Date: 20080428

Docket: T-1315-06

Citation: 2008 FC 542

Ottawa, Ontario, April 28, 2008

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

UNION OF CANADIAN CORRECTIONAL OFFICERS – SYNDICAT DES AGENTS CORRECTIONNELS DU CANADA – CSN (UCCO-SACC-CSN)

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This is an application pursuant to section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, for judicial review of the decision of an appeals officer dated August 10, 2006 overturning a direction issued by a health and safety officer dated October 7, 2005, which found that exposure to

second hand smoke constituted a danger to employees while at work and directed Correctional Services Canada (CSC) to protect any person from the danger.

[2] The applicant requested that the Court set aside the appeals officer's decision and that the matter be returned to the Canada Appeals Office on Occupational Health and Safety with the Court's direction.

Background

[3] Millhaven Institution is a federal penitentiary under the jurisdiction of CSC. The occupational health and safety of Millhaven Institution employees is governed by Part II of the *Canada Labour Code,* R.S.C. 1985, c. L-2 (the Code). Millhaven Institution (CSC), Howard Page and the Union of Canadian Correctional Officers (the union) are respectively the employer, the employee and the union.

[4] On October 3, 2005, Howard Page, a correctional officer, refused to work at Millhaven Institution pursuant to section 128 of the Code because he believed that the exposure to second hand smoke at the institution constituted a danger as defined in section 122 of the Code. As a result of the work refusal, health and safety officer Chris Mattson conducted an investigation on October 3, 2005. On October 7, 2005, the health and safety officer issued a direction (the direction) finding:

> The said health and safety officer considers that a condition in a place constitutes a danger to an employee while at work:
>
> **Employees are continuing to be exposed to second hand smoke.**

> Refer: 125(1)(w) of the Canada Labour Code, Part II Occupational Health and Safety
>
> 12.1 of the Canada Occupational Health and Safety Regulations Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(2)(a) of the *Canada Labour Code*, Part II, to protect any person from the danger.
>
> Issued at Millhaven, this 7th day of October, 2005

[5] On October 24, 2005, CSC applied for a stay of the direction until an appeals officer could hear the appeal of the direction. On October 31, 2005, a stay was granted on the conditions that the employer make improvements to the ventilation system and implement a no smoking policy commencing January 31, 2006.

[6] On May 24 and 25, 2006, the appeals officer heard the case. On August 10, 2006, the appeals officer reached his decision rescinding the direction issued by the health and safety officer on October 7, 2005. This is the judicial review of the appeals officer's decision.

Appeals Officer's Reasons for Decision

[7] The appeals officer began by noting that in order to determine whether to vary, rescind or confirm the direction, he had to decide if a danger existed. To do this, the officer noted that he would have to consider the legislative definition of danger, the relevant jurisprudence, and all the facts and circumstances of the case at hand. In his decision, the appeals officer reproduced the definition of danger in subsection 122(1) of the Code and the means by which prevention should be

achieved in subsection 122.2 of the Code. The appeals officer then turned his attention to the jurisprudence. The appeals officer noted that the jurisprudence held that appeals before an appeals officer are *de novo* proceedings and forward looking.

[8] The appeals officer then found that keeping in mind the legislative provision and jurisprudence, the following test should apply when assessing whether a danger existed:

> A danger exists where the employer fails, to the extent reasonably practicable, to:
>
> a) eliminate a hazard, condition or activity;
>
> b) control a hazard, condition or activity within safe limits; or
>
> c) ensure employees are personally protected from the hazard, condition or activity;
>
> and one determines that:
>
> d) there are circumstances in which the remaining hazard, condition or activity could reasonably be expected to cause injury or illness to any person exposed thereto before the hazard, condition or activity can be corrected or altered; and that the circumstances will occur in the future as a reasonable possibility as opposed to a mere possibility or a high probability.

[9] In applying the above articulated test, the appeals officer acknowledged that CSC had developed and implemented a no smoking policy inside Millhaven Institution. The appeals officer noted that the policy applied to all inmates and employees and included monetary fines for inmates as well as for employees who contravened the policy. The appeals officer also noted that all correction officers had the duty and power to enforce the policy. The appeals officer also noted that Warden Ryan had provided assurance that to further protect employees from potential exposure to

second hand smoke, he would be installing drop boxes for the inmates to keep their tobacco, matches, lighters and other smoking paraphernalia locked up in the courtyard.

[10] The appeals officer noted that a report from the World Health Organization stated that there are no safe limits for exposure to second hand smoke. However, the appeals officer stated that the evidence in the report could not be verified and questioned by the other party to validate its authenticity, the method of analysis used and the goal of the tests conducted to arrive at the said results. Furthermore, the appeals officer noted that no expert witness was brought in to testify one way or another on the issue. As such, the appeals officer stated “I cannot give much weight to these arguments.” The appeals officer was not convinced under the circumstances that there was a reasonable possibility that such a low exposure would cause injury to the health of a healthy person in any foreseeable future.

[11] Consequently, the appeals officer found that CSC had implemented measures to try to eliminate exposure to the second hand smoke within the institution and to control the hazard within safe limits. As such, the first prong of the test was not met and there was no danger. The appeals officer believed that, under the circumstances, the reasonable expectation that the near zero exposure to second hand smoke would cause injury to the health of the employees was so remote that no danger existed for the employees.

[12] For these reasons, the appeals officer rescinded the direction issued by the health and safety officer on October 7, 2005.

Issues

[13] The applicant submitted the following issues for consideration:

1. What is the appropriate standard of review?
2. Does the decision warrant the intervention of the Court?

[14] I would rephrase the issues as follows:

1. What is the appropriate standard of review?
2. Did the appeals officer err in his interpretation of "danger" as per section 122 of the *Code*?
3. If not, did the appeals officer err in his application of the test for "danger" to the facts of this case?

Applicant's Submissions

[15] The applicant submitted that the appropriate standard of review is patent unreasonableness. The applicant submitted that the appeals officer's decision is patently unreasonable as he failed to take into account clear and relevant evidence of the continued daily exposure to second hand smoke and the scientific and medical determinations on the danger of exposure to second hand smoke.

[16] The applicant submitted that the appeals officer's findings of "near zero" exposure to second hand smoke, "injury so remote that no danger exists" and "low exposure" are based purely on the measures that CSC has already taken and plans to take to reduce second hand smoke exposure. The

applicant submitted that these findings are patently unreasonable as they fail to consider the concrete testimonial of witnesses as to the continual exposure to second hand smoke despite these measures and the medical reports stating that there are no safe limits for exposure to second hand smoke.

[17] The applicant noted the case of *Martin* v. *Canada (Attorney General)*, 2005 FCA 156, whereby the Federal Court of Appeal found the decision of an appeals officer to be patently unreasonable as he had failed to apply the provisions of the Act and to take account of relevant evidence. The applicant asked this Court to come to the same conclusion on the merits, albeit for different reasons particular to the present case. The applicant submitted that the appeals officer in the present case unreasonably misconstrued the amended definition of danger in section 122 of the Code by concluding that the unproven prospects of present and future measures intended to reduce exposure to second hand smoke would amount to a near zero exposure, and as such no danger. The applicant stated that according to the appeals officer's reasons, it does not matter what the precise level of exposure to second hand smoke was at the time of the hearing; 'danger' is assessed by focusing on the reasonable expectation of future harm once the measures intended to reduce exposure have been put in place.

[18] The applicant submitted that the amended definition of danger now includes potential hazards or conditions or any current or future activity that could reasonably be expected to cause injury or illness and it is no longer limited to specific factual situations existing at the time the employee refuses to work (*Martin,* above). The applicant agreed that the definition of 'danger'

includes those that may take place in the future, but submitted that it is simply not reasonable to rule out existing danger until the measures effectively remedy that danger. The applicant submitted that the appeals officer's decision was patently unreasonable as it failed to consider the present level of exposure as evidenced by the four large garbage bags full of cigarette butts and ashes collected at the gym area alone, the testimony of three correctional officers who work in three different units which together represent over 95% of where the inmate population can be on any given day, and all the indirect evidence of exposure, such as fines for contravention, and the further need for drop boxes.

[19] The applicant also submitted that the appeals officer's decision failed to consider the unequivocal medical and scientific authorities establishing the danger resulting from exposure to second hand smoke. The applicant noted that the appeals officer considered a report from the World Health Organization which found that there are not safe limits for exposure to second hand smoke, but failed to give it much weight. The applicant submitted that this conclusion was remarkable given that there was also a report by Health Canada determining that there is no safe level of exposure to second hand smoke. The applicant submitted that the medical and scientific documents submitted support the conclusion that exposure to second hand smoke is a danger to one's health and that there is no acceptable level of exposure. Therefore, the applicant submitted that there was no evidence on the record to support the appeals officer's determination, that the level of second hand smoke that remained was within safe limits.

Respondent's Submissions

[20] The respondent submitted that the appropriate standard of review is patently unreasonable. The respondent noted that the Code was amended in 2000 and now contains a 'watertight' privative clause (*Maritime Employers' Association.* v. *C.U.P.E., Locale 375*, 2006 FC 66, affirmed 2006 FCA 360). The respondent submitted that while the applicant concedes that the proper standard of review is patent unreasonableness, it nevertheless invites the Court to draw its own findings of fact as though the matter were being heard *de novo*. The respondent submitted that intervention by the Court is only warranted where the appeals officer was "clearly irrational" or "evidently not in accordance with reason" (*Canada (Attorney General)* v. *P.S.A.C.*, (1993) 1 S.C.R. 941).

[21] The respondent submitted that the right to refuse work is an important but limited right under the Code; it is not the means by which the bulk of the objectives of the Code are achieved (*Michel Collard* (1993), 92 d.i. 49 (C.L.R.B.)). The respondent noted that the right to refuse work provision remains fundamentally the same as they were prior to the amendments to the Code in 2000. The respondent submitted that the mechanism is an *ad hoc* opportunity given to employees as an emergency measure (*Canada (Attorney General)* v. *Fletcher*, 2002 FCA 424).

[22] The respondent submitted that the legislative scheme is as follows. An employee's right to refuse to work is found in section 128 of the Code and hinges on the definition of danger in section 122. Under section 128, an employee must report the matter to their employer and if the employer's response to the matter is unsatisfactory to the employee, they can continue to refuse to work

(subsection 128 (9)). The employer then has a duty to investigate the matter. If at the end of the investigation the employee believes the danger continues to exists, the employee may continue to refuse to work. It is at this stage that a health and safety officer is notified (subsection 128(13)). The health and safety officer then conducts an investigation and determines whether a danger exists and as a corollary, whether the employee may continue to refuse to work (s. 129(6)). Where the officer finds that a danger does not exist, the employee is not entitled to continue to refuse to work (subsection 129(7)). Where the officer is satisfied that there is a continual danger, they issue a direction pursuant to subsection 145(2) of the Code and the employee may continue to refuse to work. The employer can then appeal the direction (subsection 146(1)).

[23] The respondent submitted that the legal test for danger, as developed by the appeals officer in his decision, ties together the legislative scheme, Parliament's intent and relevant jurisprudence on the matter. The respondent submitted that the first part of the test examines whether or not an employer has failed, to the extent reasonably practicable, to eliminate, to control within safe limits or to ensure employees are personally protected from the hazard, condition or activity. The respondent submitted that this section of the test ties in the purpose of the Code under section 122.2 which states that "preventative measures would consist first of the elimination of hazards, then the reduction of hazards and finally, the provision of personal protective equipment, clothing, devices or materials, all with the goal of ensuring the health and safety of employees." The respondent submitted that the first three elements of the appeals officer's test are consistent with the intent of Parliament and are not patently unreasonable.

[24] With regards to the second prong of the test, the respondent submitted that it carries with it the elements of: (a) “before the hazard, condition or activity can be corrected or altered”, and (b) “reasonable possibility”. The respondent submitted that by requiring a reasonable possibility rather than a mere possibility or high probability the appeals officer properly interpreted the definition of danger. The respondent submitted that to understand why this threshold is not patently unreasonable, but is in fact correct, it is important to see the legislative development of the terms used in the current definition of danger.

[25] The respondent submitted that the first comprehensive provision for a federal worker’s right to refuse to work was enacted in 1978; however, the Code did not include a definition of danger. The respondent submitted that in *Alan Miller* v. *Canadian National Railways*, [1980] 39 d.i. 93 (C.L.R.B.), the Canada Labour Board adopted the concepts of “likely to happen at any moment without warning” and “the injury might occur before the hazard could be removed” to define danger under the Code. The respondent submitted that subsequent jurisprudence held that “a narrower interpretation of imminent danger is called for and the right to refuse is primarily intended to deal with safety or health concerns which arise from day to day rather than a ‘last resort’ to bring existing disputes to a head” (*William Gallivan* v. *Cape Breton Development Corporation*, [1982] 45 d.i.180 (C.L.R.B.)). The respondent submitted that the Code was amended in 1985 removing the concept of “imminent” from the work refusal provisions and adding a definition of “danger”. The respondent submitted that the definition had two components: (1) the expectation of danger had to be reasonable, and (2) the danger had to be expected to cause injury or illness before the hazard or condition could be corrected. The respondent submitted that the 1985 definition was considered in

David Pratt v. *Gray Coach Lines Limited,* [1988] 73 d.i. 218 (C.L.R.B.) wherein it was noted that very little had changed as a result of the removal of the word imminent. The respondent submitted that in 2000 the Code was amended and a new definition of danger was adopted. The respondent submitted that the new definition has added two concepts: (1) the concept of potential hazard and (2) the harm that can occur by the hazard, condition or activity does not have to occur immediately after exposure to it. The respondent submitted that in *Welborne* v. *Canadian Pacific Railway Co.*, [2001] C.L.C.R.S.O.D. No. 9, the appeals officer held that the new definition was not a radical departure but rather an improvement from the previous definition in that it was not as restrictive, but would not support hypothetical or speculative situations. Finally, the respondent submitted that the Federal Court of Appeal has established that it is up to the appeals officer "to establish a corpus of decisions having precedential value" (*Martin,* above at paragraph 17).

[26] The respondent then applied the definition of danger to the case at bar. The respondent submitted that the evidence before the appeals officer established that the CSC had addressed the first three elements of the test for danger. The respondent submitted that CSC had implemented a total indoor smoking ban, the ban included monetary fines for its contravention, and correctional officers were required to enforce the ban. Furthermore, the CSC demonstrated its commitment to continuing improvements. The respondent submitted that given the appeals officer's finding that the level of exposure to second hand smoke at Millhaven Institution was "near zero", it was open to the appeals officer to conclude that the hazard would not cause injury or illness as a reasonable possibility as opposed to a mere possibility or a high probability. The respondent submitted that the appeals officer relied on Warden Ryan's testimony that that the situation was improving as

indicated by the decrease in inmate charges and correctional officer observation reports for violations of the indoor smoking ban. The respondent submitted that these documents provide the best objective evidence available to the appeals officer because every correctional officer is required to fill out these documents if they detect second hand smoke. The respondent submitted that given the evidence, it was open to the appeals officer to conclude that the level of exposure was "near zero".

Analysis and Decison

[27] **Issue 1**

What is the appropriate standard of review?

Although both parties submitted that the appropriate standard of review is patent unreasonableness, that standard no longer exists since the Supreme Court of Canada's decision in *Dunsmuir* v. *New Brunswick,* 2008 SCC 9. In *Dunsmuir*, at paragraph 62, the Supreme Court provided the following guidance on the reformed standard of review analysis:

> In summary, the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of defence to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.

[28] The Supreme Court of Canada went on to rule that the standards of reasonableness *simpliciter* and patently unreasonable were no longer and that the new standards were correctness and reasonableness.

[29] The parties in the present case relied on *Martin*, above in making their submissions that the appropriate standard of review is patently unreasonable. In my opinion, based on the above articulation by the Supreme Court, the standard of review expressed in *Martin*, above is no longer satisfactory in light of *Dunsmuir*, above and as such the Court must proceed to do its own analysis. However, I note that the case of *Martin*, above relied on by the parties is still useful as it applied the same factors that this Court must now apply.

[30] To begin, I note that there are two issues for which the standard of review must be determined. With regards to the appeals officer's development of a test for "danger", I am of the opinion that the appropriate standard of review is one of reasonableness. As discussed in *Martin*, above there exists a strong privative clause in the Act and although the question is one of law with precedential value, the Court must respect Parliament's decision and "must take the statute as it finds it" (*Martin*, above at paragraph 17). I am also of the opinion that the standard to be applied to the appeals officer's application of the test for "danger" to the facts of this case is reasonableness. The nature of the question is that it is mixed fact and law, and some deference is owed.

[31] **Issue 2**

Did the appeals officer err in his interpretation of "danger" as per section 122 of the *Code*?

In his decision, the appeals officer considered the relevant legislative provisions, and jurisprudence in developing a test for "danger":

> [58] Keeping in mind the above noted Code provisions and the findings of Justice Gauthier, I believe that a danger exists where the employer fails, to the extent reasonably practicable, to:

> a) eliminate a hazard, condition or activity;
>
> b) control a hazard, condition or activity within safe limits; or
>
> c) ensure employees are personally protected from the hazard, condition or activity;
>
> and one determines that:
>
> d) there are circumstances in which the remaining hazard, condition or activity could reasonably be expected to cause injury or illness to any person exposed thereto before the hazard, condition or activity can be corrected or altered; and that the circumstances will occur in the future as a reasonable possibility as opposed to a mere possibility or a high probability.

[32] I agree with the respondent's submission that as per Professor David Mullan quoted in *Martin*, above at paragraph 17, "the legislature has expressed confidence in the ability of a decision-maker to interpret questions of law arising under its home statute and to itself establish a corpus of decisions having precedential value in the sense of application to many future cases." Having reviewed the appeals officer's test for "danger", I am of the opinion that there is no reason for this Court to intervene on this ground. The appeals officer carefully considered the relevant statutory provisions, jurisprudence and Parliament's intent. The test developed is reasonable and I see no reason to interfere.

[33] **Issue** 3

If not, did the appeals officer err in his application of the test for "danger" to the facts of this case?

In applying the developed test for danger, the appeals officer made the following findings at paragraphs 59 to 63:

> [59] CSC developed and implemented a no smoking policy inside Millhaven institution and:
>
> - the policy applies to all inmates, all persons as well as all employees;
> - it also includes monetary fines for inmates as well as for employees who contravene the policy;
> - correctional officers have the duty and power to enforce the policy.
>
> [60] I retain in addition that Warden Ryan assured me that to further protect employees from potential exposure to second hand smoke, he is to install drop boxes for the inmates to keep their tobacco, matches, lighter and other smoking paraphernalia locked up in the courtyard.
>
> [61] C. Blanchette argued that according to the World Health Organisation, there are no safe limits for exposure to second hand smoke. However, the evidence presented could not be verified and questioned by the other party to validate its authenticity, the method of analysis used and the goal of the tests conducted to arrive at the said results. Unfortunately, no expert witness was brought in to testify one way or another on the issue. Therefore, I cannot give much weight to these arguments.
>
> [62] Even though C. Blanchette stated that there were no safe exposure limits to second hand smoke, I was not convinced under the circumstances that there was a reasonable possibility that such a low exposure would cause injury to the health of a healthy person in any foreseeable future.
>
> [63] Consequently, I find that CSC has implemented measures to try to eliminate exposure to second hand smoke within the institution and to control the hazard within safe limits.

[34] In my opinion, the appeals officer failed to consider the evidence before him regarding the continual exposure to second hand smoke at the time of the hearing despite the implementation of the indoor smoking ban. The evidence before the appeals officer included testimony from three

correctional officers who work in three different units, which together represent over 95% of where the inmate population can be on any given day, as to the continued existence of exposure to second hand smoke. The appeals officer did not refer to or even mention this evidence in his analysis and decision. In my opinion, this evidence should have been considered and weighed by the appeals officer in deciding whether or not a danger existed. It is not sufficient for the appeals officer in assessing whether or not the first part of his "danger" test is met, to simply look at the measures taken by the CSC to reduce the danger. The test requires that the appeals officer not only look at the actions of CSC, but also the success of those actions in eliminating, or controlling the hazard, condition, or activity. In my opinion, the appeals officer failed to consider evidence as to the effectiveness of the measures taken by the CSC. As stated in *Martin*, above at paragraph 42:

> It is not for this Court to weigh that evidence or to come to any conclusion about whether the evidence rose to the level of a reasonable expectation of injury, or indeed whether park wardens should be issued handguns. That is for the appeals officer to determine. However, this Court is required to determine whether the appeals officer had regard to relevant evidence. The failure to take account of relevant evidence by him in this case was patently unreasonable.

[35] I find the decision of the appeals officer was made in error and as a result, the application must be allowed.

JUDGMENT

[36] **IT IS ORDERED that** the application for judicial review is allowed and the matter is returned to the Canada Appeals Office on Occupational Health and Safety for redetermination.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

The relevant statutory provisions are set out in this section.

Canada Labour Code, R.S.C. 1985 c. L-2 :

122.(1) In this Part,	122.(1) Les définitions qui suivent s'appliquent à la présente partie.
"danger" means any existing or potential hazard or condition or any current or future activity that could reasonably be expected to cause injury or illness to a person exposed to it before the hazard or condition can be corrected, or the activity altered, whether or not the injury or illness occurs immediately after the exposure to the hazard, condition or activity, and includes any exposure to a hazardous substance that is likely to result in a chronic illness, in disease or in damage to the reproductive system;	«danger » Situation, tâche ou risque — existant ou éventuel — susceptible de causer des blessures à une personne qui y est exposée, ou de la rendre malade — même si ses effets sur l'intégrité physique ou la santé ne sont pas immédiats — , avant que, selon le cas, le risque soit écarté, la situation corrigée ou la tâche modifiée. Est notamment visée toute exposition à une substance dangereuse susceptible d'avoir des effets à long terme sur la santé ou le système reproducteur.
122.1 The purpose of this Part is to prevent accidents and injury to health arising out of, linked with or occurring in the course of employment to which this Part applies.	122.1 La présente partie a pour objet de prévenir les accidents et les maladies liés à l'occupation d'un emploi régi par ses dispositions.
122.2 Preventive measures should consist first of the elimination of hazards, then the reduction of hazards and finally, the provision of personal protective equipment,	122.2 La prévention devrait consister avant tout dans l'élimination des risques, puis dans leur réduction, et enfin dans la fourniture de matériel, d'équipement, de dispositifs ou

clothing, devices or materials, all with the goal of ensuring the health and safety of employees.

de vêtements de protection, en vue d'assurer la santé et la sécurité des employés.

128.(1) Subject to this section, an employee may refuse to use or operate a machine or thing, to work in a place or to perform an activity, if the employee while at work has reasonable cause to believe that

128.(1) Sous réserve des autres dispositions du présent article, l'employé au travail peut refuser d'utiliser ou de faire fonctionner une machine ou une chose, de travailler dans un lieu ou d'accomplir une tâche s'il a des motifs raisonnables de croire que, selon le cas:

(a) the use or operation of the machine or thing constitutes a danger to the employee or to another employee;

a) l'utilisation ou le fonctionnement de la machine ou de la chose constitue un danger pour lui-même ou un autre employé;

(b) a condition exists in the place that constitutes a danger to the employee; or

b) il est dangereux pour lui de travailler dans le lieu;

(c) the performance of the activity constitutes a danger to the employee or to another employee.

c) l'accomplissement de la tâche constitue un danger pour lui-même ou un autre employé.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1315-06
STYLE OF CAUSE:	UNION OF CANADIAN CORRECTIONAL OFFICERS – SYNDICAT DES AGENTS CORRECTIONNELS DU CANADA – CSN (UCCO-SACC-CSN) - and - ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	October 29, 2007
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DATED:	April 28, 2008

APPEARANCES:

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Richard E. Fader	FOR THE RESPONDENT

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