

Heenan Blaikie

Of Counsel

The Right Honourable Pierre Elliott Trudeau, P.C., C.C., C.H., Q.C., FRSC (1984 - 2000)
The Right Honourable Jean Chrétien, P.C., C.C., O.M., Q.C.
The Honourable Donald J. Johnston, P.C., O.C., Q.C.
Pierre Marc Johnson, G.O.Q., FRSC
The Honourable Michel Bastarache
The Honourable René Dussault, FRSC
The Honourable John W. Morden
Peter M. Blaikie, Q.C.
André Bureau, O.C.

November 27 2009

By E-mail

Ronald Middel
Chief Administrative Officer
Police Association of Ontario
6730 Davand Drive, Unit 1
Mississauga, Ontario L5T 2K8

Dear Mr. Middel:

**Re: Opinion Regarding Police Officers' Rights to Counsel in SIU Investigations
Our File: 055100-0001**

A. Introduction

You have asked for my opinion on how counsel representing police officers in investigations involving serious bodily harm or death conducted by the Ontario Special Investigations Unit (the "SIU") can fully comply with the Law Society of Upper Canada's *Rules of Professional Conduct* (the "Rules") and the governing law. You have asked that I identify and address all relevant legal issues that impinge upon the provision of the rights to counsel to police officers in SIU investigations and that I address the issues set out below.

B. Material Reviewed

To assist me in understanding the facts and issues in the litigation on which you have sought my opinion, I have reviewed the following materials:

- (1) SIU Interview Questions;
- (2) Two press releases, one from the SIU and one from the Ontario Provincial Police Association regarding an incident of June 24, 2009 involving two OPP officers that resulted in the death of a civilian, Levi Schaeffer;

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- (3) The factum in *R. v. Jupiter*, which includes an excerpt that the SIU accepted as an accurate description of the investigative process;
- (4) *Police Services Act*, Ontario Regulation 673/98;
- (5) Ontario Regulation 123/98 of the *Police Services Act* regarding the offence of insubordination;
- (6) Two letters from recent cases in which the SIU has been critical of counsel;
- (7) The Law Society of Upper Canada's *Rules of Professional Conduct*;
- (8) G. W. Adams, *The Consultation Report of the Honourable George W. Adams, Q.C. to the Attorney General and Solicitor General Concerning Police Cooperation with the Special Investigations Unit*, 14 May 1998 (the "Adams Report I");
- (9) *Review Report on the Special Investigations Unit Reforms prepared for the Attorney General of Ontario by the Honourable George W. Adams, Q.C.*, 23 February 2003 (the "Adams Report II");
- (10) Ombudsman of Ontario, *Oversight Unseen: Investigation into the Special Investigations Unit's operational effectiveness and credibility* (September 2008);
- (11) Paul Ceyssens, *Legal Aspects of Policing* (looseleaf) (Salt Spring Island: Earls Court Legal Press, Inc., 1994); and
- (12) Jurisprudence dealing with issues of solicitor-client privilege.

C. Issues

You have asked me to provide my opinion on the following issues.

1. Regarding the practical application of sections 6, 7 and 9 of Ontario Regulation 673/98 of the *Police Services Act*, R.S.O. 1990, Chapter P.15:
 - (a) Do the officers have a right to meet and consult with counsel before and while they are segregated?
 - (b) Do the segregated officers have a right to meet and consult with counsel before SIU investigators attend at the police division?
 - (c) Do segregated officers have the right to meet and consult with counsel before they write up their involvement in the incident in their police notebooks?
 - (d) Is the timing of the involved officers' access to counsel in SIU investigations an issue in any respect?
 - (e) Due to the vastness of the Province, the SIU investigators may take up to 12 hours before they arrive on scene, depending on location and availability of

flights. In those cases, the officers have long since gone home and are no longer at the Detachment or Division. For the same reason, counsel for the officers may be unable to attend quickly. To alleviate problems with communication, some counsel have asked officers to prepare written "Confidential Instructions" for them to review. The SIU and some police forces are of the opinion that officers have a duty to complete their notes before the end of shift and that any notes to counsel, written before any notebook entries are done, should be considered as original notes and disclosed. Is this a legitimate method for the officer to exercise his right to counsel? Should counsel continue this practice of asking for written "instructions", which usually amount to a rendition of the facts?

2. Do counsel have a duty to ensure compliance with Section 6 of Regulation 673/98?
3. Is it permissible under the Law Society of Upper Canada's *Rules of Professional Conduct* (the "*Rules*") for one counsel to represent multiple subject and witness officers involved in an SIU investigation in cases in which no actual conflict arises from the facts of the incident or from the information regarding the incident provided to counsel by the involved officers?
4. If the representation of multiple witness and subject officers is permissible, can the duty under the *Rules* to share client information be reconciled with section 6 of Regulation 673/98 and counsel's other duties under the *Rules*? If so, how?
5. At the outset of witness officer interviews, SIU investigators qualify the officers' notes and ask the questions in a list you have provided to me. Does the seventh question, asking the officer whether his or her notes were written before the officer consulted with counsel, infringe upon solicitor-client privilege? If so, what objections should be made by counsel, keeping in mind that refusing to answer a question may expose the officer being interviewed by the SIU to prosecution under the *Police Services Act*.

D. Analysis and Opinion

1. (a) **Whether officers have a right to meet and consult with counsel before and while segregated.**

Sections 6 and 7 of Regulation 673/98 under the *Police Services Act*, R.S.O. 1990, Chapter P.15 (the "*Act*") provide as follows:

6(1) The chief of police shall, to the extent that it is practicable, segregate all the police officers involved in the incident from each other until after the SIU has completed its interviews.

(2) A police officer involved in the incident shall not communicate with any other police officer involved in the incident concerning their involvement in the incident until after the SIU has completed its interviews.

7(1) Subject to subsection (2), every police officer is entitled to consult with legal counsel or a representative of the association and to have legal counsel or a representative of the association present during his or her interview with the SIU.

(2) Subsection (1) does not apply if, in the opinion of the SIU director, waiting for legal counsel or a representative of the association would cause an unreasonable delay in the investigation.

Section 7(1) specifically provides that officers are entitled to consult with counsel and to have counsel present during their interviews.¹ There is no suggestion in the Regulation that this entitlement cannot be exercised either before or while the officers are segregated. Section 7(1) had its genesis in recommendation 11 of the *Adams Report I*.²

The regulation should stipulate that an officer is entitled to representation by legal counsel and/or a police association, provided the availability of such advisors will not lead to an unwarranted delay.

The commentary accompanying recommendation 11 at page 51 of the *Adams Report II* provides that:

This recommendation has been implemented in s.7 of the Regulation. Every police officer is entitled to have legal counsel or an association representative present during his or her interview.

Again, neither recommendation 11 nor its associated commentary suggests that an officer's right to counsel cannot be exercised before or while the officers are segregated. Because officers must be able to consult with their lawyer before and during

¹ Section 10 (1) of the *Canadian Charter of Rights and Freedoms* provides that "Everyone has the right on arrest or detention ... (b) to retain and instruct counsel without delay". In light of the requirement of section 6 of the Regulation that officers be segregated, it may well be that both subject and witness officers are detained within the meaning of section 10 (b), and that they accordingly have a constitutional right to counsel. In light of the specific recognition of the right to counsel in section 7 (1) of the Regulation, however, the issue need not be considered further.

² Although none of the recommendations from the Adams Reports are binding, they may assist in a purposive interpretation of various sections in Regulation 673/98.

segregation in order to have a full, meaningful right to counsel, in my opinion officers must be allowed to meet with and consult counsel before and while segregated.

1. (b) Whether segregated officers have a right to meet and consult with counsel before SIU investigators attend at the police division

Similarly, there is no suggestion in section 7 of the Regulation, in recommendation 11 of the *Adams Report I*, or in the commentary accompanying recommendation 11 in the *Adams Report II*, that an officer's entitlement to consult counsel cannot be exercised before SIU investigators attend at the police division. In my opinion, the timing of officers' right to consult with counsel is unaffected by section 5 of the Regulation 673/98, which provides that:

5. The SIU shall be the lead investigator, and shall have priority over any police force, in the investigation of the incident.

In my opinion, section 5 cannot be interpreted as a limitation on the timing of an officer's right to consult counsel. The purpose of section 5 is to make it clear that the SIU is to assume the lead role in the investigation, and that the role of other police forces is to be subordinate to that of the SIU. Recognition of the officers' right to consult with counsel before the SIU investigators attend at the police division does not compromise the primacy of the SIU's role as lead investigator in any way. In my opinion, officers have a right to meet and consult with counsel before SIU investigators arrive at the police division.

1. (c) Whether segregated officers have the right to meet and consult with counsel before they write up their incident notes in their police notebooks

Again, there is no suggestion in section 7 of the Regulation, in recommendation 11 of the *Adams Report I*, or in the commentary accompanying recommendation 11 in the *Adams Report II*, that segregated officers' entitlement to consult counsel cannot be exercised before they write up their notes in their police notebooks. In my opinion, they have the right to consult with counsel before they write up their notes in their police notebooks.

1. (d) Whether the timing of the involved officers' access to counsel in SIU investigations is an issue in any respect.

For the reasons set out above, in my opinion, the timing of the officers' access to counsel in SIU investigations is not an issue in any respect.

1. (e) Whether counsel's practice of asking for written instructions should continue.

Due to the vastness of the Province, the SIU investigators may take up to 12 hours before they arrive on scene, depending on location and availability of flights. In many such cases, the officers will have gone home and are no longer at the Detachment or Division. For the same reason, counsel for the officers may be unable to attend quickly. To alleviate problems with communication, some counsel have asked officers to prepare written "confidential instructions" for them to review. These instructions typically consist of or include the officers' account of the events in question.

Officers are required to complete their notes, which also consist of their account of the events in question, in their police notebooks. Witness officers are required to submit their notes to the chief of police within 24 hours of the SIU's request for their notes³ (section 9 of Regulation 673/98).

Oral or written communications between a client and his or her lawyer for the purpose of obtaining legal advice are subject to solicitor-client privilege if made with the intention that they be confidential.⁴ This principle applies both to the client's account of the facts and to the lawyer's advice.

Where both the SIU and counsel for the officers are able to attend at the Detachment or Division reasonably promptly, the officer's account of the events will ordinarily be imparted to counsel in person. Where counsel cannot attend reasonably promptly, it will be necessary for the officers to describe what occurred by telephone or in writing. For the right to counsel to be meaningful, in any event, it is essential that the officers are assured that what they tell their lawyer about what occurred will be maintained in confidence.

In my opinion, there is nothing objectionable in the practice of officers providing a written account of what occurred to their lawyer so that the lawyer may advise the officers fully.

Such an account is privileged, and neither the officer nor the lawyer can be compelled to divulge it.

³ Only witness officers' notes should be submitted to the SIU; a subject officer's notes must be completed but are not to be submitted to the SIU pursuant to Section 9(3) of Regulation 673/98. The Attorney General's Directive of December 23 1998, as outlined at pages 49-50 and 54-55 of the Adams Report II, should alleviate some of the officers' concerns about submitting their notes to the SIU. In this Directive, the Attorney General directed Crown counsel by means of a Crown Policy that a police officer's statement in a compelled interview and the officer's police notebook notes obtained by the SIU are involuntary statements. As such, neither the statement nor any evidence that would not have been found but for the statement is to be used to incriminate the officer in any subsequent criminal proceeding.

⁴ *Canada v. Solosky*, [1980] 1 S.C.R. 821 at 837.

That is not to say that the officer can delay writing up his or her notes indefinitely while seeking counsel's advice. Section 7 (2) of the Regulation recognizes that the right to consult with counsel must yield to the need to avoid unreasonable delay in the investigation and, as mentioned above, witness officers are required to provide their notes to the chief of police within 24 hours after a request for the notes is made by the SIU.

An officer's account of what occurred as recorded in the officer's notes may well be virtually identical to the account set forth in a written communication to the officer's lawyer. The latter, nevertheless, is privileged, and neither the officer nor the officer's lawyer can be compelled to produce it.

2. Whether counsel has a duty to ensure compliance with section 6 of Regulation 673/98.

Section 6 provides that:

- (1) The chief of police shall, to the extent that it is practicable, segregate all the police officers involved in the incident from each other until after the SIU has completed its interviews.
- (2) A police officer involved in the incident shall not communicate with any other police officer involved in the incident concerning their involvement in the incident until after the SIU has completed its interviews.

The chief of police may designate a member of the force to act in his place pursuant to section 2 of Regulation 673/98, which provides that:

- (1) The chief of police may designate a member of the police force who is not a subject officer or a witness officer in the incident to act in the place of the chief of police and to have all the powers and duties of the chief of police in any matter respecting an incident under investigation by the SIU.

Thus the Chief of Police or a designate of the Chief of Police bears the legal responsibility of ensuring compliance with section 6 of the regulation.

That is not to say, however, that counsel for subject or witness officers may participate in or encourage a breach of section 6. Lawyers have a duty to uphold and abide by the law, and a duty not to participate in or encourage illegal conduct.⁵ Counsel for subject and witness officers accordingly have a duty not to undermine section 6 by disclosing to one police officer involved in the incident anything said to counsel by another officer about his or her involvement in the incident.

⁵ Rules, rule 2.02 (5), commentary to rule 4.01 (1).

3. Whether the *Rules* allow for one counsel to represent multiple officers involved in an SIU investigation where no conflict of interest arises.

The *Rules* expressly allow one counsel to represent multiple clients where no conflict arises, subject to certain disclosure obligations set out below.

As background, under section 62 (0.1) of the *Law Society Act*, R.S.O. 1990, c.L.8, as amended, Convocation (the Law Society's governing body) is empowered to make by-laws authorizing and providing for the preparation, publication, and distribution of a code of professional conduct and ethics. The *Rules* have been promulgated under this authority. Lawyers may be disciplined for breaching the *Rules*.

The Supreme Court of Canada has observed that although an expression of a professional standard in a code of ethics is not binding on the courts it should nevertheless be considered an important statement of public policy: *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235 at 1246.

The *Rules* define a conflict of interest as follows:

a "conflict of interest" or "conflicting interest" means an interest

- a) that would be likely to affect adversely a lawyer's judgment on behalf of, or loyalty to, a client or prospective client, or
- b) that a lawyer might be prompted to prefer to the interests of a client or prospective client.

Thus, to take a relevant example, it would be a conflict of interest for a lawyer to represent two officers who each implicate the other but deny personal responsibility for a death or serious injury.⁶

The *Rules* recognize, however, that in the absence of a conflict of interest it is permissible for a lawyer to represent more than one client on a joint retainer, provided that the lawyer advises the clients that:

- a) the lawyer has been asked to act for both or all of them,
- b) no information received in connection with the matter from one can be treated as confidential so far as any of the others are concerned, and

⁶ Even where there is a conflict of interest, a lawyer may generally act for multiple parties if they all consent in writing after the lawyer makes disclosure adequate to enable them to provide informed consent. In some cases this will require independent legal advice: rules 1.02 (definition of "consent"), 2.04 (3), 2.04 (6) and accompanying commentary.

- c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.⁷

The *Rules* recognize that even in cases in which there is an actual or potential conflict of interest it may be in the clients' interest that they consent to a joint representation. The commentary under rule 2.04 (3) provides that:

“ As important as it is to the client that the lawyer's judgment and freedom of action on the client's behalf should not be subject to other interests, duties, or obligations, in practice this factor may not always be decisive. Instead it may be only one of several factors that the client will weigh when deciding whether or not to give the consent provided in the rule. Other factors might include, for example, the availability of another lawyer of comparable expertise and experience, the extra cost, delay, and inconvenience involved in engaging another lawyer, and the latter's unfamiliarity with the client and the client's affairs. In some instances, each client's case may gather strength from joint representation.”

Thus, the *Rules* allow for one counsel to represent multiple client officers where no conflict of interest exists (and also allow one counsel to represent multiple client officers in certain circumstances where a conflict or potential conflict does exist, with informed written consent). Counsel must disclose to each client officer that he or she has been asked to act for both or all of them and that no information received in connection with the matter from one can be treated as confidential so far as any of the others are concerned. Counsel must also inform all of the client officers that if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

4. If a joint retainer is permissible, how can the duty under the *Rules* to share client information be reconciled with section 6 of Regulation 673/98.

It will be apparent from the foregoing analysis that a lawyer who is asked to represent multiple officers involved in an incident being investigated by the SIU concurrently (i) has a duty not to participate in or encourage a breach of section 6 of the Regulation – which requires that all officers involved in the incident be segregated and not communicate with one another until the SIU has completed its interviews – and (ii) has a duty to inform each officer that no information received in connection with the matter from one officer may be treated as confidential so far as any of the others are concerned.

In my opinion the rules creating these duties should be interpreted in such a way that they are consistent with each other. These duties can readily be reconciled. A lawyer

⁷ Rule 2.04 (6).

retained to act for multiple officers has a duty not to defeat the purpose of section 6 by serving as a conduit between segregated officers whom the lawyer represents. It would be a breach of the lawyer's duty not to participate in or encourage illegal conduct if the lawyer were to allow officers directly or indirectly to collaborate on their accounts of the incident in question. Nothing in rule 2.04 (6) either requires or permits the lawyer to do so. Rule 2.04 (6) says nothing about the timing of any disclosure to a client of confidential information acquired from another client. In my opinion, a lawyer retained to act for multiple officers has a duty not to disclose anything, confidential or otherwise, said to him by one segregated officer to any other segregated officer until the SIU has completed its interviews.

The Director of the SIU has suggested⁸ that where a lawyer represents more than one police officer "one might reasonably infer a sharing through the lawyer of information gained from one client to the other". In my opinion, in light of the lawyer's duty not to participate in or encourage a breach of section 6, it would be improper for the lawyer to disclose information acquired from one segregated officer to another before the SIU's interviews are completed. It would be entirely unreasonable to infer that counsel for officers would breach this duty.

The Director has also suggested⁹ that "even if the involved officers were represented by different lawyers before they wrote up their notes, there could still be a compromise of the notes' independence if the clients given their respective lawyers' permission to share information with other lawyers." Again, this assertion disregards the lawyer's duty not to participate in or encourage a breach of the law.

If the Director's suggestions were correct (and I emphasize that in my opinion they are not) the only way of rectifying the problem would be to deprive officers of the right to counsel; even requiring that each officer have his or her own lawyer (which would be completely impractical, in light of the fact that some incidents involve more than a dozen officers) would not resolve the Director's concern. But to deprive officers of counsel would be incompatible with section 7 of the Regulation (and, quite possibly, section 10 (1)(b) of the *Charter*¹⁰).

The Ombudsman of Ontario (who is a former Director of the SIU) recommended in his September 2008 report titled "Oversight Unseen: Investigation into the SIU's Operational Effectiveness and Credibility" that "[t]here should be a legislative prohibition against legal counsel representing police officers involved in the same incident under investigation by the [SIU] to ensure that the integrity of its investigations

⁸ Closing letter dated May 6 2009 for SIU File #09-TSA-060.

⁹ *Ibid.*

¹⁰ See note 1, *supra*.

is maintained.”¹¹ This recommendation is based on the Ombudsman’s belief that “the utmost care should be taken to foster the integrity of the investigative process”, and that “[t]his includes avoiding any potential for witness information to be tainted or tailored, intentionally or otherwise.”¹²

The Ombudsman evidently agrees that it is permissible at present for the same lawyer to act for more than one officer in an SIU investigation; there would be no need for the legislative change the Ombudsman recommends if the practice were already prohibited. In light of the lawyer’s ethical duty not to participate in or encourage a breach of section 6 of the Regulation – and in the absence of evidence that lawyers for officers are breaching that duty – it is difficult to appreciate the need for the legislative reform the Ombudsman has recommended.

In summary, lawyers have a duty not to participate in or encourage illegality. They must not undermine the purpose of section 6 of the Regulation by coaching officers to alter their notes based on what other officers have said. This is so whether the officers involved are represented by the same or different lawyers. It is a duty that can readily be reconciled with the lawyer’s duty of disclosure to the lawyer’s client, either under rule 2.04 (6) or pursuant to a client’s authorization to share information with other officers. No such disclosure may be made until after the SIU has completed its interviews.

5. Whether the seventh SIU question, asking the officer whether his or her notes were written before the officers consulted with counsel, infringes upon solicitor-client privilege.

As discussed above, for a communication to garner the protection of solicitor-client privilege, the communication must be a communication between solicitor and client that entails the seeking of legal advice, and which is intended to be confidential. These criteria must be applied to each matter at issue to determine whether a matter is protected by solicitor-client privilege. In the case of officers consulting counsel prior to transcribing their police notes, the content of the communication will generally be protected by solicitor-client privilege because there is a communication between a client officer and his solicitor, where the client officer is seeking counsel’s legal advice, and where the communication is intended to be made in confidence.

Generally, however, the *fact* that an officer has met with counsel prior to writing up the incident notes in a police notebook is not subject to solicitor-client privilege because the content of the privileged communication is not being disclosed. It is the communications between lawyer and client that are protected by solicitor-client

¹¹ Recommendation 42 at page 116.

¹² Paragraph 207 at page 59.

privilege, not whether the client has sought legal advice.¹³ Thus, in asking whether the officer met with counsel prior to making his police notes, the SIU would not infringe upon solicitor-client privilege. In the absence of a basis for suspecting that the officer's counsel has improperly disclosed information to circumvent the requirement that officers be segregated, however, it is difficult to see the relevance of the question. No inference of guilt may be drawn, of course, from the fact that an officer has sought legal advice.

Summary of Conclusions

In summary, my conclusions are as follows:

1. (a) Officers have a right to consult with counsel before and while segregated.
- (b) Segregated officers have a right to consult with counsel before SIU investigators attend at the police division.
- (c) Segregated officers have a right to consult with counsel before they write up their incident notes in their police notebooks.
- (d) The timing of involved officers' access to counsel in SIU investigations is not an issue in any respect.
- (e) There is nothing objectionable in counsel obtaining from officers whom they represent a confidential account of the events that have given rise to the SIU investigation, and such an account will be subject to solicitor-client privilege if provided for the purpose of seeking legal advice. Neither the officer nor the lawyer can be compelled to disclose such an account, even if the facts set out are identical to those set out in the officers' notes.
2. It is the legal responsibility of the Chief of Police to ensure compliance with the requirement in section 6 of Regulation 673/98 under the *Police Services Act*, that officers involved in an incident under investigation by the SIU be segregated and refrain from communicating with one another until after the SIU has completed its interviews. Lawyers retained to represent officers, however, have a duty not to participate in or encourage a breach of section 6.
3. In the absence of an actual conflict of interest, the Law Society of Upper Canada's *Rules of Professional Conduct* allow one lawyer to advise and represent more than one officer involved in an incident provided that the lawyer advises the officers that he or she has been retained to act for all of them, that

¹³ See *Thorson v. Jones* (1973), 38 D.L.R. (3d) 312 and *Ontario (Securities Commission) v. Greymac Credit Corp.* (1983), 41 O.R. (2d) 328 at 338, (Div. Ct.) in which the courts held that the identity of a client is not protected by solicitor-client privilege unless the client's identity is the essence of the confidential communication.

nothing disclosed by one of them may be treated as confidential so far as any of the others are concerned, and that if a conflict develops that cannot be resolved, the lawyer cannot continue to act for all of them and may have to withdraw completely.

4. The lawyer's duty not to participate in or encourage a breach of section 6 of the Regulation is compatible with the lawyer's duty to inform each officer that no information received in connection with the matter from one officer may be treated as confidential so far as any of the others are involved. Nothing in the applicable rules of professional conduct requires or permits lawyers to allow officers directly or indirectly to collaborate on their accounts of the incident in question. Rule 2.04 (6) of the *Rules of Professional Conduct* is silent as to the timing of any disclosure of information obtained from one of multiple clients, and the lawyer will be compliant with both duties if he or she refrains from disclosing such information until after the SIU's interviews are complete.
5. Oral and written communications between the officers and their lawyer will be subject to solicitor-client privilege if they are intended to be confidential. Generally, the *fact* that an officer has consulted with counsel will not be privileged. In the absence of a basis for believing that the officers' counsel has participated in or encouraged a breach of section 6, however, it is difficult to see the relevance of the question. No inference of guilt may be drawn, of course, from the fact that an officer has sought legal advice.

Should you wish to discuss this opinion, I would, of course, be pleased to hear from you.

Yours truly,

Gavin MacKenzie

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GM:rw

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