Consultation Requirements in the Post-Treaty Context

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I. INTRODUCTION

Considerable attention has been given to recent decisions of the Courts regarding the duty of the Crown to consult and accommodate the interests of Aboriginal people in the context of *asserted but unproven* claims. These issues were addressed in two recent Supreme Court of Canada decisions—*Haida* and *Taku River*[1]—that confirmed that the Crown has a duty to consult, and must seek a balanced approach to accommodation, when it has knowledge, real or constructive, of the *potential* existence of an Aboriginal right or title and contemplates conduct (in those cases, authorization of land and resource uses) that might adversely affect it. These cases clarify the scope of the duty to consult in circumstances where Aboriginal rights or title have been asserted, but have not yet been proven or confirmed through either litigation or through the negotiation of a land claim agreement or treaty.

These cases of potential rights or title should be distinguished from cases such as *Sparrow*[2], in which an Aboriginal right (in that case, the right to harvest fish) was adjudicated and confirmed as an existing right. In such circumstances, the Crown has an obligation to consult, and an obligation to meet the test of "justification" for any proposed infringement of the legally confirmed Aboriginal right.

Although the Courts have not yet drawn a specific distinction between "accommodation" and "justification", the authors suggest that the concept of "accommodation" is a more flexible one, allowing for a fair balancing of interests, pending final determination of the nature and extent of Aboriginal rights or title. In contrast, the concept of "justification" is a more demanding standard, applicable to potential interference with rights or title that have been established or confirmed—either by the Courts or through agreements such as land claim agreements or treaties.

The purpose of this paper is to review the approach of the Courts (and the issues currently before the Courts) to the concepts of consultation, accommodation, and justification in the post-treaty context—specifically in relation to the numbered treaties. In addition, we consider the approach to consultation that appears to be reflected in the modern land claims agreements and treaties, including the various agreements-in-principle currently under negotiation under the auspices of the British Columbia Treaty Commission. Essentially, the

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[1] *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73;
Taku River Tlingit First Nation v. British Columbia (Project Assessment Director), 2004 SCC 74.

[2] *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

issue under consideration is how, and to what extent, the concepts of consultation, accommodation and justification may continue to apply with respect to land and resource decisions on Crown land in the post-treaty context.[3]

II. CONSULTATION UNDER THE NUMBERED TREATIES

Between 1871 and 1923, the federal government, and various Aboriginal people entered into 11 numbered treaties covering most of the provinces of Ontario, Manitoba, Saskatchewan, Alberta, plus the Mackenzie District of the Northwest Territories and the northeast corner of British Columbia. Treaty Number 8 was negotiated in 1899 and was adhered to by a number of bands that lived in what are now Alberta, Saskatchewan, British Columbia and the Northwest Territories.

Treaty Number 8 contains the following clause (which is included in similar terms in most of the other numbered treaties):

> And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.

The numbered treaties did not expressly incorporate the concepts of consultation, accommodation and justification in relation to land that is "required or taken up."[4]

The Courts have specifically considered the question of the duty of the Crown to consult before making land and resource decisions which might affect Aboriginal interests under Treaty Number 8, in the case of *Halfway River First Nation v. B.C. (Ministry of Forests)*, 1999

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[3] While the concepts of consultation, accommodation and justification also apply to proposed government legislation or regulations (eg. regulation of hunting and fishing rights through licences and allocations, etc.), this paper will focus only on the issues associated with Crown decisions relating to projects and activities involving the use of Crown lands or the development of natural resources.

[4] Other sections of the numbered treaties do expressly reference consultation. For example, Treaty 8 provides that the Crown is to "set apart such reserves and lands, *after consulting with the Indians* concerned as to the locality which may be found suitable and open for selection." [Emphasis added.]

B.C.C.A. 470, and in the case of *Canada (Canadian Heritage) v. Mikisew Cree First Nation*, 2004 F.C.A. 66.

The *Halfway River* Case

In the *Halfway River* case, the British Columbia Ministry of Forests issued a cutting permit over certain lands within the area of northeast British Columbia covered by Treaty Number 8. The Halfway River First Nation challenged the issuance of the cutting permit through judicial review proceedings on the grounds that, *inter alia*, the Crown had a legal obligation to consult with the Halfway River First Nation before issuing the permit, and that the Crown had failed in meeting that obligation. The Crown and forest products company that had received the permit argued that the Crown had an independent right under the terms of the treaty to take up lands for lumbering and other purposes, that the rights of hunting, trapping and fishing were consequently limited, and that the issuance of the cutting permit, therefore, did not amount to an infringement, giving rise to the legal obligation to consult.

The British Columbia Court of Appeal found that the Aboriginal right of hunting, trapping and fishing, on the one hand, and the Crown's right to regulate or to take up lands, on the other hand, "cannot be given meaning without reference to one another". The Court found that "the Crown's right to take up land cannot be read as absolute or unrestricted", and that "a balancing of the competing rights of the parties to the Treaty was necessary" (see paragraph 134 of the decision). The Court also found that the enactment of s. 35 of the Constitution Act in 1982, "improved the position" of the First Nation signatories to the Treaty by confirming that their rights "cannot be infringed or restricted other than in conformity with constitutional norms" (see paragraph 135 of the decision).

Chief Justice Finch concluded as follows:

> I respectfully agree with the learned Chambers Judge that any interference with the right to hunt is a *prima facie* infringement of the Indians' treaty right as protected by s. 35 of the *Constitution Act*, 1982. (See paragraph 144 of the decision)

The Chief Justice went on to confirm that the approach set out in the *Sparrow* case is therefore applicable in deciding whether infringement of a treaty right is justified, requiring consideration of the following questions (said in *Sparrow* not to be an exhaustive or exclusive list):

1. Whether the legislative or administrative objective is of sufficient importance to warrant infringement;

2. Whether the legislative or administrative conduct infringes the treaty right as little as possible;

3. Whether the effects of infringement outweigh the benefits derived from the government action; and

4. Whether adequate meaningful consultation has taken place.

The Court found that, while the decision of the Ministry of Forests that the harvesting authorized under the cutting permit would have minimal impacts on hunting, fishing or trapping, the Crown had not met the requirements of consultation:

> . . . namely to provide in a timely way information the aboriginal group would need in order to inform itself on the effect of the proposed action, and to ensure that the aboriginal group had an opportunity to express their interests and concerns. (See paragraph 165 of the decision)

This interpretation of the treaty uses the adoption of s. 35 in 1982, as a vehicle for modifying the existing Aboriginal and treaty rights, through the imposition of restrictions on the exercise of treaty rights by the Crown. The Court imposed the more demanding standard of "justification" based on the *Sparrow* test, applicable to potential interference with established rights or title in the absence of any express consultation requirements in the text of the Treaty.

The *Mikisew Cree* Case

In the *Mikisew Cree* case, the Federal Court of Appeal reached a different conclusion respecting the interpretation and application of Crown duties and Aboriginal rights under Treaty Number 8. The Minister of Canadian Heritage approved the construction of a winter road through Wood Buffalo National Park, which is located within the boundaries of Treaty Number 8. The Mikisew Cree First Nation challenged the approval of the winter road through judicial review proceedings in the Federal Court on the grounds that, *inter alia*, the approval constituted an infringement of treaty rights, and that the Crown had failed to meet the obligations of consultation and justification. The Mikisew Cree relied on the decision of the British Columbia Court of Appeal in the *Halfway River* case.

The Province of Alberta, an intervenor at the Court of Appeal, argued that the approval of the construction of the winter road was a "taking up" of land as contemplated in the provisions of Treaty Number 8, that the hunting, trapping and fishing rights were expressly "subject to" such taking up of land, and that therefore there was no infringement of the treaty rights. The Federal Crown did not rely on this argument at the hearing of the appeal (although it did rely on the argument in the court below).

By a majority, the Federal Court of Appeal found that the treaty included a geographical limitation on the existing hunting rights where there was a "visible, incompatible land use". It

found that the taking up of land for a winter road, and the prohibition of the use of firearms on or within 200 metres of the road, was such a visible, incompatible land use. The Court noted that s. 35 of the *Constitution Act*, 1982 protected "existing" Aboriginal and treaty rights. The Court found that the intention of the parties to the treaty included the acceptance of settlement and other uses of land that would restrict rights to hunt, "so long as sufficient unoccupied land would remain to allow them to maintain their traditional way of life". (See paragraph 17.) The Court noted that the land required for the road corridor was only 23 square kilometres out of the 44,807 square kilometres of Wood Buffalo National Park and the 840,000 square kilometres encompassed by Treaty Number 8. It found that this was not a case "where no meaningful right to hunt remains". (See paragraph 18.)

The majority decision concluded:

> [19] The treaty right to hunt has always been limited by the fact that hunting is not permitted on land that has been taken up. It is the right to hunt on land which is not required for settlement, mining, lumbering, trading or other purposes which obtained constitutional protection when s. 35 came into force.
>
> [20] In *Badger*, [[1996] 1 S.C.R. 771] Cory J. recognized the limited nature of the treaty right to hunt. He found that Mr. Badger and Mr. Kiyawasew were hunting on land that was visibly being used. As their treaty right to hunt did not extend to hunting on such land, the hunting limitations set out in the provincial *Wildlife Act* did not infringe their existing right and were properly applied to them (paragraph 67). Accordingly, Cory J. did not find a *prima facie* infringement of s. 35 and did not apply the *Sparrow* test to those defendants.
>
> [21] Where a limitation expressly provided for by a treaty applies, there is no infringement of the treaty and thus no infringement of s. 35.

The Honourable Madam Justice Sharlow issued dissenting reasons in which she adopted the reasoning in the *Halfway River* case.

The Supreme Court of Canada heard an appeal in the Mikisew case this spring and a decision is pending.

The possible outcomes of the appeal would appear to include:

1. a finding that "<u>any</u> interference with the right to hunt is a *prima facie* infringement of the Indians' treaty right as protected by s.35 of the ***Constitution Act, 1982***." (See paragraph 144 of the *Halfway River* decision; Emphasis in original.);

2. the taking up of land for settlement, mining, lumbering, trading or other purposes does not constitute an infringement of hunting, trapping or fishing rights, as those rights are expressly circumscribed or limited by the "taken up" provisions of Treaty Number 8; or

3. the taking up of land does not constitute an infringement under the provisions of Treaty Number 8 unless the taking up of land goes potentially so far that "no meaningful right to hunt remains." (See paragraph 18 of the *Mikisew Cree* majority decision.)

A further potential compromise may be suggested by the *Haida* and *Taku River* decisions. Using the reasoning in those cases, the Court may find that, while the taking up of land by the Crown does not per se constitute an infringement which requires the Crown to meet the "justification" test, the Crown might be required to consult and to seek a fair balance or "accommodation" of Aboriginal interests, to ensure that the taking up of land does not ultimately subsume the rights of hunting, trapping or fishing.

These cases reflect the difficulty of overlaying the approaches of the Courts to reconciliation and to a balancing of interests, as reflected in the cases decided since the beginning of the 1990's, with treaty provisions which do not expressly provide for consultation, accommodation or justification.

As will be seen below, modern land claim agreements and treaties, particularly those in northern Canada, provide mechanisms for the balancing of these interests that is more in line with the reconciliation approach articulated by the Courts.

III. CONSULTATION UNDER MODERN LAND CLAIMS AGREEMENTS

Since 1973, 14 comprehensive land claims have been reached in the northern territories (Yukon, the Northwest Territories, and Nunavut) and three other comprehensive land claims have been concluded in the rest of Canada, including the Nisga'a Final Agreement ratified in 2000.

A common approach in these agreements, which each contain their own structural and procedural arrangements, is as follows:

1. a specific tract of land is identified and confirmed as land held by the Aboriginal group in fee simple;

2. a larger tract of land is identified as a management area, within which the Aboriginal group, federal government and either territorial or provincial government participate in land use planning and land use permitting and approvals; and

3. a larger area within which Aboriginal land use rights, such as hunting, fishing, trapping and gathering, continue to apply. This larger area often overlaps with management areas or other areas within which neighbouring Aboriginal groups have and exercise rights.

Clearly, decisions regarding land and resource projects on the fee simple lands under these agreements are within the control of the Aboriginal group, subject to the laws and regulations of the Aboriginal group, as well as to any generally applicable environmental assessment or environmental protection laws and regulations. The more difficult and nuanced issue is to identify the degree of control exercised by the Aboriginal group on the second and third categories of land identified above.

The Nisga'a Final Agreement

The Nisga'a Final Agreement follows the above model in identifying different categories of land and attempts to identify and clarify the consultation obligations that attach to each category. For example, Chapter 10 of the Nisga'a Final Agreement, which deals with environmental assessment and protection, provides that:

1. if a proposed project (physical works or activities) is located on Nisga'a lands, it is potentially subject to Nisga'a laws in respect of environmental assessment, and may be subject to concurrent or coordinated assessments under federal (eg. CEAA) and provincial (eg. BCEAA) laws; and

2. if a proposed projects that will be located off Nisga'a lands (that is, on Crown lands) may reasonably be expected to have adverse environmental effects on residents of Nisga'a lands, Nisga'a lands, or Nisga'a interests set out in this Agreement (eg. hunting and fishing rights), Canada or British Columbia, or both must ensure that the Nisga'a Nation:

    (a) receives timely notice of, and relevant available information on, the project and the potential adverse environmental effects;

    (b) is consulted regarding the environmental effects of the project; and

    (c) receives an opportunity to participate in any environmental assessment under federal or provincial laws related to those effects, in accordance with those laws, if there may be significant adverse environmental effects (see Chapter 10, paragraph 6).

The Nisga'a Final Agreement defines consultation (such as that referenced in paragraph b, above) as follows:

> "consult" and "consultation" mean provision to a party of:
>
> a. notice of a matter to be decided, in sufficient detail to permit the party to prepare its views on the matter,
>
> b. in consultations between the Parties to this Agreement, if requested by a Party, sufficient information in respect of the matter to permit the Party to prepare its views on the matter,
>
> c. a reasonable period of time to permit the party to prepare its views on the matter,
>
> d. an opportunity for the party to present its views on the matter, and
>
> e. a full and fair consideration of any views on the matter so presented by the party.

With respect to the obligation to ensure that the Nisga'a Nation receives an opportunity to participate in any environmental assessment, Chapter 10, paragraph 7 provides as follows:

> If Canada or British Columbia establishes a board, panel, or tribunal to provide advice or make recommendations with respect to the environmental effects of a project on Nisga'a Lands or a project off Nisga'a Lands that may reasonably be expected to have adverse environmental effects on residents of Nisga'a Lands, Nisga'a Lands, or Nisga'a interests set out in this Agreement, the Nisga'a Nation will:
>
> a. have standing before the board, panel, or tribunal; and
>
> b. be entitled to nominate a member of the assessment board, panel or tribunal, unless the board, panel, or tribunal is a decision-making body, such as the National Energy Board.

The general provisions of the Nisga'a Final Agreement contain the following provision on consultation:

CONSULTATION

28. When Canada and British Columbia have consulted with or provided information to the Nisga'a Nation in respect of any activity, including a resource development or extraction activity, in accordance with their obligations under this Agreement and federal and provincial legislation, Canada and British Columbia will not have any additional obligations under this Agreement to consult with or provide information to the Nisga'a Nation in respect of that activity.

Accordingly, the Nisga'a Final Agreement specifically addresses the extent and nature, as well as the limits, of consultation obligations in relation to land and resource projects on Crown land, in circumstances where those projects may have an impact on Nisga'a residents, Nisga'a lands or Nisga'a interests.

The Tlicho Agreement

As indicated above, 14 land claim agreements have been reached between the federal government and Aboriginal groups in the three northern territories.

The most recent of these is the Tlicho Agreement. The federal legislation ratifying this agreement received royal assent on February 15, 2005 and will come into force on a date to be set by proclamation.

The Tlicho Agreement follows the general structure of identifying and confirming Tlicho lands which are held in fee simple, a larger tract of land known as Wek'èezhìi, within which the Tlicho people participate directly in land use planning and the issuance of land and water permits and licences, and a broader area of land known as Mowhì Gogha Dè Niitlèè within which the Tlicho people have rights such as hunting, fishing, and trapping.

Proposed projects on Tlicho lands are within the general control of the Tlicho government.

Proposed projects outside of the Tlicho lands, but within Wek'èezhìi or Mowhì Gogha Dè Niitlèè are, with some similarities to the Nisga'a Final Agreement, subject to consultation with the Tlicho government and subject to environmental assessment and review by the Mackenzie Valley Environmental Impact Review Board, on which the Tlicho people will have direct representation, and the Mackenzie Valley Land and Water Board (of which the Wek'èezhìi Land and Water Board is a local panel), again with direct participation of the Tlicho people.

Specific consultation requirements are provided for in the Tlicho Agreement under Chapter 23, which addresses subsurface resources.

Section 23.2 provides as follows:

> 23.2 CONSULTATION
>
> 23.2.1 Any person who, in relation to Crown land wholly or partly in Mowhì Gogha Dè Niitlèè (NWT) or Tlicho lands subject to a mining right administered by government under 18.6.1, proposes to
>
> (a) explore for or produce or conduct an activity related to the development of minerals, other than specified substances and oil and gas, if an authorization for the use of land or water or deposit of waste is required from government or a board established by government to conduct these activities; or
>
> (b) explore for or produce or conduct an activity related to the development of oil or gas,
>
> shall consult the Tlicho Government.
>
> 23.2.2 The consultations conducted under 23.2.1 shall include
>
> (a) environmental impact of the activity and mitigative measures;
>
> (b) impact on wildlife harvesting and mitigative measures;
>
> (c) location of camps and facilities and other related site specific planning concerns;
>
> (d) maintenance of public order including liquor and drug control;
>
> (e) employment of Tlicho Citizens, business opportunities and contracts, training orientation and counselling for employees who are Tlicho Citizens, working conditions and terms of employment;
>
> (f) expansion or termination of activities;
>
> (g) a process for future consultations; and

(h) any other matter agreed to by the Tlicho Government and the person consulting that government.

23.2.3 The consultations conducted under 23.2.1 are not intended to result in any obligations in addition to those required by legislation.

23.2.4 No consultation is required under 23.2.1 where negotiations have been conducted in accordance with 23.4.1.

23.3 OIL AND GAS EXPLORATION RIGHTS

23.3.1 Prior to opening any lands wholly or partly in Mowhì Gogha Dè Niitlèè (NWT) for oil and gas exploration, government shall consult the Tlicho Government on matters related to that exploration, including benefits plans and other terms and conditions to be attached to rights issuance.

23.4 MAJOR MINING PROJECTS

23.4.1 Government shall ensure that the proponent of a major mining project that requires any authorization from government and that will impact on Tlicho Citizens is required to enter into negotiations with the Tlicho Government for the purpose of concluding an agreement relating to the project. This obligation comes into effect one year after the effective date. In consultation with the Dogrib Treaty 11 Council or the Tlicho Government, government shall, no later than one year after the effective date, develop the measures it will take to fulfil this obligation, including the details as to the timing of such negotiations in relation to any governmental authorization for the project.

23.4.2 The Tlicho Government and the proponent may agree that negotiation of an agreement under 23.4.1 is not required.

The term "consultation" is defined in Chapter 1 of the Tlicho Agreement as follows:

"consultation" means

(a) the provision, to the person or group to be consulted, of notice of a matter to be decided in sufficient form and detail to allow that person or group to prepare its views on the matter;

(b) the provision of a reasonable period of time in which the person or group to be consulted may prepare its views on the matter, and provision of an opportunity to present such views to the person or group obliged to consult; and

(c) full and fair consideration by the person or group obliged to consult of any views presented.

Accordingly, the Tlicho Agreement contains specific obligations on, and limitations to, consultation in relation to land and resource projects on Crown land, which may have impacts upon the Tlicho people, Tlicho lands, or Tlicho interests.

IV. CONSULTATION UNDER AGREEMENTS-IN-PRINCIPLE IN BRITISH COLUMBIA

While no treaties have been finalized under the British Columbia Treaty Commission process, agreements-in-principle provide some indication of the potential requirements for consultation in relation to land and resource projects on Crown land.

For example, the Lheidli T'enneh Agreement-in-Principle (LTAIP) dated July 26, 2003 provides some guidance on these issues. The Wildlife chapter under the LTAIP confirms that the Lheidli T'enneh will have the right to harvest wildlife for food, social and ceremonial purposes in the Lheidli T'enneh Area in accordance with the final agreement.

Paragraph 9 of the Wildlife chapter addresses the issue of Crown land disposal as follows:

9. The Crown may authorize use of or Dispose of Crown Land, and any authorized use or disposition may affect the methods, times and locations of harvest in Wildlife under the Final Agreement, provided that the Crown ensures that those authorized uses or dispositions do not deny Lheidli T'enneh Citizens the reasonable opportunity to harvest Wildlife under the Final Agreement.

10. The Lheidli T'enneh right to harvest Wildlife will be exercised in a manner that does not interfere with other authorized uses or dispositions of Crown Land existing as of the Effective Date or authorized in accordance with paragraph 9.

11. Prior to the Final Agreement, the Parties will negotiate and attempt to reach agreement on the factors to be considered in determining whether the reasonable opportunity to harvest Wildlife would be denied under paragraph 9.

These provisions in the LTAIP provide only a broad outline of the potential structure of Crown land use decisions, environmental impact reviews and consultation requirements which would be applicable under a final agreement reached within the British Columbia Treaty Commission process. Generally similar provisions appear in other agreements-in-principle.

The Definition of Consultation

All of the existing AIPs include a definition of consultation. The AIPs of the Lheidli T'enneh, Maa-nulth First Nation and Sliammon essentially duplicate the definition found in the Nisga'a Final Agreement (reproduced above). The Tsawwassen First Nation Agreement-in-Principle contains a definition that is only slightly revised from that found in earlier agreements:

> "consult" and "consultation" mean provision to a Party of:
>
> a. notice of a matter to be decided;
>
> b. sufficient information in respect of the matter to permit the party to prepare its views on the matter,
>
> c. a reasonable period of time to permit the party to prepare its views on the matter,
>
> d. an opportunity for the party to present its views on the matter, and
>
> e. a full and fair consideration of any views on the matter so presented by the Party.

In addition, the four AIP's all contain a limiting provision similar to that in the Nisga'a Final Agreement. The Tsawwassen AIP states:

> CONSULTATION
>
> 50. Where Canada and British Columbia have Consulted or provided information to Tsawwassen First Nation as required by the Final Agreement, Canada and British Columbia will have no additional Consultation obligations under the Final Agreement.

While there are still no final agreements under the BC Treaty Commission process, the above definitions of consultation and attendant limiting language appear to be becoming standard features of AIP's.

V. SUMMARY AND CONCLUSION

Recent case law has confirmed that the Crown has a duty to consult, if necessary, accommodate aboriginal interests when it has knowledge, real or constructive, of the *potential* existence of an Aboriginal right or title and contemplates conduct that might adversely affect it. However, in cases involving established or proven Aboriginal rights, the Crown has an obligation to consult, and an obligation to meet arguably more stringent test of "justification" for any proposed infringement of the legally confirmed Aboriginal right.

The numbered treaties, concluded between 1871 and 1923, did not expressly incorporate the concepts of consultation, accommodation and justification in relation to land that is "required or taken up." The pending decision from the Supreme Court of Canada should clarify the extent to which the duty of consultation is triggered when Crown decisions or land use authorizations permit a potential interference with treaty rights.

Modern land claims agreements (and agreements currently under negotiation) opt to expressly identify the circumstances in which consultation is required and to define the requirements of consultation. These agreements generally include limiting language to clarify that, once the consultation requirements of the agreements have been met, the federal, provincial or territorial government will have no additional consultation obligations under the agreements.

It appears that the concept of consultation will continue to apply with respect to land and resource decisions on Crown land in the post-treaty context. While the continued application of the concepts of accommodation and justification is less clear, the authors suggest that the two concepts should be distinguished: The Courts have clarified that the duty to accommodate applies in the context of asserted but unproven rights. Given the tendency of modern treaties to more expressly identify and define rights, the resulting rights under land claims agreements may be subject to the arguably more demanding standard of justification.

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