

CANADA

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

(Class Action)
SUPERIOR COURT

NO: 500-06-001081-203

S. HOLCMAN

Applicant

-vs-

RESTAURANT BRANDS INTERNATIONAL
INC.
and
RESTAURANT BRANDS INTERNATIONAL
LIMITED PARTNERSHIP
and
THE TDL GROUP CORP.

Defendants

**AMENDED APPLICATION TO AUTHORIZE THE BRINGING OF A CLASS ACTION
AND TO APPOINT THE STATUS OF REPRESENTATIVE PLAINTIFF**
(ARTICLES 571 AND FOLLOWING C.C.P.)

I. INTRODUCTION

1. The Defendant, Restaurant Brands International Inc. (hereinafter “**RBI**”), is a publicly traded company on the Toronto Stock Exchange (symbol: QSR.TO) and on the New York Stock Exchange (symbol: QSR). The Applicant discloses herewith a copy of RBI’s *CIDREQ* report as **Exhibit P-1**;
2. The Defendant, Restaurant Brands International Limited Partnership (“**RBILP**”), is a subsidiary of RBI and the indirect parent of The TDL Group Corp. The Applicant discloses herewith a copy of RBI LP’s *CIDREQ* report as **Exhibit P-2**;
3. The Defendant, The TDL Group Corp. (“**TDL**”), is registered as a restaurant and also operates under the name “Tim Hortons”, as it appears from copy of its *CIDREQ* report disclosed as **Exhibit P-3**. TDL has an establishment located at 10590-10592 Chemin de la Côte-de-Liesse, in Lachine, Quebec, H8T 1A4, as it appears from an extract from the *Rôle d’évaluation foncière* of the city of Montreal and the tax statement disclosed herewith *en liasse* as **Exhibit P-8A and Exhibit P-8B**. As can be seen from various *CIDREQ* reports, on 2003-06-02, The TDL Groupe Ltd. (NEQ 1140867012) merged to become The TDL Group Corp. (NEQ 1161643532) [**Exhibit P-9A**]; then on 2003-06-30, The TDL Group Corp. (NEQ

1161643532) merged to become The TDL Group Corp. ULC (NEQ 1161643912) [Exhibit P-9B]; then on 2015-03-02, The TDL Group Corp. ULC (NEQ 1161643912) [in French called *Groupe TDL Corporation SRI*] merged to become the TDL Group Corp. (NEQ 1170975521) [Exhibit P-9C]; the Defendant TDL is NEQ 1170975521 (Exhibit R-3);

4. Together, the Defendants RBI, RBILP and TDL operate the Tim Hortons coffee chain (include the mobile application) and are collectively referred to herein as “Tim Hortons”;
5. In the “About Us” section of its website (www.timhortons.ca), Tim Hortons describes itself as “*Canada’s largest restaurant chain*” and a “*proud symbol of our country and its values*”, Applicant disclosing **Exhibit P-4**:

“Tim Hortons is now proud to be Canada's largest restaurant chain serving over 5 million cups of coffee every day with 80% of Canadians visiting a Tims in Canada at least once a month. More than a coffee and bake shop, Tim Hortons is part of the fabric of Canada and a proud symbol of our country and its values.”

6. One of Canada’s values is that her citizens have a fundamental right to respect for their private lives, which was violated by Tim Hortons who used its mobile application to invasively track and monitor its customers without their knowledge;
7. On June 12, 2020, a Financial Post article by James McLeod titled “*Double-double tracking: How Tim Hortons knows where you sleep, work and vacation*” first reported that the Tim Hortons mobile application is logging detailed location data of its customers (unbeknownst to them) and was using a location-tracking service from a company called Radar Labs Inc., who boasts that it can ping its customers’ phones as often as every three to five minutes, as it appears from **Exhibit P-5**;
8. In his article (Exhibit P-5), Mr. McCleod details his personal experience using the Tim Hortons mobile application, which enabled him (with the assistance of experts) to conclude that Tim Hortons has been tracking the movements of all of its customers in exacting detail through its mobile application for more than a year;
9. Mr. McCleod highlights how, until the week of June 8, 2020, Tim Hortons privacy “FAQ” stated “***the app uses your location only while you have the app open***” but that in response to his inquiries Tim Hortons acknowledged that this statement was misleading:

“We absolutely agree that our FAQ on location data could have been more clear,” Fulton said, adding that the company was planning to send an updated statement to customers.

10. On June 29, 2020, the Office of the Privacy Commissioner of Canada announced that several Privacy Commissioners across Canada, including la *Commission*

d'accès à l'information du Québec (CAI) have launched a joint investigation into the Tim Hortons mobile application and how it may be collecting and using data about people's movements as they go about their daily lives, as it appears from **Exhibit P-6**;

11. On June 29, 2020, a Financial Post article titled "*Tim Hortons scaling back data collection as four privacy watchdogs announce joint investigation into app*", reported that Tim Hortons announced that it had discontinued its detailed location tracking after coming under public scrutiny, as it appears from **Exhibit P-7**;
12. The Applicant is a consumer who has been using Tim Hortons mobile application since 2019 and who was completely unaware that Tim Hortons was intrusively tracking his movements, even when the application was closed;
13. Consequently, the Applicant seeks to institute a class action on behalf of the following class of which he is a member:

Class:

All Canadian Resident users of the Tim Hortons® application with registered accounts in Canada whose geolocation information was collected by any of the Defendants between April 1, 2019 and September 30, 2020.

(hereinafter referred to as the "**Class**").

II. CONDITIONS REQUIRED TO AUTHORIZE THIS CLASS ACTION AND TO APPOINT THE STATUS OF REPRESENTATIVE PLAINTIFF (SECTION 575 C.C.P.):

A) THE FACTS ALLEGED APPEAR TO JUSTIFY THE CONCLUSIONS SOUGHT:

14. In 2019, the Applicant downloaded the Tim Hortons mobile application on his Android smartphone;
15. He also downloaded the Burger King mobile application in 2019 (which is relevant because RDI uses location-tracking service supplied by Radar Labs Inc. for both its Burger King and Tim Hortons mobile applications);
16. The Applicant downloaded this application because he enjoys Tim Hortons coffees and food, and visits Tim Hortons regularly;
17. The Tim Hortons mobile application is useful for the Applicant because it notifies him of ongoing promotions that he would otherwise not know about;
18. Just as in the case of James McLeod (Exhibit P-5), the Applicant was unaware that Tim Hortons was constantly tracking his movements and personal activities, even when the application was not opened on his phone;

19. Had he been aware that Tim Hortons was engaging in this intrusive conduct, he would have never downloaded their mobile application;
20. Up until June 8, 2020, Tim Hortons falsely stated on its privacy “FAQ” section that: **“the app uses your location only while you have the app open”**, contrary to sections 40, 41, and 219 of Quebec’s *Consumer Protection Act* (“CPA”);
21. Tim Hortons and its agents - unlawfully and without consent - constantly streamed the Applicant’s location via his Android smartphone and kept logs of his activities;
22. The Applicant (or any reasonable person for that matter) could have never suspected that downloading an application for a coffee shop would enable a large corporation to watch virtually every single one of his moves and keep this data stored on foreign servers;
23. Tim Hortons actions of secretly tracking its customers was intentional and intended to further their own selfish business interests at the expense of Class Members’ personal privacy rights;
24. Tim Hortons has taken a cavalier and arbitrary attitude to their legal and moral duties to the Class Members;
25. At all material times, the conduct of Tim Hortons as set forth was malicious, deliberate, and oppressive towards their customers and Tim Hortons conducted themselves in a wilful, wanton and reckless manner as to Class Members’ privacy rights, such as to warrant punitive damages;
26. Tim Hortons violated: (i) the Applicant’s privacy rights; (ii) the Federal *Personal Information Protection and Electronic Documents Act* (PIPEDA); (iii) *An Act respecting the Protection of Personal and Private Information in the Private Sector*; and (iv) its own contractual undertaking that the application would only use its customers’ location while the application is open;
27. The Applicant’s claim for damages is based on breaches by Tim Hortons of the following legislation:
 - a) Articles 3, 35 and following, and 1457 C.C.Q.;
 - b) Articles 5 and 49 of the *Québec Charter*;
 - c) Articles 40, 41 and 219 CPA;
 - d) Articles 5 and 14 of *An Act respecting the Protection of Personal and Private Information in the Private Sector*; and
 - e) Sections 5 and following and Schedule 1 of PIPEDA.

28. The Applicant hereby claims \$100 in damages (including punitive damages), subject to adjustment;
29. The Applicant's damages are a direct and proximate result of Tim Hortons omissions, breaches, and negligence;

B) THE CLAIMS OF THE MEMBERS OF THE CLASS RAISE IDENTICAL, SIMILAR OR RELATED ISSUES OF LAW OR FACT:

30. All Class members have a common interest in proving the Defendants' liability;
31. In this case, the legal and factual backgrounds at issue are common to all members of the Class;
32. Every Class member downloaded the Tim Hortons mobile application and their activities were tracked, without their consent, even when the application was closed;
- 32.1 The dispute between the parties relates in part to TDL's activities in Quebec;
33. Class Members' claim for damages is based on the following:
 - a) *Civil Code of Québec*, CQLR c CCQ-1991, including articles 3, 35 and following, and 1457 (Quebec);
 - b) *Charter of Human Rights and Freedoms*, CQLR c C-12, including articles 5 and 49 (Quebec);
 - c) *Consumer Protection Act*, CQLR c P-40.1, including articles 40, 41 and 219, 228, 253, and 272 (Quebec);
 - d) *An Act respecting the Protection of Personal and Private Information in the Private Sector*, CQLR c P-39.1, including articles 5, 10, and 14 (Quebec);
 - e) *Consumer Protection Act, 2002*, SO 2022, c 30, Sch A, including sections 8, 11, 14-15, and 17-18 (Ontario);
 - f) *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31, including sections 38, 39, 41, 42, and 61 (Ontario);
 - g) *Privacy Act*, RSBC 1996, c 373, including section 1 (British Columbia);
 - h) *Business Practices and Consumer Protection Act*, SBC 2004, c 2, including sections 4, 5, and 7-10, 171-172 (British Columbia);

- i) *Freedom of Information and Protection of Privacy Act*, RSBC 1996 c 165 (British Columbia);
- j) *Consumer Protection Act*, RSA 2000, c C-26.3, including sections 5-9, 13, and 142.1 (Alberta);
- k) *Personal and Private Information Protection Act*, SA 2003, c P-6.5 (Alberta);
- l) *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25 (Alberta);
- m) *The Consumer Protection and Business Practices Act*, SS 2013, c C-30.2, including sections 5-9, 16, 18-23, 26, 36, and 93 (Saskatchewan);
- n) *The Privacy Act*, RSS 1978, c P-24, including section 2 (Saskatchewan);
- o) *The Freedom of Information and Protection of Privacy Act*, SS 1990-91, c F-22.01 (Saskatchewan)
- p) *The Business Practices Act*, CCSM, c B120, including sections 2-9 and 23 (Manitoba);
- q) *The Privacy Act*, CCSM c P125, including section 2 (Manitoba);
- r) *The Freedom of Information and Protection of Privacy Act*, CCSM c F175 (Manitoba);
- s) *Consumer Product Warranty and Liability Act*, SNB 1978, c 18.1, including sections 4, 13, 15, and 23 (New Brunswick);
- t) *Right to Information and Protection of Privacy Act*, SNB 2009, c R-10.6 (New Brunswick);
- u) *Consumer Protection and Business Practices Act*, SNL 2009, c C-31.1, including sections 7-10 and *Trade Practices Act*, RSNL 1990, c T-7, including sections 5-7 and 14 (Newfoundland and Labrador);
- v) *Privacy Act*, RSNL 1990, c P-22, including section 3 (Newfoundland and Labrador);
- w) *Access to Information and Protection of Privacy Act*, 2015, SNL 2015, c A-1.2 (Newfoundland and Labrador);

- x) Consumer Protection Act, RSNS 1989, c 92, including sections 26-29 (Nova Scotia);
- y) Freedom of Information and Protection of Privacy Act, SNS 1993, c 5 (Nova Scotia);
- z) Business Practices Act, RSPEI 1988, c B-7, including sections 2-4 (Prince Edward Island);
- aa) Freedom of Information and Protection of Privacy Act, RSPEI 1988, c F-15.01 (Prince Edward Island);
- bb) Consumers Protection Act, RSY 2002, c 40, including sections 58 and 86 (Yukon);
- cc) Access to Information and Protection of Privacy Act, RSY 2002, c 1 (Yukon);
- dd) Consumer Protection Act, RSNWT 1988, c C-17, including sections 70-71 (Northwest Territories);
- ee) Access to Information and Protection of Privacy Act, SNWT 1994, c 20 (Northwest Territories);
- ff) Consumer Protection Act, RSNWT (Nu) 1988, c C-17, including sections 70-71 (Nunavut);
- gg) Access to Information and Protection of Privacy Act, SNWT (Nu) 1994, c 20 (Nunavut);
- hh) Competition Act, RSC 1985, c C-34, including sections 36 and 52 (Canada);
- ii) Personal Information Protection and Electronic Documents Act, SC 2000, c 5, including sections 5 and following and Schedule 1 (Canada);
- jj) Digital Privacy Act, S.C. 2015 (Canada);
- kk) Tort of intrusion upon seclusion;
- ll) Breach of privacy;
- mm) Breach of confidence;
- nn) Breach of contract;
- oo) Violation of Privacy Policy;

- pp) Vicarious liability;
 - qq) Trouble, inconvenience, and lost time;
 - rr) Stress and anxiety;
 - ss) Identity theft protection;
 - tt) Waiver of torts;
 - uu) Unjust enrichment;
 - vv) Constructive trust;
 - ww) Restitution;
 - xx) Disgorgement;
34. All of the damages to the Class members are a direct and proximate result of the Defendants' negligence and privacy violations;
35. Individual questions, if any, pale by comparison to the common questions that are significant to the outcome of the present Application;
36. **The recourses of the Class members raise identical, similar or related questions of fact or law, namely:**
- a) Did the Defendants violate the privacy rights of Class Members who downloaded the Tim Hortons mobile application?
 - a.1) Did the Defendants engage in unfair, false, misleading, or deceptive acts or practices by collecting, recording, or using Class Members' geolocation information?
 - b) Did the Defendants falsely or misleadingly state that "*the app uses your location only while you have the app open*"?
 - b.1) Did the Defendants violate of any of the agreed-upon terms and conditions of a binding contract entered into with Class Members?
 - b.2) Did the Defendants, without authorization, intentionally or negligently invaded the private concerns of Class Members, in a manner that is offensive to a reasonable person, and to which caused mental anguish or suffering?

- b.3) Did the Defendants use Class Members' confidential information for a purpose other than that for which the information was disclosed to them without authorization?
- b.4) Did the Defendants, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect?
- b.5) Did the Defendants violate Class Members' privacy rights gross negligently, intentionally, recklessly, or wantonly?
- b.6) Are any of the Defendants vicariously liable to Class Members through any act, omission, or fault of its affiliates, related entities, subsidiaries, mandataries, agents, contractors, representatives, partners, insurers, reinsurers, shareholders, employees, officers, directors, professionals, staff, predecessors, successors and assigns?
- c) Should an award of aggregate damages be made, and if so, in what amount?
 - c.1) If any of the damages should be awarded or liquidated individually, how should such amount be determined?
 - d) Are the Defendants liable to pay nominal or symbolic damages to Class Members, and if so, in what amount?
 - d.1) Are the Defendants liable to pay punitive or exemplary damages to the Class Members, and if so, in what amount?

C) THE COMPOSITION OF THE CLASS

- 37. The composition of the Class makes it difficult or impracticable to apply the rules for mandates to take part in judicial proceedings on behalf of others or for consolidation of proceedings;
- 38. Tim Hortons has hundreds of thousands of customers in Quebec;
- 39. According to Duncan Fulton, RBI's chief corporate officer, there are "a few million Canadians" using the Tim Hortons mobile application;
- 40. Class members are very numerous and are dispersed across the province and Canada;
- 41. These facts demonstrate that it would be impossible to contact each and every Class member to obtain mandates and to join them in one action;

42. In these circumstances, a class action is the only appropriate procedure for all of the members of the Class to effectively pursue their respective rights and have access to justice without overburdening the court system;

D) THE CLASS MEMBER REQUESTING TO BE APPOINTED AS REPRESENTATIVE PLAINTIFF IS IN A POSITION TO PROPERLY REPRESENT THE CLASS MEMBERS

43. The Applicant requests that he be appointed the status of representative plaintiff for the following main reasons:

- a) he is a member of the Class and has a personal interest in seeking the conclusions proposed herein;
- b) he is competent, in that he has the potential to be the mandatary of the action if it had proceeded under article 91 of the *Code of Civil Procedure*;
- c) his interests are not antagonistic to those of other Class members;

44. Additionally, the Applicant respectfully adds that:

- a) he has the time, energy, will and determination to assume all the responsibilities incumbent upon him in order to diligently carry out the action;
- b) after learning about the situation, he mandated his attorneys to file the present application for the sole purpose of having his rights, as well as the rights of other Class members, recognized and protected so that they can be compensated;
- c) he cooperates and will continue to fully cooperate with his attorneys, who have experience in consumer protection-related class actions;
- d) he understands the nature of the action;

45. As for identifying other Class members, the Applicant draws certain inferences from the situation and realizes that by all accounts, there is a very significant number of Class members that find themselves in an identical situation, and that it would not be useful to attempt to identify each of them given their sheer numbers;

46. For the above reasons, the Applicant respectfully submits that his interest and competence are such that the present class action could proceed fairly and in the best interest of Class members;

III. NATURE OF THE ACTION AND CONCLUSIONS SOUGHT

47. The action that the Applicant wishes to institute on behalf of the members of the Class is an action in damages;

48. The conclusions that the Applicants wish to introduce by way of an originating application are:

GRANT the Representative Plaintiff's action against the Defendants on behalf of all Class members;

CONDEMN the Defendants, solidarily (jointly and severally), to pay the Representative Plaintiff damages, including punitive damages, in the amount of \$100, subject to adjustment;

DECLARE that an award of aggregate damages should be made;

CONDEMN the Defendants, solidarily (jointly and severally), to pay (...) damages in an amount to be determined;

ORDER the collective recovery of all damages to the Class members;

CONDEMN the Defendants, solidarily (jointly and severally), to pay interest and the additional indemnity on the above sums according to law from the date of service of the *Application to Authorize a Class Action*;

ORDER the Defendants, solidarily (jointly and severally), to deposit in the office of this Court the totality of the sums which forms part of the collective recovery, with interest and costs;

ORDER that the claims of individual Class members be the object of collective liquidation if the proof permits and alternately, by individual liquidation;

CONDEMN the Defendants, solidarily (jointly and severally), to bear the costs of the present action at all levels, including the cost of all exhibits, notices, the cost of management of claims and the costs of experts, if any, including the costs of experts required to establish the amount of the collective recovery orders;

49. The interests of justice favour that this Application be granted in accordance with its conclusions;

IV. JURISDICTION

50. The Applicant requests that this class action be exercised before the Superior Court in the district of Montreal, since he is domiciled and resides in the district of Montreal and his attorneys practice in this district.

FOR THESE REASONS, MAY IT PLEASE THE COURT:

1. **GRANT** the present application;
2. **AUTHORIZE** the bringing of a class action in the form of an originating application in damages;

3. **APPOINT** the Applicant the status of Representative Plaintiff of the persons included in the Class herein described as:

Class:

All Canadian Resident users of the Tim Hortons® application with registered accounts in Canada whose geolocation information was collected by any of the Defendants between April 1, 2019 and July 22, 2020.

(hereinafter referred to as the “**Class**”).

or any other Class to be determined by the Court;

4. **IDENTIFY** the principle questions of fact and law to be treated collectively as the following:

- a) Did the Defendants violate the privacy rights of Class Members who downloaded the Tim Hortons mobile application?
 - a.1) Did the Defendants engage in unfair, false, misleading, or deceptive acts or practices by collecting, recording, or using Class Members’ geolocation information?
- b) Did the Defendants falsely or misleadingly state that “*the app uses your location only while you have the app open*”?
 - b.1) Did the Defendants violate of any of the agreed-upon terms and conditions of a binding contract entered into with Class Members?
 - b.2) Did the Defendants, without authorization, intentionally or negligently invaded the private concerns of Class Members, in a manner that is offensive to a reasonable person, and to which caused mental anguish or suffering?
 - b.3) Did the Defendants use Class Members’ confidential information for a purpose other than that for which the information was disclosed to them without authorization?
 - b.4) Did the Defendants, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect?
 - b.5) Did the Defendants violate Class Members’ privacy rights gross negligently, intentionally, recklessly, or wantonly?

- b.6) Are any of the Defendants vicariously liable to Class Members through any act, omission, or fault of its affiliates, related entities, subsidiaries, mandataries, agents, contractors, representatives, partners, insurers, reinsurers, shareholders, employees, officers, directors, professionals, staff, predecessors, successors and assigns?
- c) Should an award of aggregate damages be made, and if so, in what amount?
- c.1) If any of the damages should be awarded or liquidated individually, how should such amount be determined?
- d) Are the Defendants liable to pay nominal or symbolic damages to Class Members, and if so, in what amount?
- d.1) Are the Defendants liable to pay punitive or exemplary damages to the Class Members, and if so, in what amount?

5. **IDENTIFY** the conclusions sought by the class action to be instituted as being the following:

- a) **GRANT** the Representative Plaintiff's action against the Defendants on behalf of all the Class members;
- b) **CONDEMN** the Defendants, solidarily (jointly and severally), to pay the Representative Plaintiff damages, including punitive damages, in the amount of \$100, subject to adjustment;
- c) **DECLARE** that an award of aggregate damages should be made;
- d) **CONDEMN** the Defendants, solidarily (jointly and severally), to pay (...) damages in an amount to be determined;
- e) **ORDER** the collective recovery of all damages to the Class members;
- f) **CONDEMN** the Defendants, solidarily (jointly and severally), to pay interest and the additional indemnity on the above sums according to law from the date of service of the *Application to Authorize a Class Action*;
- g) **ORDER** the Defendants, solidarily (jointly and severally), to deposit in the office of this Court the totality of the sums which forms part of the collective recovery, with interest and costs;
- h) **ORDER** that the claims of individual Class members be the object of collective liquidation if the proof permits and alternately, by individual

liquidation;

- i) **CONDEMN** the Defendants, solidarily (jointly and severally), to bear the costs of the present action at all levels, including the cost of all exhibits, notices, the cost of management of claims and the costs of experts, if any, including the costs of experts required to establish the amount of the collective recovery orders;
6. **DECLARE** that all members of the Class that have not requested their exclusion, be bound by any judgement to be rendered on the class action to be instituted in the manner provided for by the law;
7. **FIX** the delay of exclusion at thirty (30) days from the date of the publication of the notice to the members, date upon which the members of the Class that have not exercised their means of exclusion will be bound by any judgement to be rendered herein;
8. **ORDER** the publication of a notice to the members of the Class in accordance with article 579 C.C.P. within sixty (60) days from the judgement to be rendered herein in the “News” sections of the Saturday editions of various national newspaper, to be decided at a further hearing;
9. **ORDER** that said notice be published on the Defendants’ various websites, Facebook pages and Twitter accounts, in a conspicuous place, with a link stating “Notice of a Class Action”;
10. **ORDER** the Defendants to notify Class members via a “pop-up” notification in their mobile application, with the subject line “Notice of a Class Action”, containing a hyperlink to the notice;
11. **ORDER** the Defendants to send an Abbreviated Notice by e-mail to each Class member, to their last known e-mail address, with the subject line “Notice of a Class Action”;
12. **RENDER** any other order that this Honourable Court shall determine;
13. **THE WHOLE** with costs, including the court stamp, bailiff fees, stenographer fees and publication fees.

Montreal, May 26, 2022

Montreal, May 26, 2022

(s) LPC Avocat Inc.

LPC AVOCAT INC.
Co-Counsel for Applicant
Me Joey Zukran

(s) Consumer Law Group Inc.

CONSUMER LAW GROUP INC.
Co-Counsel for Applicant
Me Jeff Orenstein

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(Class Action)
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v.

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(ARTICLES 571 AND FOLLOWING C.C.P.)

ORIGINAL

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