Case Name:

Pollock v. Gardon Construction Ltd.

Between
Ron Pollock, Lennard Rech, Susan Renard and Douglas Gordon, Applicants, and
Gardon Construction Ltd., and Winnipeg Condominium No. 30, and The Government of Manitoba (The Property Registry (Winnipeg Land Titles Office), Respondents

[2007] M.J. No. 265

2007 MBQB 175

Docket: CI 07-01-50819

Manitoba Court of Queen's Bench
Winnipeg Centre

K.I. Simonsen J.

July 6, 2007.

(63 paras.)

Counsel:

In person: Ron Pollock, Lennard Rech, Susan Renard, Douglas Gordon.

Candace A. Everard, for Gardon Construction Ltd. and Winnipeg Condominium No. 30.

Sean D. Boyd, for The Government of Manitoba (The Property Registry (Winnipeg Land Titles Office).

Diana M. Cameron, for the Manitoba Department of Justice, Constitutional Law Branch.

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1 **K.I. SIMONSEN J.**:-- This application relates to the replacement of windows by the respondent Winnipeg Condominium Corporation No. 30 ("the Condominium Corporation") at a thirty-eight storey condominium complex at 55 Nassau Street North, Winnipeg ("the Property"). The applicants are unit holders of the Condominium Corporation. The applicant Ron Pollock ("Mr. Pollock") co-owns his unit with his sister Natalie Pollock. Amongst other relief, the applicants seek interlocutory injunctions in connection with the window project pending resolution or adjudication of the complaints they have filed with the Manitoba Human Rights Commission ("MHRC") against the Condominium Corporation.

2 The situation that gives rise to the matters before the court is as follows.

3 The Condominium Corporation has retained the respondent Gardon Construction Ltd. ("Gardon") to replace the windows. Although the window project is currently underway, the windows have essentially not yet been replaced in any of the applicants' units.

4 The Condominium Corporation has registered liens and Notices of Exercising Power of Sale against the units of the applicants (other than Ms Renard) arising from their unpaid share of a special assessment levied primarily in connection with the window replacement project.

5 The applicants have filed complaints with MHRC alleging that, in contracting for the window installation, the Condominium Corporation has contravened their rights under *The Human Rights Code*, C.C.S.M. c. H175 ("the *Code*").

6 Although the relief sought in the Notice of Application and two Notices of Constitutional Question filed in this proceeding is unclear, Mr. Pollock advised the court that he seeks the following:

(a) an injunction restraining the Condominium Corporation from taking any steps under the lien and Notice of Exercising Power of Sale which it has registered against the title to his unit until there has been resolution or adjudication of his complaint to MHRC;
(b) an injunction restraining Gardon from replacing the windows in his unit until there has been resolution or adjudication of his complaint to MHRC;
(c) a pending litigation order in respect of his unit;
(d) unspecified relief on the basis that the following violate his rights under ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms:*

(i) the contract between the Condominium Corporation and Gardon for replacement of the windows;
(ii) the vote of the Condominium unit holders in favour of the window replacement;
(iii) the alleged policy of the Manitoba Property Registry requiring a court order to refuse the registration of documentation in furtherance of a Notice of Exercising Power of Sale; and
(iv) the alleged policy of the Government of Manitoba to retain Gardon (although the relevance of this challenge is of some doubt, it will nonetheless be addressed later in these reasons).

7 At the hearing of the application, Mr. Gordon, Ms Renard and Mr. Rech advised that they seek the same relief and adopt the arguments advanced by Mr. Pollock.

8 Counsel for all of the respondents indicated that they take no issue with the irregularities and deficiencies in the pleadings and documents which have been filed by the applicants, and stated that they consent to the adjudication of the above issues on the basis of the material filed.

BACKGROUND

9 In April 2006, the Condominium Corporation entered into a written contract with Gardon for replacement of the windows at the Property at a cost of more than $3 million. The work was to be done over a period of approximately 2.5 years.

10 In May 2006, the Condominium Corporation levied a special assessment against all unit holders, representing each unit's share of the cost of the window project. This special assessment also included a component for replacement of the heating and cooling lines in the Property.

11 In July 2006, Mr. Pollock filed a Statement of Claim (in Queen's Bench File No. 06-01-48045) against the Condominium Corporation in connection with the window project. The claim was dismissed by a master of this court on September 29, 2006, pursuant to a motion brought by the Condominium Corporation. Mr. Pollock appealed this decision, which appeal was later abandoned.

12 Replacement of the windows began in October 2006.

13 In November, 2006, another unit holder, who is not a party to this proceeding, initiated an application (in Queen's Bench File No. CI 06-01-49638) seeking a declaration that the window project was *ultra vires* because it had not been approved by a vote of unit holders.

14 On November 14, 2006, the Condominium Corporation caused to be registered against the title to Mr. Pollock's unit, in the Winnipeg Land Titles Office ("WLTO"), a lien in respect of the outstanding special assessment.

15 In December 2006, Mr. Pollock filed a complaint with MHRC in connection with the windows. In his complaint, he alleges that the Condominium Corporation, in contracting for installation of this particular type of replacement windows, discriminated against his sister because it failed to make reasonable accommodation for her special needs caused by her mental disability, thereby contravening s. 13(1) of the *Code*. He says that his sister suffers from Generalized Anxiety Disorder with panic attacks and Obsessive-Compulsive Disorder and that the windows are not acceptable for her condition because they do not allow sufficient ventilation and are tinted.

16 The other applicants have filed similar complaints with MHRC, also alleging that the Condominium Corporation has contravened s. 13(1) of the *Code* on the basis of disability. Mr. Gordon and Ms Renard are both legally blind but have some limited vision. They say that the tinting of the windows will adversely affect their ability to see within their units. Mr. Rech has been diagnosed with depression. He contends that both the tinting and lack of ventilation will worsen his depression.

17 All of these complaints are now being investigated by MHRC. However, it is anticipated that they may not be resolved for many months, or years.

18 On January 19, 2007, the Condominium Corporation caused to be registered against the title of Mr. Pollock and his sister a Notice of Exercising Power of Sale ("NEPS"). The NEPS indicated that the Condominium Corporation was commencing foreclosure and sale proceedings on account of the Pollocks' failure to pay the special assessment.

19 Similar liens and Notices of Exercising Power of Sale have been registered against the titles of the other applicants (except Ms Renard who has paid the first instalment of the assessment).

20 On February 14, 2007, Justice Jewers delivered his decision in Queen's Bench File No. CI 06-01-49638. He declared that the replacement of the windows required approval of a majority of unit holders and that the contract with Gardon was *ultra vires*, but could be ratified by the requisite majority of unit holders.

21 In his affidavit sworn February 27, 2007, Mr. Pollock deposes that, on February 16, 2007, he went to the WLTO and spoke with an individual who identified himself as "Grant Scott". Mr. Pollock requested a discharge of the lien and NEPS because of his concerns about the windows and the MHRC complaints. He also referred to Justice Jewers' decision. Mr. Pollock says that Mr. Scott declined his request and essentially indicated that the land titles office is not bound by the *Code*, that it is not concerned about irregularities in NEPS and that steps under the NEPS could only be restrained by Mr. Pollock going to court. Mr. Pollock says that, as a consequence, he filed this application on February 23, 2007.

22 Mr. Pollock further deposes that, on February 26, 2007, he met with Richard Wilson ("Mr. Wilson"), Registrar General and Chief Operating Officer of the Manitoba Property Registry, who advised that he would not allow the Condominium Corporation to proceed under the NEPS until the matters in the application had been decided by the court. Mr. Wilson states in his affidavit sworn March 6, 2007 that Mr. Pollock contacted him on February 26, 2007 and served him with a copy of the notice of application in this proceeding. Mr. Pollock disputed the right of the Condominium Corporation to foreclose on his property. Mr. Wilson says that he advised Mr. Pollock that the Registry could not refuse to process documents in furtherance of the NEPS unless a pending litigation order were obtained and registered against the property. However, as a courtesy, because litigation had been initiated, Mr. Wilson agreed to advise Mr. Pollock of any further documents registered to proceed on the NEPS and indicated that the processing of such documents could be delayed briefly if Mr. Pollock indicated he was seeking a pending litigation order from the court.

23 A vote of the unit holders was held on April 11, 2007. A large majority of unit holders voted in favour of the window replacement project and the contract with Gardon.

24 When this application came before my colleague Justice McKelvey on April 12, 2007, she granted an interim injunction preventing the Condominium Corporation from taking steps under any lien and NEPS registered against the units owned by Mr. Pollock and the three additional (then anticipated) applicants until the hearing of the application.

25 On May 18, 2007 at the hearing of this application, I granted further interim injunctions preventing steps being taken pursuant to the NEPS or the replacement of the windows in the applicants' units pending this decision; this was done in order to preserve the *status quo*.

RELEVANT LEGISLATION

26 The applicants' complaints to MHRC allege a contravention of s. 13(1) of the *Code* which provides as follows:

Discrimination in service, accommodation, etc.

13(1) No person shall discriminate with respect to any service, accommodation, facility, good, right, licence, benefit, program or privilege available or accessible to the public or to a section of the public, unless bona fide and reasonable cause exists for the discrimination.

27 They allege discrimination on the basis of ss. 9(1)(d) and 9(2)(l) of the *Code*:

"Discrimination" defined

9(1) In this Code, "discrimination" means

...

(d) failure to make reasonable accommodation for the special needs of any individual or group, if those special needs are based upon any characteristic referred to in subsection (2).

Applicable characteristics

9(2) The applicable characteristics for the purposes of clauses (1)(b) to (d) are

...

(l) physical or mental disability or related characteristics or circumstances, including reliance on a dog guide or other animal assistant, a wheelchair, or any other remedial appliance or device.

28 As for the Condominium Corporation's rights upon non-payment of the special assessment, the relevant provisions are contained in *The Condominium Act*, C.C.S.M. c. C170 and *The Real Property Act*, C.C.S.M. c. R30.

29 Section 14(1)(e) of *The Condominium Act* provides a condominium corporation with a right to a lien against the title to a unit when a unit owner is in default of his or her obligation to pay common expenses or other amounts the condominium is entitled to recover from the owner. Pursuant to s. 14(1)(f) of *The Condominium Act*, the lien may be enforced in the same manner as a mortgage is enforced pursuant to *The Real Property Act*.

30 Section 134(1) of *The Real Property Act*, as follows, provides that where there is default on payment of a sum secured by a mortgage, the mortgagee may register a notice of sale in the land titles office and must serve the owner with the notice. Section 135(1) of *The Real Property Act* provides that, if default continues for one month from the date of service of the notice, the mortgagee may apply to the District Registrar for an order permitting him to sell.

Notice of sale on default

134(1) Where default is made in the payment of the principal sum, interest, annuity, or rent charge, or any part thereof, secured by a mortgage or encumbrance registered under this Act, or in the observance of any covenant expressed or implied in the mortgage or encumbrance, if the default is continued for the space of one month, or for such longer period of time as is therein for the purpose expressly limited, the mortgagee or encumbrancer may forthwith give a written notice, a copy of which shall be filed in the land titles office, to the mortgagor or owner of land subject to an encumbrance, and to every other person appearing at the time of filing the notice to have any mortgage, encumbrance, or lien upon, or estate, right, or interest in, the lands subsequent to his mortgage or encumbrance requiring the mortgagor or owner of land subject to an encumbrance and the other persons to be served with the notice to pay, within a time to be specified therein, the money then due or owing on the mortgage or encumbrance or to observe the covenants therein expressed or implied, and stating that in case default is made in so doing, all remedies provided in this Act will be resorted to, to remedy the default.

Application for order to sell

> 135(1) Where the default in payment or in the observance of any covenant continues for the space of one month from the date of service of the notice, the mortgagee or encumbrancer may make application in writing to the district registrar for an order permitting him to sell the land, or a part thereof, and all the estate or interest therein of the mortgagor or owner of land subject to an encumbrance, and of the other persons entitled to be served with the notice.

31 Also relevant are ss. 134(3) and 134(4) of *The Real Property Act*, which provide as follows:

> Effect of pending litigation order
>
> 134(3) Except as provided in subsection (4), a pending litigation order registered in the land titles office subsequent to the registration of a mortgage shall not affect the right of the mortgagee to proceed under the mortgage with mortgage sale and foreclosure proceedings, and any title issued to a purchaser, or to the mortgagee, pursuant to such proceedings, shall issue clear of, and unaffected by the pending litigation order.
>
> Status of plaintiff
>
> 134(4) The plaintiff as shown in a pending litigation order registered in a land titles office shall be deemed to be a person interested in the land to the same extent, and in the same manner, as though he had given notice of his claim by filing a caveat; and, where the pending litigation order discloses that the mortgagee is a party to the action, or where the district registrar has been served with written notice by the plaintiff as shown in the pending litigation order that the mortgage, or the right of the mortgagee to proceed, is called into question in the action, the district registrar shall not make an order authorizing a sale or a final order of foreclosure, until the claim has been resolved, or the pending litigation order is disposed of by order of the court.

ANALYSIS AND DECISION

A. APPLICATIONS FOR INJUNCTIONS

32 The applicants seek interlocutory injunctions that are to remain in effect until the resolution or adjudication of their MHRC complaints.

33 Section 55 of the *Code*, as follows, states that the court may grant an injunction to restrain a person from depriving any other person in the enjoyment of a right under the *Code*:

> Injunction
>
> 55 The Commission or any person may, by statement of claim, bring action against any person for an injunction to restrain the person from depriving, abridging or restricting or attempting to deprive, abridge or restrict on the basis of any characteristic referred to in subsection 9(2), any other person in the enjoyment of a right under this Code, and the court may grant the injunction on such terms and conditions as it considers appropriate.

34 Further, the Supreme Court of Canada held, in ***Brotherhood of Maintenance of Way Employees Canadian Pacific System Federation v. Canadian Pacific Ltd.*** [1996] S.C.J. No. 42, that courts have jurisdiction to award interim injunctive relief where final relief will be granted in another forum. Indeed, the respondents have not raised any issue as to the court's jurisdiction.

35 In cases involving applications for interlocutory injunctions, it is well-established that the courts are to apply the traditional test set out by the Supreme Court of Canada in ***RJR-MacDonald Inc. v. Attorney-General of Canada*** [1994] S.C.J. No. 17 in determining whether the injunction should be granted. None of the parties in the case before me suggested that the test should be otherwise.

36 In ***RJR-MacDonald***, *supra*, the court held that the following three-part test should be applied to applications for interlocutory injunctions:

(a) whether there is a serious issue to be tried;
(b) whether the applicant will suffer irreparable harm if the injunction is not granted; and
(c) whether the balance of convenience weighs in favour of granting the injunction.

37 As to whether there is a serious issue to be tried, the threshold is a low one.

a. Injunction Restraining the Condominium Corporation from Taking Steps under the NEPS

38 In deciding whether to grant this injunction, I must first consider whether there is a serious issue regarding the applicants' obligation to pay the special assessment.

39 In their complaints to MHRC, the applicants assert that the Condominium Corporation has contravened the *Code* because the type of windows chosen does not reasonably accommodate their special needs caused by their disabilities. However, their complaints do not raise any issue as to their obligation to pay the special assessment levied against them. In fact, during oral argument, Mr. Pollock stated that the relief he is seeking from MHRC does not include a request that it conclude that he does not owe the assessment for the window project.

40 The only concerns expressed by Mr. Pollock in connection with the assessment are arguments touched upon in his motions brief, as follows:

(a) the Condominium Corporation cannot claim for costs incurred prior to the vote of the unit holders; and
(b) the Condominium Corporation is charging a criminal rate of interest because it is charging interest on a debt which does not exist due to the argument set out in subparagraph (a).

41 These matters are not properly before me. Evidence and comprehensive arguments on these issues were not submitted. Even if I were to address these issues, I expect that I would have difficulty finding that they raise serious questions when Justice Jewers concluded that a vote of the unit holders could ratify the contract (para. 93(b)), and that vote has now taken place.

42 Therefore, there is no serious issue to be tried in connection with the applicants' indebtedness to the Condominium Corporation.

43 The applicants contend that they will suffer irreparable harm if the injunction is not granted because foreclosure under the NEPS will result in their losing their properties. The Condominium Corporation and Gardon say that the applicants can pay the outstanding assessment and thereby prevent steps being taken in furtherance of foreclosure. They further submit that, although these condominium units are the applicants' homes, loss of the units through foreclosure can be compensated for in damages and, therefore, there is no irreparable harm.

44 I agree that the applicants can prevent the foreclosure by paying the assessment. There is no evidence that the applicants would suffer financial hardship if they were to do so. I, therefore, conclude that the applicants would not suffer irreparable harm if the injunction was denied.

45 I now turn to the balance of convenience. The windows are being replaced with the approval of the majority of the unit holders. The Condominium Corporation is contractually bound to pay Gardon for the window project. The applicants (with the exception of Ms Renard) have not paid the special assessment. NEPS have been registered; foreclosure is clearly available to the Condominium Corporation by virtue of the provisions of *The Condominium Act* and *The Real Property Act*. Even if MHRC were to conclude that there should be modifications to the windows or that different windows should be installed in these units, this would not change the applicants' obligation to pay the special assessment. Rather, the Condominium Corporation could be ordered to take the appropriate steps or pay damages. I have no reason to believe that it would not be able to comply with any order of MHRC. Taking all of these factors into account, I conclude that the balance of convenience does not weigh in favour of granting the injunction.

46 Therefore, I dismiss the application for an injunction restraining the Condominium Corporation from taking steps under the NEPS pending resolution or adjudication of the MHRC complaints.

b. Injunction Restraining Gardon from Replacing the Windows in the Applicants' Units

47 As to whether there is a serious issue in connection with the type of replacement windows to be installed in the applicants' units, this is difficult to assess when the issue is the subject of the MHRC complaints and is therefore within the exclusive jurisdiction of MHRC. Nonetheless, even if there were a serious issue to be tried, I am not persuaded that consideration of the other two criteria in ***RJR-MacDonald*** favour granting the injunction, for the reasons that follow.

48 With respect to irreparable harm, the applicants say that the installation of the windows in their units will present difficulties because of their disabilities. Mr. Pollock submits that he and his sister will move immediately if they are at risk of the windows in their unit being replaced at any time. However, none of the applicants have filed medical or other evidence indicating that they would suffer irreparable harm if they had to live with the replacement windows pending determination of the MHRC complaints.

49 In my view, there are significant factors which tip the balance of convenience in favour of declining this injunction. First, presumably litigation would ensue between the Condominium Corporation and Gardon if the window project were interrupted. Further, Robert Shafer, President of the Condominium Corporation, has provided evidence about the schedule of the project which is relevant. Specifically, he has deposed that work commenced, and is continuing, on the north side of the Property. (As well, over the winter of 2006-2007, Gardon replaced all "D" style windows at the Property.) Following the work on the north side, Gardon will replace the windows on the west side of the Property, followed by the south and finally the east side. All of the work is expected to be complete by early 2009. The units of both Mr. Pollock and Mr. Gordon are on the east side of the property, and Ms Renard's unit is on the south, as a result of which their windows will not likely be replaced for sometime. Mr. Rech is on the west and his windows will likely be replaced sometime in 2007. Given these timeframes, it may well be that MHRC will have dealt with the complaints by the time Gardon begins working on most of the applicants' units, thus rendering an interlocutory injunction unnecessary.

50 Finally, the Condominium Corporation's engineer, John Wells of Crosier Kilgour & Partners Ltd., has advised that, if even one original window is left in the Property, wind driven rain penetration will result, such that water will cascade downward inside the wall, causing leakage and corrosion to the condominium units below. In other words, if all of the windows in the Property are not replaced, there will be a breach of the building envelope. Although the applicants have filed the affidavit of Peter Turner, an industrial engineer and principal of PT Management and Consultant Services Inc., Mr. Turner does not specifically address these concerns presented by Mr. Wells.

51 In all, I conclude that the balance of convenience weighs in favour of allowing the window replacement to continue, including replacement of the windows in the applicants' units, and having any modifications to the applicants' windows as may be ordered by MHRC dealt with following the Commission's decision.

52 Therefore, I dismiss the application for an injunction restraining Gardon from replacing the windows in the applicants' units pending resolution or adjudication of the MHRC complaints.

B. APPLICATION FOR PENDING LITIGATION ORDER

53 Sections 134(3) and (4) of *The Real Property Act* read together provide that a pending litigation order will stop a sale if it shows that the mortgagee (lien holder) is a party to the action or the mortgagee's (lien holder's) entitlement to sell the property is called into question.

54 Section 58(1) of *The Court of Queen's Bench Act*, C.C.S.M. c. C280, as follows, provides that pending litigation orders can be obtained in proceedings involving an interest in land:

> Pending litigation order
>
> 58(1) The commencement of a proceeding that involves an interest in land is not notice of the proceeding to a person who is not a party until a pending litigation order made by the court is registered in the land titles office of the land titles district in which the land is situated.

55 I am not satisfied that the applicants' Notice of Application or their complaints to MHRC constitute claims to an interest in land such that they should be granted a pending litigation order. Rather, their claims are essentially for injunctive relief or damages based on an alleged contravention of the *Code*.

56 Further, the Condominium Corporation and Gardon maintain that a pending litigation order is not appropriate in these circumstances because it would not be registered to give notice of a claim to an interest in land but rather would be nothing more than a tactic to frustrate or postpone any sale under the NEPS. They rely on the decision of the Manitoba Court of Appeal in ***Winkler Credit Union Ltd. v. Driedger, Driedger and Driedger Developments Ltd.*** (1985) 31 Man. R. (2d) 43, at para. 12 as follows:

> ... The purpose of the registration was not to give notice that the defendants are claiming an interest in land owned by the plaintiff. The tactic of the defendants was to register the *lis pendens* in an attempt to prevent the plaintiff from exercising its rights as mortgagee to proceed with the mortgage sale or foreclosure proceedings of the mortgagors' lands.

57 Therefore, the Court of Appeal declined to grant the *lis pendens* (now known as a pending litigation order).

58 In my view, the comments in ***Driedger***, *supra*, apply to this case. That is, the applicants seek a pending litigation order for the sole purpose of thwarting a sale pursuant to the NEPS. This is not appropriate.

59 Therefore, the application for a pending litigation order is dismissed.

C. CHARTER CHALLENGES

60 As stated earlier, the applicants challenge the following on the basis that they violate ss. 7 and 15 of the *Charter*:

(a) the contract between the Condominium Corporation and Gardon for replacement of the windows;
(b) the vote of the condominium unit holders;
(c) the alleged policy of the Property Registry as to the documentation it requires in order to refuse for registration documentation in furtherance of a Notice of Exercising Power of Sale; and
(d) the alleged policy of the Government of Manitoba to retain Gardon.

61 Section 7 provides that "everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice". Section 15 provides that every individual has the right to equal protection and equal benefit of the law without discrimination.

62 I am satisfied that the applicants' *Charter* arguments can be dealt with by the following brief comments:

(a) The applicants' challenge to the contract with Gardon and the vote of unit holders cannot succeed because the *Charter* does not apply to private entities (s. 32(1) of the *Charter*);
(b) Mr. Pollock has deposed to the alleged policy of the Property Registry on the basis of information he says was provided to him by Mr. Scott. Although he explains his conversation with Mr. Scott in some detail, the only part of this discussion which, in my view, could constitute a policy is the statement that the Registry would require a court order in order to refuse registration of documents pursuant to a NEPS. This is generally consistent with the advice Mr. Wilson says he gave to Mr. Pollock, namely that the Registry could not refuse to process documents in furtherance of a NEPS unless a pending litigation order were obtained.

    If this is the policy of the Registry, presumably it is based on s. 134(4) of *The Real Property Act*. Under questioning during oral argument, Mr. Pollock clarified his *Charter* challenges and stated that he does not challenge the validity of s. 134(4). In fact, Mr. Pollock relies on this section in seeking a pending litigation order. If there is no challenge to the section, I fail to see how there can be a meaningful challenge to any alleged policy based on the section.

(c) As to the alleged policy of the Government of Manitoba to retain Gardon, Mr. Pollock submits that such a policy violates s. 15 of the *Charter* because Gardon engages in discriminatory practices such as this window replacement project. Mr. Pollock has sworn an affidavit stating that he has seen Gardon doing renovations at premises occupied by the Government of Manitoba and he also refers to printouts of internet searches which he says show Gardon's involvement in other government work. In my view, this is not sufficient evidence of any policy on the part of the Government of Manitoba. In the absence of a proper factual foundation, I need not address the *Charter* arguments raised.

CONCLUSION

63 The application is, therefore, dismissed. If there is no agreement on costs, they may be spoken to.

K.I. SIMONSEN J.

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