

CANADA / JUDGMENT

R. v. Shaw

2019 BCSC 1641

COURT

Supreme Court of British Columbia

DECIDED

27 September 2019

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2019 BCSC 1641 R. v. Shaw IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: R. v. Shaw, 2019 BCSC 1641 Date: 20190927 Docket: 28498-2-C Registry: Prince Rupert Her Majesty the Queen v. Garrett William Shaw Before: The Honourable Mr. Justice Punnett Reasons for Judgment on Jordan Application Counsel for the Applicant: H. Lucky Counsel for the Crown: M. Hajivandi Place and Date of Trial: Prince Rupert, B.C. June 17-19, 2019 Place and Date of Judgment: Prince Rupert, B.C. September 27, 2019

Introduction

- [1] Mr. Shaw is charged with one count of possession of cocaine for the purpose of trafficking. His arrest occurred at a random vehicle stop by the RCMP conducting sobriety checks on August 5, 2016.
- [2] Mr. Shaw applies under sections 11(b) and 24(1) of the Charter for a stay of proceedings on the basis his right to be tried within a reasonable time has been violated.
- [3] There has been a delay of 1,057 days, or 35 months and 23 days since the indictment was sworn on August 6, 2016 to the anticipated trial end date of June 28, 2019. This exceeds the ceiling of 30 months beyond which delay is presumptively unreasonable (R. v. Jordan, 2016 SCC 27).
- [4] The primary issue on this application is the characterization and attribution of delays arising from delayed disclosure and the nature of the disclosure sought by defence.

Background

- [5] On August 5, 2016, Mr. Shaw was driving a vehicle in Prince George, B.C. He was pulled over by Constable Segers of the Prince George RCMP for a sobriety check. A smell of dried marijuana emanating from the vehicle led to Mr. Shaw's arrest for possession of marijuana. This resulted in the discovery of cocaine, which Mr. Shaw apparently dropped to the ground, and Mr. Shaw's arrest for possession of cocaine for the purpose of trafficking.

- [6] The significant dates for this matter are: Date Action Note August 5, 2016 Offence August 6, 2016 Information Sworn August 26, 2016 Initial disclosure provided to defence September 21, 2016 First Appearance Accused represented by his first counsel. October 12, 2016 Arraignment Accused elects Supreme Court Judge alone with Preliminary Inquiry ("PI"). October 14, 2016 Fix date for PI Adjourned at Crown's request. October 25, 2016 First PI date set PI set for July 4, 2017 with a Pre-trial Conference ("PTC") May 31 2017. November 9, 2016 First counsel off record November 26, 2016 Second counsel on record March 28, 2017 Second counsel off record May 3, 2017 Third counsel, Mr. Lucky, on record; accused applies to set new PI date to accommodate new counsel's availability Adjourned to Judicial Case Manager ("JCM") to fix new PI date. May 14, 2017 Second PI date set PI set for September 25 and 26, 2017 with a PTC July 19, 2017. September 25, 2017 Accused committed to stand trial after PI Judge alone trial date set for May 14, 2018. October 3, 2017, January 2, 2018, March 12, 2018 Defence requests disclosure from Crown via letter April 3, 2018 Crown responds to disclosure request Crown advises defence they will seek the requested information from the RCMP, but that defence counsel should pursue other options as required so they may "have the time to do what should be done". April 23, 2018 Defence subpoenas Cst. Segers (s. 700 of Criminal Code) Defence applied for subpoena April 20, 2018; subpoena issued April 23, 2018. April 26, 2018 Defence advises Crown of subpoena Defence counsel advises Crown of either Stinchcombe or O'Connor application as basis for disclosure. April 26, 2018 Crown contacts defence Crown advises they expect to have some of the disclosure materials in the next couple of weeks. April 26, 2018 Crown interoffice memo Memo states delay unavoidable and must land on the Crown's shoulders. April 26 to May 1, 2018 Crown contacts defence counsel Crown advises service of subpoena and O'Connor process unnecessary as the Crown would continue to request the documents from the RCMP. April 30, 2018 Crown provides disclosure Crown provides items 1, 2 and 3 of requested disclosure. May 1, 2018 Accused applies to adjourn trial due to lack of disclosure Crown acknowledges delay at their feet. Trial rescheduled for January 8, 2019 for 3 days instead of 5 by consent. December 11, 2018 Defence writes to Crown Defence advises still awaiting requested disclosure; informed Crown of Notice of Application for disclosure and for adjournment. December 24, 2018 Crown advice to defence Crown advises "Disclosure will not have to go through a judge, per O'Connor" and Crown will provide "any material we are able to obtain". January 3, 2019 Crown advice to defence Crown advises defence requested items 6, 7 and 8 in the subpoena exist, however RCMP advised "a court order is necessary for them to disclose these documents". January 7, 2019 Crown advice to defence Crown advises it opposes any further disclosure. January 8, 2019 Accused applies to adjourn trial due to lack of disclosure. All parties consent to adjournment; trial rescheduled for June 17, 2019. January 10, 2019 Defence files O'Connor application
- [7] The significant delay periods are set out in the following table with the positions of each party:
- | Time Period | Time Length | Crown Position | Defence Position |
|--------------------------------|----------------------------------|---------------------------------|--------------------------------|
| August 6, 2016 to July 4, 2017 | 333 days | Crown delay Agreed | July 5, 2017 to Sept. 25, 2017 |
| 83 days | Defence delay Agreed | Sept. 26, 2017 to April 9, 2018 | 196 days |
| Crown delay Agreed | April 10, 2018 to April 16, 2018 | 7 | |

days Defence delay Not Agreed April 17, 2018 to Sept.10, 2018 147 days Defence delay Not Agreed Sept. 11, 2018 to Dec. 10, 2018 119 days Defence delay Not Agreed Dec. 11, 2018 to Jan 8, 2019 28 days Defence delay Not Agreed Jan. 9, 2019 to June 27, 2019 160 days Defence delay Not Agreed June 18, 2019 to June 28, 2019 11 days Crown delay Agreed Totals 397 days Defence delay 82 days Defence delay Position of the Defendant

- [8] The defence concedes responsibility for 82 days of defence delay in 2017 in relation to Mr. Lucky being retained as counsel and the Preliminary Inquiry being re-scheduled. Defence does not accept responsibility for the remaining time involved. Position of the Crown
- [9] Firstly, I note that several Crown counsel had conduct of the file prior to present counsel whose involvement appears to have begun in 2019. The Crown submits that the majority of the delay periods in issue arise from the defence requests for third-party records. The Crown further submits that besides being third-party records, the records were of questionable relevance and the request a mere fishing expedition. The Crown also submits that, assuming conclusion of the trial had occurred on June 28, 2019, a total delay of 397 days is attributable to the defence which, when deducted from the total delay of 1,057 days, results in a net delay of 660 days or 21 months and three weeks, a period well below the presumptive ceiling. The Crown does not allege delay caused by exceptional circumstances. The Crown also acknowledges this is a post-Jordan matter, so the transitional considerations do not apply. Scheduling Delay First Trial Date Set
- [10] Mr. Lucky was appointed as new counsel for Mr. Shaw on May 3, 2017. The Preliminary Inquiry originally set for July 4, 2017 was rescheduled to September 25, 2017 to accommodate Mr. Lucky's schedule. Mr. Lucky conceded this defence delay of 82 days.
- [11] On September 25, 2017 Mr. Shaw was committed to stand trial following the preliminary inquiry. Neither Crown nor defence were available for the first trial dates offered of December 4 and December 11, 2017. Crown was unavailable for the next date of February 19, 2018 but available April 9, 2018. Defence was unavailable on April 9, 2018. Crown was unavailable on the next available date of April 16, 2018. The trial date was eventually set for May 14, 2018.
- [12] Crown acknowledged responsibility for a delay of 48 days from February 19, 2018 to April 9, 2018 and for a delay of 27 days from April 16, 2018 to May 14, 2018, for a total of 75 days of delay attributable to the Crown. Defence is responsible for a delay of 7 days from April 9, 2018 to April 16, 2018. Second Trial Date Set
- [13] On May 1, 2018, the parties appeared before Justice Funt to adjourn the May 14, 2018 trial date based on late and outstanding disclosure. The Crown stated on the record "that the delay that will arise is going to be at the feet of the Crown" to allow time to address the need for an O'Connor application.

- [14] The parties were offered trial dates of July 9, 2018 and July 13, 2018. Defence was available on these dates, but Crown was not. On the next available days of September 10, 2018 and December 10, 2018, Crown was available but defence was unavailable. The trial date was eventually set for January 8, 2019.
- [15] The Crown is responsible for a delay of 118 days from May 14, 2018 to September 10, 2018. Defence is responsible for a delay of 119 days from September 10, 2018 to January 8, 2019.
Third Trial Date Set
- [16] On January 8, 2019 the defence applied to adjourn the trial due to outstanding disclosure issues. The Crown consented and the trial was adjourned to allow defence to bring an O'Connor application. The parties were offered March 11, 2019 as the first available trial date. Crown was available for this date but defence was not, so the trial was set June 17, 2019. The delay arising from the adjournment of the trial from January 8, 2019 to the March 11, 2019 assize lies at the feet of the Crown for 61 days given their position an O'Connor application was now required. However, the defence bears the onus for the delay arising from defence counsel's unavailability from March 11, 2019 to June 17, 2019 for 97 days. Delay Related to Disclosure
- [17] The Crown provided what they describe as "full disclosure" on August 26, 2016. Defence requested disclosure of Constable Segers' notes on October 5, 2016 and Crown provided them on January 17, 2017.
- [18] The defence first raised further RCMP records in a letter to the Crown dated October 3, 2017 listing 10 items requested for disclosure:
1. McNeil disclosure with respect to all police witnesses anticipated to be witnesses at the trial;
 2. Constable Segers' call logs/contact logs/dispatch logs, or other entries or contacts made between himself and the RCMP dispatch centre in Prince George on the dates of August 4, 2016 and August 5, 2016;
 3. Constable Segers' call logs/contact logs/dispatch logs, or other entries or contacts made between himself and the RCMP in Prince Rupert on the dates of August 4, 2016 and August 5, 2016;
 4. Prince George RCMP dispatch history of any contacts made by Constable Segers on August 4, 2016 and August 5, 2016;
 5. The CPIC and PIRS electronic inquiry history for Constable Segers on August 4, 2016 and August 5, 2016;
 6. Constable Segers' handwritten notes, occurrence reports, or other material that make any reference to Garrett Shaw on August 4, 2016;
 7. The Affidavit of Service with respect to the expert opinion report of Constable MacFarland served directly on Garrett Shaw in April 2017;

8. A listing of all vehicle stops made where Garrett Shaw was the driver or passenger between August 1, 2015 and August 5, 2016;
 9. A listing of all vehicle stops made of a vehicle with serial number 1G1AT58H797139753 between August 1, 2015 and August 5, 2016;
 10. Information with respect to the RCMP categorization of, associations of, or notations respecting a vehicle with serial number 1G1AT58H797139753 between January 1, 2016 and August 5, 2016, inclusive.
- [19] The Crown produced one item (item 7 above). On January 2, 2018 the defence wrote again respecting the nine remaining items but Crown did not respond. On March 12, 2018 the defence wrote to Crown once again, reiterating the disclosure request. On March 13, 2018 the Crown advised defence counsel by phone that they were still seeking the requested information from the RCMP. On April 3, 2018 the Crown, in a letter of that date (the "April 3 Letter"), advised the defence: We have asked the RCMP for the requested disclosure, and it has not been provided to us. We will continue to attempt to get the requested information for you. However, we wish to write this letter so that if you feel that other options are required you may have the time to do what should be done. (Emphasis added.).
- [20] Between April 19 and April 20, 2018, the defence attempted to contact both Prince Rupert and Prince George RCMP and were told Prince Rupert RCMP were responsible for the disclosure and had received the request from the Crown. On April 20, 2018 the accused applied to the Supreme Court pursuant to s. 700 of the Criminal Code seeking a subpoena for Cst. Segers which was issued and filed on April 23, 2018.
- [21] On April 26, 2018 defence counsel wrote to Crown with a copy of the subpoena indicating they were having trouble serving the officer. Defence counsel sought the assistance of Crown counsel, noting that they took the position disclosure was required under Stinchcombe, but if the Crown did not agree that was the case, then the defence would rely on the O'Connor process. On that same day the Crown advised the defence they expected to have some of the disclosure materials within the next "couple of weeks." Also, on that day the Crown sent an inter-office email regarding the defence's application to adjourn. In that email then Crown counsel stated "[t]his delay is unavoidable and must land on Crown's shoulders."
- [22] On April 26, 2018 and May 1, 2018 Crown advised defence counsel that neither service of the subpoena nor an O'Connor application were necessary, as the Crown would continue to request the documents from the RCMP. On April 30, 2018 the Crown provided defence with three more items from the requested list. As discussed above, on May 1, 2018 the May 14, 2018 trial was adjourned based on the late and outstanding disclosure and a new trial date of January 8, 2019 was set.

- [23] On December 11, 2018 defence counsel wrote to the Crown advising of the remaining outstanding disclosure requests and asking Crown to advise if production would not be made, as an O'Connor application might be necessary. On December 24, 2018 Crown advised defence that while relevance of the requested material remained outstanding that "[n]otwithstanding any of that. We would provide you with any material we are able to obtain. Disclosure will not have to go through a judge, per O'Connor" (emphasis added) and commented that Crown did not think there was any more disclosure to provide and that the request for the Call Logs were "over the top."
- [24] On December 28, 2018 a paralegal from the Crown advised defence the RCMP would be producing an occurrence report indicating which of the requested disclosure items would require a court order and which did not exist. On January 3, 2019 a different Crown counsel advised that three of the requested items did exist but that a court order would be required before the RCMP would disclose them. Then on January 7, 2019 another Crown counsel advised that the Federal Crown opposed any further disclosure and would require time to consider their position regarding the O'Connor application and likely would require an adjournment.
- [25] As discussed above, on January 8, 2019, a defence application to adjourn the trial was consented to by the Crown and the trial was re-scheduled for June 17, 2019. The hearing of the O'Connor application was set for February 22, 2019.
- [26] The O'Connor application was heard on February 22, 2019 with reasons released on March 8, 2019. The application was dismissed, having been found to be based on speculation and conjecture or lacking relevancy and in the nature of a fishing expedition. Law and Discussion
- [27] In *R. v. K.N.*, 2018 BCCA 246, Fenlon J.A. for the court adopted the Jordan framework set out by the Ontario Court of Appeal in *R. v. Coulter*, 2016 ONCA 704:
5. The Jordan framework was neatly summarized by the Ontario Court of Appeal in *R. v. Coulter*, 2016 ONCA 704:
- [32] At the heart of the new framework lies a ceiling, beyond which delay is presumptively unreasonable. The presumptive ceiling is 18 months for cases going to trial in the provincial court and 30 months for cases going to trial in the superior court or cases going to trial in the provincial court after a preliminary inquiry (*Jordan*, para. 46).
- [33] [T]he new framework is set out below, with the key elements highlighted in bold.
- [34] Calculate the total delay, which is the period from the charge to the actual or anticipated end of trial (*Jordan*, at para. 47).
- [35] Subtract defence delay from the total delay, which results in the "Net Delay" (*Jordan*, at para. 66).

- [36] Compare the Net Delay to the presumptive ceiling (Jordan, at para. 66).
- [37] If the Net Delay exceeds the presumptive ceiling, it is presumptively unreasonable. To rebut the presumption, the Crown must establish the presence of exceptional circumstances (Jordan, para. 47). If it cannot rebut the presumption, a stay will follow (Jordan, para. 47). In general, exceptional circumstances fall under two categories: discrete events and particularly complex cases (Jordan, para. 71).
- [38] Subtract delay caused by discrete events from the Net Delay (leaving the "Remaining Delay") for the purpose of determining whether the presumptive ceiling has been reached (Jordan, para. 75).
- [39] If the Remaining Delay exceeds the presumptive ceiling, the court must consider whether the case was particularly complex such that the time the case has taken is justified and the delay is reasonable (Jordan, at para. 80).
- [40] If the Remaining Delay falls below the presumptive ceiling, the onus is on the defence to show that the delay is unreasonable (Jordan, para. 48).
- [41] The new framework, including the presumptive ceiling, applies to cases already in the system when Jordan was released (the "Transitional Cases") (Jordan, para. 96). [Bolding in original.]
- [28] The nature of defence delay and its two components are explained in Jordan:
61. Defence delay has two components. The first is delay waived by the defence (Askov, at pp. 1228-29; Morin, at pp. 790-91). Waiver can be explicit or implicit, but in either case, it must be clear and unequivocal. The accused must have full knowledge of his or her rights, as well as the effect waiver will have on those rights. However, as in the past, "[i]n considering the issue of 'waiver' in the context of s. 11(b), it must be remembered that it is not the right itself which is being waived, but merely the inclusion of specific periods in the overall assessment of reasonableness" (R. v. Conway, [1989] 1 S.C.R. 1659, per L'Heureux-Dubé J., at p. 1686).
63. The second component of defence delay is delay caused solely by the conduct of the defence. This kind of defence delay comprises "those situations where the accused's acts either directly caused the delay ... or the acts of the accused are shown to be a deliberate and calculated tactic employed to delay the trial" (Askov, at pp. 1227-28). Deliberate and calculated defence tactics aimed at causing delay, which include frivolous applications and requests, are the most straightforward examples of defence delay. Trial judges should generally dismiss such applications and requests the moment it becomes apparent they are frivolous.
- [29] The Supreme Court of Canada expands on this analysis in R. v. Cody, 2017 SCC 31 ("Cody"):
30. The only deductible defence delay under this component is, therefore, that which: (1) is solely or directly caused by the accused person; and (2) flows from defence action that is illegitimate inasmuch as it is not taken to respond to the charges. As we said in Jordan, the

most straightforward example is "[d]eliberate and calculated defence tactics aimed at causing delay, which include frivolous applications and requests" (Jordan, at para. 63). Similarly, where the court and Crown are ready to proceed, but the defence is not, the resulting delay should also be deducted (Jordan, at para. 64). These examples were, however, just that - examples. They were not stated in Jordan, nor should they be taken now, as exhaustively defining deductible defence delay. Again, as was made clear in Jordan, it remains "open to trial judges to find that other defence actions or conduct have caused delay" warranting a deduction (para. 64).

31. The determination of whether defence conduct is legitimate is "by no means an exact science" and is something that "first instance judges are uniquely positioned to gauge" (Jordan, at para. 65). It is highly discretionary, and appellate courts must show a correspondingly high level of deference thereto. While trial judges should take care to not second-guess steps taken by defence for the purposes of responding to the charges, they must not be reticent about finding defence action to be illegitimate where it is appropriate to do so.
- [30] Here the issues are the characterization of the time spent by the defence seeking third-party records, who is accountable for such time given the disclosure sought, and whether this time constitutes defence delay.
- [31] The specific records sought by defence that were not produced were:
- a) A listing of all vehicle stops made where Garrett Shaw was the driver or passenger between August 1, 2015 and August 5, 2016;
 - b) A listing of all vehicle stops made of a vehicle with serial number 1G1AT58H797139753 between August 1, 2015 and August 5, 2016; and
 - c) Information regarding the RCMP categorization of, associations of, or notations respecting a vehicle with serial number 1G1AT58H797139753 between January 1, 2016 and August 5, 2016, inclusive.
- [32] Such records were not in the possession or control of the Crown nor were they materials the RCMP ought to have provided to the Crown. They were third-party records in possession and control of the RCMP. As stated in *R. v. King*, 2018 NLCA 66, by the Newfoundland and Labrador Court of Appeal:
- [155] The Supreme Court of Canada recently reiterated the distinction between first party and third party disclosure in *R. v. Gubbins*, 2018 SCC 44. First party disclosure is information that is in the possession or control of the prosecuting Crown. The regime for first party disclosure also applies to information when its nature is such that the police or other Crown entity in possession or control of the information ought to have supplied it to the prosecuting Crown. McNeil concerned disclosure of a police officer's disciplinary records. Such a situation is regarded in the jurisprudence as a variation on first party disclosure which arises from the corollary duty on police to disclose materials "obviously relevant" to

the accused's case (McNeil at paragraph 59). Importantly, while the Crown's duty to disclose first party disclosure not in its possession or control is an ongoing obligation, it is triggered by a defence request (Gubbins at paragraphs 18-24).

- [33] The Crown relies on *R. v. N.N.M.*, [2006] O.J. No. 1802 (C.A.) ("N.N.M."), for the proposition that the Crown is not responsible for delay associated with the retrieval of third-party records outside the scope of the Crown's constitutionality mandated disclosure duties, even where the Crown voluntarily assists the defence in retrieving those records. The Court in *N.N.M.* allocated this delay as "inherent", a pre-Jordan concept. In the Jordan analysis, the question is not whether the Crown is responsible for the delay, but rather whether any delay constitutes "defence delay" such that it can be deducted from the total delay.
- [34] The obligation to move matters to trial is not solely that of the Crown, "all participants in the justice system must work in concert to achieve speedier trials": Jordan at para. 116. As of April 3, 2018, the Crown quite properly sought to assist the defence by attempting to acquire the materials requested. However, it was clear from the April 3 Letter these materials were not in Crown's possession or control and the Crown advised: "we wish to write this letter so that if you feel that other options are required you may have the time to do what should be done." [Emphasis added.]
- [35] At this point, the defence remained obligated to take such steps as they deemed necessary to obtain the third-party records they sought. Where the Crown offers to assist with acquiring third-party records, and where it has not been shown they were dilatory in doing so, the delay does not lie at the feet of the Crown. The Crown did not guarantee they would obtain the requested disclosure. That certain materials were not disclosed despite the defence requesting them does not make the Crown responsible. In such circumstances the defence cannot complain of a lack of disclosure by the Crown. The defence "cannot benefit from its own delay-causing action or inaction": Jordan at para. 113.
- [36] After receiving the April 3 Letter, the defence responded on April 20, 2018 by filing the subpoena of Cst. Segers in furtherance of acquiring the requested disclosure. However, the Crown advised the defence at the end of April 2018 that service of the subpoena and the O'Connor process were not necessary. At that point it cannot be said any ensuing delay was caused "solely by the conduct of the defence" as contemplated in Jordan at para. 63. Indeed, the Crown did eventually produce some of the requested items; however, the Crown did not change their position on the necessity of an O'Connor application until January 3, 2019. The defence filed its O'Connor application on January 10, 2019. Prior to this, the Crown by its conduct effectively discouraged the defence from pursuing the O'Connor application at an earlier date.
- [37] The defence was entitled to rely on the Crown's assurances that it would attempt to acquire the requested documents from the RCMP and that an O'Connor application would not be necessary. The efficient operation of the court system relies on such cooperation between Crown and defence counsel to avoid unnecessary applications in court. The Court in Jordan

held that counsel are expected to act reasonably, not perfectly, and that "trial judges should not take this opportunity, with the benefit of hindsight, to question every decision made by the defence" (at para. 85). In all the circumstances, taking into account the correspondence between Crown and defence, I find the defence acted reasonably.

- [38] The defence's O'Connor application was ultimately dismissed on the basis that the disclosure sought was based on speculation and conjecture or lacking relevancy; however, it has not been shown this was a frivolous or deliberate delaying tactic of the defence. In their correspondence, the Crown never asserted that the defence's requests were frivolous other than a comment that it was "over the top." The defence was entitled to pursue the disclosure. It was legitimate defence conduct. As held in *Jordan* at para. 65: To be clear, defence actions legitimately taken to respond to the charges fall outside the ambit of defence delay. In addition, defence applications and requests that are not frivolous will also generally not count against the defence.
- [39] As a result, I allot responsibility for the relevant time periods as follows:
- | Time Period | Length | Party Responsible |
|---------------------------------|-----------------|-------------------|
| Aug. 6, 2016 - July 4, 2017 | 333 days | Crown |
| July 5, 2017 - Sept. 25, 2017 | 82 days | Defence |
| Sept. 26, 2017 - April 9, 2018 | 196 days | Crown |
| April 10, 2018 - April 16, 2018 | 7 days | Defence |
| April 17, 2018 - Sept 10, 2018 | 147 days | Crown |
| Sept. 11, 2018 - Jan. 8, 2019 | 119 days | Defence |
| Jan. 9, 2019 - March 11, 2019 | 61 days | Crown |
| June 18, 2019 - June 28, 2019 | 11 days | Crown |
| Total Defence Delay | 208 days | Defence |
- [40] The total defence delay is 208 days. Deducted from the total delay of 1,057 days or 35 months and 23 days to June 28, 2019 results in 849 days, or 28 months and 9 days, a period below the presumptive ceiling of 30 months.
- [41] The defence application is dismissed. "The Honourable Mr. Justice Punnnett"

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