Date: 20080416

Docket: T-658-07

Citation: 2008 FC 492

Ottawa, Ontario, April 16, 2008

PRESENT: The Honourable Mr. Justice Blanchard

BETWEEN:

ROBERT ARSENAULT, JOSEPH AYLWARD, WAYNE AYLWARD, JAMES BUOTE, BERNARD DIXON, CLIFFORD DOUCETTE, KENNETH FRASER, TERRANCE GALLANT, DEVIN GAUDET, PETER GAUDET, RODNEY GAUDET, TAYLOR GAUDET, CASEY GAVIN, JAMES GAVIN, SIDNEY GAVIN, DONALD HARPER, CARTER HUTT, TERRY LLEWELLYN, IVAN MACDONALD, LANCE MACDONALD, WAYNE MACINTYRE, DAVID MACISAAC, GORDON L. MACLEOD, DONALD MAYHEW, AUSTIN O'MEARA

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicants are traditional crabbers from Prince Edward Island, fishing in Snow Crab Areas 12, 25 and 26. The Applicants take issue with the implementation of the 2006 Management

Plan for Snow Crab Areas 12, 18, 25 and 26 (the Management Plan) approved by the Minister of Fisheries and Oceans (the Minister) on March 30, 2006. The Management Plan provided for financial assistance of $37.4 million to traditional crabbers to offset the 10.85% reduction of their portion of the Total Allowable Catch (TAC) needed to fulfill the quotas for the First Nations under the Marshall Response Initiative (MRI).

[2] To receive the financial assistance, the Applicants were required by departmental officials to sign an agreement which provided for a release by the Applicants from any and all claims or suits against the Crown that are related to or arise from the agreement. The Applicants contend that such a release was not reflected in the Management Plan and refused to sign. They argue the Minister had a legal duty to carry out the Management Plan as approved. As a consequence of the Minister failing to pay the crabbers the financial assistance unless the impugned release was obtained from the crabbers, the Applicants bring this Application. The Applicants seek, among other things, a writ of *mandamus* requiring the Minister to pay the financial assistance approved in the Management Plan without condition.

II. Facts

[3] The MRI was established to facilitate the integration of First Nations people into the Atlantic Canadian commercial fishery following the Supreme Court decision in *R. v. Marshall*, [1999] S.C.J. No. 55 (QL). This meant that the TAC would have to be shared henceforth between

the traditional snow crab fishers and the First Nations people.

[4] In response to the MRI, the Minister approved in the Management Plan a reduction in the TAC to the traditional crabbers. The Plan also provided for a financial assistance program which would see $37.4 million, or $2.6 million per percentage point of the TAC, go to the traditional crabbers. These funds were made available under the MRI which was coming to an end on March 31, 2006.

[5] The MRI was initially set up to fund a voluntary licence retirement program for the traditional crabbers. With little interest in the program, the Minister had to consider other options to ensure permanent access to the snow crab fishery for First Nations people. He was presented with three different options, and subsequently approved Option 2, which was incorporated as part of the Management Plan. Option 2 provides as follows:

> **Option 2 – Assistance of $37.4M ($2.6M per percentage point)**
>
> - The Industry agreed to this level of assistance in the fall of 2001. The Industry is aware that DFO has funds available for Area 12 crab. This option would address the shortfall of 10.85% of the TAC for the MRI.
>
> Pros:
>
> - This option would be in line with DFO's policy to provide financial assistance for access provided to First Nations under the MRI and is within the funds set aside for the snow crab.
> - It is in line with the price paid for the access retired to date in area 12.
> - It would resolve DFO's shortfall and provide on a permanent basis the communal commercial access to snow crab to the First Nations as negotiated in their Fisheries Agreements.

- The MRI is ending on March 31, 2007 and DFO's commitments for snow crab would be fulfilled.

Cons:

- The crabbers in Area 12 will not be happy with the level of assistance offered and will hope to gain more in a judgement from the Court.
- May increase cost for litigation and legal fees to address the crabbers' motion in Court.

[6] The Minister approved Option 2 and signed the agreement on March 30, 2006. The document is silent on the inclusion of a release clause even though the agreement makes reference to the possibility of litigation due to the alleged unsatisfactory nature of the financial package.

[7] On the same day, a press release by the Department of Fisheries and Oceans (DFO) announced the approval of the Management Plan. Again, there was no reference to the inclusion of a release in the Management Plan or any conditions attached to the financial package announced.

[8] In letters dated July 11, 2006, each Applicant was notified of the Minister's decision and their eligibility to receive financial assistance under the Program. The letters also indicated that "The department of Fisheries and Oceans is prepared to provide you financial assistance in the amount of $72,481 to relinquish your eligibility to receive part of the snow crab allocation related to licence No. 024375." Attached to these letters, the Applicants were provided with a "Financial Assistance Agreement" which they were required to sign in order to obtain the financial assistance. This agreement included the following "Undertaking and release" (the release):

> 9. In consideration for the payments herein, the Recipient here releases Her Majesty the Queen in Right of Canada and Her Ministers, officers, employees and agents from any and all claims, suits, actions or demands of any nature that the Recipient has or may have and that are related to or arise from this Agreement.

These letters also made reference to the fact that the Program would be coming to an end on March 31, 2007.

[9] On March 15, 2007, the Respondent wrote to each of the Applicants advising them that he had not received their signed agreements and reiterated the terms of eligibility for financial assistance under the Program.

[10] On March 21, 2007, the Applicants wrote to the Respondent indicating their refusal to sign the agreement and demanding payment of the funds before March 31, 2007.

[11] On March 22, 2007, counsel for the Respondent replied to the Applicants' letter by advising that the terms of eligibility for financial assistance as initially conveyed to them in the letter dated July 11, 2006 remained the same. Consequently, they had to sign the agreement before being eligible for moneys under the Program.

[12] On March 29, 2007, the Applicants wrote to the Respondent again indicating their refusal to sign the agreements on the basis that they contained the release clause. There was no reply from the

Respondent to this letter.

[13] On March 31, 2007, the Program ended. Since the Applicants had refused to agree to the terms and conditions of payment, they did not receive any financial assistance under the Program.

[14] On April 20, 2007, the Applicants brought this application for judicial review seeking a declaration that the Minister exceeded his discretionary authority and a writ of *mandamus* requiring the Minister to pay and distribute, without condition, to the Applicants the financial assistance approved in the Management Plan.

[15] On July 6, 2007, the Attorney General of Canada, on behalf of the Minister, sought an order to have the application for judicial review struck on the grounds it that it had been filed beyond the 30 days delay provided for in section 18.1 of the *Federal Courts Act*, R.S. 1985, c. F-7, s. 1; 2002, c. 8, s. 14.

[16] On July 25, 2007, Justice Harrington dismissed the motion on the basis it was arguable that the decision under judicial review was one made on or about March 31, 2007 or perhaps March 22, 2007. In any event, he found that the application would have been filed in time.

III. Issue

[17] The only issue to be determined in this proceeding is whether the Applicants have satisfied the conditions required for the issuance of a writ of *mandamus*?

IV. Statutory Provisions

[18] Pertinent legislative and regulatory provisions are reproduced in the Annex to these reasons.

V. Analysis

Applicants' Position

[19] The Applicants maintain that the application for judicial review does not aim to challenge the decision rendered by the Minister on March 30, 2006, but rather to enforce it. The Applicants further maintain that they are under no obligation to challenge a subsequent decision by the Minister, which essentially has the effect of adding a condition to the approved Management Plan. The Applicants submit that the terms of the Management Plan, approved by the Minister, make them eligible to receive financial assistance without having to sign an agreement releasing the Crown of all liability. In essence, the Applicants argue that the Minister has a public legal duty to release the said funds as per the Management Plan, approved on March 30, 2006. The failure to do so has led to the current application for a writ of *mandamus*.

Respondent's Position

[20] The Respondent argues that the Applicants have mischaracterized the nature of the application. It is submitted that the heart of the matter is a challenge by the Applicants of the terms of a discretionary policy decision made by the Minister.

[21] The Respondent contends that the Minister has been vested with "absolute discretion" to make such discretionary decisions by subsection 7(1) of the *Fisheries Act*, R.S. 1985, c.F-14 (the Act). Given the Minister's broad discretion, it is not within the purview of a reviewing court to "second guess" the Minister's decision. The Respondent also contends that matters dealing with fishing quotas and their implementation are essentially policy matters and such ministerial policies are not binding and therefore not enforceable. The Respondent further contends that the Applicants' request for an order in the nature of *mandamus* cannot succeed. It is argued that in reviewing a decision made in the exercise of a broad discretion, a reviewing Court should only intervene if the decision was made in bad faith, if the decision made failed to take relevant factors into account, considered irrelevant factors or if the decision was contrary to law. The Respondent contends that in the circumstances the Court's intervention is not warranted.

[22] If this were an application to review the Minister's discretionary decision, I agree that the above-noted factors would be the only basis upon which the Court could intervene. This application however, does not challenge the Minister's discretionary decision. Instead, it is rather an application for an order in the nature of *mandamus*. For such an order to issue, the Court must be satisfied that

the Minister has a public legal duty to act as a result of the decision to put in place the impugned Management Plan, that the duty is owed to the Applicants and that they have a clear right to the performance of that duty.

[23] The Respondent advances three further arguments: first, that the Minister could only implement the policy decision by requiring the Applicants to sign the agreement with a release, and accordingly, the clause was an "inherent component of the policy"; second, that from the outset the Minister notified the Applicants of his decision to distribute financial assistance upon condition that they sign the release; finally, as the Applicants knew of the release clause requirement on July 11, 2006, they are now out of time to challenge the decision and, as a consequence, the decision remains unchallenged and must stand.

[24] I will deal with each of the above arguments by the Respondent in turn. I reject the proposition that the requirement to sign a release is an "inherent component of the policy". First, apart from the bald statement in the Respondent's submissions, there is simply no evidence to support this contention. Second, there is no evidence to support the assertion the Applicants were notified at the outset that they would only receive the financial assistance upon signing the agreement which included the release. The Management Plan makes no mention of such a release. The evidence clearly establishes that the condition requiring the signing of the release was raised by the Department for the first time on July 11, 2006.

[25] Finally, with respect to the Respondent's argument that the Applicants' application should fail since they did not challenge the Minister's decision requiring the release in a timely manner cannot succeed. If that were the decision challenged by this application, the Respondent's assertion may arguably have merit. However, this application is not about that decision. As stated earlier in these reasons, the Applicants seek an order in the nature of *mandamus* to have the Management Plan implemented as announced. In my view the Respondent's position mischaracterizes the nature of the application and therefore must be rejected.

Writ of mandamus: the legal test

[26] A writ of *mandamus* is an extraordinary equitable remedy and its issuance is subject to the following conditions precedent established by the Federal Court of Appeal in *Apotex Inc. v. Canada (Attorney General)*, [1994] 1 F.C. 742, affirmed by the Supreme Court of Canada in [1994] 3 S.C.R. 1100, namely that:

1. there is a public legal duty to act;
2. the duty is owed to the applicant;
3. there is a clear right to performance of that duty, in particular:
   (a) the applicant has satisfied all conditions precedent giving rise to the duty;
   (b) there was a prior demand for performance of the duty, a reasonable time to comply with the demand, and a subsequent refusal which can be either expressed or implied;
4. no other adequate remedy is available to the applicant; and that
5. the balance of convenience favours the applicant.

The burden of establishing these conditions rests with the Applicants.

1: A public legal duty to act

[27] A writ of *mandamus* is a discretionary remedy which lies to compel the performance of a public legal duty, found either in a statutory provision or at common law. Here, the alleged legal duty, if any, is based in the Act. There is no dispute regarding the Minister's discretion to issue leases and licenses for fisheries or fishing. Subsection 7(1) of the Act vests absolute discretion in the Minister for those purposes. In exercising the discretion, the Minister is bound to base his or her decision on relevant considerations, avoid arbitrariness and act in good faith. Otherwise, the Minister's discretion is limited only by the requirements of natural justice.

[28] Under the Act, the Minister's power is a continuing power until such time the licence is actually issued. Once issued, the Minister's discretionary power is said to be spent. The Supreme Court made this finding in *Comeau's Sea Foods Ltd. v. Canada (Minister of fisheries and Oceans)* [1997] 1 S.C.R. 12. Mr. Justice Major, writing for the Court, sated at paragraphs 40, 43 and 49 of his reasons:

> 40 In light of the foregoing review on the purpose of s. 7 and the broad discretion afforded to the Minister in the exercise of his duties thereunder, it is my view that the Minister's power to authorize the issuance of licences is a continuing power until such time as a licence is actually issued. It follows that he retains the power to revoke the authorization at any time prior to the issuance of the licence. Once the authorization is revoked, the person authorized no longer has the authority to issue the licence. After the issuance, the ability to revoke is governed by s. 9 of the Act.
>
> 43 The power to issue the licence, once exercised in any single instance, is expended and may only be revised or revoked under the specific statutory conditions in s. 9. …

> 49 It is only after a licence has been issued that the *Fisheries Act* imposes limits upon the Minister's discretion. No such limits are imposed upon the Minister's authorization of a fishing licence and in the absence of any words or an indication of legislative intent to the contrary, none should be imposed. [My Emphasis]

[29] Here, the Management Plan was announced and the fishing licences were issued on March 30, 2006. In so far as the fishing licences are concerned, there is no dispute that the Minister had exhausted his discretionary power under the Act. The issue is whether the financial assistance announced in the Management Plan forms part of the Minister's discretionary decision under the Act and if so, whether the Minister has a public legal duty to implement the Plan as announced.

[30] In my opinion, for the reasons that follow, the financial assistance promised is part of the Management Plan and the Minister has a legal duty to implement the Plan as announced.

[31] Canada's fisheries are a "common property resource" belonging to all the people of Canada. Under the Act, it is the Minister's duty to manage, conserve and develop the fishery on behalf of Canadians in the public interest (s. 43) (*Comeau's Sea Foods*, above, at para. 36). Licensing is but one tool in the Minister's arsenal of powers available under the Act to manage fisheries. These tools include the ability to restrict entry into the commercial fishery and limit the number of fishers, vessels and other aspects of commercial fishery. The Minister also has the authority under the Act to open and close the fishery, protect fishery habitat and act to enhance fish-producing streams. While the Act does not expressly provide for the payment of compensation to fishers who have their

quotas reduced, it would appear to me that such payments are consistent with the Minister's duty to manage, conserve and develop the fishery.

[32] Following the decision in *Marshall*, the Minister had a legal obligation to accommodate First Nations fishers. To do so and properly manage the resource, he had no alternative but to reduce the quotas of the traditional crabbers. The Minister was under no obligation to pay any compensation to the traditional crabbers for the reduction in their quotas. However, once he elected to provide financial assistance to them under the MRI and incorporate the financial assistance package as part of the Management Plan, then the financial assistance package became part of his discretionary decision. Once the Management Plan was announced, the Minister's discretionary power under the Act was expended and the Plan could only be revised or revoked under the specific statutory conditions found in s. 9 of the Act. Those conditions find no application here. In these circumstances, the Minister had a public legal duty to implement the Management Plan as announced. The legal duty flows from the Minister's statutory obligation to manage, conserve and develop the fishery under the Act.

[33] I reject the Respondent's argument that imposing the condition requiring a release from the Applicants was an appropriate exercise of the Minister's unfettered authority to manage the fishery. This would undoubtedly have been the case had the condition been made part of the financial assistance package in the Management Plan, but it was not. Further, I am satisfied that the incorporation of such a condition was not contemplated at the time of the announcement of the

Management Plan. The record indicates that the Minister was presented with three options in a memorandum prepared by his staff to address the outstanding issue of adjusting MRI quota needs and its implications on the sharing of the available TAC. The Minister adopted Option two and incorporated it as part of the Management Plan on March 30, 2006. That option expressly stated that the traditional crabbers would not be happy with the level of assistance offered and will hope to gain more in a judgment from the Court. The memorandum also states that Option two could "increase cost for litigation and legal fees to address the crabbers' motions in Court." Given that this information was available to the Minister, if the offer of financial assistance had been intended to be conditional on obtaining a release from the crabbers, then such a condition would have been expressly incorporated in the agreement. It was not.

[34] Citizens whose rights are determined administratively are entitled to know where they stand. That is why, save for the limited exceptions provided for in the Act and discussed above, the Minister is unable to modify the allocated fishing quotas after the Management Plan is announced. There is a need for finality in administrative decision making. (*Comeau's Sea Foods*, above, at para. 42.) For essentially the same reasons, there is also no legal basis to allow the imposition by the Minister of a condition, which could affect the implementation of the Management Plan, after its approval. Further, as stated above, there is no evidence here that the Minister had any intention to impose such a condition on the payment of the financial assistance at the time he announced the Management Plan. Nor is there any evidence that the Minister delegated to others his discretionary authority to impose such a condition, before or after the fact.

[35] Further, I reject the proposition that requiring such a release from the Applicants is an inherent part of the implementation of the Minister's policy decision. While it was open to the Minister, in his absolute discretion, to require the release in the Management Plan, he opted not to. Once the Plan was announced the Minister's discretion was spent. The subsequent decision to require the execution of the release significantly changed the nature of the financial assistance component of the Management Plan. Taken at face value, agreeing to the inclusion of the said release clause meant that further attempts by the Applicants to seek full compensation for alleged losses would no longer be possible. Here, the Minister was aware that the Applicants would not be satisfied with the amounts offered in financial assistance before the Plan was announced. The Minister was also aware that they would likely bring legal action to seek further compensation for their losses. Finally, the evidence establishes that the financial assistance provided for in the Management Plan was not intended to fully compensate the Applicants for their losses. This is not disputed by the Respondent. In these circumstances, requiring the Applicants to sign a release in order to obtain the financial assistance promised cannot be considered an inherent part of the Management Plan. Consequently, DFO's subsequent decision to insist on the execution of the release is illegal.

2: Legal duty owed to the Applicants

[36] There is no dispute that the Applicants are indeed the traditional crabbers in the aforementioned areas. Consequently, the public legal duty was owed to them.

3: There is a clear right to performance of that duty

[37] The Applicants submit that they have satisfied the only condition precedent giving rise to the Minister's duty to pay the financial assistance, namely that they were and continue to be traditional crabbers falling under the scope of the Management Plan approved by the Minister.

[38] The Respondent argues that for the funds to be released, the Applicants were required to sign the Agreement which includes the release.

[39] In the absence of any evidence demonstrating that such a release was indeed part of the Management Plan approved by the Minister, there was no condition precedent to be met by the Applicants.

[40] With respect to the condition of a prior demand for the performance of a duty, the documentary evidence clearly establishes that on March 21, 2007, the Applicants wrote to the Respondent indicating their refusal to sign the Agreement and demanding payment of the financial assistance. A similar request was made on March 29, 2007. The evidence also clearly establishes that the Department had no intention of paying the financial assistance under the Management Plan without releases from the Applicants. I am satisfied that there was a prior demand for the performance of the duty, a reasonable time to comply with the demand and a subsequent refusal. I take the Minister's refusal to be implied from the July 11, 2006 and March 22, 2007 letters sent to the Applicants on his behalf.

4: No other adequate remedy is available to the Applicants

[41] The Applicants contend that the financial assistance made available under the Management Plan does not represent compensation for the true market value of the quota taken from them to provide access to First Nations fishers. It is, nonetheless, partial compensation that, but for the granting of the order sought, will be lost. The Applicants argue that regardless of what other legal remedies may be available to them, they will never be able to access the funds made available under the MRI and already paid to the vast majority of snow crab fishers unless this Court issued a writ of *mandamus*.

[42] In his written and oral submissions, the Respondent did not take issue with the Applicants' stated position on the availability of an "alternative adequate remedy". The Respondent's submissions were essentially based on his own characterization of the nature of the application and failed to address the conditions required to be met for the issuance of a writ of *mandamus*. I have already expressed my views on the Respondent's characterization of the nature of the within application and will not repeat them here. Suffice it to say, it was open to the Applicants to frame their application as they did. That said I am left with no response from the Respondent in respect to this particular aspect of the test for an order in the nature of *mandamus*.

[43] At the hearing of this application, mention was made of an action by the Applicants against the federal Crown. The recorded entries of the Court indicate that the cause of action was for breach of contract, unjust enrichment, negligent misstatements, misfeasance in public office and breach of fiduciary relationship. In their action, the Applicants seek, among other relief, restitution of the value of snow crab quotas and do not appear to seek to recover the funds made

available under the Management Plan. The recorded entries also indicate that the action was struck by a decision of the Prothonotary of the Court on the grounds that the Applicants should have first obtained a declaration of invalidity of the decisions before bringing their action in damages against the Crown. An appeal of the Prothonotary's decision was allowed on the basis that the Respondent had not established that the Applicants' claim was devoid of any chance of success.

[44] Without further information or argument regarding the above noted action, it is difficult to draw any conclusion as to whether it constitutes an adequate alternative remedy in the context of the within application. I have no alternative but to accept the Applicants' submissions, that but for the writ sought they will never be able to access the funds made available under the Management Plan. In the circumstances, I am satisfied that no other adequate remedy is available to the Applicants.

5: the balance of convenience favors the Applicants.

[45] The duty sought to be enforced is not owed to the public at large but to a relatively small number of snow crab fishers under the Management Plan. The evidence establishes that the Plan is consistent with the Department's own policy decision to provide compensation to retire the quota from the crabbers. The Applicants are entitled to have the Management Plan implemented as approved. In my view, granting the order sought would not precipitate administrative or financial chaos. In these circumstances, the balance of convenience favours the Applicants.

Conclusion

[46] I am satisfied that there are no equitable bars to the prerogative relief sought. The Applicants have satisfied the conditions for the issuance of an Order in the nature of *mandamus*. An order will issue requiring the Minister to implement the Management Plan as approved on March 30, 2006, without the requirement that the Applicants sign the impugned release. The Applicants are also entitled to their costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The application is allowed in part.

2. The Minister of Fisheries and Oceans implement the 2006 Management Plan for Snow Crab Areas 12, 18, 25 & 26, as approved on March 30, 2006, without the requirement that the Applicants sign the impugned release.

3. The Applicants will have their costs on the application.

"Edmond P. Blanchard"
Judge

ANNEX

The Fisheries Act / *Lois sur les pêches*

7.(1) Subject to subsection (2), the Minister may, in his absolute discretion, wherever the exclusive right of fishing does not already exist by law, issue or authorize to be issued leases and licences for fisheries or fishing, wherever situated or carried on.

(2) Except as otherwise provided in this Act, leases or licences for any term exceeding nine years shall be issued only under the authority of the Governor in Council.

7.(1) En l'absence d'exclusivité du droit de pêche conférée par la loi, le ministre peut, à discrétion, octroyer des baux et permis de pêche ainsi que des licences d'exploitation de pêcheries — ou en permettre l'octroi —, indépendamment du lieu de l'exploitation ou de l'activité de pêche.

(2) Sous réserve des autres dispositions de la présente loi, l'octroi de baux, permis et licences pour un terme supérieur à neuf ans est subordonné à l'autorisation du gouverneur général en conseil.

9. The Minister may suspend or cancel any lease or licence issued under the authority of this Act, if

(*a*) the Minister has ascertained that the operations under the lease or licence were not conducted in conformity with its provisions; and

(*b*) no proceedings under this Act have been commenced with respect to the operations under the lease or licence.

9. Le ministre peut suspendre ou révoquer tous baux, permis ou licences consentis en vertu de la présente loi si :

a) d'une part, il constate un manquement à leurs dispositions;

b) d'autre part, aucune procédure prévue à la présente loi n'a été engagée à l'égard des opérations qu'ils visent.

The Federal Courts Act / *Loi sur les Cours fédérales*

18.(1) Subject to section 28, the Federal Court has exclusive original jurisdiction

(*a*) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and

(*b*) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (*a*), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

18.(1) Sous réserve de l'article 28, la Cour fédérale a compétence exclusive, en première instance, pour :

a) décerner une injonction, un bref de *certiorari*, de *mandamus*, de prohibition ou de *quo warranto*, ou pour rendre un jugement déclaratoire contre tout office fédéral;

b) connaître de toute demande de réparation de la nature visée par l'alinéa *a*), et notamment de toute procédure engagée contre le procureur général du Canada afin d'obtenir réparation de la part d'un office fédéral.

FEDERAL COURT

SOLICITORS OF RECORD

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