S.C.C. File No. 38562

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE QUEBEC COURT OF APPEAL)

BETWEEN:

INTERNATIONAL AIR TRANSPORT ASSOCIATION

APPELLANT
(Impleaded Party)

and

INSTRUBEL, N.V.

RESPONDENT
(Appellant)

and

THE REPUBLIC OF IRAQ, THE MINISTRY OF INDUSTRY OF THE REPUBLIC OF IRAQ, THE MINISTRY OF DEFENCE OF THE REPUBLIC OF IRAQ, and THE SALAH ALDIN STATE ESTABLISHMENT

INTERVENERS
(Respondents)

AND BETWEEN:

THE REPUBLIC OF IRAQ, THE MINISTRY OF INDUSTRY OF THE REPUBLIC OF IRAQ, THE MINISTRY OF DEFENCE OF THE REPUBLIC OF IRAQ, and THE SALAH ALDIN STATE ESTABLISHMENT

APPELLANTS
(Respondents)

and

INSTRUBEL, N.V.

RESPONDENT
(Appellant)

and

INTERNATIONAL AIR TRANSPORT ASSOCIATION

INTERVENER
(Mise en cause)

FACTUM OF THE APPELLANT
(International Air Transport Association)
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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APPELLANT'S FACTUM

PART I: OVERVIEW

a) Introduction

1. The Canadian court system should not become a convenient avenue for the seizure of funds essential to the integrity of international air traffic and airport operations as the result of disputes between foreign parties that have no connection whatsoever to Canada.

2. When foreign air navigation and airport charges (or other trade debts) are collected all over the world by the International Air Transport Association ("**IATA**"), the proceeds of such collections have generally no connection whatsoever with Canada and they are not maintained in Canada. They are collected and maintained abroad by IATA, whose financial services and various clearing houses act as a global collection agency for the industry.

3. The Québec Court of Appeal Decision in the matter (the "**QCA Decision**") [1] concluded that IATA, in its capacity as agent, actually acquires title to such funds when collected, and as a result they could potentially be liable to be garnished worldwide through a writ issued by the Quebec Superior Court, since IATA's global head office is located in Montreal.

4. This could have far reaching consequences for the IATA E&F Service, a global invoicing and collection service operated by IATA, which serves as a linchpin of the worldwide management of aircraft traffic and efficient operation of airport services (as further explained and defined below).

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[1] *Instrubel* v. *Republic of Iraq*, 2019 QCCA 78, *Joint Record of the Appellants*, tab 1-B [*QCA Decision*].

5. Respectfully, the QCA Decision is wrongly decided. It is based on an erroneous interpretation of the earlier jurisprudence of this Court, and it ignores some fundamental principles of Quebec Civil Law.

b) Statement of Facts

i) The International Air Transport Association

6. IATA is the global trade association for the international air transport industry.

7. IATA was incorporated in 1945 by Special Act of the Parliament of Canada[2]. Although technically incorporated in Canada and based in Montreal, the mission of IATA and its responsibilities are worldwide. IATA's members include over 290 airlines present in more than 120 countries (representing 82% of the world's total air traffic) and IATA plays a vital role in the conduct of commercial aviation worldwide[3].

8. IATA's stated purpose, objectives and aims, as determined by its act of incorporation, are as follows:

> - *to promote safe, regular and economical air transport, for the benefit of peoples of the world, to foster air commerce and to study the problems connected therewith;*
> - *to provide means for collaboration among the air transport enterprises engaged directly or indirectly in international air transport service; and*
> - *to co-operate with the International Civil Aviation Organization and other international organizations*.[4]

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[2] *An Act to Incorporate the International Air Transport Association*, SC 1945, c 51 [*IATA Act*].
[3] Affidavit of Manfred Blondeel, dated March 25, 2019, *Joint Record of the Appellants*, tab 3-D.
[4] *IATA Act*, *supra* note 2 at s 3.

9. IATA's responsibilities towards the aviation industry also include operating a variety of financial services and settlement systems catering to international airlines, travel agents, cargo agents, airports, governments, civil aviation authorities, ground handling companies and other industry suppliers and partners. These financial services and settlement systems annually process over USD 400 billion in the aggregate, and can justifiably be seen as the "glue" that binds the contemporary commercial aviation system together[5].

The IATA E&F Service

10. Among the financial services provided by IATA to global air transport, the Enhancement and Financing Service (the **"E&F Service"**) plays a particularly critical role.

11. Under the global civil aviation regime, civil aviation authorities are typically tasked by sovereign states to monitor, control and direct air traffic in the air space over and around their territory (when performing such functions, they are also known as air navigation services providers or "**ANSPs**"). For example, in Canada this role is currently performed by NAV CANADA which serves as Canada's ANSP[6].

12. Airlines operating in a country are required to pay certain charges incurred during flights through a nation's airspace (commonly referred to as the "air navigation charges ") to the relevant ANSPs. They are also called upon to pay various charges related to the use of airports and other ground or navigation facilities all over the world[7].

[5] Affidavit of Manfred Blondeel, dated March 25, 2019, *Joint Record of the Appellants*, tab 3-D.
[6] *Id*.
[7] *Id*.

13. Through the E&F Service, IATA collects the funds described above (the "**E&F Client Funds**") from the world's airlines which have agreed to participate in this service, leveraging its existing relationships with its members and other actors in the industry. The genesis of the E&F Service, the significant role it plays in increasing aviation safety and efficiency in many countries worldwide, and the potential impact of this case on the industry as a whole are further detailed at paragraphs 116 and following hereof.

14. All E&F Client Funds are held in, and remitted from, a specific IATA bank account with UBS Bank (the "**UBS Bank Account**" and the "**Swiss Bank**", respectively) which is maintained and located in Geneva, Switzerland, where, at all relevant times in this matter, the E&F Service was based[8].

15. As of today, more than 25 ANSPs and 100 airports use the E&F Service. Almost USD 4 billion in E&F Client Funds are collected annually from 4,500 airlines and remitted to ANSPs and airports across all continents, at a collection rate close to 100%[9].

ii) The Iraqi Civil Aviation Authority

16. The Iraqi Civil Aviation Authority (the "**ICAA**") is the ANSP responsible for the airspace of the Republic of Iraq.

[8] Joint Stipulations of the Parties, dated March 11, 2016, *Joint Record of the Appellants*, tab 2-N.
[9] Affidavit of Manfred Blondeel, dated March 25, 2019, *Joint Record of the Appellants*, tab 3-D.

17. In 2004, the ICAA and IATA entered into a *Contract for the establishment of a Route Facility Charges Billing and Connection System on behalf of the State of Iraq as represented by the Coalition Provisional Authority, Civil Aviation* (as amended, the "**ICAA Contract**")[10].

18. Under the ICAA Contract, the ICAA mandated IATA to bill and collect the air navigation charges due to the ICAA by participating airlines.

19. IATA collected such funds (the **"ICAA Funds"**) on behalf of the ICAA for many years, but for a long time, due to political instability in Iraq, it was unable to remit them to the ICAA. As a result, the ICAA Funds accumulated in the UBS Bank Account.

iii) Instrubel and its Claim

20. The Plaintiff Instrubel, N.V. ("**Instrubel**"), is a Dutch company pursuing payment from the Republic of Iraq and certain related entities, namely The Ministry of Industry of the Republic of Iraq, The Ministry of Defence of the Republic of Iraq and the Salah Aldin State Establishment (together, the "**Defendants**") for the price of weapons and war equipment sold to the Saddam Hussein regime.

21. The claim of Instrubel against the Defendants arose following a number of arbitration awards issued years after the overthrow of the Saddam Hussein regime (the "**Arbitration Awards**")[11].

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[10] Exhibit A-1 to the Solemn Declaration of the Garnishee filed by IATA on August 12, 2013, *Joint Record of the Appellants*, tab 3-A at preamble [*ICAA Contract*].

[11] Partial Award in ICC case no 7472 CK/AER/ACS, dated February 6, 1996, *Joint Record of the Appellants*, tab 4-A; Final Award in ICC case no 7472/CK, dated March 12, 2003, *Joint Record of the Appellants*, tab 4-B; Request for arbitration of Plaintiff Instrubel N.V., dated January 27, 1992, *Joint Record of the Appellants*, tab 4-C; Interim Award in ICC case no 7472/CK, dated January 16, 1995, *Joint Record of the Appellants*, tab 4-D.

22. The ICAA is <u>not a Defendant</u> to the present proceedings, was not a party to the Arbitration Awards, and is a distinct corporate entity from all such Defendants.

c) Procedural Background

23. The proceedings which lead to this appeal were commenced before the Superior Court of Québec on March 11, 2013 by Instrubel against the Defendants, seeking to enforce the Arbitration Awards.

24. On July 30, 2013, Instrubel sought and obtained the issuance of a writ of seizure before judgment by garnishment with respect to the ICAA Funds held by IATA (the "**Garnishment Order**"[12]).

25. The Garnishment Order required IATA "*to declare under oath the amounts of money, securities or movables* ***<u>belonging</u>*** *to the Defendants*[13] *which are in your* [IATA's] *possession for whatever purpose or grounds, and to hold them until the Court has ruled upon the matter*".

26. Shortly thereafter, on August 5, 2013, the Defendants made a motion to quash the Garnishment Order, on the basis that any such funds in possession of IATA would either belong to a different entity from the Defendants, or be immune from seizure as State funds, as well as other technical grounds[14].

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[12] Writ of Seizure Before Judgment by Garnishment, dated July 30, 2013, *Joint Record of the Appellants*, tab 2-C.
[13] The "Defendants" are the same entities under the Writ as the Defendants, as defined herein.
[14] Motion to Quash a Writ of Seizure before Judgment, dated August 5, 2013, *Joint Record of the Appellants*, tab 2-D.

27. On August 12, 2013, IATA responded to the Garnishment Order by filing a "negative declaration"[15].

28. The IATA negative declaration stated that IATA "*does not currently have in its possession any sums of money, securities or movable property that is marked as belonging to the Defendants*", and added that IATA had in its possession an amount of approximately US$166 million, held for the benefit of the ICAA.

29. IATA further explained in its negative declaration that E&F Client Funds collected by IATA, such as the ICAA Funds, are normally destined to be used by ANSPs and airport authorities in the building, design, maintenance, or operation of air navigation and airport services and equipment facilities, which are a sovereign activity of states. Therefore, IATA indicated in the negative declaration that the ICAA Funds were in its view immune from seizure in Canada under the doctrine of state immunity.

30. On November 12, 2013, the Superior Court of Québec dismissed certain technical grounds found in the Defendant's motion to quash the seizure. On November 14, 2013, Instrubel contested IATA's negative declaration.

31. In the months that followed, the parties debated the validity of the Garnishment Order under various technical grounds.

32. In the meantime, to avoid freezing the ICAA Funds to a greater extent than necessary, the Superior Court of Québec authorized the release of the ICAA Funds to the ICAA, provided that an amount of CAD $90 million be transferred to the trust account of IATA's attorneys in Canada.

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[15] Solemn Declaration of the Garnishee filed by IATA on August 12, 2013, *Joint Record of the Appellants*, tab 3-A.

This order was made on December 11, 2013 and stipulated that it was "*without prejudice to any and all rights or arguments that the parties may wish to invoke or make*".

33. During the course of this process, the Defendants realized that, at all times relevant, the ICAA Funds had in fact been held in Switzerland at the IATA UBS Bank Account.

34. As a result, the Defendants amended their motion to quash the Garnishment Order in order to invoke the lack of jurisdiction of the Québec courts over the ICAA Funds as an additional ground to quash the Garnishment Order.

The Superior Court of Québec Judgment

35. On 21 March 2016, Mr. Justice Hamilton ruled in favor of the Defendants, agreeing that the Superior Court of Québec did not have the required jurisdiction to issue the Garnishment Order[16] (the "**SCQ Judgment**").

36. Mr. Justice Hamilton held that the Garnishment Order was directed against the ICAA Funds themselves, and not against IATA personally, which in turn, meant that "*the primary jurisdiction with respect to assets is the Court of the place where the assets are located*", i.e. Switzerland[17].

37. He further held that, as part of its E&F Service operations, IATA acts merely as the holder of the property of third parties in a mandatary (i.e. an agent) capacity[18]. As a result, he decided that ICAA Funds belonged to the ICAA, and not to IATA.

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[16] *Instrubel, N.V.* c. *Ministry of Industry of The Republic of Iraq*, 2016 QCCS 1184, *Joint Record of the Appellants*, tab 1-A [*SCQ Judgment*].
[17] *SCQ Judgment*, *supra* note 16 at paras 61, 75-76.
[18] *SCQ Judgment*, *supra* note 16 at paras 57-58.

38. Mr. Justice Hamilton was further satisfied that "*the funds belonging to [the ICAA] were readily identifiable, and therefore that they continued to belong to [the ICAA]*", notably highlighting the separation of E&F Client Funds from IATA's own funds and stating that IATA maintained appropriate records of the attribution of such E&F Client Funds ensuring their traceability.

39. Mr. Justice Hamilton concluded that the Garnishment Order exceeded the jurisdiction of the Superior Court of Québec since the ICAA Funds were located in Switzerland.

The Québec Court of Appeal Judgment

40. In the QCA Decision rendered on January 22, 2019, the Québec Court of Appeal overturned the SCQ Judgment and decided that, although IATA was a mandatary of the ICAA in respect of holding the ICAA Funds, it was nevertheless "personally" indebted towards the ICAA for a corresponding amount[19].

41. The Québec Court of Appeal decided that, unlike the situation that prevails where corporeal or tangible property is involved, where money is involved, an agent such as IATA only has a personal claim against the bank where the funds of its principal are deposited, and in turn, the agent "owes" an equivalent amount to its principal (the ICAA in this case).

42. Thus, in the Québec Court of Appeal's view, IATA only had a claim against UBS for the ICAA Funds, and in turn, IATA "owed" an equivalent amount of money to the ICAA. The Court

[19] *QCA Decision, supra* note 1 at para 41.

of Appeal held that this "debt" was subject to garnishment in Québec since IATA is based in Québec.

43. In *obiter*, the Québec Court of Appeal also disagreed with the Superior Court of Québec that the ICAA Funds could somehow be "traced" into the UBS Bank Account[20], and held that though the funds may be quantifiable, they were unlikely to be identifiable, and therefore they were not traceable.

PART II. QUESTION IN ISSUE

44. This appeal raises the following question:

> *"Do Québec Courts have the proper territorial jurisdiction to garnish E&F Client Funds held by IATA outside of the province of Québec, and collected from international airlines in its capacity as mandatary of worldwide foreign civil aviation and airport authorities, where neither the parties, nor the transaction giving rise to the garnishment or even the related funds have any connection with Canada or Québec?"*

PART III. STATEMENT OF ARGUMENT

45. Pursuant to Articles 518 and 711 of the Québec Code of Civil Procedure[21], when the recovery of a claim from a litigant is considered to be in jeopardy, a garnishment order may be issued against a third party garnishee in respect of (i) a debt owing by such third party to the litigant

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[20] *QCA Decision, supra* note 1 at para 41.
[21] *Code of Civil Procedure*, CQLR c C-25.01, at arts 518, 711.

in question, or (ii) any goods belonging to the said litigant, that happen to be in the possession of the third-party garnishee.

46. In the present case, as will be discussed further below, neither of these two possibilities applied. As a result, the Garnishment Order was invalid and should be quashed.

47. First, contrary to what the Québec Court of Appeal decided, the ICAA Funds did not constitute a "debt" owed by IATA, and thus, they did not represent a garnishable "debt".

48. Second, though the ICAA Funds were clearly "goods" in the possession of IATA, they were not, at any relevant point in time, located within the Province of Québec, and thus, they were not within the jurisdiction of the Superior Court of Québec.

49. As a result of the above, the Garnishment Order was invalid insofar as it purported to target the ICAA Funds, and it was properly quashed by the Superior Court of Québec.

50. Accordingly, the QCA decision, which decided otherwise, was erroneous and should be reversed by this Court.

51. We will review the two aspects above in the two sections below.

A. THERE WAS NO GARNISHABLE DEBT OWING BY IATA

52. The relationship between IATA and the ICAA is governed by the ICAA Contract. The ICAA Contract provides as follows:

> "*[ICAA] wishes to delegate the task of the operation of a Route Facility Charges Billing and Collection System to IATA for the services provided by CFACC in the Baghdad FIR, (Taltil ACC, Kirkuk ACC & Baghdad ACC).*"[22]
>
> *"[ICAA] has instructed the Operators* [NTD: airlines] *concerned to pay the route facility charges for the services provided on the routes prescribed in the lraqi Aeronautical Information Publication (AIP to IATA acting as its Agent*)." [our emphasis][23]
>
> *IATA will remit to the [ICAA] route facility charges collected on the [ICAA's] behalf, less the agreed administrative fees as detailed in Annex 2 of this Contract, only upon and to the extent of IATA's receipt of payment of the concerned charges […].*"[24]

53. Thus, IATA is directed by the ICAA to act essentially as a collection agency in respect of the ICAA Funds and to remit them to the ICAA[25]. In addition to the above, the ICAA Contract further stipulates that any disputes relating to the route facility charges shall be resolved between ICAA and the airlines[26]. In fact, the ICAA actually has the obligation to indemnify IATA for any expenses or claims of any type arising or asserted against IATA as a direct or indirect result of the performance of its obligations under the ICAA Contract[27]. Clearly, the terms of the ICAA Contract never purport to assign to IATA the ICAA's claims to the route facility charges owed to the ICAA by the airlines[28].

54. The foregoing is consistent with the contract of "mandate" which governs relationships between principals and agents in Québec Civil Law[29]:

> *"2130. Mandate is a contract by which a person, the mandator, confers upon another person, the mandatary, the power to represent him in the*

[22] *ICAA Contract*, *supra* note 10 at preamble.
[23] *ICAA Contract*, *supra* note 10 at preamble, art. 6 (C).
[24] *ICAA Contract*, *supra* note 10 at art. 7.2.
[25] *ICAA Contract*, *supra* note 10 at art. 1 and Annex 1.
[26] *ICAA Contract*, *supra* note 10 at art. 7.1 para. 3.
[27] *ICAA Contract*, *supra* note 10 at art. 1.4 of Amendment No. 1.
[28] *ICAA Contract*, *supra* note 10 at art. 7.2.
[29] *Civil Code of Québec*, CQLR c CCQ-1991, at art 2130.

> *performance of a juridical act with a third person, and the mandatary, by his acceptance, binds himself to exercise the power."*

55. In its capacity as a "mandatary" (or agent) of the ICAA, IATA is a simple "administrator of the property of others" (in this case, the ICAA), within the meaning set forth by Article 1301 C.c.Q. Further, IATA does not itself benefit from the "*property* [it] *is charged with receiving or administering in the performance of* [its] *mandate*"[30] or become its owner, but rather has a specific duty to remit those sums.

56. Thus, pursuant to the relevant rules of the Québec Civil Code, IATA never becomes the owner of the ICAA Funds, or of any claim against airlines for such funds.

57. Past decisions of this Court have clearly recognized that property held by an agent is not part of the agent's patrimony and that agents (such IATA) are not indebted towards their principals (such as the ICAA)[31]. For instance, in *Victuni*, this Court said:

> *"Under the general principles of the law of mandate, it is clear that the obligation of a mandatary towards the mandator is not a debt. The person who has bought property on behalf of a third party who wishes to remain unknown is no more indebted for the price paid than he is the owner of the property. The true owner is the mandator, and the obligation of the mandatary nominee is to render an account to the mandator and deliver over what he has received on his behalf (C.C., art. 1713). What he receives, even if it is money, does not belong to him: he is obliged to keep it separate from his own property. It is a crime for him to take control of it so as to make himself a debtor thereof instead of a mandatary: R. v. Légaré."*
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> [our emphasis, references omitted]

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[30] *Civil Code of Québec*, CQLR c CCQ-1991, at art 2146.
[31] *Victuni v. Minister of Revenue of Québec*, [1980] 1 SCR 580, 1980 CanLII 169 (SCC) at 584 [*Victuni*].

58. The principle established in *Victuni* has been cited on numerous occasions across all levels of courts in support of the proposition that property held by a mandatary does not form part of its assets and that the agent's obligation towards the principal is to collect the property and forward it to its principal, since the property does not belong to it.[32]

59. This is equally true when the property in question is a sum of money. In *Laporte c. Lauzon*, for instance, the Superior Court of Québec recognized that when sums are held by an agent for a principal, no debtor-creditor relationship is created between them:

> *" [73] […] S'il est clair, selon la preuve, que le compte en question a été mis en place justement pour s'assurer que les sommes y déposées soient traitées à part des autres actifs de la débitrice, dans le seul but de les gérer à titre de mandataire ou de fiduciaire et non à titre de créancier ou débiteur, alors les actifs du compte en question ne tomberont pas sous la saisine du Syndic."* [33]

60. Likewise, In *Harp Investments Inc.*[34], a property manager collected money as a "mandatary" for the syndicate of co-owners and deposited the sums collected in a bank account opened in his own name. As the manager became insolvent, the Court had to determine whether the amounts deposited in the account in question were part of the bankrupt's estate.

61. Citing *Victuni*, the Court concluded that, as agent, the debtor was not the true owner of the sums, which still belonged to the principals, i.e. the co-owners of the syndicate. After a careful

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[32] See for instance: *Hydro-Québec c. PF Résolu Canada inc.*, 2019 QCCA 30 at para 28; *9172-0904 Québec inc. c. Commission des relations du travail*, 2010 QCCS 3397.
[33] *Laporte c. Lauzon*, 2007 QCCS 6226 at para 73.
[34] *Harp Investments inc. (Syndic de)*, [1992] R.J.Q. 1581, J.E. 92-508 (C.S) [*Harp*].

review and analysis, the Court concluded that depositing money into an account held by the manager (the agent) did not alter the nature of the parties' rights to the funds[35].

62. The Québec Court of Appeal in this case decided not to apply the above principles for the following reasons:

a. It interpreted the decision of this Court in *Caisse Populaire Desjardins de Montmagny*[36], as meaning that agents who collect sums of money for their principals would somehow "own" the sums collected and be indebted towards their principals;

b. In any event, when the ICAA Funds were deposited in the UBS Bank Account by IATA, IATA only had a personal claim against the Swiss Bank, which in turn, would mean that the ICAA only has a personal claim against IATA;

c. The ICAA Funds were allegedly not sufficiently traceable in the UBS Bank Account, and thus, any direct ownership right would have been lost.

63. All of these reasons are ill-founded. We shall review them in turn below.

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[35] *Harp, supra* note 34 at 16.
[36] *Québec (Revenue)* v. *Caisse populaire Desjardins de Montmagny*, [2009] 3 SCR 286, 2009 SCC 49 [*Caisse Populaire Desjardins de Montmagny*].

i) The Québec Court of Appeal misinterpreted the Law governing Principals and Agents in Québec

64. The Court of Appeal erroneously relied on *Caisse Populaire Desjardins de Montmagny*[37], in order to conclude that agents (such as IATA in this case) would somehow become the actual owners of the funds they collect on behalf of their principals (such as the ICAA in this case).

65. Yet, *Caisse Populaire Desjardins de Montmagny* did not address the general civil law principle governing property being held by a third party, such as an agent, nor is it applicable to the present situation.

66. More specifically, *Caisse Populaire Desjardins de Montmagny* dealt with the tax collection mechanism created by the *Excise Tax Act*[38], and the *Act Respecting the Ministère du Revenu*[39] and must be read in that context.

67. The findings of this Court were very specific to these peculiar statutory regimes and were not meant to be extrapolated to the general regime governing "mandates" in general under the Québec Civil Code. All this Court decided in *Caisse Populaire Desjardins de Montmagny* was that the specific statutory mechanisms set out in the above mentioned two tax statutes, which were deemed to actually create a security interest, did not confer on the Crown a true ownership title to the actual tax proceeds.

68. This conclusion was reached by this Court after reviewing the underlying policy decisions made by Parliament where it clearly intended the rights of the Crown to the tax proceeds to be

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[37] *Caisse Populaire Desjardins de Montmagny, supra* note 36.
[38] *Excise Tax Act*, RSC 1985, c E-15 [*ETA*].
[39] Now the *Tax Administration Act*, RSQ c A-6.002.

subordinate to the rights of the bankruptcy estate[40], and also given the peculiar (and sometimes contradictory) statutory mechanism of collecting the GST/QST, which were not consistent with a true "mandate" or a proprietary right being granted to the tax authorities in the uncollected amounts[41].

69. In reaching this conclusion, this Court highlighted certain factual characteristics of the tax collection mechanism, which led it to conclude that no actual "mandate" existed between the tax debtor and the tax authorities:

a. "*the collection mechanism does not require separate invoices*"[42];

b. "*suppliers remit to the tax authorities amounts corresponding to the tax amounts that have been billed for and are collectible during the reporting period in question even if these collectible amounts have not in fact been collected from the recipients*"[43];

c. "*nothing in the legislation respecting the GST and the QST requires suppliers to keep the taxes they collect separate"*[44]; and

d. "*The mandate with respect to the two taxes involves the performance of obligations to collect and then to remit, not the amounts collected, but a*

[40] Other than certain claims on account of unremitted payroll source deductions, for income tax, Canadian or Quebec pension plan contributions and employee remittance for unemployment insurance, see *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, at ss. 86 and 67(3)(b).
[41] *Caisse Populaire Desjardins de Montmagny, supra* note 36 at paras 21-23.
[42] *Caisse Populaire Desjardins de Montmagny, supra* note 36 at para 25.
[43] *Caisse Populaire Desjardins de Montmagny, supra* note 36 at para 25.
[44] *Caisse Populaire Desjardins de Montmagny, supra* note 36 at para 26.

> *balance resulting from offsetting claims of the Crown and the supplier*"[45]
>
> [our empahsis]

70. Thus, in *Caisse Populaire Desjardins de Montmagny* this Court only rejected the proposition that certain specific statutory tax collection mechanisms would have created a property right in favor of the tax authorities. The Court actually distinguished this situation from that of an ordinary mandate[46].

71. In the case of the E&F Service however, each of the elements noted as missing by this Court in *Caisse Populaire Desjardins de Montmagny* are in fact present:

a. Invoicing is specifically addressed and required at section 7.1 of the ICAA Contract;

b. Section 7.2 of the ICAA Contract specifically provides that IATA will only remit amounts to the extent they are collected;

c. The E&F Client Funds are kept in the single purpose UBS Bank Account, which is separate from, and not comingled with, IATA's own funds;

72. As a result, the statements of this Court in *Caisse Populaire Desjardins de Montmagny* clearly have no relevance or bearing whatsoever in the present matter, especially to the extent they relate to the effects of a mandate, as generally understood.

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[45] *Caisse Populaire Desjardins de Montmagny, supra* note 36 at para 27.
[46] *Caisse Populaire Desjardins de Montmagny, supra* note 36 at para 27.

ii) The ICAA Funds continued to belong to the ICAA even once deposited by IATA in the UBS Bank Account

73. The Québec Court of Appeal decided that the fact that IATA only had a personal claim against the Swiss Bank for the ICAA Funds (because a bank deposit is equivalent to a loan by the depositor to the bank) necessarily meant that the rights of the ICAA to the ICAA Funds were also in the nature of a personal claim (against IATA).

74. In *obiter*, the Québec Court of Appeal also decided that the ICAA Funds had in any event not been sufficiently segregated from the rest of the E&F Funds while on deposit with the Swiss Bank in the UBS Bank Account, and thus any direct title to the funds would have been lost through a lack of sufficient "traceability".

75. However, both of these findings are incorrect.

a. The Loan Theory

76. The Québec Court of Appeal decided that as a general proposition, "*funds in a bank account held by a mandatary for the mandator do not give rise to real [proprietary] rights*" by drawing a parallel to the principle that "*amounts on deposit in a bank constitute in law a loan from the depositor to the bank*", i.e. a personal right[47].

77. The Québec Court of Appeal further noted that since all that IATA had was a personal claim against the Swiss Bank, this necessarily meant that all that the ICAA has against IATA was a personal claim as well.

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[47] *QCA Decision, supra* note 1 at para 49.

78. This reasoning inaccurately conflates two separate relationships into a single one.

79. There is no dispute that IATA, as the account holder of the UBS Bank Account, actually lent to the Swiss Bank a sum of money equivalent to the ICAA Funds, and thus it has a personal right against the Swiss Bank for the same amount. This is an accepted principle, recently reiterated by this Court[48].

80. However, the nature of this relationship between IATA and the Swiss Bank has no bearing whatsoever on the nature of the relationship between the ICAA and IATA and the ICAA's right to the ICAA Funds.

81. As outlined above, given the nature of the contractual arrangements between the parties, and in light of the law applicable to principals and agents in Québec, IATA is not "indebted" towards the ICAA. The ICAA Funds represent incorporeal property directly "owned" by the ICAA, which is in the possession of IATA.

82. By analogy, in *Harp* (summarized above), the Superior Court of Quebec specifically noted that the contract between a bank and account holder had no impact on the account holder's relationship with third parties[49].

83. Furthermore, in *Porterlane Investments Ltd. c. Chambre des notaires du Québec*[50], the Québec Court of Appeal commented as follows on a case involving the ownership of money entrusted to a notary and deposited in his bank account:

> "*lorsqu'un client confie une somme d'argent à son notaire et que celui-ci la dépose dans un compte bancaire, deux contrats*

[48] *1068754 Alberta Ltd. v. Québec (Agence du revenu)*, 2019 SCC 37 at para 33 [*1068754 Alberta Ltd*].
[49] *Harp, supra* note 34 at 14.
[50] *Porterlane Investments Ltd. c. Chambre des notaires du Québec*, 2010 QCCA 813 [*Porterlane*].

> *interviennent. Un contrat de dépôt irrégulier entre le notaire et son client et un contrat de prêt entre notaire et la banque*"[51]

84. According to the Québec Court of Appeal in *Porterlane,* the fact that the legal relationship between the notary and its bank consists only of personal rights does not change the fact that under the first contract (the deposit contract between the client and his notary) title to the sums remained with the notary's client[52].

85. *Porterlane* was followed in *Angers v. Angers*[53], a case where a brother, in possession of certain sums of money belonging to his sister, deposited them in his own bank account. When characterizing the relationships, the Court held that, although the brother created a loan between himself and the bank by depositing the money, this did not affect the nature of the relationship between the brother and the sister, which was not a loan:

> "*[30] L'avocate de Bernard Angers soutient que c'est un prêt puisque l'argent avait été déposé à la Banque.*
>
> *[31] Dans les faits, il y a deux opérations juridiques. La première, Édith Angers remet de l'argent à son frère sans convenir de l'usage, des fruits et de l'utilisation. La seule condition est qu'il doit lui remettre son argent lorsqu'elle en aurait besoin.*
>
> *[32] La deuxième opération, c'est lorsque Bernard Angers dépose cet argent à la Caisse populaire. Alors intervient un contrat de prêt entre lui et l'institution financière. Bernard Angers prête 16 500 $ à la Banque.*
>
> *[33] Cela ne modifie pas la relation contractuelle entre Édith et Bernard Angers.*
>
> *[34] Ce n'est pas un prêt, c'est un dépôt.*

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[51] *Porterlane, supra* note 50 at para 43.
[52] See *Nadon (Syndic de),* 2014 QCCS 166 at para 27, where the Superior Court gave the same treatment to funds held by lawyers and further noted that they were administrators of the property of other, rather than debtors.
[53] *Angers c. Angers*, 2014 QCCQ 9360.

> *[36] Comme le dit la Cour d'appel dans l'affaire Porterlane Investments Limited précitée, lorsque le bien confié présente un caractère de fongibilité, la doctrine établit qu'il s'agit d'un dépôt irrégulier et, dans le cas d'un dépôt bancaire, que l'acte juridique est un contrat de prêt*."

86. In the present matter, when the underlying air navigation charges were collected by IATA, the proceeds thereof belonged to the ICAA. When IATA subsequently assembled them and deposited them into the UBS Bank Account, the ICAA continued to enjoy the same direct ownership title to them.

87. Moreover, where a person holds funds on behalf of a third party, the logical way to hold such funds is depositing same at a bank, a reality long recognized by this Honourable Court. There is no reason for such a common operation to affect the ownership of the funds:

> *"It cannot nowadays be maintained that the obligation to keep a sum of money received for a particular purpose means that the actual specie received must be kept. Not only is money a fungible thing (except in numismatics), but the <u>ordinary way of keeping it is to deposit it in a bank</u>* […]" [54]
>
> [our emphasis]

b. The ICAA Funds were at all times traceable once collected by IATA

88. The Québec Court of Appeal also decided, in *obiter*, that once deposited in the UBS Bank Account, the ICAA Funds were no longer traceable, and as such, any direct title to the money by the ICAA would have been lost through confusion.

[54] *R. v. Légaré*, [1978] 1 SCR 275, 1977 CanLII 156 (SCC).

89. In support of this view, the Québec Court of Appeal stated that "*given that money is fungible, once funds are co-mingled, they cannot be traced*"[55], and further that "*funds deposited in a bank account lose their identity*"[56].

90. The Québec Court of Appeal's view in this regard was not in line with the applicable jurisprudence and with the evidence in the case.

91. First, it is only if the sums can no longer be identified (or traced) that they lose their identity and that title to the money itself is lost.

92. For instance, in *B.M.P. Global Distribution* this Court said that:

> *[79] […] It is sometimes said that funds cannot be traced to bank accounts at common law. This view overstates the rule and fails to take into account the fact that, as an evidentiary process, tracing is possible if identification is possible […].*
>
> *[80] […] Two points drawn from that case are important for our purposes: neither the fact that a cheque is cleared through the banking system before being deposited in the payee's account nor the fact that the payee has mixed the funds with other funds is sufficient to bar recovery at common law.*[57]

93. The Québec Court of Appeal itself acknowledged this principle in *Norbourg*[58]:

> *« [224] Selon la Cour suprême, la ségrégation de la somme dans un compte séparé est sans doute fort utile, mais n'est pas essentielle. Il faut cependant pouvoir analyser le contenu du compte bancaire ou du compte de valeurs et constater si les sommes qui s'y trouvent peuvent être identifiées ou retracées à des dépôts provenant de sommes perçues pour fins de taxe, le tout conformément aux normes comptables générales applicables en pareilles circonstances. Si le compte peut-être*

[55] *QCA Decision, supra* note 1 at para 37.
[56] *QCA Decision, supra* note 1 at para 38.
[57] *B.M.P. Global Distribution Inc. v. Bank of Nova Scotia*, 2009 SCC 15.
[58] *Fonds Norbourg Placements équilibrés (Liquidation de)*, 2007 QCCA 1076 at para 75 [*Norbourg*].

> *reconstitué sans équivoque, l'opération d'identification et de retraçage peut alors être accomplie. »*

94. The Ontario Court of Appeal also recently reaffirmed the long-standing case-law that appropriate accounting practices could indeed permit the tracing of property held on behalf of a third party[59].

95. Second, the QCA Decision also disregarded the clear evidence in the case relating to IATA's collection and record-keeping mechanisms. In fact, the ICAA Funds were fully traceable in the UBS Bank Account thanks to the detailed banking records maintained by IATA.

96. On the basis of the evidence and the Joint Stipulations[60] agreed by the parties, Justice Hamilton properly concluded that the ICAA Funds remained "readily identifiable". As Mr Justice Hamilton noted, the evidence showed that:

a. The E&F Funds were kept in a specific account designated as such by IATA and at no time were co-mingled with other funds held by IATA or IATA's own funds[61];

b. The ICAA contract required that IATA "*establish financial control procedures of its activity, including all relevant accounting and budgeting procedures, in accordance with acceptable international accounting practice and internal regulations of IATA*"[62];

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[59] *The Guarantee Company of North America v. Royal Bank of Canada*, 2019 ONCA 9.
[60] Joint Stipulations of the Parties, dated March 11, 2016, *Joint Record of the Appellants*, tab 2-N.
[61] Joint Stipulations of the Parties, dated March 11, 2016, *Joint Record of the Appellants*, tab 2-N, at para 3.
[62] *ICAA Contract*, *supra* note 10 at art 7.3.

c. In accordance with its above obligations, IATA continuously maintained such procedures and financial records[63] and each credit and debit to and from the UBS Bank Account was carefully noted.

97. Contrary to the above mentioned case law, the Québec Court of Appeal appears to have disregarded the impact of these accounting and banking practices on the traceability of the ICAA Funds.

98. Finally, and although this was not supported by any evidence, the Québec Court of Appeal conjectured that "*if any client (including ICAA) disputed the amount due to it by IATA, then the claims against the fund* [the UBS Bank Account] *could potentially exceed the aggregate funds on deposit so that it would not be possible to earmark any one mandator's "property"*.

99. This hypothesis is neither correct, nor helpful to the Québec Court of Appeal's view. In the situation where a dispute would arise with the ICAA as to whether more air navigation charges ought to have been collected as invoiced, the missing charges would be readily identifiable. If this were to happen, any litigation would lie between the airline concerned and the ICAA, and the right to sue to collect them also lies with the ICAA[64]

B. The Garnishment Order cannot purport to apply to property located abroad

100. As outlined above, title to the ICAA Funds remained at all times with the ICAA. As such, the validity of the Garnishment Order depended entirely on whether the ICAA Funds were located in Québec or not.

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[63] Joint Stipulations of the Parties, dated March 11, 2016, *Joint Record of the Appellants*, tab 2-N, at para 5 a).
[64] *ICAA Contract*, *supra* note 10 at art 7.1 para 3.

101. In this case, both the Superior Court of Québec and the Québec Court of Appeal accepted this principle.

102. Indeed, Article 3152 *C.c.Q.* establishes that Québec Courts only have jurisdiction over property located in Québec:

> *"**3152.** Québec authorities have jurisdiction to hear a real action if the property in dispute is situated in Québec."*

103. The prohibition of extraterritorial seizures is further embodied by the conflict of laws rules of the *C.c.Q*, where Article 3097 provides that property is subject to the laws of its location:

> *"**3097.** Real rights and their publication are governed by the law of the place where the property concerned is situated.*
>
> *However, real rights on property in transit are governed by the law of the State of their place of destination."*
>
> *[our emphasis]*

104. Québec courts have also consistently applied the prohibition against extraterritorial seizures. For instance, in *Martin c. Espinhal*, the Court of Québec considered Article 3152 C.c.Q. and invalidated a writ of seizure against goods located in Portugal.[65] More recently, in *Mastronikolas c. Krassakopoulos*, the same court found that a condominium in Florida was not subject to a writ of seizure issued in Québec.[66]

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[65] *Martin c. Espinhal*, 2001 CanLII 12120 (QC CQ), EYB 2001-24926, at 5, 6.
[66] *Mastronikolas c. Krassakopoulos*, 2017 QCCQ 3606 at paras 13-14.

105. Similarly, in common law provinces, there is consistent case law to the effect that enforcement orders are only possible if the targeted assets are located within the enforcing courts' jurisdiction. See, for instance, in *Chevron*:

> *"The [enforcing] court merely offers an enforcement mechanism to facilitate the collection of a debt within the jurisdiction.*
>
> *[…]*
>
> *Second, enforcement is limited to measures — like seizure, garnishment, or execution — that can be taken only within the confines of the jurisdiction, and in accordance with its rules. The recognition and enforcement of a judgment therefore has a limited impact: as Walker states, "[a]n order enforcing a foreign judgment applies only to local assets". The enforcing court's judgment has no coercive force outside its jurisdiction."* [67]
>
> [our emphasis, references omitted]

106. In the case of funds in a bank account, they are considered to be located at the branch where the account is located. For instance, in *Equity Accounts Buyers Limited* v. *Jacob*[68], the Superior Court of Québec quashed a garnishment order which purported to seize amounts held in an RBC branch in Ontario[69].

107. This principle has been consistently applied in Canadian jurisprudence, both in Québec and in the common law provinces[70].

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[67] *Chevron Corp. v. Yaiguaje*, [2015] 3 SCR 69, 2015 SCC 42, at paras 44, 46 [*Chevron*].
[68] *Equity Accounts Buyers Ltd. v. Jacob & Modulcon Ltd*., 1972 CarswellQue 125, [1972] C.S. 676 at para 1.
[69] See also the following examples of seizures that were refused as they purported to affect accounts located abroad: *Lussier Centre du camion Ltée v. GDM Transport Inc*., 2002 CanLII 35343 (QC CQ), SOQUIJ AZ-50110541 at paras 6-7, 10-11; *Italsav, s.r.l. c. Dynafund Ltd*., 2011 QCCS 3643 at para 10.
[70] On the notion that, for seizures and garnishment purposes, money in bank account constitutes property located at the location associated with the account branch, please refer notably to: *Bank Act*, SC 1991, c 46 at s 462(1); *Parmar c. Banque royale du Canada*, 1992 CanLII 3544 (QC CA), J.E. 92-1623; *I.C.I. Chèque c. Travel Currency Inc.*, 2005 CanLII 7020 (QC CS), J.E. 2005-708; and *1068754 Alberta Ltd, supra* note 48.

108. It stems from the need to preserve comity between nations. As this Court noted in *Chevron*, international comity promotes the respect of the legal orders of other sovereign states.[71] Such need for comity dictates that enforcement should not be ordered in Québec against property that is located abroad, where different local laws and regulations inevitably govern enforcement proceedings, and where meddling by the Québec courts would logically be unwelcome.

109. The current rule thus has a clear public policy benefit.

110. In first instance, Instrubel attempted to circumvent this principle and the limits to the territorial jurisdiction of Québec courts by drawing an analogy between garnishment proceedings (such as the one in the case at bar) and *Mareva* injunctions. Specifically, Instrubel alleged that in similar circumstances, the *Mareva* injunction, an entirely distinct procedural remedy, could have extraterritorial effects.[72] This argument, though, disregarded the very nature of *Mareva* injunctions, and their difference with garnishment orders, and was properly rejected by the Superior Court of Québec[73].

111. A *Mareva* injunction contains a direct *in personam* order against a defendant who could ultimately become a judgment debtor. In *Mareva* injunctions, a plaintiff must prove that the defendant, who is subject to the *in personam* jurisdiction of the court,[74] is actively trying to dissipate its assets to avoid execution under a judgment.[75] To counter such a defendant behaviour, the court may issue a protective order directing the defendant to do or not do a number of things, including in situations where the things to be done or not done, might happen abroad.

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[71] *Chevron, supra* note 67 at paras 51, 53.
[72] *SCQ Judgment, supra* note 16 at paras 64-74.
[73] *SCQ Judgment, supra* note 16 at paras 64-74.
[74] *Talisman Energy* v. *Flo-Dynamics Systems Inc.*, 2015 ABQB 340 at para 35 [*Talisman*].
[75] *Talisman, supra* note 74 at para 40.

112. This is not the situation with garnishment orders. IATA is not a party to the litigation on the merits of Instrubel's claim, and it is not directed to do, or not do, anything personally. As mentioned above, the Garnishment Order seeks to attach the ICAA Funds themselves. It is strictly an execution proceeding that improperly targets assets located abroad, beyond the jurisdiction of Quebec courts.[76]

113. Interestingly, in *Talisman*, the petitioner sought an order (within a *Mareva* injunction) from the Court of Queen's Bench of Alberta to transfer funds held by the defendant back to Canada. The Court did not see fit to order such remedy and mentioned that *"[...] to the extent the Plaintiff argues that a judgment of this Court cannot be enforced in Austria, I question why the remedy to that problem is an order of this Court.*"[77]

114. At all times relevant herein, the ICAA Funds were located in Switzerland. As a result, neither the ICAA Funds, nor any other E&F Client Funds for that matter, have any connection whatsoever with Canada, or the province of Québec (other than the fact that IATA's head office is located in Québec).

115. For the reasons set forth above, worldwide or extraterritorial enforcement orders are not a proper or legal means of execution of judgments (or arbitral awards) and seizing assets and the Garnishment Order should be quashed.

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[76] *Chevron*, *supra* note 67 at para 44.
[77] *Talisman*, *supra* note 74 at para 47.

C. Importance of this Case for the International Air Navigation Industry

116. As outlined above, "*E&F*" stands for "*Enhancement & Financing*", reflecting the founding mission of the service, which is to assist Air Navigation Service Providers (or ANSPs, as previously defined) and airports around the world, particularly in developing countries, in invoicing and collecting revenues efficiently, thereby facilitating investments in essential infrastructure enhancements.

117. Indeed, whether managing day-to-day expenses or embarking on longer-term investment projects, ANSPs need to be able to forecast cash flow over several months and years. Stable, regular and efficient collections are essential to ensure the financial health of ANSPs, a benefit that can be especially important to less developed countries. The effect of the E&F Service is to streamline and stabilize such collections, especially for industry participants that may lack the necessary resources and infrastructure to do it themselves in an effective manner.

118. Due to its structure, the E&F Service provides the participating ANSPs and airports with a virtual certainty of payment in a timely manner, alleviating many potential concerns regarding their proper funding, while at the same time facilitating and simplifying the payment process for airlines.

119. Allowing direct collection of the air navigation charges and airport charges from airlines participating in IATA industry financial systems and agreeing to such collection by IATA, helps to ensure that the world's air space is properly managed and that ANSPs and airports are sufficiently funded, even in less developed countries. This is key to attaining "*safe, regular and*

economical air transport, for the benefit of peoples of the world", which is one of the main statutory objectives and aims of IATA noted above[78].

120. The E&F Service accomplishes this objective despite outside interferences, which, in some countries, can range from (i) corruption, (ii) political unrest, or (iii) unfavorable budget allocations in countries where other financial needs are dire, any of which could undermine the finances of critical ANSPs and airports.

121. A significant advantage of the E&F Service is thus to insulate the payments owing to ANSPs and airports from such external factors.

122. Given the vital importance to international aviation of uninterrupted and quality air navigation and airport services around the world and the effective management of airspace globally, maintaining the integrity of the E&F Service has become critical to modern aviation.

123. The QCA Decision, if allowed to stand, would allow opportunistic trade creditors to view IATA as a convenient target when seeking recovery from E&F Service clients from around the world (or even, as in the current case, entities only peripherally linked to E&F Service clients), and attempt to capture these funds abroad from Canada, irrespective of the sovereign nature of the ANSP or airport in question, and regardless of the rules that may govern such seizures in the relevant countries and jurisdictions.

124. IATA and the E&F Service would then become an "automatic teller machine" where anybody who purports to have a claim against a given E&F Service client or related parties, even

[78] *IATA Act*, *supra* note 2 at s 3.

if based only on the outcome of a summary and initially ex-parte proceeding, may block the flow of money to the entities that require it to operate. Moreover, all such proceedings would be commenced in Montreal, where IATA's headquarters are located, without regard to the location of the affected parties or that of the money.

125. The QCA Decision thus threatens to vitiate the E&F Service's singular objective: to ensure the prompt and reliable remittance of payments to the world's aviation service providers in the interest of maintaining the integrity and continuity of vital air navigation and airport services everywhere.

PART IV. COSTS SUBMISSIONS

126. IATA seeks its costs for this appeal and throughout the courts below.

PART V. ORDER SOUGHT

127. IATA requests that the appeal be granted and the conclusions of Mr. Justice Hamilton of the Superior Court of Québec be reinstated.

Dated at Ottawa, Ontario, this 26th day of September, 2019

SIGNED BY:

 / agent for the Appellant

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