Legal Analysis / L'analyse juridique

Bring Them Home? Canadian Supreme Court Responses to Section 7 Challenges on Behalf of Former Canadian ISIS Members Detained in Syria

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As of September 2022, the Canadian government has failed to publicly address the legal condition of detained Canadian foreign fighters. A legal case being brought on the fighters' behalf argues that the lack of consideration is a violation of the detainees' section 7 Charter rights. This paper finds that there is sufficient precedent in the Canadian legal cannon to support this assertion. This conclusion is reached through an analysis of key s. 7 Charter cases similar to the case at hand, including the application of the Charter overseas, a discussion of the Canadian anti-terrorism regime, and the potential for positive rights under s.7. There is little existing literature on this topic, so broader academic writings on s. 7 rights were considered alongside the selected cases. Although this paper is limited by a lack of information pertaining to the individuals involved, there appears to be strong evidence that the non-action of the Canadian state constitutes a violation of the detainees' s. 7 rights.

Depuis septembre 2022, le gouvernement canadien n'a pas réussi à aborder publiquement la condition juridique des combattantes étrangères canadiennes détenues. Une affaire judiciaire est engagée au nom des combattantes pour faire valoir que ce manque de considération constitue une violation des droits des détenues, selon l'article 7 de la Charte. Cet article constate qu'il existe un précédent suffisant dans le canon juridique canadien pour suggérer que la position du gouvernement est une violation des droits des combattantes selon l'article 7. Cette conclusion s'appuie sur une analyse des principales affaires relatives à l'article 7 de la Charte, contenant des éléments similaires à l'affaire en question, y compris

l'application de la Charte à l'étranger, la discussion du régime antiterroriste canadien et la possibilité pour des droits positifs sous l'article 7. Il existe peu de littérature sur ce sujet, alors les écrits universitaires plus larges sur les droits de l'article 7 sont examinés en même temps que les cas sélectionnés. Bien que le manque d'informations concernant les individus concernés limite cette analyse, il y a néanmoins des preuves solides que l'inaction de l'État

Introduction

In 2019, the Islamic State of Iraq and al-Sham (ISIS) ceded the final remnants of its territorial holdings to internationally backed Kurdish-Syrian forces. Since then, the Syrian government has detained many of the remaining members, including foreign fighters from Western democracies pending repatriation for trial in their home states. Although France, Germany, and the United States have all successfully repatriated at least a portion of their citizens, Canada appears to have no plans of doing so. This has led to a Charter challenge being brought by the relatives of the detainees alleging that the government of Canada has shirked their responsibilities towards their detained citizens. To assess whether the Canadian courts would find in the detainees' favour, I have determined the Charter sections that these cases are most likely to invoke based on the specific rights allegedly violated; selected analogous cases from the Canadian legal cannon for analysis; and examined the potential counterarguments that could lead the courts to not find in the detainee's favour.

This case has the potential to challenge key aspects of Charter jurisprudence including the use of the Charter outside Canadian soil, the expansion of positive-rights discourse, and the need to balance Canada's anti-terrorism agenda with the individual Charter rights and protections enjoyed by citizens. Although this paper is limited by a lack of information pertaining to the individuals involved, there does appear to be strong evidence that the non-actions of the Canadian state constitute a violation of the detainees' section 7 Charter rights. I base this prediction on landmark Charter cases that share key elements with the case the media has dubbed "Bring Our Canadians Home."

Case Background and Choice of Section 7

The challenge to the Canadian government's refusal to repatriate is being brought by Lawrence Greenspon, who in 2020 won a case that led to the repatriation of "Amira"—a five-year old Canadian orphan stranded in a Syrian detention camp. In 2020, Amira was the only Canadian removed from Syria by the Canadian government and according to Prime Minister Justin Trudeau, the state has no plans to offer assistance to any of the Canadians remaining in detention. In a statement from October 2020, Trudeau stated that "Amira's case [is] exceptional because she was orphaned" and that "no other operations of the sort" are in progress (Coletta

2020). Since then, a group of the detainees' relatives have retained Greenspon to bring the remaining Canadians and their children back to Canada. The Greenspon case concerns approximately 35 individuals held in the Roj and al-Hol detention camps in Northeastern Syria (Glavin 2021). Alexandra Bain, founder of Families Against Violent Extremism, plans to bring a similar case before the Canadian courts on behalf of 26 other Canadians also scattered between the two camps (Farooq 2021). It is unclear whether Bain's case has come before any Canadian courts yet or whether it overlaps with individuals from the Greenspon case. The detained individuals and their families have remained anonymous to protect their safety and privacy. At least forty other Canadians have been imprisoned in Syrian detention camps, although estimates are difficult to verify. As of October 2022, the Canadian government has repatriated only an additional two women and two children. Hearings for repatriating other Canadians detained in Syria are set for December 2022, but Canadian officials have indicated that repatriation efforts are currently limited to those with severe illness (Mazigh and Neve, 2022; Fine, 2022).

Challenges arguing for repatriation will most likely invoke section 7 of the Charter and as a result, s.7 is this paper's main focus. MacIvor (2013) provides a succinct summary of s.7, stating that it prohibits "any law or government action that threatens life, liberty or physical security" and it is "sufficient to prove that any one of the three is infringed" to bring a challenge. This paper foregoes discussion of section 1 of the Charter because the cases in question concern a government action (or inaction) as opposed to a bill or law. Hence, the Oakes Test's justification for limiting a Charter right is not relevant. Though section 15 provisions for equal rights may also be relevant in detainee repatriation cases, there is insufficient precedent to apply due process rights outside Canadian soil. Section 7 has a wider scope than s. 15 and provides the strongest basis for a challenge to the state's inaction on behalf of the detainees.

Contributions and Literature Review

The foreign fighter phenomenon will continue to involve the Canadian state and Canadian citizens. The UN Office on Drugs and Crime identifies the growth in the number of foreign fighters as "unprecedented" and anticipates "a significant threat to peace and security" in their home countries if the problem is not effectively dealt with (UNODC, para. 1-3); Canada needs to determine how its legal apparatus will handle this ever-growing crisis and it is inevitable that the Charter will be involved in questions of balance between freedom and security. This paper aims to create a foundation for assessing foreign fighter repatriation under s. 7.

Because Canadian participation in Islamist militarism is a unique and developing phenomenon, there is relatively little academic literature on the subject. Even less has been published on its relationship with the Charter. Academic discourses on the repatriation of Canadian militants have tended to be moral and ethical debates rather than legal ones. Govier and Boutland (2020) consider various strategies for re-entry into Canadian society in "Dilemmas Regarding

Returning ISIS Fighters". This paper assumes that the detainees will be successfully repatriated but does not examine the role of the Charter in repatriation. Govier and Boutland claim that "to take away citizenship, or leave citizens exposed to hasty trials in harsh circumstances outside the country [would] deny rights" but make no direct reference to the Charter (2020, 99). Yet as the primary source of Canadians' rights, their thesis implies reference to the Charter. International obligations also feature frequently as a central question of the existing works on the topic. West et al. (2019) urge the Canadian state to take responsibility for citizens radicalized on Canadian soil and cites the failure of the Canadian security apparatus to honour its international security commitments by preventing these individuals from leaving the country. The article goes on to argue that to refuse to take action on repatriation is "to shirk [Canada's] responsibility as a nation" (West et al., 2019). Once again, the authors do not make direct reference to Charter but assert that there is sufficient precedent for the inclusion of international laws, norms, and objectives to support Charter challenges. This is especially important given the lack of precedent in cases arguing for the repatriation of Canadian militants.

A more substantial body of work that applies here is literature which explores an expanded definition of s. 7 in a more general fashion. Of particular importance is the question of positive rights, which remains a heavily contested topic within the cannon of Charter scholarship. Latimer's (2014) piece concerning the rights of children suggests expanding s. 7. She argues that "the unique nature of children and their relation to the state as well as Canadian laws and jurisprudence support recognition of positive rights [...] under section 7 of the Charter" (Latimer, 2014, 544). This piece examines an aspect of s. 7 that may be interpreted to confer positive rights on certain groups—specifically, children. Although not all detained Canadian citizens are children, Latimer's contribution is relevant because it expands possible interpretations of s. 7 when it comes to predicting the outcome of foreign fighter cases. It is worth noting that many of the Canadians detained overseas are children whose rights must be considered uniquely in light of their age (Mazigh & Neve, 2022).

Michael Da Silva explores the potential for positive rights recognition in the future in a paper examining the current status of positive rights in ss. 7, 12, and 15 of the Charter. Da Silva writes that positive rights are currently not conferred by these sections but that "new legislative and social facts, like changes in transnational law and expert or public opinion on relevant issues" could lead to the overruling of this precedent (Da Silva, 2021, 13). MacIvor's work on the definition of s. 7 offers one of the most salient reasons for the courts to find in favour of ordering repatriation by asserting that "as long as the claimant can establish a causal connection between our government's participation and the deprivation ultimately affected the guarantees of section 7 may apply to the actions of a foreign power" (MacIvor, 2013). The government of Canada is not keeping the detainees indefinitely imprisoned in unsafe and unhealthy conditions, but the state's lack of concrete action has prevented fighters from leaving

making the government of Canada ultimately responsible for the s. 7 violations that have resulted from prolonged incarceration in the detention camps. Conversely, MacIvor also states that s. 7 does "not impose positive duties on the state" despite the works mentioned above which do not negate the possibility of positive s. 7 rights under certain circumstances or more broadly at some point in the future (MacIvor 2013, 132).

Case Selection

MacIvor's legal text (2013) sets out a clear precedent for the use of s. 7 as it applies to the actions of or in a foreign state. The Canadian government is not committing actions that harm the Canadians detained in the camps but their lack of willingness to repatriate has prolonged the detention and suffering of the detainees, therein causing indirect harm. Their refusal to reclaim their citizens is the causal connection that MacIvor states is necessary to invoke s. 7. There are a number of key Canadian legal cases that back up MacIvor's assertion, including *Bedford* (2013), *Suresh* (2002), and *Hape* (2007). These cases were selected for analysis based on shared characteristics to the Greenspon case, including a consideration of positive rights, the use of s. 7, the involvement of Canada's international obligations and its anti-terrorism regime, and a discussion of indirect harm caused by state action. As there is no perfect precedent, not all of the analyzed cases feature every element listed. If these cases only supported Charter application to direct government action or if no precedent for positive s. 7 rights could be found, this paper's thesis would be disproven. In other words, the government's failure to repatriate would not violate s. 7 rights.

Section 7 Rights Violations

The conditions in the camps violate all three of the detained individuals' s. 7 rights. Human Rights Watch reports that the conditions in the two camps are unfit for human habitation. The report cites severe overcrowding, inadequate shelter from the elements, rapid and uncontrolled spread of disease, and a lack of sanitation and water management to the extent that sleeping areas have been flooded with waste. The Kurdish Red Crescent has also reported the deaths of over 400 people in the larger al-Hol camp, many of whom died from "preventable diseases" (Human Rights Watch, 2020). These conditions violate Canadian detainees' rights to personal security and even to the most basic human right to life.

The Amira case illustrates the extent of the camps' squalid conditions. Overcrowding combined with a lack of even rudimentary medical resources and sanitation infrastructure create severe health risks. The camp's impact on Amira's body was evident upon her release, at which time "her cheeks were so swollen from an untreated tooth infection that she couldn't close her mouth" (Coletta, 2020). Detainees are also at risk of emotional and psychological harm. One woman living in the women's camp detailed her physical and mental deterioration as a result of detention. In a letter to a Canadian relative, she wrote that "this place guarantees you lost your sanity, your dignity, your humanity one way or another…It's exhausting trying to protect myself

all day, all night. I can't do it anymore" (Somos 2021). Lack of sanitation and poor living conditions are not the only threats to the security and lives of the detained Canadians. In a separate report, Human Rights Watch details an interview with one of the women who described being raped and threatened with "an ISIS 'kill list' for not supporting the group" (2020). The squalid conditions and threats of ISIS retaliation is akin to both physical and psychological torture. The precedent cases discussed below will make clear that the Canadian state bears some level of responsibility for the duration of the rights violations. By allowing the detainees to remain in unsafe conditions, the Canadian state is in clear and direct violation of its Charter obligations, and I argue that when the Greenspon case or another like it makes to court, that the Canadian legal system will find in their favour and order the repatriation of the Canadian citizens from the camps in Northern Syria.

Legal Analysis

Bedford

Canada v. Bedford (2013) provides a strong precedent for government culpability in the case of harm caused by indirect government actions. In this case, the court ruled that government restrictions on prostitution violated sex workers' right to security of the person because "while it is ultimately the client who inflicts violence upon a prostitute … the law plays a sufficient contributory role in preventing a prostitute from taking steps that could reduce the risk of such violence" (2013 SCC 72, at para. 18). There is a parallel here to the repatriation cases. The state caused indirect harm to sex workers through prostitution laws just as the state is causing indirect harm to the detainees by refusing to repatriate them. Although the Canadian government did not imprison Canadians in Syrian detention camps or create the camps' inhumane conditions, its lack of actions which has kept Canadians there and thereby allowed violations of Charter rights and human rights. The important difference between *Bedford* and the repatriation cases is that the former caused indirect harm through action, while the latter caused indirect harm through inaction. Yet this does not negate the similarities to *Bedford*, making it plausible that the court would rule the same way as they did in that landmark case.

Bedford also sets precedent regarding the "actions have consequences" argument that has appeared in various news articles concerning the case. This argument posits that since these citizens left of their own free will to take part in terrorist activities, they have thus waived any protections the Charter may have offered them had they remained in Canada. This argument appears in *Malmo-Levine*, where it the Court stated that "lifestyle choices [are] not constitutionally protected" (2003 SCC 74). Some argue that joining ISIS falls under the "lifestyle choice" argument and thus, the detainees have voided their rights to Charter protections. The same argument was brought up during the *Bedford* case; the Crown argued that prostitution is a lifestyle choice that voids Charter protections because it is inherently dangerous. The justices did not accept this reasoning as "realistically, while [prostitutes] may retain some minimal

power of choice …these are not people who can be said to be truly 'choosing' a risky line of business" (2013 SCC 72, 2013). According to the sister of one of the detained Canadians, the fighter in question was coerced and brainwashed into both joining ISIS and leaving Canada while "suffering from post-traumatic stress and facing other challenges" (Blanchfield 2021). Cult indoctrination makes the case of detainees more similar to *Bedford* than to *Malmo-Levine*. Although this would be difficult to prove as long as the woman remains in Syria, Alexandra Bain describes the detainees as "victims of a bizarre cult" (Farooq 2021). Because coercion, psychological manipulation, and intimidation are likely in this scenario I believe the courts would apply the logic of *Bedford* to at least some of the detained Canadians and extend s. 7 protections to them.

An additional issue is the children in the camps, who are unable to choose the circumstances in which they now find themselves. Latimer (2014) argues that "recognition of positive rights for children, even where claims for such rights may have failed for adults in the past, is consistent with Canada's legal/political traditions, current laws, and jurisprudence" (538). There are children detained, as well individuals who were likely restricted in their choices to leave Canada and join the group. There is no way of determining who left of their own free will and who was coerced unless a fair trial is brought against all of the detainees. This trial cannot happen without repatriation. Human Rights Watch's report termed this a form of collective punishment—a condition forbidden by international law and a violation of basic human rights (Human Rights Watch, 2020). This is not an action in accordance with the "principles of fundamental justice" detailed in the text of s. 7, and thus strengthens the case for ordering repatriation on the grounds of s. 7 Charter violations.

Suresh

A case containing many of the key elements present in the case of the ISIS detainees is *Suresh v. Canada* (2002). This case centered around the potential deportation of an individual with refugee status who was denied citizenship on the grounds of association with a terrorist organization. *Suresh* is a key precedent for the case of the ISIS detainees, as both cases share two key elements: overseas detention and the presence of a terrorist organization. This does not mean that major differences like the 'deportation to' versus 'repatriation from' situations of rights violations should be ignored.

Although there is scope for positive rights recognition in the interpretation of s. 7, the ruling in *Suresh* concerned a negative right that is more germane to the Court's purview. What *Suresh* does for the current case is establish that "that the guarantee of fundamental justice applies even to deprivations of life, liberty or security effected by actors other than our [Canadian] government, if there is a sufficient causal connection between our government's participation and the deprivation ultimately affected" (2002 SCC 1, at para. 54). In other words, *Suresh* establishes that the Canadian government has a responsibility under the Charter for what may

happen to its citizens at the hands of a foreign government or on the soil of a foreign country, as long as the Canadian state played a role in placing them there. In the *Suresh* ruling, this principle was used to keep *Suresh* in the country on the grounds that he would likely face torture if extradited. Because the Canadian government would be the entity responsible for placing him in the situation where torture was likely, the state would bear responsibility despite not directly causing him harm. This is an important principle to consider in this case; the Canadian government did not force the former ISIS fighters to leave Canada, but without the interference of the Canadian state they cannot leave the situation in which their rights are being violated. Even before *Suresh*, *R. v. Cook* (1998) affirmed the need for Charter protections to not be constrained by Canada's physical borders stating that "the Charter can in certain limited and rare circumstances apply beyond Canada's territorial boundaries" (R. v. Cook 1998). As in *Suresh*, Canada's national security and anti-terrorism regime are embedded in the facts of this case. The courts will have to consider the implications of repatriation in the context of collective security, but the precedent set in *Suresh* is that collective security is not worth sacrificing collective values. The final judgement in *Suresh* reads "in the end, it would be a pyrrhic victory if terrorism were defeated at the cost of sacrificing our commitment to those [Charter] values" (2002 SCC 1, at para. 4). In other words, the court has previously placed Charter rights at the forefront of the discussion when it comes to balancing individual and collective security. While the state would have to carefully consider the security implications of repatriation, the judgement in *Suresh* makes it clear that simply ignoring the detained individuals and refusing to consider their rights is not an acceptable solution.

Hape

A final case worth considering as a piece of key precedent is *R. v. Hape* (2007). Like our previous cases, *Hape* suggests that the courts may find in favour of a s. 7 Charter challenge in the repatriation cases. There are numerous reports from Human Rights Watch suggesting that Canada is shirking its international duties in its inaction on behalf of its detained citizens. In *Hape*, the Supreme Court found that "in interpreting the scope of application of the Charter, a court should seek to ensure compliance with Canada's binding obligations under international law" (2007 SCC 26, para. 56). Conditions in the camps violate various international human rights statutes to which Canada is signatory, which should lend weight to a Charter challenge. For example, Canada is a signatory to the UN Convention on the Rights of the Child which entitles all children to "the provision of adequate nutritious foods and clean drinking-water" (UNICEF 1990). As described above, the al-Hol and Roj camps lack these basic provisions. Camp conditions also violate other UN statutes designed to protect all imprisoned persons (UNHCR 1988). The violation of domestic and international norms is likely to sway the courts towards a ruling in favour of the Charter challenge. *Hape* also makes it clear that an overseas violation of rights does not mean the government of Canada is not implicated; "deference to foreign law," the judgement reads, "ends where clear violations of international law and fundamental justice

begin" (2007 SCC 26). This adherence to international norms is reaffirmed in *Suresh*, where the justices in this case maintain that their inquiry into the principles of fundamental justice in the text of s. 7 was informed by Canada's international obligations. This body of jurisprudence means that the Charter should not be considered in a vacuum and that "a complete understanding of the Act and the Charter requires consideration of the international perspective" (2002 SCC 1).

Counterarguments and Limitations

As repatriation is a positive right, the question of whether section 7 can be interpreted this way is a central one and a potential pitfall for the Greenspon case. Global Affairs Canada has stated their views in their Framework to Evaluate the Provision of Extraordinary Assistance, stating that "the government of Canada has no positive rights obligations under domestic and international law to provide consular assistance, including repatriation" (Public Safety Canada 2019). This is unsurprising considering that most of the Charter is based on negative rights. The courts have also proven reluctant to rule in favour of positive rights, but there is a small body of precedent suggesting that s. 7 positive rights could soon have their day in court. Case in point, *Gosselin v. Quebec* (2002) denied the positive application of s. 7 in 2002, but this case did not deny the potential for a positive interpretation in the future. One of the justices in that case opined that "one day s. 7 may be interpreted to include positive obligations," and that "it would be a mistake to regard s. 7 as frozen, or its content as having been exhaustively defined" (2002 SCC 84). This case further affirmed a potentially positive future for s. 7, detailing a need for the courts to remain flexible in their interpretations of s. 7 in future cases. (2002 SCC 84, at para. 82). Commenting on the continued evolution of this Charter section, Da Silva writes that "the 'door' to positive rights recognition remains 'slightly ajar'" (Da Silva 2021, 667). This jurisprudence and academic literature analysis suggest that the Courts may accept a s.7 challenge based on positive rights in the cases of the detained Canadian foreign fights.

Despite the Court's potential openness to positive rights cases, there are still some significant counterarguments that could lead rulings against my predicted outcome. The strongest of these is the principle that international relations are typically the exclusive domain of the executive branch of the Canadian government. Diplomatic relations, or a lack thereof, with any government entity in Syria has been cited by the Canadian government as a major reason for the lack of action in the case of the detained Canadians. In a report released on the ISIS fighters detained overseas, Global Affairs Canada stated that "in certain locations such as countries without permanent consular staff or with a complex security situation, GAC's ability to provide basic consular services could be severely limited. This currently holds true for the case in Syria." (Public Safety Canada, 2019). Trudeau has also remarked on the situation, citing a lack of Canadian diplomats on the ground as the reason more repatriation efforts are not being launched. In an interview with CBC News, he said, "while there are countries that have

diplomats on the ground in Syria, Canada is not one of them" (Levitz, 2020). Several news outlets covering the Greenspon case have been extremely critical of this stance, but international diplomacy in Canada is generally considered the sole domain of the executive. The courts have been very hesitant to become involved in consular relations in the past, such as in the case of Omar Khadr. It is beyond the scope of this paper to examine the relationship of the Charter and Canadian diplomatic relations, or the courts' role in this relationship. However, the Charter does not exist in a vacuum and despite the strong Charter support for government intervention, the current lack of diplomatic relations may override a Charter challenge.

There is also the potential revival of the controversial Bill C-24, which may have the power to override a Charter challenge in the case of the ISIS detainees. This bill was passed by Stephen Harper's government and included a provision to revoke the citizenship of dual citizens if serious crimes have been committed. Affiliation with a known terrorist organization would fall under this category, and at least one of the detained women is confirmed to hold dual citizenship (Human Rights Watch, 2020). If the detainees were no longer considered Canadian citizens, any Charter case would become significantly weaker. There is some precedent for non-citizen Charter applications, but these occur exclusively on Canadian soil. The Trudeau government partially repealed Bill C-24 and is unlikely to reinstate it. As part of his "a Canadian is a Canadian is a Canadian" critique of the bill, Trudeau said that he opposed "mak[ing] citizenship for some Canadians conditional on good behavior, [because] you devalue citizenship for everyone" (Vice News 2015). This does not preclude the possibility of a future government reinstating legislation of this kind. In such a scenario, the courts may point to a bill like C-24 to remove Charter responsibility from the Canadian government. Further research would be required in order to determine if a reinstated Bill C-24 would be compatible with the Charter.

A limitation of this paper is lack of information concerning the detained individuals. The analysis cannot consider how the particulars of each case may affect Charter challenges and therefore, its conclusions may not be relevant to all foreign fighter cases. As more information becomes available, scholars can undertake more specific predictions. This paper is overall restricted by a lack of specific information about the camps and the individuals involved in both Syria and Canada. These details are not publicly available to protect those involved. This case is also complex and will inevitably involve many Canadian legal codes beyond the Charter, such as the Criminal Code. Due to the scope of this project, I have had to consider only the Charter, but there is no doubt that this is to the exclusion of documents and legal procedures that may lead the court to rule very differently than the way that I have predicted based on my Charter-narrowed perspective. Although I have tried to find and analyse the cases that are the most important to an understanding of Section 7 and its possible interpretations, it would be impossible for a paper of this length to read and consider every s. 7 case to pass through the Canadian court system. For this reason, it is possible that there is a body of precedent that has been excluded from this analysis.

Conclusion

Despite these shortcomings, there is a strong body of Section 7 Charter jurisprudence that suggests that the Canadian government's inaction in the case of the Canadian former ISIS fighters is a violation of their Charter rights. An analysis of s. 7 case law has provided evidence that s. 7 protects Canadians from harm caused by indirect government action, places a burden on the state to protect its citizens overseas and from the hands of foreign governments and has the potential to more broadly confer positive rights. The examined cases also illustrate the importance of considering international law and context in the judgement of Charter cases. The Charter must be treated as an ever-evolving document as the Canadian state and its legal apparatus confront an increasingly globalized world. What remains to be seen is whether the predicted judgement of this paper will come to pass and if Canada will ever "Bring Our Canadians Home".

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