

# Class Proceedings Fund 20 Years in Review



Class  
Proceedings  
Fund

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# Two Decades of Achievement

In 1990, “The [Attorney-General’s Advisory Committee on Class Action Reform] recognized that private litigants could face significant problems financing class actions, that many would not be prepared to underwrite the cost of bringing a class proceeding even if they had significant assets, and many would not be prepared to accept the cost consequences of an unsuccessful action....” – Cullity J. in *Martin v. Barrett*

In response to these concerns, in 1992 the Class Proceedings Fund (the “CPF”) was created, and in 1993 it received a \$500,000 endowment from the Law Foundation of Ontario. Funding covers approved disbursements and adverse cost awards, and is provided based on several factors including the strength of both the claim and the public interest involved.

Over the last twenty years, the CPF has received a growing number of applications and has funded more than 82 cases\*. While this represents 10 per cent of all class actions in Ontario to date, 30 per cent of those that have gone to trial in the province have been CPF-supported – underscoring its importance in enabling plaintiffs to fully pursue their claims.

Many CPF-supported claims serve as test cases, often establishing novel legal principles and contributing to the evolution of class-proceedings jurisprudence. They have consistently raised issues of broad public importance, and many would not have proceeded without the CPF.

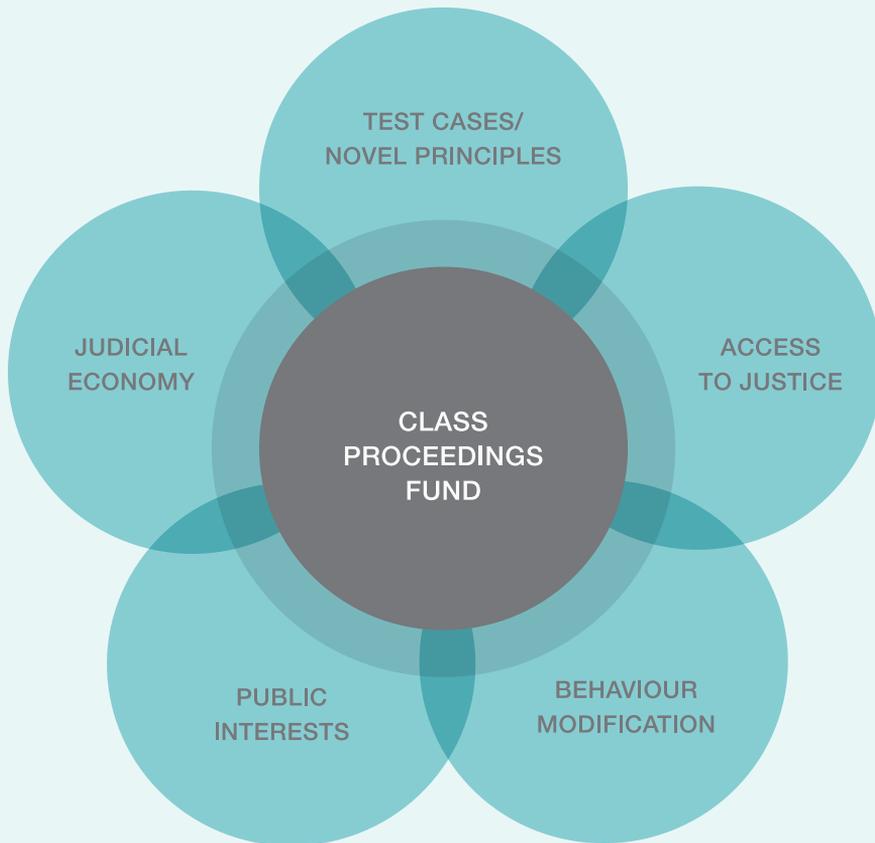
\* All statistics and references to the status of cases are current as of December 2012.

Under the leadership of senior members of the bar, the CPF has helped to more fully realize the vision embodied in the *Class Proceedings Act* of improved access to justice, behavior modification, and efficient use of judicial resources in Ontario. Class members have also received settlements or awards in a large proportion of CPF-supported cases.

On this 20-year anniversary, this publication overviews a cross section of the cases the CPF has supported and their impact.

“The *Class Proceedings Act* and the Fund enable potential plaintiffs and defendants in class action lawsuits to bring and defend actions which they would not otherwise have the financial resources to support. The Fund is only one of several ways in which legislation makes the justice system financially accessible to parties.”

**Winkler J. in *Garland v. Consumers Gas Co.***



All CPF-supported cases advance the objectives set out in the *Class Proceedings Act* and the jurisprudence decided pursuant to the *Act*. Each represents enhanced access to justice and judicial efficiency, and advances one or more public interest, often including the added benefits of behavior modification and the establishment of new legal principles.

# A Cross Section of CPF Supported Cases

**Access to Justice** is the most fundamental objective of class proceedings, and as the Attorney General's Advisory Committee recognized, it risked being undermined without the existence of a costs-assistance fund.

## **Markle and Horsely v. City of Toronto –**

A group of retirees alleged unilateral denial of pension coverage that they argued had vested at the time of their retirement. Their benefits were reinstated through settlement of the action.

## **Plaunt v. Renfrew Power Generation and Wrigley v. Parker Canada –**

Both claims drew upon principles established in the *Pearson* certification (see page 8) to allege property devaluation resulting from environmental contamination. *Wrigley* has been settled, with the 12 homeowners receiving \$18,000 each.

## **Monkton v. Canada Business College –**

Students alleged that the defendant misrepresented the accreditation of its dental hygienist program. There were two mediation attempts, four days of argument and multiple re-attendances. An eventual settlement provided the class members with tuition refunds and other compensation.

### **Givogue v. Burke –**

A group of 200 retired bus drivers alleged negligent management of their under-funded pension plan. They sought CPF support for their certified action after eight years of litigation, mediation and settlement attempts had failed. They ultimately recovered two-thirds of their benefits through settlement.

### **Hickey-Button and Potter v. Loyalist College –**

Former students alleged misrepresentation regarding the college's relationship with a university nursing program. Admission of liability came after 12 years of litigation. Six members have now been compensated and the remaining 59 claims are being adjudicated through individual assessments.

### **Jeffery and Rudd v. London Life –**

The representative plaintiffs alleged in this case that funds belonging to insurance policyholders had been improperly used to finance a corporate takeover. The trial court ordered that the defendant repay \$285 million to the defendants' participating accounts. This is currently under appeal.

### **Wright v. United Parcel Service –**

This case, which is under appeal, involved an additional charge levied on goods shipped from the United States. The plaintiffs alleged that the \$40 charged to the representative plaintiff was undisclosed, unauthorized and in breach of consumer protection legislation. The matter has been certified and partial summary judgment granted.

As noted by Justice Rosenberg in *Pearson v. Inco*, **Behaviour Modification** is aimed at “ensuring that actual and potential wrongdoers do not ignore their obligations to the public.” Many CPF cases have resulted in defendants and their peers taking steps to better safeguard the interests of others.

**Cannon v. Funds for Canada Foundation –**

This certified case arose from a complex arrangement claiming to enhance support for charities while reducing tax liability. Class members are pursuing various causes of action. The case has spotlighted a type of program that the Canada Revenue Agency has concluded does not benefit charitable causes and which is now widely seen as discredited.

**Krajewski v. Ticketmaster –**

A claim of conspiracy and unjust enrichment was made based on business practices relating to the re-sale of event tickets. In addition to providing compensation for 49,000 class members, the defendant changed its online sales practices and agreed to various re-sale restrictions.

**Smith v. Money Mart, Mortillaro v. Cash Money and Mortillaro v. Unicash —**

This trio of cases involved allegations that payday loan companies were charging usurious rates of interest to vulnerable people. In addition to settlements in each of these cases, in 2008, Ontario passed the *Payday Loans Act* which now includes provisions for better disclosure to and protection of payday loan consumers.

**Gilbert v. CIBC, Meretsky v. BNS, Cassano v. TD Bank —**

This trio of breach of contract claims involved allegations of inadequate or non-disclosure of charges on foreign currency transactions on credit card accounts. Millions of class members and cy-près award recipients benefitted from settlements totaling about \$100 million. Class counsel believe the outcome has influenced bank disclosure practices.

“(T)his action and other class actions involving consumer loans have achieved the goal of behavior modification by bringing about changes in the regulatory landscape.”

**Strathy J. in Mortillaro v. Unicash**

CPF funded cases often break new ground through **Test Cases** or by establishing **Novel Principles**. The CPF supported three of the five Ontario class actions that resulted in important judgments from the Supreme Court of Canada.

#### **Garland v. Consumers Gas –**

This novel claim sought to establish that late payment penalties on hydro bills violated interest rate provisions in the *Criminal Code*. Ultimately settled for \$22 million, it resulted in a definitive and expansive interpretation of section 347 by the Supreme Court of Canada which has become the basis for many other consumer protection actions.

#### **Hollick v. The City of Metropolitan Toronto –**

This claim related to alleged pollution from a landfill, and while unsuccessful it opened the door to environmental class proceedings. The Supreme Court of Canada underscored the importance of claims based on environmental harm, held that they could be certified, and validated the notion of a geographically defined class.

#### **Pearson v. Inco –**

Following shortly after *Hollick*, this case related to alleged property devaluation due to airborne emissions and was the first environmental class action certified in Ontario. While the claim was ultimately unsuccessful, the Court of Appeal took an expansive view of behavior modification when it certified the case. In deciding costs, the trial court also concluded that this case provided important guidance relating to environmental claims. The defendants are seeking leave to appeal the trial court's findings relating to costs.

### **Robertson v. Thomson –**

In what Justice Cullity termed a “breakthrough” decision, the Supreme Court of Canada determined that consent is required for further electronic distribution of published materials purchased from freelance writers. The case resulted in a significant settlement and has influenced industry practices in the context of an increasingly important type of author-publisher relationship.

### **Taylor v. Canada (Attorney General) –**

This claim involves alleged regulatory negligence on the part of Health Canada in connection with a jaw implant. The Court of Appeal provided important clarity on the nature of the “proximity” that can give rise to Crown liability.

### **Trustees of the Millwright Regional Council of Ontario Pension Trust Fund v. Celestica Inc. –**

This case opens the door to relief for shareholders from the strict application of a limitation period pertaining to alleged secondary market misrepresentation. The common law “special circumstances” doctrine was held to provide the necessary discretion. An appeal of this and a case coming to a contrary finding on this point is pending.

“To suggest that these issues should be resolved by individual suits by each creator of copyright material is, from a practical perspective, to suggest that the issues should never be resolved.”

**Sharpe J. in Robertson v. Thomson**

While all CPF supported cases engage **Public Interests**, the following are a few illustrations of claims that have a special significance for our society at large, and that are directed towards improving the situation of people in vulnerable circumstances.

**McCracken v. Canadian National Railway –**

Thousands of railway employees sought redress for alleged unpaid overtime. Although ultimately unsuccessful, the Court of Appeal confirmed that public interests were at stake in the case, since it involved employees of a federally regulated company and raised the issue of whether their classification for employment purposes could be the subject of a class proceeding.

**Ruffolo v. Sun Life. –**

A pensioner under a long-term disability plan argued that the insurer improperly deducted Canada Pension Plan benefits received by his children from his disability payments. Although ultimately unsuccessful, the court concluded that there was a strong public interest factor in this case.

**Williams v. City of Toronto –**

Class members in this case are residents of low-income housing, and allege the city breached a statutory duty to notify them of an entitlement to rent reductions. Justice Perell concluded that “the matter of a municipality’s liability for failure to send notice of rent reductions has a considerable public interest component.”

Class proceedings enable parties and courts to deal with what might otherwise become large numbers of separate claims as a single proceeding, greatly improving **Judicial Economy** and reducing the demands on scarce resources.

**Crisante v. Slotec, Parker v. Pfizer, Schick v. Boehringer –**

These three cases – the latter two of which have been certified – are among a number supported by the CPF that involve pharmaceutical or medical product liability. Allegations relate respectively to hip implant failure; and to links between prescription drugs and each of suicidal ideation and gambling.

**Good v. Toronto Police Services Board –**

The 1,000 members of this class are looking for redress for what they allege was unlawful arrest and detention during the G20 Summit in Toronto in the summer of 2010.

**Bechard v. Her Majesty the Queen, Dolmage v. Her Majesty the Queen, Seed v. Her Majesty the Queen –**

Each of these certified cases involves allegations of abuse at residential facilities housing children with some form of disability.

“I wouldn’t have proceeded without funding from the Class Proceedings Fund because I would have been solely responsible; and as a young person and young professional I would not have put myself in that position.”

**Jill Hickey-Button, Representative Plaintiff in Hickey-Button v. Loyalist College**

“I think the defendants took us more seriously because of the Class Proceedings Fund support.”

**Robert Givogue, Representative Plaintiff in Givogue v. Burke**

“My class action was a smaller case, but I would have been financially devastated if I’d had to pay the college’s costs. And I’m glad that some of our settlement will go to funding other cases like our own.”

**Thea Monkton, Representative Plaintiff in Monkton v. Canada Business College**

## Statistics Regarding Number of Applications for Funding Made, and Awards by the Class Proceedings Committee

Since its establishment, the CPF has received more than 130 applications and 82 of them have been approved for funding. To date, 30 CPF-funded cases\* have resulted in settlements or awards in favour of class members.

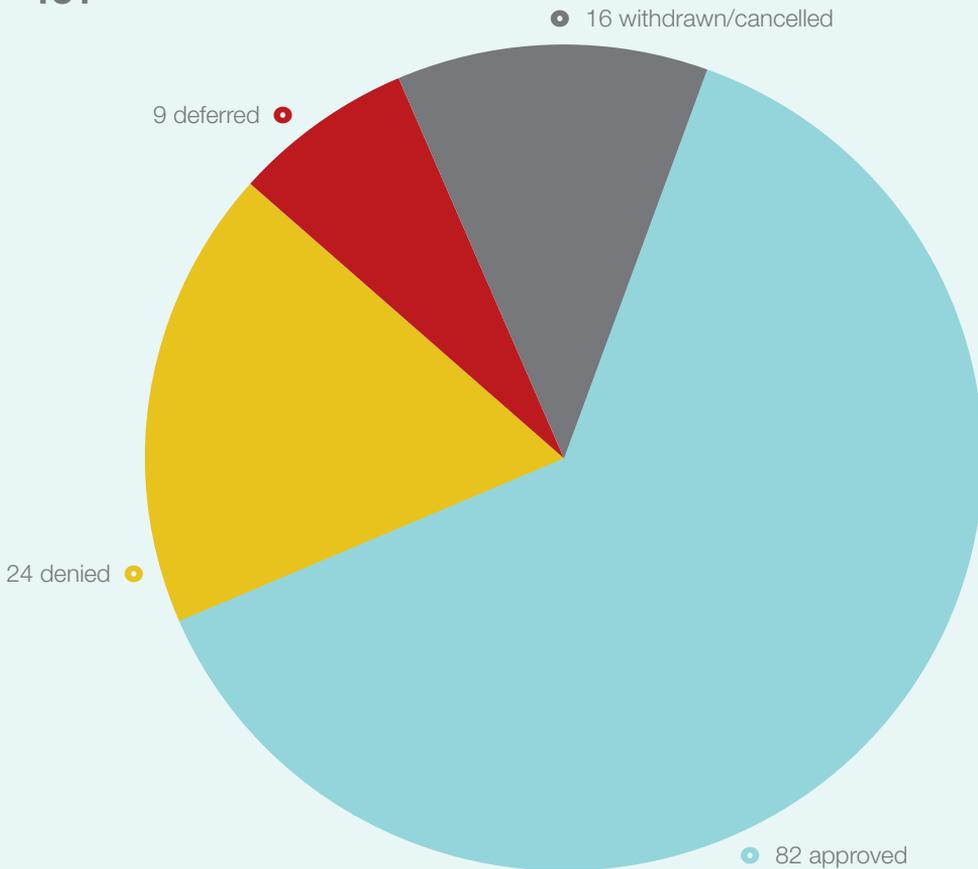
The 10 per cent levies on these awards and settlements are, in turn, what has enabled the CPF to be financially self sustaining.

All CPF-supported cases, even those that do not result in a levy, increase access to justice.

\* All statistics and references to the status of cases are current as of December 2012.

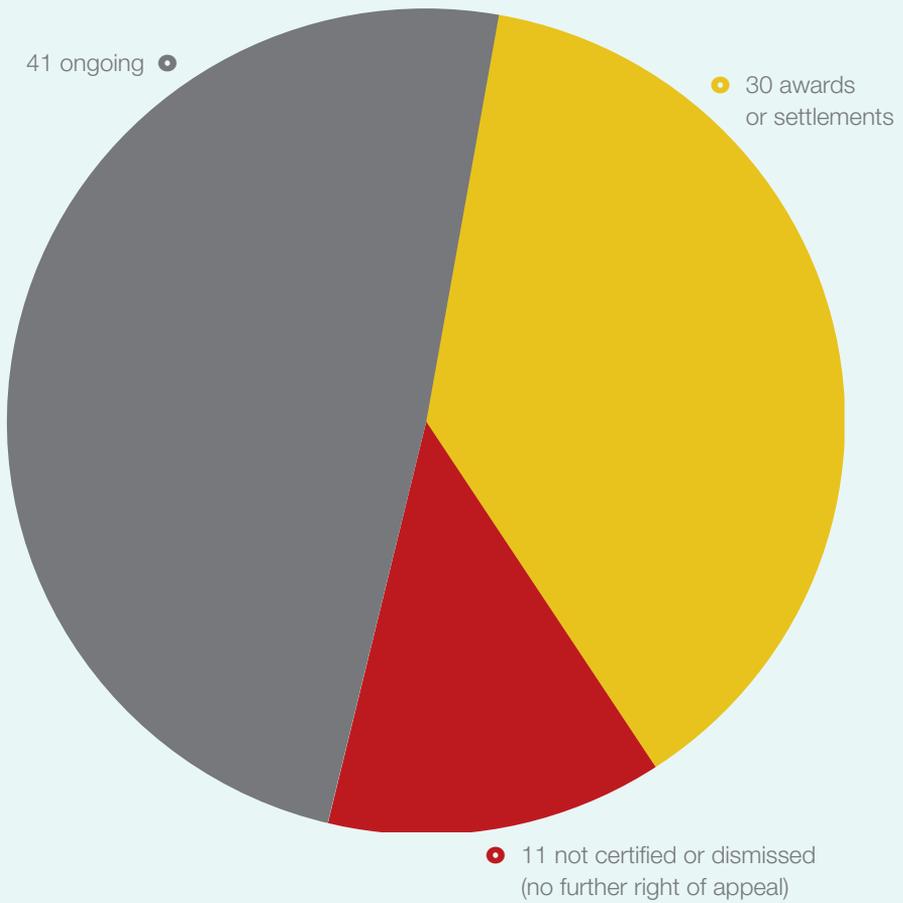
# Statistics Regarding Number of Applications for Funding Made, and Awards by the Class Proceedings Committee

## Total Applications 131



## Approved Applications

82



# Cases Resulting in Awards or Settlements

	Class Members (approximate)	Recovery (\$)	Years To Recovery
<b>Environmental</b>			
1. Mangan v. Inco (alleged damages caused by sulphur dioxide spill)	10,000	2,552,071	5
2. Wrigley v. Parker Canada (alleged environmental contamination)	12	275,000	5
<b>Copyright</b>			
3. Robertson v. Thomson (alleged copyright infringement when work published in print media was disseminated electronically)	837	11,000,000	14
4. Robertson v. Canwest (alleged copyright infringement when work published in print media was disseminated electronically)	837	7,871,894	9
<b>Pension</b>			
5. Markle & Horsely v. City of Toronto (alleged unilateral denial of pension benefits to retirees)	600	\$200,000 cash plus health care spending accounts	4
6. Martin v. Barrett (alleged negligence related to pension investments)	2,400	13,926,195	5
7. Sutherland v. Scott (alleged breach of trust related to pension plan windup)	2,000	8,500,000	7
8. Givogue v. Burke (alleged negligence and breach of duty related to pension plan)	200	2,900,000	11
<b>Medical Devices/Products/Negligence</b>			
9. Anderson v. Wilson (alleged infection of hepatitis B at medical clinic after medical tests)	18,000	27,500,000	6
10. Heward v. Eli Lilly (alleged deficiencies in drug used to treat various mental illnesses)	575,000	17,750,000	6
11. Serhan v. Johnson & Johnson (alleged defective glucose monitors)	Thousands	4,000,000	10

	Class Members (approximate)	Recovery (\$)	Years To Recovery
<b>Competition</b>			
12. Knowles v. Arctic Glacier (alleged price fixing in ice industry)	Hundreds	2,000,000	Ongoing
<b>Securities</b>			
13. Lawrence v. Atlas Cold Storage (alleged misrepresentation in securities prospectus in violation of s.130(1) of <i>Securities Act</i> )	Thousands	40,000,000	6
<b>Corporations</b>			
14. Jeffery & Rudd v. London Life (alleged misappropriation of participating policyholder surplus and various breaches of statute)	1,800,000	\$284,675,000 ordered to be repaid to defendants' participating accounts	Ongoing (under appeal)
<b>Consumer Protection</b>			
15. Garland v. Consumers Gas (alleged criminal rates of interest)	Millions	22,000,000	14
16. Walker v. Union Gas (alleged criminal rates of interest as a result of late payment penalties)	650,000	9,227,500	6
17. Nehme v. Civil Service Co-op (alleged breach of contract re mortgage prepayment provision)	Unknown	147,329	3
18. Gilbert v. CIBC (alleged non-disclosure of foreign transaction currency fees on credit cards)	Millions	19,500,000	8
19. Meretsky v. BNS (alleged non-disclosure of foreign transaction currency fees on credit cards)	1,500,000	24,200,000	12

	Class Members (approximate)	Recovery (\$)	Years To Recovery
20. Cassano v. TD Bank (alleged non-disclosure of foreign transaction currency fees on credit cards)	Millions	55,000,000	12
21. Smith v. Money Mart (alleged criminal rates of interest charged on payday loans)	306,714	\$57.5 million in credits and cash plus \$56,000,000 debt forgiveness	8
22. Mortillaro v. Cash Money (alleged criminal rates of interest charged on payday loans)	315	432,711	7
23. Mortillaro v. Unicash (alleged criminal rates of interest charged on payday loans)	Thousands	155,000	8
24. Markson v. MBNA (alleged criminal rates of interest related to credit card advances)	625,000	8,000,000	9
25. Speevak v. CIBC (alleged disclosure of personal information)	20	118,250	6
26. Krajewski v. Ticketmaster (alleged breaches related to fees charged on tickets)	49,000	5,000,000	4
27. Monkton v. Canada Business College (alleged misrepresentation related to dental hygienist program)	18	115,000	6
28. Hickey-Button v. Loyalist (alleged misrepresentations relating to nursing program)	66	Individual damage assessments pending	Ongoing (13 years to date)
29. Potter v. Loyalist		Consolidated with Hickey-Button	
30. Williamson v. Sheila Morrison School (alleged abuse at privately run facility for children with disabilities)	Hundreds	4,000,000	Ongoing

# Statement of Financial Position: 1993 – Dec. 31, 2012



# Class Proceedings Committee Members

The Class Proceedings Committee has five volunteer members, one appointed by each of the Law Foundation of Ontario and the Attorney General of Ontario and three appointed jointly.

## Current Members



**Valerie A. Edwards (chair)**  
Partner, Torkin Manes Cohen  
Arbus LLP  
Appointed 2000



**Wendy J. Earle**  
Partner, Borden Ladner  
Gervais LLP  
Appointed 2006



**Paul Evraire, QC**  
Special Counsel,  
Department of Justice  
Appointed 2008



**Jasminka Kalajdzic**  
Professor, Faculty of Law,  
University of Windsor  
Appointed 2011



**F. Paul Morrison**  
Partner, McCarthy Tétrault LLP  
Appointed 2004

## Past Committee Members

Bellmore, Brian	2000 to 2006
Fisher, Stanley G.	1993 to 1999
Foulds, Jim	1992 to 1995
Girard, Michael	2000 to 2003
Goldberg, Elizabeth	1999 to 2004
Kirby, Ian	1996 to 1999
Leach, Mark	2004 to 2007
McGowan, Michael	1992 to 1995
Merritt, Ann	1992 to 1995
Minor, Janet	2010 to 2011
Molloy, Anne	1992 to 1995
Mullins, Anne M.	1996 to 2000
Munroe, Robert	1997 to 2006
Sossin, Lorne	2007 to 2010
Vigmond, James	2007 to 2008
Watson, Garry D.	1996 to 2000



**For more information visit**  
**[www.lawfoundation.on.ca/cpcabout.php](http://www.lawfoundation.on.ca/cpcabout.php)**

**To discuss a potential application  
please contact:**

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