Federal Court of Appeal | Cour d'appel fédérale

Date: 20120111

Docket: A-82-11

Citation: 2012 FCA 9

CORAM: **NOËL J.A.**
DAWSON J.A.
TRUDEL J.A.

BETWEEN:

BRADLEY RICHARD FRANCIS BUCKLEY, KELLY BUCKLEY, JOE WILLIAM BUCKLEY and CAROL J. BUCKLEY

Appellants

and

JAMES BUHLMAN and CINDY MAISONVILLE

Respondents

Heard at Toronto, Ontario, on December 13, 2011.

Judgment delivered at Ottawa, Ontario, on January 11, 2012.

REASONS FOR JUDGMENT BY: TRUDEL J.A.

CONCURRED IN BY: NOËL J.A.
DAWSON J.A.

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REASONS FOR JUDGMENT

TRUDEL J.A.

Introduction

[1] This appeal is about the difference between sections 28 and 29 of the *Marine Liability Act*, S.C. 2001, c. 6 (MLA) and which limitation applies to the collision that happened between two pleasure boats on July 22, 2006. Unless otherwise specified, I shall refer to the sections of the MLA as in force on July 22, 2006 mindful that these sections have been renumbered through a recent legislative amendment (*Marine Liability Act*, S.C. 2001, c. 6, as am. by S.C. 2009, c. 21), section 29

now reading mostly the way section 28 did in 2006. In my view, this amendment is of no consequence on the outcome of this appeal.

[2] In order to limit their potential liability under the MLA, the respondents, James Buhlman and Cindy Maisonville, sought summary judgment in the Federal Court against the appellants, Bradley Richard Francis Buckley [Bradley], his wife Kelly Buckley, Bradley's father Joe William Buckley and his wife Carol J. Buckley. I shall refer to Bradley and his father as the Buckleys.

[3] As a result of the respondents' motion, the Federal Court order bearing neutral citation 2011 FC 73 provided as follows:

> … the maximum liability of James Buhlman and Cindy Maisonville for all claims arising out of bodily injuries sustained by Bradley Richard Francis Buckley and Joe William Buckley in a boating accident that occurred on Eagle Lake, District of Kenora, Province of Ontario on July 22, 2006 is $1,000,000 pursuant to section 28 of the *Marine Liability Act*, S.C. 2001, c. 6, exclusive of pre-judgment interest.
>
> In the exercise of my discretion pursuant to the *Federal Courts Rules*, SOR/98-106, I make no order as to costs.

[4] The appellants raise a number of arguments in appeal to show that the Federal Court Judge (the Judge) erred in not finding that the Buckleys' claim for personal injury is a maritime claim subjected to the higher limit of liability afforded by subsection 29(2) of the MLA. Instead, she made her order pursuant to section 28 of the MLA.

[5] The respondents support the Judge's conclusion. However, they disagree with the Judge on two questions which are the focus of their cross-appeal: (1) Is the maximum potential liability amount of $1,000,000 for claims respecting personal injury pursuant to section 28 of the MLA inclusive of pre-judgment interest and costs or exclusive of pre-judgment interest as found by the Judge? and (2) Were the respondents entitled to their costs of the summary judgment motion?

The respondents' cross-appeal

[6] At the outset of the hearing in front of this Court, the respondents informed the panel that they were not pursuing the first issue in the cross-appeal, leaving only the matter of costs to be addressed. It is their position that having prevailed below on their motion for summary judgment, costs should have followed the event and have been awarded to them.

[7] As I propose to uphold the decision of the Federal Court, I will dispose immediately of this issue and of the cross-appeal.

[8] The Judge had full discretionary power over the amount and allocation of costs pursuant to rule 400 of the *Federal Courts Rules*, SOR/98-106. It is trite law that an appellate court is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the trial judge (see *Elders Grain Co. v. Ralph Misener (The)*, 2005 FCA 139, [2005] 3 F.C.R. 367 at paragraph 13; *Apotex Inc. v. Merck & Co.*, 2006 FCA 324 at paragraphs 3-4).

[9] At paragraph 45 of her reasons, the Judge explains that "(s)ince the [respondents] have succeeded upon an argument that they did not raise and the [appellants] did not answer, … I make no order as to costs".

[10] The respondents are not challenging this finding, which, in my respectful view, fully justifies the outcome. The respondents have failed to persuade me that the Judge's decision on costs was based on an error of principle or that it was plainly wrong (*Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*), 2007 SCC 2, [2007] 1 S.C.R. 38 at paragraph 49).

[11] Therefore, I propose to dismiss the cross-appeal with costs. In so doing, I take no position on the question of whether the pre-judgment interest is inclusive or exclusive of the maximum amount of liability. This question is left for another day where the Court will have had the benefit of full arguments on this topic.

The appeal

A. The relevant facts

[12] To better understand the position of the parties to the within appeal, it is useful to know the relevant facts. They are fully set out in the reasons of the Federal Court and the parties take no issue with the Judge's summary.

[13] On July 22, 2006, Joe William Buckley, his son Bradley and two children checked-in at the Eagle Lake Sportsmen's Lodge (the Lodge) located, as the name suggests, on Eagle Lake in Vermillion Bay, Ontario.

[14] The Lodge, owned and operated in partnership by the respondents Buhlman and Maisonville, is a fishing resort where use of a motorboat is part of the services offered to registered guests.

[15] In the evening of July 22, 2006, the Buckleys went to the dock for a tour of parts of Eagle Lake. Bradley and his father at the helm took control of a seventeen-foot Lund Outfitter while respondent Buhlman and the children went on board a Crestliner boat of similar size. The boats and engines were owned by and licensed to the Lodge.

[16] On the return trip, the Crestliner collided with the Lund Outfitter. As a result of this collision, both passengers of the Lund Outfitter sustained bodily injuries, Bradley's injuries being the most serious.

[17] The appellants have commenced an action against the respondents in the Ontario Superior Court of Justice (Court File No. 548821) advancing claims in negligence and damages pursuant to the *Family Law Act*, R.S.O. 1990, c. F-3. They seek recovery of damages of approximately $8.2 million, together with pre-judgment interest and costs.

[18] Recently, the parties have consented to a 6-month adjournment of the trial scheduling hearing of the Ontario Superior Court file pending resolution of the within appeal.

B. Summary of the Decision of the Federal Court

[19] In a nutshell, the Federal Court Judge found that the Buckleys' claims were maritime claims as defined under section 24 of the MLA which refers to article 2 of the *Convention on Limitation of Liability for Maritime Claims, 1976* [the 1976 Convention], as amended by the Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime claims, 1976.

[20] For our purposes, it is sufficient to reproduce article 2(1)(a) of the 1976 Convention, as found at paragraph 17 of the Judge's reasons:

Claims subject to limitation	Créances soumises à la limitation
1. Subject to Articles 3 and 4 the following claims, whatever the basis of liability may be, shall be subject to limitation of liability:	1. Sous réserves des articles 3 et 4, les créances suivantes, quel que soit le fondement de la responsabilité, sont soumises à la limitation de la responsabilité :
(a) claims in respect of loss of life or personal injury or loss of or damage to property (including damage to harbour works, basins and waterways and aids to navigation), occurring on board or in direct connexion with the operation of the ship or with salvage operations, and consequential loss resulting therefrom;	a) créances pour mort, pour lésions corporelles, pour pertes et pour dommages à tous biens (y compris les dommages causés aux ouvrages d'art des ports, bassins, voies navigables et aides à la navigation) survenus à bord du navire ou en relation directe avec l'exploitation de celui-ci ou avec des opérations d'assistance ou de

	sauvetage, ainsi que pour tout autre préjudice en résultant;
[I underline]	(Je souligne)

[21] The Judge found that the higher limit of liability under subsection 29(2) of the MLA did not apply because the Buckleys were not on board the ship whose operator and owners were seeking to limit liability (reasons for judgment at paragraphs 34, 36, 37 and 41). They were not on the "striking ship". Instead, she concluded that paragraph 28(1)(*a*) of the MLA applied, limiting the respondents' liability to $1,000,000 as compared to $3,000,000 under section 29 of the MLA (appellants' memorandum of fact and law at paragraph 2).

[22] I will return to the Judge's reasons in a more detailed fashion during my analysis.

C. Position of the parties and relevant legislation

[23] The position of the parties has remained the same throughout the proceedings and is fully canvassed in the reasons of the Federal Court. Sections 28 and 29 of the MLA were central to the disposition of the motion for summary judgment. They read as follows:

Liability for ships under 300 tons	Navires d'une jauge inférieure à 300 tonneaux
28. (1) The maximum liability for maritime claims that arise on any distinct occasion involving a ship with a gross tonnage of less than 300 tons, other than claims mentioned in section 29, is	**28.** (1) La limite de responsabilité pour les créances maritimes — autres que celles mentionnées à l'article 29 — nées d'un même événement impliquant un navire jaugeant moins de 300 tonneaux est fixée à :
(*a*) $1,000,000 in respect of claims for	*a*) 1 000 000 $ pour les créances pour décès ou blessures corporelles;

loss of life or personal injury; and

(*b*) $500,000 in respect of any other claims.

Calculation of tonnage

(2) For the purposes of subsection (1), a ship's gross tonnage shall be calculated in accordance with the tonnage measurement rules contained in Annex I of the International Convention on Tonnage Measurement of Ships, 1969, concluded at London on June 23, 1969, including any amendments, whenever made, to the Annexes or Appendix to that Convention.

Passenger claims, no certificate

29. (1) The maximum liability for maritime claims that arise on any distinct occasion for loss of life or personal injury to passengers of a ship for which no certificate is required under Part V of the *Canada Shipping Act* is the greater of

(*a*) 2,000,000 units of account; and

(*b*) the number of units of account calculated by multiplying 175,000 units of account by the number of passengers on board the ship.

Passenger claims, no contract of carriage

(2) Notwithstanding Article 6 of the Convention, the maximum liability for maritime claims that arise on any

b) 500 000 $ pour les autres créances.

Jauge du navire

(2) Pour l'application du paragraphe (1), la jauge brute du navire est calculée conformément aux règles de jaugeage prévues à l'annexe I de la Convention internationale de 1969 sur le jaugeage des navires, conclue à Londres le 23 juin 1969, y compris les modifications dont les annexes ou l'appendice de cette convention peuvent faire l'objet, indépendamment du moment où elles sont apportées.

Créances de passagers — navire sans certificat

29. (1) La limite de responsabilité pour les créances maritimes nées d'un même événement impliquant un navire pour lequel aucun certificat n'est requis au titre de la partie V de la *Loi sur la marine marchande du Canada*, en cas de décès ou de blessures corporelles causés à des passagers du navire, est fixée au plus élevé des montants suivants :

a) 2 000 000 d'unités de compte;

b) le produit de 175 000 unités de compte par le nombre de passagers à bord du navire.

Créances de passagers sans contrat de transport

(2) Malgré l'article 6 de la Convention, la limite de responsabilité pour les créances maritimes nées d'un même événement, en cas de décès ou de blessures corporelles causés à des

distinct occasion for loss of life or personal injury to persons carried on a ship otherwise than under a contract of passenger carriage is the greater of

(*a*) 2,000,000 units of account, and

(*b*) 175,000 units of account multiplied by

(i) the number of passengers that the ship is authorized to carry according to its certificate under Part V of the *Canada Shipping Act*, or

(ii) if no certificate is required under that Part, the number of persons on board the ship.

Exception

(3) Subsection (2) does not apply in respect of

(*a*) the master of a ship, a member of a ship's crew or any other person employed or engaged in any capacity on board a ship on the business of a ship; or

(*b*) a person carried on board a ship other than a ship operated for a commercial or public purpose.

Definition of "passenger"

(4) In subsection (1), "passenger" means a person carried on a ship in circumstances described in paragraph 2(*a*) or (*b*) of Article 7 of the

personnes transportées sur un navire autrement que sous le régime d'un contrat de transport de passagers, est fixée au plus élevé des montants suivants :

a) 2 000 000 d'unités de compte;

b) le produit de 175 000 unités de compte par :

(i) le nombre de passagers que peut transporter le navire aux termes du certificat requis au titre de la partie V de la *Loi sur la marine marchande du Canada*,

(ii) le nombre de personnes à bord du navire, si aucun certificat n'est requis au titre de cette partie.

Exception

(3) Le paragraphe (2) ne s'applique pas :

a) dans le cas du capitaine d'un navire, d'un membre de l'équipage et de toute autre personne employée ou occupée à bord, en quelque qualité que ce soit, pour les affaires de ce navire;

b) dans le cas d'une personne transportée à bord d'un navire autre qu'un navire utilisé à des fins commerciales ou publiques.

Définition de « passager »

(4) Au paragraphe (1), « passager » s'entend de toute personne transportée sur le navire dans les cas prévus aux alinéas *a*) et *b*) du paragraphe 2 de l'article 7 de la Convention.

Convention. Definition of “unit of account” (5) In subsections (1) and (2), “unit of account” means a special drawing right issued by the International Monetary Fund.	Définition de « unités de compte » (5) Aux paragraphes (1) et (2), « unités de compte » s’entend des droits de tirage spéciaux émis par le Fonds monétaire international.
[I underline]	(Je souligne)

[24] Both sections can be found in Part 3 of the MLA entitled *Limitation of Liability for Maritime Claims*. It was common ground, at the hearing of this appeal that Part 4 of the MLA, entitled *Liability for Carriage of Passengers by Water* was not relied upon by the parties. As a result, the parties did not take support on the *Athens Convention relating to the Carriage of Passengers and their Luggage by Sea*, 1974, as amended by the Protocol of 1990 (13 December 1974, 1463 U.N.T.S. 19). Therefore, the parties are not challenging the Judge’s finding that Part 4 of the MLA does not apply to the present case.

[25] The appellants opine that the Judge’s analysis under Part 3 of the MLA was incomplete (appellants’ memorandum of fact and law at paragraph 16). They say that after finding that the Buckleys’ claim was a maritime claim within the meaning of the 1976 Convention, the Judge had to pursue her analysis under section 29. Had she properly done so, she would have found that the Buckleys were persons on board a ship operated for a commercial purpose. Subsection 29(2) would have applied to their case (appellants’ memorandum of fact and law at paragraphs 45 and 46). Therefore, the respondents would have been subjected to a higher limit of liability.

[26] The appellants argue that when deciding whether or not subsection 28(1) applies, a two-step inquiry is mandated: (1) Does the claim involve “a ship with a gross tonnage of less than 300 tons”? and (2) Is the claim, as stated in subsection 28(1), one “other than claims mentioned in section 29 of the MLA”? The appellants argue that section 28 is engaged by default if section 29 does not apply (*ibidem* at paragraph 20).

[27] As for the first question, there is no doubt here that both vessels weighed less than 300 tons. So the remaining question is whether or not the Buckleys’ claims fall under section 29 of the MLA. The appellants argue that the Judge should have asked herself (1) Do the maritime claims fall under subsection 29(1) following personal injury to passengers of a ship for which no certificate is required? (2) If subsection 29(1) does not apply, what about subsection 29(2) regarding maritime claims of “persons carried on a ship otherwise than under a contract of passenger carriage”? and (3) Were the persons carried on board “a ship other than a ship operated for a commercial or public purpose”?

[28] The appellants argue that the Judge’s finding that the Buckleys’ claims are maritime claims for the purposes of section 28, but not for section 29, is inconsistent and incorrect (*ibidem* at paragraph 25), adding that “a claim that does not meet the definition of maritime claim in section 29 cannot meet the definition of section 28 – the same definition applies to both sections” (*ibidem* at paragraph 25). So the Judge erred when excluding the Buckleys’ maritime claims from the benefits of section 29 of the MLA because they were not claiming against the vessel on which they were on board. Being on board the “striking vessel” is not a pre-requisite for the application of subsection

29(2) of the MLA. All that needs to be shown is that the injured person was on a ship. Subsection 28(1) and paragraph 29(3)(*b*) of the MLA refer to "a" ship, not "the" ship. For convenience, I reproduce them again.

Liability for ships under 300 tons	Navires d'une jauge inférieure à 300 tonneaux
28. (1) The maximum liability for maritime claims that arise on any distinct occasion involving a ship with a gross tonnage of less than 300 tons, other than claims mentioned in section 29, is	**28.** (1) La limite de responsabilité pour les créances maritimes — autres que celles mentionnées à l'article 29 — nées d'un même événement impliquant un navire jaugeant moins de 300 tonneaux est fixée à :
(*a*) $1,000,000 in respect of claims for loss of life or personal injury; and	*a*) 1 000 000 $ pour les créances pour décès ou blessures corporelles;
(*b*) $500,000 in respect of any other claims.	*b*) 500 000 $ pour les autres créances.
Exception	Exception
29 (3) Subsection (2) does not apply in respect of	**29** (3) Le paragraphe (2) ne s'applique pas :
…	[…]
(*b*) a person carried on board a ship other than a ship operated for a commercial or public purpose.	*b*) dans le cas d'une personne transportée à bord d'un navire autre qu'un navire utilisé à des fins commerciales ou publiques.
[I underline]	(Je souligne)

[29] The appellants further allege that the Judge's interpretation "creates an incongruous result" as injured passengers would be treated differently whether they were on board the "striking ship" or the "struck ship" at the time of the collision.

[30] For their part, the respondents rest on the judgment of the Federal Court and generally agree with the Judge's reasoning.

Issue

[31] Did the Federal Court Judge err when applying section 28 of the MLA to the Buckleys' maritime claims? No.

Standard of review

[32] Neither of the parties discussed the applicable standard of review. The issue is a question of law involving the interpretation of sections 28 and 29 of the Act in light of the 1976 Convention. The issue is therefore subject to review on a standard of correctness *(Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paragraph 8*).*

Analysis

[33] The 1976 Convention addresses a wide variety of claims, which are subject to limitations. In article 2(1)(a), it refers more specifically to events "occurring on board or in direct connexion with the operation of the ship" (see paragraph [20] above).

[34] In this case, appropriately so, the Judge found that the injuries sustained on the Lund Outfitter had occurred in direct connection with the operation of the Crestliner (reasons for judgment at paragraph 18), the ship against which liability was sought.

[35] The Judge framed the key issue as being "the status of [the Buckleys] *vis-à-vis* the Crestliner vessel" (*ibidem* at paragraph 34). In search of the correct answer, she embarked on an analysis of the limitation of liability regime brought about by sections 28 and 29 of the MLA. Recognizing that sections 28 and 29 address different scenarios and having already accepted that she had maritime claims in front of her, the Judge turned her mind to section 29 of the MLA, the focus of the appellants' thesis.

[36] From the outset, she ruled out the application of subsection 29(1) as it was agreed that the Buckleys were not passengers under a contract of passenger carriage as required by article 7(2)(a) of the 1976 Convention (*ibidem* at paragraphs 36 and 22).

[37] Next, the Judge considered subsection 29(2) of the MLA, which she also ruled out. In her view, "(i)n order to engage subsection 29(2) the injured persons must be claiming against the vessel on which they were on board" (reasons for judgment at paragraph 37). The Buckleys were not on the Crestliner.

[38] As mentioned earlier, the appellants disagree with the Judge's interpretation of the relevant sections of the MLA. The purpose of the voyage and the use of the indefinite article "a" to qualify the vessel as opposed to the definite article "the" inform the appellants' position in this appeal.

The commercial purpose

[39] I shall deal first with paragraph 29(3)(*b*) concerning claims of persons carried on board a ship for a commercial or public purpose.

[40] In her reasons, the Judge was critical of both counsel for their attention to the nature of the trip and whether it was for a commercial purpose as opposed to a recreational one. She found this emphasis misplaced, preferring instead to concentrate on the "role of the vessel for which limitation of liability is sought" (*ibidem* at paragraph 32). After all, the respondents were not in front of the Court to determine liability but rather to determine the limitation of their liability under the MLA (*ibidem* at paragraph 33).

[41] There is no need in appeal to discuss this issue and whether or not the Lund Outfitter and Crestliner were operated for a commercial purpose or recreational one. I agree with the Judge that subsection 29(2) of the MLA has no application in this case because the Buckleys were not on board the Crestliner. That finding was sufficient to put the appellants' arguments to rest without further examining the purpose of the voyage.

The "*a* ship / *the* ship" argument

[42] By enacting the MLA, Parliament intended to set limits of liability and establish uniformity by balancing the interests of shipowners and other parties. In that vein, I agree with the respondents that section 29 affords certainty regarding limits of potential liability and enables the owners of the ships and their concomitant insurers to set a global limit of potential liability limits arising from

claims advanced by their passengers or by those that they transport or carry for commercial or public purposes (respondents' memorandum of fact and law at paragraph 21). Shipowners and insurers have a clearer indication of what they could be liable for, and to what degree.

[43] Article 7 of the Convention, the source of section 29 of the MLA reads as follows:

ARTICLE 7	ARTICLE 7
THE LIMIT FOR PASSENGER CLAIMS	LIMITE APPLICABLE AUX CREANCES DES PASSAGERS
1. In respect of claims arising on any distinct occasion for loss of life or personal injury to passengers of a ship, the limit of liability of the shipowner thereof shall be an amount of 175,000 Units of Account multiplied by the number of passengers which the ship is authorized to carry according to the ship's certificate.	1. Dans le cas de créances résultant de la mort ou de lésions corporelles des passagers d'un navire et nées d'un même événement, la limite de la responsabilité du propriétaire du navire est fixée à un montant de 175 000 unités de comptes multiplié par le nombre de passagers que le navire est autorisé à transporter conformément à son certificat.
2. For the purpose of this Article "claims for loss of life or personal injury to passengers of a ship" shall mean any such claims brought by or on behalf of any person carried in that ship:	2. Aux fins du présent article, l'expression « créances résultant de la mort ou de lésions corporelles des passagers d'un navire » signifie toute créance formée par toute personne transportée sur ce navire ou pour le compte de cette personne :
(*a*) under a contract of passenger carriage, or	*a*) en vertu d'un contrat de transport de passager; ou
(*b*) who, with the consent of the carrier, is accompanying a vehicle or live animals which are covered by a contract for the carriage of goods.	*b*) qui, avec le consentement du transporteur, accompagne un véhicule ou des animaux vivants faisant l'objet d'un contrat de transport de marchandises.
[I underline]	(Je souligne)

[44] In my view, a combined reading of Article 7 of the Convention and of section 29 of the MLA favours the Judge's interpretation that subsection 29(2) of the MLA refers to persons on the ship seeking to limit liability.

[45] Although found to be inapplicable to this case, subsection 29(1) of the MLA concerns passengers on a ship, therefore persons carried on that ship, who are under a contract of carriage. Subsection 29(2) applies to persons carried on that ship for a commercial or public purpose without such a contract.

[46] Together, subsections 29(1) and (2) of the MLA provide for the class of persons on board the vessel, either as passengers or as persons carried on a ship otherwise than under a contract of carriage. Also, the formulae for determining the maximum amount of potential liability, as stipulated in subparagraphs 29(2)(*b*)(i) and (ii) considers either the number of *passengers* which the ship is authorized to carry under its certificate or the number of *persons on board the ship* at the time of the incident.

[47] All this leads me to the conclusion reached by the Judge: subsection 29(2) does not apply to the maritime claims at issue. Accordingly, the Judge committed no error of law or of principle warranting our intervention. She was correct in concluding that section 29 of the MLA did not apply to the Buckleys who were neither passengers nor persons being carried on board the Crestliner and that the broader language of subsection 28(1) governed their maritime claims.

Conclusion

[48] As a result, I would dismiss the appeal with costs and the cross-appeal also with costs.

"Johanne Trudel"

J.A.

“I agree
Marc Noël J.A.”

“I agree
Eleanor R. Dawson J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-82-11
APPEAL FROM THE ORDER OF THE HONOURABLE MADAM JUSTICE HENEGHAN OF THE FEDERAL COURT DATED JANUARY 20, 2011, IN DOCKET NO. T-864-09.	
STYLE OF CAUSE:	BRADLEY RICHARD FRANCIS BUCKLEY, KELLY BUCKLEY, JOE WILLIAM BUCKLEY AND CAROL J. BUCKLEY v. JAMES BUHLMAN AND CINDY MAISONVILLE
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	December 13, 2011
REASONS FOR JUDGMENT BY:	TRUDEL J.A.
CONCURRED IN BY:	NOËL J.A. DAWSON J.A.
DATED:	January 11, 2012

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