

Federal Court



Cour fédérale

**Date: 20160915**

**Docket: T-1889-15**

**Citation: 2016 FC 1046**

**Ottawa, Ontario, September 15, 2016**

**PRESENT: The Honourable Mr. Justice Boswell**

**BETWEEN:**

**RICHTREE MARKET RESTAURANTS INC. /  
RICHTREE RESTAURANTS DU MARCHE  
INC.**

**Applicant**

**and**

**MÖVENPICK HOLDING AG**

**Respondent**

**JUDGMENT AND REASONS**

[1] The Applicant, Richtree Market Restaurants Inc. / Richtree Restaurants du Marche Inc., has brought an appeal pursuant to section 56 of the *Trade-marks Act*, RSC 1985, c T-13 [the *Act*], in respect of a decision of the Trade-marks Opposition Board dated September 8, 2015, in which a member of the Board rejected Richtree's opposition to a trade-mark application filed by Mövenpick Holding AG.

[2] Before the Board, Richtree opposed Mövenpick's application on three grounds, namely that the proposed mark was:

- 1) not registrable because, contrary to paragraph 12(1)(b) of the *Act*, it was clearly descriptive of the character or quality of the services in association with its proposed use;
- 2) not distinctive within the meaning of section 2 of the *Act* because it was not adapted to distinguish, nor was it capable of distinguishing, the services in association with which Mövenpick proposed to use the mark from other trade-marks, trade-names or business names used by numerous third parties containing the word "marché" or "market" in association with similar or identical services; and
- 3) not registrable because, contrary to paragraph 12(1)(c) of the *Act*, it was the name of "restaurant services" and "take-out restaurant services".

[3] On appeal in this Court, however, Richtree only takes issue with the Board's rejection of the "not distinctive" ground of opposition under section 2 of the *Act*.

#### I. Background

[4] Richtree is a wholly owned subsidiary of Natural Market Restaurants Corp. In May 2005, Richtree purchased the assets of Richtree Markets Inc. [Old Richtree] after Old Richtree had become insolvent. Prior to its insolvency, Old Richtree operated Marché and Marcheline free-flow "market" style restaurants in Canada under license and franchise agreements with

Mövenpick who, on July 12, 1996, had obtained registration of “MARCHÉ” as a trade-mark for the operation of restaurant services.

[5] On July 29, 2008, Mövenpick filed a trade-mark application for a “Marché & Wave” Design which looks like this:



[6] The proposed trade-mark [the Mark] is a composite one that incorporates a word element (i.e., Marché) together with design elements (i.e., a rectangle with a wave on top design, and the style of type). It also claims colour as a feature of the mark: the first top wave is a light green; the rectangle is a darker green; the word Marché is in white and the second wave located under the first wave is also in white; there is also a white line under the word Marché. Mövenpick based its application on use and registration of the Mark in Switzerland on August 12, 2004, and its proposed use in Canada in association with restaurant services, take-out restaurant services, and offering technical assistance in the establishment and operation of restaurant franchises.

[7] Richtree filed a statement of opposition to Mövenpick’s application for the Mark on August 9, 2011. Its statement of opposition was subsequently amended twice in October 2011. Mövenpick filed its counter statement on December 21, 2011.

[8] In support of its opposition, Richtree filed affidavit evidence from four individuals, namely:

- 1) Lynda Palmer, a trade-mark searcher, who provided the results of her searches for trade-marks using the words “market” or “marché” in association with the food service industry;
- 2) James Meadway, an investigator then with Northwood & Associates Inc., who conducted various searches for restaurants, grocery stores, and other businesses in Canada with the word “market” or “marché” in their names; he also contacted and attended at some of these businesses and provided photographs of the storefronts of some of these businesses;
- 3) Robert Breton, an investigator with GW Consulting and Investigations, who conducted various searches to identify businesses in Montreal and Quebec City using the word “Marché” as part of their name; like Mr. Meadway, he too contacted and attended at some of these businesses in Montreal and provided photographs of the storefronts of some of these businesses; and
- 4) Yves Crépeault, another investigator with GW Consulting and Investigations, who contacted and attended at some of the businesses in Quebec City identified by Mr. Breton and provided photographs of the storefronts of some of these businesses.

All of these affiants were cross-examined and the transcripts of the cross-examinations, along with the replies to the undertakings, formed part of the record before the Board.

[9] In support of its application, Mövenpick filed the affidavit of Geng Liu, an assistant employed by Mövenpick's trade-marks agent at the time; this affidavit included a certified copy of an affidavit from Yves Lefebvre, a private investigator, which had been filed in another, separate proceeding in this Court. Mövenpick also filed a certified copy of its trade-mark registration for "MARCHÉ", as well as certain other documents which had been filed with the Registrar of Trade-marks in another, separate opposition proceeding between the parties: i.e., a certified copy of the affidavit of Matthew Williams, the President and CEO of Richtree's parent company, the transcript of his cross-examination, and the replies to the undertakings.

[10] Richtree and Mövenpick attended a hearing before the Board on July 29, 2015 and, on September 8, 2015, the Board rejected Richtree's opposition (see: *Richtree Market Restaurants Inc v Mövenpick Holding AG*, 2015 TMOB 152 (CanLII)). Subsequent to filing its appeal by way of a Notice of Application on November 9, 2015, Richtree filed a further affidavit from Mr. Meadway dated December 7, 2015, as well as an affidavit from Pei Heng Li dated December 9, 2015. These two affidavits were not before the Board when it rendered its decision.

## II. The Board's Decision

[11] In the context of these reasons for judgment, it is necessary to summarize only the Board's decision as it pertains to the non-distinctiveness ground of opposition under section 2 of the *Act* because Richtree, on this appeal, does not take issue with the Board's dismissal of the grounds of opposition under paragraphs 12(1)(b) and 12(1)(c) of the *Act*.

[12] After reviewing the procedural history and the evidence filed by the parties, the Board noted that, while Mövenpick bore the legal onus of establishing on a balance of probabilities that its application complied with the requirements of the *Act*, Richtree had an initial evidentiary burden to show “sufficient admissible evidence such that it could reasonably be concluded that the facts alleged to support each ground of opposition exist.” The Board further noted that the material date for assessing the distinctiveness of a proposed trade-mark is generally accepted as being the date of filing of the opposition, which was August 9, 2011. In view of pertinent case law, the Board stated that, for a proposed trade-mark to be adapted to distinguish the owner’s goods or services it had to be inherently distinctive and a trade-mark is inherently distinctive when nothing about it refers the consumer to a multitude of sources. In the Board’s view, whether a trade-mark is distinctive was a question of fact determined by reference to the message it conveys to the ordinary consumer of the goods or services in question when the trade-mark is considered in its entirety as a matter of first impression. The Board further stated that the distinctiveness of a composite mark may be tested by “sounding” the words if the design element was not the dominant element of the trade-mark.

[13] The Board concluded, in view of the entirety of the evidence, that Richtree had not “met its initial evidential burden to show that MARCHÉ or MARKET is a term commonly used by third parties in the trade to describe the applied for services or that the Mark is clearly descriptive of the character or quality of those services.” In reaching this conclusion, the Board stated that the evidence concerning the use of the term Marché or Market in association with other types of food related businesses, such as supermarkets, grocery stores, specialty food stores and convenience stores, had no bearing on the question of whether the term Marché describes

restaurant services, take-out restaurant services, and the offering of technical assistance in the establishment and operation of restaurant franchises; in the Board's mind, the former businesses offer services that fundamentally differed from those of a restaurant.

[14] As to Richtree's allegation that the Mark was not distinctive since it was clearly descriptive of the character or quality of the applied for services, the Board rejected this allegation for the same reasons it had determined that the Mark was not descriptive, namely that: (1) the dictionary definitions and the relevant evidence did not support a finding that, as a matter of first impression, the terms *Marché* or *Market* describe something going to the material composition or an obvious intrinsic quality of Mövenpick's restaurant services, take-out restaurant services, or offering of technical assistance in the establishment and operation of restaurant franchises; (2) neither term was self-evident, plain, or manifest, of restaurant services going beyond the simple act of selling and buying food products; (3) the character or quality of Mövenpick's restaurant and take-out restaurant services were not, as a matter of first impression, instantly apparent of a trade-mark bearing the term *Marché*; and (4) while there was some evidence that the term *Market* was used in trade-marks, trade-names, and business names for restaurant services, there was no clear evidence of what character or quality of restaurant services it had been commonly adopted to describe in the industry.

[15] As to the issue of whether *Market* or *Marché* were a term commonly used in the trade to describe similar or identical services by third parties, the Board reiterated its finding under its descriptiveness analysis that the evidence failed to show that the terms had been adopted by the restaurant industry to describe a particular style of restaurant or that it held a commonly

understood meaning in association with restaurant services. The Board further stated that the state of the register evidence did not speak to the descriptiveness of the term *Marché* or *Market* in association with restaurant services and, in any event, that evidence was irrelevant because there was no allegation of confusion with respect to the use of trade-marks containing the term *Market* or *Marché*.

[16] Although the Board did not consider the investigators' reports for purposes of its analysis as to whether the Mark was clearly descriptive of the services, it did consider these reports in its distinctiveness analysis because there was no objection and such evidence was collected a few months after the material date. Accordingly, the Board was prepared to give this evidence some weight given the nature of the search results. The Board found that the vast majority of the establishments visited by Richtree's investigators were convenience stores, grocery stores, public markets, supermarkets, and specialty food stores; it further found that, even for those businesses categorized as restaurants with names that included the term *Marché* or *Market*, there was no evidence to suggest that these restaurants shared a commonly known character or quality or a commonly understood meaning attached to restaurants identified as a *Marché* or *Market*. In short, the Board concluded that the evidence did not show that the term *Marché* or *Market* would be perceived by the average consumer of restaurant services as anything else but a source identifier, and the mere fact that the term *Marché* or *Market* appeared as part of other source identifiers did not render the Mark incapable of functioning as a source identifier for Mövenpick's services.



III. Issues

[17] The main issues to address on this appeal are the following:

1. What is the appropriate standard of review? and
2. Did the Board err in dismissing the non-distinctiveness ground of opposition to the Mark?

IV. Analysis

A. *What is the appropriate standard of review?*

[18] Although an appeal under subsection 56(1) of the *Act* proceeds in many ways like an application for judicial review, subsection 56(5) of the *Act* provides that on such an appeal “evidence in addition to that adduced before the Registrar may be adduced and the Federal Court may exercise any discretion vested in the Registrar.” The Federal Court of Appeal has held that subsection 56(5) allows a party to file evidence on an appeal even if it submitted no evidence before the Board (see: *Brain Tumor Foundation of Canada v Starlight Foundation*, 2001 FCA 36 at paras 3-6, 11 CPR (4th) 172). In this case, Richtree has filed a further affidavit from Mr. Meadway dated December 7, 2015, as well as one from Pei Heng Li dated December 9, 2015. Consequently, these affidavits must be considered by the Court in the context of this appeal. Moreover, the nature of the evidence offered by these affidavits dictates the appropriate standard of review of the Board’s decision.

[19] Before assessing the evidence offered by these new affidavits, it should be noted that an appeal under section 56(1) of the *Act* is not a trial *de novo* in the strict sense of that term since the material before the Board and its findings must also be considered in addition to any new evidence adduced by the parties (see: *Molson Breweries v John Labatt Ltd*, [2000] 3 FC 145 at paras 46 and 47, 5 CPR (4th) 180 (CA) [*Molson*]). As Justice Rothstein stated in *Molson*:

51 ...Even though there is an express appeal provision in the *Trade-marks Act* to the Federal Court, expertise on the part of the Registrar has been recognized as requiring some deference. Having regard to the Registrar's expertise, in the absence of additional evidence adduced in the Trial Division, I am of the opinion that decisions of the Registrar, whether of fact, law or discretion, within his area of expertise, are to be reviewed on a standard of reasonableness *simpliciter*. However, where additional evidence is adduced in the Trial Division that would have materially affected the Registrar's findings of fact or the exercise of his discretion, the Trial Division judge must come to his or her own conclusion as to the correctness of the Registrar's decision.

[20] The Supreme Court of Canada has acknowledged that the Federal Court of Appeal's approach in *Molson* is consistent with its approach in *Mattel, Inc v 3894207 Canada Inc*, 2006 SCC 22 at para 41, [2006] 1 SCR 772. This approach to an appeal under subsection 56(1) when new evidence has been filed has also been followed by this Court and the Federal Court of Appeal subsequent to *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, [*Dunsmuir*] (see: e.g., *Saint Honore Cake Shop Limited v Cheung's Bakery Products Ltd*, 2015 FCA 12 at para 18, 132 C.P.R. (4th) 258; *Iwasaki Electric Co Ltd v Hortilux Schreder BV*, 2012 FCA 321 at para 2, 442 NR 310; and *Scott Paper Ltd v Georgia-Pacific Consumer Products LP*, 2010 FC 478 at paras 42-44, 83 CPR (4th) 273).

[21] The question then is whether the new evidence that was not before the Board would have materially affected its findings of fact or the exercise of its discretion: if so, the Court must make its own conclusion as to the correctness of the Board's decision on the issue to which the additional evidence relates; but if not, the appropriate standard for review of the Board's decision is that of reasonableness (see: *Ron Matusalem & Matusa of Florida Inc v Havana Club Holding Inc, SA*, 2010 FC 786 at para 4, 86 CPR (4th) 437, aff'd 2011 FCA 244, [2011] FCJ No 1285).

[22] The test for whether this new evidence would have had a material effect upon the Board's findings of fact or the exercise of its discretion was stated in *Gemological Institute of America v Gemology Headquarters International*, 2014 FC 1153, 127 CPR (4th) 163:

[25] In order to determine whether new evidence would have materially affected the Board's decision, the Court must consider the evidence's nature and quality, taking into account its significance, probative value and reliability (*Bojangles' International LLC et al v Bojangles Café Ltd*, 2006 FC 657 at para 10, 293 FTR 234 [*Bojangles*]; *CEG*, above, at paras 16 and 20). The test is one of quality not quantity (*London Drugs*, above, at para 35; *Bojangles*, above, at para 15; *Hawke & Company Outfitters LLC v Retail Royalty Co*, 2012 FC 1539 at para 31, 424 FTR 164 [*Hawke*]); the new evidence cannot be merely repetitive or supplementary to the material that was before the Board, but must add something of significance and enhance its cogency (*Telus Corp v Orange Personal Communications Services Ltd*, 2005 FC 590 at para 33, 273 FTR 228; *Rothmans, Benson & Hedges, Inc v Imperial Tobacco Products Ltd*, 2014 FC 300 at para 34, 239 ACWS (3d) 473, quoting *Vivat Holdings Ltd v Levi Strauss & Co*, 2005 FC 707 at para 27, 139 ACWS (3d) 93; ...[additional citations omitted].

[23] Furthermore, as this Court noted in *Eclectic Edge Inc v Gildan Apparel (Canada) LP*, 2015 FC 1332, 138 CPR (4th) 289:

[45] While the new evidence must be such that it would have materially affected the Registrar's decision, it does not mean that it

would necessarily affect or change the final conclusion (*Worldwide Diamond Trademarks Limited v Canadian Jewellers Association*, 2010 FC 309 [*Canadian Jewellers*] at para 40). In other words, the Court can still come to the same conclusion as the Board, even with the new evidence.

[46] New evidence will typically be considered sufficiently material when it is putting a different light on the record or is significantly extending the evidence that was in front of the Registrar. Before the Court can decide whether it should review the whole matter anew or simply review the decision for reasonableness, the Court must first examine the new evidence that has been brought forward as part of the appeal (*Farleyco* at para 87).

[24] In general terms, the further affidavit of Mr. Meadway contains sworn evidence and photographs of various businesses that use the word “Market” or “Marché” in their name, while that of Pei Heng Li contains evidence as to numerous business name registrations and corporate profile reports for various businesses located in Ontario with either or both of these words in their name. In particular, the new Meadway affidavit contains, for the most part, the same type of evidence as that contained in his 2012 affidavit, albeit with some additional details arising from his contact with and visits to some of the same businesses identified in 2012. For example, in paragraph 25 of his first affidavit, Mr. Meadway described a visit to the Little Polish Market; and in paragraph 21 of his second affidavit, he described in more detail a second, more recent visit to the Little Polish Market and his discussion with an employee there. Mr. Meadway’s second affidavit also contains some details about the services and products offered and sold by the supermarkets, grocery stores, convenience stores, and specialty food stores with Marché or Market in their name; whereas his first affidavit contained more of a listing or summary of his searches for businesses with the word “Market” or “Marché” in their name and referred to only a few visits to or contact with such businesses. As for the new affidavit from Pei Heng Li, it

primarily confirms elements of the second Meadway affidavit by providing business and corporate name searches as well as a trade-mark search for businesses contacted or visited by Mr. Meadway in November and December 2015.

[25] According to Richtree, the new evidence shows that various food related businesses such as supermarkets, grocery stores, convenience stores, and specialty food stores commonly use “Market” or “Marché” with regard to the provision of restaurant services, contrary to the Board’s finding that the services offered by such businesses are fundamentally different than those offered by restaurants. Richtree contends that this new evidence would have materially affected the Board’s decision with respect to the “not distinctive” ground of opposition under section 2 of the *Act* and that, consequently, the Court must reassess this ground of opposition in a *de novo* analysis. Regardless of the standard of review to be applied by the Court, Richtree further contends that the Board’s decision was neither correct nor reasonable and should be reversed.

[26] For its part, Mövenpick states that the new evidence would not have materially affected the Board’s findings or exercise of discretion because it does not add something of significance which could have had a material or concrete effect on the Board’s conclusions. Mövenpick asserts that the new evidence does not put a different light on the record that was before the Board, and also notes that the new evidence was prepared in November and December 2015, more than four years after the material date for assessing the distinctiveness of the Mark. In any event, Movenpick submits that the Board’s decision was not only reasonable but also correct.

[27] In this case, after carefully reviewing the new evidence, I cannot find that it would have materially affected the Board's findings of fact or the exercise of its discretion with respect to the "not distinctiveness" ground of opposition. For the most part, the new evidence is merely repetitive or supplementary to that which was before the Board. The new evidence does not enhance the cogency of the evidence that was before the Board and it does not significantly or materially add to the record before the Board or cast a new light upon that record.

[28] The second Meadway affidavit provides some evidence which suggests that marché or market style restaurants are a specific type of restaurant where meals are prepared at different food counters where patrons place their order and it also offers information that some of the businesses identified in the first Meadway affidavit allow consumers to approach a counter to order meals. However, the second Meadway affidavit does not clearly or convincingly show that there is a recognized or established market or marché style restaurant where, as in a market, there are multiple counters and consumers go from one to the other and pick up various foods without table service. In particular, the second Meadway affidavit does not establish that it is the counters and prepared foods that make these establishments, found within grocery stores, convenience stores, specialty food stores, and supermarkets, a marché or market style restaurant. Moreover, this evidence does not undermine the Board's finding and conclusion that the food services offered in places such as supermarkets, grocery stores, convenience stores, and specialty food stores are fundamentally different than those offered by restaurants.

[29] Accordingly, the standard of review to be applied on this appeal in respect of the Board's dismissal of the "not distinctive" ground of opposition is reasonableness. As a result, the Court

must determine whether the Board's decision is justifiable, transparent, and intelligible, and the Court's role, as noted by the Federal Court of Appeal in *Monster Cable Products, Inc v Monster Daddy, LLC*, 2013 FCA 137 at para 7, 445 NR 379 (citing *Dunsmuir* at para 47), "is limited to determining whether, on the basis of the evidentiary record before him, the Registrar's decision falls within a "range of possible, acceptable outcomes which are defensible in respect of the facts and law" ...".

B. *Did the Board err in dismissing the non-distinctiveness ground of opposition to the Mark?*

[30] Richtree argues that the Board's decision was unreasonable because the evidence of multiple restaurants using *marché* or *market* as part of their name means that the Mark could not reasonably be seen as distinctive. According to Richtree, the Board failed to appreciate that distinctiveness requires a mark to be capable of identifying a single source for services, and that multiple trade-marks using the same word as part of the Mark cannot be a single source. Richtree asserts that the Board misapprehended the state of the register evidence and unreasonably interpreted and applied the test for distinctiveness under section 2 of the *Act* by confounding it with those for assessing whether a mark is clearly descriptive or likely to cause confusion.

[31] Mövenpick submits that the Board's decision is not only reasonable but correct and, therefore, it should not be disturbed. Mövenpick contends that Richtree's argument that the Mark is not distinctive, since names and trade-marks containing the word "market" or "marché" are commonly used with food service businesses, is flawed because the Mark must be considered in its entirety and, moreover, Mövenpick's existing MARCHÉ word mark has previously been

found to possess “some measure of inherent distinctiveness when used in association with ‘operation of restaurant’” (see: *Mövenpick Holding AG v Exxon Mobil Corporation*, 2011 FC 1397 at 43, 98 CPR (4th) 334).

[32] In assessing the reasonableness of the Board’s decision to reject the “not distinctive” ground of opposition, it is helpful to begin by noting the definition of “distinctive” contained in section 2 of the *Act*: “distinctive, in relation to a trade-mark, means a trade-mark that actually distinguishes the goods or services in association with which it is used by its owner from the goods or services of others or is adapted so to distinguish them.” It is also helpful to remember that the Board’s decision was not one which determined whether Mövenpick had, on a balance of probabilities, established that the Mark was distinctive within the meaning of the *Act*. On the contrary, the Board’s decision was principally focused on whether Richtree had met its initial evidentiary burden to adduce sufficient admissible evidence from which it could reasonably be concluded that the facts alleged to support each ground of opposition existed.

[33] Whether a trade-mark is distinctive is a question of fact that is determined by reference to the message it conveys to the ordinary consumer of the goods or services in question when the trade-mark is considered in its entirety as a matter of first impression (see: *Philip Morris Products SA v Imperial Tobacco Canada Limited*, 2014 FC 1237 at para 66, 129 CPR (4th) 309). In this case, even if the word “Marché” may not be in and of itself immediately or inherently distinctive, the Board’s decision finding that Richtree had failed to show that the term lacked distinctiveness was reasonable. The Board clearly considered the arguments made by Richtree, yet was not satisfied that it had met its initial evidentiary burden to show that either “marché” or



“market” is “a term commonly used by third parties in the trade to describe the applied for services.” Although the Board did find that there were numerous businesses that use the word “market” or “marché” in their name and that the word element was the dominant portion of the Mark, it also found that the majority of these businesses were not restaurants. It was open to and reasonable for the Board to conclude that the evidence offered by Richtree was not sufficient to show that the Mark, comprised of the dominant word portion and the design element, lacked distinctiveness such that it was incapable of functioning as a source identifier for Mövenpick’s services. Although the Board did on occasion intersperse its distinctiveness analysis with certain aspects of its descriptiveness analysis, this does not render its decision unreasonable when viewed as an “organic whole” (see: *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper Ltd.*, 2013 SCC 34 at para 54, [2013] 2 SCR 458).

[34] In short, I find the Board’s decision is justifiable, transparent, and intelligible, and it falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

#### V. Conclusion

[35] For the reasons stated above, Richtree’s application for an appeal pursuant to section 56 of the *Act* is dismissed.

[36] Mövenpick has requested its costs. Since the appeal has been dismissed, Mövenpick is entitled to costs in such amount as may be agreed to by the parties. If the parties are unable to agree as to the amount of such costs within 15 days of the date of this judgment, Mövenpick

shall thereafter be at liberty to apply for an assessment of costs in accordance with the *Federal Courts Rules*, SOR/98-106.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that:** the Applicant's appeal pursuant to section 56 of the *Trade-marks Act* is dismissed; and that the Respondent is entitled to costs in such amount as may be agreed to by the parties, provided that if the parties are unable to agree as to the amount of such costs within 15 days of the date of this judgment, the Respondent shall thereafter be at liberty to apply for an assessment of costs by an assessment officer in accordance with the *Federal Courts Rules*, SOR/98-106.

"Keith M. Boswell"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1889-15

**STYLE OF CAUSE:** RICHTREE MARKET RESTAURANTS INC. /  
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**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** JUNE 7, 2016

**JUDGMENT AND REASONS:** BOSWELL J.

**DATED:** SEPTEMBER 15, 2016

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