

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

KEVIN PETER GOSSELIN

REASONS FOR SENTENCE
of the
HONOURABLE JUDGE GARTH MALAKOE

Heard at: Yellowknife, Northwest Territories
April 13, 2011

Date of Decision: June 29, 2011

Counsel for the Crown: Marc Lecorre

Counsel for the Accused: Robert H. Davidson

[s.5(2) of the *Controlled Drugs and Substances Act*]

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A. BACKGROUND

A.1 Introduction

[1] Kevin Gosselin has entered a guilty plea to possessing 3 grams of powder cocaine with a street value of \$300 for the purpose of trafficking. The offence is contrary to section 5(2) of the *Controlled Drugs and Substances Act*. Mr. Gosselin was arrested on October 12, 2010 after the transaction for the 3 grams was arranged by text messages on his cell phone. Mr. Gosselin drove to the agreed upon place. The police were waiting. Mr. Gosselin swallowed the cocaine; eventually told the police that he had swallowed the cocaine; and was detained until the cocaine was recovered in the hospital.

[2] The Crown and defence agree that this is case where a term of imprisonment is appropriate. The defence seeks to have Mr. Gosselin serve his term of imprisonment in the community.

[3] A conditional sentence of imprisonment as described in section 742.1 of the *Criminal Code* is a sentencing option which must be considered in this case; however, for the reasons indicated below, I have decided that Mr. Gosselin must serve his term of imprisonment in jail.

A.2 The Law

[4] Section 742.1 of the *Criminal Code* sets out the criteria for a conditional sentence:

742.1 If a person is convicted of an offence, other than a serious personal injury offence as defined in section 752, a terrorism offence or a criminal organization offence prosecuted by way of indictment for which the maximum term of imprisonment is ten years or more or an offence punishable by a minimum term of imprisonment, and the court imposes a sentence of imprisonment of less than two years and is satisfied that the service of the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2, the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the offender's compliance with the conditions imposed under section 742.3.

[5] The maximum penalty for possession of cocaine for the purpose of trafficking is imprisonment for life. There is no minimum term of imprisonment and it is not a serious personal injury offence, a terrorism offence or a criminal organization offence. Therefore, a conditional sentence of imprisonment is available if the following are satisfied:

- (a) a sentence of imprisonment of less than two years is appropriate;
- (b) service of the sentence in the community would not endanger the safety of the community; and
- (c) service of the sentence in the community would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2 of the *Criminal Code*.

[6] In reviewing the above-noted criteria, I will be referring to the background of the accused. This background was presented to the Court by way of a thoroughly researched Pre-Sentence Report filed March 7, 2011, Mr. Gosselin's criminal record, various letters of information and support and a letter from Mr. Gosselin's legal counsel outlining certain events which occurred following the sentencing hearing on April 13, 2011.

B. ANALYSIS

B.1 Is a term of imprisonment of less than two years appropriate?

[7] In the Northwest Territories, trafficking in cocaine or possession of cocaine for the purposes of trafficking is a crime which attracts a term of imprisonment. The

length of the term is based on a number of factors related to the offence and the offender. In *R. v. Maskell* (1981), 58 C.C.C. (2d) 408, the Court of Appeal of Alberta set a starting point of three years for a youthful, first time offender involved in commercial trafficking on a scale which is more than minimal. This starting point was confirmed in *R. v. Rahime*, [2001] A.J. No. 988 and is reflected in decisions in the Northwest Territories. See, for example, *R. v. Findlay*, [1989] N.W.T.R. 239 (S.C.).

[8] Where the quantity of cocaine is of a lower level; i.e., a few grams; where the transaction is not part of a large scale commercial organization; and where there are sufficient mitigating factors, a sentence which is less than two years is not uncommon.

[9] The transaction for which Mr. Gosselin has pled guilty is a single transaction. Although this was a “dial-a-dope” transaction, there is no evidence that he was part of a larger operation. Still, the facts presented by the Crown along with Mr. Gosselin’s admissions in his Pre-Sentence Report allow me to make certain observations about the circumstances of the offence. At the time of the offence, Mr. Gosselin was involved with individuals associated with the drug trade. The transaction was organized to the extent that it was known that orders for cocaine could be placed to Mr. Gosselin’s cell phone number and Mr. Gosselin accepted the “order” for cocaine via text message without knowing the buyer. Mr. Gosselin attended the transaction site in a sufficient state of preparation that he was able to swallow the 3 grams of cocaine without being detected or stopped by the RCMP.

[10] Mr. Gosselin is 26 years old. He has a criminal record with three offences: in 2007, failure to comply with a recognizance (section 145(3)); in 2008, driving while over 80 (section 253(1)(b)); and in 2008, failure to attend court (section 145(2)(b)).

[11] The following cases are representative of the range of sentencing in the Northwest Territories for Mr. Gosselin’s offence and indicate that Mr. Gosselin’s term of imprisonment should be less than two years:

- (a) *R. v. Blake*, 2003 NWTSC 28: 30 year old; three 1 gram transactions on different occasions; criminal record for possession of narcotics; common assault and sexual assault: 12 months for trafficking in cocaine.
- (b) *R. v. Greenland*, 2003 NWTSC 27: 20 year old; two 1 gram transactions on different occasions; criminal record for break and enters; 10 months for trafficking in cocaine.

- (c) *R. v. Draskoczi*, 2008 NWTTC 12: 33 year old; offer to sell 1 gram of crack cocaine; lengthy criminal record including 2 counts of possession for purposes of trafficking; 18 months for trafficking in crack cocaine.
- (d) *R. v. Turner*, 2006 NWTSC 6: 22 year old; agreed to sell 1 gram of crack cocaine; no criminal record; 11 months for trafficking in crack cocaine.
- (e) *R. v. Basson*, [2000] N.W.T.J. No. 20 (N.W.T. S.C.): 23 year old; no criminal record; party to the offence of trafficking in cocaine (drove the seller to the place of transaction); 7 months.

[12] In Mr. Gosselin's case, I am satisfied that the purpose and principles of sentencing as set out in section 718 to 718.2 of the *Criminal Code* are satisfied with a period of imprisonment of less than 2 years. The analysis which justifies this finding is presented below in the context of determining whether a conditional sentence is consistent with the purpose and principles of sentencing and I will not repeat the analysis here

[13] Having decided that a period of imprisonment which is less than 2 years is appropriate, the next step is to determine whether or not there would be a danger to the community if Mr. Gosselin were to serve his sentence of imprisonment in the community.

B.2 Would the community be in danger?

[14] The Supreme Court of Canada in *R. v. Proulx*, [2000] S.C.J. No. 6 said that the sentencing Court should assess danger to the community by assessing, first, the risk of the offender re-offending; and second, the gravity of the damage that could ensue in the event that the offender re-offends.

[15] At the time of the offence, Mr. Gosselin was associating with drug users and drug dealers. He was using cocaine and abusing alcohol. He last used cocaine in December 2010.

[16] He has been attending alcohol and drug counselling sessions twice a week since January 2011. He has been playing squash and volunteering to help a basketball team train for the Western Canada Games. He entered a plumbing apprenticeship program with a Yellowknife plumbing company on October 28, 2009; however, lost that employment after the circumstances of his offence were published in a local newspaper after the sentencing hearing in April, 2011.

[17] But for the use of cocaine until December 2010, Mr. Gosselin appears to have stayed out of trouble since his arrest in October 2010. Furthermore, he has taken positive steps to deal with his addiction issues and to disassociate himself from individuals involved in the drug culture.

[18] The defence submits that the accused has undergone “rehabilitative remand” by voluntarily attending treatments and taking other proactive steps. This is a sign of his ability to follow the terms of a conditional sentence order and therefore, he would not be a danger to the public when serving a conditional sentence order.

[19] It is not surprising that an accused stays out of trouble while awaiting sentence. This should not be considered remarkable. As the Alberta Court of Appeal said in *R. v. Wilson* [2009] A.J. No. 781 at paragraph 31, “[a]nd of course, most persons awaiting sentence behave themselves, so doing so is no proof of lack of future dangerousness after sentence.”

[20] The accused has, in the past, failed to comply with the terms of an undertaking and failed to attend court. These offences plus his continued use of cocaine until December 2010 cause me to think carefully about the risk of the accused re-offending. On balance, however, I am satisfied that given the positive changes in his life and the positive comments in the PSR, i.e., that the accused “is a suitable candidate for a community based sentence”, there is not a large risk that Mr. Gosselin would re-offend.

[21] Given my finding with respect to Mr. Gosselin’s low risk for re-offending, it is still necessary for me to look at the dangers arising from him becoming involved in cocaine trafficking again. I am aware that these dangers are significant as discussed by the Alberta Court of Appeal in *R. v. Wilson*, [2009] A.J. No. 781 and the statements of many Judges in the Northwest Territories. For example, Justice Richard of the Supreme Court of the Northwest Territories, in *R. v. Turner*, 2006 NWTSC 64 stated:

The illegal trade in cocaine and crack cocaine in Yellowknife has had a devastating effect on the people and on the social life of our community. We know this because of the many cases that come before the Courts where we see the snowball effect on the commission of crimes in this community. We see thefts, break and enters, assaults, domestic violence, and we have seen homicides - all related to cocaine addiction. We have seen broken families and we have seen destroyed lives.

It has been said many times in this courtroom that the illegal cocaine trade is like a plague which has infested the social fabric of our community. Those who are involved in the supply and sale and trafficking of cocaine are like vultures or predators who are preying upon those weak members of the community who are addicted to this drug. The traffickers are doing this presumably for profit, or money. They, apparently, have no scruples about

preying upon vulnerable people. For this reason alone, they ought to be punished. They are doing so even though there is a risk that they will end up in jail for a substantial period of time.

[22] Even if the risk of re-offending is low, if the effects of re-offending are too high, the sentencing court may decide that the overall potential danger to the community is too high to allow a conditional sentence. In this case, I am satisfied that Mr. Gosselin's involvement in the drug trade was relatively limited and that he has made substantial progress in his rehabilitation. In conclusion, although the dangerous effects of re-offending would be high, the risk of Mr. Gosselin re-offending is sufficiently low that it would not be a danger to the community if Mr. Gosselin serves his sentence in the community.

B.3 Consistent with Fundamental Purpose and Principles of Sentencing

[23] Whether or not a conditional sentence is an appropriate sentence for Mr. Gosselin turns on whether a conditional sentence would be consistent with the fundamental purpose and principles of sentencing as set out in sections 718 to 718.2 of the *Criminal Code*.

[24] Section 718 states that the fundamental purpose of sentencing is to impose just sanctions and therefore contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just and peaceful society. These just sanctions have one or more of the following as objectives:

- (a) to denounce unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

[25] It is a fundamental principle of sentencing that the sentence imposed must be proportionate to the gravity of the offence and the degree of responsibility of the offender (the "proportionality principle" - s.718.1).

[26] Other principles of sentencing that must be considered in this case include the following:

- (a) the sentence should be similar to sentences received by similar offenders for similar offences committed in similar circumstances (the “parity principle” – s.718.2(b))
- (b) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances (the “restraint principle” – s.718.2(d));
- (c) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders (s.718.2(e));
- (d) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender (s.718.2(a))

[27] I have previously stated that there is a low risk for Mr. Gosselin to re-offend. He is an individual who has completed his grade 11 and has one semester of college. He has had steady employment and is able to pursue career goals. I am satisfied that regardless of the sentencing outcome, he has been deterred from further involvement in drug trafficking and recognizes the effects that drug use and trafficking has on him and others. Accordingly, a conditional sentence order in this case would be consistent with the purpose of sentencing as it relates to the objectives of rehabilitation, specific deterrence and reparation and acknowledgement of harm. In addition, a conditional sentence order would be consistent with the restraint principle.

[28] In increasing or reducing the sentence to account for relevant aggravating or mitigating circumstances, I consider the following to be relevant mitigating circumstances:

- (a) The accused entered an early guilty plea. This was prior to the certificate of analysis being available and on his third appearance in Court. This demonstrates that Mr. Gosselin is remorseful. He has also saved the Court and the Crown considerable time and resources and spared the witnesses from having to testify.
- (b) The accused has been sober since January 2011 and has taken regular counselling for substance abuse.
- (c) The accused was cooperative with the RCMP and with the author of the Pre-Sentence Report.

[29] I consider the following factors to be relevant aggravating circumstances:

- (a) Cocaine is a “hard” drug and trafficking in cocaine is more serious than trafficking in the so-called “softer” drugs.
- (b) The accused has a criminal record, which although unrelated to drugs, has offences against the administration of justice.

[30] The issues which I consider to be most important and difficult with respect to whether or not a conditional sentence is consistent with the purpose and principles of sentencing are the following:

- (a) Would a conditional sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender?
- (b) Is a conditional sentence order a sentence which is similar to similar offences committed in similar circumstances by similar offenders?
- (c) Is a conditional sentence order sufficient to satisfy the objectives of general deterrence and public denunciation?

Proportionality

[31] To determine the effect of the proportionality principle, it is necessary to characterize both the gravity of the offence and the responsibility of the offender.

[32] The sale of cocaine where the contact with the trafficker is made to a cell phone number provided to the prospective purchaser and the cocaine is subsequently delivered by the trafficker is known as a “dial-a-dope” scheme. It is a scheme which is an efficient and difficult-to-detect method of selling cocaine. The transaction is set up electronically and the interaction between buyer and seller is very brief. Since the quantity being sold is known in advance, the seller only has to show up with the requested quantity.

[33] The transaction is purely commercial in the sense that the seller is selling to make money. He is not selling to friends. It is not spur of the moment. The components of the scheme have to be set up in advance.

[34] The quantity of cocaine involved was 3 grams. The street value was approximately \$300. The nature of the drug was powdered cocaine as opposed to crack cocaine. As would be expected in this type of transaction, the accused was found with the quantity of cocaine that was being sold.

[35] The effect of cocaine on the residents of the Northwest Territories has been stated in other cases from all levels of Courts in the Northwest Territories; for example, see the quote in paragraph 21 above from *R. v. Turner*. Individuals who are addicted to cocaine lose control of their lives to their addiction. Crimes are committed to feed the addiction. Family relationships are destroyed. The continued use of cocaine results in physical and social deterioration of the user.

[36] The selling of cocaine is a lucrative business. Those who are in the business will use violent and illegal means to keep or expand their market share. Often, gangs are involved.

[37] The gravity of an offence involving the trafficking of cocaine is serious. Cocaine is a hard drug. In this case, the quantity was significant but not so much as to be a medium or large-scale commercial transaction. Nonetheless, this was a transaction which was commercial.

[38] An offence involving the trafficking of cocaine is sufficiently serious that there will always be severe consequences. As Justice Schuler stated in *R. v. Basson*, [2000] N.W.T.J. No. 20 (N.W.T. S.C.):

9 . . . One of the things that is very important here is that Mr. Basson and, in particular, young men like Mr. Basson - and by that I mean young men in the Yellowknife community - are aware that trafficking in cocaine, whether as the principal actor or as a party, will entail severe consequences and that there will be punishment for it.

10 Both counsel have very fairly acknowledged that much of the sadness and the human devastation that we see in court can be tied to both drug and alcohol abuse. It is not a victimless crime. There is always a victim when it comes to drug trafficking.

11 I note that one of the concluding comments made in the *Proulx* case - the court upholding the jail sentence that had been imposed for an offence unrelated to this one - said: Trial judges are closer to their community and know better what would be acceptable to their community.

[39] Mr. Gosselin was a user of cocaine; however, no evidence was led to indicate whether or not he was addicted to the drug. He claims to have been selling cocaine to make money to buy cocaine for his own use. Mr. Gosselin had access to legitimate financial resources. He was driving what appeared to be his own truck; had a personal loan of \$12,000 and was employed as an apprentice plumber. He made a choice to sell cocaine in order to raise money to purchase cocaine. He had other financial alternatives available to him. He chose to prey on the vulnerability of others to the lure of cocaine.

[40] There is no evidence to show whether or not the accused was tied to a larger organization. There is no evidence to suggest that he had any other role than to receive the cell phone order and to deliver the cocaine in response.

[41] The accused swallowed the cocaine. After he was detained, he told the police that he swallowed the cocaine. Both the defence and the Crown have made submissions on these facts. The Crown says that the swallowing of the cocaine exhibits a sophistication and familiarity with the drug trade which indicates that the accused has more than a casual involvement with trafficking. On the other hand, the defence argues that had the accused not told the police that he had swallowed the cocaine, they might not have known that he swallowed the drugs. This cooperation should be a mitigating factor.

[42] Without more evidence, I am unable to conclude that these facts have any significance in sentencing. The swallowing of the drugs could have been a reaction to the presence of the police. There is no evidence that the drugs were packaged in such a manner that would ensure that they could be swallowed safely in the event of police detection. That the accused told the police that he had swallowed the drugs could be a result of fear that the cocaine might endanger his life if he was not detained with access to a medical facility in the event the packaging ruptured.

[43] With respect to proportionality, the offence of trafficking in cocaine is of sufficient gravity to warrant a term of incarceration. In certain situations, the diminished responsibility or moral blameworthiness of the offender may effect a mitigation of this requirement. For example, in the case of *R. v. Bohnet*, (unreported T-1-CR 2009 000441), the Territorial Court of the Northwest Territories imposed a conditional sentence where the offender was a long-term drug addict who at the time of sentencing was diagnosed and treated for cervical cancer. In the Alberta Court of Appeal case of *R. v. McCulloch*, 2011 ABCA 124, a conditional sentence was imposed where the addict offender was a reluctant seller who was pressed into selling after initially refusing to become involved.

Parity

[44] With respect to the parity principle, there has been only one case in the Northwest Territories brought to my attention, in which a conditional sentence was imposed with respect to the offence of cocaine trafficking or possession of cocaine for the purpose of trafficking. This was the *Bohnet* case referred to above and the decision to impose a conditional sentence can be explained as indicated.

[45] The principle of parity in relation to cases involving the trafficking of cocaine was discussed by Justice Richard in *R. v. Turner*, 2006 NWTSC 6:

10 Counsel have themselves referred to earlier sentencing decisions of this Court, some of which have a number of similarities with the present case. In some of those cases, the offenders were young; like Peter Turner. In some of those cases, the offender had no criminal record; like Peter Turner. In some of the cocaine trafficking cases that have come before this Court, the offender has pleaded guilty at an early opportunity; unlike Peter Turner. In some of the cases, there was more than one trafficking transaction; unlike Peter Turner's case which involves one trafficking incident only. All of this is to say that each sentencing disposition is different and is dependent on specific circumstances of the offence and of the offender. However the Court must, because of the prevalence of this crime in this community, have specific regard to the important sentencing principle of parity so that, generally speaking, similar sentences are imposed on similar offenders for similar offences. It is for that reason, among others, that a conditional sentence is not available to Peter Turner in this case.

11 Without repeating what this Court said in *Greenland*, in *Basson*, [2000] N.W.T.J. No. 20 and in *Chamberlin*, [2000] N.W.T.J. No. 25, I adopt those reasons for deciding that a conditional sentence is not available to Peter Turner in the particular circumstances of this offence of trafficking in cocaine in Yellowknife in December 2005.

[46] In applying the principle of parity to those cases decided in the Northwest Territories, I am aware that defence counsel urges me to consider cases from Alberta since members of the Alberta Court of Appeal also sit as the Northwest Territories Court of Appeal. In *R. v. Rahime*, [2001] A.J. No. 988, the Alberta Court of Appeal chose not to interfere with conditional sentences imposed on six individuals involved in cocaine trafficking in circumstances not unlike that of Mr. Gosselin.

[47] In response to this submission, I emphasize the passage in *Proulx*, which is from *M. (C.A.)*, [1996] 1 S.C.R. 500 and which is quoted in *Rahime*:

Perhaps most importantly, the sentencing judge will normally preside near or within the community which has suffered the consequences of the offender's crime. As such, the sentencing judge will have a strong sense of the particular blend of sentencing goals that will be "just and appropriate" for the protection of that community. The determination of a just and appropriate sentence is a delicate art which attempts to balance carefully the society goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence, while at all times taking into account the needs and current conditions of and in the community.

[48] Judges in the Northwest Territories have recognized that the offence of trafficking in cocaine or possession of cocaine for the purpose of trafficking will normally attract a term of incarceration. This is a recognition that the "needs and current conditions" of the Northwest Territories and in this case, the community of Yellowknife, may not be the same as communities in Alberta.

General Deterrence and Denunciation

[49] With respect to general deterrence and public denunciation, I recognize that, in general, a conditional sentence order is capable of satisfying both of these sentencing objectives. Still, a conditional sentence, even with stringent conditions, will usually be a more lenient sentence than a jail term of equivalent duration (see *Proulx* at paragraph 40).

[50] A sentence served in the community is insufficient to send the necessary message to deter others who might be in a situation such as the accused from trafficking in cocaine or possessing cocaine for the purpose of trafficking. Drug traffickers need to be aware that trafficking of cocaine in the Northwest Territories will normally result in a jail term unless there are special circumstances. In this situation, I do not find that such special circumstances exist. To use the words of the Justice Vertes in *R. v. Mulligan* [2002] N.W.T.J. No. 45, “when punitive objectives such as deterrence and denunciation are particularly pressing, then generally incarceration is the preferable and more appropriate sanction.”

[51] I recognize that there exist mitigating factors which affect Mr. Gosselin’s sentence. These factors have been stated previously. These factors such as Mr. Gosselin’s early guilty plea, his cooperation with authorities and his post-offence conduct have reduced the length of the term of incarceration that he would have otherwise received.

C. CONCLUSION

[52] For the offence of possession of cocaine for the purpose of trafficking pursuant to section 5(2) of the *Controlled Drugs and Substances Act*, Kevin Peter Gosselin will be imprisoned for nine (9) months.

[53] After he is released from imprisonment, he will be subject to the following conditions in a probation order for a period of twelve (12) months:

- (a) keep the peace and be of good behaviour;
- (b) appear before the court when required to do so by the Court;
- (c) notify the Court or the probation officer in advance of any change of name or address;
- (d) promptly notify the Court or the probation officer of any change of employment or occupation;

- (e) report to a probation officer within two (2) working days of being released from imprisonment and thereafter as directed by the probation officer;
- (f) actively participate in counselling as directed by the probation officer and to the satisfaction of the probation officer, including but not limited to counselling for drug and alcohol abuse; and
- (g) abstain completely from the consumption and possession of alcohol and non-prescribed illegal drugs.

[54] A mandatory 10 year firearms prohibition pursuant to section 109(1)(c) is imposed.

[55] I make an order pursuant to section 487.051 of the *Criminal Code*. In doing so, I have considered the accused's criminal record, the seriousness of the offence, and the circumstances surrounding its commission. I have also considered the importance of DNA testing as a tool for crime solving. I feel that such an order would have minimal impact on Mr. Gosselin's privacy and security of the person and am satisfied that it is in the best interests of the administration of justice to make this order.

[56] All drugs including the cocaine, testosterone and Trenbolone; the medical needles and alcohol prep pads; the backpack and the Blackberry are to be forfeited to the Crown pursuant to section 16 of the *Controlled Drugs and Substances Act*. I am satisfied that these are "offence-related" property within the meaning of that section.

[57] A victim of crime surcharge of \$100.00 is imposed. Mr. Gosselin will have 10 months to pay the surcharge.

Garth Malakoe
J.T.C.

Dated at Yellowknife, Northwest
Territories, this 29th day of June,
2011.

R. v. Kevin Peter Gosselin, 2011 NWTTC 15

Date: 2011 06 29

File: T1-CR-2010-002114

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