing anything referred to in paragraphs (a) to (c)" a copy of a work which "the person knows or should have known infringes copyright or would infringe copyright if it had been made in Canada by the person who made it." Subparagraphs (a) to (c) deal with acts such as selling or offering to sell and "distributing either for the purpose of trade or to such an extent as to affect prejudicially the owner of the copyright." Desjardins J.A. cited *CCH Canadian* to the effect that three elements "must be proven to ground a claim for secondary infringement: (1) the copy must be the product of primary infringement; (2) the secondary infringer must have known or should have known that he or she is dealing with

a product of infringement; and (3) the secondary dealing must be established; that is, there must have been a sale." (*CCH Canadian*, para 81) She noted that the reproduction of the designs on the product labels in Europe was likely done by someone with licence to do so. Thus, the reproductions on the labels in Europe were not themselves infringing. However, she took the view that proof on an initial infringement is not necessary when one is dealing with s. 27(2)(e) of the *Copyright Act*. In her view, in the case of a copy imported under the circumstances set out in s. 27(2)(e) the law recognizes importation to be an act of infringement. Her authority for this is s. 2 of the *Act*, where the definition of "infringing" states: "*The definition includes a copy that is imported in the circumstances set out in paragraph 27(2)(e) and section 27.1 but does not otherwise include a copy made with the consent of the owner of the copyright in the country where the copy was made*". Since the reproduction of the images on the wrappers would have infringed copyright in Canada if it had been done in Canada by anyone other than KCI, which held the exclusive licence, then the importation of the labels bearing the designs violated s. 27(2)(e).

[Comment on the issues raised in this case at IT.CAN blog](#)



Criminal Law

R. v. C.K [2005] O.J. No. 545 (O.C.J.) (hyperlink not available)

A year after their 43 year old mother's death in the bathtub was determined to be accidental drowning, the Defendants, aged 17 and 18, were charged with first degree murder. One of the Defendants confessed her active role in the murder to her childhood friend. According to her, she and her sister were motivated to embark on an elaborate conspiracy (with the aid of a boyfriend to one of the sisters) to kill their mom. They were motivated mainly by frustration over their mother's chronic alcoholism.

Their childhood friend to whom the confession was made approached the police with the information. Consequently, the police provided the young man with a car wired for audio and video. Under judicial authorization, for almost one month, he

then facilitated the subsequent recording of graphic description by each Defendant of the detailed plot to kill their mom and their role in the plot's execution by way of getting her drunk, drugged and drowned in her bathtub. They also revealed how they staged an alibi and other precautions to cover their crime. Upon the arrest of the Defendants, a computer in their residence was seized by warrant and analyzed. It showed records of on-line chatting the week before the murder which contained a plan to drown the Defendants' mother in the bathtub after she was intoxicated. Also, the analyses showed that the computer has been used to access websites dealing with the effects of alcohol and Tylenol 3—substances implicated in the drowning death of the deceased.

After finding the case as essentially one of conspiracy, the Court affirmed that “where a conspiracy or common criminal enterprise is alleged, acts and statements of one in the furtherance of that common design are admissible against all those proven to be members of the common enterprise” (para. 10). The Court found that for the most part, the Crown's case rested on documented MSN internet chat, videotaped conversations with one of their friends as set up by the police. Establishing the integrity of these hi-tech evidence is important for their credibility and for the conviction of the Defendants. In this regard the Court found that record of on-line chat was well preserved. An officer with appropriate expertise, removed the hard drive and write-protected it and had it copied or imaged onto a large server in the tech crime unit ensuring that it had no connection with the outside world and only accessed by a handful of officers (para. 19). Relying on physical evidence, expert opinion, etc the Court found the Defendants were sufficiently implicated by the record, even though “it may strictly be unnecessary to identify which Defendant made which statement” (para. 21).

The Court proceeded to analyze the truthfulness of the statements in the sense described in order to satisfy itself that there was no coincidence. According to the Court, “[u]nless her [the deceased's] death was an astonishing macabre coincidence, the inference is unmistakable that the internet-chat discussions represented real plan that was carried out in accordance with its terms” (para. 25). On the video recorded conversations, the Court had no hesitation in holding that it was procured by a credible witness and that those conversations “made no suggestions

that the death was bizarre and extraordinary coincidence” (para. 31). The Defendants' description of their mother's “convulsion at death corresponds to the reality as described by the pathologist” (para. 34). Because of the Court's conviction about the integrity of the internet chat and video records, it downplayed the effect of oral statements made by Defendants to their friends and a number of other damaging testimonies at the trial. For the Court, at best those merely reinforced the internet chat and video records. The Court surmised: “the two Defendants set out to commit the perfect crime but instead they created the perfect prosecution” (para 70).

Domain Names

In *Toronto-Dominion Bank v. TM WatchDog*, sole panelist Michael D. Manson considered a dispute over the domain name tdvisa.ca.

Manson found that the complainant was the holder of a significant number of TD trademarks that had been in use dating back as far as 1969 in relation to a wide range of services. The registrant's tdvisa.ca domain name blended the TD trademark with VISA, which is a trademark held by another corporation, Visa International Service Association. The complainant was entitled to use the visa trademark in association with its TD mark under licence with VISA. The tdvisa.ca domain name resolved to a site that “gives the impression that the website is associated or connected with the Complainant, or at least authorised by the complainant in respect of use of the Complainant's TD trade-mark”. (at para 11) The site also provided links to the web sites of competitor banks.

The hybrid nature of the [tdvisa](http://tdvisa.ca) mark, referred to by Manson as a “co-branded” trademark, raised an issue that had not previously been considered under the CDRP. Manson found there was a likelihood of confusion, notwithstanding that “one should not dissect a trade-mark when considering likelihood of confusion”. He ruled that the registered domain name was confusingly similar to both the TD mark and the TD mark used in association with the VISA mark. He stated “I am able to come to this conclusion, in part, having regard to the amendments to the *Trade-marks Act* made in 1993 that specifically permit a licensee to institute an infringement action under the *Trade-marks Act* in respect of licensed

rights provided in respect of registered trade-marks.” (at para 12) Manson also noted that the likelihood of confusion is increased by virtue of the TD mark’s status as a well known mark.

Manson determined that there was no evidence to suggest that the registrant had a legitimate interest in the domain name. He also found that the complainant had met their burden to establish that the domain name had been registered in bad faith. Manson stated that: “[w]hile I am not prepared to consider a single instance of a registrant registering a trade-mark of another party as a “pattern” of conduct, the fact that the Registrant has done so in at least one other case, combined with the clear and convincing evidence that the Registrant has registered the domain name tdvisa.ca primarily for the purpose of disrupting the business of the Complainant, by directing potential customers of the complainant to a website that advertises and offers for sale competing products of competitors..” leads to a finding of bad faith. (at para 16)

The decision is interesting at the remedial level. Normally, where a complainant is successful, the panel orders that the registration of the domain name be transferred to the complainant. Here, Manson declined to make such an order, noting that “the domain name makes use of both the Complainant’s TD registered trade-mark(s) and Visa International’s registered trade-mark VISA, in which the Complainant has no ownership” (at para 18). In consequence, Manson ordered the Registrar to cancel the registration of tdvisa.ca.

[Comment on the issues raised in this case at IT.CAN blog](#) 

Evidence

In *Sycor Technology Inc. v. Kiaer*, Master MacLeod commented on the impact of technology on the production of documents in litigation. The motion he was dealing with related to the production of documents contained in an electronic database. He had been advised that the cost of printing and copying the documents would amount to \$50,000.00. Master MacLeod noted:

Dealing with databases or other electronic documents requires procedural collaboration

and a healthy dose of pragmatism and common sense. The volume of information now available electronically may well be the greatest challenge to face civil litigators in the coming years. If thousands of documents exist and must be reviewed by counsel on both sides, the cost of litigation will be driven to astronomical proportions. At the very least their should be consideration given to electronic production of documents that are required and perhaps the use of computer experts to identify what exists and what is truly relevant to the issues that are actually in dispute.

He referred counsel to [draft guidelines on e-discovery](#) released by the Discovery Task Force in Ontario, as well as to other sources on the issue.

[Comment on the issues raised in this case at IT.CAN blog](#) 

Privacy

In *ENCANA CORP. v. DOUGLAS* THE ALBERTA COURT OF Appeal considered the interrelationship of *PIPEDA*, *PIPA* and s. 21 the *Canada Business Corporations Act*. Section 21 of the *CBCA* requires corporations, on request by a shareholder, to provide a list setting out “the names of the shareholders of the corporation, the number of shares owned by each shareholder and the address of each shareholder as shown on the records of the corporation.” (s. 21 *CBCA*). Douglas was a shareholder seeking to identify lost shares in EnCana his ultimate objective was to “unite the shares with their rightful owner for a fee” (para 6). He applied under s. 21 *CBCA* for a list of shareholders. EnCana resisted the application, arguing that Douglas’ intended use was not an authorized use under s. 21(9) *CBCA*, and arguing as well that the disclosure of this information would violate *PIPEDA* and *PIPA*.

On the privacy issue, the court noted that both *PIPEDA* (which would apply to activities outside Alberta) and *PIPA* (which would apply to commercial activities within Alberta) were essentially the same with respect to the key applicable provisions. They noted that both statutes placed similar obligations on corporations to protect personal information, and both allowed for the collection, use or disclosure of

personal information without consent in specific circumstances. One such circumstance is where “the disclosure and use are provided for by another statute or regulation—in other words, personal information may be disclosed or used without consent if authorized by law.” (at para 25). The Court noted that “If the *CBCA* authorizes the release of the information to Douglas, then disclosure by EnCana is allowed under both *PIPEDA* and *PIPA*.” (at para 26) The Court went on to note that “A corporation cannot hide behind general privacy law to deprive shareholders access to the securities register, nor can it use such concerns to fish for information.” (at para 26) The Court ruled that the use which Douglas planned to make of the information simply had to be “a matter relating to the affairs of the corporation”, and reuniting shares with shareholders fell within the meaning of that phrase, notwithstanding the fact that he intended to do so for a fee.

of Ontario Exemption Order” exempting health information custodians to which *PHIPA* applied from the application of part 1 of *PIPEDA* in respect of the collection, use and disclosure of personal health information that occurs within the Province of Ontario in the course of commercial activity.

OFFICE OF PRIVACY COMMISSIONER RELEASES 2005-06 **Privacy Research Awards**

In December 2005, the Privacy Commissioner of Canada, Jennifer Stoddard, announced privacy-related research awards totaling \$148,850 in value to five Canadian academic/research establishments and not-for-profit groups. The funding for the winning projects is sourced from the Contributions Program of the Office of the Privacy Commissioner for research into emerging privacy issues. This year’s award is the second of its kind under this program which was established in 2002 to support research by not-for-profit groups and educational institutions aimed at furthering “the development of a national research capacity in Canada in the broad spectrum of issues impacting privacy”. Funded research projects under the 2005-2006 awards include projects dealing with data brokerage phenomenon, use of DNA samples, employers’ workplace surveillance trends and tendencies, and compliance and enforcement evaluation of the *PIPEDA*.

IN NOVEMBER 2005, PURSUANT TO PART 1 OF THE *PIPEDA*, specifically paragraph 26(2)(b) thereof, the Governor in Council determined that the Ontario *Personal Health Information Protection Act* of 2004 (*PHIPA*) is substantially similar to *PIPEA*. Consequently, the Governor in Council issued the “Health Information Custodians in the Province

2^{ème} partie

Régulation des technologies de l'information

En vue de célébrer son dixième anniversaire, la revue juridique *Lex Electronica* (vol. 10, no 3, hiver 2006) publie plusieurs points de vue sur l'évolution des courants de pensées quant aux incidences des nouvelles technologies sur le droit. Ce numéro spécial est l'occasion de porter un regard rétrospectif mais également prospectif sur le droit comme mode de régulation des technologies de l'information et sur le rôle, les modalités et les fonctions du droit au regard de la mondialisation.

- BOURCIER, Danièle, *Comment s'accorder sur les normes ? Le droit et la gouvernance face à Internet*
- BURKERT, Herbert, *Internet Law—An Attempt At A Polemic Retrospective*
- DURELL, Karen Lynne, *Intellectual property protection for plant derived vaccine technology: here they come are we ready or not?* (Prix *Lex Electronica*—Dixième Anniversaire)
- GAUTRAIS, Vincent, *Libres propos sur le droit des affaires électroniques*
- GEIST, Michaël, *Looking at The Future of Canadian Copyright in The Rear View Mirror*
- GÉLINAS, Fabien, *Interopérabilité et normalisation des systèmes de cyberjustice : Orientations*
- GUIBAULT, Lucie, *Paradigm Shift in European Intellectual Property Law? From Microsoft to Linux*
- KATSH, Ethan, *Online Dispute Resolution: Some Implications for the Emergence of Law in Cyberspace*
- MACKAAY, Ejan, *What's so Special About Cyberspace: Reflections on Elkin-Koren And Salzberger*
- MARX, Gary T., *Soft Surveillance: The Growth of Mandatory Volunteerism in Collecting*

Personal Information—“Hey Buddy Can You Spare a DNA?”

- POULLET, Yves, *Les aspects juridiques des systèmes d'information*
- VAN GYSEGHEM, Jean-Marc, *Les modifications de la relation médecin/patient au contact de la télématique médicale: quelques réflexions à bâtons rompus*
- VERMEYS, Nicolas, *Réflexion juridique autour de la notion de désinformation eu égard à la transmission de métavirus*

Ordonnances d'exemption – Loi sur la radiodiffusion

La loi sur la radiodiffusion prévoit un processus d'exemption de certaines catégories d'entreprises de radiodiffusion lorsque l'activité de ces dernières ne soulève pas d'enjeux significatifs. Les ordonnances d'exemption sont un outil souple et flexible, mis à la disposition du CRTC. Les entreprises visées par l'ordonnance d'exemption peuvent s'adapter aux situations sans pour autant se trouver complètement exclues du champ d'application de la politique de la radiodiffusion qui préside à leur développement. Il s'agit, selon l'auteur, d'une approche flexible qui permet de régler tout en ne réglementant pas tout à fait.

TRUDEL, Pierre, *Quand l'État invite la radio-TV à ignorer la loi*, *medialex*, no 4, décembre 2005, pp. 188-189.

Gouvernement en ligne – Québec

Une conférence ministérielle portant sur le gouvernement en ligne a eu lieu à Québec les 4 et 5 novembre 2005 et portait sur l'état d'avancement du gouvernement électronique au pays et sur les défis qui se présentent aux administrations publiques provinciales, territoriales et fédérale. Une déclaration commune a conclu cette rencontre.

Dans son numéro de janvier, le bulletin *e-Veille* présente trois points traités lors d'un atelier technique tenu au cours de cette conférence : les portails de services publics-provinciaux, les expériences américaines de collaboration

intergouvernementale ainsi que la confiance dans le gouvernement en ligne et la sécurité de l'information. Le bulletin rend également compte de l'expérience de l'Estonie, le premier pays à instaurer le vote en ligne à grande échelle.

L'édition de janvier 2006 du bulletin *e-Veille* du ministère des Services gouvernementaux du Québec.

Commerce électronique et résolution des litiges en ligne

Cet ouvrage, issu d'une thèse dirigée par Gabrielle Kauffman-Kohler à l'Université de Genève, défend la thèse selon laquelle le recours aux institutions de résolution en ligne des conflits est en train de générer de véritables ordres juridiques non étatiques. Les sites adhèrent à des règles qui leur sont propres, établissent des mécanismes d'exécution des décisions, comme cela se fait déjà en matière de noms de domaine. L'application de ces normes non étatiques s'effectue sans avoir à recourir nécessairement au droit et aux tribunaux étatiques.

Dans sa préface, Kauffman-Kohler observe que ce qui se joue dans ces matières, ce sont les fondements du droit international privé via une mise en perspective de l'incidence du territoire et du droit de l'arbitrage. Elle ne manque pas d'évoquer les mots d'Henri Lévy-Bühl selon lesquels « un conformisme trop rigide est un obstacle sérieux aux progrès humains. »

SCHULTZ, Thomas, *Réguler le commerce électronique par la résolution des litiges en ligne*, Bruxelles, Bruylant, 2005, « Cahiers du Centre de recherches Informatique et Droit » no. 27, 671p.

Marques de commerce et noms de domaine – France

Un titulaire d'une marque de commerce pour des services relatifs aux voyages, *Locatour*, poursuit en contrefaçon une société qui avait enregistré le nom de domaine *locatour.com*, ouvrant sur un site inactif. La marque *Locatour* avait aussi été déposée pour des services de télécommunications, suivant une pratique voulant entre autres protéger la marque contre les cybersquatters. Le titulaire de marque *Locatour* obtient partiellement gain de cause en cour d'appel.

La cour de cassation casse la décision en rappelant la rigueur des règles applicables en matière de contrefaçon. Un nom de domaine ne peut contrefaire par reproduction ou par imitation une marque antérieure, peu importe que celle-ci soit déposée pour désigner des services de télécommunications, que si les produits et services offerts sur ce site sont soit identiques, soit similaires à ceux visés dans l'enregistrement de la marque et de nature à entraîner un risque de confusion dans l'esprit du public. La contrefaçon suppose une similitude de services désignés par un même signe et il ne peut y avoir contrefaçon puisque le nom de domaine ici n'est pas exploité.

Pour Manara, cette décision ne fait que réaffirmer les règles du droit des marques. Et que, sauf exception, « le titulaire d'une marque ne peut qu'échouer s'il assigne en contrefaçon le propriétaire d'un nom qui ne l'exploite pas ». La stricte réservation d'un nom de domaine est sauve d'une action fondée contrefaçon. Il conclut que les titulaires de marque devront changer d'arme : « la bonne vieille action en responsabilité sera d'un utile secours pour la nouvelle ère procédurale qui s'ouvre dans les conflits entre marques et noms de domaine »

MANARA, Cédric, *Première décision de la Cour de cassation dans un litige marque/nom de domaine*, juriscom.net, 7 janvier 2006.

Cour de cassation, chambre commerciale, 13 décembre 2005, no 04-10143.

À signaler

Ezee ATM L.P. c. 9116-5423 Québec inc., 2005 IJCan 47497 (QC C.S.), 20 décembre 2005. L'entente ici qui prévoit l'achat de guichets bancaires automatiques à être installés dans les locaux d'un restaurant n'est pas un contrat d'entreprise ou de service auquel s'applique l'article 2125 C.c.Q et ne peut être résiliée unilatéralement sans motifs. Il s'agit d'un contrat innomé, *suis generis*, auquel les règles générales en matière de contrat s'appliquent.

Anne DEBET, *Internet et vie privée : la protection et la liberté du mineur internaute*, *Communication/Commerce électronique*, no. 12, Décembre 2005, 11-17.

This newsletter is intended to keep members of IT.Can informed about Canadian legal developments as well as about international developments that may have an impact on Canada. It will also be a vehicle for the Executive and Board of Directors of the Association to keep you informed of Association news such as upcoming conferences.

If you have comments or suggestions about this newsletter, please contact Professors Teresa Scassa, Chidi Oguamanam and Stephen Coughlan at it.law@dal.ca if they relate to Part 1 or Pierre Trudel at pierre.trudel@umontreal.ca if they relate to Part 2.

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Le présent bulletin se veut un outil d'information à l'intention des membres d'IT.Can qui souhaitent être renseignés sur les développements du droit canadien et du droit international qui pourraient avoir une incidence sur le Canada. Le comité exécutif et le conseil d'administration de l'Association s'en serviront également pour vous tenir au courant des nouvelles concernant l'Association, telles que les conférences à venir.

Pour tous commentaires ou toutes suggestions concernant la première partie du présent bulletin, veuillez contacter les professeurs Teresa Scassa, Chidi Oguamanam et Stephen Coughlan à l'adresse électronique it.law@dal.ca ou en ce qui concerne la deuxième partie, veuillez contacter Pierre Trudel à pierre.trudel@umontreal.ca.

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