

Federal Court



Cour fédérale

**Date: 20110413**

**Docket: T-235-09**

**Citation: 2011 FC 453**

**Ottawa, Ontario, April 13, 2011**

**PRESENT: The Honourable Madam Justice Heneghan**

**BETWEEN:**

**FIONA G. MCLEAN**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

**Introduction**

[1] Ms. Fiona McLean (the “Applicant”) seeks judicial review of a decision made by the Veterans Review and Appeal Board (the “VRAB” or the “Board”) on January 12, 2009. In that decision, the Board denied the Applicant’s request for a further disability pension, pursuant to subsection 21(5) of the *Pension Act*, R.S.C. 1985, c. P-6 (the “Act”).

Background

[2] The Applicant, a lawyer, is a member of the Canadian Armed Forces Reserves. She acquired status as a reservist in 1987 and has continued to serve in that capacity. In the course of her service she sustained injuries for which she requested pension benefits under the Act.

[3] By a decision dated March 5, 2004, the Department of Veteran Affairs (the “Department”) awarded the Applicant a partial disability pension for the medical condition Mechanical Low Back Pain. That decision stated that the condition of Mechanical Low Back Pain is pensionable pursuant to subsection 21(2) of the Act. The pension was assessed at 5 percent, effective October 14, 2003, pursuant to subsection 39(1) of the Act.

[4] The decision of March 5, 2004 also contained the following statement:

The diagnosis of mechanical low back pain is recorded on a Medical Examination dated June 08, 2001, and your Physician’s Statement dated December 04, 2003, contains a provisional diagnosis of lumbar/thoracic strain.

[5] By application dated March 18, 2004, the Applicant requested a further disability pension in respect of pain in her lower back, with associated problems in her left neck, headaches and range of movement and problems with her left shoulder. The conditions for which the Applicant was seeking a further pension were described in the Department’s “First Application Condensed Summary” as being “Intrascapular/Suprascapular Muscle Spasm consequential to Mechanical Low Back Pain”; “Trapezius Muscle Spasm consequential to Mechanical Low Back Pain”; and “Thoracic Paraspinal Muscle Spasm consequential to Mechanical Low Back Pain”.

[6] The Applicant's pension request was reviewed by a pension adjudicator within the Department. In a decision dated May 11, 2006, the Applicant's application for consequential disability pension was declined on the basis that a "**confirmed** diagnosis of a chronic medical condition has not been established..." [emphasis in original].

[7] In this letter, the pension adjudicator went on to say that the Department had reviewed medical questionnaires, dated February 9, 2006. These questionnaires were completed by a Dr. Peter Neary, an attending physician to the Applicant. Dr. Neary had expressed the opinion that the Applicant's spasms were "...secondary to the pensioned lower back condition...". However, the Department did not share that opinion and noted that "...current medical literature does not support a cause and effect relationship between the claimed muscle spasms and your pensioned mechanical low back pain".

[8] The Department concluded that no confirmed diagnosis of a chronic medical condition had been established and that in the absence of medical evidence to support a consequential relationship, no pension entitlement could be granted pursuant to subsection 21(5) of the Act.

[9] The Applicant sought Departmental Review of the May 11, 2006 decision. In a letter dated August 14, 2007, she was advised that upon a Departmental Review, the Department confirmed the decision made on May 11, 2006. In this Departmental Review, the Department acknowledged receipt of an independent medical report dated January 17, 2007 from Dr. Richard Hu. This report was submitted as new evidence. However, the Department discussed this independent medical report only briefly in the following terms:

The Department acknowledges the additional medical evidence presented. It is medically accepted by the Department that the spinal segments, i.e. cervical, thoracic and lumbar segments, do not contribute to degenerative changes or spasms in each other. Any altered posture or gait due to your lower back disability is not considered to place stress on the thoracic or cervical spine.

[10] Pursuant to section 84 of the Act and section 18 of the *Veterans Review and Appeal Board Act*, S.C. 1995, c. 18, the Applicant sought entitlement review before the Board. In a decision dated March 20, 2008 the Board dismissed the Applicant's review and affirmed the Departmental Review decision dated August 14, 2007.

[11] In its decision the Board made the following introductory comments:

A Departmental Review decision dated 14 August 2007 confirmed the Minister's decision of 11 May 2006, which denied the Applicant pension entitlement for the claimed conditions pursuant to subsection 21(5) of the *Pension Act*. The Departmental Review decision noted that although the Applicant related the spasms of her upper thoracic region of her back were due to her pensioned condition of Mechanical Low Back Pain, it considered that a spasm was a symptom of an underlying condition and that current medical literature does not support a cause-and-effect relationship between the Applicant's claimed muscle spasms and her pensioned Mechanical Low Back Pain. In this determination, the Minister acknowledged that the Applicant brought forward an opinion from her physician that her spasms were secondary to her pensioned lower back condition, and the spasms only occurred with lower back flare-ups.

The Departmental Review decision also considered a medical report from Dr. Richard Hu dated 17 January 2007, and indicated it is medically accepted that the spinal segments, i.e. cervical, thoracic and lumbar segments, do not contribute to degenerative changes or spasms in each other, and any altered posture or gait due to the lower back disability is not considered to place stress on the thoracic or cervical spine. Further, the decision indicated that a confirmed diagnosis of a chronic medical condition was not established, and that particular muscle groups were not identified.

[12] The Board reviewed the facts and acknowledged various medical reports, including the independent medical report from Dr. Hu. The Board quoted from parts of that report, including the physician's impression of the Applicant's injuries, as follows:

The Panel notes that Dr. Richard Hu, in his report of 17 January 2007, identifies the following, in part:

IMPRESSION

Ms. McLean's presentation is very consistent with pain originating from the mechanical structures in the low back. She has documented evidence on x-ray from May of 1999 that there was a chronic spondylolisthesis and pars interarticularis defect at the L5-S1 level. This likely was asymptomatic prior to the increased physical demands in 1998 and there likely was initiation of mechanical symptoms and instability as a result of the significantly increased physical demands placed upon Ms. McLean's spine.

In addition to the spondylolisthesis, Ms. McLean has clinical evidence of a scoliosis in the thoracic and lumbar spine. She has a relatively well balanced right thoracic and left lumbar scoliosis. Despite being balanced in the medical sense there is clearly asymmetry of the rib cage and musculature in the peri-scapular area in the upper thoracic region...

My suspicion in Ms. McLean's case is that the physical activity and demands Ms. McLean experiences in her military training can initiate pain in the previously non-painful back. The spondylolisthesis was present for a long duration, however, there is no way that I can categorically quantify the time of occurrence of the spondylolisthesis.

In regards to scoliosis, I believe that it is likely the scoliosis was present from adolescence, however, was not symptomatic in nature.

Based upon my assessment of the documentation and my assessment of Ms. McLean it is likely that the increased physical demands of Ms. McLean's

military training initiated the onset and development of these symptoms.

In regards to occurrence of pain elsewhere in the spine as a result of localized injury in another area of the spine this occurs relatively frequently. The muscle groups throughout the spine have a large amount of overlap between their origin and their insertions. Thus, occurrence of pain and spasm in one area of the spine can translate into pain and spasm in other areas of the spine.

This migration of pain from the left lower back area coupled with a diffuse change in alignment such as scoliosis as a result of pain can then manifest as increasing pain and be more noticeable than in the individual without significant spinal deformity.

[13] The Board interpreted Dr. Hu's opinion as meaning that the Applicant suffers from scoliosis and spondylolisthesis and "...likely has overlapped pain with regard to her pensioned condition of Mechanical Low Back Pain". Nonetheless, the Board found that the Applicant had failed to establish a causal relationship between the claimed condition and the previously pensioned Mechanical Low Back Pain. Accordingly, the Board rejected the Applicant's request for entitlement review.

[14] The Applicant appealed the entitlement review panel decision before the Board. In a decision dated January 12, 2009, the Board dismissed the appeal. The Board ruled that entitlement was denied for the disabilities cited by the Applicant on the grounds that "they are not a consequence of the pensioned condition of Mechanical Low Back Pain".

[15] In its decision upon the entitlement appeal, the Board referred to the governing legislation, that is the Act and the *Veterans Review and Appeal Board Act*, and noted that in determining pension entitlement, it must liberally construe the relevant legislation.

[16] The Board identified the issue before it as being whether “the claimed conditions are, in whole or in part, consequential to the pensioned condition”. In this case, the pensioned condition is Mechanical Low Back Pain.

[17] The Board found that the Applicant had not established entitlement to a consequential pension on the grounds that the evidence did not establish that the “claimed conditions are consequential to the pensioned condition, mechanical low back pain”.

[18] The Board referred to the independent medical report of Dr. Hu and noted the following from page 8 of his report:

In addition to this, Ms. McLean has mechanical symptoms from the paraspinal and peri-scapular muscles in the cervical, thoracic and lumbar spine that are related to the increased physical demands placed upon a spine with scoliosis and chronic lumbar disease such as spondylolisthesis, the pensionable disorder in this case.

[19] The Board went on to make the following conclusion:

However, spondylolisthesis is not the pensioned disorder; rather the pensioned disorder, in relation to which the consequential entitlement is claimed, is mechanical low back pain. As a result, Dr. Hu’s medical report does not support the claim for consequential pension entitlement.

Therefore, the 20 March 2008 decision of the Review Panel is affirmed.

## Submissions

### (i) The Applicant's Submissions

[20] The Applicant argues that the Board committed several errors in reaching its decision.

Although she sets out 13 separate issues, they can be summarized as being a failure on the part of the Board to respect the direction set out in subsection 5(3) of the Act and section 39 of the *Veterans Review and Appeal Board Act* concerning the drawing of favourable inferences in favour of the Applicant, as well as various failures by the Board to consider and weigh relevant and probative evidence, including evidence from her medical advisors.

### (ii) The Respondent's Submissions

[21] The Attorney General of Canada (the "Respondent") takes the position that the Board reached a reasonable decision, having regard to the evidence before it.

## Discussion and Disposition

[22] The first matter to be addressed is the applicable standard of review.

[23] In *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, the Supreme Court of Canada determined that administrative decisions made by statutory decision-makers are reviewable on one of two standards, that is reasonableness or correctness. The standard of reasonableness will apply to findings of fact, findings of credibility and questions of mixed fact and law; see *Dunsmuir* at para. 53.



[24] In its decision in *Dunsmuir*, the Supreme Court also observed that where prior jurisprudence has established the standard of review that should apply in a particular case, that standard can be followed. In this regard, I refer to paragraph 57.

[25] The prior jurisprudence has already established that in cases involving weighing of evidence pursuant to the Act and the *Veterans Review and Appeal Board Act*, the applicable standard is patent unreasonableness. Subsequent to the release of the decision in *Dunsmuir*, the Federal Court confirmed that decisions of the Veterans Review and Appeal Board, involving questions of fact and the weighing of evidence, should be reviewed on the standard of reasonableness; see *Goldsworthy v. Canada (Attorney General)*, 2008 FC 380 and *Dugré v. Canada (Attorney General)*, 2008 FC 682.

[26] Insofar as the Applicant in the present case invokes errors of law on the part of the Board in applying section 39 of the *Veterans Review and Appeal Board Act* and subsection 5(3) of the Act, in *Goldsworthy* at para. 10, the Court made the following observations:

Although the Applicant characterizes all the issues as errors of law, it is my view that issue (ii), which involves the Board's appreciation and assessment of the evidence, is a fact-driven matter that should be reviewed on a reasonableness standard. Issues (i) and (iii) involve questions that are mixed questions of law and fact. Issue (i) really asks whether, in the circumstances of this case, the Board was obliged under section 38(1) of the Act to seek its own medical opinion and issue (iii) addresses whether section 39 of the Act was properly applied given the Board's finding that the Applicant's evidence was credible. In my view, because the legal aspects of these questions arise under the Act and are not matters that go to the heart of the administration of justice, it is appropriate to review these issues on a reasonableness standard (see *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9, 2008 SCC 9 at para. 60).

[27] In accordance with the prevailing jurisprudence I am satisfied that the Board's decision in the present case is subject to review upon the standard of reasonableness.

[28] The Applicant, as a serving reserve member of the Canadian Armed Forces, is entitled to seek a pension pursuant to paragraph 21(2)(a) of the Act which provides as follows:

Service in militia or reserve army and in peace time	Milice active non permanente ou armée de réserve en temps de paix
(2) In respect of military service rendered in the non-permanent active militia or in the reserve army during World War II and in respect of military service in peace time,	(2) En ce qui concerne le service militaire accompli dans la milice active non permanente ou dans l'armée de réserve pendant la Seconde Guerre mondiale ou le service militaire en temps de paix :
(a) where a member of the forces suffers disability resulting from an injury or disease or an aggravation thereof that arose out of or was directly connected with such military service, a pension shall, on application, be awarded to or in respect of the member in accordance with the rates for basic and additional pension set out in Schedule I;	a) des pensions sont, sur demande, accordées aux membres des forces ou à leur égard, conformément aux taux prévus à l'annexe I pour les pensions de base ou supplémentaires, en cas d'invalidité causée par une blessure ou maladie — ou son aggravation — consécutive ou rattachée directement au service militaire;

[29] The statutory scheme of the Act allows a person such as the Applicant to apply for a pension. The pension application is initially reviewed by a delegate of the Minister of Veterans Affairs. If an applicant is dissatisfied with the initial decision, he or she may seek Departmental Review pursuant to section 82 of the Act. That is what happened in the present case.

[30] A negative determination upon Departmental Review may be appealed to the Veterans Review and Appeal Board pursuant to section 84 of the Act and section 18 of the *Veterans Review and Appeal Board Act*. The powers of the Board upon an application for review are set out in section 21 of the *Veterans Review and Appeal Board Act* as follows:

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| <p>21. A review panel may</p> <p>(a) affirm, vary or reverse the decision of the Minister being reviewed;</p> <p>(b) refer any matter back to the Minister for reconsideration; or</p> <p>(c) refer any matter not dealt with in the decision back to the Minister for a decision.</p> | <p>21. Le comité de révision peut soit confirmer, modifier ou infirmer la décision qu'on lui demande de réviser, soit la renvoyer pour réexamen au ministre, soit déférer à ce dernier toute question non examinée par lui.</p> |
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[31] Section 25 of the *Veterans Review and Appeal Board Act* provides a right of appeal before the Board, as follows:

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| <p>25. An applicant who is dissatisfied with a decision made under section 21 or 23 may appeal the decision to the Board.</p> | <p>25. Le demandeur qui n'est pas satisfait de la décision rendue en vertu des articles 21 ou 23 peut en appeler au Tribunal.</p> |
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[32] Section 29 of the *Veterans Review and Appeal Board Act* describes the mandate of the Board when sitting in an appeal pursuant to section 25, as follows:

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| <p>29. (1) An appeal panel may</p> <p>(a) affirm, vary or reverse the decision being appealed;</p> <p>(b) refer any matter back to the person or review panel that made the decision being appealed for reconsideration,</p> | <p>29. (1) Le comité d'appel peut soit confirmer, modifier ou infirmer la décision portée en appel, soit la renvoyer pour réexamen, complément d'enquête ou nouvelle audition à la personne ou au comité de révision qui l'a rendue, soit encore déférer à cette personne</p> |
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re-hearing or further investigation; or

ou à ce comité toute question non examinée par eux.

(c) refer any matter not dealt with in the decision back to that person or review panel for a decision.

Where matter cannot be referred to review panel

Nouveau comité de révision

(2) Where the members of a review panel have ceased to hold office or for any other reason a matter cannot be referred to that review panel under paragraph (1)(b) or (c), the appeal panel may refer the matter to the Chairperson who shall establish a new review panel in accordance with subsection 19(1) to consider, hear, investigate or decide the matter, as the case may be.

(2) Lorsqu'elle ne peut être renvoyée au comité de révision parce que ses membres ont cessé d'exercer leur charge par suite de démission ou pour tout autre motif, la décision peut être transmise au président afin qu'il constitue, conformément au paragraphe 19(1), un nouveau comité de révision pour étudier la question.

[33] The Board's assessment of the evidence before it is to be informed by the Act and the *Veterans Review and Appeal Board Act*. Sections 2 and 5 of the Act provide as follows:

Construction

Règle d'interprétation

2. The provisions of this Act shall be liberally construed and interpreted to the end that the recognized obligation of the people and Government of Canada to provide compensation to those members of the forces who have been disabled or have died as a result of military service, and to their dependants, may be fulfilled.

2. Les dispositions de la présente loi s'interprètent d'une façon libérale afin de donner effet à l'obligation reconnue du peuple canadien et du gouvernement du Canada d'indemniser les membres des forces qui sont devenus invalides ou sont décédés par suite de leur service militaire, ainsi que les personnes à leur charge.

...

...

## Powers of the Minister

5. (1) Subject to this Act and any other Act of Parliament and to the regulations made under this or any other Act of Parliament, the Minister has full power to decide on all matters and questions relating to the award, increase, decrease, suspension or cancellation of any pension or other payment under this Act and to the recovery of any overpayment that may have been made.

## Ministre

5. (1) Sous réserve des autres dispositions de la présente loi ou de toute autre loi fédérale ou de leurs règlements, le ministre a tout pouvoir de décision en ce qui touche l'attribution, l'augmentation, la diminution, la suspension ou l'annulation de toute pension ou autre paiement prévu par la présente loi ainsi que le recouvrement de tout versement excédentaire.

[34] Sections 3 and 39 of *Veterans Review and Appeal Board Act* are relevant to the assessment of the evidence and provide as follows:

## Construction

3. The provisions of this Act and of any other Act of Parliament or of any regulations made under this or any other Act of Parliament conferring or imposing jurisdiction, powers, duties or functions on the Board shall be liberally construed and interpreted to the end that the recognized obligation of the people and Government of Canada to those who have served their country so well and to their dependants may be fulfilled.

...

## Rules of evidence

39. In all proceedings under this Act, the Board shall

## Principe général

3. Les dispositions de la présente loi et de toute autre loi fédérale, ainsi que de leurs règlements, qui établissent la compétence du Tribunal ou lui confèrent des pouvoirs et fonctions doivent s'interpréter de façon large, compte tenu des obligations que le peuple et le gouvernement du Canada reconnaissent avoir à l'égard de ceux qui ont si bien servi leur pays et des personnes à leur charge.

...

## Règles régissant la preuve

39. Le Tribunal applique, à l'égard du demandeur ou de l'appelant, les règles suivantes

en matière de preuve :

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| <p>(a) draw from all the circumstances of the case and all the evidence presented to it every reasonable inference in favour of the applicant or appellant;</p>     | <p>a) il tire des circonstances et des éléments de preuve qui lui sont présentés les conclusions les plus favorables possible à celui-ci;</p> |
| <p>(b) accept any uncontradicted evidence presented to it by the applicant or appellant that it considers to be credible in the circumstances; and</p>              | <p>b) il accepte tout élément de preuve non contredit que lui présente celui-ci et qui lui semble vraisemblable en l'occurrence;</p>          |
| <p>(c) resolve in favour of the applicant or appellant any doubt, in the weighing of evidence, as to whether the applicant or appellant has established a case.</p> | <p>c) il tranche en sa faveur toute incertitude quant au bien-fondé de la demande.</p>  |

[35] Sections 3 and 39 of the *Veterans Review and Appeal Board Act* have been interpreted to mean that a person seeking benefit must submit sufficient evidence to establish a causal link between his or her injury or disability and his or her period of service. These statutory provisions do not relieve an applicant for a disability pension under the Act from the obligation of adducing sufficient probative evidence to meet the requirements for the award of a disability pension. In this regard, I refer to the decisions in *Hall v. Canada (Attorney General)* (1998), 152 F.T.R. 58; aff'd (1999), 250 N.R. 93 (F.C.A.), *Tonner v. Canada* (1995), 94 F.T.R. 146; aff'd [1996] F.C.J. no. 825 (F.C.A.) and *MacKay v. Canada (Attorney General)* (1997), 129 F.T.R. 286.

[36] In the present case, the Board was in possession of three earlier decisions made concerning the Applicant's request for a consequential pension, that is the Minister's decision as per his

delegate dated May 11, 2006; the Departmental Review decision dated August 14, 2007; and the entitlement review decision dated March 20, 2008.

[37] The medical evidence before the Board is contained in the Tribunal Record that was prepared by Kathleen Vent, Legal Advisor to the Board. The medical information consists of the following documents:

- i) Report from Radiology Consultants Associated referring to an examination conducted November 28, 2003;
- ii) Report dated April 1, 2004 from Terry Lumney, physiotherapist with Advanced Massage & Associated Therapies;
- iii) Physician Statement: Musculoskeletal - Left Shoulder Conditions dated April 12, 2005;
- iv) Physician Statement: Musculoskeletal Cervical Spine conditions dated April 12, 2005;
- v) Physician Statement: Musculoskeletal Thoracic-Lumbar Spine and Sacroiliac Joint conditions dated April 12, 2005;
- vi) Medical Questionnaire: Musculoskeletal Upper Limb and Chest Conditions referring to examination on February 9, 2006;
- vii) Medical Questionnaire: Musculoskeletal Cervical Spine Conditions referring to examination conducted on February 9, 2006;
- viii) Medical Questionnaire: Musculoskeletal Thoracolumbar Spine, Pelvic and Sacroiliac Joint Conditions referring to examination conducted on February 8, 2006;

- ix) Independent medical report prepared by Dr. Richard W. Hu, Orthopaedic Surgeon, dated January 17, 2007;
- x) Report dated June 20, 2006 from Bionomics Center from Dr. Michael P. Sawa, a licensed chiropractor; and
- xi) Letter dated March 2008 from the Applicant to Dr. Peter Neary with confirmation by Dr. Neary that the condition for which the Applicant seeks a consequential pension are chronic conditions.

[38] The Board determined that the medical evidence did not show a causal connection between the Applicant's pensioned condition of Mechanical Low Back Pain and the conditions of scoliosis and spondylolisthesis. It focused on one sentence in the lengthy independent medical report that had been prepared by Dr. Hu to conclude that Dr. Hu's opinion should be discounted because he called the spondylolisthesis the "pensionable disorder in this case".

[39] Obviously, this is an error by Dr. Hu but that does not justify the Board's apparent wholesale rejection of his report.

[40] Indeed, since it focused exclusively on Dr. Hu's report and did not refer to the other medical reports, including those of Dr. Neary, the Board effectively disregarded the evidence that was before it.

[41] The reports prepared by the Physiotherapist Lumney, Dr. Neary and Chiropractor Dr. Sawa provide evidence in support of the Applicant's claim. These reports are consistent with the report of



Dr. Hu. In my opinion, the Board should have discussed these reports and given reasons for rejecting them, if that is what they intended to do.

[42] Having regard to the medical evidence contained in the Tribunal Record, the Department's own guidelines and the statutory presumptions set out in both the Act and the *Veterans Review and Appeal Board Act*, I am satisfied that the decision under review does not meet the applicable standard of review.

[43] In the result, the decision of the Board dated January 12, 2009 is set aside and the matter is remitted for re-determination before a different panel of the Board.

**JUDGMENT**

**THIS COURT ORDERS AND ADJUDGES that** the application for judicial review is allowed. The decision of the Board dated January 12, 2009 is set aside and the matter is remitted to a differently constituted panel of the Board for re-determination. The Applicant shall have her taxed costs in accordance with Column III, Tariff B of the *Federal Courts Rules*, SOR/98-106.

“E. Heneghan”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-235-09

**STYLE OF CAUSE:** FIONA G. MCLEAN v ATTORNEY GENERAL OF CANADA

**PLACE OF HEARING:** Calgary, AB

**DATE OF HEARING:** June 16, 2010

**REASONS FOR JUDGMENT AND JUDGMENT:** HENEGHAN J.

**DATED:** April 13, 2011

**APPEARANCES:**

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