Federal Court  Cour fédérale

Date: 20090811

Docket: T-664-09

Citation: 2009 FC 812

Ottawa, Ontario, August 11, 2009

PRESENT: The Honourable Max M. Teitelbaum

BETWEEN:

ROGER COLLARD

Applicant

and

THE ELECTORAL OFFICER OF THE BETSIAMITES BAND COUNCIL AND PAUL VOLLANT AND RAPHAËL PICARD

Respondents

REASONS FOR ORDER AND ORDER

[1] This is a motion, by respondents Paul Vollant and Raphaël Picard, to dismiss or strike out the applicant's notice of application for judicial review of the decision of the electoral officer of the Betsiamites Band Council, dated March 27, 2009, on the ground that the custom election code of the Betsiamites Innu Nation (the Election Code) provides that the time limit to contest an election is 14 days following the date of the election in question, and no provision of the Election Code provides for any possible extension of that time limit.

[2] In his notice of application for judicial review, the applicant alleges the following causes of action against the respondents:

1. The electoral officer made a decision or order without regard for the evidence before her.
2. The electoral officer erred in law in making a decision or order.
3. There is a reasonable apprehension of bias, since the office of the electoral officer, Cynthia Labrie, represents the interests of the Betsiamites Band Council.

Background

[3] The applicant, Roger Collard, was a candidate for the position of vice-chief in the Betsiamites Band Council elections on August 17, 2008. On the weekend of August 15, 2008, the applicant noticed a great deal of beer circulating in the community and suspected that bribes were being distributed for the elections. However, the applicant had no evidence and had not personally observed that any corrupt electoral practices aimed at affecting the election results had been used. The applicant lost the election.

[4] After the August 17, 2008, election until March 19, 2009, no evidence of corrupt election practices aimed at affecting the election results came to the applicant's personal attention. It was not until March 20, 2009, that the applicant first became aware of the sworn statements of Sandy Hervieu and Marjolaine St-Onge.

[5] On March 25, 2009, more than nine months after the elections, the applicant filed a contestation of the elections that took place at Betsiamites on August 17, 2008, under the Election

Code pertaining to Betsiamites Band Council elections. The sworn statements of Sandy Hervieu and Marjolaine St-Onge were attached in support of the applicant's contestation of election.

[6] On March 27, 2009, the electoral officer of the Betsiamites Band Council informed the applicant that his contestation of the August 17, 2009, elections was dismissed on the following ground:

> [TRANSLATION]
>
> After checking the Election Code of the Betsiamites Band Council and, more specifically, article 8.1, I cannot allow your application to contest. In fact, in order to be admissible and comply with the process and with custom, the contestation must be filed within a time limit of 14-days after an election. You filed your application to contest on March 25, 2009. Your application is therefore clearly outside the time limit, and the Election Code does not authorize me to extend that time limit for any reason whatsoever. Consequently, I will not forward your contestation to the candidates pursuant to article 8.4 of the Election Code, since your contestation fails to comply with article 8.1.

Respondents' submissions

[7] The respondents, who are bringing this motion, submit that the Federal Court may immediately dismiss the applicant's application for judicial review, which must fail on the grounds that the courts have recognized that a time limit for contestation provided in a custom election code cannot be extended where the language of that election code makes no provision to that effect. The Election Code specifically provides that the time limit to contest an election is 14 days following the date of the election in question:

> [TRANSLATION]
>
> Chapter 8 Appeal of the election
> 8.1 Within a 14-day time limit after an election, an election candidate or an elector who voted or presented himself or herself to vote may,

> after having paid a non-refundable $300 deposit, contest the election, . . .

[8] According to the respondents, no provision in the Election Code provides for the possibility of extending the 14-day time limit for contesting an election and, absent an ambiguity in the Election Code, it is not workable to try to interpret the Election Code so as to make it say what it does not, or add terms, conditions or powers to it where none are provided therein (*R. v. McIntosh*, [1995] 1 S.C.R. 686, 178 N.R. 161 at paragraph 18; *R. v. Multiform Manufacturing Co.*, [1990] 2 S.C.R. 624 at page 630, 113 N.R. 373).

[9] The electoral officer's decision to refuse such a contestation filed over nine months after the election date, after those elected had completed over a third of their term of office (according to article 3.2 of the Election Code), is clearly well founded.

[10] The respondents also submit that the arguments of bias raised against the electoral officer were not made at the appropriate time and are also unfounded. Therefore, the notice of application for judicial review of the electoral officer's decision to dismiss the contestation by reason of lateness is *prima facie* doomed to failure.

[11] The *Federal Courts Rules* do not specifically provide for the possibility of requesting the dismissal of a notice of application for judicial review on motion. However, following the comments made by the Federal Court of Appeal in *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1995] 1 F.C. 588, 176 N.R. 48 (*Pharmacia*), the Court allowed this in limited circumstances. The dismissal of an application for judicial review by means of a preliminary motion may be ordered by the Court when it is plain and obvious that the application will fail (*Maracle v.*

Six Nations of the Grand River Band of Indians, (1998), 146 F.T.R. 208, 78 A.C.W.S. (3d) 649 at paragraph 10).

[12] The Innu of Betsiamites First Nation's election process, its supervision by the electoral officer and the appeal mechanisms are governed by the custom Election Code adopted by the band members, which came into force in 1994. The custom Election Code provides for a mechanism by which it can be amended, but no amendments have been made.

[13] The respondents submit that when the members of the Innu of Betsiamites First Nation adopted their custom Election Code, nothing prevented them from agreeing upon a provision for a possible extension of the time to appeal. Moreover, other First Nations have expressly provided such a power for an extension of time in their election codes (see, for example, *Nisichawayasihk Cree Nation v. Nisichawayasihk Cree Nation (Appeal Committee)*, 2003 FCT 464, 232 F.T.R. 187 at paragraphs 4 and 51). In the case at hand, the applicant is relying on the modern rules of interpretation to lead the Court to find certain powers in the Election Code for which no provisions are made on matters of election contestations. However, the electoral officer committed no error in deciding that in the absence of an express power to that end, she was not empowered to extend a time to appeal set forth in the Election Code.

[14] The Federal Court of Appeal has already recognized that in the absence of a provision in the custom Election Code, the courts do not have the power to make orders having the effect of complementing or adding to the Election Code. If the Federal Court of Appeal believes that it does not have such power, despite the broad remedial powers recognized at section 18.1 of the *Federal Courts Act*, R.S., 1985, c. F-7, it must necessarily be the same in the event that the decision-maker is

an electoral officer (*Bill v. Pelican Lake Indian Band*, 2006 FC 679, 294 F.T.R. 189, aff'd by the Federal Court of Appeal, 2006 CAF 397, 357 N.R. 314; *Giroux v. Swan River First Nation*, 2007 FCA 108, 361 N.R. 360).

[15] According to the July 19, 1994, ministerial order of the Minister of Indian and Northern Affairs Canada, the band's return to the custom election format, rather than the format under the *Indian Act*, R.S., 1985, c. I-5, was recognized on the grounds that "for the good government of the Betsiamites Band, reversion to custom for selecting the members of the Council of the band would better serve the needs of the band". A band's inherent power to adopt a custom Election Code is not a power conferred on the band by the *Indian Act* but, rather, is an inherent power of the band (*Bone v. Sioux Valley Indian Band No. 290*, (1996), 107 F.T.R. 133, 61 A.C.W.S. (3d) 214 at paragraph 32).

[16] The customs documented in a custom Election Code reflect the practice established or adopted by the persons to whom the code applies and who have accepted to be governed by it. Setting down an election process in keeping with custom aims, among other things, to keep disputes out of the courts and thus spare bands the financial consequences that litigation with respect to such disputes can bring (*McLeod Lake Indian Band v. Chingee*, [1998] 153 F.T.R. 257, 82 A.C.W.S. (3d) 414, at paragraphs 8 to 9).

[17] The respondents note that this Court has already found that when a time for appeal is provided by a custom Election Code and that there is no provision allowing an extension of that time, an appeal committee provided for under that same code does not have jurisdiction to extend the time in question (*Big "C" First Nation v. Big "C" First Nation (Election Appeal Tribunal)*,

[1994], 80 F.T.R. 49, 48 A.C.W.S. (3d) 683 at paragraph 8). The respondents submit that the same rule must apply to an electoral officer appointed under a code.

[18] As well, as regards the argument of a reasonable apprehension of bias on the part of the applicant electoral officer, the applicant refers to a letter dated January 10, 2008, sent by the respondent's office to certain persons. Insofar as this letter is the only evidence supporting the grounds of bias raised by the applicant, the respondents submit that the applicant was aware of this evidence as early as January 2008, namely over a year before he filed the application to contest which is at issue.

[19] It makes no sense that the applicant knowingly made his application to contest an election directly to the respondent electoral officer on March 25, 2009, but in his notice of application in this case, filed barely one month later, alleges that she is biased. Does this mean that had the electoral officer agreed to allow his application to contest an election, the applicant would not have challenged her impartiality?

[20] The respondents take the position that the argument of bias was, in addition, not made at the appropriate time. In *Marshall v. Canada (M.C.I.),* 2004 FC 34, 128 A.C.W.S. (3d) 781, this Court had before it an application for judicial review of a decision of the Immigration Division of the Immigration and Refugee Board of Canada. The Court concluded that the argument of bias raised by the applicant in that case should have been raised by motion before the presiding member and not on judicial review.

Applicant’s arguments

[21] The applicant notes that although the Federal Court accepts that it is possible to file a motion to dismiss or strike out a notice of application for judicial review, such a motion will only be allowed exceptionally, if the application is so clearly improper as to be bereft of any possibility of success. The applicant emphasizes that a very strict standard and a very heavy burden are placed on the person moving to strike out a notice of application.

[22] The Court must be extremely prudent in striking out an application for judicial review, for there is a risk that justice will be denied. Given that the full hearing of an application for judicial review proceeds in much the same way as the hearing of a motion to strike out a notice of application, such a motion does not seem necessary and incurs costs for both parties, while placing additional demands on their time. The applicant submits that the appropriate way to request the dismissal of a notice of application is to appear and argue at the hearing of the motion.

[23] In a motion to strike out a notice of application, the Federal Court must take the facts alleged by the applicant in the notice of application to be proven and read the notice as generously as possible, in a manner that accommodates any inadequacies in the allegations (*Elders Council of Mitchikanibikok Inik v. Canada (Minister of Indian Affairs and Northern Development),* 2008 FC 975, 333 F.T.R. 275 at paragraph 23 (*Wawatie*)).

[24] In light of the respondents’ statement that the applicant’s application is clearly unfounded, the applicant examined each of the arguments set out in his notice of application. First, the applicant submits that the electoral officer made a decision or order without regard for the material before her.

[25] The applicant submits that the standard of review in this case is patent unreasonableness, and therefore the new standard of unreasonableness according to *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 (see also *Laurentian Pilotage Authority v. Gestion C.T.M.A. Inc.*, 2005 FCA 221, [2006] 1 F.C.R. 37 at paragraph 19). In neglecting to make a decision on certain important facts, the electoral officer made an unreasonable finding of fact within the meaning of *Dunsmuir*.

[26] In his application for judicial review, the applicant relies on Sandy Hervieu's and Marjolaine St-Onge's sworn statements dated March 20, 2009. According to Sandy Hervieu's sworn statement, signed on March 12, 2009, at Betsiamites, it appears that Stéphane Tshernish, a former bodyguard of Raphaël Picard, told Sandy Hervieu personally that before the election on August 17, 2008, he had made an agreement with Paul Vollant and Raphaël Picard which had the primary purpose of distributing alcohol and money to electors so as to influence them to vote for their team.

[27] Stéphane Tshernish's job was to meet with electors and offer them alcohol and/or money in exchange for their promise to vote for Paul Vollant and Raphaël Picard's team. Then, if the elector agreed, the elector entered himself or herself on a list of the persons who had accepted the offer.

[28] In his sworn statement, Sandy Hervieu personally acknowledged having received two cases of 24 beers that were delivered to his home on August 15, 2008, by Stéphane Tshernish, who asked him to vote for Paul Vollant's and Raphaël Picard's team in return.

[29] As well, a few days after the election on August 17, 2008, Stéphane Tshernish himself told Sandy Hervieu that, owing to his practices, Paul Vollant's and Raphaël Picard's team had been

elected and he estimated that at least 300 electors had accepted alcohol or money on the condition that they cast their vote for Paul Vollant's and Raphaël Picard's team.

[30] In her sworn statement signed on March 20, 2009, at Québec, Marjolaine St-Onge personally reported that on August 16, 2008, she was on her balcony with her friend Johanie Simon when Stéphane Tshernish arrived in a rented wine-red van to offer them 12 beers each if they voted for Paul Vollant and Raphaël Picard.

[31] It was only on March 20, 2009, that the applicant, Roger Collard, became aware of these pieces of evidence which may prove that corrupt election practices were used before and during the August 17, 2008, election at Betsiamites. This is the evidentiary basis for the legal facts giving rise to his right to contest the election.

[32] The applicant submits that the electoral officer, in her March 27, 2009, decision, did not make a full determination on the evidence, since she only states that the application is clearly out of time and that pursuant to the Election Code and custom, she has no authority to extend the time limit for any reason whatsoever.

[33] Second, the applicant submits that the electoral officer erred in law in making a decision or order and that the standard of review in this case is correctness in accordance with *Dunsmuir* and the case law established prior to that decision which remains relevant (*Dunsmuir*, *Grand Rapids First Nation v. Nasikapow*, [2000] 197 F.T.R. 184, 101 A.C.W.S. (3d) 660 at paragraph 65 (*Ballantyne*)).

[34] The applicant acknowledges that the electoral officer has the power to decide the time limit to contest, pursuant to articles 8.1 and 8.5 of the Betsiamites' Election Code. The electoral officer must ask herself whether, *prima facie*, the applicant has an exceptional ground that justifies extending the time limit.

[35] The applicant submits that the Betsiamites' Election Code must be interpreted according to the modern approach to statutory interpretation, which is to seek the intent of the legislators by reading the words of the provision in context according to their grammatical and ordinary sense, harmoniously with the scheme and object of the law and the legislators' intent (*Kootenhayoo v. Alexis First Nation Council*, 2003 FC 1128, 240 F.T.R. 49 at paragraph 13).

[36] The courts often rely on the pragmatic rule of interpretation when they interpret and apply statutory provisions that produce absurd, irrational, unfair or unreasonable effects. This means that such consequences may be avoided by applying the "golden rule", whereby the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense may be modified so as to avoid that absurdity or inconsistency (*Driedger on the Construction of Statutes*, Ruth Sullivan, Toronto, Butterworths, 1994, at p. 80). This rule of interpretation, recognized by the Federal Court (see *Canada (M.C.I.) v. Lai*, 2001 FCT 118, [2001] 3 F.C. 326 at paragraph 23), is based on the presumption that Parliament cannot have wished to adopt provisions producing absurd, irrational or unfair results.

[37] According to the applicant, even though the Election Code is silent on the matter of an extension of time and does not expressly confer this power on the electoral officer, the discretionary

power to grant of an extension of time on an exceptional basis is a power inherent to the function of the electoral officer in accordance with the purpose of the Election Code, its underlying principles and the drafters' intent, and the customs of the Betsiamites Aboriginal community. Moreover, the Federal Court recognized that an electoral officer has a discretionary power that extends beyond those which are expressly established by law (*Ballantyne*, above at paragraph 66).

[38] The applicant is using a caricatured and hypothetical situation, in which an election is held at Betsiamites and band members and elected members of the Band Council use corrupt election practices, but all of the community members who are eligible to contest the election at Betsiamites are trapped by a flood preventing them from reporting to the electoral officer's office within the 14-day time limit stipulated at article 18.1 of the Election Code. Yet, according to the March 27, 2009, decision and the interpretation of the Election Code made therein, in no circumstances does the electoral officer have the power to grant an extension of time for any reason whatsoever.

[39] Consequently, in this hypothetical situation, the 14-day time limit to contest the election in the interests of stability and the rule of law would create injustice, since the Band Council members who used corrupt election practices could continue to serve their terms of office, thus flouting the principle of democracy. There is a presumption that, when the Electoral Code was adopted, the drafters did not intend to produce such an absurd result arising from a limiting and strictly textual interpretation of the electoral officer's powers. No law or code is of perfect completeness, and the drafters cannot provide for everything.

[40] The applicant notes that the principles of time limit for appeal and of prescription are founded, *inter alia*, on legal stability and certainty, which flow from the rule of law. However, in

electoral matters, the purpose of the law is to safeguard citizens' trust in democratic institutions and ensure the effectiveness of democracy, two principles that must guide the interpretation of the courts (see *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, 81 A.C.W.S. (3d) 798 at paragraphs 50, 61, 64 and 67). To strike the right balance between democracy and the rule of law, it must be open to the electoral officer to extend, on exceptional grounds, the time limit to contest the election under the Election Code.

[41] Therefore, according to the applicant, the electoral officer has the discretionary power to allow an elector, for whom it was impossible in fact to act, to extend the time limit stipulated at article 8.1 of the Election Code in certain rare and exceptional circumstances. This interpretation must prevail because it promotes the purpose of the Election Code (*Simon v. Samson Cree Nation*, 2001 FCT 467, 205 F.T.R. 49 at paragraph 24).

[42] By analogy, the applicant notes that Quebec civil law recognizes the suspension of prescription if it was impossible in fact for the applicant to act (see, for example, article 2904 of the *Civil Code of Québec* (C.C.Q.), S.Q. 1991, c. 64). If an applicant is not in a position to freely and voluntarily waive the exercise of his or her right because the applicant is not aware of the legal facts which are the basis of his or her right, neither public order nor the public interest, nor even a legitimate security of legal relations, will be served.

[43] What is more, the Federal Court has the power to grant certain extensions of time under, *inter alia*, Rule 8 of the *Federal Courts Rules*, SOR/98-106 and subsection 18.1(2) of the *Federal Courts Act* (see also *Parrish & Heimbecker Ltd. v. Canada (Minister of Agriculture)*, 2007 FC 789,

159 A.C.W.S. (3d) 178, at paragraph 17; *Grewal v. Canada (M.E.I.)*, [1985] 2 F.C. 263, 63 N.R. 106 and *CP Ships Trucking Ltd. v. Kuntze*, 2006 FC 1174, 303 F.T.R. 54 at paragraph 84).

[44] The applicant submits that he meets the criteria developed by Federal Court case law in matters of extension of time, since his explanation for the delay by reason of it being impossible to act has merit. Furthermore, the applicant always intended to bring the judicial review within the period allowed for bringing the application and that intention was continuous thereafter. In fact, right after he became aware of Sandy Hervieu's and Marjolaine St-Onge's sworn statements on March 20, 2009, the applicant filed a contestation of election on March 25, 2009. The length of the period of the extension, nine months, is not overly long and remains contemporaneous. The applicant submits that in electoral matters, the prejudice to the opposing party is not a primary consideration because public interest must prevail. Moreover, there is no prejudice to the other party from a contestation of election filed out of time. Lastly, the applicant's case is arguable and contains serious allegations based on the sworn statements of Betsiamites electors.

[45] In *Ballantyne*, this Court noted the following at paragraph 67:

> Although the notion of aboriginal self-government is a goal towards which many aboriginal communities strive (although it is not expressed in the Constitution), Courts have recognized that they must step in where an injustice exists.

[46] The applicant submits that it would be unjust and contrary to his right of action to refuse to hear him on the merits of his application because of noncompliance with the time limits imposed by the Election Code. Indeed, when it is impossible in fact for an applicant to act, that is an exceptional reason that warrants an extension of time. In electoral matters, the rules related to time limits for

contestation should be interpreted and applied so as to allow the parties to assert their rights to do justice between the parties (*Parrish & Heimbecker Ltd.*, at paragraph 17).

[47] Lastly, the applicant believes that there is a reasonable apprehension of bias in this case, since the office of the electoral officer, Cynthia Labrie, represents the interests of the Betsiamites Band Council. Applicant Roger Collard's contestation of election concerns certain members of the Betsiamites Band Council, and also affects Raphaël Picard's personal interests.

[48] Given this appearance of conflict of interest and bias, the applicant submits that an informed person, viewing the matter realistically and practically and having thought the matter through, would think that it is more likely than not that the electoral officer, whether consciously or unconsciously, would be unable to decide fairly.

[49] Finally, the applicant submits that in determining whether certain reasons such as the Committee's bias and the apprehension of bias following the elections could be submitted on the merits, a motion to strike out a notice of application for judicial review is not the appropriate way to decide this type of issue. In fact, in *Kulbashian v. Canada (Canadian Human Rights Commission)*, 2007 FC 354, 156 A.C.W.S. (3d) 732, at paragraphs 37 to 39, the Court noted that the courts have long frowned on the practice of raising new points on appeal.

Analysis

[50] The test upon a motion to strike out pleadings, as set out in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, 117 N.R. 321, is whether it is plain and obvious that the claim discloses no reasonable cause of action. In *Pharmacia*, the Federal Court of Appeal said that parties cannot use a motion to strike out an originating motion, now a notice of application, except in very exceptional cases. At paragraph 11 of that decision, the Court of Appeal found that to strike out an application for judicial review, the application must be "so clearly improper as to be bereft of any possibility of success":

> It is obviously important that parties not be put to the delay and expense involved in taking a matter to trial if it is "plain and obvious" (the test for striking out pleadings) that the pleading in question cannot amount to a cause of action or a defence to a cause of action. Even though it is important both to the parties and the Court that futile claims or defences not be carried forward to trial, it is still the rare case where a judge is prepared to strike out a pleading . . .

[51] The remarks of Justice Strayer of the Federal Court of Appeal in *Pharmacia* are clear, and a motion to strike out an application imposes a very heavy burden on the moving party. The principles governing motions to strike out applications for judicial review were summarized by this Court in *Amnesty International Canada et al. v. Chief of the Defence Staff et al.*, 2007 FC 1147, 320 F.T.R. 236 at paragraphs 22 to 23.

[52] Keeping in mind the admonition of the Court in *Amnesty International* regarding the heavy onus on the moving party and the need to read the notice of application as generously as possible, I am not persuaded that this case can succeed.

[53] The respondents argue that the band's custom Election Code is clear and that the Court should not interfere with the electoral officer's decision. By way of example, in *Nisichawayasihk Cree Nation*, above, this Court determined that the Appeal Committee in that case did not have the jurisdiction to hear an appeal regarding the decisions made by the electoral officer at the nomination meeting on August 14, 2002. That is because no appeal with respect to those decisions was filed within the seven days provided, namely within the period from August 14 to August 21, 2002. Accordingly, since the applicants did not file their appeal until September 2, 2002, the Court found that the Appeal Committee did not have the jurisdiction to consider it.

[54] I agree with the respondents that a broad and liberal interpretation of the Election Code does not provide for an extension of time to contest an election. In *R. v. Multiform Manufacturing Co.* at paragraphs 9 and 10, the Supreme Court of Canada noted that when the courts must interpret a statute, their task is to discover the intention of Parliament:

> When the words used in a statute are clear and unambiguous, no further step is needed to identify the intention of Parliament. There is no need for further construction when Parliament has clearly expressed its intention in the words it has used in the statute.

[55] Furthermore, in *R v. McIntosh* at paragraph 18, the Supreme Court explained that,

> In resolving the interpretive issue raised by the Crown, I take as my starting point the proposition that where no ambiguity arises on the face of a statutory provision, then its clear words should be given effect. This is another way of asserting what is sometimes referred to as the "golden rule" of literal construction: a statute should be interpreted in a manner consistent with the plain meaning of its terms. Where the language of the statute is plain and admits of only one meaning, the task of interpretation does not arise (Maxwell on the Interpretation of Statutes (12th ed. 1969), at p. 29).

[56] It is not for the Court to interfere with the electoral officer's decision in this case. However, the applicant has also raised other causes of action, namely that the electoral officer erred in law and that there is a reasonable apprehension of bias, and I see nothing plain and obvious that shows the lack of a cause of action at this stage in the proceedings which could justify striking out the notice of application for judicial review.

[57] For these reasons, the Court orders the dismissal of the respondents' motion to strike out or dismiss the notice of application for judicial review.

ORDER

THIS COURT ORDERS that the respondents' motion to strike out or dismiss the applicant's application for judicial review be dismissed with costs.

"Max M. Teitelbaum"
Deputy Judge

Certified true translation
Sarah Burns

FEDERAL COURT

SOLICITORS OF RECORD

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