FAMLNWS 2021-08
Family Law Newsletters
March 1, 2021

— Franks & Zalev - This Week in Family Law

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The End Of Excess

Schieder v. Gajewczyk, 2021 CarswellOnt 883 (S.C.J.) - Himel J.; and 2021 ONSC 640 - Jarvis J.

The days of tolerating blatant non-compliance with procedural rules, Notices to the Profession, and Practice Directions appear to be over - at least in Ontario.

In *Schieder*, the parties' Case Conference judge, Justice Himel, issued very specific directions about the materials the parties would each be permitted to file in support of the motions they both wanted to bring. The applicable Notice to the Profession also provided that unless leave was granted in advance, and that did not happen in this case, each party's Affidavits could not exceed ten pages of narrative and ten pages of exhibits.

Instead of complying with Justice Himel's Order and the Notice to the Profession, and without even trying to seek leave, the parties simply filed Affidavits that were *exponentially* longer than they were supposed to be. The wife, for example, filed an Affidavit that had more than 300 pages of exhibits. That is a far cry from "10".

The day before the motions were supposed to have been heard, Justice Jarvis advised the parties and their lawyers that he was not going to hear the matter given their failure to comply with Justice Himel's Order and the Notice to the Profession. He also advised the parties' lawyers to familiarize themselves with Rule 24(9)(a) of the Ontario *Family Law Rules*, which allows a court to order a lawyer not to charge a client for work that was done and/or to reimburse the client for fees that have already been paid. This is something that no lawyer ever wants to see in a decision.

Despite Justice Jarvis' rather stern and direct warning, the parties did not get the message. Although Justice Himel had specifically directed counsel to speak before their next attendance to at least try to resolve some of the issues, they did not do so - and they could offer no explanation. And, as Justice Himel noted in her Endorsement, during their next court attendance, "neither counsel provided any explanation for the gross repudiation of the page limitations that they filed for the motion [that was supposed to have been heard by Justice Jarvis], nor any apology."

All of this led Justice Himel to issue a stern warning to lawyers and litigants in both Ontario and across Canada that this type of unreasonable behaviour simply needs to stop - especially in these times of judicially-limited resources:

> [11] **The case is indicative of the culture of unreasonableness that plagues the Court. This culture is particularly problematic given the current challenges and delays faced by litigants in gaining access to justice**. Other flagrant examples include:

(a) failing to file any conference materials and/or Confirmation notices;

(b) ignoring the line spacing and font size so as to "comply" with the page limits;

(c) circumventing page limitations by directing the judge to earlier affidavits;

(d) bringing "urgent" motions that are *not* urgent, and attempting to squeeze long motions into one hour slots;

(e) seeking last minute adjournments based on information known weeks in advance;

(f) failing to advise the Court until the morning of a matter that the case has settled when the Minutes of Settlement were executed days before;

(g) using the Court's limited resources to further the delay, delay, delay game;

(h) seeking costs in amounts that are unreasonable and not proportionate;

(i) requesting relief that is extreme, not child-focused and unrealistic; and

(j) playing "good cop, bad cop" with the judge delivering the unfavourable opinion rather than the client's legal advisor.

[12] It seems that, **for some counsel, the days of valuing one's reputation over success in any particular file may be gone**. Given the current state of rapid transformation of the Court, coupled with additional unspecified future changes, that is unfortunate.

[13] **Civility inside and outside of the courtroom, and respect for colleagues and the Court, are vitally important to the successful functioning of the Family Justice system.**

[14] **Enough is enough.** [emphasis added]

With one caveat, we echo Justice Himel's concerns, and hope that her decision, and others like it (several of which we have commented on in earlier editions of *TWFL*), should help prevent this from continuing to happen in the future.

The caveat? Some cases are complicated. They just are. And *sometimes* (not all the time, but ***sometimes***) the objectively necessary detail for a Case Conference just cannot be reduced to six-double-spaced-pages of Case Conference Brief or a 10-double-spaced-page Affidavit and 10 pages of Exhibits (of which a Financial Statement would consume almost all the allotted exhibit pages).

A deep breath is required from both sides here.

Counsel get upset when their pages numbers are limited. But the system cannot function if each side to a Case Conference or motion files a 4-inch binder of material. It is an impossible task for any judge of any court. Counsel must also carefully consider how much time will be needed for oral argument *before* scheduling a hearing. As lawyers, we are notorious under-estimators (in fairness, time does seem to fly when arguing a motion). If a motion involves complicated legal and/or factual issues, it is not realistic or fair to expect that the court will be able to deal with the matter if only 45 minutes has been set aside for oral arguments, particularly if factums are not filed, and/or the matter is being dealt with in a jurisdiction that was already under resourced before COVID-19. But if your motion requires multiple affidavits and expert reports - it's likely not a short motion.

Counsel need not include full expert reports in their materials. The summary or conclusion page can often suffice; and the full report can be "available" electronically at the hearing if necessary. Several years' worth of account statements need not be included in exhibits - attach the statements that are necessary. Full income tax returns are rarely necessary to make any point; but again, they can be available electronically should they be required. If you are concerned that the court might need to see an entire document, consider uploading it to a file sharing site and providing a link that can be used to access the full document

during the hearing should the need arise (although until this practice is expressly authorized either by the rules or a Practice Direction, it should probably only be done with either the other party's consent or prior judicial approval).

Paragraphs spent on "rhetorical excess" (to borrow from Justice Kurz in *Alsawwah v. Afifi* (2020), 41 R.F.L. (8th) 362 (Ont. S.C.J.)) can (and should) be omitted (they are only going to annoy the court anyway). And counsel must condense their materials with ruthless editing: what is really necessary, and what is not? Know your limit and (try to) draft within it.

In those situations where the file is, in fact, sufficiently complicated such that more pages are required, counsel must plan ahead and seek leave to file more lengthy materials (not the day before the material is due), offering a reasonable explanation. These types of requests must be made enough in advance to give the court a reasonable opportunity to process them. And courts should address those requests on a timely basis because, anecdotally, those requests are often not answered until after the material is already due to be filed.

And finally, there is excessive material and then there is ***excessive*** material. *Schieder* involved ***excessive*** material. There are stories of materials being rejected (not just in Ontario) for being very marginally over the page limit (i.e. as little as one-half page). If the pages have been limited by an Order, that is the end of it; an order is an order and counsel simply *must* get leave prior to filing anything in excess of the ordered page limits. But if the page limit comes by way of Practice Direction or Notice to the Profession, provide a reasonable explanation and respectfully request the indulgence, as Courts will surely continue to accept that, sometimes, a complicated case may call for an extra page or two (or three? Or are we pressing our luck . . . ?).

Even if You're Happily Married - It Might be Time for a Serious Talk

L.T. v. D.T. Estate, 2020 CarswellBC 2982 (C.A.) - Harris, Goepel, Abrioux JJ.A.

This appeal was about whether human reproductive material (in this instance, sperm) removed from a deceased donor who had not given prior written consent to its removal or use could be used to create embryos to allow his partner to have a child fathered by him.

This is a very sad story. The parties were happily married at the time of the husband's sudden and unexpected death, and everyone agreed that the parties wanted to have more children and at least one sibling for their first child.

The antagonist in the story? The *Assisted Human Reproduction Act*, S.C. 2004, c. 2 [the "*AHRA*"] and its regulations, the *Consent for Use of Human Reproductive Material and In Vitro Embryos Regulations*, SOR/2007 137 [the "Regulation"], which prohibit the removal of human reproductive material from a donor without the donor's prior, informed, written consent.

As the Supreme Court of Canada had previously upheld the constitutionality of these parts of the *AHRA* and Regulation [*Québec (Procureur général) c. Canada (Procureur général)*, 2010 CarswellQue 13213 (S.C.C.)], the question before the Court was only one of statutory interpretation.

Background

Sadly, the husband died suddenly, unexpectedly, and intestate. The parties had been in a long-term relationship, and had just had a child not long before the husband's death.

The evidence was clear that they planned to have more children and a sibling for their child.

As is probably true for 99.5 percent of the Canadian population, neither the husband nor the wife considered what would happen if one of them died. They did not turn their minds to the possible posthumous use of their respective reproductive materials. However, for the purpose of their analysis, the Court of Appeal accepted that the husband would have consented to the posthumous use of his reproductive material had he considered it. But he did not *actually* consent in accordance with the plain statutory language of the *AHRA* and Regulation. And that was a big, big problem.

When the husband died, the wife brought an urgent after hours application seeking orders that the husband's reproductive material:

a) be removed from his body after his death;

b) be stored at an IVF Clinic chosen by the wife; and

c) be used to create embryo(s) for the reproductive use by the wife (and for no other purpose).

Recognizing that a denial or adjournment of the application would end the matter, the judge below made an order maintaining the *status quo* so as to allow for full submissions. The judge authorized the removal of the husband's sperm; ordered that the material be stored at an identified fertility centre; and ordered that such material could not be released, distributed, or used until further order of the Court.

The judge at first instance also invited the Federal Department of Justice and the provincial Ministry of the Attorney General to participate in the future hearing, which then took place on October 7, 2019.

In the court below, Justice Masuhara understood that the issue was one of statutory interpretation. He concluded that Parliament intended to permit the posthumous use of reproductive material only if the donor had provided consent in compliance with the Regulation: prior informed written consent.

While the wife advanced arguments in an attempt to support a different interpretation, Justice Masuhara found himself unable to accept those arguments. The statute was clear; there was no legislative gap; and it clearly applied to the facts at hand. Removal and use of the husband's sperm was prohibited, and he could not just interpret the legislation contrary to its clear meaning. Very reluctantly, and recognizing the terribly tragic circumstances, His Honour dismissed the Application and terminated his interim order. However, he stayed his own Order to permit the wife to appeal.

Analysis

Spoiler Alert: This story does not have a happy ending.

The prohibition on the use of reproductive material without consent is set out in s. 8 of the *AHRA*:

Posthumous use without consent

8.(2) No person shall remove human reproductive material from a donor's body after the donor's death for the purpose of creating an embryo unless the donor of the material has given written consent, in accordance with the regulations, to its removal for that purpose.

The Court of Appeal first emphasized that the statutory scheme was a valid exercise of Parliament's constitutional power over criminal law. As an exercise of criminal powers, one would expect Parliament to try to achieve clarity and certainty. Where the words of a statutory provision are clear and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process: *Celgene Corp. v. Canada (Attorney General)*, 2011 CarswellNat 34 (S.C.C.) at para. 21. It is hard to argue that s. 8(2) is not clear and unequivocal. And the section does not admit of exceptions or allow room for debate or a weighing exercise. There is either consent pursuant to the Regulation - or there is not.

The conditions for providing the required form of consent are set out in ss. 6, 7, and 8 of Part 2 of the Regulation:

Consent Given Under Subsection 8(2) of the Act

6 This Part applies in respect of a consent given under subsection 8(2) of the Act to remove human reproductive material from a donor's body after the donor's death for the purpose of creating an embryo.

> 7 Before a person removes human reproductive material from a donor's body after the donor's death for the purpose of creating an embryo, the person shall have a document **signed by the donor** stating that, before consenting to the removal, the donor was informed in writing that
>
> (a) the human reproductive material will be removed in accordance with the donor's consent to create an embryo for one or more of the following purposes, namely,
>
> (i) the reproductive use of the person who is, at the time of the donor's death, the donor's spouse or common-law partner,
>
> (ii) improving assisted reproduction procedures, or
>
> (iii) providing instruction in assisted reproduction procedures;
>
> (b) if the donor wishes to withdraw their consent, the withdrawal must be in writing;
>
> (c) the withdrawal is effective only if the person who intends to remove the human reproductive material is notified in writing of the withdrawal before the removal of the material; and
>
> (d) human reproductive material removed from the donor cannot be used for a purpose mentioned in paragraph (a) unless the person who intends to make use of the material has the donor's written consent under Part 1 respecting the use of the material.
>
> 8 Before a person removes human reproductive material from a donor's body after the donor's death for the purpose of creating an embryo, the person shall have the donor's written consent respecting the removal of the material and the donor's **written consent** under Part 1 respecting the use of the material. [emphasis added]

It is uncontroversial that the principles of statutory interpretation apply with equal force to regulations, which must be read concurrently with, and in the context of, the enabling statute in order to implement the statutory scheme and give effect to the intention of Parliament: *S.H. v. D.H.* (2019), 25 R.F.L. (8th) 68 (Ont. C.A.) at para. 31.

As is the *AHRA*, the Regulation is clear and unambiguous, and admits of no exceptions. Only "consent" under the statutory scheme will suffice to make the posthumous removal of reproductive material lawful. According to the Court of Appeal:

> [23] . . . Implied, hypothetical, imputed, or substituted consent are simply not consent for the purpose of avoiding the prohibition set out in s. 8 and the *Regulation*. Parliament has provided for legal certainty in what is, without doubt, a morally challenging and humanly complex area.

In the view of the Court of Appeal, this was not even a close call:

> [24] Respectfully, this is not, as was suggested in argument, an interpretation of the statute lacking in nuance. It is not a narrow reading. It is a recognition that Parliament has made a policy choice. Parliament has defined the *only* circumstances in which it is lawful to remove and use reproductive material from a donor. That choice reflects the value Parliament has placed on a donor's individual autonomy and an individual's control over his or her body. It has made that choice in the face of numerous deep moral and ethical dilemmas posed by new reproductive technologies.

Quoting (now Associate Chief) Justice Fairburn in *S.H. v. D.H.*, *supra* at para. 37 - a case very similar to this one:

> [36] Parliament's deliberate decision to criminalize the use of reproductive material and *in vitro* embryos in the absence of written donor consent reflects deep moral concerns about human reproduction and its intersection with human autonomy. Those moral concerns were front and centre when considering whether it was acceptable for the criminal law to govern donor consent under s. 8 of the *AHRA*. As McLachlin C.J. said in *Reference re AHRA*, at para. 90:

> At the heart of s. 8 lies the fundamental importance that we ascribe to human autonomy. The combination of the embryo's moral status and the individual's interest in his or her own genetic material justify the incursion of the criminal law into the field of consent. There is a consensus in society that the consensual use of reproductive material implicates fundamental notions of morality. This confirms that s. 8 is valid criminal law.

The wife tried to argue that she had a property interest in the husband's genetic material - but that argument had already been unsuccessfully tried in Ontario in *S.H. v. D.H.* as inconsistent with the prohibition found in s. 8(2) of the *AHRA*.

In that case, a couple had created a number of *in vitro* embryos with the aid of anonymous donors. The couple divorced and the ex husband notified the IVF clinic in writing that he withdrew his consent to the use of the embryos. His written demand complied with the provisions in the Regulation governing withdrawing consent. His former wife attempted to argue that one reason her former husband could not withdraw his consent was that he would be doing so in breach of contract. The Court concluded in effect that the regulatory scheme ousted the applicability of the common law. The Regulation governed the right to withdraw consent regardless of any common law restriction that might otherwise apply.

In *S.H. v. D.H.*, the Ontario the Court of Appeal concluded that granting permission to use the husband's reproductive material would be contrary to the explicit language of s. 8(2) and the overarching legal and moral objective of the *AHRA* - to protect the donor's interest in their reproductive material by only permitting its use with their express and informed written consent. To find otherwise, held the Court of Appeal, would be to actually amend the legislation, which was for Parliament, not the Courts. The same principle was engaged in the matter currently before the B.C. Court of Appeal.

The B.C. Court of Appeal also openly, but respectfully, questioned the reasoning in *W. (K.L.) v. Genesis Fertility Centre* (2016), 83 R.F.L. (7th) 150 (B.C. S.C.), to the extent that it offered some support for the idea of a property interest and in permitting use of reproductive material after donor death, absent proper consent. In that case, suffering from a life-threatening medical condition, the donor consented to the removal of his reproductive material during his lifetime. The couple had agreed that his reproductive material should be used, even if he died. He died, intestate, without completing the written consent as required by s. 8(2) of the *AHRA* to permit the post-death use of his reproductive material.

That proceeding was uncontested, and the judge ultimately determined that the consent was sufficient to satisfy the fundamental objective of the *AHRA* (that the donor's consent must be both free and informed). However, given that the judge in that uncontested case did not have the benefit of full argument, the Court of Appeal was not persuaded the case was at all authoritative, and suggested that *W. (K.L.)* should be treated as having been overruled.

The Court of Appeal also found the *parens patriae* jurisdiction to be inapplicable here; given the clear wording of the statute, there was no legislative gap: *J.E.S.D. v. Y.E.P.* (2018), 12 R.F.L. (8th) 154 (B.C. C.A.) at para. 58. The *parens patriae* jurisdiction is not to be used as a mechanism for statutory amendment.

Finally, for good measure, the Court had this to say about Justice Masuhara's interim order:

> [51] It is useful to add one final word about the interim order. In the circumstances that confronted the judge, making an order to permit the removal of [the husband's] reproductive material pending a determination of whether that material could be removed and used was clearly the right thing to do. What it permitted, however, was the removal of [the husband's] removal of reproductive material contrary to the prohibition in s. 8(2). In that sense, it permitted the commission of a criminal offence. This was not a case in which there was doubt about whether [the husband] had actually complied with s. 8(2). It was accepted from the beginning that he had not. The issue was whether the statute could be interpreted so that the failure to comply with those requirements was not fatal to the right to remove and use the reproductive material. This Court has now provided a definitive answer to that question. In the legal sense, the interim order ought not to have been pronounced. It will, accordingly, be unnecessary to make a similar order in similar circumstances in the future.

The appeal was dismissed, albeit with regret given the tragic circumstances. Given those circumstances, the Court stayed its order for 60 days to permit the parties to consider their position on an appeal to the Supreme Court of Canada. And with that,

one last question: Given the suggestion that the court below permitted the commission of a criminal offence; does this mean that the B.C. Court of Appeal is now an accessory after the fact?

A Quick Review about Reviews

Verkaik v. Verkaik, 2020 CarswellOnt 18860 (Div. Ct.) - Penny, Kristjanson and O'Brien JJ.

Parties show up in court (virtually, *naturellement*) for a review of child support pursuant to Minutes of Settlement. But the parties do not marshal sufficient evidence for the court to properly determine the incomes of the parties. What is a judge to do? One might think an option would be to simply have the previous payments continue. Apparently not. It was, in fact, *not* open to the trial judge to simply continue the original payments in the absence of any findings of fact about the parties' incomes and the impact of the parties' equal time parenting plan under s. 9 of the *Child Support Guidelines*. That the trial judge did so was an error of law and a palpable and overriding error of fact.

The parties were married June 10, 2001, and they separated April 13, 2006. They had one child who was now 19 and attending university. The parties shared joint custody of, and an equal parenting schedule with, the child. The parties had amassed significant litigation frequent flier points since their separation.

On the eve of trial, the parties entered into Minutes of Settlement on October 1, 2010, in which the father agreed to pay child support in the amount of $725 per month. This amount was fixed and non-variable for a period of three years - until October 2013 - during which period neither party was obliged to provide financial disclosure. The child support obligations under the Minutes became reviewable as of July 1, 2013, with any new amount to start October 1, 2013. There was no right to retroactive adjustment.

The figure of $725 monthly had been notionally based on an income for the father of $80,000 and an income of zero for the mother.

While the father paid child support as required for the 3-year term, when it expired, the father stopped paying child support, based on his position that, on review, his child support obligations would be reduced or eliminated altogether. The parties also argued about the sufficiency of financial disclosure and the calculation of their incomes for child support purposes, including for the purposes of s. 9 of the *Guidelines*. The father commenced his application to review and change child support as of October 1, 2013, on November 19, 2015.

After a 6-day trial essentially focussed on determining the parties' incomes, the trial judge found that he was unable to determine the income of either party. The trial judge gave detailed reasons explaining why he was not prepared to accept the evidence of either party about their respective incomes. Notably, the trial judge thought that the father's asset base and lifestyle suggested an income well in excess of the income he reported.

The trial judge dismissed the father's application to review and to change child support (as of October 1, 2013) on that basis.

In his Costs Endorsement, the trial judge made findings relevant to the Reasons for Judgment that had not previously been mentioned in the original Reasons. In particular, in the Costs Endorsement, the trial judge stated that:

> The minutes obligated the [father] to pay $725.00 monthly subject to any adjustment at or following October 1, 2013. Given that I made no adjustment, that $725.00 monthly payment continues to be payable.
>
> . . . . .
>
> . . . the $725.00 monthly continued to accrue such that [the father] owes retroactive table child support in that amount monthly from October 1, 2013 forward.

The Divisional Court was not happy with this result.

The Divisional Court first noted that the Minutes called for a review - not a variation. The child support payable under the Minutes for three years was "fixed and non-variable" and the child support payable commencing October 1, 2013 was specifically *reviewable* as of July 1, 2013, with effect from October 1, 2013.

The eve-of-trial Minutes were meant to "buy peace" for three years. And while there was no requirement to show a material change, there was, however, a requirement that the trial judge make factual findings about the parties' incomes.

As the Supreme Court of Canada made clear in *Leskun v. Leskun* (2006), 34 R.F.L. (6th) 1 (S.C.C.), there is a distinction between a "variation" and a "review". A review obviates the need to show a material change in circumstances. And, unless the review is restricted to a specific issue (and, here, it was not), a review of support is essentially an initial application for support requiring a complete rehearing of every issue from entitlement to quantum (and with the original onuses of proof): *Fisher v. Fisher* (2008), 47 R.F.L. (6th) 235 (Ont. C.A.) at para. 63. This is why the parameters of a review are supposed to be circumscribed and not left wide open: *S. (R.M.) v. S. (F.P.C.)* (2011), 90 R.F.L. (6th) 1 (B.C. C.A.); *Leskun v. Leskun*, *supra*.

The trial judge was clearly frustrated, and absent sufficient evidence, he relied on (and ordered) the original sum of $725 per month. This, opined the Divisional Court, was an error. On a *review* (as opposed to a *variation*) the trial judge could only make an order for $725 a month in support *after* making specific findings with respect to the incomes of the parties and after an assessment of the factors in s. 9 of the *Child Support Guidelines*. In contrast, had this been a *variation* application, absent finding a material change, the trial judge could have simply ordered that the support amount of $725 a month continue.

A figure of $725 a month (as of October 2013) implied factual findings that the father's income was $80,000 and that the mother's income was zero. But the trial judge did not make these findings.

The Divisional Court noted the unfortunate but accurate statement that judges in family court cases are regularly faced with inadequate, incorrect, and sometimes misleading evidence about income. The Court then noted that ss. 15 to 20 of the *Child Support Guidelines* empower the court to impute income where, such as here, the payor has failed to provide adequate income information. That is, had the trial judge found that the father had not produced sufficient information - or had produced misleading information - about his income, and on that basis imputed an income of $80,000 to him - we would be reporting on a different case right now.

The Divisional Court then went one step further and suggested that it was within the trial judge's power, "to insist upon production of other collateral sources of information such as personal bank and credit card statements from which lifestyle and patterns of expenditure (and therefore available income) might be derived." We are not so sure about that statement. We practice in the adversarial system, not an inquisitional system. Especially when the parties are represented by counsel, respectfully, it is not for the court to insist on the production of evidence.

Furthermore, given the equal parenting time agreement, the trial judge was also required to assess the factors in s. 9 of the *Guidelines*. There is clear direction from appellate courts as to the process a trial judge should follow in a s. 9 analysis (including adjourning the trial to allow the parties the chance to put forward proper evidence supporting the s. 9 factors): *J.C.M. v. M.J.M.* (2018), 12 R.F.L. (8th) 70 (N.B. C.A.); *Woodford v. MacDonald*, 2014 CarswellNS 218 (C.A.); *Dyck v. Bell* (2015), 71 R.F.L. (7th) 10 (B.C. C.A.); *Conway v. Conway* (2011), 96 R.F.L. (6th) 1 (Alta. C.A.); *A.S.L. v. L.S.L.* (2020), 38 R.F.L. (8th) 351 (N.B. C.A.).

According to the Divisional Court, the trial judge's failure to follow this process was also an error of law.

As a result, the appeal was allowed, and the order for $725 a month in child support was set aside.

The Divisional Court also briefly dealt with the question as to whether the father's obligation to pay $725 a month continued past October 2013, if not specifically changed by order or agreement. This dispute, found the Divisional Court, was a red herring. The father stopped paying support on the theory that, under a review, his child support obligations would be reduced or eliminated. It was open to the mother to initiate the review herself, but she did not do so. The question as to whether the father ought to

have continued the payments was not a question that required an answer at that time. There was no doubt that, as of 2013, both parents continued to have child support obligations. And there was no doubt that, if the review continued (after the successful appeal), any order for child support could take effect from as early as October 1, 2013. The mother still had her remedies.

As the Divisional Court was not in a position to resolve the conflicting evidence, the matter was sent back for a new trial.

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