

[Abstract prepared by the PCT Legal Division (PCT-2010-0003)]

Case Name:

[Thinkstream Inc. v. Commissioner of Patents](#)

Jurisdiction:

Federal Court of Canada

Abstract:

The Commissioner of Patents refused the national phase entry of a PCT application because the applicant failed to meet the time limit for the payment of maintenance fees.

PCT Legal References:

- Article 22
- Article 39
- Rule 16*bis*

Date: 20050623

Docket: T-1518-04

Citation: 2005 FC 894

Ottawa, Ontario, June 23, 2005

PRESENT: MR. JUSTICE BLAIS

BETWEEN:

THINKSTREAM INC.

Applicant

and

COMMISSIONER OF PATENTS

Respondent

REASONS FOR ORDER AND ORDER

[1] This is an application for judicial review of a decision by the Commissioner of Patents (the Commissioner), dated July 21, 2004, refusing to allow the entry into national phase of the patent application of Thinkstream Inc. (the applicant) under the Patent Cooperation Treaty (PCT) for delay.

RELEVANT FACTS

[2] On January 14, 2000 (the priority date), the applicant filed in the United States a patent application for its invention entitled "Distributed Global Accessible Information Network" No. US 01/00915.

[3] On January 12, 2001, this U.S. application was filed with the World Intellectual Property Organization as a PCT application and Canada was one of the designated countries.

[4] To enter the national phase in Canada, the applicant had to comply with the time limits provided for by section 58 of the *Patent Rules*, 1996, SOR/96-423 (the Rules). The applicant thus had an initial 30 month period following the priority date in which to proceed to entry into national phase (on July 14, 2000), but could avail itself of an additional 12 month period (until July 14, 2003) by paying some penalty charges.

[5] On July 10, 2003, the applicant filed in the patent office a "Form for Request of Entry into National Phase under Articles 22 or 39 of the Patent Cooperation Treaty" and instructed the Commissioner to debit \$200 from its credit card to pay the regulatory fees (the fee).

[6] The applicant paid \$200 for the fee, since it submitted its request more than 30 months after the priority date, but before the expiration of the 42 month period, and paragraph 58(3)(b) of the Rules provides for an additional fee of \$200 (the additional fee) making a total of \$400.

[7] In early September 2003, an official with the Commissioner contacted the applicant to notify it that it still had to pay the \$200 additional fee for the PCT request to enter into the national phase, and this was done on September 9, 2003.

[8] However, on December 11, 2003, the Commissioner advised the applicant that, although it had submitted the additional fee on September 9, 2003, it had not paid it before the expiry of the time limits provided for by the Rules and it was thus too late for the PCT application to enter the national phase. On January 9, 2004, the applicant renewed its instructions to the Commissioner to debit all of the regulatory fees so that the PCT application could proceed to the national phase.

[9] On April 26, 2004, the Commissioner again refused to have the PCT application enter the national phase. On May 21, 2004, the Commissioner, following the applicant's renewed request made in writing and by telephone, stated that the file would be sent to a senior officer "for a review of your application".

[10] On June 9, 2004, the applicant sent its submissions to the Commissioner, claiming *inter alia* that section 3.1 of the Rules applied in this case. On July 21, 2004, the Commissioner replied to the applicant's letter, refusing to allow the PCT request to enter into the national phase, and saying that section 3.1 of the Rules had come into force on January 1, 2004 and therefore did not apply in the circumstances.

IMPUGNED DECISION

[11] The impugned decision is the one made by the Commissioner on July 21, 2004, in refusing to apply section 3.1 of the Rules to the applicant's request for entry into the national phase. Section 3.1 provides that a payment received late may be considered to have been paid before the expiry of the time limit in certain cases.

[12] In the decision dated July 21, 2004, the Commissioner states that section 3.1 came into force on January 1, 2004, and does not apply retroactively.

ISSUE

[13] Did the Commissioner err in refusing to apply section 3.1 of the Rules to the PCT application for entry into the national phase, given the applicant's failure to comply with the requirements of paragraph 58(3)(b) of the Rules?

ANALYSIS

[14] Although the Commissioner's first notice was sent on December 11, 2003, I do not agree with the respondent's argument that the applicant had 30 days from that date to file its application for judicial review. On the contrary, the Commissioner, on May 21, 2004, agreed to submit the applicant's request to a senior officer for review and, on June 9, 2004, the Commissioner accepted the 11 pages of submissions from the applicant. I am therefore of the opinion that, for the purposes of applying rule 18.1(2) of the *Federal Court Rules, 1998*, the letter of July 21, 2004 was clearly the subject-matter in respect of which relief is being sought and the applicant thus filed its application within the prescribed time periods.

[15] Since the issue is whether section 3.1 of the Rules applies in this case and in the manner suggested by the applicant, the applicable standard of review is correctness. (See *Harvard College v. Canada (Commissioner of Patents)*, [2002] 4 S.C.R. 45; *Apotex Inc. v. Wellcome Foundation Ltd.*, [2002] 4 S.C.R. 153; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748.)

[16] The applicant submits, that although section 3.1 of the Rules came into force on January 1, 2004, it applies in this case because the facts occurred after its coming into force and, in the alternative, if the facts occurred before January 1, 2004, section 3.1 is retroactive. The section in question reads as follows:

3.1 (1) Subject to subsection 6(1), if, before the expiry of a time limit for paying a fee set out in Schedule II, the Commissioner receives a communication in accordance with which a clear but unsuccessful attempt is made to pay the fee, the fee shall be considered to have been paid before the expiry of the time limit if

(a) the amount of the fee that was missing is paid before the expiry of the time limit;

3.1 (1) Sous réserve du paragraphe 6(1), si, avant l'expiration du délai fixé pour le versement d'une taxe prévue à l'annexe II, le commissaire reçoit une communication dans laquelle une personne fait une tentative manifeste mais infructueuse pour verser la taxe, celle-ci est réputée avoir été reçue avant l'expiration du délai dans les cas suivants :

a) la taxe impayée est versée avant l'expiration du délai;

(b) if a notice is sent in accordance with subsection (2), the amount of the fee that was missing, together with the late payment fee set out in item 22.1 of Schedule II, are paid before the expiry of the two-month period after the date of the notice; or

b) dans le cas où un avis est envoyé conformément au paragraphe (2), la taxe impayée, accompagnée de la surtaxe pour paiement en souffrance prévue à l'article 22.1 de l'annexe II, est versée dans les deux mois suivant la date de l'avis;

(c) if a notice is not sent, the amount of the fee that was missing, together with the late payment fee set out in item 22.1 of Schedule II, are paid before the expiry of the two-month period after the day on which the communication was received by the Commissioner.

c) dans le cas où aucun avis n'est envoyé, la taxe impayée, accompagnée de la surtaxe pour paiement en souffrance prévue à l'article 22.1 de l'annexe II, est versée dans les deux mois suivant la date à laquelle le commissaire a reçu la communication.

(2) Subject to subsection 6(1) and unless the person making the communication did not provide information that would allow them to be contacted, if the Commissioner has received a communication in the circumstances referred to in subsection (1), the Commissioner shall, by notice to the person who made the communication, request payment of the amount of the fee that was missing together, if applicable, with the late payment fee referred to in subsection (1).

(2) Sous réserve du paragraphe 6(1) et à moins que l'auteur de la communication au commissaire ne soumette pas les renseignements permettant de communiquer avec lui, si le commissaire reçoit la communication dans les circonstances visées au paragraphe (1), il demande, par avis, à la personne qui lui a envoyé la communication de verser la taxe impayée, accompagnée, s'il y a lieu, de la surtaxe pour paiement en souffrance visée au paragraphe (1).

[17] Although the final decision was issued on July 21, 2004, the relevant facts all occurred before January 1, 2004. The priority date was January 14, 2000, so the deadlines were July 14, 2002 (30 month period) and July 14, 2003 (42 month period). The original payment of the fee occurred on July 10, 2003 and the Commissioner's decision rejecting the applicant's PCT request was issued on December 11, 2003, that is, prior to the coming into force of section 3.1 of the Rules.

[18] The applicant submits that this was not the final decision, since the Commissioner sent it another letter on April 26, 2004 indicating that it was too late for the entry into the national phase of its PCT request.

[19] But the only reason why the Commissioner resent a letter reiterating his remarks of December 11, 2003 was to answer the applicant's letter of January 9, 2004, which stated:

Dear Mrs. McQuaig:

This letter is being sent to you pursuant to your notice of December 11, 2003.

The Canadian Intellectual Property Office is hereby authorized to charge the amount of \$350.00 to the credit card of ... in payment of the following fees:

- i. \$200.00 in payment of the reinstatement fee for the filing of the application;
- ii. \$100.00 in payment of the late payment fee set out in item 22.1 of schedule II of the patent rules;
- iii. \$50.00 being the second annuity with respect to the caption application.

The Canadian Intellectual Property Office is hereby authorized to charge any additional amount which may be due in respect to the caption application to the credit card of

The applicant claims the status of a small entity.

We await the reception of the formal filing certificate and remain,

Yours truly,

BROUILLETTE KOSKIE PRINCE

(See exhibit RB-2 of the affidavit of Robert Brouillette.)

[20] In view of the reference to item 22.1 in Schedule II of the Rules, which did not come into force until January 1, 2004, it seems to me that the applicant was trying to draw the matter out until at least January 1, 2004, in an effort to avail itself of the new amendments to the Rules. I am of the opinion that, in the absence of payment of the fee and of the additional fee, the Commissioner correctly applied the Act and the Rules as they stood at the time when the application for entry into the PCT national phase was filed and rejected for delay.

[21] In support of its argument that section 3.1 of the Rules should be applied retroactively, the applicant cited an extract from a backgrounder appended to the "Government of Canada's Legislative Response to Recent Federal Court Decisions", which was published on the CIPO web site. I reproduce this extract below:

The proposed changes include retroactive amendments to the *Patent Act* to provide a mechanism for the retroactive correction of past fee payments in situations where a fee was incorrectly paid at the small entity fee level instead of the large entity fee level. This action is required to protect patent applicants and patentees who, through no fault of their own, may lose patent protection for their inventions. **Regulatory changes will also be forthcoming to provide greater clarity to the patent payment regime on a forward-looking basis.** The Canadian Intellectual Property Office will consult with clients and stakeholders on the nature of these technical amendments.

Les changements proposés comprennent des modifications rétroactives à la *Loi sur les brevets* pour établir un mécanisme permettant de corriger, de façon rétroactive, les taxes versées au tarif applicable à une petite entité plutôt que celui d'une grande entité. Ces mesures sont nécessaires pour empêcher que les demandeurs et les titulaires de brevet perdent, pour des raisons indépendantes de leur volonté, la protection que le brevet confère à leur invention. **Des modifications aux règles seront également proposées, à des fins proactives, pour clarifier le régime de versement des taxes relatives aux brevets.** L'Office de la propriété intellectuelle du Canada consultera les clients et les divers intéressés sur la nature de ces modifications de forme.

[Emphasis added]

[Je souligne.]

(Tab F-7 of applicant's record)

[22] Since the French version of the backgrounder mentioned the expression "à des fins proactives", I thought I would look at the English version by referring to the CIPO web site, the address of which was mentioned at paragraph 36 of the applicant's memorandum of fact and law, to determine precisely what this expression meant.

[23] The government's position as to the proposed amendments is clear: the Rules will be amended proactively (on a "forward-looking basis", in the English version) and not retroactively. Therefore, section 3.1 of the Rules applied as of January 1, 2004, and not for the past.

[24] Although the comments by Mr. Justice Martineau in *Johnson & Johnson Inc. v. Boston Scientific Ltd.*, 2004 FC 1672, [2004] F.C.J. No. 2040, concerned an abandonment of patent, his analysis of section 3.1 is applicable in this case:

On another note, section 3.1 does not purport to retroactively resurrect patents already deemed abandoned by section 30 of the *Patent Act*. Section 3.1 is not construed to have retroactive effect to resurrect patents already deemed permanently abandoned under section 30 of the *Patent Act*. **In fact, legislation is presumed to apply to future acts and conditions. In other words, statutes are not to be construed as having retroactive operation unless such a construction is expressly set out in the statute or is required as a necessary implication of the language used (*Gustavson Drilling (1964) Ltd. v. Canada (Minister of National Revenue - M.N.R.)*, [1977] 1 S.C.R. 271). There must be sufficient indication that the legislation is meant to apply not only to ongoing and future acts but also to past acts which is not the case here (*Baker Petrolite Corp. v. Canwell Enviro-Industries Ltd.*, [2003] 1 F.C. 49 at para. 19).** [Emphasis added]

[25] Now, the deadline by which the applicant had to pay the fee and additional fee was July 14, 2003. Since the amount owing under the Rules remained unpaid at that date, under the Act and the Rules that were applicable at that time the Commissioner had no power to remedy this deficiency.

In any event, the authority of the Commissioner to extend deadlines is limited by any contrary provision in the Rules. The Judge found, and I agree, that section 157, of the *Patent Rules* and former subsection 76.1(6), preclude the Commissioner from extending the deadlines for the payment of maintenance fees. **That necessarily implies that the Commissioner lacks the authority to permit a deficient maintenance fee to be topped up after the date upon which the fee was due.** (*Dutch Industries Ltd. v. Canada (Commissioner of Patents)*, [2003] 4 F.C. 67 (F.C.A.), at paragraph 26) [Emphasis added]

[26] See also *Eiba v. Canada (Attorney General)*, [2004] 3 F.C.R. 416, where Mr. Justice Mosley states:

It is clear that the Commissioner has no authority pursuant to the Act and the Rules to extend the deadline for payment of maintenance fees: *Pfizer Inc. v. Canada (Commissioner of Patents)* (2000), 9 C.P.R. (4th) 13; 269 N.R. 373 (F.C.A.) and *Dutch Industries Ltd. v. Canada (Commissioner of Patents)*, [2003] 4 F.C. 67; (2003), 24 C.P.R. (4th) 157; 301 N.R. 152 (C.A.); leave to appeal to S.C.C. dismissed, [2003] 3 S.C.R. vi.

[27] Since section 3.1 of the Rules does not apply retroactively and the Commissioner did not err in applying the Act and the Rules in force at the time of the PCT national phase request, I am of the opinion that this application for judicial review must be dismissed.

ORDER

THE COURT ORDERS that:

- The application for judicial review be dismissed;
- With costs.

_____ "Pierre Blais"

Judge

Certified true translation

François Brunet, LLB, BCL

STATUTORY PROVISIONS

Patent Rules, SOR/96-423

3. Where a person takes any proceeding or requests that any service be rendered by the Commissioner or by the Patent Office, the person shall pay to the Commissioner the appropriate fee, if any, set out in Schedule II for that proceeding or service.

3. La personne qui remplit des formalités ou demande la prestation d'un service par le commissaire ou le Bureau des brevets verse au commissaire la taxe qui est prévue, le cas échéant, à l'annexe II.

(3.1 came into effect January 1, 2004)

(3.1 est entrée en vigueur le 1 janvier 2004)

3.1 (1) Subject to subsection 6(1), if, before the expiry of a time limit for paying a fee set out in Schedule II, the Commissioner receives a communication in accordance with which a clear but unsuccessful attempt is made to pay the fee, the fee shall be considered to have been paid before the expiry of the time limit if

3.1 (1) Sous réserve du paragraphe 6(1), si, avant l'expiration du délai fixé pour le versement d'une taxe prévue à l'annexe II, le commissaire reçoit une communication dans laquelle une personne fait une tentative manifeste mais infructueuse pour verser la taxe, celle-ci est réputée avoir été reçue avant l'expiration du délai dans les cas suivants :

(a) the amount of the fee that was missing is paid before the expiry of the time limit;

a) la taxe impayée est versée avant l'expiration du délai;

(b) if a notice is sent in accordance with subsection (2), the amount of the fee that was missing, together with the late payment fee set out in item 22.1 of Schedule II, are paid before the expiry of the two-month period after the date of the notice; or

b) dans le cas où un avis est envoyé conformément au paragraphe (2), la taxe impayée, accompagnée de la surtaxe pour paiement en souffrance prévue à l'article 22.1 de l'annexe II, est versée dans les deux mois suivant la date de l'avis;

(c) if a notice is not sent, the amount of the fee that was missing, together with the late payment fee set out in item 22.1 of Schedule II, are paid before the expiry of the two-month period after the day on which the communication was received by the Commissioner.

c) dans le cas où aucun avis n'est envoyé, la taxe impayée, accompagnée de la surtaxe pour paiement en souffrance prévue à l'article 22.1 de l'annexe II, est versée dans les deux mois suivant la date à laquelle le commissaire a reçu la communication.

(2) Subject to subsection 6(1) and unless the person making the communication did not provide information that would allow them to be contacted, if the Commissioner has received a communication in the circumstances referred to in subsection (1), the Commissioner shall, by notice to the person who made the communication, request payment of the amount of the fee that was missing together, if applicable, with the late payment fee referred to in subsection (1).

(2) Sous réserve du paragraphe 6(1) et à moins que l'auteur de la communication au commissaire ne soumette pas les renseignements permettant de communiquer avec lui, si le commissaire reçoit la communication dans les circonstances visées au paragraphe (1), il demande, par avis, à la personne qui lui a envoyé la communication de verser la taxe impayée, accompagnée, s'il y a lieu, de la surtaxe pour paiement en souffrance visée au paragraphe (1).

National Phase

Phase nationale

56. Where an international application in which Canada is designated is filed, the Commissioner shall act as the designated Office as defined in Article 2(xiii) of the Patent Cooperation Treaty.

56. Lorsqu'est déposée une demande internationale dans laquelle le Canada est désigné, le commissaire agit à titre d'office désigné au sens de l'article 2(xiii) du Traité de coopération en matière de brevets.

57. Where an international application in which Canada is designated is filed and the applicant has elected Canada as a country in respect of which the international preliminary examination report referred to in Article 35 of the Patent Cooperation Treaty shall be established, the Commissioner shall act as an elected Office as defined in Article 2(xiv) of the Patent Cooperation Treaty.

57. Lorsqu'est déposée une demande internationale dans laquelle le Canada est désigné et que le demandeur a élu le Canada comme pays pour lequel un rapport d'examen préliminaire international visé à l'article 35 du Traité de coopération en matière de brevets doit être établi, le commissaire agit à titre d'office élu au sens de l'article 2xiv) de ce traité.

58. (1) An applicant who designates Canada, or who designates and elects Canada, in an international application shall, within the time prescribed by subsection (3),

58. (1) Le demandeur qui, dans une demande internationale, désigne le Canada ou désigne et élit le Canada est tenu, dans le délai prévu au paragraphe (3) :

(a) where the International Bureau of the World Intellectual Property Organization has not published the international application, provide the Commissioner with a copy of the international application;

a) lorsque le Bureau international de l'Organisation mondiale de la propriété intellectuelle n'a pas publié la demande internationale, de remettre au commissaire une copie de cette demande;

(b) where the international application is not in English or French, provide the Commissioner with a translation of the international application into either English or French; and

b) lorsque la demande internationale n'est ni en français ni en anglais, de remettre au commissaire la traduction française ou anglaise de cette demande;

(c) pay the basic national fee set out in item 10 of Schedule II.

c) de verser la taxe nationale de base prévue à l'article 10 de l'annexe II.

(2) An applicant who complies with the requirements of subsection (1) after the second anniversary of the international filing date shall, within the time prescribed by subsection (3), pay any fee set out in item 30 of Schedule II that would have been payable in accordance with section 99 or 154 had the international application been filed in Canada as a Canadian application on the international filing date.

(2) Le demandeur qui se conforme aux exigences du paragraphe (1) après le deuxième anniversaire de la date du dépôt international verse, dans le délai visé au paragraphe (3), la taxe prévue à l'article 30 de l'annexe II qui aurait été exigible selon les articles 99 ou 154 si la demande internationale avait été déposée au Canada à titre de demande canadienne à la date du dépôt international.

(3) An applicant shall comply with the requirements of subsection (1) and, where applicable, subsection (2) not later than on the expiry of

(3) Le demandeur se conforme aux exigences du paragraphe (1) et, s'il y a lieu, du paragraphe (2) dans le délai suivant :

(a) the 30-month period after the priority date; or

a) dans les trente mois suivant la date de priorité;

(b) where the applicant pays the additional fee for late payment set out in item 11 of Schedule II, the 42-month period after the priority date.

b) s'il verse la surtaxe pour paiement en souffrance prévue à l'article 11 de l'annexe II, dans les quarante-deux mois suivant la date de priorité.

(4) Where the applicant provides a translation of the international application into either English or French in accordance with paragraph (1)(b) and the Commissioner has reasonable grounds to believe that the translation is not accurate, the Commissioner shall requisition the applicant to

(4) Lorsque le demandeur remet la traduction française ou anglaise de la demande internationale conformément à l'alinéa (1)b), le commissaire, s'il a des motifs raisonnables de croire que la traduction n'est pas exacte, exige du demandeur qu'il fournisse une déclaration du

provide a statement by the translator to the effect that, to the best of the translator's knowledge, the translation is complete and faithful.

traducteur portant qu'à sa connaissance la traduction est complète et fidèle.

(5) Where the applicant who complies with the requirements of subsection (1) is not the applicant originally identified in the international application, the Commissioner shall requisition evidence that the applicant who complies with the requirements of that subsection is the legal representative of the originally identified applicant where the documents already in the Patent Office do not provide such evidence.

(5) Lorsque le demandeur qui s'est conformé aux exigences du paragraphe (1) n'est pas le demandeur désigné initialement dans la demande internationale, le commissaire exige la preuve, si celle-ci ne ressort pas des documents déjà au Bureau des brevets, que le demandeur qui s'est conformé aux exigences du paragraphe (1) est le représentant légal du demandeur désigné initialement.

(5.1) Where the applicant who complies with the requirements of subsection (1) does not comply with a requisition made by the Commissioner pursuant to subsection (5) within three months after the requisition is made, that applicant shall be deemed never to have complied with the requirements of subsection (1).

(5.1) Lorsque le demandeur qui s'est conformé aux exigences du paragraphe (1) ne se conforme pas à l'exigence formulée par le commissaire en vertu du paragraphe (5) dans les trois mois suivant la formulation de cette exigence, il est réputé ne jamais s'être conformé aux exigences du paragraphe (1).

(6) For the purposes of subsection (2), "international filing date" means the date accorded to an international application by a receiving Office pursuant to Article 11 of the Patent Cooperation Treaty.

(6) Pour l'application du paragraphe (2), « date du dépôt international » s'entend de la date accordée par l'office récepteur à la demande internationale en conformité avec l'article 11 du Traité de coopération en matière de brevets.

(7) For greater certainty, section 26 does not apply in respect of the times specified in subsection (3) but does apply in respect of the time specified in subsection (5.1).

(7) Il est entendu que l'article 26 ne s'applique pas aux délais prévus au paragraphe (3) mais qu'il s'applique à celui prévu au paragraphe (5.1).

(8) Article 48(2) of the Patent Cooperation Treaty does not apply in respect of the times specified in subsection (3) of this section or in respect of any time limit applicable to a PCT national phase application.

(8) L'article 48(2) du Traité de coopération en matière de brevets ne s'applique pas aux délais prévus au paragraphe (3) du présent article ni aux délais applicables à l'égard d'une demande PCT à la phase nationale.

(9) An international application may not become a PCT national phase application where:

(9) La demande internationale ne peut devenir une demande PCT à la phase nationale si :

(a) before April 1, 2002, the 32-month period after the priority date has expired;

a) une période de trente-deux mois suivant la date de priorité s'est écoulée avant le 1^{er} avril 2002;

(b) the applicant had not complied with the requirements of subsection (1) and, where applicable, subsection (2) before the expiry of that period; and

b) le demandeur ne s'est pas conformé aux exigences du paragraphe (1) et, s'il y a lieu, du paragraphe (2) avant l'expiration de cette période;

(c) an election of Canada was not made before the expiry of the nineteenth month after the priority date. SOR/99-291, s. 5; SOR/2002-120, s. 1.

c) l'élection du Canada n'a pas été faite avant l'expiration du dix-neuvième mois suivant la date de priorité. DORS/99-291, art. 5; DORS/2002-120, art. 1.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-1518-04

STYLE: THINKSTREAM INC. v. THE COMMISSIONER OF PATENTS

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: June 14, 2005

REASONS FOR ORDER: Blais J.

DATE OF REASONS: June 23, 2005

APPEARANCES:

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Serge Fournier

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Mariève Sirois-Vaillancourt

FOR THE RESPONDENT

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