

BRITISH COLUMBIA LABOUR RELATIONS BOARD

MICHAEL NOLIN

("Nolin")

-and-

DERYK KENDALL, RANDY KATZMAN, ROGER ARNOLD, JAY WATSON, GREG
KUSE, AND RICK CARLSON DBA CUELENAERE, KENDALL, KATZMAN & WATSON

(the "Law Firm")

-and-

SUSAN MACLEOD and DENAE FELLERS

("MacLeod" and "Fellers", together, the "Certain Employees")

-and-

GRANT FRANCIS

("Francis")

-and-

WAL-MART CANADA CORP.

("Wal-Mart" or the "Employer")

-and-

UNITED FOOD AND COMMERCIAL WORKERS
INTERNATIONAL UNION, LOCAL 1518

(the "Union")

PANEL: Brent Mullin, Chair
Michael Fleming, Associate Chair
Allison Matacheskie, Vice-Chair

APPEARANCES: Michael Hunter, Q.C., for Nolin and the
Law Firm
Peter M. Archibald, Q.C., for Wal-Mart
Chris Buchanan and Brandon Quinn, for
the Union

CASE NO.: 55022 and 55025

DATE OF DECISION: March 30, 2007

DECISION OF THE BOARD

I. **NATURE OF APPLICATION**

1 Nolin and the Employer apply under Section 141 of the *Labour Relations Code*
(the “Code”) for leave and reconsideration of the decision of the Labour Relations Board
(the “Board”) in BCLRB No. B123/2006 (the “Original Decision”). They argue that the
Original Decision is inconsistent with principles expressed or implied in the Code.

2 The Original Decision finds that statements made by Nolin in a letter dated
February 4, 2005 (the “Letter”) were coercive and intimidating, contrary to Section 9 of
the Code. Nolin, a lawyer who resides in Saskatchewan, wrote the Letter on his firm’s
letterhead. It was addressed to the employees of the Wal-Mart store in Dawson Creek,
B.C., which at the time was in the midst of an organizing drive by the Union. Nolin
urged an employee at the store, McLeod, to distribute the Letter to other employees at
the store, which she did the evening of February 4.

3 Among other things, the Letter states that the Dawson Creek Wal-Mart might
shut down if it were unionized, and that only Nolin could tell the employees because
Wal-Mart could not; that the Union lied to employees when it told them there would be a
representation vote if it obtained a sufficient number of cards; that employees should
not sign Union cards because there could be a certification without a representation
vote; and that the Union violated the Code by offering employees \$1,000 to sign Union
cards.

4 Before the original panel Nolin did not assert that these statements were true.
Rather, he submitted that, as he was neither the employer Wal-Mart nor acting on
behalf of Wal-Mart, his statements could not be seen as threatening. He therefore

submitted they were protected by Section 8 as "views" he was entitled to express. The original panel rejected this argument, finding in the circumstances that the statements were coercive or intimidating and therefore they fell outside the protection of Section 8.

5 In his application for leave and reconsideration, Nolin submits the Original Decision erred in finding his statements coercive or intimidating and therefore falling outside the protection of Section 8. He argues that a person cannot be guilty of coercion or intimidation where they are unable to carry out a threat, and further that a person is not guilty of coercion or intimidation where there is no basis for finding that they were passing on "inside information" from an employer.

6 The Original Decision dismisses the Union's complaints against Wal-Mart. Nonetheless, Wal-Mart seeks leave and reconsideration of the Original Decision's finding that Nolin breached the Code, and of the original panel's remedial order that required Wal-Mart to provide the names and addresses of all Dawson Creek employees to a third party mail service provider of the Union's choice.

7 In rendering this decision, we have considered the submissions of the parties. Rather than summarizing these submissions, they are subsumed in the analysis portion of this decision.

8 II. ANALYSIS AND DECISION

8 An application under Section 141 must meet the Board's established test before leave for reconsideration will be granted. An applicant must demonstrate a "good arguable case of sufficient merit that it may succeed on one of the established grounds for reconsideration": *Brinco Coal Mining Corporation*, BCLRB No. B74/93 (Leave for Reconsideration of BCLRB No. B6/93), 20 CLRBR (2d) 44. A *prima facie* case will not suffice; an applicant must raise a serious question as to the correctness of the Original Decision.

9 As noted in the Original Decision, this matter involves an unusual, if not unique, set of factual circumstances, in that the person claiming Section 8 protection is not the union, the employer, an employee of the employer, or a member of the union. Rather, it is a lawyer who is a stranger to the labour relations situation on which he expressed views. The language of Section 8 is clearly broad enough to encompass views expressed by such a person. However, to date, the Board's policies under Section 8 have been developed in the more common context of views expressed by the interested or affected parties, that is, the union, the employer or the employees.

10 This case requires that the Board consider how Section 8 applies in a context that the Board has not previously considered. As this is a case of first instance, and raises some unusual factual and policy issues, we find it appropriate to grant leave for reconsideration of the Original Decision with respect to the question of how Section 8, and the Board's policies developed pursuant to that provision, apply to the statements at issue in this case.

11 With respect to the more common context before the Board, the Board has made a number of policy statements concerning the expression of views under Section 8, which can be summarized as follows.

12 Expression rights have been broadened with the 2002 amendments to Section 8 of the Code: *Convergys Customer Management Canada Inc.*, BCLRB No. B62/2003 (“*Convergys*”), paras. 95-118. But equally, those rights must not be exercised in a manner which is coercive or intimidating: Sections 8 and 9 of the Code: *Ibid.* One of the effects of the amendments is that the expression of views under the Code may interfere with union organizing (Sections 6(1) and 8), but it must not intimidate or coerce (Sections 8 and 9).

13 Expression rights include the right to hear or receive views: *RMH Teleservices International Inc.*, BCLRB No. B188/2005 (Leave for Reconsideration of BCLRB No. B345/2003), para. 39 (“*RMH*”). Under the Code, employees have the right to hear or receive views about unionization. In our view, the Legislature has decided this supports the employees’ ability to make an informed choice.

14 Employees also have the right under the Code not to be subjected to coercion or intimidation from others expressing their views. This supports the employees’ right to make a free choice in respect to unionization.

15 The employees’ rights to an informed and free choice are supported by Section 2(a) of the Code. It requires the Board to exercise its duties under the Code in a manner that “recognizes the rights and obligations of employees”, as well as unions and employers.

16 The legislative intent in the most recent amendments to the Code was thus to broaden expression rights, while narrowing the legislative restrictions: *RMH*, para. 36. This was captured and well explained in the original decision in *Convergys*, paras. 104-118. That decision notes the expanded scope of permissible expression as being one in which expression rights are not to “be scrutinized against a standard of reasonableness” (para. 104), “undue influence” is not prohibited (paras. 105-110), and thus views “may reflect a person’s bias and be uninformed or unreasonable” (para. 112). However, the expression of views must not be coercive or intimidating (paras. 114-116) and the nature and impact of the expression of views will be measured contextually (paras. 114-115).

17 By way of summary, the explanation in *Convergys* concludes:

Taken as the whole, the Legislature’s amendments to Sections 2, 6(1) and 8 reflect important judgments about the ability of employees to make free choices about union representation, despite attempts to influence their decision-making through the expression of views that are not coercive or intimidating. The amendments reflect the confidence that a reasonable employee can make inquiries and assess these views, knowing that most often, their employer will view their participation in a union and collective bargaining as contrary to the employer’s self-interest. Hence, the expression of non-coercive or non-intimidating views based on the preference to resist certification are *prima facie* protected by Section 8 and do not constitute interference for the purposes of Section 6(1). This reasoning equally applies if views are expressed in what might be characterized a campaign to influence employees’ decision-making about union representation.

In the absence of a deliberate lie, it is not the Board's role to police the accuracy or reasonableness of views expressed in accordance with Section 8. (para. 118)

18 The Board applied the approach set out in *Convergys in British Columbia Lottery Corporation*, BCLRB No. B289/2003 (Leave for Reconsideration of BCLRB No. B82/2003) ("*British Columbia Lottery Corp.*"). The original decision in that case had found that an employee (Mike Wong ("Wong")) had breached Section 9 of the Code through inaccurate statements he had made to other employees in an e-mail regarding the effect of the freeze provision in Section 32 of the Code. It was held on reconsideration that Wong's statements could not be found to be coercive under the analysis in *Convergys*.

19 The original panel in *British Columbia Lottery Corp.* had concluded that Wong's incorrect statements of the law had risen to the level of intimidation or coercion under Section 9 of the Code. The original panel did so on the basis of the following analysis:

We will first deal with Wong's conduct. It is an undisputed fact that, ten days before the second certification vote, Wong incorrectly reported in an e-mail to the warehouse employees that if the Union became certified they would automatically be protected against layoffs for four months, and that after this four month period the Employer would have to justify and consult with the Union before making any staffing reductions or changes. These incorrect statements were made in the context of layoffs which had already been announced and were "on everyone's mind". *In our view the references to layoffs, job cuts and downsizing in Wong's e-mail amount to "threats of adverse consequences" and would reasonably instil "fear" in the warehouse employees about their job security.* The fact that Wong may have innocently misstated the law or the fact that the layoffs were Employer-initiated does not, in our view, lessen the effect of Wong's misstatements. (BCLRB No. B82/2003, para. 42, emphasis added)

20 On reconsideration, the union argued that Wong's misstatement could not be construed as intimidation or coercion. The union submitted:

...that the conclusion that such an innocent misstatement of the law by a junior employee constituted coercion or intimidation within the meaning of Section 9 is inconsistent with Code principles, and unsustainable in light of the Board's recent statement of policy with respect to innocent misrepresentations by employers in *Convergys Customer Management Canada Inc.*, BCLRB No. B62/2003 ("*Convergys*"). (*British Columbia Lottery Corp.*, para. 25)

21 In its reconsideration decision, the Board agreed with that submission:

Based on the law and policy or legal standard as set out in *Convergys* regarding what constitutes protected communication and what falls outside it as coercion or intimidation, we find that the result in the Original Decision could only have been reached by applying a different legal standard than that in *Convergys*. In particular, the Original Decision did not give the weight required

under the *Convergys* analysis to: (1) the basic right to communicate [and] the need to treat employees as adults (including their ability to recognize a situation as one which would naturally include promises and puffery); (2) the ability the employees had to check whether what Wong was asserting was true; and (3) the ability of the Employer had to reply and correct what Wong was asserting. Applying the *Convergys* legal standard (i.e., law and policy) in such circumstances, we find that Wong's communications did not constitute coercion or intimidation and was protected under Section 8 of the Code. (para. 43)

In doing so, the Board noted:

While a misrepresentation may "cross the line" from being merely a persuasive statement to constituting coercion or intimidation, in order to do so the misrepresentation must be "so outrageous or inflammatory that it places undue or excessive pressure" upon employees with respect to the issue of union representation: *British Columbia Housing Management Commission*, BCLRB No. B3/93 ("*BC Housing*"). (para. 46)

22 The reconsideration panel found that Wong's misstatements could not be construed as either threatening or fear inducing:

The observation that Wong's misstatement "would have naturally fed the employees' fears about job security" cannot, in our view, reasonably be taken to amount to a finding that Wong's statement was threatening or fear-inducing. The employees' "fears" about job security would have resulted from the Employer's March 2 announcement of layoffs. The Original Panel noted that the layoffs had already been announced and were "on everyone's mind" at the time of the e-mail (Original Decision, paragraph 42). Accordingly, it cannot be said that Wong's e-mail reminded the employees of something they might otherwise have forgotten or overlooked, and in that way induced fear which did not otherwise exist.

While the e-mail undoubtedly addressed the employees' fears occasioned by the announcement of layoffs, far from increasing those fears, it could at most have only provided a false sense of reassurance that certification would provide protection from layoff. As Wong's misstatement about the level of protection from layoff accorded by the Code was neither threatening nor fear-inducing, the mere fact that it was objectively likely to influence the vote is not in itself enough to transform it from a persuasive (albeit mistaken) statement by one employee to others into an intimidating or coercive one within the meaning of Section 9. In order to "cross the line", the employee misrepresentation must be "so outrageous or inflammatory that it places undue or excessive pressure" upon employees (*BC Housing*, page 11). (paras. 49-50)

23 The Board concluded on this issue as follows:

If it is basically not the Board's role to police the accuracy of views expressed by employers under Section 8, then it is also not

our role to police the accuracy of views expressed by employees during a representation campaign. In fact, this is reflected in the Board's policy with respect to employee speech, as illustrated by the decisions cited above including *Sacpyr*, *T. Jordan*, and *Excell*. If anything, that policy has been reinforced by the recent Code amendments and the Board's interpretation of them in *Convergys*.

Applying this approach to the issue of "innocent" (i.e., non-deliberate) employee misrepresentations, we find the inaccuracies in Wong's e-mail did not, as a matter of law and policy, constitute coercion or intimidation within the meaning of Section 9. Accordingly, we set aside this finding of the Original Panel. The implications of this determination for the remedy ordered by the Original Panel will be discussed below. (paras. 57-58)

24 Our task in the present matter is to apply the above law and policy under the Code to the reconsideration applications in this case, bearing in mind the context in which the issues arise.

25 The facts in the present case are set out in the Original Decision and need not be repeated at length here. Their essence is captured in summary form in paragraph 60 of the Original Decision:

The Union takes issue with the following comments in the February 4 Letter:

- That the Dawson Creek Wal-Mart might shutdown if it was unionized and that only Nolin could tell employees because Wal-Mart could not.
- That the Union lied to employees when it told them there would be a representation vote if it obtained a sufficient number of cards;
- That employees should not sign Union cards because there could be a certification without a representation vote; and
- That the Union violated the Code by offering employees \$1,000 to sign Union cards.

Nolin, who is a lawyer, was the author of this letter.

26 The prohibition on coercion and intimidation has been a longstanding one in the Code. A helpful explanation of the Board's approach to those concepts is found in *North Shore Association for the Mentally Handicapped*, BCLRB No. B474/99:

In our view, the types of conduct which most clearly fall within the notion of coercion or intimidation involve a person using force, threats of adverse consequences, fear or compulsion for the purpose of controlling or influencing an employee's freedom of association. A violation of the Code will more likely be found where the person is an employer or exercises "employer-like influence".

Economic pressures are perhaps the most obvious forms of conduct caught by this prohibition... (para. 57)

As well, the following passage from *British Columbia Lottery Corp.* is pertinent:

While a misrepresentation may "cross the line" from being merely a persuasive statement to constituting coercion or intimidation, in order to do so the misrepresentation must be "so outrageous or inflammatory that it places undue or excessive pressure" upon employees with respect to the issue of union representation: *British Columbia Housing Management Commission*, BCLRB No. B3/93 ("*BC Housing*"). (para. 46)

However, it must also be recalled that the Code now allows for expression under Section 8 to interfere with union organizing (whereas it previously prohibited that under Section 6(1) of the Code), though not to coerce or intimidate.

27 Nolin submits that, because he was not the Employer nor speaking on behalf of the Employer, his statements could not reasonably be seen as "threatening". Nor was there any basis on which could be seen as passing on "inside information" from the Employer.

28 We find that, even if we were to accept the argument on the latter point, the original panel did not err when it concluded that Nolin's statements were coercive or intimidating, notwithstanding he was not in a position (as the Employer or its spokesperson) to carry out the threat of store closure stated or implied in the Letter.

29 We find Nolin's letter to be coercive. In it, Nolin wrongly threatened adverse consequences, used "fear or compulsion for the purpose of controlling or influencing an employee's freedom of association", cloaked himself with "employer-like influence" while playing upon the economic pressures the employees were already feeling regarding the Jonquiere store closure, and put forward misrepresentations which were "so outrageous or inflammatory" that they placed undue or excessive pressure on the employees. We will explain each point in turn.

30 Nolin threatened adverse consequences when he wrongly asserted that the employees should not sign Union cards because there could be certification without a representation vote. He added to the force of this and all his other comments by playing upon his status as a lawyer, and one allegedly with expertise and experience in the area at that. To buttress the impact of his statement in that capacity he wrote his letter using his firm's letterhead and repeatedly articulated his statements as being his "opinion". He was thus giving force to his comments as if they were an informed, considered legal opinion.

31 Nolin was ensuring that his comments, wrongful as they were, would have as much force and weight as possible. We find his intent was to create fear in the employees in respect to his legally wrong view of the consequences of signing a Union card. The letter was intended to be, and was, coercive in that regard.

32 Nolin also sought to give himself in his letter "employer-like influence". Along with the above noted assertions of lawyer status, expertise and experience in the area,

Nolin specifically notes that he can, with the benefit of those characteristics, tell the employees things that the Employer cannot. In particular in that regard, as a supposedly informed lawyer, he plays upon the employees' already existing fears for their job security given the Jonquiere store closure. We find he is in fact deliberately attempting to use pressure and give his letter a coercive effect. We find the letter was coercive in that regard.

33 Lastly, at least one of Nolin's comments was "so outrageous or inflammatory that it place[d] undue or excessive pressure" upon the employees in respect to the union choice issue. That assertion is that the Union had offered employees a thousand dollars to sign a Union card.

34 It should be noted that there has been no claim by Nolin in the proceedings before the Board that there is any element of truthfulness in this assertion. Quite to the contrary, the original panel found that there was no support for either this assertion or the assertion that the Union was lying to the employees when the Union assured the employees that, irrespective of signing a card, they would be entitled to a representation vote under the Code before being unionized: Original Decision, paras. 66-67.

35 We find that the totally non-supported and unfounded assertion that the Union was bribing other employees with large sums of money to sign Union cards crosses the line from being a mere representation to being one which is so outrageous or inflammatory that it constitutes coercion.

36 As well, in Nolin's comments, he did not simply assert the Union was merely wrong (although, of course, it was he who was providing misinformation), but rather the Union had "lied" to the employees in that regard. Nolin's implication is that the Union knew what the truth was, but deliberately told the employees the opposite.

37 It is not necessary to find that Nolin had, or could reasonably be perceived by an employee to have, "inside information" (Original Decision, para. 64) to conclude that these comments in his letter are coercive or intimidating. The allegations by Nolin, that the Union was bribing employees and, in his role as a lawyer, that the Union was lying to employees in respect to legal matters, were not a legitimate exercise of the expression of views protected by Section 8 of the Code. They were a coercive abuse of that important right in Section 8 of the Code.

38 A central argument of both Nolin and the Employer is that coercion or intimidation requires there be a credible threat of adverse consequences, with the person having the ability to carry out the threat. They assert this is the long-standing jurisprudence of the Board: *British Columbia Housing Management Commission*, BCLRB No. B3/93; *Teleflex (Canada) Limited*, BCLRB No. B69/97; *Procon Miners Inc.*, BCLRB No. B225/94. They say that Nolin could not reasonably be perceived by the employees to have this capability. Nor could he reasonably be perceived to have the "inside knowledge" which the original panel attributed to him.

39 Nolin and the Employer are correct that the Board has, in some of its decisions, focused on the need for a threat, and the capacity (or reasonably perceived capacity) to carry out the threat, in order for there to be coercion. However, it has not done so exclusively and those factors are not in fact essential requirements in the legal roots of

coercion in *Therien v. International Brotherhood of Teamsters, etc., Local No. 213 (1958)*, 27 W.W.R. 49, at p. 64, cited in *R.M. Hardy & Associates Ltd.*, BCLRB No. 41/77, [1977] 2 Can LRBR 357, at p. 370. This is in effect noted in the passage from the *British Columbia Lottery Corporation* case in paragraph 70 of the Original Decision:

In *British Columbia Lottery Corp.*, BCLRB No. B289/2003 (Leave for Reconsideration of BCLRB No. B82/2003) 99 CLRBR (2d) 93 ("*BC Lottery*"), the Board dealt with the erroneous comments of an employee regarding job protection following union certification and commented as follows:

The Board has noted that "[p]romises and puffery, and hyperbole and exaggeration are common features of representational campaigns" and that "[t]o the extent that a party has the opportunity of responding to allegations in a representational campaign, the less likely it is that a Section 9 complaint will succeed": *7-Eleven Canada Inc.*, BCLRB No. B91/2000 at paragraphs 240 and 254 ("*7-Eleven*"). While a misrepresentation may "cross the line" from being merely a persuasive statement to constituting coercion or intimidation, in order to do so the misrepresentation must be "so outrageous or inflammatory that it places undue or excessive pressure" upon employees with respect to the issue of union representation: *British Columbia Housing Management Commission*, BCLRB No. B3/93 ("*BC Housing*").

Communications by the employer to its employees about representation issues have traditionally been regulated more stringently under the Code than communications amongst employees. However, as we have noted, even with respect to employers, the Board, in response to recent legislative changes broadening speech rights, has concluded that it will not necessarily find "innocent" (i.e., not deliberate) misrepresentations by employers to be coercion or intimidation within the meaning of Section 9 (*Convergys*, paragraph 133). (paras. 46 -47) (emphasis added)

40 As we have explained above, in our view Nolin's assertions that the Union had bribed employees and was lying would fall within the category in the *British Columbia Housing Management Commission* case of misrepresentations that had crossed the line from being persuasive to being coercive in nature because they were "so outrageous or inflammatory" that they could wrongfully compel a reasonable employee to, in this case, not support the Union. Nolin's comments were certainly also not "innocent" misrepresentations, nor were they, properly in our view, defended as such.

41 In our view, threat is a species of coercion and is not a precondition to a finding
of coercion under Sections 8 or 9 of the Code. If it was, then a party could act with
impunity providing it gave no prior information regarding its intention to act.

42 Given the nature of Nolin's allegations against the Union, and Nolin's reliance on
his stature and knowledge as a lawyer in making them, we do not find the ability to
check the accuracy of these points or reply to them to be compelling factors, as they
were in *British Columbia Lottery Corp.* (see para. 43). Reasonable adults can be
expected to check the accuracy, or doubt the veracity, of statements made by a
layperson such as a fellow employee. Accordingly, the Board has found the
unintentionally inaccurate views expressed by one employee to another may be
protected by Section 8: *British Columbia Lottery Corp.*

43 While reasonable adults would anticipate that laypersons such as fellow
employees might express honestly held but inaccurate views about unionization,
reasonable people would expect more of lawyers, particularly lawyers holding
themselves out as expert and offering a legal opinion on a matter. The circumstances
in this case are therefore far removed from the circumstances in *British Columbia
Lottery Corp.* This case cannot be properly understood without considering not only
the nature of the statements made, but also the fact that the speaker was a lawyer,
deliberately expressing his views on unionization in writing, and relying on his capacity
and authority as a legal expert, addressing an audience of layperson employees.

44 In sum, in light of the above we find no error in the Original Decision's conclusion
that Nolin's communication was coercive and intimidating and, as such, a breach of
Section 9 of the Code.

45 We turn now to the application for leave and reconsideration of the remedy
ordered in the Original Decision. First, it is worth noting that a number of issues have
been resolved by the Board's mail-out of the Original Decision to the employees. That
process resolved the issue of who should conduct the mail-out. It also required the
Employer to provide an employee list to the Board for the mail-out. We see no reason
why those processes should not also be applied to the remaining issue.

46 Second, we do not read Section 133 of the Code in the restrictive manner argued
by the Employer. The reference to "any person" in the opening portion of subsection 1
does not necessarily require that "a person" referred to in the following (a) through (f) is
the same person. In this case, in order to have an effective remedy, steps need to be
taken by the Employer, which has not been found to be in breach of the Code, because
the Employer is the only source of the information necessary to give effect to the
remedy. That is a minimal but necessary intrusion into the Employer's interests. It is
required in the present circumstances in respect to the Employer providing an employee
list for the mail-out to the employees of both the Board's decision and the Union's letter.

47 Lastly, the rational connection test in *National Bank of Canada*, [1982] 3 Can
LRBR 1 (SCC) "...does not require a precise numerical equivalency between the
employees affected by the unfair labour practice and the employees affected by their
remedy": *Convergys Customer Management Canada Inc.*, BCLRB No. B111/2003
(Leave for Reconsideration of BCLRB No. B62/2003). The ordering of a mail-out of a

letter from the Union is an appropriate remedy. The parties previously agreed on the Board mailing out a copy of the Original Decision to all of the employees. We see no compelling reason why the Union's letter should be treated any differently. Both aspects of the remedy in the Original Decision were designed to remedy the unfair labour practices which had been found.

48 As a result, leave for reconsideration is denied in respect to the remedy portion of the Original Decision.

49 In summary, leave is granted with respect to the question of whether Nolin's statements were coercive or intimidating, but the Original Decision's conclusion on that point is upheld and the applications for reconsiderations on that issue dismissed. Leave is denied with respect to the application for reconsideration of the remedial order.

LABOUR RELATIONS BOARD

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CHAIR

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ASSOCIATE CHAIR

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