

ONTARIO COURT OF JUSTICE

HER MAJESTY THE QUEEN

v.

WILLIAM R. McCONNELL

PROVINCIAL OFFENCES APPEAL
PROCEEDINGS

BEFORE THE HONOURABLE JUSTICE P. WEST
on February 1, 2017 at OSHAWA, Ontario

APPEARANCES:

J. Bateman
H. Marscheler

Prosecutor for Region of Durham
Agent for William McConnell

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LEGEND

[sic] Indicates preceding word has been reproduced verbatim and
is not a transcription error.

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WEDNESDAY, FEBRUARY 1, 2017

MS. BATEMAN: Thank you, we're left with line
number one, William McConnell.

THE COURT: Yes.

MR. MARSCHLER: Good morning, Your Honour. If I
may sit up here so I can hear better, I have some
hearing issues.

THE COURT: No, no, I don't mind for you to sit
there. You're an agent, I take it?

MR. MARSCHLER: I am a licensed paralegal, yes.

THE COURT: Well, Mr. McConnell, you're here, you
can have a - you can sit over here, sir, in one of
those black chairs, I don't mind that. If I can
get Mr. McConnell - it's Mr. Marschler?

MR. MARSCHLER: Yes. It's M-A-R-S-C-H-L-E-R,
initial 'H', legal representative for Mr. McConnell
on this matter, Your Honour.

THE COURT: All right. You can have a - yeah,
everyone's got a seat, thank you.

MR. MARSCHLER: Thank you, Your Honour.

THE COURT: Mr. Marschler, I take it, you're
licensed by the Law Society?

MR. MARSCHLER: I am, yes.

THE COURT: Okay, thank you.

MR. MARSCHLER: At least they haven't told me
otherwise yet.

THE COURT: I'm sorry?

MR. MARSCHLER: They haven't told me otherwise yet.

THE COURT: Well, I've had some agents who indicate
that to me but they're - things reported in the
O.R.'s that indicate otherwise, so. I take it you
filed the amended grounds of appeal?

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5 MR. MARSCHLER: I did, Your Honour. When this was up for the status hearing, the transcript had just been freshly made out and my friend's colleague had asked at that time for amended grounds with respect to my original grounds.

THE COURT: Mr. Marschler, I stand on protocol. When you're addressing the Court, sir, you really have to stand up.

MR. MARSCHLER: My apologies, Your Honour...

10 THE COURT: That's all right.

MR. MARSCHLER: I'm sorry.

15 THE COURT: I don't stand on much protocol, but if you are going to address me then we're in a court of law, and this an appeal, so you need to stand. So, stand, please, and tell me what you were telling me.

20 MR. MARSCHLER: Thank you, Your Honour. Yes, on the status hearing date, the transcript had just been freshly produced and my friend's colleague, at the time, had made a request that I provide some amended grounds of the - or amended grounds for the appeal as the original grounds that are found under item 16 of the original appeal notice. So I did focus on something more, at point, with respect to the amended grounds and be able to reference the transcripts - the transcript itself. I don't know if Your Honour wishes me to carry on with....

25 THE COURT: Well, I want to hear your submissions. I mean, I don't know - you tell me what case says that - there's no doubt that Constable Stinson had no recollection, whatsoever, about the event other than what was contained in his notes. But where

30

does it indicate that he has to - like what case indicates that he - the prosecutor or the Crown has to file the officer's notes as an exhibit?

MR. MARSCHLER: Well, it was - Your Honour, with the greatest respect, I'm - I'm not specifically aware of any case law. The only thing I....

THE COURT: I don't think there's any that says that.

MR. MARSCHLER: Yeah.

THE COURT: And if past recollection recorded, it creates its own difficulties for Constable Stinson and for the Crown in terms of the evidence that he gives. It becomes fairly obvious in the cross-examination of him that much of what he said in his evidence he had no recollection at all. I mean, the officer - just looking at page - it actually starts in the - and I'll tell you right off the top, it's something that I put a big asterisk beside when I read the transcript is when the prosecutor, Ms. Miller, was seeking to qualify the officer's notes, she asked him, you know, why he wanted to look at his notes and it was just to refresh his memory.

And then she asked him, "Do you have an independent recollection apart from your notes?"

And his answer was, "Yes, I do."

But then right over on the next page, 3, these are questions by you on the use of his notes. It says, "You indicated you have an independent recollection, what do you mean by that?"

"I mean, I can remember doing enforcement in this

location."

5 I'm wondering how many times he did enforcement in
that location. And then you put down to him at the
bottom of page 3,

"Is it fair to say then that based on that you
don't really have any other independent
recollection of this specific event before the
court?"

10 He then says, "This specific one at that time, no.
That's, that's too far back, I don't recall
specifically talking to."

15 He says, "I remember the location, I do enforcement
there a lot. Specifically relating to speaking to
your client, I can't recall that."

20 And then, quite frankly, Mr. Marschler, you then
say you're not opposed to him referring to his
notes. If I'd been counsel, I would've had some
comments to make for an officer that basically has
no recollection of anything, because then the Crown
should have made an application to file the notes
or to allow the officer to refer to his notes for
the purposes, for past recollection recorded, and
25 there's a whole process that the prosecutor would
have had to go through that the Justice of the
Peace - but you, you've consented, so he then uses
his notes.

30 It turns out that it's around 6:20 p.m., I know the
intersection that he's referring to at Brock Road
and Highway 7, there's - it's in the Hamlet of

5
Brougham, and there is a Wesley and Methodist Church right on the southeast corner. And he's standing in the parking lot and I know that parking lot, and he's actually, I think sort of hiding behind a large maple tree based on his evidence, and he's observing northbound traffic. And he's watching for motorists that may be holding their cell phone or using their cell phone while they're driving.

10
And I fully appreciate why this charge is in the *Highway Traffic Act* now. And he could see a male driver holding a black flip-style cell phone. He's - at this point he's got to be reading his notes to the court. And he says, "This phone looked like it was plugged in, possibly, to a charger" which would support Mr. McConnell's evidence that he gave.

15
And then he stepped out and directed the vehicle over, he says, to the side of the road.
20
Mr. McConnell says that he had to back up and pull into the parking lot because - and I know - I know where the church parking lot is, it would be more than four - the length of four vehicles south of the intersection on Highway 7.
25

30
And then you cross-examine and his answer, "I don't recall whether when I first saw him with the cell phone he was driving up to the light or physically stopped." That to me is pretty significant answer. And then he says, "Typically speaking", so now he's not talking about Mr. McConnell's case, he's

5 talking about what normally happens or typically happens. But then over at page 7, he starts - he is six to eight car lengths back from the intersection itself, from the stop line. He doesn't recall if there's any other vehicles in front of Mr. McConnell's vehicle. He cannot recall the tint on the windows of Mr. McConnell's vehicle. He can't recall if he made the observation through the front windshield or the side-passenger windows.

10 And when you ask him if he recalls if there was any conversation of Mr. McConnell or any observation, rather, of Mr. McConnell actually talking on his phone, I mean, that's what most police officers talk about. They see the person, they've got the phone up to their ear and they're speaking into it and that, quite frankly, you read the cases, that proves the charge.

20 He then, in my view, is somewhat evasive to your - to answer your question. And then you say, "Well, did you make any observation of seeing Mr. McConnell's mouth moving?"

"No."

25 "Or his lips moving?"

"No."

30 And then the Court says that there's a *prima facie* case, "Do you wish to bring a defence?" And you called Mr. McConnell who indicates that he is driving approximately four cars behind the intersection at 7 and Brock Road. He was 10 yards

5 north of the opening of the parking lot where the
officer was standing at the church. And he
indicates that his phone beeped indicating a low
charge and that's when he was stopped. He put his
vehicle in park because he knew there would be a
window of opportunity before the light changed, was
going to be roughly 35 seconds. And he plugged the
phone into - the adapter into the cigarette
10 lighter. Actually, you asked that question and he
says, "No, he actually plugged the female portion -
the male portion into the female portion of the
phone", is the way he describes it. He's basically
- his adapter is always in his cigarette lighter
and he's attaching it to his phone, his flip phone.

15 Then Justice of the Peace Coopersmith says, "This
was a flip phone" and she indicates that she
actually had one up until a few months before this
trial, so she knows what he's talking about. I
20 think the last time I had a flip phone was probably
10 years ago but in any event.

25 He's then - Mr. McConnell was cross-examined, a
very brief cross-examination, by Ms. Miller. He
doesn't recall if there's anybody behind him but
then he corrects that and says, "Well, there
couldn't have been because I had to back up because
I was 10 feet or 10 yards north of the opening to
the parking lot and that's where he gave me the
30 ticket." The officer summonsed him back to there
and directed him back and so there was nobody
behind him.

5 So then submissions are made, you bring out all of
the evidence that shows the officer really has no
independent recollection of anything that happened
between what he observed and what he did as it
related to Mr. McConnell. Ms. Miller's argument is
that Mr. McConnell is still on the travelled
portion of the roadway, but Ms. Miller seems to, in
her submissions, to be accepting Mr. McConnell's
10 evidence, "And when he finished putting the power
source into his flip phone the light was still red,
nothing had transpired."

15 Sorry, this is yourself in response to what is at
page 19, in response to Ms. Miller's argument that
an emergency vehicle could've been coming, even
though the vehicle is not in motion. He didn't
take his keys out of the motor vehicle but it seems
that one of the things that nobody seems to focus
on in this trial was the difference between driving
20 and care or control, and there is a difference.

25 The *Criminal Code* in an impaired or over 80
situation allows for both driving and care or
control. And I can tell you, I did some research.
There was reference to the *Kazemi* case which I'm
assuming the Crown's going to provide to me and
also another decision of our Court of Appeal called
Pizzurro, P-I-Z-Z-U-R-R-O, both dealing with
30 section 78.1(1) of the *Highway Traffic Act*.

But both of those cases sort of are dealing with an

5 argument that I think developed in the Provincial
Offences courts and I think maybe even one or two
of my colleagues accepted, and hence why there were
appeals in the Court of Appeal where agents or
lawyers on behalf of their clients were arguing
that the officer has to know that the handheld
device, the cell phone or the tablet, or whatever
it is, was actually capable of transmitting or
actually was transmitting, and I think both of
10 those cases indicate that it's not so. It can be a
momentary holding, is basically what *Kazemi*
indicates.

15 And I know the - I know the decision of Justice
Nakatsuru which overturned the justice of the
peace's conviction and entered an acquittal. And I
think the important portion of *Kazemi* has to do
with - I think it sort of starts at paragraph 11 of
the judgment and flows from there when he talks
20 about and he goes to various dictionaries, holding
the meaning, the ordinary meaning of holding a cell
phone is having it in one's hand.

25 But the section itself seems to say, "No person
shall drive a motor vehicle on a highway while
holding or using a handheld wireless communication
device or other prescribed device that is capable
of receiving or transmitting telephone
communications, electronic data, mail, or text
30 messages."

So what you want to say to me is the difference

5 with respect to - and where Justice of the Peace
Coopersmith erred in terms of your client's holding
because he's clearly holding at some point, his
cell phone when he's plugging the charger into the
bottom of his phone?

10 MR. MARSCHLER: Correct, Your Honour and there's -
you know, sometimes hindsight is 20/20, but in this
particular case, the *Kazemi* case law that you've
referred to from the Ontario Court of Appeal
specifically talks about that one issue only, and
that's the holding, but it does not talk about
whether a vehicle is parked. In other words, the
vehicle is - the transmission is in park, immovable
at that point in time.

15 And as you've already indicated the section says
"while driving." Now, care and control under the
Criminal Code I think is more general. As you've
indicated, that one does not actually have to have
20 a vehicle in motion to have care and control, but
under the *Provincial Offences Act* - and I believe
Your Honour has certainly alluded to that is that
driving is different and driving means that you are
actually in motion being observed in motion,
25 whether you're forward, backward, but in this
particular case, when the transmission is
disengaged from the engine by a physical means
other than by the driver's own foot brake, if you
will, or his own control, then it's respectfully
30 submitted that he, at that point in time, is not
driving under that definition. That's my
respectful submission with respect to that element.

5 And, Your Honour, with respect to the officer's
evidence, and I understand, you know, from what
you're saying that, yes, things may - should have
done - been done differently with respect to the
fact when he alluded that he knew nothing about
this event other than what was recorded on his
notes, and that's why the amended grounds now say
that it - those notes ought to have been filed as
10 the exhibit, as the evidence because that in fact
was the evidence.

15 As you've indicated, there is no - or well, I think
we both agree there's no case law to that. I can
only reference the fact that there is a - the law
of evidence, where I got some information from, *The
Law of Evidence*, Third Edition, 2002. And it does
there relate to, "If a document is actually the
source of the evidence, permit the document itself
to be admitted as an exhibit, where the document is
20 in the font or source of the information permitting
it to be filed as an exhibit is sensible unless the
document contains otherwise inadmissible
information."

25 And it goes on to say information that's not
verifiable. And I think that goes in line with
your earlier comments that back in the cross-
examination of the officer's notes an application
should've been made at that time before the Court.
30 And I guess I had the mindset, whether it's correct
or incorrect, to see if the prosecutor, at the

conclusion of their case, was going to ask that that be made part of an exhibit.

5 However, I'm here before you today, my client - and this matter does go back to 2014, ironically, just a few months after the *Kazemi* decision which was, I believe in September. This occurred the following June. Still under the old regime of the charging section, under 78.1, before the amendments with respect to demerit points and increased penalties.

10 However, I can only ask, Your Honour, that based on my submissions, based on the evidence and/or the lack of the evidence that there may not have been any driving per definition when all this did occur. I don't think there's anyone saying that the phone was not being held even if it was for a mere few seconds, but I don't know if that - at that point in time if an offence would've been made out based on the holding for that few seconds when the vehicle was disengaged from being able to move.

20 There is the evidence, there was nobody behind him. Her Worship talks about, you know, other vehicles around or if the light changed or any colour of light, that none of that was substantiated. In fact it was just all, you know, submissions of could've, should've, what if, but it wasn't there.

25 Like, for example, on page 21 of the transcript in and around line 28, "The light happened stay red throughout this time. It could've turned green, it

could've turned any colour."

THE COURT: What page are you at?

MR. MARSCHLER: I'm sorry?

THE COURT: What page?

MR. MARSCHLER: Sorry, Your Honour, page 21, in and around line 28.

THE COURT: Yes.

MR. MARSCHLER: This would be the submissions on the judgment.

THE COURT: This is said at Justice of the Peace Coopersmith's reasons for judgment?

MR. MARSCHLER: Yes.

THE COURT: Yes.

MR. MARSCHLER: Also on that same page, Your Honour....

THE COURT: Same paragraph - line 28, what portion are you....

MR. MARSCHLER: Okay. Somewhere around line 28 where there's an indication, "The light happened to stay red throughout this time." Then she goes on to say, "It could've turned green, it could've turned any colour, it happened to turn red."

It's making submissions that are not grounded in fact.

THE COURT: No, it's making findings not submissions.

MR. MARSCHLER: Sorry, findings. My apologies, I'm - I apologize, Your Honour. On that same page, further up at approximately line, maybe 13 she indicates that there is case law that talks about stopping at a red light is the same as being in the

process of travel.

THE COURT: I'm interested in the Crown because I looked for that and I don't know if the Crown has cases, but I looked online and I was unable to find anything that would support that.

MR. MARSCHLER: As am I, but just to the next sentence, Your Honour, then she says, "So by putting your vehicle in park you're still in the process of travel, you're in the active lane." Those two are two separate things. If there is case law talking about a red light it has nothing to do about your vehicle being put in park. Because she indicates there's case law about the red light but she doesn't indicate about any case law about a vehicle being put in park, but it almost seems like she alludes to it's one in the same.

THE COURT: She makes a finding over at the bottom of page 22. It says, "Mr. McConnell should have gotten off the road into the church parking lot or any other parking spot. That was not a parking spot. So I'm not satisfied you were actually parked when you're in an active lane and all that's parked is your engine. So you were driving on a highway, that being you were driving your motor vehicle, you're on a highway, that being northbound on Brock Road in Pickering and you were holding a handheld wireless communication device. It's the evidence of the officer, it's your evidence it was a flip phone."

So, I'm interesting in hearing from the Crown as to

5 whether or not there is case law that supports the finding of the learned justice of the peace because she indicates there is case law that says that someone who stops at a red light is - that is the same as being in the process of travel, that's the same as actually driving your car.

10 Because if there are cases that suggest that, if they're binding on me then obviously that's something I would have to take into account because at page 22, that's when, based on what she had said previously at page 21 about this case law existing, that's when she makes her finding of fact. I have some concerns too about the finding of fact that she makes because she says she's not satisfied that Mr. McConnell was actually parked when he was in the active lane and all that's parked is his engine. There's no onus on Mr. McConnell, she seems to have put an onus on him there by saying that she's not satisfied. That's on a, I'm assuming, a balance of probabilities which doesn't enter into the *Quasi Criminal Act* like the *Highway Traffic Act*.

25 "So, I'm not satisfied you're actually parked when you're in the active lane and all that's parked is your engine." It seems to me if the engine is parked then the car is parked because the engine, and frankly, the engine could be running and you could be parked. Some people do that and they get into trouble because they're in care or control of their motor vehicle and they've got more alcohol in

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5 their system than they ought to and so they are then charged, not with impaired driving, they're charged with impaired care or control. That's my concern with Justice of the Peace Coopersmith's findings.

10 I don't know that I need to hear anymore from you Mr. Marscheler, I think I need to see if the Crown's got some cases to support the justice of the peace's comments on page 21 and then her findings at page 22.

MS. BATEMAN: I can advise...

MR. MARSCHLER: Thank you, Your Honour.

15 MS. BATEMAN: I can advise we don't have case law to support that.

THE COURT: I can tell you I looked.

20 MS. BATEMAN: I'm echoing Kazemi. I'm aware of that case, as well as Pizzurro. I will echo Her Worship's comments in her decision that just because the defendant is not driving doesn't mean that he's not in care or control of that vehicle, that lane is not.

25 THE COURT: No, but the section doesn't say "care or control". There's no doubt he's in care or control of his motor vehicle but is he driving? It - you see if this - if this was an officer who sees him go by him...

MS. BATEMAN: Driving.

THE COURT: ...driving...

30 MS. BATEMAN: Right.

THE COURT: ...before he comes to a stop behind the four vehicles that the officer has no recollection

5 of how many vehicles, if any, are in front of
Mr. McConnell, but usually the evidence that you
hear in these cases is, "I was driving on the 401
and I glanced over at the car that was going past
me and I saw the driver with their cell phone up to
their ear."

10 I can tell you everyone in this courtroom has
probably driven on a street or a highway and seen
someone with their cell phone up to their ear or
seen their cell phone on the steering wheel while
they are typing in a text message, if they're
younger and they communicate by text messages.
15 You'll see people doing that, which that to me is
clearly distracted driving. It's clearly holding
the phone, and they're doing it while they're
driving. But when someone comes to a red light and
is stopped and she does not reject Mr. McConnell's
evidence, that's the problem.

20 MS. BATEMAN: No....

THE COURT: His evidence, she actually uses his
evidence to say, "Although you were parked, you put
your car in park which she doesn't reject, I still
believe that you are driving", and I just don't see
25 any support for that at that point...

MS. BATEMAN: Because what I was...

THE COURT: ...in the circumstances of this case.

30 MS. BATEMAN: What I was going to say was the
evidence is different from what the officer had to
say, even if it's past recollection recorded. He's
saying that he observed the vehicle travelling
northbound, so travelling. I'm going to assume

that to be moving, driving.

THE COURT: Yeah, for sure, but he doesn't say when and he says he has no recollection of when he sees Mr. McConnell using the phone. He says later, you're missing the part I read out earlier where he says, "I don't know if he was stopped or moving." I'll get it for you.

MS. BATEMAN: Sorry, page 6, line 10...

THE COURT: Right.

MS. BATEMAN: ...I see that now.

THE COURT: "So, I can't recall whether when I first saw him with the cell phone, he was driving up to the light or physically stopped."
And then I have the evidence in the transcript of Mr. McConnell which the justice of the peace does not reject, where he says, "I was stopped when I took the phone and I put the charger into it at the red light. And I actually, before I put the charger into the phone, I put my car in park to be safe."

And I think there are many circumstances where a car can be stopped in a live lane and the individual is not driving because they've stopped it. They are in care or control of their vehicle because they're sitting in the driver's seat and all of the case law dealing with care or control under the *Criminal Code* sections would apply, and those same decisions would apply to a *Highway Traffic Act* situation if care or control was an issue. But in this offence, this offence only occurs when you're holding a cell phone or

communication device and you're driving.

5 And I don't see any evidence that would support,
prove beyond a reasonable doubt that mister - which
is an essential element of this offence that
Mr. McConnell is in fact driving. And I don't
think *Kazemi* or *Pizzurro* assist the Crown because
those - both those cases are only defining what
holding means, and *Pizzurro* stands for the
10 proposition, there's no obligation on the
prosecutor to prove that the device is actually
working, and that there's actually communication
because that was an argument, I know, that
developed. I'm sure you experienced it,
15 Ms. Bateman.

MS. BATEMAN: Mm-hmm.

THE COURT: We don't experience it very often in
the Ontario Court of Justice Criminal Division, but
I think it happens before the justices of the peace
20 in *Highway Traffic Act* court all the time. There
was a period of time, not since those two cases
from 2013, *Kazemi* and *Pizzurro* because Court of
Appeal put an end to that. They said the Crown
doesn't have to prove those things.

25 Holding can be momentary if you're driving.

MS. BATEMAN: Correct. I hear what you're saying,
Your Honour.

THE COURT: That's my difficulty with this - these
30 reasons for judgment.

MS. BATEMAN: The only thing that I want to say is
that even if you're in park, you're in a parked

5 position on a red light, it really can wait. You
can deal with a phone either when you're pulled off
of the roadway or when you're not driving the
vehicle. I just think that people don't seem to
get this charge and that the penalties keep
escalating because people aren't getting it and
even though the evidence came out that the
defendant wasn't driving, I personally still don't
10 think it was appropriate of what the defendant did
while driving and that he - there was evidence that
he passed that parking lot. He could've pulled in
and dealt with the phone there. And that....

THE COURT: Well, he could've...

MS. BATEMAN: Could've....

15 THE COURT: ...actually driven just north of the
intersection and there's - there was a business
that sold hot tubs and there was a whole area...

MS. BATEMAN: For sure.

THE COURT: ...that you could just pull up.

20 MS. BATEMAN: For sure and my point is that it
really can wait and that a phone dying is not
detrimental, and that really drivers' attention
should be on the road and I just wanted to point
that out.

25 THE COURT: I have no doubts, and I hear exactly
what you're saying. I do think, though, that the
provision itself, as I've read, indicates under
78.1(1), "That no person shall drive a motor
vehicle on a highway while holding or using a
30 handheld wireless communication device or other
prescribed device that is capable of", and I won't
read all the rest of it.

5 The learned justice of the peace, I have great
respect for, indicates that, in effect, she accepts
Mr. McConnell's evidence that he was stopped, the
car was in park. She found that he was still in
the process of travel. She makes reference to
being aware of some case law that I have been
unable to find, and in my view, Mr. McConnell was
not driving his vehicle. At most he was in care or
10 control of it, stopped at a red light, and that he
put the charger into the bottom of his phone while
he was stopped and that's all he did with it.
There are no findings of fact by the Justice of the
Peace that are contrary to that.

15 REASONS FOR JUDGMENT

WEST, J. (Orally):

20 In all of the circumstances, in my view, the
learned justice of the peace erred in finding that
because he was parked in a live lane that that
meant he was driving, and in my view that was an
error. That was an essential element of the
25 offence that was not proven by the prosecution
beyond a reasonable doubt, and in my view, that
should lead to an acquittal.

30 My judgment is that the conviction is overturned
and an acquittal is entered.

MR. MARSCHLER: Your Honour, thank you both for
your decision, your facts, and your research, and I

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do appreciate...

THE COURT: Thank you.

MR. MARSCHLER: ...what was said here today. And I
also thank my friend for her valiant effort, as
well, as we are friends. But thank you, very much,
Your Honour. That does conclude my matters, if I
may be excused?

THE COURT: Yes, thank you.

MR. MARSCHLER: Thank you.

...WHEREUPON PROCEEDINGS COMPLETED

24.
Certification

FORM 2

CERTIFICATE OF TRANSCRIPT (SUBSECTION 5 (2))

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