

**TO THE SUPREME MOOT COURT FOR INTELLECTUAL PROPERTY APPEALS**

BETWEEN:

**HEALTHWARD CANADA.**

Appellant

and

**VAXCO Ltd.**

Respondent

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**RESPONDENT'S FACTUM**

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## **PART I – General Overview**

[1] Official marks have broad and extensive protection under the Canadian trademark system. Although the aim is to avoid potential confusion with the public authorities that hold such marks, many criticize this protection as being overly broad. This aim is essential to the protection of Canadians, to prevent fraud or forgery of government identity. However, as the status of public authority is difficult to define, there is a risk with respect to the ease with which such status can be obtained and with overprotecting a mark which should not have been given such protection. To have such broad inordinate power over a trademark would be the equivalent of the David and Goliath of counterfeiting.

[2] Seeking to establish itself in the Canadian market after 20 years of operations in the United States, Vaxco Ltd. (“Vaxco”) applied to the Registrar for registration of its FLUSTOPPA mark in March 2019. However, the application was refused because of the official mark FLUSTOPPER of Healthward Canada (“Healthward”), which it has owned since January 2019.

[3] Thus, in appealing this decision, Vaxco is also challenging the validity of the appellants’ trademark, as Healthward does not meet the criteria for public authority status required to obtain an official mark. Healthward is therefore seeking a declaration that Vaxco's trademark causes confusion with its own, in addition to seeking an injunction to prevent its use.

## **PART II – Statement of Facts**

### *Vaxco and the FLUSTOPPA trademark*

[4] For more than 20 years, Vaxco has promoted vaccination in the United States. In addition to manufacturing, distributing and selling vaccines and medical supplies, it also produces

educational materials on the importance of vaccination, all using its FLUSTOPPA mark.<sup>1</sup>

[5] Vaxco already had a presence in Canada prior to January 2019. First, the FLUSTOPPA mark was not unknown to Canadians. In fact, Vaxco's website (www.vaxco.com) targeted Canadians by providing educational materials and allowing them to search for Vaxco products. Canadians could book an appointment to receive the vaccines in Vaxco clinics in the United States, and the evidence shows that many have done so. Additionally, strategically placed billboards along the U.S. border promote their immunization services in the U.S.<sup>2</sup> Moreover, its vaccines were transported through Canada on their way to the European market.<sup>3</sup>

[6] Eager to provide more than just immunization information and expand into the Canadian market, Vaxco initiated the Health Canada approval process. In February 2020, after receiving approval, Vaxco began marketing in Canada.

[7] In March 2019, Vaxco filed an application to protect its FLUSTOPPA mark and logo, for the following goods and services:<sup>4</sup>

Goods

(1) Pharmaceutical preparations, diagnostic preparations and biological products for human use, namely, influenza vaccine; vaccine injectors; syringes; parts and fittings for vaccine injectors and syringes.

Services

(1) Research and development services for pharmaceutical preparations and substances.  
(2) Training relating to vaccination practices.

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*Vaxco Ltd v. Healthward Canada*, 20 TCCIP 1222, para. 4.

<sup>2</sup> *Ibid.*, para. 5.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*, para. 6 and 7.

(3) Medical advice and information in connection with vaccination.

(4) Retail, wholesale and distribution services online and in-store in the field of vaccination

[8] The Registrar, however, denied Vaxco's application under subsection 12(1)(e) of the *Trademarks Act*<sup>5</sup> on the basis of Healthward's official mark, FLUSTOPPER, adopted and in use since January 2019.<sup>6</sup>

#### *Healthward and the official mark FLUSTOPPER*

[9] Healthward Canada has worked in public health and immunization in Canada since 2014. This non-profit organization entered into a funding agreement with Health Canada in 2015 which either party can unilaterally terminate simply by giving reasonable notice. Health Canada covers up to 75% of Healthward's operating expenses, with the remainder coming primarily from private donations and licensing revenue from its own subsidiary.<sup>7</sup> Health Canada also has the authority to appoint two of the five positions on Healthward's Board of Directors.<sup>8</sup>

[10] In January 2019, Healthward obtained its official mark FLUSTOPPER for its public health and vaccination activities. It also authorized one of its affiliated organizations, Healthward Industries Corp ("Industries") to use the official mark on its products in exchange for royalties.<sup>9</sup>

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<sup>5</sup> *Trademarks Act*, R.S.C. 1985, ch. T-13 (hereinafter the "TMA").

<sup>6</sup> *Vaxco Ltd v. Healthward Canada*, prec., note 1, para. 8.

<sup>7</sup> *Ibid.*, para. 10 and 11.

<sup>8</sup> *Ibid.*, para. 11.

<sup>9</sup> *Ibid.*, para. 12 and 13.

[11] Industries is a corporation, and direct competitor of Vaxco since 1990. Industries supplies several Canadian hospitals and immunization clinics, including Healthward clinics, with vaccines and medical supplies.

*Judgment at trial*

[12] At trial, Vaxco appealed the decision of the Registrar and requested the cancellation of Healthward's trademark, since Healthward is not a public authority that can hold an official mark, and as Vaxco had been using FLUSTOPPA before the Healthward registration. Healthward is therefore seeking a declaration that Vaxco's trademark causes confusion with its own and is also seeking an injunction to terminate its use.

[13] The Court disallowed Vaxco's petition, denying all of its claims. However, it did not allow all of Healthward's petitions either. The Court understands that there is confusion between the marks, but finding an absence of use by Vaxco, it does not consider it appropriate to grant the requested injunction.

*Decision appealed*

[14] On appeal, Vaxco argued that the trial judge erred in qualifying Healthward as a public authority, but also regarding the existence of previous use by Vaxco.

[15] The appellate judge reversed the trial decision, stating that the Registrar erred in refusing Vaxco's claim, that Healthward's FLUSTOPPER mark is invalid, and that Vaxco's prior use had been shown. The judge did not grant Healthward the injunction as the trademark is unenforceable.

### **PART III – Issues**

[16] There are two issues before the Court:

**Issue 1:** Did the Court of Appeal err in concluding that the FLUSTOPPER official mark was invalid?

**Issue 2:** Did the Registrar err in refusing registration of the FLUSTOPPA mark?

### **PART IV – Argument**

**Issue 1: Did the Court of Appeal err in concluding that the FLUSTOPPER official mark was invalid?**

[17] The Court of Appeal did not err in finding that the Healthward official mark was invalid. The notice of adoption and public use should not have been granted to Healthward, as the entity does not meet the criteria for public authority status.

[18] Without this status, the FLUSTOPPER official mark is unenforceable against Vaxco and cannot prevent the use or registration of its trademark. However, both courts erred in finding that Healthward’s activities served the public interest.

[19] Official marks in Canada receive special protection under this country’s unique legislative trademark system. Subparagraph 9(1)n)iii) of the *TMA* protects official marks adopted and used by a “public authority” in Canada.<sup>10</sup> The Registrar is therefore responsible for ensuring that the applicant is in fact a public authority before granting it an official mark with many advantages.<sup>11</sup>

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<sup>10</sup> *Canada Post Corp. v. Post Office*, 8 C.P.R. (4th) 289, para. 39 to 44.

However, public authority status is not defined in the *TMA*.

[20] In *Ontario Association of Architects v. Association of Architectural Technologists of Ontario*,<sup>12</sup> the Federal Court of Appeal upheld the use of a two-part test to determine whether a body is a public authority: it must be subject to significant government control and its activities must serve the public interest.

[21] Considering the importance of the prerogatives conferred by official marks, case law requires a narrow interpretation of the concept of public authority, in particular by not giving “broad meaning”<sup>13</sup> to subparagraph 9(1)n)iii).<sup>14</sup>

[22] Healthward Canada’s organization is not subject to a sufficient degree of ongoing government supervision and the body’s activities do not serve the public interest. Healthward therefore does not have the characteristics necessary to obtain public authority status.

#### *Insufficient government control over the body*

[23] The body applying for an official mark must first be subject to a significant degree of government control. Although Health Canada exercises some oversight over Healthward's activities, this does not represent sufficient government control.

[24] The assessment of the control exercised by the government over the body in question must take into account the full context by establishing facts and indicators of this oversight. Although

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<sup>11</sup> *Société ontarienne du stade Ltée v. Wagon-Wheel Concessions Ltd.*, 1989 CarswellNat 633, para. 18.

<sup>12</sup> *Ontario Assn. of Architects v. Assn. of Architectural Technologists of Ontario*, 2002 FCA 218.

<sup>13</sup> *Ibid.*, para. 63 and 64.

<sup>14</sup> *College of Chiropractors (Ontario) v. Canadian Podiatric Medical Assn.*, 37 C.P.R. (4th) 219, para. 90 to 92; *Canada Post Corp. v. United States Postal Service*, 2005 FC 1630, para. 31 to 35.

this oversight need not be absolute, the government must exercise a significant degree of control.<sup>15</sup> In the present case, the absence of a legislative provision granting the government authority over the activities of the body demonstrates the lack of government control over Healthward.

[25] Following the *Ontario Association of Architects* decision,<sup>16</sup> the case law has established five powers to be considered in evaluating the first criterion of the public authority test. These powers include advising the body on the implementation of the framework of legislation, asking the body to undertake certain activities deemed necessary, and approving the regulations adopted by the body.<sup>17</sup> Such characteristics may, however, be taken into account only if they are administered by the competent minister or by the Lieutenant Governor-in-Council. In the Healthward case, neither one exerts these authorities over the company.<sup>18</sup>

[26] In fact, only Health Canada exercises partial oversight over the body. However, this oversight is not sufficient enough to constitute significant and ongoing government control. Besides the opportunity to appoint two members to the board, the powers identified by the Court require that the body be constituted by enabling legislation or that it have regulatory authority.<sup>19</sup> However, Healthward does not follow any legislative framework.

[27] Indeed, although the fact that the body is statutory is not synonymous with effective government control,<sup>20</sup> the absence of such regulation highlights the low level of government

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*See You In – Canadian Athletes Fund Corp v. Canadian Olympic Committee*, 2007 FC 406, para. 60.

<sup>16</sup> *Ontario Assn. of Architects v. Assn. of Architectural Technologists of Ontario*, prec., note 12, para. 60 to 62.

<sup>17</sup> *Council of Natural Medicine College of Canada v. College of Traditional Chinese Medicine Practitioners and Acupuncturists of British Columbia*, 2013 FC 287, para. 36.

<sup>18</sup> *Ibid.*, para. 35-36.

<sup>19</sup> *Ibid.*, para. 36.

<sup>20</sup> *Ontario Assn. of Architects v. Assn. of Architectural Technologists of Ontario*, prec., note 12, para. 58 and 64.

supervision of Healthward. There is no legislative mandate that gives the body any functions. The government is therefore not empowered to exercise ongoing influence over the activities and management of Healthward.

[28] Moreover, the analysis of the governmental control applicable to a body applying for an official mark must be both legal and factual.<sup>21</sup> In addition to having no legislative mandate, Healthward's role is not recognized by the Canadian community. The entity does not have an exclusive role and does not enjoy any public recognition of being in the interest of the community.<sup>22</sup> Governmental control therefore fails both legally and factually.

[29] Compliance with the regulations applicable to a registered charity would not indicate sufficient government control either.<sup>23</sup> Healthward's charitable status can have no impact on the evaluation of government control and is not sufficient in law to determine whether the organization is a public authority.<sup>24</sup>

[30] Health Canada exercises incomplete authority over Healthward. The funding agreement adopted between the two entities is limited. Although it grants Health Canada some influence over decisions made by the organization, the agreement itself can be terminated unilaterally solely upon reasonable notice. The control exercised by Health Canada therefore depends on Healthward's desire to perpetuate this control and respect the limits of the contract.

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*See You In – Canadian Athletes Fund Corp v. Canadian Olympic Committee*, prec., note 15, para. 63.

<sup>22</sup> *Canadian Olympic Assoc. v. Registrar of Trade Marks*, 67 C.P.R. (2d) 59 (FCA), para. 11.

*Canadian Jewish Congress v. Chosen People Ministries Inc.*, 2002 FCT 613, para. 53, 55 and 59; *Canadian Jewish Congress v. Chosen People Ministries Inc.*, 2003 FCA 272, para. 4.

<sup>24</sup> *TCC Holdings Inc. v. Families as Support Teams Society*, 2014 FC 830, para. 22 to 30.

The trial judge therefore erred in finding that Healthward was subject to a significant degree of governmental control. Moreover, even though the government control test for a private organization does not absolutely require control of the Executive, it still requires some ongoing supervision of the activities of the body.<sup>25</sup>

[31] Not only do the various factors of government oversight considered individually not constitute ongoing government supervision, but even when assessed collectively, the oversight and partial decision-making power exercised by Health Canada do not lead to the conclusion that there is a sufficient degree of governmental control under the public authority status.<sup>26</sup>

*The body's activities do not serve the public interest*

[32] The lower courts concluded that Healthward's activities represented an important and significant benefit to the public.<sup>27</sup> The judges erred in this interpretation. The benefits of using the mark are primarily private.

[33] As the Court of Appeal noted,<sup>28</sup> Healthward's relationship with Industries is problematic. Healthward authorized its own subsidiary, a for-profit corporation, to use its official mark in exchange for royalties. The adoption and use of an official mark is limited to the body classifying itself as a public authority.<sup>29</sup> This status requires fulfillment of criteria which Industries absolutely does not meet. Healthward profits from the sale of goods by its subsidiary

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<sup>25</sup> *Ontario Assn. of Architects v. Assn. of Architectural Technologists of Ontario*, prec., note 12, para. 59.

<sup>26</sup> *TCC Holdings Inc. v. Families as Support Teams Society*, prec., note 24, para. 28.

<sup>27</sup> *Vaxco Ltd v. Healthward Canada*, prec., note 1, para. 20.

<sup>28</sup> *Vaxco v. Healthward Canada*, 2020 CAIP 333, para. 9.

<sup>29</sup> *Canada Post v. Post Office*, prec., note 10, para. 45.

to third parties by way of royalties. There is, therefore, use of an official mark by an entity which does not qualify as a public authority. This relationship raises a potential misuse of the official marks system in Canada.<sup>30</sup>

[34] The evaluation of the scope of the activities of the authority claiming to be public requires a broad and exhaustive analysis. The case law is clear on this point. In determining whether the public benefit requirement is met, the mission, duties and powers of the organization in question must be examined, including its asset allocation.<sup>31</sup> This means that the activities of Industries and the resulting benefits to Healthward must be taken into account. A portion of its annual expenses is covered by its royalties. These royalties are pocketed thanks to Industries' use of an official mark while not having the status of public authority. As such, Healthward's activities are far from being solely in the public interest.

[35] The benefit for members of the body does not entirely preclude its activities from fulfilling the public benefit requirement.<sup>32</sup> However, the *Canadian Olympic Association*<sup>33</sup> decision applied a third criterion prior to the two-part test in *Ontario Assn. of Architects*<sup>34</sup> to identify a public authority. This criterion required that any profit earned by the body be of public benefit. It is still applied today in some of the case law.<sup>35</sup> While not an absolute constraint, the obligation to do something that benefits the entire public is relevant in assessing public benefit.<sup>36</sup>

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<sup>30</sup> *Vaxco Ltd v. Healthward Canada*, prec., note 28, para. 14.

<sup>31</sup> *Ontario Assn. of Architects v. Assn. of Architectural Technologists of Ontario*, prec., note 12, para. 52. *See You In – Canadian Athletes Fund Corp v. Canadian Olympic Committee*, prec., note 15, para. 64; *Ontario Assn. of Architects v. Assn. of Architectural Technologists of Ontario*, [2001] 1 F.C. 577, para. 20. *Canadian Olympic Assn. v. Canada (Registrar of Trade Marks)*, prec., note 22.

<sup>34</sup> *Ontario Assn. of Architects v. Assn. of Architectural Technologists of Ontario*, prec., note 12.

<sup>35</sup> *Big Sisters Assn. of Ontario v. Big Brothers of Canada*, [1997] FCJ No. 627, para. 75; *Ontario Assn. of Architects v. Assn. of Architectural Technologists of Ontario*, prec., note 12, para. 50.

<sup>36</sup> *Ontario Assn. of Architects v. Assn. of Architectural Technologists of Ontario*, prec., note 12, para. 52.

As a result, the profits earned by Healthward and Industries are far from benefiting the general public or being solely in the public interest.

[36] Thus, Healthward receives significant private profit through the misuse of its official mark. Given the need to consider the larger context of the organization's activities as well as the obligation that those activities benefit the general public, Healthward fails to ensure that its activities serve the public interest.

[37] As a result, Healthward is not subject to significant and ongoing government control and its activities are not in the public interest. The public notice of adoption and use should therefore not have been given to the entity, as it does not qualify as a public authority.

Considering that the Healthward official mark is not valid, granting a permanent injunction against Vaxco is irrelevant.

**Issue 2: Did the Registrar err in refusing registration of the FLUSTOPPA mark?**

*The Registrar erred in refusing registration of FLUSTOPPA*

[38] To obtain and maintain the registration of a trademark, it must be “used” within the meaning of s. 4 *TMA* and must not cause confusion with another trademark already registered.

[39] The Registrar erred in refusing the application for registration of the FLUSTOPPA mark since the date of first use by Vaxco in Canada does indeed precede the date of first use of Healthward’s FLUSTOPPER mark.

*Use in association with services – ss. 4(2) TMA*

[40] Subsection 4(2) of the *TMA* provides that “a trademark is deemed to be used in association with services if it is used or displayed in the performance or advertising of those services”.

[41] Recent case law shows that accessing a website in Canada can constitute valid use in association with the services of a mark, even if these services are not performed in Canada. In *Hilton Worldwide Holding LLP v. Miller Thomson*,<sup>37</sup> the federal court concluded that online bookings of hotel stays in other countries gave Canadians sufficient benefit to establish use of the trademark in association with such services.

[42] Vaxco has used the FLUSTOPPA mark on its website for over 20 years. This website promotes in detail the services offered by Vaxco at its vaccination clinics in the United States. Moreover, it is not disputed that Canadians have had access to Vaxco's website for more than 20 years, and that they even book appointments on that website to benefit from its services.

[43] Canadians derive a tangible benefit from viewing the content of Vaxco's website, namely that of having all the medical information related to the preparation and administration of their vaccine. Although the services associated with the FLUSTOPPA mark were not provided and were also not available for performance in Canada prior to February 2019, the information and online booking services for vaccination at Vaxco's vaccination clinics in the United States is

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<sup>37</sup> *Hilton Worldwide Holding LLP v. Miller Tomson*, 2018 FC 895 (CanLII) WF. Pentney, para. 102.

sufficient to establish a valid date of first use in association with these services.

[44] Moreover, the presence of a trademark on an advertising poster constitutes sufficient use when it is in association with services.<sup>38</sup> The services do not have to be performed or offered simultaneously with their advertisement.<sup>39</sup>

[45] Vaxco uses billboards located in cities across Canada to promote its services. Since these billboards are located within Canada's borders, use of the FLUSTOPPA trademark is in association with its services in Canada.

[46] Since Vaxco has had a website for over 20 years which displays all medical information related to vaccines of the FLUSTOPPA trademark and which also provides appointment booking services that Canadians may use, use of the FLUSTOPPA mark in association with its services is established. The presence of its billboards in Canada further confirms this use. As such, the Registrar erred in refusing Vaxco's application for registration of its mark.

*Use in association with goods – ss. 4(1) TMA*

[47] Pursuant to subsection 4(1) of the *TMA*, a trademark is used in association with goods in Canada when it is marked on the goods themselves or on the packages, or is in any other manner

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<sup>38</sup> *London Drugs Limited v. Brooks*, 1997 CanLII 15844 (Comm opp; 1997-08-20) P.C. Cooke, para. 11.

<sup>39</sup> *RA Brands, LLC v. Calsper Developments Inc.*, 2006 CanLII 80334 (Comm opp; 2006-08-23) J.W. Bradbury, para. 47.

so associated with the goods at the time of the transfer of the property in or possession of the goods, in the normal course of trade.

[48] In *Robinson Sheppard Shapiro v. Ineat Canada Inc.*,<sup>40</sup> the Opposition Board confirmed that there is use in association with goods when at least part of the transaction chain takes place in Canada. For over 20 years, Vaxco has been manufacturing vaccines and shipping them across Canada to ultimately end up in the European market. This makes Canada an obvious intermediary in the transaction chain.

[49] In short, by making Canada an important player in its distribution chain for vaccines headed for Europe, the use of the FLUSTOPPA mark in association with its goods is well and truly established. In this sense, the Registrar erred in refusing registration of FLUSTOPPA.

*Knowledge of the trademark and its goodwill by third parties*

[50] A trademark is a key asset for its owner. It aims to protect the owner of the trademark and the goodwill associated with it against “unscrupulous competitors looking to use a similar or identical trademark”.<sup>41</sup>

[51] For over 20 years, Canadians have used the Vaxco website to search for FLUSTOPPA mark products and services as well as to book appointments at its vaccination clinics. This demonstrates a strong and undeniable interest of Canadians in Vaxco products and therefore

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<sup>40</sup> *Robinson Sheppard Shapiro v. Ineat Canada Inc.*, 2019 COMC 64 (Registrar; 2019-06-28) O. Osadchuk, para. 28.

<sup>41</sup> <https://www.fasken.com/fr/knowledge/2020/03/registering-trademark-canada-madrid-protocol-filings-steps/>

demonstrates the existence of real goodwill in Canada for the goods and services offered under the FLUSTOPPA mark.

[52] Industries is not only a Healthward supplier insofar as it sells its vaccines and other medical supplies, but it is also one of our client's direct competitors. Industries was well aware that Vaxco had been selling its products in the United States for over 20 years. It was aware of Vaxco's product approval process with Health Canada, and that if this process had been shorter, Vaxco would likely have been selling its products in Canada earlier. Industries also knew that Vaxco's application was still pending even before Healthward filed its application for registration of the FLUSTOPPER trademark in Canada.

[53] Having knowledge on one hand of the significant goodwill created by Vaxco's goods and services, and on the other hand, of the application for approval of these same goods by Health Canada, Industries had every interest in its client, Healthward, registering its trademark in Canada before Vaxco could legally do so, which reflects its bad faith. The official marks system is not intended to allow a private subsidiary such as Industries to benefit from such protection.

[54] In short, such knowledge by Healthward of Vaxco's activities demonstrates that there was indeed a previous use, and this is confirmed by Healthward's eagerness to seek an official mark. The aim of this hasty application was to block the use of its competitor's mark. The petition for a permanent injunction combined with its legal proceedings testify to its bad faith.

[55] Even if the Court were to conclude that there was no use in association with the goods, FLUSTOPPA's use in association with its services alone is sufficient to establish sufficient prior use of the mark in Canada.

### **PART V – Order Sought**

[56] Vaxco requests that the appeal be dismissed and that the decision of the Court of Appeal be upheld, namely the reversal of the decision of the Registrar and the cancellation of the Healthward mark. Healthward also requests that the Court award costs in the appellant's favour against Vaxco, here and in the lower courts.

Signed January 26, 2021

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Team No. 10

Counsel for appellant

## PART VI – Table of Authorities

### Statutes

*Trademarks Act*, R.S.C. 1985, ch. T-13.

### Case Law

*Big Sisters Assn of Ontario v. Big Brothers of Canada*, [1997] FCJ No. 627.

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*Canada Post Corp. v. Post Office*, 8 C.P.R. (4th) 289.

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