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BILL 130

AN ACT RESPECTING ADMINISTRATIVE JUSTICE

The Minister of Justice of Québec, Mr. Paul Bégin, recently introduced in the National Assembly Bill 130 dealing with administrative justice. It is the outcome of a long maturing process concerning the need for a reform of administrative justice in Québec, which was initiated more than twenty-five years ago and has ended with the submission, in October 1994, of the report of the task force on certain issues relating to the reform of administrative justice, chaired by Professor Patrice Garant, of Université Laval. Bill 130 is largely inspired by this report, without, however, retaining all the recommendations contained therein.

Quite obviously, the reform contemplated by this Bill will have a significant impact on the relations of individuals and businesses with the Government. The Commission des institutions was therefore asked by the Minister to undertake a public consultation and to hold public hearings.

In this paper, we summarize the principal elements of the Bill and provide our preliminary analysis of the difficulties it raises.

The Bill's 188 sections are divided into three separate titles preceded by preliminary provisions. Title I establishes the rules governing the decisions of government departments and bodies. Title II establishes the Administrative Tribunal of Québec, determines its powers, enumerates the proceedings over which it has jurisdiction and sets forth the rules of evidence and of procedure applicable to proceedings heard before it. Title III establishes the Conseil de la justice administrative, the role of which is similar to that of the Conseil de la magistrature created pursuant to the *Courts of Justice Act*.

Preliminary Provisions

Section 1 of the Bill provides that its purpose is to affirm the specific character of administrative justice, and to ensure the quality and promptness of administrative justice and its accessibility to citizens. It establishes the general rules of procedure applicable to decisions by government departments and bodies.

Such rules of procedure will vary according to whether a decision is made in the exercise of an administrative function or of an adjudicative function.

Thus, individual decisions that are made by government

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departments or bodies pursuant to the norms and standards prescribed by law and that concern allowances, compensation or indemnities, authorizations, permits or licences, privileges or benefits are made in the exercise of an administrative function, whereas the decisions of administrative bodies specially empowered to act as third persons charged with making decisions in respect of proceedings brought by citizens against decisions of the Administration are made in the exercise of an adjudicative function (section 2).

A government body is defined as a body whose members are in the majority appointed by the Government or by a Minister and whose personnel is appointed and remunerated pursuant to the *Public Service Act* (section 3).

Although the definitions of administrative function and adjudicative function seem at first glance to cover a very wide range of decisions, not all the decisions of the Administration appear to be covered. We may also wonder what rules will be applied where a government body is called upon to render decisions which are neither administrative nor adjudicative, such as decisions rendered by a government body which has to rule on a dispute between one or more parties other than the Administration.

These queries lead us to believe that the extent and scope of the reform will not come up to our expectations.

TITLE I RULES GOVERNING INDIVIDUAL DECISIONS OF GOVERNMENT DEPARTMENTS AND BODIES

Under this title, the legislator establishes the rules applicable to both administrative and adjudicative decisions.

The procedures leading to an administrative decision shall be carried out in keeping with the duty to act fairly (section 4). This requirement merely makes law a rule firmly rooted in jurisprudence. It is however qualified by a certain number of more specific rules with which government departments or bodies shall be required, to the extent possible, to comply (section 5).

Government departments or bodies are thus required to ensure:

- (a) that such procedures comply with the statutory and administrative norms or standards governing them;
- (b) that the procedures are carried out informally, according to simple and flexible rules;
- (c) that the agents of the government department or body carry out the procedures respectfully, prudently and promptly and in accordance with the requirements of good faith;
- (d) that the person concerned had been given the opportunity to provide any information useful for the making of the decision and, where applicable, to complete his file;
- (e) that all decisions are made with dispatch.

Every decision must be communicated to the person concerned in clear and concise terms. The administrative authority must furnish the person with the information required to enable him to communicate with it so as to be provided with an explanation of the substance and scope of the decision (section 7).

Unfavourable decisions will be subject to additional rules. Thus, the Administration may not make an unfavourable decision without first having informed the person concerned of its intentions and the reasons therefor, having informed him of any complaints and objections that concern him, and having given him the opportunity to present his observations, and in particular to produce documents to complete his file (section 6). Unfavourable decisions must also give the reasons therefor and indicate any non-judicial proceeding available under the law and the time limit for bringing such a proceeding (section 7).

We are pleased that an approach more closely oriented to the needs of litigants has been adopted by the legislator. This new client approach undoubtedly results from the intention that administrative justice be marked with more subtleness and greater openness, which will no doubt disturb the customs and practices of numerous departments and bodies.

That being said, we still detect certain problems. We question the opportunity to qualify the rules set forth under section 5 by the terms "to the extent possible", particularly as regards the first of these rules. On the one hand, we can hardly see what circumstances would warrant a body called upon to render a decision to ignore, or depart from, the norms provided for in the Act it must enforce. On the other hand, inasmuch as not all the administration's decisions are subject to appeal or review before the Administrative Tribunal of Québec, how could citizens complain and seek redress in the event that these rules are not respected? Unfortunately, they will have no choice other than turn to judicial recourses such as mandamus or the application for judicial review, which are often time-consuming and costly.

Given the adjudicative role of the body exercising its adjudicative function, the rules specific to this category of decisions must be applied with greater formalism and reflect certain long-standing fundamental principles recognized by our Courts.

Therefore, the procedures leading to adjudicative decisions shall, so as to allow for fair argument, be carried out in public and in keeping with the duty to act impartially (section 8). Obviously, the body must give the parties the opportunity to be heard (section 9).

The body has full authority over the conduct of the hearing, and is not required to adhere to the ordinary rules of evidence applicable in civil matters. It shall however reject any evidence which was obtained under such circumstances that fundamental rights and freedoms are breached and the use of which could bring the administration of justice into disrepute. The use of evidence obtained through violation of the right of professional secrecy is deemed to bring the administration of justice into disrepute (section 10).

Unlike the rules applicable to administrative decisions, the rules specific to adjudicative decisions establish the right of each party to be assisted or represented by a lawyer or by any person authorized by law to that effect (section 11). These rules also introduce a new concept in that the body exercising its adjudicative function must provide, if necessary, fair and impartial

assistance to each party during the hearing (section 11).

This rule undoubtedly stems from the legislator's concern to impart equity or flexibility to the decision-making process, which, in our view, is difficult to reconcile with the adjudicative role of the body exercising its adjudicative function, especially since the assistance provided for shall only be fair and impartial where the body deems it necessary. We also wonder to which body these rules will apply in practice, since the Administrative Tribunal of Québec, whose decisions perfectly fit into the definition of adjudicative decisions, will follow its own procedural rules. Moreover, what will be the situation in the case of the above-mentioned decisions which do not involve a recourse against a decision of the Administration? Will the body have discretion to apply the rules of its choice in those situations?

We hope to find an answer to these questions in the implementing legislation which is provided for under section 188 of the Bill and which will apparently contain 400 or 500 sections.

TITLE II THE ADMINISTRATIVE TRIBUNAL OF QUÉBEC

The institution of the Administrative Tribunal of Québec is manifestly the central element of the Bill, as more than 140 sections are devoted to that subject. A summary thereof follows.

Function and Jurisdiction

The function of the Tribunal, in the cases provided for by law and to the exclusion of any other tribunal or adjudicative body, is to make determinations in respect of proceedings of full jurisdiction brought against the Administration (section 13).

Unfortunately, a certain confusion seems to be created by the use of the expression "proceedings of full jurisdiction", heretofore unknown and still undefined.

The Tribunal has the power to decide any question of law or fact necessary for the exercise of its jurisdiction and may confirm, vary or quash the contested decision or, if appropriate, make the decision which, in

its opinion, should have been made initially (section 14).

The seat of the Tribunal shall be situated in the territory of the Communauté urbaine de Québec (section 15). The Tribunal shall consist of five divisions, namely the social affairs division (section 17), the employment injuries division (section 31), the real estate assessment division (section 34), the territory and environment division (section 35), and the economic affairs division (section 36).

The social affairs division is in turn divided into six subdivisions: the income security and social aid and allowances subdivision (section 19), the mentally ill persons protection subdivision (section 21), the health services and social services subdivision (section 23), the pension plan subdivision (section 25), the compensation subdivision (section 27) and the immigration subdivision (section 29).

The Tribunal's divisions are respectively charged with making decisions in respect of the proceedings listed in Schedule I to V to the Bill, which specify the sections of each Act providing for a proceeding which is thenceforth reviewable by the Tribunal. A detailed list of these proceedings is attached hereto. In certain cases, the schedules refer to sections which are not yet existent. These sections will probably be adopted in the above-mentioned implementing legislation.

The decision-making process varies from one division to another, and even from one subdivision to another. Depending on the type of proceedings before the social affairs division, decisions shall be rendered by one, two or three members, whereas the proceedings before the other divisions shall be determined by a single member. In certain cases, the Vice-President responsible for a division is entitled, where he considers it to be appropriate, to increase or reduce the number of members prescribed by the Act. Depending on the nature of the proceedings, decisions may be rendered either by one or more jurists, by one or more jurists together with a physician, or by a single member whose professional qualifications are not specified, such as in the case of the territory and environment division.

While it is appropriate for an expert to make decisions on issues pertaining to his expertise, we question whether it is appropriate to have certain determinations revised by a single member without any specified field of expertise. The problem could prove to be particularly significant in environmental matters, where intricate technical and legal issues are raised.

In addition, should a single member, specialized in law for instance, be called upon to review a decision rendered by three experts in another field, as would be the case, for example, for certain decisions rendered by the Régie du gaz naturel?

Greater consistency on the part of the legislator would have been advisable, both as regards the number of members required to render decisions and the qualifications of these members.

Composition of the Tribunal

Members of the Tribunal shall be selected by the Government (section 39) among persons declared apt according to the recruiting and selection procedure established by government regulation (section 44). The names of the persons declared apt shall be recorded in the register kept at the Ministère du Conseil exécutif. They shall have at least ten years' experience pertinent to the exercise of the functions of the Tribunal (section 43).

The recruiting procedure will most likely involve the establishment of selection committees charged to assess the aptitude of candidates (section 44). The members of these committees shall come from the sectors concerned (section 44) and shall receive no remuneration (section 47).

The establishment of such a commendable process aims at alleviating a major fault of the present system, namely the lack of openness in the appointment of members of administrative tribunals. No one will challenge that in this area there has been a tendency to result in partisan appointments.

The term of office of a member is five years (section 48). It may be renewed for additional five-year periods, but only twice. Therefore, no one may be a member of the Tribunal for more than fifteen years (section 51).

While this rather arbitrary limitation of mandate may be justified, it may result in the unavailability of members whose competence is widely acknowledged. Young candidates with proper qualifications might not be interested in engaging in a career limited to fifteen years.

The term of office of a member may terminate prematurely only on his retirement or resignation, or on his being dismissed or otherwise removed from office, pursuant to a recommendation of the Conseil de la justice administrative (section 55). The term of office of a member may also be terminated for loss of a legal qualification for holding the office of member or for permanent disability which prevents the member from performing the duties of his office satisfactorily (section 56).

The Government shall make regulations determining the mode of remuneration and the other conditions of office applicable to all or certain members, according to whether they are full-time or part-time members (section 58). The Government shall designate, amongst the members of the Tribunal who are advocates or notaries, a president and any number of vice-presidents who shall exercise their duties on a full-time basis (section 64). Their office is of fixed duration. It may however be terminated prematurely essentially on the same grounds as those applicable to the other members (sections 68 to 70).

Duties and Powers of Members

A member may not, on pain of forfeiture of office, have a direct or indirect interest in any enterprise that could cause a conflict of interest (section 72) and he shall observe the rules of conduct and duties imposed by the code of ethics adopted by the Conseil de la justice administrative (section 73).

The Tribunal and its members are vested with the powers and immunity of commissioners appointed under the *Act respecting public enquiry commissions*, except the power to order imprisonment. They are also vested with the powers to make any order they consider appropriate to safeguard the rights of the parties (section 77).

Operation

The Tribunal is administered by the president, who shall maintain a high level of

quality and coherence of decisions, coordinate the activities and assign work to the members of the Tribunal and see to the observance of standards of ethical conduct (section 78). The president may assign a member temporarily to another division (section 80) and may delegate all or part of his powers and duties to the vice-presidents (section 82).

The vice-presidents shall assist the president (section 83) and see to the assignment of work in their own division (section 84). The Tribunal may sit at any place in Québec (section 87) except that, in real estate assessment matters, save for certain exceptions, the Tribunal shall sit in the territory of the municipality whose roll is involved (section 88).

The members of the Tribunal are assisted by personnel appointed and remunerated in accordance with the *Public Service Act*. No judicial proceedings may be brought against members of this personnel for any act done in good faith in the performance of their duties (section 89).

Save for certain exceptions and notwithstanding section 9 of the *Act respecting Access to documents held by public bodies and the Protection of personal information*, only a person authorized by the Tribunal may have access, for good reason, to the records of the social affairs division (section 92). The Tribunal shall establish a bank of jurisprudence, the public access to which shall be ensured by the Société québécoise d'information juridique (section 93).

The sums required for the administration of the Tribunal shall be taken out of the sums voted annually by the National Assembly (section 100), except that the sums required for the operation of the social affairs and employment injuries division shall be financed, on the one hand, by the Minister of Income Security, the Commission de la santé et de la sécurité du travail, the Régie des rentes and the Société de l'assurance automobile du Québec and, on the other hand, by the Commission de la santé et de la sécurité du travail (section 101).

We must point out that these rules of operation, combined with the fact that the members are assigned to a single division of the Tribunal as per their terms of

appointment, may lead in practice to the creation of six independent mini tribunals jealous of their respective prerogatives. This possibility could have been avoided through greater interchangeability of the members of the various divisions.

Rules of Evidence and of Procedure

As indicated above, the Tribunal is subject to certain specific rules of evidence and of procedure which are intended to be basic rules to determine the manner in which the principles governing the exercise of an adjudicative function are to be applied (section 102).

Although they are set forth under title II and specifically refer to the administrative tribunal only, it cannot be doubted that, in light of the provisions of section 102, they are complementary to the general rules set forth under title I. They are therefore applicable to all bodies rendering adjudicative decisions. The implementing legislation might clarify the true intent of the legislator on this point.

The Bill reiterates the rule whereby no decisions may be rendered if the parties have not been heard or summoned. There are exemptions from that requirement in the case of uncontested applications or if a party who has been summoned does not appear and fails to provide a valid excuse or if the party appears but refuses to be heard (section 103).

A proceeding is brought before the Tribunal by a motion filed at the secretariat of the Tribunal within 45 days after notification to the applicant of the contested decision, unless the Act authorizing the proceeding prescribes a different procedure or time limit (section 113). The motion may also be filed in any office of the Court of Québec (section 113).

A proceeding before the Tribunal does not suspend the execution of the contested decision unless a provision of law provides otherwise or, upon a motion heard and judged by preference, a member of the Tribunal orders otherwise by reason of urgency or of the risk of serious and irreparable harm (section 110).

The Tribunal may, by regulation, make rules of procedure which may differ according to the divisions or subdivisions to which they apply. The regulation is made after

consultation with the Conseil de la justice administrative and upon approval by the Government (section 112).

The Tribunal may make the admission of evidence subject to rules on prior communication (section 133). In addition to facts so well-known as to not reasonably be questionable, the Tribunal must take judicial notice of the law in force in Québec in the fields within its jurisdiction (section 135).

A member may, of his own initiative, raise generally-known facts, opinions and information which fall within his specialization or that of the division to which he is assigned (section 136). Except as regards facts covered under section 135, the Tribunal may not base its decision on grounds of law or fact raised of a member's own initiative if it has not first given the parties an opportunity to present their observations (section 137).

Any decision of the Tribunal must be given within four months after being taken under advisement, unless, for a valid reason, the president of the Tribunal grants an extension (section 141). If this rule is breached, the matter may be withdrawn from the member and heard again, unless the other members having heard the matter are in sufficient number to constitute a quorum, in which case the matter will be decided by the other members (section 142).

Decisions of the Tribunal are executory according to the terms and conditions stated therein provided the parties have received a copy of the decision or have otherwise been advised of it. Compulsory execution of decisions is effected, by deposit, in accordance with the prescriptions of the *Code of Civil Procedure* (section 151). Any person who contravenes a decision or an order which is executory is in contempt of the Tribunal (section 152).

Except on a question of jurisdiction, none of the recourses provided in articles 33 and 834 to 846 of the *Code of Civil Procedure* may be exercised and no injunction may be granted against the Tribunal or against any of its members acting in their official capacity. A judge of the Court of Appeal may, upon a motion, annul by a summary proceeding any judgment rendered or

order or injunction pronounced contrary to this section (section 153).

TITLE III

CONSEIL DE LA JUSTICE

ADMINISTRATIVE

Section 154 provides for the institution of the Conseil de la justice administrative, which is composed of nine members, namely the president of the Tribunal, one of the vice-presidents thereof, two other members thereof, and five other members who are not members of the Tribunal, two of whom shall be advocates or notaries (section 156).

The members of the council receive no remuneration (section 160). Their term of office is three years and may be renewed consecutively only once (section 157). The principal functions of the council are to establish a code of ethics applicable to the members of the Tribunal, to promote professional development of the members and to receive and examine any complaint lodged against any member of the Tribunal.

It cannot be doubted that the institution of the council constitutes a significant improvement compared to the present situation, particularly as regards the code of ethics.

CONCLUSION

Those who expected an in-depth reform of administrative justice as recommended in the Garant Report will be disappointed by this Bill.

Complete sections of the administrative framework such as the Labour Court, Revenu Québec or the Commission de l'accès à l'information, are not covered by the reform. The Bill also raises concerns for which no answer can be expected before the filing and review of the implementing legislation. It is only then that the true extent of the reform will be known, in that it will become clear which tribunals will survive the institution of the new system, what role they will play in future and what rules will be applicable to them.

While it is a step in the proper direction, in particular with respect to the openness of the selection process of the members of the Tribunal and the application of a code of ethics to them, we are concerned with the outcome of a reform which only took into account part of the recommendations submitted by the various bodies having reviewed the issue. The legislator removed the judicial nature of the administrative decision-making process, as recommended in the Garant Report, without implementing the recommendations contained in this report for the protection of individual rights. It should be noted that the Garant Report had recommended a diversion from the judicial process in purely administrative matters, provided that litigants be afforded a right to appeal from any decision before the Tribunal, which recommendation was disregarded.

The Bill also seems to abolish the concept of "paritarisme" (joint review) in occupational health and safety matters, which will probably give rise to protest on the part of various interested groups. Is it appropriate to reconsider a system which, although imperfect in certain aspects, has nonetheless the merit of ensuring a certain stability?

We come to the conclusion that the reform contemplated by the legislator will in many respects be beneficial to litigants, particularly as regards the flexibility and promptness of the decision-making process. However, we fear that the adoption of the Bill in its present form would considerably affect the protection of the rights of citizens in the face of decisions of the Administration.

Louis-A. Leclerc

**LIST OF PROCEEDINGS COMING WITHIN
THE JURISDICTION OF THE ADMINISTRATIVE TRIBUNAL OF QUÉBEC**

**SCHEDULE I
SOCIAL AFFAIRS DIVISION**

PART 1

**INCOME SECURITY AND SOCIAL AID
AND ALLOWANCES SUBDIVISION**

1. Section 20 of the *Act respecting family assistance allowances*
2. Sections 48 and 59 of the *Act to secure the handicapped in the exercise of their rights*
3. Sections 78 and 81 of the *Act respecting income security*
4. Section 40 of the *Act respecting income security for Cree hunters and trappers who are beneficiaries under the Agreement concerning James Bay and Northern Québec*
5. Section 45 of the *Act respecting child day care*
6. Section 517 of the *Act respecting health services and social services*
7. Section 162 of the *Act respecting health services and social services for Cree Native persons*

PART 2

MENTALLY ILL PERSONS PROTECTION SUBDIVISION

1. Section 30 of the *Mental Patients Protection Act*
2. Sections 672.38 and following of the *Criminal Code*

PART 3

HEALTH SERVICES AND SOCIAL SERVICES SUBDIVISION

1. Sections 4.8, 18.4 and 50 of the *Health Insurance Act*
2. Sections 20, 30 and 44 of the *Act to secure the handicapped in the exercise of their rights*
3. Section 41 of the *Public Health Protection Act*
4. Section 120 of the *Act respecting occupational health and safety*
5. Section 44 of the *Act respecting child day care*
6. Sections 27, 148, 205, 252, 253, 450, 453 and 530.16 of the *Act respecting health services and social services*
7. Sections 7, 59, 132, 148 and 182.1 of the *Act respecting health services and social services for Cree Native persons*

PART 4

PENSION PLAN SUBDIVISION

1. Section 188 of the *Act respecting the Québec Pension Plan*
2. Section 74 of the *Act respecting the Pension Plan of Elected Municipal Officers*

PART 5

COMPENSATION SUBDIVISION

1. Section 65 of the *Workmen's Compensation Act*
2. Section 83.49 of the *Automobile Insurance Act*
3. Section 16.7 of the *Public Health Protection Act*
4. Section 138 of the *Act respecting assistance and compensation for victims of crime*

PART 6
IMMIGRATION SUBDIVISION

1. Section 26 of the *Act respecting immigration to Québec*

SCHEDULE II
EMPLOYMENT INJURIES DIVISION

1. *Act respecting industrial accidents and occupational diseases*
2. Sections 37.3 and 193 of the *Act respecting occupational health and safety*

SCHEDULE III
REAL ESTATE ASSESSEMENT DIVISION

1. Section 117.7 of the *Act respecting land use planning and development*
2. Section 68 of the *Act respecting the National Assembly*
3. Section 43 of the *Cultural Property Act*
4. Sections 58 to 89 of the *Expropriation Act*
5. Sections 173.3 and 244.0.1 and chapter X of the *Act respecting municipal taxation*
6. Section 36.14 of the *Act respecting the Ministère de l'Agriculture, des Pêcheries et de l'Alimentation*
7. Section 64 of the *Environment Quality Act*
8. Section 29 of the *Act respecting the Régie des télécommunications*
9. Section 13 of the *Watercourses Act*
10. Sections 45, 137 and 191.29 of the *Act respecting the land regime in the James Bay and New Québec territories*
11. Section 27 of the *Act respecting roads*

SCHEDULE IV
TERRITORY AND ENVIRONMENT DIVISION

1. Section 151.2.8 of the *Act respecting the Communauté urbaine de Montréal*
2. Section 21.0.4 of the *Act to preserve agricultural land*
3. Section 10.1 of the *Roadside Advertising Act*
4. Section 96 of the *Environment Quality Act*
5. Section 68 of the *Pesticides Act*
6. Section 51.11 of the *Act respecting hunting and fishing rights in the James Bay and New Québec territories*

SCHEDULE V
ECONOMIC AFFAIRS DIVISION

1. Section 17 of the *Travel Agents Act*
2. Section 45 of the *Act respecting prearranged funeral services and sepultures*
3. Section 65 of the *Crop Insurance Act*
4. Section 366 of the *Act respecting insurance*
5. Section 83 of the *Charter of the French language*
6. Section 154 of the *Cinema Act*
7. Section 560 of the *Highway Safety Code*
8. Section 123.145 of the *Companies Act*
9. Section 26 of the *Act respecting the development of Québec firms in the book industry*
10. Section 15 of the *Tourist Establishments Act*
11. Section 50 of the *Grain Act*
12. Section 37 of the *Act respecting market intermediaries*
13. Section 26 of the *Act respecting stuffing and upholstered and stuffed articles*
14. Section 22 of the *Cullers Act*
15. Section 191.1 of the *Act respecting the marketing of agricultural, food and fish products*
16. Section 51.1 of the *Farm Producers Act*
17. Section 17 of the *Agricultural Products, Marine Products and Food Act*
18. Section 49.1 of the *Dairy Products and Dairy Products Substitutes Act*
19. Section 339 of the *Consumer Protection Act*
20. Section 55.35 of the *Animal Health Protection Act*
21. Section 35 of the *Act respecting the class action*
22. Section 36 of the *Act respecting the collection of certain debts*
23. Section 40.1 of the *Act respecting the Régie des alcools, des courses et des jeux*
24. Section 55 of the *Act respecting the Régie des télécommunications*
25. Section 26.1 of the *Act respecting the Régie du gaz naturel*
26. Section 53.1 of the *Act respecting safety in sports*
27. Section 42 of the *Act respecting child day care*
28. Section 36 of the *Act respecting the Société des alcools du Québec*
29. Section 252 of the *Act respecting trust companies and savings companies*
30. Section 51 of the *Transport Act*
31. Section 19 of the *Act respecting the use of petroleum products*
32. Section 324 of the *Securities Act*

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