Federal Court of Appeal | Cour d'appel fédérale

Date: 20161123

Docket: A-497-15

Citation: 2016 FCA 294

CORAM: **NADON J.A.**
WEBB J.A.
DE MONTIGNY J.A.

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Appellant

and

MAJOR JOHN S. BEDDOWS

Respondent

Heard at Ottawa, Ontario, on September 20, 2016.

Judgment delivered at Ottawa, Ontario, on November 23, 2016.

REASONS FOR JUDGMENT BY: NADON J.A.

CONCURRED IN BY: WEBB J.A.
DE MONTIGNY J.A.

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REASONS FOR JUDGMENT

NADON J.A.

I. Introduction

[1] Before us is an appeal of the decision of Beaudry J. of the Federal Court (the Judge) rendered on October 21, 2015 pursuant to which he allowed the respondent's judicial review application of a decision made by General Thomas Lawson, the Chief of Defence Staff (CDS) on February 18, 2015.

[2] More particularly, the CDS rejected a grievance filed by the respondent on May 26, 2014 challenging the order made on May 9, 2013 by Major General J. R. Ferron repatriating him back to Canada from Afghanistan. The CDS dismissed the applicant's grievance because it had not been filed within the six month period prescribed by the *National Defence Act*, R.S.C. 1985, c. N-5, sections 29 – 29.15 (the Act) and the *Queen's Regulations and Orders for the Canadian Forces*, chapter 7 (the *Queen's Regulations*).

[3] Section 7.06 of the *Queen's Regulations* provides for the following in respect of the filing of grievances:

7.06 - TIME LIMIT TO SUBMIT GRIEVANCE	7.06 - DÉLAI POUR DÉPOSER UN GRIEF
(1) A grievance shall be submitted within three months after the day on which the grievor knew or ought reasonably to have known of the decision, act or omission in respect of which the grievance is submitted.	(1) Tout grief doit être déposé dans les trois mois qui suivent la date à laquelle le plaignant a pris ou devrait raisonnablement avoir pris connaissance de la décision, de l'acte ou de l'omission qui fait l'objet du grief.
(2) A grievor who submits a grievance after the expiration of the time limit set out in paragraph (1) shall include in the grievance reasons for the delay.	(2) Le plaignant qui dépose son grief après l'expiration du délai prévu à l'alinéa (1) doit y inclure les raisons du retard.
(3) The initial authority or, in the case of a grievance to which Section 2 does not apply, the final authority may consider a grievance that is submitted after the expiration of the time limit if satisfied it is in the interests of justice to do so. If not satisfied, the grievor shall be provided reasons in writing.	(3) L'autorité initiale ou, dans le cas d'un grief qui n'est pas visé par la section 2, l'autorité de dernière instance peut étudier le grief déposé en retard si elle est convaincue qu'il est dans l'intérêt de la justice de le faire. Dans le cas contraire, les motifs de la décision doivent être transmis par écrit au plaignant.
(4) Despite paragraph (1), if the day on which the grievor knew or ought	(4) Malgré l'alinéa (1), si la date à laquelle le plaignant a pris ou aurait dû

reasonably to have known of the decision, act or omission in respect of which the grievance is submitted is before 1 June 2014, the grievance shall be submitted within six months after the day that the grievor knew or ought reasonably to have known of the decision, act or omission in respect of which the grievance is submitted.	raisonnablement avoir pris connaissance de la décision, de l'acte ou de l'omission faisant l'objet du grief est antérieure au 1er juin 2014, le grief doit être déposé dans les six mois qui suivent la date à laquelle le plaignant a pris ou aurait dû avoir raisonnablement pris connaissance de la décision, de l'acte ou de l'omission faisant l'objet du grief.
(G) [P.C. 2000-863 effective 15 June 2000; P.C. 2014-0575 effective 1 June 2014]	(G) [C.P. 2000-863 en vigueur le 15 juin 2000; C.P. 2014-0575 en vigueur le 1er juin 2014]
NOTE	NOTE
If the delay is caused by a circumstance which is unforeseen, unexpected or beyond the grievor's control, the initial authority or, in the case of a grievance to which Section 2 does not apply, the final authority should normally be satisfied that it is in the interests of justice to consider the grievance if it is submitted within a reasonable period of time after the circumstance occurs.	Si le retard résulte d'un évènement imprévu, inattendu ou qui échappe au contrôle du plaignant, l'autorité initiale ou, dans le cas d'un grief qui n'est pas visé par la section 2, l'autorité de dernière instance devrait normalement être convaincue qu'il est dans l'intérêt de la justice d'étudier le grief, pour autant qu'il ait été déposé dans un délai raisonnable après l'évènement en question.
(C) [1 June 2014]	(C) [1er juin 2014]

[emphasis added]

[4] Because the repatriation order was made prior to June 1, 2014, the respondent's grievance, by reason of subsection 7.06(4) of the *Queen's Regulations*, was subject to a filing delay of six months from the day on which the respondent knew or ought to have known of the repatriation order.

[5] It is not disputed that the respondent did not file his grievance within the prescribed time. Instead, on November 12, 2013, the respondent filed a document entitled Intent to Request Redress of Grievance, in order to inform his chain of command of his intention to grieve the repatriation order. More particularly, the respondent indicated that he was waiting for the outcome of investigations concerning a sexual harassment complaint and allegations of the misuse of his weapon in order to substantiate his grievance.

[6] In March 2014, the officer investigating the sexual harassment claim found there had been no harassment. Ultimately, it appears that the allegations of misuse of a weapon were not pursued.

[7] On May 26, 2014 the Appellant filed his grievance. The initial authority dismissed the grievance as out of time, and the respondent appealed to the CDS as final authority. The issue before the CDS was whether, notwithstanding the delay, it was in the interests of justice to consider the respondent's grievance. The CDS concluded that it was not.

[8] Following the CDS' decision dismissing his grievance, the respondent commenced a judicial review application before the Federal Court. That application was allowed by the Judge who concluded that the CDS' decision was unreasonable.

[9] For the reasons that follow, I conclude that the Judge did not err in allowing the respondent's judicial review application. However, I come to this conclusion for reasons which

differ from those given by the Judge and which lead me to conclude that we ought to allow the appeal, but in part only.

II. The Repatriation Order

[10] In concluding that the respondent should be repatriated to Canada, Major General Ferron relied on a recommendation made by Lieutenant-Colonel MacDonald, the respondent's immediate superior, and on statements made by Master Warrant Officer (MWO) Babin and Marc Beaurivage. In Major General Ferron's view, this evidence showed that the respondent "has displayed leadership deficiencies and has displayed serious errors in judgment and a less than rigorous adherence to the relevant OPSEC procedures which were expected of him given his rank, position and experience". Major General Ferron also considered relevant the fact that there were ongoing investigations in regard to a sexual harassment complaint made against the respondent as well as with respect to the misuse by the respondent of his weapon. In that regard, Major General Ferron indicated that although the investigations were still in progress, it was necessary to remove the respondent from his duties in order to permit the "chain of command to discharge their professional obligations and [to] ensure the safe working environment of the other members of the Task Force". At paragraph 5 of his order, Major General Ferron stated that:

> The cumulative effect of the documented instances of workplace conflict…and the impact of serious allegations which form the basis of the ongoing investigations and allude to real or perceived improper or unprofessional behaviour, support the conclusion that Maj Beddows' supervisor has lost confidence in his ability to operate effectively.

[11] Major General Ferron also stated, at paragraph 6 of his order, that, in light of the evidence before him, which included written representations received from the respondent, there could be no doubt that the respondent "is no longer effective as a leader in this theatre of

operations and the confidence entrusted to him by the chain of command has been irreparably lost", adding that the respondent had acknowledged that he could no longer be operationally effective. Major General Ferron then went on to say, again at paragraph 6 of his order, that:

> Considering all the factors at hand and understanding that the two investigations are still ongoing, it is clear to me that operational effectiveness and command and control of the Task Force are impaired by the presence of Maj Beddows in this theatre of operations.

[12] Hence, Major General Ferron ordered the immediate repatriation of the respondent.

III. The Grievance And The Initial Authority's Decision

[13] As I indicated earlier, the respondent filed his grievance on May 26, 2014. On November 5, 2014, the initial authority, Lieutenant-General J. H. Vance, rejected it on jurisdictional grounds. It was determined that the grievance had not been filed within the delay prescribed in the *Queen's Regulations*. The initial authority found it was not in the interests of justice to consider the grievance because the reasons given by the respondent for the delay in filing did not show that the delay resulted from circumstances which were "unforeseen, unexpected or beyond the grievor's control" (hereinafter circumstances beyond the grievor's control).

[14] In the initial authority's view, the repatriation order made on May 9, 2013 was a circumstance of which the respondent was fully aware on the day that it was made. In making his determination, the initial authority indicated to the respondent that his discretion was "bound by the Federal Court on what constitutes acceptable reasons for exceeding time limits". More particularly, the initial authority indicated that "[t]he Courts have ruled that in order to accept an

explanation for a delay in submitting a file to the IA [initial authority] or the final authority, it must be '…from an event that was unforeseen, unexpected or beyond their control'."

IV. The CDS' Decision

[15] On December 3, 2014, the respondent requested the final authority, the CDS, to consider his grievance notwithstanding the delay in filing. The CDS reviewed his request on a *de novo* basis.

[16] On February 18, 2015, the CDS dismissed the respondent's grievance because of late filing. In the opinion of the CDS, the respondent had failed to demonstrate that it was in the interests of justice to allow him to pursue his grievance.

[17] First, the CDS points out in his decision that, pursuant to section 7.06 of the *Queen's Regulations*, he can only allow a grievance filed outside of the six month period if he is satisfied that the interests of justice require him to do so, adding that he should normally consider the grievance if the reasons given for the delay satisfy him that it resulted from circumstances beyond the grievor's control.

[18] The CDS then turns to the respondent's explanation that he did not file his grievance sooner because he was waiting for the results of two ongoing investigations and that he had a reasonable belief that his failure to file his grievance in a timely manner had the support of his chain of command. He was never advised that, in proceeding in the way that he did, he was in danger of losing his right to grieve.

[19] This prompted the CDS to state that "[y]ou are therefore of the view that it is their omission [his Chain of Command] that caused you to miss the time line and that the omission was clearly outside your control." The CDS then states that his review of the respondent's grievance leads him to the conclusion that there was no justifiable basis for the respondent not having filed his grievance within the time prescribed by the *Queen's Regulations*. As a result, the CDS refused to consider the respondent's grievance and he dismissed it.

V. The Federal Court's Decision

[20] After a brief review of the facts, the Judge states that the applicable standard of review is that of reasonableness. He then refers to the relevant provisions of the *Queen's Regulations* and notes that the respondent had filed a notice of intent to grieve to the effect that he would be filing a formal grievance upon the completion of the investigation of the sexual harassment complaint. The Judge then expressed his view that the sexual harassment complaint made against the respondent "was an important element if not determinative in the Applicant's [the respondent's] repatriation to Canada" (page 4 of Judge's decision).

[21] Then, after pointing out that the sexual harassment complaint had been dismissed, the Judge states his opinion that the explanations given by the respondent for the delay were reasonable and that "the interest of justice favours him". This view then led the Judge to state that the CDS's decision was unreasonable and that it could not be supported by the evidence. Hence, he allowed the respondent's judicial review application and remitted the matter back for reconsideration by a different final authority with a direction that the respondent's explanations

for the late filing of his grievance be accepted. Finally, he granted costs in the sum of $2000 to the respondent.

VI. Issues

[22] Although the appellant submits that the appeal raises four issues, I am of the opinion that only three issues call for determination, namely:

1. Whether the Judge applied the correct standard of review in reviewing the decision of the CDS.

2. Whether the Judge erred in determining that the CDS' decision was unreasonable.

3. Whether the Judge erred in remitting the matter back for reconsideration by a different final authority with a direction to accept the respondent's explanations for the late filing of his grievance.

VII. Analysis

A. *What Standard Of Review Should The Judge Have Applied In Reviewing The Decision Of The CDS And Did The Judge Fail To Apply That Standard To The Decision Under Review?*

[23] In reviewing a decision of the Federal Court which deals with an application for judicial review, this Court's task is to determine whether the Federal Court identified the proper standard of review and whether that standard was correctly applied (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paragraph 47).

[24] The first part of our task is easy, since there can be no doubt that the Judge correctly identified the applicable standard of review. At page 3 of his order, he indicated that the parties were agreed that the appropriate standard was that of reasonableness and in so stating, he referred to the Federal Court's decision in *Hudon v. Canada (Attorney General)*, 2009 FC 1092. Neither the appellant nor the respondent, correctly in my view, object to the applicability of the standard of reasonableness.

[25] However, the appellant submits that the Judge failed to apply the standard of reasonableness in reviewing the decision made by the CDS. In my view, the appellant is correct in making that submission.

[26] It is now trite law to say that pursuant to the standard of reasonableness, the Court's task is to satisfy itself that the decision under review is justifiable, transparent and intelligible and that it falls within the range of possible acceptable outcomes that are defensible in respect of the facts and the law (*Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, at paragraph 47).

[27] In *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339 at paragraph 59, the Supreme Court held that "as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome".

[28] On my understanding of the Judge's decision, there can be no doubt that he failed to apply the standard of reasonableness. More particularly, it is my opinion that the Judge

substituted his assessment of the facts to that of the CDS. This is quite apparent from page 4 of his decision where he says that the respondent's explanations for delaying the filing of his grievance are reasonable and then, on that premise, determines that the CDS' decision is unreasonable. The Judge's approach is clearly flawed.

[29] The question before the Judge was not whether the respondent's explanations for the delay were reasonable, but whether it was reasonable for the CDS to conclude that the interests of justice did not require him to consider the respondent's grievance. In my respectful opinion, the Judge did not conduct that exercise.

[30] Consequently, because the Judge erred in failing to apply the proper standard of review, it is open to us to intervene and to conduct the exercise which the Judge failed to conduct, i.e. to determine whether the CDS' decision is reasonable.

B. *Is The CDS' Decision Unreasonable?*

[31] At the outset, it is necessary to emphasize that in reviewing the CDS' decision, we are not reviewing a decision concerning the merits of the respondent's grievance. It may well be that the respondent has valid arguments to submit with regard to the repatriation order, but that is not what we are concerned with in the present appeal.

[32] Subsections 7.06(3) and (4) of the *Queens Regulations*, including the NOTE to the section, are not ambiguous. They require a grievor to submit his grievance within six months of the decision which he challenges and if he fails to meet that deadline, his grievance may still be

considered if the interests of justice so require. The CDS concluded that the interests of justice did not require him to consider the grievance and the question is whether that conclusion is reasonable in light of all the circumstances. In my view, for the reasons that follow, the CDS' decision is unreasonable.

[33] Before us, the respondent makes a number of submissions as to why the CDS ought to have considered his grievance even if filed after the six month period. First, he says that the Canadian Armed Forces Administrative Law Manual (CFALM) provides that "it may be in the interests of justice to accept a grievance where not all of the information was available to the grievor within six months" (CFALM, chapter 34, page 2, paragraph 6). In making that submission, the respondent says that he was not aware of the specific reasons for his repatriation until at least January 21, 2014 adding that "It is clear that the harassment complaint informed the grievance, framed the grievance, and legitimized the grievance" (paragraph 20 of the respondent's memorandum of fact and law). In other words, in the respondent's opinion, he could not grieve what he did not know or was not aware of.

[34] The respondent further says that the filing of his grievance was beyond his control because he had not been made aware of the substance of the repatriation order until eight months after the order was made, i.e. in January, 2014. In addition, he says that he had a legitimate expectation that he would not be penalized if he did not file within the six month period because his chain of command was fully aware of his intent to grieve.

[35] Before proceeding further, I should point out that the respondent received a copy of the detailed sexual harassment complaint on June 3, 2013.

[36] A further argument put forward by the respondent is that even if his grievance had been filed within the six month period, it would have been held in abeyance until the investigations into the sexual harassment complaint and the allegations of misuse of a weapon had been completed. In that respect, he refers to section 2.9 of the Canadian Forces Grievance Manual (CFGM) which provides that "a grievance shall be placed into abeyance if it concerns a harassment complaint that the appropriate responsible officer has not yet answered". Consequently, he submits that no prejudice was caused to the Crown because of the late filing of his grievance.

[37] In conclusion, the respondent says that he is simply asking for the right to be heard. More particularly, he says that the interests of justice require that he be given that opportunity.

[38] As I understand the respondent's submission, it is that the "frivolous harassment complaint" is at the heart of the decision to repatriate him. In his view, were it not for that complaint, the repatriation order would not have been made. At paragraphs 36 and 37 of his memorandum of fact and law, he concludes as follows:

> 36. …Here the incident giving rise to this grievance – a frivolous harassment complaint – has had a significant effect on the Applicant's reputation, career and standing, as well as causing undue stress and anxiety to his family and marriage, and financial loss – including the cost of this proceeding.
>
> 37. No prejudice will come to the Attorney General if his grievance is accepted and heard. However, tremendous prejudice will come to the Applicant should this Appeal be granted because he will have no mechanism available to challenge his wrongful repatriation.

[39] As appears clearly from Major General Ferron's repatriation order, the ongoing investigations concerning the sexual harassment complaint and the misuse of a weapon were not the only considerations which led to the making of the order. I therefore cannot agree with the respondent's submission, which the Judge accepted, that the sexual harassment complaint was the prime consideration and that it was determinative of the making of the repatriation order. The sexual harassment complaint and its investigation was obviously not a trivial consideration, but it cannot be said that it was determinative.

[40] The question before the Judge, and now before us, is whether it was unreasonable for the CDS to conclude that the interests of justice did not require him to consider the respondent's grievance. In order to determine that question, it is necessary to take a closer look at the reasons given by the CDS for refusing to consider the respondent's grievance.

[41] In determining whether he should consider the respondent's grievance, notwithstanding the delay, the CDS first referred to section 7.06 of the *Queen's Regulations* and stated that it was open to him to consider the respondent's grievance if he was satisfied that the interests of justice required him to do so. He then referred to the NOTE to the section to the effect that the existence of circumstances beyond the grievor's control should normally lead to a consideration of the grievance even if filed after the six month period.

[42] The CDS then specifically dealt with the respondent's submission that the test for consideration of his grievance was met. In response to that submission, the CDS determined that the respondent had sufficient information as to why he had been repatriated prior to the expiry of

the six month delay notwithstanding the fact that the ongoing investigations had yet to be completed. With regard to the fact that the respondent had received no warning from his chain of command that his grievance might not be considered if he failed to file within the appropriate delay, the CDS was of the view that the responsibility to file was entirely within his control and that he could not shift that responsibility to his chain of command. Consequently, the CDS dismissed the respondent's grievance in the following terms at page 2 of his decision:

> You had six months to file your grievance, yet you did not do so. I am therefore rejecting your grievance on the basis that you did not demonstrate that the delay was beyond your control and it [sic] will take no further action on the matter.
>
> [emphasis added]

[43] I will now explain why I conclude that the Judge did not err in allowing the respondent's judicial review application, albeit for the wrong reasons.

[44] As I have already indicated, the test for determining whether a grievance should be considered, even if filed beyond the prescribed period, is whether "the interests of justice" so require. Although the demonstration by a grievor that he was prevented from filing by circumstances beyond the grievor's control should normally satisfy the decision maker that the grievance should be considered, failure to demonstrate such circumstances is not the end of the matter. A determination of whether "the interests of justice" require consideration of a grievance calls upon the decision maker to consider all relevant circumstances including those which were beyond the grievor's control. In my view, both the initial authority and the CDS erred in limiting their consideration of the relevant circumstances to circumstances beyond the grievor's control. In other words, the decision makers fettered their discretion because they misunderstood the applicable legal provision.

[45] In the case of the decision made by the initial authority, this is abundantly clear in that he states, on the second page of his decision of November 5, 2014, that:

> In making my determination, I must keep in mind that I am also bound by the Federal Court on what constitutes acceptable reasons for exceeding time limits. The Courts have ruled that in order to accept an explanation for a delay in submitting a file to the IA, or the final authority, it must be '…from an event that was unforeseen, unexpected or beyond their control'.

Although the CDS does not make such an explicit statement in his decision, it seems to me that this is exactly what he did. On the second page of his decision, he concludes by saying that he is rejecting the respondent's grievance "on the basis that you did not demonstrate that the delay was beyond your control…".

[46] As there is no authority for the proposition put forward by the initial authority that the exercise of discretion under subsection 7.06(3) of the *Queen's Regulations* is limited to circumstances beyond the grievor's control, I can only conclude that both the initial authority and the CDS misunderstood the meaning of the words "the interests of justice". As a result of this error, the CDS failed to consider all of the circumstances that were relevant to the determination which he was called upon to make in respect of the respondent's grievance. In the circumstances, I am satisfied that the CDS' error renders his decision unreasonable.

[47] Without deciding whether the respondent's grievance should be considered, which decision is entirely in the hands of the CDS, I believe that there exist a number of circumstances which are relevant to the determination which the CDS must make. I pause to say that what follows are only suggestions of circumstances which the CDS may wish to consider.

[48] The circumstances which I believe to be relevant are the following. First, whether the respondent's failure to file his grievance in a timely manner has caused prejudice. Second, the fact that the respondent clearly intended to file a grievance in respect of the repatriation order once the results of the investigations were made known to him. Third, the fact that the respondent kept his chain of command fully informed as to his intention to grieve. Fourth, whether the grievance is frivolous. Fifth, whether the grievance, had it been filed in a timely manner, would have been kept in abeyance until the completion of the investigations. I also believe that the effect of the repatriation order on the respondent's career and future in the armed forces is a relevant consideration. It goes without saying that if there are other circumstances which the CDS considers relevant, it is open to him to consider them.

[49] In making these suggestions, I wish to reiterate that the decision as to whether the grievance ought to be considered is entirely that of the CDS who must exercise his discretion pursuant to subsection 7.06(3) of the *Queen's Regulations*.

C. *Did The Judge Err In Remitting The Matter Back For Reconsideration To A Different Final Authority With A Direction To Accept The Respondent's Explanations For The Late Filing Of His Grievance?*

[50] Although I conclude that the Judge did not err in allowing the respondent's judicial review application and in returning the matter back for reconsideration, I am satisfied that he made a reviewable error in returning the matter back to a different final authority with a direction to accept the respondent's explanations for the delay to file within the prescribed period.

[51] First, there was clearly no basis to order that the CDS was bound to accept the respondent's explanations for the delay. As I indicated earlier, the *Queen's Regulations* make it clear that the discretion to be exercised as to whether the grievance should be considered if filed after the prescribed period is that of the CDS and not that of the Federal Court. No exceptional circumstances have been shown to exist so as to justify, in effect, what is a directed verdict (*Stetler v. The Ontario Flue-Cured Tobacco Growers' Marketing Board*, 2009 ONCA 234, 311 D.L.R. (4th) 109, at paragraph 42).

[52] Second, there was also no basis whatsoever to remit the matter back to a different final authority. The final authority in the decision making process provided by the legislation is the CDS and no evidence has been put forward to show that he would have been unable to reconsider the matter in a fair and impartial manner. I say "would" because General Lawson has retired and has been replaced, as of July 2015, by General Jonathan Vance. Although a different final authority will reconsider the matter, it is important, in my view, to make the point that the order made by the Judge that a different CDS should reconsider the matter should not have been made.

VIII. Conclusion

[53] I would therefore allow the appeal, I would set aside the Judge's decision to the extent that he remitted the matter back for reconsideration by a different final authority with a direction to accept the respondent's explanations for the late filing of his grievance and, rendering the decision which the Judge ought to have rendered, I would allow the respondent's judicial review application and I would return the matter to the CDS for reconsideration in light of these reasons.

In the circumstances, I would make no order for costs in regard to this appeal or in regard to the judicial review application.

"M Nadon"

J.A.

“I agree.
Wyman W. Webb J.A.”

“I agree.
Yves de Montigny J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-497-15
(APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE BEAUDRY DATED OCTOBER 21, 2015, DOCKET NO. T-473-15)	
STYLE OF CAUSE:	THE ATTORNEY GENERAL OF CANADA v. MAJOR JOHN S. BEDDOWS
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DATED:	NOVEMBER 23, 2016

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