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PROPOSALS TO AMEND THE CRIMINAL CODE (GENERAL PRINCIPLES)

DEFENCE OF PROPERTY---SECTION 38

1. Introduction:

I have been asked to assess the proposed new provisions in respect of defence of property. In order to facilitate the discussion, it is appropriate to set out the new provisions and the current provisions.

The proposed section 38 would read as follows:

38. (1) A person in peaceable possession of property under a claim of right is not guilty of an offence to the extent that, in the circumstances as the person believes them to be,

(a) the person acts in order to defend that possession against interference;

(b) the interference is

(i) lawful interference, other than lawful interference that is protected by section 25, or

(ii) unlawful interference; and

(c) the person's acts are reasonable and are proportionate to the interference that the person seeks to avoid or terminate.

(2) A person in peaceable possession of property, whether or not under a claim of right, is not guilty of an offence to the extent that, in the circumstances as the person believes them to be,

(a) the person acts in order to defend that possession against interference;

(b) the interference is unlawful; and

(c) the person's acts are reasonable and are proportionate to the interference that the person seeks to avoid or terminate.

(3) The defences provided by subsections (1) and (2) are also available to a person acting under the authority of a person referred to in those subsections or lawfully assisting such a person.

(4) In this section,

"defend that possession" means to protect the property from interference, to retake possession of the property from a person who has removed it or taken possession of it, or to remove from the property a person who has entered or remains on the property;

"interference" includes destruction of or damage to property, removal of property, taking possession of property, or entering or remaining on property, whether occurring or imminent.

This section would replace the current sections 38-42 of the Criminal Code which read as follows:

38. (1) Every one who is in peaceable possession of personal property, and every one lawfully assisting him, is justified

(a) in preventing a trespasser who has taken it, or

(b) in taking it from a trespasser who has taken it,

if he does not strike or cause bodily harm to the trespasser.

(2) Where a person who is in peaceable possession of personal property lays hands on it, a trespasser who persists in attempting to keep it or take it from him or from any one lawfully assisting him shall be deemed to commit an assault without justification or provocation.

39. (1) Every one who is in peaceable possession of personal property under a claim of right, and every one acting under his authority, is protected from criminal responsibility for defending that possession, even against a person entitled by law to possession of it, if he uses no more force than is necessary.

(2) Every one who is in peaceable possession of personal property, but does not claim it as of right or does not act under the authority of a person who claims it as of right, is not justified or protected from criminal responsibility for defending his possession against a person who is entitled by law to possession of it.

40. Every one who is in peaceable possession of a dwelling-house, and every one lawfully assisting him or acting under his authority, is justified in using as much force as is necessary to prevent any person from forcibly breaking into or forcibly entering the dwelling-house without lawful authority.

41. (1) Every one who is in peaceable possession of a dwelling-house or real property, and every one lawfully assisting him or acting under his authority, is justified in using force to prevent any person from trespassing on the dwelling-house or real property, or to remove a trespasser therefrom, if he uses no more force than is necessary.

(2) A trespasser who resists an attempt by a person who is in peaceable possession of a dwelling-house or real property, or a person lawfully assisting him or acting under his authority to prevent his entry or to remove him, shall be deemed to commit an assault without justification or provocation.

42. (1) Every one is justified in peaceably entering a dwelling-house or real property by day to take possession of it if he, or a person under whose authority he acts, is lawfully entitled to possession of it.

(2) where a person

(a) not having peaceable possession of a dwelling-house or real property under a claim of right, or

(b) not acting under the authority of a person who has peaceable possession of a dwelling-house or real property under a claim of right,

assaults a person who is lawfully entitled to possession of it and who is entering it peaceably by day to take possession of it, for the purpose of preventing him from entering, the assault shall be deemed to be without justification or provocation.

(3) Where a person

(a) having peaceable possession of a dwelling-house or real property under a claim of right, or

(b) acting under the authority of a person who has peaceable possession of a dwelling-house or real property under a claim of right,

assaults any person who is lawfully entitled to

possession of it and who is entering it peaceably by day to take possession of it, for the purpose of preventing him from entering, the assault shall be deemed to be provoked by the person who is entering.

The present provisions are very complicated since they purport to make distinctions between real and personal property, between situations where the defender of property has or has not a claim of right as against the other party, and, in deeming certain action to be assault, by invoking the self-defence provisions in sections 34-37.

2. The Policy Underlying the Provisions:

While some of the policy objectives behind the new proposal are fairly obvious, whether all of the changes reflect considered policy choices involves some conjecture. Nevertheless, the broad policy objective of simplification appears to run through the proposed section 38 and is consistent with both the Section by Section Commentary¹ and the Report of the Sub-Committee on the Recodification of the General Part of the Criminal Code of the Standing Committee on Justice and the Solicitor General. Simplification is a very desirable goal since, as the Sub-Committee Report commented:

Even as cursory an examination of these provisions as this reveals serious problems with the current law in this area. First, the fact that the law is spread across five sections which, in some cases, overlap with others makes it difficult to determine the ambit of the defence

¹ Section by Section Commentary, at 9.

² Canada, Report of the Sub-Committee on the Recodification of the General Part of the Criminal Code of the Standing Committee on Justice and the Solicitor General, First Principles: Recodifying the General Part of the Criminal Code of Canada (Ottawa: Queen's Printer, February, 1993) at 45. [Hereinafter "the Sub-Committee Report"]

of property justification.³

In addition to the fact that five sections are required to set out the present defence of property, sections 38(2), 41(2), and 42 (2) and (3) also invoke the self-defence provisions, which are themselves quite complicated.⁴ Thus, there is extreme complexity in the present law of defence of property and, properly, the proposals attempt to address this concern.

The Sub-Committee Report stated that the degree of force permitted in the present defence of property provisions was excessive in some situations when compared with self-defence.⁵ I do not share this view of the present law nor do I believe that this concern is reflected in the proposals. While I will comment below on the precise wording of the reasonableness and proportionality limits to the degree of permissible force, by way of general comment, I would say now that the degree of force permitted by the proposals is not out of line with defence of the person.

Some other policy matters that appear to be reflected in the proposals include: removal of the justification/excuse terminology, removal of the distinction between personal and real property, implementing a subjective view of the circumstances for which defence of property is required, maintenance of the hierarchy of rights between those who operate under a claim of right and those who do not, removal of the deemed assault provisions referred to above, and the rejection of restrictions against force that causes death or serious harm. In addition, the proposals would

³ Ibid., at 45.

⁴ See my assessment of the proposed defence of the person provisions: Quigley, "Proposals to Amend the Criminal Code (General Principles): Defence of the Person--Section 37", particularly at pages 3-5.

⁵ Supra, note 2, at 45.

retain the extension of the defence to those who assist the person who is defending the property in question against interference.

Most of these matters indicate that there has been no great shift in the policy behind the proposals from that inherent in the present provisions. The predominant motivation seems to have been simplification and a better fit with the defence of the person provisions. Those are sound policy goals.

3. Do the Provisions Convey the Policy Effectively?

Generally speaking, the policy behind the proposals, at least as far as I am able to discern it, is conveyed reasonably well in the provisions themselves. For example, five Criminal Code sections (plus the deeming provisions relating back to self defence) have been shortened to one section. As well, the same conditions apply whether the property in question is real or personal (or movable or immovable) and the same priority of interests (those with a claim of right are in a better position than those without a claim of right) applies to all defence of property situations.

Nevertheless, in the next section, I will offer some critical comments and some suggestions for change to parts of the provision. For the most part, however, I support the proposal and would welcome its passage into law.

4. Implications of the Provisions:

In this section, I will discuss the specific changes that would be effected if the provisions were implemented. Where I consider that modifications ought to be made, I will indicate this along with the discussion of the specific issue in question.

(a) The Avoidance of Justification/Excuse Terminology:

By adopting the terminology that a person is "not guilty of an offence to the extent that" she has acted in defence of property, the proposals would rid Canadian criminal law of the oft-criticized distinction between justifications and excuses. However, this would only be done in a partial way unless there are accompanying amendments to some other sections of the Criminal Code such as sections 25, 27, 30, 31, 32, 43, and 44. Therefore, if the justification/excuse dichotomy is to be abandoned, it should be done completely; otherwise, there may well be some conceptual confusion about the nature of and relationship between particular defences.

Since Professor McGillivray will be addressing the justification/excuse terminology in more detail, I shall not devote much attention to it in this paper. Nevertheless, I support the abandonment of the justification/excuse terminology, primarily on the ground that it is not a meaningful distinction in practical terms for the criminal law to maintain. In this respect, I endorse the criticisms that are frequently made of the distinction,⁶ even while acknowledging that there is a rich body of opinion in the other direction.⁷ I would only add that the adoption in the proposed section 38 of a subjective test for mistaken beliefs in the surrounding circumstances ("... in the circumstances as the person believes them to be ...") lends further support for the avoidance of justification terminology. This is because, while defence of property, like defence of the person, has traditionally been viewed as a justification, a subjective approach to the

⁶ See, for example, Colvin, Principles of Criminal Law (2nd. ed., 1991), at 208-11.

⁷ Particularly in the person of George Fletcher. See for example, Fletcher, Rethinking Criminal Law (1978), Chapter Ten, "The Theory of Justification and Excuse".

circumstances is somewhat contradictory of the justificator rationale that justified conduct is not wrongful conduct. Where an accused is exonerated on the basis of an unreasonable mistake about the circumstances and hence the need for defensive force, there is a strong argument that this is incompatible with the justificator nature of the defence.

(b) "To the Extent That ...":

There is a problem with the wording of the new proposals that may be rather easily remedied. The phrase, "to the extent that" in subsections (1) and (2), frankly makes me uneasy. I am not certain of its origin nor why this particular terminology was chosen. My concern is that it is suggestive of defence of property being only a partial defence. This concern is not so great as it is for defence of the person where, for example, in the case of murder the provision might be interpreted as only serving to reduce murder to manslaughter. For the defence of property, it is admittedly less likely that the murder situation would occur (because if the amount of force necessary to repel the invader is the infliction of death or grievous bodily harm, it is very likely that defence of the person will also be invoked as a defence). Nevertheless, it may be that in other contexts that defence of property might be seen as a partial defence only if the proposed wording is maintained.

That is surely not the intention nor, perhaps, is the judiciary likely to interpret it in that fashion because of the longstanding acceptance of defence of property as a completely exonerating defence. Nonetheless, some risk of that remains. A bigger risk might be that a jury instructed in the words of the section might accord it that interpretation. If the aim of the provisions is to simplify, why not choose simpler wording? The phrase "to the extent that" could easily be changed to "if" to ensure that defence of property is a complete defence when not

disproved by the Crown.

(c) Removal of the Distinction Between Real and Personal Property:

This change is, in my opinion, a very sound move. Although the Law Reform Commission of Canada had previously recommended the retention of the distinction on the ground that trespass to real property was a more serious infringement of possession than trespass to chattels,⁸ both the Sub-Committee Report⁹ and Report of the Canadian Bar Association Criminal Recodification Task Force¹⁰ recommended otherwise. The reason each body had for that recommendation was apparently simplicity. I concur completely in that view. Whatever differences there might be between the defence of personal property versus real property can best be dealt with in the consideration of the circumstances as seen through the eyes of the accused and the degree of force that is resorted to. It is unnecessary and overly complicated to establish different rules for each situation.

An ancillary benefit of this change is to also remove the overlap between the present sections 40, 41, and 42 in connection with dwelling-houses and other real property. At present, section 40 applies only to dwelling-houses while the other two sections apply to both dwelling-houses and real property. Again, there is no need for such a distinction.

⁸ Canada, Law Reform Commission of Canada Report 31, Recodifying Criminal Law: Revised and Enlarged Edition (Ottawa: Supply and Services, 1987) at 38. [Hereinafter "Report 31"]

⁹ Supra, note 2, at 46.

¹⁰ Report of the Canadian Bar Association Criminal Recodification Task Force, Principles of Criminal Liability: Proposals for a New General Part of the Criminal Code of Canada (1992), Appendix "Code-6" to the Sub-Committee Report, supra, note 2, at 5A-90. [Hereinafter referred to as "the CBA Task Force Report"].

(d) Removal of the "Deemed Assault" Provisions:

The current provisions, in sections 38(2) and 41(2), deem resistance by a trespasser to amount to an assault without justification or provocation.¹¹ In a similar vein, section 42(2) deems an assault by someone not in peaceable possession under claim of right against another person entering for the purpose of taking lawful possession to be an assault without provocation or justification; where the assaulter is in peaceable possession under a claim of right, the person entering is deemed to have provoked the assault under section 42(3). The effect of these extremely complicated provisions is to invoke the self-defence provisions which self-defence provision is applicable then depends upon whether the deemed assault in question was provoked or not.¹²

The proposals would remove all of this complexity and in the process separate defence of the person from defence of property. Thus, while there will be many situations which invoke both defences because there are both threats to the person and to property, the instructions to a jury would be much simpler because of the absence of the deeming provisions.

Moreover, the proposals would avoid too much overlap between the two defences by the definition given "interference" which is wholly oriented to interference with a property interest, rather than in any way referring to assault or defence of the person.

¹¹ Although case law has sensibly interpreted this to require that the resistance be more than passive resistance: R. v. Baxter (1975), 33 C.R.N.S. 22, at 42 (Ont. C.A.).

¹² The major self-defence provisions that would be invoked are s. 34 in relation to an unprovoked assault and s. 35 in relation to a provoked assault. However, s. 37 could also be applicable since it overlaps with the other two provisions in at least some circumstances.

These changes to defence of property should be read in conjunction with the elimination in defence of the person of the distinction between provoked and unprovoked situations. Both changes are major simplifications of the present law. In both instances, a factor in deciding whether the defence is available will be the role of the accused in the affray. Triers of fact should be able to determine whether the accused really was acting in defence of property or of the person, as the case may be, from all of the circumstances, without the need for confusing concepts such as those that have been eliminated from the proposals. The resultant streamlining of both defences is commendable.

(e) The Subjective Approach to Circumstances ("... in the circumstances as the person believes them to be ...") and the Reasonableness and Proportionality Requirements:

As with defence of the person, the change to assess the circumstances through the eyes of the actual accused is a change to Canadian criminal law. It would amount to adoption of the English position in judging mistaken beliefs about defensive force on a subjective basis.¹³ Because it would accord more respect to background experiences and context that have a bearing on the perceptions of the person confronting a challenge to her property, it would be a welcome change. Threats to property are usually emergency situations where detached reflection about the need for and degree of force and alternatives are lacking or greatly limited. Although perhaps on a lesser scale than with defence of the person, defence of property situations may involve vulnerable people--for example, a parent with small children or the elderly--who do not have ready access to outside assistance; women who are estranged from their partners, particularly those who have suffered prior abuse at his hands, may find their homes or property under

¹³ R. v. Williams (1984), 78 Cr. App. R. 276 (C.A.); Beckford v. R., [1987] 3 All E.R. 425 (P.C.).

threat. To avoid stereotypy about defensive force situations, it is necessary in the interest of justice to contextualize the evaluation of the circumstances. The fairest way to do this is by the subjective approach advocated in these proposals, for that approach best accommodates mistakes about the need for force and the amount of force that is required; after all, an emergency situation is precisely that where mistakes are most likely to be made.

As with the defence of the person proposals, however, this change is not necessarily a wholesale change. It is very likely that the same contextualization of the objection portions would occur for defence of property as has been done with self-defence. It is simply that no cases from the Supreme Court of Canada have confirmed that position. Nevertheless, I would suppose that the decision in R. v. Lavallee¹⁴ is portable to defence of property. If that is the case, the further move to a wholly subjective approach to circumstances as called for in the proposed section 3 is a change, but not a radical change.

However, the proposed change is not without potential problems. The English position has been to exclude self-induced intoxication from consideration in evaluating the accused's belief in the circumstances.¹⁵ This is, of course, incompatible with a subjective approach to evaluating the circumstances, although it is consistent with the approach taken to the defence of intoxication in relation to mens rea.¹⁶ The present proposals suffer from th

¹⁴ R. v. Lavallee (1990), 76 C.R. (3d) 329 (S.C.C.).

¹⁵ R. v. O'Grady, [1987] 3 All E.R. 420 (C.A.); R. v. O'Connor [1991] Crim. L.R. 135 (C.A.).

¹⁶ If the law relating to intoxication were applied to this part of the provision, a mistake induced by self-induced intoxication would avail in the case of a specific intent offence but not for a general intent offence. This approach was rejected by the English Court of Appeal in O'Grady, Ibid., at 423.

defect of not indicating whether the English position will prevail as a limitation on the subjective approach or whether a completely subjective approach is intended.

Some clarification should be given because there is undue complexity in, for example, a murder case to permit intoxication to be considered by the trier of fact on the issue of mens rea, but not when evaluating whether the use of defensive force is exculpatory. The same inconsistency could occur whenever the offence charged is one that has been categorized as a specific intent offence for the purposes of the intoxication defence. Avoiding this complexity seems a sensible step to take.¹⁷ Moreover, to do so is consistent with the aim of the proposals to evaluate circumstances through the eyes of the accused.

To propose that intoxication be taken into account in determining the circumstances is not a licence for drunks to defend themselves. The person who is very drunk will effectively be deprived of advancing a defence based on a very unreasonable view of the circumstances simply because she will, by definition, have been too intoxicated to form a credible belief in the circumstances. On the other hand, for the accused only mildly impaired by alcohol or drugs, it is far simpler to assess the circumstances from her point of view including the intoxication, rather than attempting to filter out the effect that the intoxication might have had on her perceptions and beliefs.

This feature of the proposals cannot be considered in

¹⁷ It must be conceded that to do as I suggest will inject complexity where the offence is a general intent offence such as assault because the intoxication will be irrelevant in evaluating mens rea but would be relevant to the use of defensive force. The fault lies, however, with the much-criticized distinction between specific and general intent. Although it is not within my present mandate to address the intoxication rules, I note with regret that the proposed s. 35 would perpetuate the distinction.

isolation from the subsequent restrictions on the amount of force that is permitted, namely, the requirements that the accused's act be reasonable and proportional to the interference with property that is being defended against. Although the defence of property provisions are, anomalously, not so stringent as those pertaining to defence of the person,¹⁸ there is nevertheless some difficulty in having two separate restrictions apply to the defence. The positive reform of assessing circumstances on a subjective basis may in the end be outweighed by a double-barrelled objective approach to limiting the means available for dealing with the threat to property.

While it is true that proportionality requirements are usually evaluated in a way that is generous to an accused,¹⁹ it would be preferable to avoid two separate restrictions. This might easily be done by modifying section 38(1)(c) to read:

(c) the person's act are **reasonably proportionate** to the interference that the person seeks to avoid or terminate.

This would emphasize that the assessment of proportionality should be a flexible one. The requirement of proportionality is supportable, of course, because we should not encourage overreaction to situations, especially where the threat is to property only.

(f) The Rejection of Restrictions Against Force Intended to Cause Death:

The CBA Task Force Report²⁰ and the Law Reform Commission o

¹⁸ For my discussion of the corresponding restrictions relating to defence of the person, see: supra, note 4, at 11-15.

¹⁹ See, for example: R. v. Clark (1983), 5 C.C.C.(3d) 264, at 271 (Alta. C.A.).

²⁰ Supra, note 10, at 5A:86 and 5A:91.

Canada²¹ both recommended some explicit limit on the amount of force permitted in defence of property. The former would have excluded an intention to cause death, while the Commission would also have excluded purposely causing serious harm. The rationale for their recommendations was that a higher value ought to be placed on persons than on property. In the end, the Sub-Committee Report²² agreed with Don Stuart²³ that it would be arbitrary to declare in advance that one could never reasonably intend death in defence of property. I agree with Don Stuart and with the Sub-Committee that a restriction of this type should probably not be included. The reasonableness and proportionality requirements (or, as I advocate, the "reasonably proportional" requirement) should be quite sufficient to enable triers of fact to judge whether the force used was excessive in the circumstances.

Moreover, it should be kept in mind that a threat to property will frequently also include a threat to the person; in such case, the defence of the person provisions, which do permit intentional killing where necessary, will also be under consideration. The tendency, therefore, will be for the defence of the person provisions to deal with the more threatening situations anyway. This should reduce the worry that intentional killing in defence of property will be a common occurrence, yet leave room for situations where such force might be seen as proportionate to the threat.

However, if there is sufficient concern that the criminal law ought to stress the higher value of human life over that of property, I would not be opposed to a special provision whereby an accused intentionally killing in defence of property would be convicted of manslaughter only. The court would then have the

²¹ Report 31, supra, note 8, at 37-38.

²² Supra, note 2, at 47-48.

²³ Cited at supra, note 2, at 47.

sentencing discretion to extend leniency or punish unnecessary force as appropriate.

(g) The Hierarchy of Interests--Claim of Right Versus No Claim of Right:

The proposals retain a distinction between those defending property under a claim of right and those who do not have such claim. While it does contradict to a mild extent the aim of simplification to maintain this distinction, it is supportable. A person who does not even believe that she is rightfully in possession of property should not be able to use force against lawful attempts to assert a property interest against her; but she should be entitled to defend against unlawful interference. This is the effect of section 38(2). It provides protection to those lawfully seeking to regain or protect property from someone who is not asserting a claim to that property--that is, someone who is behaving illegally.

However, section 38(2) is poorly drafted to convey this position. The phrase "whether or not under a claim of right" is inapt to cover the circumstances enumerated in the subsection particularly when compared with subsection (1) which deals with claim of right. Subsection (2) could simply be amended to say "**no under a claim of right**".

Some consideration could, however, be given to eliminating subsection (2) entirely and the phrase "under a claim of right" in subsection (1). This would bring the proposals somewhat closer to those recommended by the CBA Task Force Report.²⁴ It would have the effect of permitting a defence of property in all situations except where the interference was itself protected under section 25. Although the rationale for the CBA position is not provided in

²⁴ Supra, note 10, at 5A: 186.

its Report, presumably it is for this reason and because otherwise a distinction between lawful and unlawful interference is too difficult for most lay people to assess at the time of the dispute.²⁵

It may, however, be too difficult and too ambitious to attempt to eliminate all references to the legality of actions in a defence of property situation without creating other problems, such as providing too great advantage to those unlawfully occupying or possessing property. Since property law is rife with competing claims to the same property, stipulating a distinction between a claim of right and no claim of right may well be the right place to draw the line. That distinction focusses much more on the belief of the person that she has a claim to the property, rather than on the actual legal position. Because of that, I do not take a strong stand in favour of deleting the hierarchy of legal interests conveyed in the proposals.

(h) The Structure of the Proposals:

In addition to being far more straightforward than the present defence of property sections, the proposed section 38 is structured in a coherent way. For example, placing the extension of the defence to those assisting the property claimant and the definitions of "defend that possession" and "interference" in separate subsections, rather than within the main subsections makes the provisions much more readable. In addition, the definitions

²⁵ The CBA Task Force Report did, at Ibid., at 5A: 87, criticize the expression "entitled by law to possession of it" in the present s. 39 but did not explicitly state this as a reason for eliminating the wording in the recommendations. It should be noted that similar wording to that in s. 39 is also contained in s. 42 and there is a reference to "lawful authority" in s. 40. All of these are subject to the same criticism that few lay people would be in a position to assess the legality of the claim to a property interest at the same a dispute was ongoing.

are in reasonably plain language which can only facilitate their explanation to a jury or their interpretation by the judiciary. Indeed, on the whole and apart from some criticisms advanced earlier, the section is well-drafted.

5. Suggested Modifications:

In the previous section, I proposed certain minor modifications to the proposals in light of problems that I believe are inherent in them. In this section, therefore, I will merely summarize those proposed modifications:

1. Abandon the justification/excuse terminology completely in the Criminal Code if it is to be abandoned in the proposed amendments. This would entail additional amendments to sections 25, 27, 30, 31, 32, 43, and 44;
2. Replace the wording "to the extent that" with "if" in section 38(1) and (2);
3. Clarify that evidence of the intoxication of the accused can be considered in evaluating the circumstances as the accused believes them to be;
4. Modify the restrictions on the defence contained in subsections (1)(c) and (2)(c) to eliminate two separate requirements of reasonableness and proportionality. One way to do this might be to stipulate a single restriction of "reasonable proportionality" which would emphasize that the assessment of proportionality should be flexible.
5. [Optional] Provide that a person who kills another with either of the intents in section 229(a) or (b) of the Code when in defence of property be convicted of manslaughter only;
6. Modify section 38(2) to change "whether or not under a claim of right" to "not under a claim of right". Alternatively, although I do not strongly advocate it,

consideration could be given to deleting subsection (2) entirely and eliminating the words "under a claim of right" from subsection (1).

The proposed section 38 as drafted is a drastic improvement over the present law. Nevertheless, some minor changes would improve the section. I welcome the opportunity to expand upon my reasons for the recommendations.

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