IN THE MATTER OF THE SECURITIES ACT,
R.S.O. 1990, CHAPTER S.5, AS AMENDED

-and –

IN THE MATTER OF AN APPLICATION BROUGHT BY BRUCE ASQUITH, LEO CHAN, KELLY MCEVENUE, DIANE URQUHART, ANONYMOUS #1 & #2 AND 1273880 ONTARIO LIMITED PURSUANT TO SECTION 104(1) AND 104(2) OF THE ACT

Headnote

Application for an Order in the Public Interest – Alleged Non-Compliance with Issuer-Bid/Takeover Bid Provisions – Res Judicata – Issue Estoppel – Abuse of Process – Proper Forum for Motion

The Applicant requests an order pursuant to section 127 of the Act and sections 104(1) (c), 104(2) (a), and 104(2) (c), of the Act on behalf of herself and others. The Applicant comes to the Ontario Securities Commission by means of various actions, lawsuits, complaints to banks, regulatory authorities, professional boards, claims against her lawyers and their insurers all to recover monies that she invested in a highly speculative endeavour involving internet service providers.

Held: The application under section 104 of the Act is out of time, as well as being frivolous and vexatious. The application under section 127 of the Act cannot be granted to remedy alleged Securities Act misconduct between private parties or individuals. This is a private dispute and the proper venue for such matters is in the civil courts. Failure to succeed in the civil court should not be the basis for an application to the Ontario Securities Commission to change a private dispute into a matter of public interest. The application of Urquhart is dismissed and the application of all the other Applicants should be permanently stayed.

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IN THE MATTER OF AN APPLICATION BROUGHT BY BRUCE ASQUITH, LEO CHAN, KELLY McEVENUE, DIANE URQUHART, ANONYMOUS #1 & #2 AND 1273880 ONTARIO LIMITED PURSUANT TO SECTION 104(1) AND 104(2) OF THE ACT

HEARING:	December 3, 4, and 5, 2003.	
PANEL:	Wendell S. Wigle, Q.C. Robert L. Shirriff, Q.C.	Commissioner (Chair of the Panel) Commissioner
COUNSEL:	Matthew Britton	For Staff of the Commission
	Diane Urquhart	Self-represented and acting as Agent for Bruce Asquith, Leo Chan, Kelly McEvenue, Anonymous Stakeholders #1 & #2 and 1273880 Ontario Limited, Applicants
	Cynthia Amsterdam	Alfred Borgmann, Bernard Borgmann, Barbara Bryden and William Bryden, Respondents
	David Dolson	Self-Represented, Respondent
	Wade Simpson	Technovision Systems Inc., Respondent
	Ross Jepson	Self-Represented (Via Telephone), Respondent

DECISION AND REASONS

I. The Proceedings

[1] These are a series of preliminary motions brought by the respondents (collectively the Respondents) for an order, among other things, staying or dismissing the application (Application) brought by Diane Urquhart (Urquhart) on behalf of herself and others (collectively the Applicants), as against each of them and a preliminary motion brought by staff of the Commission for an order staying or dismissing the application and, in the alternative, disclosing the names of the anonymous stakeholders.

[2] During the oral arguments at the hearing before this panel (the Hearing), Urquhart identified the anonymous stakeholders for the record. Disclosing their identity is no longer an issue for the panel to consider.

[3] The Application was dated May 12, 2003, and was subsequently amended on June 16, 2003. Any references to the Application will be to the amended application unless otherwise indicated. The Application is for an order under the *Ontario Securities Act* (the Act) specifically sections 104(1) (c), 104(2) (a), and 104(2) (c), and for administrative sanctions under section 127(1) of the Act.

[4] The motions have been brought by: (1) staff of the Commission; (2) Alfred J. Borgmann, Bernard J. Borgmann, Barbara Bryden and William M. Bryden (the Borgmann Group); (3) Technovision Systems Inc (TVS), Gordon Tremain (Tremain) and Stephen Winters (Winters); (4) David W. Dolson (Dolson); and (5) Ross Jepson (Jepson).

II. Background to Proceedings

[5] A group of seven, led by Bernard Borgmann, of which the Applicant was a member, invested in ITC.com Inc (ITC), an Ontario corporation incorporated for the purposes of consolidating internet service providers (ISP's). Urquhart made a $1,190,000 venture capital investment in ITC and held 25 % of the shares of ITC.

[6] By March 2000, ITC had purchased 28 nine-month options to acquire ISPs that were thought to have 175,000 subscribers. The purchase price was $860,000, all funded by Urquhart. The options provided for an exercise price payable as to 50% in cash and 50% in shares of what would have been an amalgamated public corporation. The cash required by ITC to exercise all the options would have been $35 million.

[7] By July 2000, ITC had been unable to raise the necessary money to exercise the options, and, rather than let the options expire, decided to attempt to sell ITC to TVS of British Columbia.

[8] In August 2000, a letter of intent was signed between TVS and the members of the Borgmann Group. In October 2000, a formal agreement (Technovision Agreement) was executed. The transaction was closed on December 13, 2000. Under the Technovision Agreement, the Borgmann group surrendered their shares in ITC for 9.1 million TVS treasury shares (Vendors' Shares) that were to be held in trust in accordance with the escrow conditions of the Canadian Venture Exchange (CDNX). At the time, the shares of TVS were trading at about $1.10; accordingly, the Vendors' Shares were given that nominal value under the Technovision Agreement, reflecting a purchase price of $10,000,000.

[9] Urquhart received the largest allocation of Vendors' Shares (2.9 million) to reflect the investment she had made. Subsequent to that, she and Bernard Borgmann became directors of TVS. Bernard Borgmann and one other member of the Borgmann group took management positions with Technovision under employment contracts for a period of two years.

[10] The Technovision Agreement provided that any release of the Vendors' Shares held in trust was subject to TVS actually acquiring ISPs for which ITC held options, within one year of the December 13, 2000 closing. The Vendors' Shares were to be released from trust on a graduated scale depending upon the number of subscribers for ISP services that were actually acquired by Technovision upon its exercise of ISP options. Unless 25,000 subscribers were obtained, all of the Vendors' Shares were to be cancelled. One hundred thousand subscribers were required for the release of all of the Vendors' Shares. Vendors' Shares that were not released from trust were to be gifted back to TVS for cancellation.

[11] It is important to note that under the Technovision Agreement, TVS only covenanted to use its best efforts to obtain regulatory approval for the ISP acquisitions, but nothing more. There was no obligation on the part of TVS to acquire any of the ISPs. It was not in a financial position to raise enough money to exercise the 28 ISP options. It thought it could raise $10 million and so entered into the transaction with a view to renegotiate the exercise price for the ISP options by offering the ISPs less cash and more TVS Shares.

[12] All but two of the ISP options expired by the end of 2000. Bernard Borgmann obtained the further agreement of nine of the 28 ISPs to sell to TVS on revised terms, but TVS only pursued three of them. In the end, TVS purchased only two of the 28 ISPs and one additional ISP introduced to it by the Borgmann group. These acquisitions were made in early 2001. Further attempts to acquire the ISPs failed because of an inability to obtain bank financing.

[13] Urquhart's relations with TVS and its board of directors became quite strained. On February 5, 2001, TVS wrote to Urquhart proposing to pay her $500,000 to settle their differences. The deal was subject to certain terms and conditions including her resignation as a director. On February 6, Urquhart rejected the offer and said, "there will be no acceptable revisions where I receive less than the $1,190,000 cash currently, or alternatively, a reduction in the 2,923,688 shares I am entitled to receive under the current TVS-iTCANADA deal."

[14] In March of 2001, Urquhart commenced arbitration proceedings in British Columbia claiming entitlement to a portion of the Vendors' Shares because of the TVS acquisition of certain ISPs allegedly falling within the Technovision Agreement.

[15] If the arbitration determined that the number was less than 25,000, as TVS contended, all of the Applicant's Vendors' Shares would have been cancelled; otherwise, she may have been entitled to 30% of the Vendors' Shares that she had been allocated.

[16] On March 29, 2001, TVS entered into a settlement agreement (Borgmann/Dolson Settlement Agreement) with the Borgmann group and David Dolson, (but not Urquhart) whereby Bernard Borgmann's employment contract and the rights of Borgmann Group and Dolson to receive Vendors' Shares were surrendered for $610,000 to be paid over a period of time.

[17] On April 4, 2001, TVS issued a press release setting out all the particulars of the Borgmann/Dolson Settlement Agreement.

[18] On April 12, 2001, the TVS board of directors, Bernard Borgmann having resigned as a director, approved the Borgmann/Dolson Settlement Agreement, with Urquhart as the sole objector. Urquhart in her written submissions of December 16, 2003 indicated she had received legal advice with respect to her position on this resolution.

[19] On April 25 2001, the Borgmann/Dolson Settlement Agreement was accepted for filing by CDNX.

[20] On April 23, 2001, Urquhart filed a formal complaint with the Institute of Chartered Accountants of Ontario against Alfred Borgmann and Barbara Bryden, alleging, among other things, improper removal of financial records and conflict of interest. After an investigation, the Institute advised the Applicant on October the 31, 2001 that the information presented disclosed no breach of the Institute's Rules of Professional Conduct and found no wrongdoing against Alfred Borgmann and Barbara Bryden.

[21] On May 17, 2001, TVS filed a counterclaim in the arbitration brought by Urquhart asking that she be removed as a director.

[22] On May 18, 2001, Urquhart wrote to Miran Shaviri at the Commission regarding investigations of TVS commenced by CDNX and the British Columbia Securities Commission (BCSC). In this letter, Urquhart indicated that she spoke on behalf of three shareholder groups, herself and Ross Jepson, 6000 minority investors in 6.2 million TVS shares as well as 18 of 20 prospective shareholder groups who were owners of the ISPs that agreed to letters of intent for acquisition by TVS.

[23] On June 15, 2001, Urquhart wrote to the Royal Bank Financial Group Ombudsman concerning a dispute involving a $10 million Royal Bank of Canada term loan to TVS. Urquhart indicated that she wrote to him as a third party mediator to deal with Royal Bank issues that

could affect, among others, Urquhart's considerable TVS investment loss and damages beyond her share interest in TVS due to alleged interference with the Royal Bank term loan through her communications with the Royal Bank and also indicated that the completion of the deal was in the interests of all shareholders "or else there are substantial prospects for successful litigation and damage recovery."

[24] An attempt was made by Technovision to acquire a third of the 28 ISPs in the spring of 2001, but the Royal Bank refused to advance the funds because TVS could not satisfy the terms the bank had imposed when it committed to finance the acquisition of the ISPs.

[25] On July 23, 2001, Urquhart petitioned against TVS, Tremain and Winters in the British Columbia Supreme Court seeking certain declarations and orders pursuant to the shareholder oppression remedy under the *Company Act*, R.S.B.C. 1996, C.62 (Company Act).

[26] On August 21, 2001, Mr. Justice Sigurdson of the British Columbia Supreme Court dismissed Urquhart's application to stay the arbitration and the counterclaim pending the hearing of the oppression application in the British Columbia Supreme Court.

[27] On September 26, 2001, Jepson surrendered his employment contract with TVS and his right to Vendors' Shares in consideration for $100,000, to be paid over time. After receiving legal advice, Urquhart voted in favour of the board resolution approving the Jepson Agreement.

[28] Also in September 2001, TVS filed a lawsuit against Urquhart alleging defamation and interference with economic relations.

[29] Urquhart's July 23, 2001 petition in the British Columbia Supreme Court seeking shareholder oppression relief was heard by Mr. Justice Lowry in Vancouver from December 17, 2001 through December 21, 2001.

[30] On February 2, 2002, Mr. Justice Lowry delivered reasons for judgment dismissing Urquhart's petition. In his reasons, Justice Lowry said among other things:

> She attributes the position in which she finds herself to the purchasing company's failure to fulfill what she says was a commitment to acquire most if not all of the ISPs that had exercised options, a commitment that underlay her support for the transaction. She accepts that she is without recourse on any contractual basis but seeks to invoke the equitable jurisdiction the court is afforded by statute under what is customarily referred to as the oppression remedy. (paragraph 2)
>
> Given the certain loss of her investment that is inherent in the cancellation of her shares, Ms. Urquhart seeks an order under section 200(2) that she be paid $1.10 for each of the shares she would ultimately have received over the course of six years had Technovision acquired a sufficient number of the ISPs to have obtained 100,000 subscribers. She maintains she should be paid over $3 million right now. (paragraph 31)

> It seems to me, that despite any representation Mr. Tremain made that Technovision was committed to purchase the ISPs that had executed options, any reasonable expectations would have to be drawn first from the Agreement. It was negotiated over a period of weeks. All concerned were represented by solicitors. Indeed, The Applicant was personally represented. The Agreement is a comprehensive document consisting of various sub-agreements. (paragraph 50)
>
> It was perfectly clear from the signing of the letter of intent, if not before, that Technovision was assuming no obligation to acquire any ISPs. It could not do so because, among other things, it could not obtain the $35 million in financing needed to exercise the options. It was at best purchasing an opportunity to negotiate revised terms of sales with 28 ISPs that had agreed to sell. (paragraph 51)
>
> The Agreement actually provides for Technovision buying no ISPs or at least buying so few that it would obtain less than 25,000 subscribers. Given that in that event the Borgmann Group would be entitled to no shares, I do not see how it can be said that it was reasonably expected that Technovision would necessarily acquire any ISPs. It is simply not consistent with the provision for the cancellation of all of the allocated shares. (paragraph 52)
>
> Indeed the whole burden of the Applicant's application is to impose on Technovision an obligation it never assumed. (paragraph 53)
>
> There is here no suggestion that Mr. Tremain or others benefited to Ms. Urquhart's disadvantage because more ISPs were not acquired before December 13, 2001, save perhaps that Technovision may be on a better financial footing than it might have been. (paragraph 54)
>
> The circumstances here appear to have been such that the Borgmann Group had little to lose by the time they sold ITC to Technovision. The money invested in the options had been spent and what was required to complete the consolidation of the ISPs could not be raised. The options were going to expire. When that happened the Borgmann Group would have had nothing. Technovision may have appeared the best bet to save something of the failing venture. The evidence does not disclose that there were any other real alternatives. It was not a matter of the Borgmann Group having chosen to sell to Technovision when there were equally attractive alternative opportunities available to them. The Applicant may have had every reason to hope that Technovision would acquire a large number of the ISPs, but she had no sound basis to reasonably expect that it necessarily would do so. She cannot now be heard to say that she has been oppressed or unfairly prejudiced because it did not. (paragraph 55)

[31] On March 4, 2002, Urquhart filed a Notice of Appeal from the decision of Justice Lowry. She was critical of her lawyers handling of the matter and attended on the appeal personally. In her argument before this panel, she stated, "there have been settlements with lawyers and their insurance companies for legitimate reasons."

[32] On October 8, 2002, Urquhart filed a statement of claim in the Ontario Superior Court against TVS, the Borgmann Group and Jepson. In the claim, Urquhart made a claim inter alia that the Borgmann Group and Jepson pay damages under section 105(2) of the Act.

[33] On October 30, 2002, the arbitrator dealing with the Technovision Agreement in the arbitration proceeding commenced by Urquhart in British Columbia ruled on a motion by

Urquhart to amend her claim by adding a claim under section 237 of the *Company Act* of British Columbia. He said:

> Since Ms. Urquhart made a conscious decision not to complain about the buy-out or settlement when she discovered it had occurred; since she made a conscious decision not to include the claim in the arbitration, but to include it in a court proceeding; since her focus was on the court proceedings and she is only raising this issue two weeks before the arbitration, after the court application is unsuccessful and now under appeal; since the application under section 237 is logically brought by way of a petition alleging breach of section 200, as she did in this case; since on the information I have so far , I question the chances of success: since I must weigh all of this with the fact I have been working to attempt to have this arbitration heard for over a year and with the prejudice in time, money and the possible loss of witnesses by Technovision, my order is that the claimant cannot amend or supplement her claim by adding a claim under section 237. That claim is presently before the courts in an oppression action.

[34] On December 6, 2002, Urquhart applied to the Commission for consent to commence proceedings under section 122(7) of the Act. In her submissions with respect to this application, she stated, "it is in the Ontario public interest that the OSC grant me the consent I seek so that I may now thoroughly seek civil justice and restitution for my $1.2 million of investment loss at Technovision." After written submissions and oral argument, on January 8, 2003 the Commission refused consent and dismissed her application.

[35] On January 23, 2003, the British Columbia Court of Appeal unanimously dismissed Urquhart's appeal of Justice Lowry's judgment. In her factum and oral argument, Urquhart relied heavily on over 270 pages of new evidence that she wished to adduce for the first time. Some of it was available at the time of trial and some was not. The Court found, among other things, that Urquhart was in effect seeking a retrial of her claim so she could ground her allegations in unlawful actions on the part of certain persons. In delivering the unanimous reasons of the Court, the Honourable Madam Justice Newbury stated:

> I appreciate that Ms. Urquhart feels strongly about these and other matters on which she made submissions before us. However, the "due diligence" criterion for the admission of fresh evidence at the appellate level is not met for much of the new material. (paragraph 15). See *Spoor v. Nicholls* (2001) 90 B.C.L.R. (3d) 88 (B.C.C.A.), at paragraphs 15 and 16.
>
> More substantively, having read much of the evidence and having heard the respondents' argument on appeal, I cannot agree that the admission of the new evidence would have affected the result of this case. The enduring picture is one of a sophisticated investor who, in danger of losing various options her company had negotiated, took a "long shot" and carried out a share exchange with a company that had little in the way of resources and that was willing to make very few commitments in return for ITC. It certainly does appear that Technovision's management was lacking in talent and honesty, but the trial judge was cognizant of that fact, and still found that Ms. Urquhart - perhaps unlike the investing public - was not oppressed or unfairly prejudiced in terms of the expectations she could reasonably have had. Ms. Urquhart pressed for a speedy trial of her allegations of oppression, and she failed to prove her case. With respect, I am not persuaded that she should be permitted now to have the case retried on a new basis. I would decline to admit the new evidence. (paragraph 15)

[36] In Ontario, on February 7, 2003 Justice Pitt permanently stayed Urquhart's action under section 105 of the Act. His concise reasons bear repeating:

> While the unorthodox nature of the plaintiff's pleading and argument and the multiplicity of defendants serve to complicate the issues somewhat, the essential complaint of the corporate defendant is that the plaintiff has chosen her forum, indeed two forums, in British Columbia, and should be required to abide by the decision already rendered by the British Columbia arbitrator, which has not been appealed, and to await the decision of the British Columbia Court of Appeal, before instituting these proceedings against it in Ontario. (paragraph 3)
>
> With due respect, the plaintiff has no sustainable legal argument to counter that submission. In fact, the only possible explanation for instituting this proceeding against the corporate defendant in Ontario is the plaintiff's apparent belief that Ontario law cannot be applied in a British Columbia Court, although I suspect she is too sophisticated to hold that belief. In any event, such a perception is mistaken. Where the subject matter of the dispute is personal property, Courts having jurisdiction over the person will apply (with expert assistance) whatever is the proper law. The relief the plaintiff is seeking in this action against the corporate defendant is the same as she sought in British Columbia, although her legal theory may be different. A different legal theory is not a proper basis for starting a new action against the same party, for as was said by Ritchie J. in *Fenerty v. Halifax (City)*, 53 N.S.R. 457 at 463; 50 D.L.R. 435 (S.C.) :
>
> > The doctrine of *res judicata* is founded on public policy so that there may be an end of litigation, and to prevent the hardship to the individual of being twice vexed for the same cause. The rule which I deduce from the authorities is that a judgment between the same parties is final and conclusive, not only as to the matters dealt with, but also as to the questions which the parties had an opportunity of raising.
>
> With respect to the personal defendants, the issues are somewhat less simple only because they were not parties in either of the British Columbia proceedings. (paragraph 5)
>
> In essence, the plaintiff's position is that all the defendants conducted themselves in a manner that was inimical to her economic interests. She claims that the corporate defendant, by refusing to release certain escrow shares to her and by failing to make an offer for the purchase of these shares that was proportionate to the settlements with the personal defendants, not only breached a common law duty owed to her, but also ran afoul of certain British Columbia and Ontario corporate and securities statutes. The personal defendants, by accepting the consideration paid by the corporate defendant, not only breached their common law duty owed to her, but also ran afoul of certain British Columbia and Ontario corporate and securities statutes. Apart from the allegations of breaches of Ontario laws, these are precisely the claims made in the British Columbia proceedings. It may be possible, although I do not believe it, that the plaintiff apparently assumed that she could not pursue the defendants in British Columbia for the alleged violations of Ontario law. Further, the nature of the duty the defendants are alleged to have owed to the plaintiff has not been pleaded, although the allegations lead to the inference that the implied duty must be fiduciary in nature. (paragraph 6)
>
> While the plaintiff did not join the personal defendants in the British Columbia proceedings, she required them to testify as witnesses to obtain evidence in support of her cause. (paragraph 7)

> In her pleadings (although not in submissions), the plaintiff relies on violations of section 122 of the Ontario Securities Act. The prosecution of offences under this section requires the consent of the Ontario Securities Commission. (paragraph 8)
>
> This is precisely the kind of proceeding that motions Judges are obliged to stay or dismiss on grounds of *res judicata*, issue estoppel, abuse of process, and on the ground that they are frivolous and vexatious. See for example, *Reddy v. Oshawa Flying Club* (1992), 11 C.P.C. (3d) 154 (Ont. Gen. Div.); *Vaughn v. Ontario (Minister of Health)*, [1996] O.J. No. 1647 (Ont. Gen. Div.); *Donmor Industries Ltd. v. Kremlin Canada Inc*. (No. 1) (1991), 6 O.R. (3d) 501 (Ont. Gen. Div.); *Germscheld v. Valois et al.* (1989), 68 O.R. (2d) 670 (S.C. Ont.); *May et al. v. Greenwood* (1990), 11 O.R. (3d) 42 (Div. Ct.). (paragraph 9)
>
> In addition, the amended statement of claim does not meet the requirement of rule 25.06(1) of the *Rules of Civil Procedure*, which requires that,
>
> > Every pleading shall contain a concise statement of material facts on which the party relies for the claim or defence, but not the evidence by which those facts are to be proved. (paragraph 10)
>
> But, what perhaps is even more important, the claim is drawn as if it were a continuation or amendment of the proceedings already underway in British Columbia. (paragraph 11)
>
> It is not surprising that the plaintiff did not join the personal defendants in the British Columbia proceedings, because she has not pleaded facts from which a duty owed to her by the personal defendants can be found without the drawing the legally unsustainable inference that since the plaintiff and defendants are "potentially" shareholders of the same company, they are fiduciaries of one another. (paragraph 12)

[37] Urquhart elected not to appeal the judgment of Justice Pitt but rather to write to the Commission asking it to take action under section 104 and 127 of the Act.

[38] On February 24, 2003, in response to Urquhart's letter and report of February 10, 2003, the Chair of the Ontario Securities Commission, David A. Brown Q.C. advised her that the "Staff of the OSC will not be pursuing this matter further," on the ground that "this matter is more appropriately characterized as a private dispute between you and Technovision and certain other individuals identified in your report. The proper forum for the resolution of private disputes remains with the civil courts."

[39] Further correspondence ensued between the Commission and Urquhart in which the Executive Director of the Commission wrote to Urquhart that "OSC staff has closed the file in terms of starting an investigation or formulating allegations of issuer bid and collateral agreement non-compliance at Technovision."

[40] As set out above, on May 12, 2003, this Application was brought, having been prepared by Urquhart on her own behalf and on behalf of Bruce Asquith, Leo Chang, Kelly McEvenue and certain anonymous shareholders, now identified. The motion was subsequently amended on June 16, 2003 for an order:

1. Directing Technovision to make an identical issuer bid under section 104 (1) (c) of the Securities Act;

2. An order under the same section directing current directors and senior officers of Technovision to make such an identical issuer bid;

3. An order under section 104 (2) (c) of the Securities Act with respect to exemptions under Part XX of the Ontario Securities Act;

4. An order that the Borgmann/Jepson Settlement Agreement was not justifiable in the circumstances; and

5. An order that administrative sanctions be imposed in the public interest under section 127 (1) of the Securities Act and to review the decision of the executive director not to conduct enforcement proceedings with respect to the Borgmann or Jepson Agreements.

[41] After the oral argument which continued from December 3, 2003 through to December 5, 2003, Urquhart wrote to the Secretary of the Commission asking permission to submit further argument in writing as David Dolson, in his closing submissions on December 5, 2003 had said that Urquhart had, in her capacity as a director, approved the TVS Board of Directors resolution approving the Jepson agreement. Her request was granted by the panel and the opposing parties were given until January 6, 2004 to submit any arguments in response. Urquhart's submissions of December 16, 2003, the reply submissions of staff of the Commission, Cynthia Amsterdam on behalf of the Borgmann Group, and David Dolson, all dated January 6, 2004 are attached to these Reasons.

III. Decision

[42] Section 104 empowers an "interested person" to apply to the Commission where a person or company has not complied or is not complying with the take-over bid or issuer bid provisions of the Act. When one compares the powers given to the Commission under section 104 and those given to the court under section 105, it is evident that section 104 is intended to deal with non-compliance while a take-over bid or issuer bid is in progress or still running its course. Section 105 in contrast, provides for an "interested person" to apply to the courts where non-compliance with the same provisions has occurred. It is intended to deal with non-compliance once a take-over bid or issuer bid has been completed or is no longer running its course. In the present case, the alleged issuer bid by TVS had run its course by the autumn of 2001.

[43] Under section 127 (1) of the Act, the Commission has the jurisdiction to make orders in the public interest. "The sanctions under the section are preventative in nature and prospective in orientation. Therefore, section 127 cannot be used merely to remedy Securities Act misconduct

alleged to have caused harm or damages to private parties or individuals." See *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario,* [2001] 2 S.C.R. 132 Iacobucci J.

[44] It is clear from her business dealings and the subsequent legal and other proceedings and negotiations, that Urquhart is an intelligent, knowledgeable and sophisticated investor. The underlying thrust of all her efforts by way of litigation, complaints to various banks, regulatory authorities, professional boards, and claims against her lawyers and their insurers, is to recover monies she invested in what turned out to be a highly speculative project. It appears that from the beginning, she acted with legal advice or that such advice was available to her. She now appears to attribute some of her present problems to what she describes as advice that was not appropriate. The facts underlying her claim and complaint have remained the same and have at all times been known to her except her complaints about Tremain, which, as stated by the BCCA, "would not have affected the result of this case."

[45] We find that this section 104 application on behalf of the Applicants is out of time and frivolous and vexatious, and in the words of the Honourable Justice Pitt, "this is precisely the kind of proceeding that motions judges are obliged to stay or dismiss on grounds of *res judicata*, issue estoppel, abuse of process and on the ground that they are frivolous and vexatious."

[46] This is a private dispute and should be resolved in the civil courts. Failure to succeed in the civil court should not be the basis for an application to the Commission to change a private dispute into a matter of public interest.

[47] The application of Urquhart is therefore dismissed.

[48] With respect to the other named Applicants, it was argued that the Applicants' actions have all along included them as silent parties. In her letter of May 18, 2001 to the Commission, Urquhart indicated that she spoke on behalf of three shareholders groups as well as 6000 minority shareholders and "the interest and damages suffered by 18 of 20 prospective shareholders…" Although it is not clear to us that those now named were in fact silent partners in the previous litigation, we are of the view that they are still involved in a private dispute to recover monies, and that their recourse, if any, should be in the civil courts. The issue of whether the judgments of Justice Pitt and the British Columbia Court of Appeal are binding on them can be determined in the civil courts if those parties so desire and the courts permit.

[49] It is our decision that the application of all the other Applicants be permanently stayed.

DATED at Toronto, Ontario this 4th day of March, 2004.

"Wendell S. Wigle" "Robert L. Shirriff"

Wendell S. Wigle, Q.C.	Robert L. Shirriff, Q.C.

Attachment #1

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December 16, 2003

RE: **BRUCE AND CATHERINE ASQUITH, LEO AND DARLENE CHAN, KELLY McEVENUE, DIANE URQUHART, AND 1273880 ONTARIO LIMITED PURSUANT TO SECTION 104 (1) and 104 (2) OF THE ACT ("the Applicants")**

Dear Commissioner Wendell Wigle and Commissioner Robert Shirriff:

The former legal counsel to iTCANADA, David Dolson (who is a respondent acting on his own behalf on this matter) advised the panel in his closing arguments on Friday, December 5th that I had approved the Technovision board of directors' resolution authorizing the Jepson Agreement. Following the logic of Commissioner Shirriff's question on whether I am guilty of acting jointly or in concert with the company, then my voting for the Jepson Agreement could be interpreted to mean that I authorized, permitted or acquiesced to the illegal issuer bid in the Jepson Agreement. The implication to this would presumably be that I could not now be filing a S. 104 application and asking the OSC Commissioners to give Notice of Hearing for sanctions on the selling shareowners. I am writing this letter to the panel since this is an important issue that was not raised in the motion submissions or reply submissions of the OSC staff or the respondents. There was no opportunity for me to reply to this issue at the motion hearing.

I voted no to the Borgmann Group Agreement at the April 12, 2001 board meeting. It is true that I voted yes to the Jepson Agreement at the October 9, 2001 board meeting. This was in the Document 2 – Applicants' First Book of Evidence, Exhibit # 47. The two board decisions were not consistent and I had obtained legal advice on both board resolutions.

The Jepson agreement was executed on September 26, 2001. I first became aware of it from a Notice of Meeting of Directors received on October 4, 2001. I obtained some more details on the Jepson Agreement from the October 5, 2001 press release announcing it. On October 4, 2001, I wrote to my lawyer to inform him that I had to vote on the Ross Jepson Agreement at the upcoming directors' meeting on October 9, 2001. I told my lawyer that "from a business point of view I would be voting yes to the Jepson settlement, while I voted no to the Borgmann Group deal." There was nominal incremental cash flow impact and damages from the Jepson Agreement. I specifically asked my lawyer in writing, "Should I vote no for legal reasons?" Not having received an answer from my lawyer on the morning of October 9, 2001, I asked again in writing, "Do you want me to vote no on Ross Jepson's deal at today's TVS Directors' meeting from a legal consistency point of view on the matter of oppression?" After my lawyer advised me to vote yes, this is the vote that was made at the board meeting later that day. I am releasing by attachment to this letter, part of my October 4, 2001 and my October 9, 2001 privileged correspondence with my lawyer, Marcus Knapp of Paliare Roland Rothstein LLP.

As I indicated in our application and presented to the panel, I had no knowledge that either the Borgmann Group or the Jepson Agreements were illegal under the OSA at the time of these agreements. I regarded them to be improper and oppressive as noted in my correspondence with the Board, the TSX Venture Exchange and the OSC at about the time of the Borgmann Group Agreement. This correspondence is evidence in our application. I sought clarification on the legal or illegal nature of the Borgmann Group Agreement from the TSX Venture Exchange, the OSC and my lawyer in April and May 2001. My lawyer did not advise me that these agreements were illegal under the OSA, even though I had specifically asked him to evaluate the Borgmann Group Agreement from a legal point of view at the time it was announced in April 2001. My lawyer not knowing about or not advising me about the Borgmann Group and Jepson Agreements being illegal under the OSA is the same issue as my lawyer not bringing the OSA S. 105 cause of action at the same time as he filed the B.C. Company Act S. 200 shareowner oppression cause of action in the B.C. Supreme Court in July 2001 or at the December 2001 hearing. I first learned that the Borgmann Group and Jepson Agreements were illegal under the OSA from Rose-Anne Yuk, Corporate Finance Specialist at the BCSC and from Terry Moore, Corporate Finance Specialist at the OSC in July 2002. The BCSC was in the midst of its investigation at the time of the continuous disclosure misrepresentation and stock trading manipulation, which it determined to be in its jurisdiction, while the illegal issuer bids were Ontario jurisdiction. The timing of my due diligence on the illegal nature of the two agreements was explained in the timeline for OSC contacts and decisions in Document 11.1 – Applicants' Second Book of Evidence, Exhibit # 83.

There is significant evidence before the motion hearing on the efforts I undertook to acquire expertise on the illegal nature of the Borgmann Group and Jepson transactions as a director and large shareowner with the same interests as other public shareowners. I did not accept any illegal issuer bids and did not obtain any ill-gotten gains. It is entirely reasonable for a director to file this S. 104 application after learning later about the misrepresentation and omission of material negative information that should have been in the issuer bid information circulars and after learning later that the two agreements were illegal under the OSA. Had the material negative information been publicly disclosed in the information circulars

at the time and had the issuer bids been legally executed, I would have accepted the offer of identical consideration made to all Ontario shareowners.

Sincerely,

Diane Urquhart

CC:

TO: Mr. Matthew Britton,
Enforcement Branch,
Ontario Securities Commission,
20 Queen Street West, Suite 1900,
Toronto, Ontario M5H 3S8
Tel: 416-593-8319
Fax: 416-593-2319
E-mail: mbritton@osc.gov.on.ca

TO: Technovision Systems Inc.
Mr. Gordon Tremain
Mr. Stephen Winters
c/o Mr. Wade D. Simpson
Suite 1010, 1030 West Georgia Street
Vancouver, British Columbia, V6E 2Y3
Tel: 604-602-0206
Fax: 604-688-5590

TO: Bernard J. Borgmann, AlfredF.J.Borgmann,
Barbara J. Bryden and William M. Bryden
c/o Cynthia Amsterdam,
Heenan Blaikie LLP,
P.O. Box 185, Suite 2600
South Tower, Royal Bank Plaza
Toronto, Ontario M5J 2J4
Tel: (416) 360-2880
Fax: (416) 360-8425
E-mail: camsterdam@heenen.ca

TO: Mr. David W. Dolson, LLB.
332 Dupont Street, Second Floor
Toronto, Ontario M5R 1V9
Tel: 416-966-9083
Fax: 416-966-9084
E-mail: d.w.dolson@on.aibn.com

Attachment #1

TO: Mr. Ross Jepson
443 Linden Lane
Oakville, Ontario L6H 3K2
Tel: 905-842-6218
rossjep@cogeco.ca

Attachment #1

Diane A. Urquhart

1486 Marshwood Place,
Mississauga, Ontario, L5J 4J6
Tel: 905-822-7618
Fax: 905-822-0041
E-Mail: urquhart@galaxycapital.com

To:	Marcus Knapp	From:	Diane Urquhart
Fax:	416-646-4331	Pages:	8
Phone:	416-646-4330	Date:	October 4, 2001
Re:	Urquhart Documents		

Marcus:

I got this FAX last night from Gord Tremain regarding an October 9, 2001 TVS Directors' Meeting. You will note last page where he is now following proper minutes procedures.

I have to vote on Ross Jepson's settlement. From a business point of view I would be voting yes to the Jepson settlement, while I voted no to the Borgmann Group deal. Should I vote no for legal reasons? The business issues are:

Borgmann Deal - NO	Jepson Settlement - YES
1. Not using best efforts to acquire iTCANADA ISP's	iTCANADA deal dead, remaining $8.5 million RB financing withdrawn/expired, now in litigation
2. Uses significant proportion of TVS cash flow needed for upfront iTCANADA acquisition expenses, monthly $50,000 - $10,400 Bernie salary = $39,600	Neutral to cash flow, monthly $15,000 - $14,600 Jepson salary = $400, Jepson cannot be retained anyway and he is not being utilized
3. Damages confidence of prospective iTCANADA ISP's	Confidence gone already
4. Share dilution benefit was not material relative to the costs above, 7% at 25,000 subs and 16% at 100,000 subs	Share dilution benefit is not material, 0.9% at 25,000 and 5% at 100,000

Attachment #1

Diane Urquhart

From: Diane Urquhart [urquhart@galaxycapital.com]
Sent: Tuesday, October 09, 2001 11:09 AM
To: 'Marcus Knapp'
Subject: RE: Vote on Ross Jepson's Deal Today

Importance: High

Marcus:

The meeting is at 7 P.M. TO time, which is 4:00 P.M. Vancouver time. It is a teleconference meeting and Gord sent a note saying there would be minutes and any written material of mine will be attached to the minutes. I sent you a FAX with agenda last Thursday.

There is also a need for me to approve change in Audit Committee from Cliff Sweeney, Raj Raniga and Steve Winters to Cliff Sweeney, Raj Raniga and Larry Lees. Last time I voted no since the committee did not have a majority of Independent Directors and I did not have a CV on Cliff Sweeney. They have fixed the first objection, while I still have not received sufficient info on Cliff Sweeney. Larry Lees has a Parkinson's health problem according to his wife, but I cannot prove this. I have requested for a long time that I be on the Audit Committee as an independent Director. Wade Simpson and Steve Winters have contested my independent Director status in recent claims, even though the CDNX has said that I am independent Director. Obviously, I want nothing to do with this company asap, subject to some court determined or out-of-court settlement.

TVS had a press release containing the following info on Cliff Sweeney:
Mr. Sweeney is a professional business consultant and prior to 1994 he was a senior executive in the investment banking division of a major Canadian Chartered Bank. "I'm also excited about Cliff Sweeney joining our Board of Directors. As an independent Director, his impartial advice based on years of business experience will be invaluable."

I am inclined to vote no to the Audit Committee since there was not a proper nominating committee process for Cliff Sweeney, he is a friend/professional acquaintance of Don Matthew of KPMG, the auditor, and I have not yet received from the Corporate Secretary a detailed CV on Cliff Sweeney.

How shall I vote on both issues from a legal point of view? Also, please note that no-one has been served so far on the latest TVS Counter Lawsuit. No-one named has called me or Ross.

Diane

From: Marcus Knapp [mailto:Marcus.Knapp@paliareroland.com]
Sent: Tuesday, October 09, 2001 10:16 AM
To: Diane Urquhart
Subject: RE: Vote on Ross Jepson's Deal Today

Diane,

When does the meeting take place?

-----Original Message-----
From: Diane Urquhart [mailto:urquhart@galaxycapital.com]
Sent: Tuesday, October 09, 2001 9:55 AM
To: Marcus Knapp
Subject: Vote on Ross Jepson's Deal Today
Importance: High

Marcus:

Do you want me to vote no on Ross Jepson's deal at today TVS Director's meeting from a legal consistency point of view on the matter of oppression.

Diane

Attachment #2

Ontario Securities Commission
Commission des valeurs mobilières de l'Ontario

P.O. Box 55, 19th Floor
20 Queen Street West
Toronto ON M5H 3S8

CP 55, 19e étage
20, rue Queen ouest
Toronto ON M5H 3S8

Telephone: 416-593-8294
Fax: 416-593-2319
E-mail: mbritton@osc.gov.on.ca

Web site: www.osc.gov.on.ca
TDX 76
CDS-OSC

January 6, 2004

To Commissioners: Wendell Wigle
Robert Shirriff

This letter is written in response to the Ms. Urquhart's letter dated December 16, 2003.

Staff submit that the letter supports Staff's position that this is a private dispute between the parties and not a case where there is a sufficient public interest component to warrant enforcement proceedings. Similarly, this is not a proper case for a section 104 application to be heard by the Commission.

The correspondence attached to Ms. Urquhart's letter of December 16, 2003 demonstrates that her concern was with the recovery of her ITCanada investment. Specifically, in her memo to her lawyer dated October 9, 2000, she stated:

> "Obviously, I want nothing to do with this company asap, subject to some court determined or out-of-court settlement."

Staff submit that the correspondence from the Applicant, Urquhart, further supports Staff's submission that this Application is an attempt to achieve through the Commission process what the Applicant, Urquhart, was unable to obtain in the Courts. As such, the Application is frivolous and vexatious and an abuse of the Commission's process and should be stayed or dismissed.

Yours truly,

Matthew Britton

Attachment #3

David W. Dolson
Barrister & Solicitor
332 Dupont Street, Second Floor, Toronto, Ontario, M5R 1V9
Telephone: (416) 966-9083
Facsimile: (416) 966-9084

January 6, 2004

by courier:

Mr. John Stevenson
Secretary's Office
Ontario Securities Commission
20 Queen Street West, 17th Floor
Toronto, Ontario
M5H 3S8

Dear Mr. Stevenson:

Subject: **In the Matter of Bruce Asquith, Leo Chan, Kelly McEvenue, Diane Urquhart, Anonymous Stakeholders #1 & #2 and 1273880 Ontario Limited**

Attached is a response to the letter written by Ms. Urquhart dated December 16, 2003, in three copies.

Yours very truly,

David W. Dolson

cc: Cynthia Amsterdam
Wade Simpson
Diane Urquhart
Matthew Britton
Ross Jepson

Attachment #3

David W. Dolson
Barrister & Solicitor
332 Dupont Street, Second Floor, Toronto, Ontario, M5R 1V9
Telephone: (416) 966-9083
Facsimile: (416) 966-9084

January 6, 2004

by courier:

January 6, 2004

To Commissioners: Wendell Wigle
Robert Shirriff

c/o Secretary's Office
Ontario Securities Commission
20 Queen Street West, 17th Floor
Toronto, Ontario
M5H 3S8

Dear Sirs;

Subject: ***In the Matter of Bruce Asquith, Leo Chan, Kelly McEvenue, Diane Urquhart, Anonymous Stakeholders #1 & #2 and 1273880 Ontario Limited***

This letter is written in response to Ms. Urquhart's further submissions of December 16, 2003.

The board approval referred to in argument was in Ms. Urquhart's own Book of Documents and was her own production. She can scarcely claim to have been surprised by it.

Again, in the further documents attached to Ms. Urquhart's e-mail, there is no evidence of any desire to have an offer made to her to purchase her shares for the same amount, proportionately, as Mr. Jepson was being paid or even at this point in time at the same price as paid for the Borgmann shares.

There is a reference in the closing paragraph of the attached e-mail from Diane Urquhart to Marcus Knapp to a then pending, but not served, law suit, by Technovision against herself and Jepson. Notwithstanding this evidence she has maintained, in the absence of any supporting evidence, that Mr. Jepson (and the other individual vendors) were acting "jointly or in concert" with issuer in an "issuer bid". This continued allegation is illustrative of the vexatious nature of these proceedings as against all of the individual "vendors".

It is, I submit, clear from a careful reading of this material that her complaint and evaluation of both the initial settlement and the Jepson settlement were based upon her judgment of the business wisdom and case for the purchase and the impact upon the issuer. She agreed with the Jepson decision initially but disagreed with the decision on the earlier, April, settlement with the other individuals.

Her choice however was to proceed to litigate or settle with the issuer relating to her own escrowed shares as set out in her memorandum to her then solicitors as attached to her most recent productions and not to seek a follow up offer on the same terms as given to Jepson (or Borgmann's, Bryden's and Dolson). Only more than two years later after failing with respect to her alternative strategies is she before the commission seeking such relief.

Yours truly,

David W. Dolson

cc: Cynthia Amsterdam
Wade Simpson
Diane Urquhart
Matthew Britton
Ross Jepson

Attachment #4

Heenan Blaikie

ORIGINAL BY E-MAIL
COPY BY REGULAR MAIL

Tuesday, January 06, 2004

Commissioner Wendell Wigle
Commissioner Robert Shiriff
c/o Mr. John Stevenson
Secretary to the Ontario Securities Commission
20 Queen Street West, Suite 1900
Toronto, ON
M5H 3SH

Re: In the Matter of Bruce Asquith, Leo Chan, Kelly McEvenue, Diane Urquhart, Anonymous Stakeholders #1 & #2 and 1273880 Ontario Limited

Dear Sirs:

This letter is in response to the written submission of the Applicants dated December 16, 2003, following our attendance at the Ontario Securities Commission on December 3, 4 and 5, 2003.

The Individual Respondents (the Borgmanns/Brydens) respectfully submit that the Applicants' letter of December 16, 2003 highlights the frivolous and vexatious nature of their Application and demonstrates further how this Application is an abuse of the process of the OSC.

Cynthia Amsterdam

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F 1 866 220.8631
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200 Bay Street
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We summarize the Applicants' submissions as follows:

1. That the Applicant Urquhart relied to her detriment on the advice of legal counsel and was therefore not aware of the "illegal" nature of the Borgmann Group Agreement and the Jepson Agreement until being advised of such by the British Columbia Securities Commission and the Ontario Securities Commission in July 2002;

2. The Applicant Urquhart ought not to be held accountable for having breached the *Ontario Securities Act* when she voted in support of the Jepson Agreement at the Technovision Board of Director meeting held on October 9, 2001; and

3. Despite the Applicant Urquhart's original lack of knowledge that the Borgmann Group Agreement and the Jepson Agreement allegedly violate the issuer-bid requirements of the *Ontario Securities Act*, all of the Respondents, including the Borgmans, Mr. Dolson and Mr. Jepson ought to be held accountable to the Applicants for having entered into these Agreements.

The Borgmanns/Brydens state that this submission advocates that the Applicants, and in particular Ms. Urquhart, should be afforded special consideration and be excused from accountability for allegedly breaching the *Ontario Securities Act*, while the Individual Respondents should be held accountable. This represents, in our respectful submission, an abuse of the process of the Ontario Securities Commission to enforce the *OSA*. Further, it evidences the private nature of the dispute between Ms. Urquhart and the Respondents, which position has been advocated by the OSC Staff.

The December 16, 2003 Submission of the Applicants highlights the fact that, irrespective of whether or not the Applicant Urquhart was of the view that the Borgmann Group Agreement breached the issuer bid requirements of the *OSA*, she nevertheless, did not seek to obtain an identical bid under the *British Columbia Company's Act*, nor an identical issuer bid under the *Ontario Securities Act*, at the time either of the Agreements were entered into.

The Borgmanns/Brydens reiterate their submission that there are clear reasons on the record evidencing why Ms. Urquhart and the other Applicants did not make this request. In Ms. Urquhart's letter to the Royal Bank dated June 15, 2001 at page 4 [see OSC Document Reference #12, Book of Documentary Evidence To Be Relied Upon By The Respondents, Volume I, Tab 24] wherein Ms. Urquhart states:

> "Ross Jepson and I decide to remain in our investment, due to our belief in the ITCanada Business Plan..."

Further, in the same document, Ms. Urquhart states that the Borgmann Group "sold their collective share interest at $0.12 per share", and "The TVS Board of Directors has held no meetings... nor introduced any tactical actions to deal with the decline in TVS stock price from its high of $1.60 last fall to a low of $0.37 recently, and a $0.41 today" [June 15, 2001].

It is respectfully submitted that Ms. Urquhart's statement in her December 16, 2003 correspondence that "I would have accepted the offer of identical consideration made to all Ontario share owners" is not tenable nor supported by her own statements made in June 2001 (that the Borgmanns sold for $0.12 and the TVS stock price of $0.37 was the all time low as at June 2001).

Reference is also made to the Memorandum dated May 18, 2001 from Ms. Urquhart to Miran Shaviri [OSC Document Reference #4, Submission on Issue Estoppel, Abuse of Process and Frivolity and Vexatiousness, dated May 12, 2003, filed by the Applicants,

Tab 14, at page 2] wherein Ms. Urquhart states that she "speaks on behalf of three share-holder groups", namely herself and Mr. Jepson, the "6,000 minority investors in 6.2 million TVS shares", and the interests of the ISP owners that were under option for acquisition by TVS.

Ms. Urquhart has throughout the relevant period of time, acted on behalf of all Applicants herein, and all minority shareholders, and as such, the Applicants ought to be bound by all of Ms. Urquhart's actions, including her approval of the Jepson Agreement.

Further, as a Director approving the Jepson Agreement, any relief that the Applicants seek as against Mr. Bernard Borgmann as a former Director of TVS, must be equally applicable to Ms. Urquhart, if not more so, by virtue of her actively having approved one of the two "illegal issuer bids". Mr. Borgmann did not act in his capacity as a Director when the Borgmann Group Agreement had been approved, given his resignation prior to the Boards' approval.

Simply stated, the thrust of Ms. Urquhart's submission that she should be treated differently than the other TVS Directors who voted in favour of the Borgmann Group Agreement and the Jepson Agreement is untenable when reviewed in the context of the documentary record filed in these proceedings. All of the Respondents should be afforded the same benefit of the doubt that Ms. Urquhart asks be extended to her.

In summary, the Borgmanns/Brydens state that the December 16, 2003 Submission constitutes further evidence of the frivolous and vexatious nature of this Application [see *Re: Lang Michener et al. and Fabian et al.* (1987), 37 D.L.R. 4th 685 at 690-693, OSC Document Reference # 18, Respondents' Brief of Authorities, Tab 32] which defines a series of indicia to characterize a proceeding that is frivolous and vexatious:

> .
> .
> .
> (d) it is a general characteristic of vexatious proceedings that grounds and issues raised tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings...

The fact that Ms. Urquhart seeks to blame it all on her legal counsel's alleged inadequate advice is a factor these Respondents rely upon.

As such, the Application should be stayed or dismissed as frivolous, vexatious and an abuse of the process of the Ontario Securities Commission.

All of which is Respectfully Submitted

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