MiningWatch Canada
Mines Alerte

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Contents:

Larson Bill, Western Shoshone Defense Project, at Mount Tenabo, Nevada. (Ramsey Hart photo)

Supreme Court To Hear Red Chris Case

Long-awaited opportunity to reinforce public participation in federal environmental assessments

On December 18, 2008, the Supreme Court of Canada decided to allow MiningWatch Canada to appeal a Federal Court of Appeal decision that had negated the public's right to be consulted on large mines and other industrial projects.

MiningWatch, represented by Ecojustice (formerly Sierra Legal) had initiated legal proceedings in June, 2006 when we filed in the Federal Court for a judicial review of the environmental assessment of Imperial Metals' proposed Red Chris copper/gold mine in northern British Columbia. We felt that the federal government violated the Canadian Environmental Assessment Act by deciding to split the project into multiple pieces for the purposes of the assessment and to downgrade the assessment from a "comprehensive study" to a simple screening-level assessment. A mining project producing 3,000 tonnes of ore per day must undergo a comprehensive study; Red Chris would produce over 30,000 tonnes a day. Under the Act, comprehensive studies include mandatory requirements for public participation, while screenings allow for but do not require public involvement.

Over our objections, the Departments of Fisheries and Oceans and Natural Resources Canada did an environmental screening – with no public participation – before approving the project in May 2006.

In a lengthy and comprehensive judgment released on September 27, 2007, the Federal Court (Justice Martineau) overturned the environmental assessment of the mine by Fisheries & Oceans Canada and Natural Resources Canada, and prohibited the federal government from issuing any permits for the mine.

The government and the company appealed, and on June 13, 2008, the Federal Court of Appeal overturned Justice Martineau's ruling, asserting that the federal agencies had the discretion to determine the scope of the environmental assessment before applying the comprehensive study list regulations. In contrast to Justice Martineau's judgment, the Federal Court of Appeal reasons for judgment, authored by Justice Desjardins, are a cursory rebuttal to the Federal Court ruling, arguing that since federal authorities have the discretion to set the scope of an environmental assessment, they can do so whenever, and at whatever stage of the assessment, they like.

The Red Chris project is located in an area known to First Nations as the "Sacred Headwaters" region, and would pose a serious threat to the headwaters of some of the continent's most important salmon rivers: the Stikine,

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Nass, and Skeena. Imperial Metals proposes to destroy fish-bearing streams by damming them and using these natural waters to dump toxic mine waste.

Our appeal will ask the Supreme Court to consider the Canadian Environmental Assessment Act for the first time, and, in doing so, to build upon and strengthen the principles of environmental assessment and endorse the need for robust federal environmental assessment of major projects – including mining projects – and the need to provide for public participation in those assessments.

Papua New Guinea Hosts International Meeting on Ocean Dumping of Mine Waste

Dumping mine tailings into the sea via a submerged pipe is a highly controversial practice. While it is effectively banned in Canada under provisions of the Fisheries Act and the Metal Mining Effluent Regulations, Canadian companies practice so-called Submarine Tailings Disposal (STD) overseas. Mining companies operating in island-rich nations in southeast Asia and the Pacific are particularly likely to seek permission to dump their waste into the sea. Papua New Guinea (PNG) has already hosted two STD mines (one of which, now closed, was Canadian). Many more companies are indicating an interest in piping their waste into the seas around Papua New Guinea. Fishing communities near the planned disposal sites of proposed STD mines in Papua New Guinea are expressing strong opposition to ocean dumping of mine waste.

The European Union has collaborated with Papua New Guinea's Mining Sector Support Programme (MSSP) to fund an independent evaluation of so-called Deep-Sea Mine Tailings Placement in Papua New Guinea. The research is being carried out by the Scottish Association for Marine Science (SAMS). In November of this year, SAMS and MSSP hosted a conference in Madang, PNG, to present the preliminary findings of the research carried out by the SAMS team and to present Draft Guidelines for the use of STD in PNG.

MiningWatch Canada has worked on the issue of STD with partners in Indonesia, the Philippines and Papua New Guinea since 2000. In 2002 MiningWatch Canada and Project Underground published an STD Toolkit that details the scientific and technical concerns associated with STD. The Toolkit also provides six case studies from the Asia Pacific region.

MiningWatch's Catherine Coumans was invited to present at the conference in Madang and to hear preliminary findings of research being conducted by SAMS. The SAMS research to date recognizes many of the scientific and technical concerns elaborated in the STD Toolkit – among others: the potential for wider than predicted dispersal of tailings along the sea bottom; shearing off of tailings at various sea levels as they make their way to the sea bottom; the problem of pipe breaks at sea; greater levels of dissolved oxygen at depth than predicted in industry consultants' reports; the potential for metal leaching from tailings in the marine environment; the ecosystem significance of marine biota found in deep sea environments; the inadequacy of baseline data for some STD mines; the importance of vertical migration of species from the deep sea to higher levels for potential metal mobility; and lack of information on potential re-colonization of tailings as biological processes are very slow at 1000 metre depths. Scientific presenters noted that "less is known about the deep sea than about the back side of the moon" raising the need first and foremost for precaution when considering a massive anthropogenic impact on a fragile and not-well-understood ecosystem.

Although the Draft Guidelines SAMS presented are meant to apply to PNG, it is clear that they may potentially form the basis for international guidelines. MiningWatch Canada will continue to monitor the development of these guidelines.

Meeting with Partners at Porgera Mine in Papua New Guinea

In November 2008 MiningWatch Canada's Catherine Coumans had the opportunity to meet with partners at Barrick Gold's Porgera Mine in the Papua New Guinea Highlands (Enga Province). Our partners are the grassroots human rights group called Akali Tange Association (ATA) and the Porgera Landowners Association (PLA). These two organizations created a joint organization called Porgera Alliance this year.

The Porgera mine is a source of serious environmental impacts as waste rock and tailings from the mine flow freely into the environment contaminating an 800 kilometre-long river system that flows from the PNG highlands to the Gulf of Papua. The Porgera mine is also associated with human rights abuses alleged to be perpetrated by the mine's security forces against civilian men and women in the mine lease area (see our web site for details).

Additionally, the mine and its massive waste flows have contaminated fresh water in the mine lease area and its surroundings, occupied land that had been used for housing and subsistence agriculture, and made other areas geotechnically unstable, creating untenable living conditions for landowners living immediately around the edges of the mine and around its waste streams. Through their Landowners' Association, these mining-affected landowners, some 12,000 in total, have been asking to be relocated (Porgera Landowners Association letter dated November 10, 2008). A further serious human health concern is the fact that an increasing number of community members now rely for their livelihood on small scale mining directly in the waste flows from the mine. As they use mercury to

extract gold from the waste, men, women, and children are directly exposed to mercury in both its liquid and vaporized forms.

Just days before arriving at the mine site, the mine had been shut down as a result of a protest by local landowners from the community of Yarik. Yarik lies within the special mine lease area. It is situated on an "island" formed by massive waste rock dumps that flow on either side of a stretch of land inhabited by a number of landowner communities. A large tunnel pumping a steady stream of waste out of the underground workings of the mine exits into the community of Yarik through the Yunarilama portal. This portal is just metres from the community's elementary school (see photo). In early November, villagers staged a protest at the Yunarilama portal by burning tires. According to reports, the smoke from the tires entered the tunnel and the underground mine forcing a closure. In a letter addressed to "The Human Rights President" the landowners of Yarik list a long list of impacts they are experiencing from the Porgera mine and note: "Due to these issues we made the call to the company to relocate the affected land owners but the company was silent and said (…) it was not its obligation to relocate the SMP (sic)[special mine lease] land owners" (letter from two special mine lease area residents, Nov. 11, 2008).

The Yunarilama mine waste portal – the green wall in the foreground is the elementary school. (Catherine Coumans photo)

Children playing in the village of Apalaka. This village is considered "geotechnically unstable" as a result of erosion by the Anjolek Erodible dump that runs through the valley visible just behind the children. (Catherine Coumans photo)

In addition to meeting with our partners, Catherine also met with local health officials, the mine management, men and women from the community who had had negative encounters with the mine's security forces, members of the Porgera Youth Association, local law enforcement, and staff from the government's Mineral Resources Authority.

All Eyes On Ontario Mining Act Reform

Ontario is Canada's leading mining jurisdiction and is the source of 30% of the total value of Canada's metal production. The province also has a longer and more continuous history of mining, and one of the more developed mining-focused bureaucracies, than most other parts of the country. With Canada's international stature as a giant in the mining world, what happens with mining in Ontario is important, not just provincially but also nationally and internationally. The Ontario Government's announcement that it intends to overhaul the legislation that governs the early and often most controversial phases of mining mean the eyes of the world are now on Ontario. MiningWatch staff are fully engaged in the reform process, collaborating with other organisations to provide concrete alternatives for new legislation.

The origins of the Ontario Mining Act go back to the 19th century, but a substantially new act was last created in 1906. Since then some changes have been implemented, but the basic process of staking mineral claims and acquiring a mining lease have remained the same. One of the most problematic aspects of the old legislation is the "free entry" system that allows prospectors to access public and some private land (where mineral rights are "severed" from surface rights), stake a claim, and acquire a mineral lease without consideration for other interests and values associated with the land. (For more on the free entry system please visit our web site.)

The Ontario Ministry of Northern Development and Mines (a.k.a. MNDM) had been examining options for updating the Mining Act for several years, releasing a

Mineral Development Strategy in 2007. For many concerned about how prospecting and permitting are done, the strategy did not go nearly far enough, and its recommendations were marinating in the bureaucracy when two high profile mining conflicts broke out in opposite ends of the province. While these two conflicts have raised the profile of the problems inherent in the current system, it's important to note that First Nations leaders have warned that the problems are widespread, with many other current and potential conflicts occurring throughout the province.

Platinex Inc., a junior exploration company, acquired mineral claims within the traditional territory and unsettled land claim area of Kitchenuhmaykoosib Inninuwug (KI) First Nation in 1999. KI is a fly-in community in the remote northwest part of the province, some 600 kilometres north of Thunder Bay. For a time Platinex was in discussion with KI about its plans, but the company proceeded with its activities before reaching an agreement. In 2001 KI issued a moratorium on further activity until a satisfactory agreement was reached. In 2006 the conflict escalated, with members of KI actively protesting and blocking Platinex from their territory. More conflict and court proceedings ensued. In October 2007, frustrated by the costs and time being taken up in court, KI withdrew its participation in legal proceedings, while the court issued an injunction prohibiting KI from interfering in Platinex's activities. Firm in their resolve, KI issued a statement saying that they would not allow Platinex back on their land, this led to contempt charges and eventual jail time for Chief Donny Morris and five councillors, soon known as the KI6.

As events were unfolding in the far north, at the other end of the province, in an area of cottages, woodlots, and farms just 90 km north of Kingston, Frontenac Ventures Inc. began staking crown and private land with the hopes of finding and claiming uranium deposits. Over the winter of 2006 and 2007 a coalition of First Nations and local "settlers" formed, to educate themselves about how the Mining Act works and about the risks they were facing from exploration and exploitation of uranium. In the summer of 2007 a number of demonstrations against the staking and proposed exploration were held, including occupation of Frontenac's base of operations at Robertsville. Legal challenges followed, including a $77-million lawsuit against the Ardoch Algonquin and Shabot Obadjiwan First Nations. An injunction to not interfere with Frontenac's operations was granted by the courts, and was then broken by First Nation and settler activists. For peacefully breaking the injunction, Bob Lovelace, former Chief of the Ardoch was sentenced to 6 months in jail and a $25,000 fine, Co-chief Paula Sherman was given a $15,000 fine and the Ardoch were collectively given another $10,000 fine.

An appeal of the sentences in both the KI and Ardoch legal cases was heard in May; all seven of those in jail were released, and the fines against the Ardoch were revoked. The appeal decision cited problems with the Mining Act and the weak role of the province in structuring constructive consultation as root causes of the conflict.

The jailing of seven First Nation leaders for peacefully asserting their constitutional rights to consultation and accommodation, and the anger and frustration of private land owners affected by claim staking, catapulted mining reform onto front pages of the papers and onto the priority list for the provincial government. In July, Premier McGuinty announced plans to "modernize" the way mining is conducted in the province. He committed to finding a balance to ensure that "the way mining companies stake and explore their claims be more respectful of private land owners and Aboriginal communities."

In August, the province laid out a framework for consultation on the Mining Act, including its own determination of the key issues. A discussion paper, "Modernizing Ontario's Mining Act: Finding A Balance", was released, and consultation sessions in Timmins, Thunder Bay, Sudbury, Toronto and Kingston were announced. The process was controversial from the outset. The discussion paper was released the same day as the Timmins consultations, making it impossible for participants to comment on it. Another point of contention was that the issues as identified by MNDM did not include uranium exploration. By the last session in Toronto, Ministry representatives had certainly got the message that many Ontarians do want to see greater regulation of exploration for uranium. When concerns about the process were raised by participants at the consultations sessions they were encouraged to submit written comments.

Concerns about the speed of the consultations and lack of time for First Nations to fully engage their communities in understanding and participating resulted in an extension of the timeline from October 15 to January 15, 2009. Though no additional consultations were planned for non-First Nation groups, additional written submissions from any interested individual or organization are also being accepted until the January deadline.

Prior to the announcement of the consultation process, MiningWatch Canada had already been working with a number of other organisations to develop a comprehensive proposal for reform of the Mining Act. Initiated through the Ontario Mining Action Network, a working group facilitated by MiningWatch identified what a revised mining Act should look like. Ecojustice and the Canadian Institute of Environmental Law and Policy (CIELAP) then took the ideas, made the appropriate comparisons with other mining jurisdictions, and developed precise wording for a Mining Modernization Act. This paper was submitted to the government, and members of the working group referenced the report in their own submissions. We have posted MiningWatch's submission and the CIELAP/Ecojustice paper as well as a number of other submissions on our web site. MiningWatch's recommendations include:

- Applying provincial environmental assessment requirements to mining.
- A permitting system for each phase of mining.
- Consent of First Nations prior to granting permits.
- Recognising First Nations' authority to withdraw lands

from claim staking, and giving municipalities similar authority.

- Requiring consent by surface rights holders for mining activities to occur on lands with separate mineral and surface titles; and an improved system of mediating conflicts and compensation where conflicts between surface rights holders and mineral rights holders occur.
- Increasing funds available for rehabilitating abandoned mine sites and improvements in legislation meant to prevent future abandonment of mine sites.
- Improved capacity for monitoring and enforcement through collection of revenues associated with a permitting system.

Please see our web site for our full submission.

We anticipate a fairly quick response from government once consultations end on January 15. It's difficult to say how far the province will go in reforming the Act. Industry is pressing for minor alterations rather than the comprehensive reforms that MiningWatch, environmental organisations, and First Nations are calling for.

However, a recent announcement about an agreement reached between the Province, Frontenac Ventures, two Algonquin communities and the Algonquins of Ontario is not a promising sign of the province's intentions for how conflicts could be resolved in a modernized mining industry. The agreement would allow Frontenac to pursue a modified drilling program despite continued objections by the Ardoch Algonquin, local residents, and downstream municipalities. In a government press release the agreement was touted as "building stronger relationships in Eastern Ontario." The process, which ignored one First Nation and large number of legitimate stakeholders, has not resolved the conflict. Nor does it reflect a modern approach to mining, rather it reflects an old fashioned approach that in the words of the Ardoch Algonquins "represents the colonial relationship that the Crown has had with Aboriginal people for the last century and a half in which treaties and land sales follow an extended period of intimidation, denial of responsibility, divide and conquer, and outright illegal actions."

Canadian Lakes and Streams at Risk of Being Converted to Tailings Impoundment Areas

One of MiningWatch Canada's key areas of work in 2008 and that will be continuing in 2009 has been our efforts to curtail the destruction of natural water bodies for the creation of tailings impoundments (i.e. waste dumps). Though contrary to both the intent and the letter of the Fisheries Act, exemptions are being granted to companies that apply for a regulatory amendment to the Metal Mining Effluent Regulations (MMER). Following an assessment of alternatives and public consultation, water bodies can be listed on Schedule 2 of the MMER and become reclassified as tailings impoundment areas.

In 2002, when this loophole in one of our oldest and strongest pieces of environmental legislation was created, it was under the guise of bringing existing mines into compliance. New mines would not use Schedule 2, it was argued, because it wasn't necessary and because the regulatory amendment process would be too onerous. However, with rising costs and fewer high grade ore bodies left to mine, the industry has found that seeking a Schedule 2 amendment can be much more economical. The costs of consultants and staff time to go through the amendment process is much less than the tens or hundreds of millions of dollars saved by not having to build a tailings impoundment.

In 2008, four more water bodies were added to Schedule 2. Two of these are previously damaged lakes receiving wastes from operating mines; the others are healthy lakes in Nunavut. Eight proposed mine projects have indicated their preference to use Schedule 2. Another Schedule 2 project, Kemess North, in northern British Columbia, was rejected by an environmental assessment panel where MiningWatch was an active intervener, and another, the Red Chris mine, also in northern British Columbia, is on hold due to MiningWatch's legal challenge of its environmental assessment (see above).

But wasn't the process for applying for the regulatory amendment supposed to be too onerous for industry to bother with? Apparently not! From MiningWatch's perspective one of the key weaknesses in the process is the consideration of alternatives. The current practice is to use an approach called Multiple Accounts Analysis. This method scores various alternatives in a comparative table and seems to objectively weigh different options. The technique is, however, very susceptible to manipulation and bias depending on the values assigned to the different factors. While some factors are relatively easy to objectively determine – financial costs, for example – others are much more subject to judgement: significance of social or environmental impacts, for example. In examining the Multiple Accounts Analysis for Vale Inco's proposal to use Sandy Pond to receive waste from a proposed hydrometallurgical nickel processing plant, MiningWatch found that several factors were heavily and unjustifiably weighted in favour of the predetermined preferred (and cheaper) option – dumping the waste into Sandy Pond.

In order to continue challenging the industry and federal government on this issue, and to support First Nations in their position on mine developments, MiningWatch has applied for participant funding in two upcoming federal environmental assessments – the Mt. Milligan and the Prosperity projects in British Columbia, both of which are open pit gold-copper mine proposals that plan to use Schedule 2 to reclassify natural water bodies as waste dumps. We have also been facilitating a national coalition of environmental and First Nation groups that are actively

educating their members and lobbying against the practice. The issue received national news coverage on CBC's the National, resulting in one of the biggest media blitzes in MiningWatch's history.

Legal Action Against Barrick Gold in Nevada

In the latest salvo in a long-standing dispute with the world's largest gold mining company, Toronto-based Barrick Gold, the South Fork Band Council of Western Shoshone, the Timbisha Shoshone Tribe, the Western Shoshone Defense Project, and Great Basin Resource Watch filed a legal complaint on November 21, 2008. The objective of the legal action is to stop construction of the Cortez Mine expansion onto the lower flanks of Mount Tenabo.

The Western Shoshone and environmental groups oppose the mine on the grounds that it would irreparably harm an area of cultural and spiritual significance, damage springs and aquifers in a water-stressed area, and infringe on Newe Segobia, the traditional Shoshone territory.

Mount Tenabo, Newe Segobia (Nevada). (Ramsey Hart photo)

Capped drill hole on Mount Tenabo. (Ramsey Hart photo)

Mt. Tenabo rises from a flat arid plateau and is "home to local Shoshone creation stories, spirit life, medicinal, food and ceremonial plants and items and continues to be used to this day by Shoshone for spiritual and cultural practices." (Western Shoshone Defense Project Press Release, November 21, 2008). Part way up the mountainside, where a little more moisture falls, the slopes are covered with piñon pine, a traditional food source for the Western Shoshone. While the US Bureau of Land Management recognises that top of Mt. Tenabo as an important cultural and spiritual area, it also supports open-pit and underground mining around the base of the mountain. The expansion would directly affect 6,800 acres.

Work at the site has already begun with the removal of piñon pines – the first step in making way for the mine. Concerned about damages that might be done before their case gets to court, Western Shoshone elders went to the site to protest and establish a camp.

For its part, Barrick supports its "legal and social licence to operate" with reference to an unsuccessful Supreme Court land claim case and agreements with some of the neighbouring Shoshone communities for funding of educational, business, and employment projects.

In July, Canada Program Coordinator Ramsey Hart had the honour of visiting Newe Segobia (Shoshone Territory) and Mt. Tenabo as a participant in the Indigenous Environment Network's biennial gathering. He carried sage from Mt. Tenabo back to Ontario and offered it to the Ardoch Algonquin during their 'Pray for the Land' event in October.

Petaquilla: Panamanian Rainforest, Communities Threatened by Mining

A remote area of Panama's rainforest is threatened by open-pit copper and gold mining. Canadian mining companies have already started building roads and bulldozing trees in an area known as Petaquilla Mountain in the Donoso district of the north-central province of Colón. Their plans include not only a series of open pit mines and all the related infrastructure, but a transportation corridor to the Caribbean coast and port facilities in one of the remaining parts of the coast that does not have commercial access.

The Molejón mine site, part of the Petaquilla complex, showing the deforestation and erosion on the site. The company claims to have remediated the site but has provided no public evidence.

The 13,600 hectare mining concession is in the heart of the Mesoamerican Biological Corridor, an area of massive biodiversity and stunning beauty stretching from Mexico to the Darién in Panama – a twenty-million-hectare chain of rain and cloud forests, coastal mangroves, and mountain ranges, encompassing forty percent of the combined national territories. The World Bank has provided substantial support to preserving the Corridor. The Petaquilla area is the only forested link between the Darién and the rest of the Corridor.

The consequences of the mining activity are already being felt by neighbouring communities, who have reported extensive deforestation and sedimentation and pollution in rivers downstream. Panama's National Environmental Authority (ANAM) has found that the mine's 160 hectare site is seriously to extremely degraded in every environmental measure except air quality, and on November 13, 2008, the prosecution of the Judicial Circuit of Colón announced it would open proceedings against one of the companies, Petaquilla Minerals, for crimes against the environment, based on that report.

On November 21, 2008, the Panamanian government announced it was fining Petaquilla Minerals $1,934,694 – $1 million for violating the law and the balance for environmental damages – and ordered the company to cease operations until its environmental assessment was approved. Less than a week later, on November 26, it approved the hugely deficient environmental impact study (EIS) for the mine. The approval is conditional on the company completing four more related EISs, as well as fulfilling some 40 related requirements, such as signing on to the International Cyanide Management Code, and posting an additional $14 million in bonds and guarantees.

The Petaquilla mining concession has been controversial since it was initially granted in 1997, by a special law giving the mining companies specific conditions and exemptions from Panamanian law. Some local people have supported it in the hopes of gaining some benefits, but many have opposed it as environmentally, economically, and socially disruptive. On November 12, 2007, ten leading Panamanian environmental groups appealed to President Martin Torrijos for a moratorium on open pit mining. A year later President Torrijos has yet to respond, but in the meantime these groups have been joined by others. On September 6, 2008, communities and environmental and human rights groups formed the Panamanian Network Against Mining, calling for an end to all open pit mining in Panama, and on October 14, 2008, the International Union for the Conservation of Nature (IUCN) passed a resolution asking Central American governments to cancel all mineral exploration and open pit metal mining activities, including Petaquilla.

The Petaquilla concession itself belongs to a Panamanian company, Minera Petaquilla, S.A. but it is being developed as two projects, an open-pit gold mine called Molejón belonging to a Vancouver-based "junior", Petaquilla Minerals, and a huge open pit copper mine belonging to a major Canadian mining company, Inmet Mining. Panamanian organisations, notably the Centre for Environmental Advocacy (CIAM), have been trying to force authorities there to perform their legal duties with respect to environmental protection, but construction of the gold mine has been rushed forward regardless. The copper mine is still in the early development stage, and with estimated capital costs of at least $3.3 billion it may never see the light of day. More details can be found on our web site.

2006 protests: "Violence and death stalk Petaquilla". The banner reads in part "Petaquilla Mountain: Bread today, contamination and death tomorrow." (photo courtesy Hector Endara Hill)

Panamanian organisations are asking for international support to stop the irresponsible development at Petaquilla, and to make sure that Panama remains free of large scale mining at least as long as it does not have adequate legal and institutional protection for its environment and its indigenous and peasant communities.

We can do this by:

1. writing to President Torrijos to respectfully ask that he

respond to the open letter;

2. pressuring the companies to disclose the true situation to their shareholders, including Canadians covered by the Canada Pension Plan, which owns shares in both of them;
3. writing to the Canadian government and the Canadian embassy in Panama to ask them to refrain from supporting these companies in any way; and
4. letting more people know so they can do the same.

Local people protest Petaquilla – Coclesito, Panama (Photo courtesy ANCON)

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