
CANADA / JUDGMENT

Northwest Organics, Limited Partnership v. Roest

2017 BCSC 191

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Supreme Court of British Columbia

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2017 BCSC 191 Northwest Organics, Limited Partnership v. Roest

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Northwest Organics, Limited Partnership v. Roest,

2017 BCSC 191

Date: 20170206

Docket: S108327

Registry: Vancouver

Between:

Northwest Organics, Limited Partnership and

Northwest Group Properties Inc.

Plaintiffs

And

Ed Roest

Defendant

Before: Master Baker

Reasons for Judgment

Counsel for Plaintiffs:

R. Deane and K. McCrystal

Counsel for Defendant:

T. Rauch-Davis, Articled Student,
on behalf of J. Gratl

Counsel for Non-party Respondents,
J. Tegart and L. Pilon

A. Powell

Place and Date of Trial/Hearing:

Vancouver, B.C.

January 12, 2017

Place and Date of Judgment:

Vancouver, B.C.

February 6, 2017

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ISSUE

- [1] The plaintiffs apply for an order pursuant to Rule 7-1(18) of the Supreme Court Civil Rules for production of documents in the possession of non-parties, i.e. Ms. Tegart and Ms. Pilon, and for an order pursuant to Rule 7-5 that these non-parties be examined.

BACKGROUND

- [2] In 2009, the plaintiffs (now known as Revolution Infrastructure Inc.) began the planning and establishment of a facility in the Botanie Valley, near Lytton, B.C., to produce organic soil for organic farming. There has been local opposition to the facility, alleging that it has or will have odours, will encourage rats and pests, and will result in the incursion of invasive species.
- [3] The plaintiff alleges in this action that the defendant, along with several other individuals, in opposition to the facility has made defamatory statements both orally and in writing. The plaintiff has commenced separate actions against these other individuals, but the actions will be tried together in August of this year. For efficiency's sake, this application is brought only in this action, but I understand that it is agreed that the result will apply to the other actions.
- [4] The plaintiffs are generally dissatisfied with document disclosure by these various defendants, so they have applied several times for production by non-party record holders. At least three previous orders have gone unopposed, and this is the first that has been opposed; that opposition comes principally from the record holders themselves. Ms. Tegart is the Member of the Legislative Assembly ("MLA") for the region and Ms. Pilon is her constituency assistant. As will be seen below, Ms. Tegart and Ms. Pilon resist production based on a claim of parliamentary privilege.
- [5] It seems generally acknowledged that Ms. Tegart and Ms. Pilon have been parties to discussions or oral communications and are in possession or control^[1] of documents relating to the dispute, mostly consisting of communications from or to constituents, but also including communications with agencies such as the Lytton and District Chamber of Commerce.

PARTIES' POSITIONS

The Plaintiffs

- [6] The likelihood of Ms. Tegart or Ms. Pilon having documents producible by Rule 7-1(18) is established, Mr. Deane argues, both by the evidence obtained from other non-parties and by admissions or acknowledgments made by Ms. Tegart. Documents from other non-parties either include or refer to, for example, e-mail correspondence to or from Ms. Tegart concerning the facility or respecting meetings or public discussions about the facility. Local newspaper accounts also evidence discussions on the subject that involved Ms. Tegart all, obviously, in her capacity as the local MLA.
- [7] Mr. Deane submits that production of these documents is essential to establishing whether defamatory words were communicated to either Ms. Pilon or Ms. Tegart, what those words were, who communicated them, and when the communications were made.

[8] Most of Mr. Deane's submissions concerned the response to the application by Ms. Tegart and Ms. Pilon; in that response they claim, as discussed below, that parliamentary privilege precludes production and that the demand is overly broad. On the question of parliamentary privilege, Mr. Deane agrees that it is incorporated into British Columbia law by virtue of the Legislative Assembly Privilege Act[2], s. 1(1) of which provides

The Legislative Assembly and its committees and members have the privileges, immunities and powers that were held and exercised by the Commons House of Parliament of the United Kingdom and its committees and members on February 14, 1871, so far as not inconsistent with the Constitution Act and whether held or exercised by custom, statute or otherwise.

He argues, however, that the parliamentary privilege given by legislation or common law is very narrowly circumscribed, rarely invoked, and can apply only where it is demonstrably necessary for the parliament and its members to discharge their constitutional functions and responsibilities. The argument, he submits, can be reduced to the issue of necessity; is it truly necessary that the communications be protected so that, in this case, Ms. Tegart could carry out or complete her duties as a member of the provincial legislature? He argues that there is no evidence supporting this supposition; no factual context or particulars that would show that Ms. Tegart's duties or functions would be inhibited or prevented by disclosure.

[9] Mr. Deane argues that parliamentary privilege as recognized, defined, or limited by the authorities does not protect and has never applied to communications between an elected member and his or her constituents; he submits that, to the contrary, the authorities have been specific in refusing to extend the privilege to legislator/constituent communications.

[10] The plaintiffs also oppose the more conventional claim to privilege i.e. the so-called "case-by-case" privilege described and defined by Wigmore and its four criteria:

- a) communications made with the expectation of confidentiality;
- b) confidentiality as an essential element of the maintenance of the relationship between the communicating parties;
- c) communications made in a relationship that the community feels should be "sedulously fostered";
- d) injury caused to the relationship by disclosure would exceed the benefit gained, for the purposes of the litigation, by disclosure.

Mr. Deane submits that none of these criteria apply in this case; there is no evidence of any expectation of confidentiality; on the contrary, it seems that Ms. Tegart shared some of the communications, at least, with other parties and some of the discussions were in public circumstances. There is no evidence, he says, of confidentiality being essential to the member/constituent relationship, and the authorities have specifically denied, at various times, each of the requirements by refusing to extend parliamentary privilege to member/constituent communications.

- [11] Addressing the defendants' response that the demand is overly broad, the plaintiffs argue that the standard for production of the documents sought is established by *Kaladjian v. Jose*[3]. The pleadings will establish which documents will prove or disprove a material fact, but evidence can support the further production of the so-called "second tier" of documents which, Mr. Deane argues, would include the documents in issue in this application. Documents already obtained and statements by Ms. Tegart constitute the evidence required by *Kaladjian*, he argues.
- [12] Finally, the plaintiffs argue that the defendant himself has very limited standing in this application; he has no standing whatsoever in respect of the application to examine Ms. Tegart or Ms. Pilon[4] and any submissions respecting the non-party documents would be restricted to the element of necessity.

The Non-parties

- [13] Mr. Powell, on behalf of Ms. Tegart and Ms. Pilon, offers three arguments against production:
- Ms. Pilon, as Ms. Tegart's assistant and employee, is not the party with possession or control of any documents; such documents, he argues, would be in the possession or control of Ms. Tegart;
 - the demand as expressed in the application is overly broad;
 - privilege applies to preclude production and the privilege takes two forms; parliamentary and case by case or so-called "Wigmore" privilege.
- [14] Mr. Powell makes an interesting argument respecting Ms. Pilon and the specific wording of the Rules. Production required by either Rule 7-1(1) (i.e. the "first tier" documents) or 7-1(18) (i.e. non-party documents) applies only to documents in the possession or control of the party or record holder. Only Rule 7-1(11) (i.e. the "second tier" documents) includes documents within the power of the party. He submits that Ms. Pilon, being an employee of Ms. Tegart and, presumably, subject to her control and direction by the usual standards of *magister/servitium*, arguably might have power over the documents, but certainly not possession or control which he argues, must pertain only to Ms. Tegart. A party can only be held to have possession or control of documents if that party has a proprietary interest in the documents[5], and since only Ms. Tegart, he submits, can have a proprietary interest in the documents, Ms. Pilon must be excused from production.
- [15] In any event, the demand, Mr. Powell argues, is overbroad and that a measure of required materiality narrows and limits the range of documents that must be produced by non-party record holders[6]. This narrowing, he says, protects the interests of the non-party and requires that it be demonstrated that the non-party does, in fact, have the documents, that they are not in litigants' possession, must be clearly or at least adequately identified, and any claimed confidentiality must be considered. More particularly, he argues that the documents sought by paras. 1(a) and (e) of the application reference conversations or

communications in one case five years old and in another three. The application requests production of all copies of certain specific flyers, articles, or reports when, Mr. Powell submits, one copy should be sufficient.

- [16] Mr. Powell maintains that two forms of privilege apply: one specific and one general, and that in any event, any privilege that Ms. Tegart can successfully invoke would apply to her assistant, Ms. Pilon. The specific privilege, as I mentioned above, is parliamentary privilege, and the more general or case-by-case one is that described by Wigmore and other authorities.
- [17] Parliamentary privilege arises under the provisions of the Legislative Assembly Privilege Act, above, and is necessary, Mr. Powell argues, to permit Ms. Tegart as an elected MLA to do her job and discharge her responsibilities as a legislator. She must be free to discuss matters of concern with her constituents and obtain their views and perspectives without fear of having those discussions or communications exposed to public scrutiny. Ms. Tegart asserts that the function of legislators is to formulate policy for the public good and to apply that policy as legislation. That process, she says, should develop from the ground up, so to speak, and that in that development communications with constituents are essential. Any intrusive examination of those communications could have the effect of constraining that development process, such that privilege applies to protect the process. The importance of a legislator's duty and responsibility, Mr. Powell submits, takes precedence occasionally over others' legal rights as, in this case, to discovery or production of documents and/or records.
- [18] If parliamentary privilege does not apply then the case-by-case Wigmore privilege does as, Mr. Powell says, its four criteria (para. 10, above) have been met. Ms. Tegart has averred that some of the constituents who communicated with her, at least, did so requesting confidentiality and that she assures constituents of confidentiality. Moreover an MLA must be able to rely on confidentiality in some cases (such as this, Ms. Tegart says) to do his or her job. If the confidentiality is not assured then the legislator will not be able to seek or receive communications essential to the formulation of policy, as above, or to resolution of public issues or problems.
- [19] The relationship of legislator and constituent is "sedulously fostered", Mr. Powell argues, as it is fundamental to our system of parliamentary democracy, governance, and lawmaking. Finally, the injury to our form of democracy that will arise with disclosure which, Mr. Powell argues, will inevitably reduce or inhibit the necessary free flow of information between constituent and representative will far exceed the harm or difficulty caused to the plaintiffs if the claim of privilege is upheld and disclosure refused.

The Defendant

- [20] Mr. Rauch Davis conceded that his client had no standing to oppose the application to examine Ms. Tegart or Ms. Pilon, and also agreed that his client's standing to oppose documentary disclosure was restricted to the issue of necessity. In that respect, he concurred with Mr. Powell in arguing that the application is overly broad such that sufficient relevance or materiality has not been established and, with that, the argument of necessity fails.
- [21] In reply, Mr. Deane argued that previous orders for disclosure (para. 4, above) have directed disclosure on the same scale and breadth of this application so that the issue of materiality or relevance has already been established. In respect of privilege, he submits that, firstly, the authorities have specifically excepted the constituent/legislator relationship or communications from parliamentary privilege and that, in any event, the four requirements of Wigmore privilege are simply not met in this case.

ANALYSIS

- [22] To begin, and to repeat, there is no serious argument or suggestion that documents pertaining (to whatever degree) to the plaintiffs' claims are in the possession or control of either or both of Ms. Tegart and Ms. Pilon. And while the case for disclosure is the plaintiff's to make, I think it best to deal with Mr. Powell's (and therefore Mr. Rauch Davis') objections in order.
- [23] Ms. Pilon's position. I agree with Mr. Powell on two points respecting Ms. Pilon. First, I agree that, in the main, the documents sought are almost certainly properly regarded as documents in the possession or control of Ms. Tegart, not Ms. Pilon. Excepted from that would be any communications particular to Ms. Pilon, e.g. an e-mail sent either by or to her specifically. I also agree that if, for the reasons argued by Mr. Powell privilege applies, then it will apply to Ms. Pilon as well as to Ms. Tegart as the privilege would, in my view, extend to Ms. Pilon as an agent or employee of Ms. Tegart.
- [24] Is the demand overly broad? Mr. Powell argues that it is, and that the standard for production is that required by Rule 7-1(1), i.e. that it must be shown that the documents in question would prove or disprove a material fact. Mr. Deane argues a wider classification, more akin to the standard set by *Compagnie Financiere du Pacifique v Peruvian Guano Co.* [7] [Peruvian Guano], i.e. any document that might reasonably lead to a path of enquiry that would assist the applicant. Mr. Deane is correct in this standard. In *Kaladjian*, Mr. Justice Davies at para. 45 agreed with the conclusions of Master Bouck in *Przybysz v. Crowe*[8] who said at paras. 27 and 28 in respect of "second tier" documents
- 27] However, such a ruling need not be considered as this application is, in fact, brought pursuant to Rules 7-1(11), (12) and (13). Those Rules contemplate a broader scope of document disclosure than what is required under Rule 7-1(1)(a)

[28] Only after a demand is made under Rule 7-1(11) for documents that relate to any or all matters in question in the action and the demand for productions is resisted can a court order production under Rule 7-1(14)...

At para. 45 of Kaladjian, Davies J. went further and concluded that that wider ambit is "equally applicable to the interpretation and application of Rule 7-1(18)".

[25] In *Global Pacific Concepts Inc. v. The Owners, Strata Plan NW 141*[9], Dillon J. came to the same conclusion as Master Bouck, in respect of Rule 7-1(11)

[9] That wording is much closer to the test traditionally known, prior to the new Rule 7-1(1), as the Peruvian Guano test of relevancy, which is cited in Biehl at paragraph 12 to be documents which may, not must, either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary

The inevitable conclusion to draw from these cases is that the standard of production for documents other than Rule 7-1(1) ("first tier") is closer to a Peruvian Guano standard. This makes sense particularly in the case of non-party documents as a non-party cannot be taken to know what document will prove or disprove a material fact, as that non-party cannot reasonably be expected to know what the material facts are. This is so for the simple reason that, as a non-party, they are typically not privy to the pleadings that establish and limit the dispute. Parties to the action, on the other hand, having both received and prepared pleadings, should know what the material facts are.

[26] Just as logically it is, I conclude, not reasonable to typically know which of the documents held by non-parties would prove or disprove a material fact, as often the applicant has concluded only by inference that the non-party has documents that may assist. That inference is drawn, as here, from other documents or information obtained by discovery. Knowing only the likelihood of helpful documents is not enough to narrow the categories as Mr. Powell submits.

[27] Mr. Powell argued that production should not apply to every flyer, for example, in Ms. Tegart's possession and that one copy would suffice. I disagree; while multiple copies may seem redundant or tedious, it is entirely possible that various copies have different annotations or notes.

[28] I do not agree, with one exception that will be discussed at para. 42 below, therefore that the application is overly broad.

[29] I am not persuaded that either parliamentary or case-by-case privilege attaches to the documents in question. To begin, the inclusion of privilege in the Legislative Assembly Privilege Act does not offer, in my view, the protection Ms. Tegart claims. I take the term "privilege" to have a wider meaning, i.e the prerogatives, advantages, or rights that a member of the legislature might enjoy, yet are not available to the general population. The general context of the Act makes that clear to me, as it deals with compelling individuals to appear before the legislature, for example, or protecting members or individuals from

damages while acting on instructions of the legislature. Any privilege respecting communications would be found, in my view, in the common law and case authorities. Probably the term in the statute that comes closer to Ms. Tegart's purpose or position is "immunities" to the extent that a legislator would be immune to requirements for disclosure that might apply to the general populace.

[30] In that respect, the leading authority is *Canada (House of Commons) v. Vaid*[10] [Vaid], a decision of the Supreme Court. Vaid concerned the extent of privilege attaching to the Speaker and the Commons respecting staff and employment issues and in particular the claims of the Speaker's chauffeur and proceedings brought by him before the Canadian Human Rights Tribunal.

[31] But first, for context, the privileges and immunities applying to provincial legislators in British Columbia are those

that were held and exercised by the Commons House of Parliament of the United Kingdom and its committees and members on February 14, 1871, so far as not inconsistent with the Constitution Act and whether held or exercised by custom, statute or otherwise.[11]

The analysis of whether privilege applies to the activities of legislators concerns, Binnie J. decided, a two-step process[12]. One must first consider if the activity or communication was included in "an acknowledged category of privilege" that existed by statute or constitutional principle[13] and, if so, what limits or definition might the courts place on the privilege without risking intrusion or compromise of the privilege itself. Second, if the activity or communication cannot be found in those categories, does it pass the "necessity" test?

[32] The purpose of privilege is to protect the autonomy of legislatures:

Parliamentary privilege is defined by the degree of autonomy necessary to perform Parliament's constitutional function. Sir Erskine May's leading text on the subject defines parliamentary privilege as

the sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High Court of Parliament, and by Members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals.

[Emphasis added in Vaid][14]

Binnie, J. restates the need or application of necessity as

necessary to protect legislators in the discharge of their legislative and deliberative functions, and the legislative assembly's work in holding the government to account for the conduct of the country's business.

[33] The question then becomes:

- a) are the communications that Ms. Tegart or Ms. Pilon seek to protect within an acknowledged category? or, if not,
- b) Is immunity to disclosure necessary to protect Ms. Tegart, as an MLA, in the "discharge of her legislative and deliberative functions"?

I agree with Mr. Deane that, with possible highly unusual exceptions, there is no parliamentary privilege protecting constituent / legislator communications:

neither the House of Commons at Westminster nor its counterpart in Ottawa has considered absolute immunity over communications to constituents is necessary for the performance of legislative duties.[15]

I conclude that what is true of the parliaments of the United Kingdom and Canada in this respect is, in this case, true of the legislature of British Columbia and that communications flowing either way between constituent and legislator are not within a category protected by parliamentary privilege or immunity.

[34] Is, then, such protection necessary to protect Ms. Tegart's duties and responsibilities? Again, the answer is no. The courts, while recognizing the evolving role of legislators in an increasingly complex and technological world, have been clear in restricting parliamentary privilege to the so-called "core" functions of legislatures and legislators, which functions are "the formal collegiate activities" of elected members, performed in Parliament or the legislature, by which they deliberate upon policy and debate, discuss, and pass legislation. It is obviously a typical activity of a legislator, wisely followed, to discuss issues with constituents and to seek their input and perspectives, but the courts have consistently concluded that such activities fall outside the ambit of parliamentary privilege.

[35] It was argued that to fulfill her functions, Ms. Tegart must be able to hear, in confidence, the views of aggrieved constituents and that if she were unable to do that, she would not be fully informed or capable of representing those constituents, be it in the legislature, before committees, or in any other legislative capacity. It is not for the court, obviously, to prescribe to a legislator how she should discharge her duties; one assumes that legislators bring to their job as many approaches as there are legislators. But one thing must be clear; once elected a legislator represents all of her constituents, not just those that seek her out with concerns or entreaties. To conclude otherwise is to relegate the legislator's role to that of advocate and while inevitably and frequently a legislator will plead or press a particular concern of a constituent or group of constituents to government, she cannot become embroiled in an issue to the extent that she is advocating one constituent group's concerns against another's. To accept Mr. Powell's argument is to come perilously close to this circumstance.

[36] Do the communications, then, fall within the protection offered by the case-by-case Wigmore approach? Again, I conclude they do not. I will take the four required elements in turn.

- [37] Was confidentiality expected? Ms. Tegart, in her affidavit says that she and her staff maintain confidentiality respecting discussions with constituents and that certain of the constituents raising the issue of the soil facility specifically asked her to keep the communications in confidence. Certainly, there is no evidence that all communications were made (either to or from the constituents) in the expectation of confidentiality. Indeed, as is clearly established, some of the discussions or communications either occurred in clearly public circumstances^[16] or flowed from those circumstances. In some instances, Ms. Tegart was part of an e-mail "loop" so that the communication was shared by others. Moreover, when one either sends to an elected member publically-distributed flyers or documents, or communicates with the member respecting those documents, any expectation of confidence is unreasonable and inapplicable. Finally, it is clear from the evidence that Ms. Tegart did discuss various of these communications with third parties, which hardly supports an expectation of confidentiality. I do not accept that discussions or communications between a constituent and elected representative respecting such an obviously public concern can reasonably be expected to be given in confidence.
- [38] I understand Ms. Tegart's wish for discretion in discussions with constituents and can respect her expectation that a degree of privacy will protect those discussions, but while that may prevent general or public disclosure, it cannot prevail against a legal obligation to disclose in proceedings such as these.
- [39] Is confidence necessary to the relationship? Again; no, it is not; see the court's conclusion in Pankiw at para. 33, above.
- [40] Is the relationship sedulously fostered? Generally speaking, of course, the relationship between a citizen and his or her elected representative is a relationship to be fostered; it is the very heart of democracy. But that is not what is meant by Wigmore's third requirement. The real question is: is a confidential relationship to be fostered, and the answer is no. Logically, an elected representative must be open to all communications from all constituents; he acts as a kind of democratic clearing house for information. His role is to then consider and analyze that information and take a considered and coherent view to government in the formulation of legislation and policy. Confidentiality would play little, if any, role in that. Moreover the authorities have already found that the third requirement does not apply in this situation:

In brief, there is no reason under the third condition propounded by Wigmore for the recognition of a privilege, to say that the relation between members of the Assembly and informants "ought to be sedulously fostered".^[17]

- [41] Will disclosure cause injury to the relationship that is greater than the benefit gained? It is, of course, possible that disclosure will, as Mr. Powell argues, discourage constituents in the future from candidly expressing concerns to their elected representatives. That is a speculative concern, and cannot stand up to the benefit to a litigant obtaining full disclosure of all relevant information to either prosecute or defend his or her position. In this case, the

plaintiff alleges various and repeated defamatory statements and is still trying to establish the nature, extent, and recipients of the alleged defamatory statements. I conclude that the disclosure as sought is essential to establishing their claims.

[42] Paragraph 1(g) of the plaintiffs' application seeks

all internal correspondence amongst Ms. Tegart, Ms. Pilon, the Fraser-Nicola Constituency Office its staff or elected officials regarding the Facility, the Property, the plaintiffs (or their directors, officers, principals, agents, employees or contractors)

This, in my view, is a document too far. As any such communications would, obviously, be between non-parties and as no claims have been made against Ms. Tegart, Ms. Pilon, or any of Ms. Tegart's staff or representatives, I am not satisfied that the basis for such enlarged production is established[18].

[43] The plaintiffs also wish to examine Ms. Tegart and Ms. Pilon as non-party witnesses under Rule 7-5. Notwithstanding that I have disagreed with Ms. Tegart's reasons for declining production, I am not at all satisfied that either Ms. Tegart or Ms. Pilon has been uncooperative either in the nature or to the degree that, in my view, Rule 7-5 is intended to address. Both, in my respectful view, have taken a principled stand based on their responsibilities as they understand them. Moreover, it is entirely possible that the disclosure I have directed will obviate the necessity for further evidence from either Ms. Tegart or Ms. Pilon. To that extent para. (2) of the application is adjourned generally.

[44] In sum: the plaintiffs are granted the relief sought in paras. (1)(a-f), (3), and (4) of the application.

"Master Baker"

[1] Mr. Powell offers a cavil on this point respecting Ms. Pilon, as discussed below.

[2] R.S.B.C. 1996, c. 259

[3] 2012 BCSC 357 at paras. 61 and 62

[4] Gardner v. Viridis Energy Inc. 2014 BCSC 232 at paras. 41 and 42

[5] Manson v. Manson (Master), 1997 CanLII 3989 BCSC, at paras. 7, 11, and 12

[6] also citing Kaladjian, interestingly, at paras. 62-4 and Century Services Inc. v. LeRoy, 2012 BCSC 1079 at para. 107.

[7] (1882), 11 Q.B.D. 55 (C.A.)

[8] 2011 BCSC 731

[9] 2011 BCSC 1752

[10] 2005 SCC 30

[11] para. 8, above

[12] at para. 32

[13] noting that the constitution of the United Kingdom is, of course, unwritten

[14] at para. 41

[15] *Pankiw v. Canadian Human Rights Commission*, 2006 FC 1544 at para. 95

[16] as, for example, in the Lytton Klowa Gallery or the Gold Mountain Restaurant, Clinton meetings open to the public or bystanders

[17] Reference Re Legislative Privilege (1978), 18 O.R. (2d) 529 at 8 (C.A.), a decision in a criminal matter.

[18] See Kaladjian at paras 53, 62-64

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