

**NOVA SCOTIA POLICE REVIEW BOARD**

**IN THE MATTER OF:**                   The *Police Act*, Chapter 31 of the *Acts* of 2004 and the Regulations made pursuant thereto

- and -

**IN THE MATTER OF:**                   An appeal filed by **Adam LeRue and Kerry Morris**, Complainants, against Cst. Kenneth O'Brien and Cst. Brent Woodworth, of the Halifax Regional Police, requesting a review of a decision made by Superintendent Colleen Kelly dated June 19, 2019

**BEFORE:**                               Jean McKenna, Chair  
Hon. Simon J. MacDonald, Vice-Chair  
Stephen Johnson, Board Member

**COUNSEL:**                             Jason T. Cooke & Ashley Hamp-Gonsalves, Counsel for Mr. LeRue & Ms. Morris  
Nasha Nijhawan, Counsel for Cst. Woodworth  
James Giacomantonio, Counsel for Cst. O'Brien  
Katherine Salsman, Counsel for Halifax Regional Police

**HEARING DATES:**                   October 8, 9, 27 & December 8, 2020

**DECISION DATE:**                   June 18, 2021

## OVERVIEW

[1] On February 12, 2018, the Complainants, Adam LeRue and Kerry Morris were parked in a lot at the bottom of Milton Drive, adjacent to the Dingle Pier / Dingle Beach (Sir Sanford Fleming Park, the “Dingle”). They had been working into the evening at home and had decided to pick up pizza rather than cooking. They were on the way home when Adam received a phone call. He decided to drive down Milton Drive to the parking lot to return the call. While he was on the phone, Kerry started to eat a slice of the pizza. It was shortly after 10:00 p.m. From where they were parked, they could see several other people in a playground, a short distance away.

[2] Cst. Kenneth O’Brien was working patrol that night. Officers on patrol in that area had been asked to check the Dingle, which is a municipal park, after 10:00 p.m, and to document those checks. Apparently, neighbours in the vicinity had complained to the local Councillor about noise, vandalism, etc.

[3] There are two access points from Purcell's Cove Road to the park, one via Milton Drive, used by Mr. LeRue that night, and the other (main park entrance) via Parkhill Drive. Cst. O’Brien testified that he entered the park that night via the Parkhill entrance; only the entrance on Parkhill displays an official park sign, including hours of operation.

[4] Cst. O’Brien stopped his marked police vehicle directly behind the LeRue vehicle, with overhead lights operating. He entered his position in his onboard system as “foot patrol”. He testified that the time entered on the system was 10:19. He then noticed the other group of people, who had been in the playground area, get in their vehicle at a second parking area, on the other side of the playground, and drive off. He drove away from the LeRue vehicle, out of the parking lot, and around the Dingle Tower. Although the other vehicle was leaving the park (presumably the desired outcome) he testified that he made the decision to follow and stop them, and they did stop, in response to his flashing overhead lights. He testified that he entered that stop as a “vehicle stop”, at 10:23 (four minutes to leave the LeRue vehicle and catch up with the other vehicle). He testified that he then spoke to the driver, obtained licence and registration, “ran” the plate, returned the documents to the driver, and advised him that the park was closed at 10:00 p.m. He did not obtain or document the names of the passengers. He did not testify that he also checked “Versadex” (a police records system) for any other information about the driver, but he testified that he treated that stop in the same way that he later treated Mr. LeRue. He then drove back to the LeRue vehicle, which was still parked in the same place. Based on his evidence, it took four minutes

to travel from the LeRue vehicle to the second vehicle stop, and only four minutes more to deal with the driver of that vehicle and return to the LeRue vehicle at 10:27.

[5] On his second LeRue stop, he testified that he entered “vehicle stop” rather than “foot patrol” which he had previously done. He did not say why he would have done so. No dispatch records, etc. were introduced to confirm these times or entries.

[6] The LeRue vehicle had not moved in the 8 minutes since his previous stop.

[7] According to Cst. O’Brien, he “ran the plate”, and then approached the LeRue vehicle, although he testified that he did not bother to look at the results of running the plate, until after he had returned from speaking to Adam LeRue. He gave no reason for this omission, although one would expect he should have “officer safety” concerns about approaching an unknown driver, without at least trying to find a minimal amount of information about the operator.

[8] He testified that he first went to the front windshield of the LeRue vehicle and checked the safety inspection. (Again, contrary to the vehicle stop policy as described later, in the evidence of Cst. Woodworth.) Cst. Woodworth testified that the policy was to approach a subject vehicle from the rear and stand at the door pillar between the front and back passenger compartment, in the safest position, just slightly behind the driver, rather than going directly to the driver's window, never mind to the front windshield.

[9] Cst. O'Brien testified that as he examined the safety sticker, he asked Mr. LeRue for his driver's licence, (“Hello, can I see your licence”), and then returned to the driver's window to continue the discussion. Neither Mr. LeRue nor Ms. Morris recall any such action or comment; Mr. LeRue testified that he had handed his phone to Ms. Morris to record the encounter. Mr. LeRue testified that he did this, as he immediately thought “here we go again”, as he says that he had experienced numerous other incidents over the years, where he has been stopped by the police for no reason, in what he believes were racially based “street checks”. Ms. Morris confirmed this in her testimony.

[10] The initial recorded response by Mr. LeRue to Cst. O'Brien is “Good” and does not logically flow from a request for a driver's licence. Cst. O'Brien's reply is also not consistent with a request for a driver's licence. The video recorded evidence begins when Mr. LeRue says “good”, apparently responding to

something Cst. O'Brien said. Cst. O'Brien is recorded as next saying "Park's closed, closes at 10:00 p.m." Mr. LeRue responds, "Okay". Cst. O'Brien says, "Do you have ID there, sir?" Mr. LeRue responds, "I do". Cst. O'Brien replies, "OK". Mr. LeRue says, "What do I have to provide ID for?", and Cst. O'Brien replies "**Because you're in the park after dark, so you have to identify yourself.** The time is 10:00 o'clock. I think it's...". Mr. LeRue responds, "OK, I want a supervisor". Cst. O'Brien: "You want a supervisor?", Mr. LeRue: "yeah, what's your name". Cst. O'Brien: "yep". Mr. LeRue: "K. O'Brien?". Cst. O'Brien: "Give me one second". Mr. LeRue: "yep" ... just to let you know, we're not in the park, we're in the parking lot, we're not using the park". Cst. O'Brien: "The park starts way up there, by the Fleming...sign; the side you came in." Mr. LeRue: "Okay, okay. Listen buddy, are, ...listen, listen, are you bored or something?" Cst. O'Brien: "Yeah, I am." Mr. LeRue: "You are, I can tell."

[11] None of this flows logically from an initial request for a driver's license.

[12] Counsel for the officers hears the next remark by Cst. O'Brien differently than the Board does. Counsel hears "Just so you know, the ticket is \$220, so...." We hear the comment as "...writing you a ticket for \$220...". Either way, it is clear that he was dealing with this as an infraction of the municipal bylaw, which closes the park at 10:00 p.m.:

### **Hours of Operation**

- 1.1.13. (1) The Director may post signs respecting the hours during which a park is opened or closed.
- (2) No person shall enter or use a park where the entry or use is prohibited by notice.
- (3) No person shall be in a park at any time during the period 10:00 p.m. till 5:00 a.m. without permission.

### **Penalty**

18. (1) Every person who violates or fails to comply with any of the provisions of this By-law or the conditions of any permit or order issued under the By-law is guilty of an offence and is liable on summary conviction to a penalty of not less than \$100.00 and not exceeding \$10,000.00, or in default of payment, to imprisonment for a term not exceeding one year.

[13] At some point in the LeRue / O'Brien conversation, Cst. O'Brien directs Mr. LeRue to a sign close by that identifies the violation. He testified that the sign was just slightly to the right and to the rear of Mr. LeRue's vehicle, about a car length away. Indeed, there is one sign in that location, and one further off, attached to a small dock. The closer of the two is depicted in Exhibit 4. It states, 'FEEDING



WATERFOWL IS PROHIBITED...HRM By-law A-300...Minimum fine \$222.00...Call 490-4000 or visit [www.halifax.ca](http://www.halifax.ca) for complaints or additional details.”



[14] Another sign which is attached to the dock, some further distance away, states: **PARK HOURS ...5 am - 10 pm...NO OVERNIGHT BERTHING...by-law P-600...by order of HRM**". There is no reference to fine in the amount of \$220, or any other fine amount.



[15] Cst. O'Brien testified that the P-600 sign is not attached to the dock, although it very clearly is. He also claims that the \$220 that he referred to in his discussion with Mr. LeRue, was just a random number, and that a Judge or Justice of the Peace could impose any fine that she / he wished to, in the event of a guilty plea. It is more probable that Cst. O'Brien in what he says was seven years of checking this park, had never closely observed the signage, and thought it was in reference to park hours.

[16] The latter sign, by location and reference to "berthing" appears to be directed to boaters on the Northwest Arm.

[17] Cst. O'Brien testified that his need to obtain ID was that he was not comfortable that Adam LeRue was actually "Adam LeRue". It was put to Adam LeRue in cross examination by Mr. Giacomantonio that the "Adam LeRue" that showed up when he "ran the licence plate" in Versadex, referenced a 130 lb. Black male. However, Cst. O'Brien also testified that he did not even run the plate until after he had spoken to Sgt. Palmeter, and the video evidence shows that he was demanding ID on his first contact with Mr. LeRue. He also agreed in cross examination that, at some point, he called Mr. LeRue as "Adam", and that Mr. LeRue didn't deny being Adam.

[18] A copy of the Versadex entry allegedly relied upon by Cst. O'Brien was never introduced in evidence, and there was no evidence connecting the plate on Adam LeRue's Land Rover with a 130 lb. Black, Adam LeRue.

[19] Cst. O'Brien insisted throughout his testimony that his eventual criminal charge for obstruction of justice was his refusal to provide his driver's licence.

[20] Cst. O'Brien testified that Mr. LeRue said that he would provide ID to a supervisor.

[21] Cst. O'Brien testified that in response to Mr. LeRue's request for a supervisor, he then contacted dispatch, to contact the shift sergeant, Sgt. Palmeter. He spoke to Sgt. Palmeter by phone, and Sgt. Palmeter responded that he was in Bedford at the time and could not attend but was willing to speak to Mr. LeRue by telephone. This was confirmed by Sgt. Palmeter's evidence; he said that he would call Mr. LeRue and he recalled that he was told by Cst. O'Brien at some point, that Mr. LeRue refused to provide his number. According to Cst. O'Brien, Mr. LeRue refused to provide his telephone number. According to Mr. LeRue, his own phone was dying. He did not refuse to provide his phone number, and he was not

asked for his number. There was no explanation offered by either Cst. O'Brien or Sgt. Palmeter as to why Cst. O'Brien wouldn't simply walk the phone over to Mr. LeRue to continue the conversation, on speakerphone, when he was already on the phone to Sergeant Palmeter.

[22] Sgt. Palmeter also testified that he had attended the park on several occasions, checking for people in the park after 10:00 p.m, but that he had never issued a ticket. He also testified that he was surprised when he learned, after the fact, how far the incident had gone. (a ticket for a municipal bylaw infraction, a motor vehicle ticket for failure to produce a licence, and a criminal charge of obstruction of justice.)

[23] At some point in the interaction, Dispatch contacted Cst. O'Brien, asking if he needed assistance, and Cst. O'Brien said he would if anyone was available. Cst. Woodworth attended in response, arriving at 10:37 according to his notes (again, we note that dispatch records were not produced, although nothing may turn on it). He was driving a police SUV. Cst. O'Brien told him that Mr. LeRue was "in the park after dark and refused to provide "ID". Cst. Woodworth then spoke to Mr. LeRue, who was still in his own vehicle (Mr. LeRue testified that he thought at first that Cst. Woodworth was a supervisor).

[24] Cst. Woodworth testified that when he first spoke to Mr. LeRue, Mr. LeRue was agitated, but that he seemed to settle down as the discussion continued. It appears that Cst. Woodworth, at that point was having some success de-escalating the situation. He testified that Mr. LeRue asked him if the ticket would be cancelled, if he produced his ID, and Cst. Woodworth said that was up to Cst. O'Brien.

[25] Mr. LeRue had testified earlier, while Cst. Woodworth was present in the hearing room, that Cst. Woodworth had said that if it was up to him, he would not issue the ticket. Cst. Woodworth later testified that he "did not recall" making that statement; it is possible that Mr. LeRue interpreted or recalled the Constable's comment explaining that the decision was up to Cst. O'Brien.

[26] It seems at that point, Mr. LeRue was referencing the \$220 ticket that he thought was being issued; at this point in the interaction there had not been any suggestion of a *Motor Vehicle Act* ticket, let alone a criminal charge of Obstruction of Justice.

[27] Cst. Woodworth's approach had seemed to have had some impact on de-escalating the situation, and he returned to speak to Cst. O'Brien, and explained that Mr. LeRue would produce ID if a ticket was not issued. Cst. O'Brien did not agree to that proposal (although it would have given him the result he

was allegedly looking for – that is, to provide a record of his patrols to the park, which at least in his view, would include names of individuals encountered). Cst. O'Brien testified that he would not agree to that option; Cst. O'Brien testified that "I felt we were past that point", effectively disrupting any de-escalation that had been achieved by Cst. Woodworth.

[28] At some point in the process, Cst. O'Brien testified that he contacted someone in booking, to verify that the proper charge was "obstruction", if Mr. LeRue refused to provide ID. It was after this discussion that he then went back to Mr. LeRue with the ultimatum that if Mr. LeRue didn't provide what Cst. O'Brien describes as "a licence" ... that he would be charged with obstruction of justice, a criminal offence. We have nothing but Cst. O'Brien's description of the contact with booking, and dispatch records were never put in evidence to confirm what he asked, and what he was told.

[29] He testified at the hearing that he completed the Motor Vehicle offence tickets "to justify my grounds for obstruction" and he testified that the basis for the obstruction charge was the refusal to provide ID". He testified that on his "last chance discussion" with Mr. LeRue, he told him that he would arrest him for obstruction if he didn't provide licence, etc.

[30] Cst. O'Brien insisted in his testimony that he "had the right" to ask for a licence, a phrase he repeated several times in his evidence to justify his various actions. He said that he returned to speak to Mr. LeRue, again asking for what he says was a driver's licence. Mr. LeRue testified that Cst. O'Brien said, "If you don't show me ID, I'm arresting you for obstruction." Mr. LeRue was asked to get out of the car, he did, he was then arrested and placed in the back of Cst. O'Brien's police vehicle. Mr. LeRue testified that Cst. O'Brien told him that they wanted to search his vehicle; Mr. LeRue told Cst. O'Brien that his papers were in a clear plastic sleeve in the glove compartment. This is not disputed.

[31] At this point, Cst. Woodworth, on Cst. O'Brien's direction, then went to the LeRue vehicle, and spoke to Kerry Morris; she was then in the driver's seat. Cst. Woodworth then told her that he was going to search the vehicle "incident to arrest", and that she would have to get out of the vehicle. She refused the search and refused to get out. Cst. Woodworth testified that he repeated the demand, and she repeatedly refused. He grabbed her by the right arm, pulled her out of the vehicle, and arrested her for obstruction. She was handcuffed by Cst. Woodworth, assisted by Cst. O'Brien.

[32] Kerry Morris testified that Cst. Woodworth did not ask her to retrieve Mr. LeRue's papers from the glove compartment, (and that is not denied by the officers). Rather he told her to get out, as the vehicle was being "searched incident to arrest". She agrees that she replied that she did not consent to the search. She denies that she was told that if she did not get out, she would be arrested for obstruction of justice.

[33] A photograph was introduced, showing a bruise on her upper right arm. Cst. Woodworth acknowledged that the bruise could have been the result of his action.

[34] Ms. Morris was handcuffed, told that she was being arrested for obstruction, and was placed in the back seat of the Woodworth vehicle. She was crying, hysterical, and she says at this point, Adam "went off", began swearing and shouting obscenities. She said that no one had ever laid a hand on her before, and that Adam was her "protector". She said that she was not read any rights, nor was she asked for ID.

[35] Cst. Woodworth testified that he did not simply ask Ms. Morris to retrieve the documents from the glove compartment, nor did he simply do so himself from the passenger side. It appears that the removal of Ms. Morris from the vehicle, and her arrest, was done on instruction from Cst. O'Brien who was the senior officer, and the officer who initiated the process. Cst. O'Brien testified that it was he who had the authority to later release Ms. Morris without charges. Cst. O'Brien confirmed in cross examination that it was his decision to search the LeRue vehicle. Cst. O'Brien testified that he "assisted" with handcuffing Ms. Morris, a small woman, barely five feet tall.

[36] The question of who actually conducted the search is unclear.

[37] According to the evidence of Ms. Morris, she observed the search from her position, handcuffed in the rear seat of the Woodworth police SUV, which according to the evidence of Cst. Woodworth was parked at an angle facing the LeRue vehicle. She testified that she saw "they" search the Land Rover, "from top to bottom, back to front, tearing bags open". Mr. LeRue testified that "they" searched every inch of his vehicle.

[38] Cst. O'Brien testified that Cst. Woodworth "spearheaded" the vehicle search, but he admitted that he, Cst. O'Brien made the decision to search. He testified that "we" searched, and that he (Cst.

O'Brien) found Mr. LeRue's documents where Mr. LeRue had told him they were, in the glove compartment. In his testimony, Cst. Woodworth's testimony tended to minimize his participation in the search and says that "we" decided to get his ID", but that he remained in his vehicle with Ms. Morris, who was handcuffed in the back seat. He also said that he could see that Cst. O'Brien was inside the LeRue vehicle at one point. It is not disputed that Cst. O'Brien returned to Cst. Woodworth's vehicle opened the door to the SUV, and held up one piece of Ms. Morris's ID, (according to Ms. Morris, not a driver's licence, but an old document that showed that she was over the age of 18) that had been located in her purse. The purse had been searched.

[39] After he was provided with the identification document by Cst. O'Brien, Cst. Woodworth then let her out, removed the handcuffs, and told her (on Cst. O'Brien's instructions) that she was being "de-arrested".

[40] It is undisputed that the "search" entailed not just the glove compartment where the officers had been told by Mr. LeRue that his licence, etc. were located, but rather the entire vehicle, including the rear cargo compartment, as well as Ms. Morris' purse.

[41] Cst. O'Brien justified the continued search of the vehicle by his allegation that he smelled "unburnt marijuana", and upon continuing the search, he located cannabis, in a closed container, in a grocery bag, with a medical authorization for the same, in the back seat.

[42] Cst. Woodworth denied smelling cannabis in Mr. LeRue's vehicle.

[43] Cst. O'Brien testified that after the search was complete, he returned to Mr. LeRue, handcuffed in his vehicle, with Mr. LeRue's licence, registration, etc. in hand. However, he did not "de-arrest" Mr. LeRue. In fact, he asked him to sign some documents, and told him that if he didn't sign, he would have to go to jail. Possibly, he could have been asked to sign a *Motor Vehicle Act* ticket, and if he was being charged with obstruction of justice, he could have been asked to sign a Promise To Appear, but there would be absolutely no requirement to sign a municipal bylaw ticket.

[44] Mr. LeRue testified that he didn't understand what Cst. O'Brien wanted him to sign, and in any event, he wasn't going to sign anything. Mr. LeRue does not deny that he was very angry and agitated at this point, which was not surprising in the circumstances. In his testimony, he readily conceded that he



used angry, abusive language towards Cst. O'Brien, and later, towards Constables O'Brien and Woodworth, and a civilian employee at the lock up.

[45] A video of the events at the lockup was introduced by Cst. Woodworth's counsel, Ms. Nijhawan, in her direct examination of him.

[46] His evidence, and the video, shows that a civilian employee was unnecessarily involving himself in the discussions, further aggravating the situation. Mr. LeRue shouted that they were destroying the life of a black man for eating pizza in a park; he stated that he worked with children. He said, "you pulled up, you saw ethnicity black, and decided to F...with me". He said, "I am not violent, see any violence on my record". Cst. Woodworth responded that "we need your ID", and Mr. LeRue responds that "You needed to tell me the park's closed, take a hike". Cst. Woodworth replies that he is tired of hearing about black issues, he testified that "we are constantly hearing people saying that what we do is race based." Mr. LeRue testified that he himself was "out of bounds", but that "they wouldn't let me get back in bounds". Mr. LeRue testified that he told "them", when asked, that he needed a puffer for his breathing issue, but it was never supplied to him. He described the time in the lockup as awful, he described the cell as dirty, with no toilet paper, and a man in the next cell dumping his colostomy bag. He was not advised that Ms. Morris had come to the station that night, and she was not given the option of speaking to him or taking him home.

[47] Following her "release", and Mr. LeRue's arrest, Ms. Morris went to the Gottingen Street headquarters of HRP. She testified that she was terrified for him, and for herself. She testified that Adam is her only family; she is from Australia. She spoke to an officer at the front desk and asked where Adam was. A Sgt. Lawlor came to speak with her. She was told that Adam was in a holding cell. She suggested that his arrest was race-based. She also told him that she had brought Adam his medications. She was not offered an opportunity to speak to Adam, or possibly take him home. The Sergeant left, and the Commissionaire at the front desk told her to leave, which she did. She then returned, saying that she wanted to file a complaint. She did, on his behalf; this was the first complaint document, a hand-written Form 5. It references his arrest, and hers, and her "de-arrest", alleging that failure to release Mr. LeRue was race-based. She describes it as racism and harassment (Exhibit 4). The document is date stamped by HRP and PCC on February 14, 2018.



[48] Mr. LeRue testified that when he was put in a cell, he was told by Cst. O'Brien that he would put his "other tickets" in his personal things. Those tickets were not found in his personal items brought with him to court the next day and were not obtained by Mr. LeRue until he attended police headquarters on Gottingen Street a couple of days later, when he was given the tickets for being in the park after hours and failure to provide identification (presumably, the *Motor Vehicle Act* offence of failure to produce a driver's licence). The "park after hours" ticket referenced Point Pleasant Park. It did not reference any fine amount. That ticket was eventually voided.

[49] He believes that he was in custody for approximately 15 hours, and that at the end of it, he signed what he described as an appearance notice, under duress. He eventually pled guilty to the *Motor Vehicle Act* ticket (failure to produce a driver's licence), on the advice of his counsel, on the understanding that the **Kienapple** principle would apply, and thus void the obstruction charge. He was wrong. It did not.

[50] According to Cst. O'Brien's testimony, when the trial date was approaching, the Crown suggested that defence counsel was going to argue that the obstruction charge was done out of malice, and perhaps the charge should be dropped. Cst. O'Brien did not want to drop the charge but agreed to restorative justice. He had learned at that point that Mr. LeRue was involved in coaching children's basketball in the community, and this approach would avoid a criminal record, and allow Mr. LeRue to continue with this volunteer work, and so he "agreed".

[51] On August 10, 2018, Kerry Morris and Adam LeRue signed a typed document, reflecting the same complaint of February 14, 2018, but now signed by herself and Mr. LeRue. Mr. LeRue had not signed the original complaint, as consenting to her third-party complaint, as required, although the Police Complaint Commissioner had sent out reminders to them. On the second, typed, document, she and Adam LeRue are both shown as complainants although her signature and that of Adam LeRue are both signatories, as "a consent to the processing of this third-party complaint". The typed document referenced some 30 grounds for the complaint, including:

- systemic discrimination
- false statements, report
- selective enforcement
- willful misconduct
- discrimination
- collusion
- violation of charter rights
- failure of duty

- cruel mistreatment,
- duress, stress
- unlawful, wrongful imprisonment, arrest, detention
- illegal search seizure
- bodily harm
- malice prosecution
- bodily harm
- loss of freedom, dignity, amenities of life
- invasion of privacy
- assault/battery
- humiliation
- neglect of life, conflict of interest
- bad faith, injury to reputation
- sworn false affidavit
- abuse of processing-
- bad faith
- tickets not served properly

[52] Both Constables O'Brien and Woodworth were named in the second Form 5. In the first, handwritten form, Cst. Woodworth was named as "other unknown officer".

[53] Following receipt of the typed, August 10 Form 5, the Police Complaints Commissioner wrote on August 27, requesting additional information, and copied Supt. Colleen Kelly, the HRP disciplinary authority at the time. Additional detail was provided on October 9, 2018. The reason given for the delay, then and now, was that they were involved in "legal / court proceedings", which were at that point, concluded.

## **ANALYSIS**

[54] In their submissions, counsel for the officers chose to file a joint brief. They initially argue that some of the allegations in the complainant's brief were new, and had not been included in the complaint, and are therefore not properly before the Board. This references the arguments by the complainants that:

1. Cst. Woodworth did not have the authority to arrest Ms. Morris.
2. Cst. Woodworth's treatment of Mr. LeRue at the lockup, and that the complainants didn't produce any evidence of that treatment.

### Authority to arrest Ms. Morris (and Mr. LeRue)

[55] Although the Respondents say that the question of Cst. Woodworth's authority to arrest Ms. Morris is not fairly before the Board, they do go on to argue justification for that arrest.

[56] The arrest of Ms. Morris and Mr. LeRue are very much before the Board. We must therefore consider the authority, and the conduct of the officers, and whether those arrests constitute a breach of the Code of Conduct.

[57] The Code of Conduct, s. 24(1) and 24(7) provide as follows:

**24 (1)** A member who engages in discreditable conduct in any of the following ways commits a disciplinary default:

- (a) acting in a disorderly manner or in a manner that is reasonably likely to bring discredit on the reputation of the police department.

...

**(7)** A member who abuses their authority in any of the following ways commits a disciplinary default:

- (a) making an arrest without good or sufficient cause;
- (b) using unnecessary force on or cruelly treating any prisoner or other person with whom the member may be brought into contact in the course of duty;
- (c) unlawfully exercising authority as a member.

[58] Even if the officers had legal authority to effect the arrests, we are obliged to further consider whether it was done with "good or sufficient cause". We must also consider whether it could be considered disorderly conduct or conduct that could bring discredit on the reputation of the police department.

[59] In arguing the legal authority to arrest, the respondent officers rely on the decision of the Supreme Court of Canada in **R. v. Moore**, [1979] 1 SCR 195. In **Moore**, the appellant cyclist drove through a red light. He was stopped by police, and was asked to provide identification, as the officer intended to issue a ticket pursuant to the British Columbia *Motor Vehicle Act*. The cyclist refused to provide any documents; he was then arrested and charged with obstruction. He was acquitted at trial, the acquittal was reversed by the Court of Appeal, the conviction was upheld by the Supreme Court of Canada.

[60] In a dissenting opinion, Dickson, J, as he then was, addressed the validity of the obstruction charge. He expressed the view that a person committing a petty traffic offence should not be liable to a criminal charge of obstruction for refusing to give his name and address to a police officer. Thus, **Moore**, *supra*, has been elaborated and further clarified by the courts since then.

[61] **R. v. L'Huillier**, 2019 ABPC 237, shows, as other cases have done, that the accused was not charged because of his failure to supply his identification pursuant to a possible *Motor Vehicle Act* infraction but rather it was for a reason unrelated to the traffic law. In **Moore**, *supra*, we saw it was because the officer needed the accused's name and address for identification to issue a ticket for a *Motor Vehicle Act* infraction. The law has no doubt elaborated and clarified **Moore**, *supra*, but not overturned the majority decision.

[62] In **R. v. Sharma**, [1993] 1 SCR 650 the Court said the power to arrest in order to enforce a municipal bylaw cannot be inferred in the face of clear language setting out a more moderate means of dealing with those type of infractions. Cst. O'Brien had no authority either at common law, or under Statute to arrest a person for failing to comply with an order to desist from conduct prohibited by the bylaw. He cannot circumvent the lack of the power to arrest by charging him under the *Criminal Code* with obstruction. We find that is what occurred here. Cst. O'Brien was there that night to enforce the municipal bylaw. It provided a complete penalty for failure to adhere to the bylaw. Thus, Cst. O'Brien had no authority to lay an obstruction of justice charge under the *Criminal Code*.

[63] Justice David Paciocco, a well-known criminal law expert having spoken to both the Canadian Bar Association and the Canadian Superior Court Judges Association on various occasions about criminal law, wrote a decision in **R. v. Yussuf**, 2014 ONCJ 143 where he capably summarized the law in this matter at paragraph 62 which states:

[62] The issue of the impact of this legal option on Mr. Yussuf's guilt arises because of the Supreme Court of Canada decision in *R. v. Sharma*, *supra* and the Ontario Court of Appeal decision in *R. v. Hayes* 2003 CanLII 3052 (ON CA), [2003] O.J. No. 2795. In *Sharma* a police officer purported to arrest Mr. Sharma for obstruction of justice after Mr. Sharma failed to comply with an order to desist in conduct that the officer believed to be contrary to a municipal by-law. The Supreme Court of Canada set aside Mr. Sharma's conviction for that offence because the by-law was *ultra vires*, undermining any claim that the officer was in the execution of his duties. Justice Iacobucci went on however to say that even if the by-law had been valid, the accused would have been acquitted. A broad reading of his *obiter dictum* is that since the legislation under which the by-law was created had the

means of enforcement - namely ticketing the offender – the officer should have used this means of executing his duty instead of resorting to a criminal charge of obstruction. This *obiter* reasoning can also be read more narrowly. A key factor in *Sharma* was that by arresting the accused for obstruction the officers had effectively created a power to arrest for a by-law infraction that was not contemplated by the regulatory statute the officers were enforcing. Unlike *Sharma*, however, the decision in *R. v. Hayes, supra* is not prone to both a broad and a narrow reading. Indeed, it instructs that *Sharma* should be given its broader reading.

[64] We agree with Paciocco J when he states at paragraph 64:

[64] In effect, the Ontario Court of Appeal in *Hayes* reads *Sharma* as holding that if an accused person is being processed under regulatory legislation and that regulatory legislation provides an enforcement mechanism for the impugned act of obstruction, a criminal charge of obstructing a peace officer in the course of their duties is inappropriate. The officer must use the regulatory means he was given.

[65] In this case Cst. O'Brien became involved with Mr. LeRue and Ms. Morris as a result of instructions from his Superiors. He was told to check out the Park (commonly referred to as the Dingle) to ensure it was clear of people pursuant to the municipal bylaw. He was not dealing with Mr. LeRue and Ms. Morris for possible motor vehicle infraction.

[66] The use of an obstruction of justice charge in the circumstances is less than clear, but the Board accepts that Cst. O'Brien believed that he did have authority to resort to the charge in the circumstances. That does not mean, however, that there was "good or sufficient cause" to make the arrests.

#### **The LeRue arrest:**

[67] The relevant municipal bylaw, P-600, dealing with park hours is applicable, and given the definition of "Park" in the bylaw, there is no dispute that Mr. LeRue and Ms. Morris were in the park after dark, and could have been issued a bylaw infraction ticket. The penalty for such a violation is set out in the bylaw:

18. (1) Every person who violates or fails to comply with any of the provisions of this By-law or the of any permit or order issued under the By-law is guilty of an offence and is liable on summary to a penalty of not less than \$100.00 and not exceeding \$10,000.00, or in default of payment, to for a term not exceeding one year.

[68] There is no provision within the bylaw that requires proof of identity, and yet Cst. O'Brien admits that the basis for the ultimate "identification" charge was failure to produce those documents, which he would now categorize as driver's licence, pursuant to a *Motor Vehicle Act* violation.

[69] The *Motor Vehicle Act* violation also relied upon by Cst. O'Brien is a violation of s. 78(2) of the *Act*. Section 78(2) is a "Category A" offence. The violation is further dealt with in s. 300:

**Penalty for failure to produce permit or license**

300 Whenever any person is prosecuted for failure to produce a driver's license or a permit other than a dealer's permit on the request of a peace officer and such person produces in court a driver's license or permit, as the case may be, dated prior to the day the offence is alleged to have been committed, the pecuniary penalty provided for failure to produce such permit or license shall be reduced to a penalty of not more than one dollar for the first offence in any calendar year. R.S., c. 293.

[70] The penalty for a Category A offence, in instances where s. 300 does not apply, is contained in the *Summary Proceedings Act*, RSNS as follows:

**Category A to category K offences**

4B Notwithstanding Section 4,

(a) where an enactment makes an offence punishable as a category A offence, a judge shall impose a fine of not less than twenty-five dollars for the first offence, not less than fifty dollars for the second offence and not less than one hundred dollars for the third or a subsequent offence

[71] We mention the above to demonstrate the minor nature of "criminality" of Mr. LeRue's conduct and the enforcement options available to Cst. O'Brien that night.

[72] Cst. O'Brien's own evidence is that his assigned task by his Superiors was to check the park for after-hours people, and to record that check, and that was his intent when he initially spoke to Mr. LeRue. That is confirmed by the video recording of his own words at the time.

[73] We reject Cst. O'Brien's evidence that he was seeking an "ID" or drivers licence pursuant to the *Motor Vehicle Act*. He was there to seek "ID" for a possible infraction of a municipal bylaw.



[74] We are satisfied that his initial request then, and throughout, was for “ID”, not a driver's licence. ID would add to the record which Supt. Cecchetto was requesting, a street check type of record. Mr. LeRue and Ms. Morris both testified that it was “ID” that was requested. Cst. Woodworth testified that Cst. O'Brien told him that Cst. O'Brien advised him that Mr. LeRue wouldn't provide “ID”. Certainly, Cst. O'Brien was acting on instructions of his supervisor at the time he asked for ID.

[75] It seems that it was not until Cst. O'Brien spoke to someone at booking (who he contacted to confirm the ability to charge with obstruction) did he turn his mind to the significance of using the “failure to produce licence” provisions. The penal consequences of this offence are set out above.

[76] Cst. O'Brien also argues that in order to carry out his duty as a police officer, he needed some form of ID so that he could issue a ticket. That may well be the case, but the evidence is undisputed that he did have sufficient, although not ideal, information to identify Adam LeRue. The licence plate identified the owner as “Adam LeRue”, and at one point he used the name “Adam LeRue” in speaking to Mr. LeRue. The only information he had that this man might not be “Adam LeRue” was the information that we are told was contained in Versadex, describing a man of much smaller stature as an “Adam LeRue”. No documentary or oral evidence was provided connecting the small Adam LeRue with this particular vehicle. Cst. O'Brien testified in fact that he did not know how height and weight came to be included in Versadex, and Mr. LeRue's evidence that he had no prior vehicle tickets, nor did he have any criminal or quasi criminal convictions.

[77] Clearly, Cst. O'Brien had some evidence that this man was indeed the Adam LeRue who owned the Land Rover. If, as he suggested, he had concerns about issuing a by-law infraction ticket to someone who was providing him with a false name, it would have been a very simple matter to drop by the address for Adam LeRue on his next shift, to confirm.

[78] Even if the arrest and obstruction charge were lawful, it cannot be described as “good or sufficient cause”.

[79] Moving to the arrest of Ms. Morris, the evidence and argument on behalf of the officers attempts to justify the vehicle search and thence the need to forcibly remove Ms. Morris from the vehicle, and charge her with obstruction of justice, as a “search incident to arrest” which would have to be the arrest of Mr. LeRue. Again, while it may have been borderline “lawful”, it cannot be justified as being for “officer safety”.



[80] Cst. O'Brien testified that it was his decision to "search the vehicle"; the Board finds that that was his plan from the outset, and the full vehicle search was not triggered by an odor of cannabis emanating from a container, itself enclosed in a bag. At the time that Cst. O'Brien decided that the vehicle should be searched, he had been told by Mr. LeRue that his licence and registration was in the glove compartment of his vehicle. Cst. Woodworth admitted that he did not simply ask Ms. Morris to retrieve the documents from the glove compartment. Nor did he, or Cst. O'Brien proceed to the passenger side of the vehicle, and retrieve the documents himself, with the other officer watching Ms. Morris from the driver's side. They argued that such reasonable actions were precluded by concerns for "officer safety". However, Cst. O'Brien also testified that he was not fearful; that with two officers, "it was smooth".

[81] Prior to the point of Ms. Morris' arrest, there had been absolutely no indication that there was any risk whatsoever to either officer. Neither Ms. Morris nor Mr. LeRue had been engaging in any concerning conduct; no noise, vandalism, rowdiness, intoxication, etc. They had been sitting quietly in their vehicle, eating pizza, and until it was pointed out to them, they did not even realize that they were in a "park", (which is not surprising, given the absence of clear signage, and direct access to the parking lot from two private homes and a public pathway). Cst. O'Brien had not previously demonstrated any concern for "officer safety". When he initially approached the LeRue vehicle on foot – he had not even bothered to "run the plate", to obtain even a modicum of information about the driver. He had proceeded past the driver's window to the front of the vehicle, again, contrary to officer safety policy.

[82] At the time that Ms. Morris was asked to exit the vehicle, Mr. LeRue was handcuffed, in the rear of Cst. O'Brien's vehicle. He had been verbally non-compliant with the demand for ID, but at no time had he offered physical resistance, even to the arrest and handcuffing of himself. He had made no attempt to evade the police, in fact, when at the initial stop, Cst. O'Brien drove away after another vehicle; he made no attempt to leave the scene to avoid an encounter with a police officer. And far from attempting to conceal some ulterior, evil, purpose, he went so far as to request another officer to attend, a "supervisor".

[83] When Ms. Morris was asked to exit the vehicle, Ms. Morris was sitting quietly in the LeRue vehicle, and had not engaged with either officer. She is a very small woman, perhaps five feet tall. She had not even been asked her name, nor had she been asked to produce any documents. But we are asked to accept that somehow, there was a risk associated with asking her to retrieve the documents that her

husband had told them were in the glove compartment, and that there was a risk associated with having one officer retrieve the documents by reaching in from the passenger side, while the other officer kept an eye on the potentially dangerous Ms. Morris., who would have had to scramble across the center console, in order to interfere with the passenger side officer.

[84] Cst. O'Brien had admitted that he had not asked the several occupants of the vehicle he had previously stopped, so that he could search for the licence, etc. He also agreed that in a normal roadside stop, a driver was permitted to retrieve documents. But Ms. Morris was not told that Mr. LeRue had essentially agreed that the documents could be obtained from the glove compartment and had told Cst. O'Brien where they were located.

[85] There was nothing in this scenario that even implied a risk to either officer, or that they would be safer, with Ms. Morris outside of the vehicle (presumably unrestrained, as they would have had no justification to restrain her). The Board cannot accept that these much larger, trained, armed officers, had even the slightest concern about officer safety. Cst. O'Brien's instruction to Cst. Woodworth to remove Ms. Morris from the vehicle as a "search incident to arrest cannot have been motivated by officer safety. Nor can it be reasonably categorized as a "search incident to arrest". At best, it was an unnecessary arrest, and an unnecessary search.

[86] Nor do we accept Cst. O'Brien's convenient allegation that a full vehicle search (including the search of Ms. Morris' purse) was required because he smelled "unburnt marijuana". The marijuana, and the legal authority to possess it for medical purposes, was in a closed container, itself contained in a bag, highly unlikely to emit any odour. Cst. Woodworth testified that he smelled nothing.

[87] It follows that Cst. Woodworth's threat of arrest for "obstruction of justice", and her subsequent arrest was unauthorized and unjustified, although we do conclude that it was done at the direction of a senior officer, and the officer who had conduct of the incident.

### **Officer Discretion**

[88] Even if we accept that the bylaw ticket, the *Motor Vehicle Act* ticket, the vehicle search, and the obstruction of justice arrests (and in Mr. LeRue's case, charge) was lawful, we must still consider whether the conduct of these officers breached the standard of conduct expected. Cst. O'Brien relied several times in his testimony that he "had the authority". But stubborn, blind exercise of authority by a police officer

cannot exonerate him or her. An officer has a duty to professionally and intelligently exercise discretion, and a duty to de-escalate when a situation is going beyond what is called for to deal with the alleged harm to be corrected (in this case, being in a municipal park after 10:00 p.m.).

[89] The Supreme Court of Canada recognized the importance of officer discretion in **R v Beare** [1988] 2 SCR 387:

The existence of the discretion conferred by the statutory provisions does not, in my view, offend principles of fundamental justice. Discretion is an essential feature of the criminal justice system. A system that attempted to eliminate discretion would be unworkably complex and rigid. Police necessarily exercise discretion in deciding when to lay charges, to arrest and to conduct incidental searches.

[90] In **Hill v. Hamilton Wentworth Police Service** [2007] 3 SCR 129, the Court referenced the nature of police discretion:

52 Police, like other professionals, exercise professional discretion. No compelling distinction lies between police and other professionals on this score. Discretion, hunch and intuition have their proper place in police investigation. However, to characterize police work as completely unpredictable and unbound by standards of reasonableness is to deny its professional nature. Police exercise their discretion and professional judgment in accordance with professional standards and practices, consistent with the high standards of professionalism that society rightfully demands of police in performing their important and dangerous work.

[91] In this case, Cst. O'Brien was the senior officer. He had the authority, and the duty, to speak to Mr. LeRue and to point out to him that he was in violation of the municipal bylaw (as he did with the previous vehicle).

[92] He had the authority to issue a ticket for a bylaw infraction, although the conduct of Mr. LeRue and Ms. Morris at that point would not seem to call for even a ticket. They were in the park, as strictly defined in definition of by-law, but it was not surprising that they would not consider it a "park", given the absence of signage gates, etc. Cst. O'Brien appears to have mistaken the signage prohibiting feeding of waterfowl, for a sign prohibiting after hours, and took the penalty on the sign to be the penalty for after-hours violations.

[93] Mr. LeRue and Ms. Morris were not engaged in any of the conduct that led a municipal councillor to ask for increased police presence in the park, such as noise, rowdy behaviour, vandalism. They were

sitting in a car, eating pizza and talking on the phone.

[94] This is the first point where Cst. O'Brien could have exercised discretion NOT to ticket, as he did with the previous vehicle. (Even Sgt. Palmeter testified that he had never written a ticket.) But as soon as Mr. LeRue questioned his reason for requiring identification, Cst. O'Brien made the decision to issue a ticket, as is clear from the comment he made on the video. This is also the point where Cst. O'Brien began to escalate the situation. He saw his "authority" as being challenged, and so he firmly made the decision to exercise his "authority", and his powers as a police officer. It was a poor exercise of discretion, but perhaps not so far from the standard, at that point, to be considered as misconduct. Unfortunately, all of what followed was as a result of his blind, inflexible insistence on his authority. Mr. LeRue was to be "taught a lesson".

[95] He needed to be absolutely convinced of Mr. LeRue's name, for the purpose of completing a ticket. He had a name and address from the licence plate, although he claims not to have "run the plate" before approaching the car. He spoke to Mr. LeRue as Adam, and Mr. LeRue responded as "Adam LeRue". His excuse for pursuing the identification issue further, was concern over issuing a ticket to the wrong person, but that concern could have been easily addressed by following up at the known address of Mr. LeRue on his next shift.

[96] Cst. O'Brien then contacts Sgt. Palmeter, eventually speaking to him by telephone. Although he was on the phone in discussion with Sgt. Palmeter, rather than simply walk the phone over to Adam LeRue he (or perhaps Sgt. Palmeter) suggested that Sgt. Palmeter would call Mr. LeRue. This would require that Cst. O'Brien end his conversation with Sgt. Palmeter, obtain Mr. LeRue's phone number, call Sgt. Palmeter back with that number, and then Sgt. Palmeter would call Mr. LeRue. The rationale for this convoluted approach is not clear at all.

[97] But with the arrival of Cst. Woodworth, Cst. O'Brien had another opportunity to exercise his discretion and de-escalate the situation; Mr. LeRue told Cst. Woodworth that he would provide his identification if the ticket was dropped. This was a reasonable request by Mr. LeRue. It would provide Cst. O'Brien with the identification he felt that he needed to comply with Supt. Cecchetto's direction and allow him to gracefully bow out of what was an obviously escalating situation. It would send Mr. LeRue on his way, with a new understanding of the municipal rules regarding this parking lot, and the park area. But Cst. O'Brien testified that he felt that they were "past that point". This is not the conduct that the

public would expect from a trained, experienced, police officer, who, after all, is dealing with a technical, very minor breach of a municipal bylaw. He was stubbornly and unnecessarily exercising what he saw was his authority.

[98] He then further inflames the situation by arresting Mr. LeRue for a charge of obstruction of justice, a very serious criminal charge, that would have both an immediate and potentially lifelong impact on Mr. LeRue. Even if he had the lawful authority to charge, it can hardly be seen as a reasonable exercise of discretion to apply such a charge in a situation where the “evil” done by Mr. LeRue was sitting in a parking lot, talking on the phone, while his wife ate pizza.

[99] He then further escalates the situation by making the decision to search the vehicle, and he testified that was his decision, according to his own testimony. That in turn led to the decision to demand that Ms. Morris exit the vehicle, and when she refused, forcibly remove her, arrest her for obstruction of justice, and engage in a full search of the vehicle.

[100] Her arrest, and full search of the vehicle, is hardly consistent with a professional exercise of discretion.

## **SUMMARY**

[101] Even without walking through the minute detail of this matter, it is clear from a “high level” view, that this matter begins with two individuals, sitting quietly in a parked vehicle, eating pizza and talking on the phone. Even with a by-law infraction, a ticket would hardly be expected in the circumstances. But it ends with two arrests, a full vehicle search, a ticket for a minor bylaw violation, a *Motor Vehicle Act* ticket, and a serious criminal charge. The result has had a considerable financial and social impact on Mr. LeRue and Ms. Morris. It cannot be justified as “officer discretion”.

[102] It was not unreasonable for Mr. LeRue to question Cst. O'Brien's authority to request ID; his evidence is unchallenged that he had experienced numerous incidents of “street checking”, which was a common and accepted practice within HRP at the time. Indeed, that is essentially what Supt. Cecchetto seemed to be asking officers to do, within the narrow ambit of this park. But Mr. Lerue interpreted it as a street check, which triggered a “last straw” stubborn response. He requested a supervisor, perhaps an unusual request, but he had been told on a previous encounter that he could do so.

[103] Mr. LeRue was wrong in his suggestion to Cst. O'Brien that he was not in the park, but again, given a past encounter with a different officer in the park, he had no reason to believe he was prohibited from being in the parking lot.

[104] Can the actions of these officers be categorized as race-based? Mr. LeRue identifies as being "black", although Cst. O'Brien did not perceive him as such. It seems that his ethnic identity appears somewhere on Versadex, but according to Cst. O'Brien, he did not even look at Versadex until later in the incident, when he was on the phone with Sgt. Palmeter.

[105] Cst. O'Brien did testify that he perceived Mr. LeRue as perhaps mid-eastern, and of course racism can be directed against any "persons of colour", black, Asian, or otherwise.

[106] Cst. Woodworth did see him as "black", but Cst. Woodworth's involvement did not occur until Cst. O'Brien was well into the confrontation.

[107] Mr. LeRue does not have particularly strong African Canadian features, and on a dark night, we can accept that he was not perceived by Cst. O'Brien as a person of colour.

[108] While it is possible that Cst. O'Brien's conduct was triggered by race, it is more likely that it was triggered by the questioning of his authority to request ID, and the request to speak to a supervisor. Most people do not happily welcome an "I want to speak to your boss" comment, whatever their job. It was immediately following that brief discussion that Cst. O'Brien announced that he was going to issue a ticket. We do not believe that was his initial intent. Rather he would have simply explained the situation and sent Mr. LeRue and Ms. Morris on their way.

[109] It is more probable that the initial discussion was what triggered the escalating and unprofessional response of Cst. O'Brien.

[110] The conduct of Cst. Woodworth at the lockup was for the most part, neutral. He did express frustration at having racism frequently raised in the course of his duties. However, as a trained, professional officer, that is something that he should expect to encounter. Halifax has a large black population, and it cannot be denied that unfortunately, racist attitudes are all too common. Police officers should recognize that non-caucasians have good reason to be sensitive to what can be at least perceived



as racist conduct. It is a sensitivity that is particularly highlighted in civilian / police confrontations, where police officers exercise authority well beyond that of the ordinary citizen.


[111] We are satisfied however that while Cst. Woodworth's comment at the lockup may have been insensitive, it is a comment that he regrets making, and was essentially a remark made to indicate that what he was doing was not, from his perspective, in any way racist.

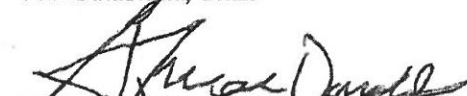
[112] Insofar as Cst. Woodworth is concerned, we accept the evidence he was acting on the instructions of Cst. O'Brien. He attended the scene when Cst. O'Brien was asked if he needed backup and he arrived there. Cst. O'Brien was the officer in charge at the scene and he was following his instructions. We accept that Cst. Woodworth, in carrying out his duties as requested by Cst. O'Brien, was doing them as he said he was trained to. To be clear, we find the manner in which he removed Ms. Morris was how he was trained. Any injuries sustained by Ms. Morris when he was removing her from the vehicle, we attribute to her resisting him in his attempting to remove her from the vehicle. We find as we review the totality of the evidence that the allegations against Cst. Woodworth by both Mr. LeRue and Ms. Morris are dismissed.


[113] We conclude Cst. O'Brien was in breach of the Code of Conduct in this matter contrary to s. 24(1)(a) and 24(7)(a) and (c).

[114] Oral and / or written submissions on penalty will be scheduled for a later date.

Dated at Halifax, Nova Scotia this 18<sup>th</sup> day of June, 2021.

  
\_\_\_\_\_  
Jean McKenna, Chair

  
\_\_\_\_\_  
Hon. Simon J. MacDonald, Vice-Chair

  
\_\_\_\_\_  
Stephen Johnson, Board Member



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