

CANADA / JUDGMENT

# Further Detention of Things Seized (Re)

2025 BCSC 1442

## COURT

Supreme Court of British Columbia

## DECIDED

28 July 2025

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2025 BCSC 1442 Further Detention of Things Seized (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Further Detention of Things Seized (Re),

2025 BCSC 1442

Date: 20250728

Docket: 37925

Registry: Vancouver

In the Matter of an Application for s. 490 of the Criminal Code for

Further Detention of Things Seized

Before: The Honourable Justice Basran

Reasons for Judgment

The Crown:

No appearance at this hearing

Counsel for Lifei Wang:

Z. Fang

Counsel for Attorney General of Canada on behalf of the Royal Canadian Mounted Police:

K. Shelley

P. Shyba

Place and Date of Hearing:

Vancouver, B.C.

May 28, 2025

Place and Date of Judgment:

Vancouver, B.C.

July 28, 2025

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## Introduction

- [1] On April 4, 2024, a black Mercedes-Benz GLS 450 (the "Mercedes") collided with a tree in Richmond, British Columbia. Lifei Wang was the sole occupant of the vehicle.
- [2] The Royal Canadian Mounted Police ("RCMP") opened an investigation to assess whether Ms. Wang was dangerously operating a motor vehicle, contrary to s. 320.13(1) of the Criminal Code, R.S.C., 1985, c. C-46, and/or whether Ms. Wang was operating a motor vehicle while impaired, contrary to s. 320.14(1)(a) of the Criminal Code. The RCMP's investigation is ongoing.
- [3] As part of their investigation, the RCMP seized the Event Data Recorder ("EDR") from Ms. Wang's Mercedes and subsequently extracted data from it. The physical EDR has since been returned to Ms. Wang. However, the RCMP retained the extracted data and wishes to continue retaining it to assist in their ongoing investigative efforts.
- [4] Accordingly, the RCMP brought an application before this Court. The RCMP submits that they are entitled to retain the extracted EDR data, without a court order, as the extracted data constitutes a copy which was created pursuant to s. 490(13) of the Criminal Code. If the Court does not accede to this position, the RCMP requests an order of further detention of the extracted data until September 23, 2025, pursuant to s. 490(3) of the Criminal Code.

- [5] In the RCMP's view, the underlying issue before the Court is whether data is a "document" for the purposes of s. 490(13). If data is a document, the RCMP argues that s. 490(13) of the Criminal Code presumptively entitles them to create an electronic copy of seized digital data and then retain that electronic copy indefinitely, without judicial supervision.

## Background Facts

- [6] On May 6, 2024, Constable Sidhu applied for a Production Order to obtain Ms. Wang's medical records from Vancouver General Hospital. On June 12, 2024, Cst. Sidhu learned that Ms. Wang's blood alcohol content at the time of the collision was between 225mg and 265 mg of alcohol in 100 milliliters of blood.
- [7] Also on May 6, 2024, the RCMP applied for a search warrant for, among other things, the data contained on the EDR.
- [8] On May 7, 2024, the RCMP obtained the warrant authorizing a search of the Mercedes. Pursuant to this warrant, on May 16, 2024, the RCMP seized the EDR from the Mercedes.
- [9] On May 23, 2024, the RCMP extracted the data from the Mercedes' EDR to an RCMP computer.
- [10] On June 13, 2024, Cst. Sidhu filed a Form 5.2 Report to a Justice of the Peace, reporting the seizure of the EDR Data.
- [11] A Return Order was obtained to return the physical EDR to Ms. Wang.
- [12] As of January 29, 2025, all of the physical items seized from the Mercedes, including the EDR, have been returned to Ms. Wang.
- [13] An initial review of the EDR Data indicates that the Mercedes' speed prior to the collision was 143 km/h, the driver was unbelted, and did not brake prior to the collision. Subsequently, a comprehensive 95-page report provided detailed information regarding the pre-impact speed, the collision, and the sequence of events. The Crown submits that the RCMP requires further time to prepare a report to Crown Counsel and for charge assessment by Crown Counsel.

## Issues

- [14] The issues are:
- Whether the EDR Data is a document that can be copied, as contemplated by s. 490(13) of the Criminal Code; and
  - If the EDR Data is subject to the s. 490 regime, is an order of further detention warranted?

## Legal Principles

- [15] Sections 489.1 and 490 of the Criminal Code set out a comprehensive legislative scheme governing the return or judicial processing and supervision of things seized by the state: *R v. Bottomley*, 2022 BCSC 2192 at para. 33.
- [16] Section 489.1(1) requires that if a peace officer seizes a thing, the peace officer must either (1) return the thing seized and report the seizure to a justice or (2) bring the seized thing before a justice. In either case, the items seized must be reported to the court using the prescribed Form 5.2 Report to a Justice.
- [17] Once the detained item has been brought before the court, s. 490 mandates ongoing judicial supervision over the things seized. Depending on the circumstances, a judge may either order that the thing be return to its lawful owner or order the further detention of the thing seized.
- [18] The Crown seeks to rely on s. 490(13), which provides:
- (13) The Attorney General, the prosecutor or the peace officer or other person having custody of a document seized may, before bringing it before a justice or complying with an order that the document be returned, forfeited or otherwise dealt with under subsection (1), (9) or (11), make or cause to be made, and may retain, a copy of the document.
- [19] The application of the s. 490 regime to electronic data is unsettled nationally. However, in British Columbia, it is settled law that data is a "thing" for the purposes of ss. 489.1 and 490 of the Criminal Code. Consequently, data that is seized by the police must be brought before a justice using a Form 5.2 Report.
- [20] The recognition that data is a "thing" began in *R. v. Craig*, 2016 BCCA 154. In that case, the accused was convicted of a number of counts related to sexual interference with, and sexual assault of, a minor. The accused appealed his conviction on several grounds, including by asserting that the police had violated his reasonable expectation of privacy when they seized messages from a third-party social media site which depicted conversations between himself and the victim, but failed to file a Form 5.2 Report disclosing the seizure of these messages.
- [21] The Court of Appeal found that the accused had a reasonable expectation of privacy in the online messages, even though a third-party social media company held the messages. Consequently, it determined that the accused's s. 8 Charter rights had been violated "because of the failure to file a Form 5.2 Report, the number of items that were seized outside the scope of the warrant, the modification of the warrant, and the seizure of items after the warrant expired": at para. 184.
- [22] In their ruling, the Court of Appeal also recognized that the owner of a thing seized has both a proprietary interest in the physical item and an ongoing privacy interest. It also noted that this ongoing privacy interest is implicated when the police extract data from a digital device:

- [180] Once goods or things are seized, the invasion of privacy rights does not end. They will likely be examined or further searches conducted. For example the contents of a computer or cell phone may be extracted; the things seized may be forensically tested for DNA, fingerprints, alcohol or drug content; the things seized may be copied, and financial documents may be audited. The privacy rights of a person connected to the seized items may be significantly engaged after the search itself has concluded.
- [181] The Charter protects against unreasonable search or seizure. In my view, a seizure does not end with the picking up of things. The requirement for a return to a justice is the ongoing judicial supervision of things seized--both under a warrant, pursuant to a warrantless search, and pursuant to a common law search: [R. v.] Backhouse. [(2005), 194 C.C.C. (3d) 1 (Ont. C.A.)] This is the only public record of what was in fact seized, whether the items were named in the warrant, whether they were seized as found in plain view, and what was seized outside of a warrant. As noted, there can be a significant invasion of privacy after the picking up of the items--including DNA testing, forensic testing, copying and other examinations. Thus, the privacy interests are continuing.
- [Emphasis added.]
- [23] The recognition of the residual privacy interest in seized items, including in extracted data, was then applied by Justice Duncan in R. v. T., 2022 BCSC 344 (unreported) [R. v. T. #1]. In this case, the police seized a number of items, including electronic devices, from the accused's residence. Not all of the electronic devices belonged to the accused. It was assumed that the accused did not have a reasonable expectation of privacy under s. 8 of the Charter in the electronic devices that did not belong to him.
- [24] The police proceeded to extract data from the electronic devices but failed to file a Form 5.2 Report about the extracted electronic data. Consequently, the accused asserted that the police's failure to bring the extracted data before a justice amounted to an abuse of process, in violation of his s. 7 Charter rights. The police asserted that while the physical electronic devices were subject to the reporting and return requirements under ss. 489.1 and 490 of the Criminal Code, the extracted data was not.
- [25] Justice Duncan concluded that extracted data was a "thing" for the purposes of ss. 489.1 and 490 and, therefore, that the police were required to file a Form 5.2 Report for the data which was extracted from the electronic devices. The following comments are noteworthy:
- [113] Another issue arises with the extraction of data from an electronic device. The data actually remains on the device, while the extraction process results in a report. The owner of the device can apply, pursuant to s. 490, for the return of the phone, complete with the data. The question then arises: who is the owner of the extracted report?
- [114] [The Crown] maintained that the report "belongs" to the police, because it was created by their use of technology. I agree that this would likely be the result if the owner of the device applied under s. 490 for return of the data extraction report. In this light, data is a bit like a

cat in Schrodinger's thought experiment: simultaneously alive and not alive. The data on the electronic device is "alive" and the owner of the device is entitled to its return. The data reflected in the police extraction report is "not alive" and need not be returned to the owner of the device, because they have the original version of the data on the device.

[115] If nothing is to be returned to the owner of the electronic device, the process of requiring police to file a Form 5.2 Report may appear to put form over function, but Craig makes it clear that there has been a search and a corresponding invasion of privacy. The Form 5.2 Report "closes the circle" with the judicial justice who issued the warrant by reporting on whether the judicially authorized invasion of privacy obtained a result.

[ ]

[121] In summary, while ss. 489.1 and 490 are not the most clearly drafted sections when applied to the seizure of data. I am bound by the decision in Craig. The Court of Appeal extensively analyzed these sections and concluded that a form 5.2 Report is required for data extracted from electronic devices. As a result, I conclude that data is a thing for the purposes of ss. 498.1 and 490.

[26] Justice Duncan found that the failure to file the Form 5.2 Report constituted an abuse of process and, consequently, a breach of the accused's rights under s. 7 of the Charter.

[27] In any event, in another ruling, R. v. T., 2022 BCSC 887 (unpublished), Duncan J. found that the evidence should not be excluded under s. 24(1) of the Charter.

[28] Justice Duncan's decisions in R. v. T. were extensively referred to by Justice Devlin in R. v. Bottomley, 2022 BCSC 2192. In Bottomley, the police seized a number of items, including a cell phone, from the accused. The police obtained judicial authorization to search the devices but after extracting the data from the electronic devices, the police failed to file a Form 5.2 Report related to the extracted data.

[29] In Bottomley, Devlin J. reaffirmed that "extracted electronic data" is a "thing" for the purposes of the ss. 489 and 490 regime and, therefore, the extracted data must be reported and brought before the court via a Form 5.2 Report. This conclusion was based on her finding that, "the fruits of the forensic examinations--i.e., the extraction of data from the seized phones--constituted a 'seizure' given that the applicants clearly had ongoing privacy interests in the data": para. 47.

[30] Justice Devlin found that the police's failure to file a Form 5.2 Report for the extracted data breached the accused's reasonable expectation of privacy, contrary to the accused's s. 8 rights under the Charter, and constituted an abuse of process, contrary to s. 7 under the Charter.

- [31] The finding that the extraction of data is a seizure, coupled with the finding in *R. v. Vu*, 2013 SCC 60 that the police require a warrant to search a cell phone or computer leads to the logical inference that, in British Columbia, police are required to obtain a warrant to extract data from cell phones, computers, and analogous digital devices. This principle was recognized in *R. v. Gill*, 2021 BCSC 377, where Justice Masuhara reasoned:
- [127] In a similar vein, the Crown argued that even if a judge had ordered the return of the seized items, s. 490(13) would have allowed the Crown to copy and retain copies of the data on the seized devices. Section 490(13) allows for copying of seized documents prior to their return. In support of this argument, the Crown cites the determination in *R. v. Bromley*, 2002 BCSC 149, that the Crown could make and retain copies of "material printed from the imaged copies on the hard drive and copies of the harddrive" prior to returning the seized items in question: at para. 27. I am not persuaded by this argument. The process of extracting and copying data from digital source like a phone or surveillance system is a search. Pursuant to *R. v. Vu*, 2013, SCC 60, warrants are required for the search of a cell phone or computer. Thus, I do not find that the police could simply have copied the items in question under the authority of s. 490(13) without a search warrant.
- [Emphasis added.]
- [32] I note that most of the cases related to the copying of electronic data relates to cell phones, computers, or similar digital devices. In the wake of *Vu*, it is indisputable that the information contained on computers and cell phones engages an accused's reasonable expectation of privacy and, therefore, their s. 8 Charter rights. However, the same cannot be said for EDR data.
- [33] In British Columbia, the leading case on whether digital data from an automobile engages s. 8 rights under the Charter is *R. v. Fedan*, 2016 BCCA 26. In *Fedan*, the accused was charged with two counts of dangerous driving causing death. As part of the investigation, the police obtained a warrant authorizing the search of the vehicle. In the course of the search, the police removed the sensing diagnostic module ("SDM") from the vehicle and downloaded its data. Notably, the SDM was not listed on the warrant.
- [34] In *Fedan*, the SDM data was admitted at trial and the accused was found guilty of dangerous driving. The accused subsequently appealed his conviction, in part, by asserting that the warrantless removal, and the subsequent search and downloading of the SDM data violated his reasonable expectation of privacy, as protected by the accused's s. 8 rights under the Charter. He also argued that the data which was extracted from the SDM should not have been admitted into evidence due to this breach.
- [35] The Court of Appeal considered whether the accused had a reasonable expectation of privacy in the SDM data and concluded that he did not. Specifically, it noted:

- [77] The more difficult question is whether Mr. Fedan's presumed expectation of privacy in the SDM translates to an objectively reasonable expectation of privacy in its data. Context is important in this analysis.
- [78] There is a distinction to be made between the device and the data downloaded from the device. Mr. Fedan had a territorial privacy interest in the device; he claims to have an informational privacy interest in its data. With respect, I am unable to see how Mr. Fedan could have any residual territorial privacy interest in the SDM after the vehicle was lawfully seized or any informational privacy interest in the SDM data as, standing alone, the data provided no personal identifiers that could link Mr. Fedan to the captured data. He therefore had no reasonable expectation of privacy in the SDM or its data after the vehicle was lawfully seized.
- [ ]
- [81] Similarly, in this case, the data recovered by the SDM provided no personal information about Mr. Fedan. The captured information pertained only to the use of the vehicle in a five-second window of time before a deployment or near-deployment event. It did not capture any information that revealed intimate details of Mr. Fedan's biographical core, and in particular about who was driving the car. Further evidence had to be obtained to connect the driving of his vehicle to Mr. Fedan himself. In my view, Mr. Fedan's informational privacy interests were not engaged by the downloading of the SDM data.
- [82] Nor do I accept Mr. Fedan's analogy between the SDM and a personal computer or a "black box" and therefore do not find the reasoning in *Vu* to be applicable. As noted, the data recorded by the device did not extend to personal identifiers of the driver of the vehicle. Most significantly it contained no intimate details of the driver's biographical core, lifestyle or personal choices, or information that could be said to directly compromise his "dignity, integrity and autonomy" ([R. v.] *Plant*, [[1993] 3 S.C.R. 281 at 293).
- [36] Accordingly, because the Court of Appeal found that the accused did not have an informational privacy interest in the data contained in the SDM, it concluded that the accused's s. 8 Charter rights were not implicated when the police extracted the SDM's data.
- [37] In my view, SDM data is analogous to EDR data, so long as the data does not contain any personal identifiers. The SDM data in *Fedan* revealed the speed, throttle, and braking of the vehicle in the five seconds immediately before the collision. The EDR data in this case revealed that the Mercedes' speed prior to the collision and that the driver was unbelted, and did not brake prior to the collision. This data contains no personal identifiers that could be linked to Ms. Wang. The decision in *Fedan*, therefore, applies to this case and, consequently, there was no reasonable expectation of privacy in the Mercedes' EDR data.
- [38] *Fedan* has also been applied to EDR data in both *R. v. Attard*, 2024 ONCA 616 at paras. 64-69 and *R. v. Major*, 2022 SKCA 80 at para. 68-71, both of which concluded that there is no reasonable expectation of privacy in extracted EDR data.

- [39] While Fedan indicates that a person does not have a reasonable expectation of privacy in EDR data, so long as that data does not maintain any biographical information, it is possible that an accused's s. 7 Charter rights may still be implicated by the extraction of EDR data. Recall that in *R. v. T. #1*, the accused did not have a reasonable expectation of privacy in electronic devices that did not belong to him, but that, nevertheless, the police's failure to file a Form 5.2 Report was an abuse of process that violated his s. 7 Charter rights.
- [40] The decision in Fedan is grounded in the finding that EDR and SDM data does not include biographical information. Data which is seized from an automobile may still engage an individual's s. 8 Charter rights, if that data engages a privacy interest by, for example, revealing the driver of the vehicle or revealing details about the individual's biographical core, lifestyle, or personal choices.
- [41] Considering the above, the following principles emerge from British Columbia authorities:
- 1) Extracting data from an electronic device constitutes a seizure;
  - 2) If the electronic data engages an individual's privacy interest and, thus, their s. 8 Charter rights, the police are required to obtain a warrant prior to extracting the data. Consequently, the police must seek specific judicial authorization prior to extracting data from a computer or cell phone but are not required, assuming the SDM or EDR was lawfully seized, to obtain prior judicial authorization to extract SDM or EDR data;
  - 3) Regardless of whether the extracted data engages an individual's reasonable expectation of privacy, extracted data is a "thing" for the purposes of the ss. 489 and 490 regime; and
  - 4) The police are required to complete a Form 5.2 Report for extracted electronic data because data is a "thing". The failure to file such a report may constitute an abuse of process and violate s. 7 of the Charter.
- [42] I note that the law across Canada is not consistent. Both *R. v. Robinson*, 2021 ONSC 2446, and *R. v. Simmons*, 2024 ABKB 397, have found that extracted data does not need to be reported to a justice via a Form 5.2 Report. Simmons also implies that the police are entitled to extract data without specific judicial authorization. On this point, I echo the comments of Devlin J. in *Bottomley*, "[r]espectfully, I am not persuaded by Robinson because, among other things, I find the decision misapplied the holding in [*R. v.*] Nurse, [2019 ONCA 260]": para. 77.

## Discussion and Decision

Is the EDR Data a document that can be copied, as contemplated by s. 490(13) of the Criminal Code?

- [43] The RCMP submits that data is a "document" for the purposes of s. 490(13) and, that, consequently, s. 490(13) entitles them to extract the data from the seized EDR and retain the product of that extraction indefinitely, without judicial supervision.

- [44] For the RCMP's claim to succeed, this court would need to accept that: (i) the process of digital "extraction" is equivalent to the s. 490(13) statutory language which permits the making and retaining of "a copy of the document"; (ii) that the police are presumptively entitled to extract the data contained on seized digital devices; and (iii) that the police are entitled to retain the extracted electronic data indefinitely, beyond the scrutiny of judicial oversight. The caselaw does not support these positions.
- [45] I am convinced that s. 490(13) has no application to the extraction of digital data in the case before me. Section 490(13) authorizes the copying of a document. In my view, making a copy of a document is distinct from the process of extracting data from a digital device. The process of copying data creates a one-for-one replication of the data. The end product created by copying is an exact duplication of the data. Conversely, the process of extracting data involves turning the information contained on a digital device into desirable and usable information. The process of extracting may, therefore, involve filtering, aggregating, and/or re-formatting the data.
- [46] When the police seize a digital device and wish to retain a copy of the information that is contained therein, they must first extract the data. The extraction process may also allow the police to access meta data or other information that would not be immediately apparent from a physical assessment of the digital device. The recognition that the police undertake an extraction process has been a feature of the relevant authorities. For example, in *R. v. T #1*, the police argued that the extracted digital data in their possession was a "report" which belonged to the police, because it was created using police technology.
- [47] In order to create a "copy" of digital data, the police must first "extract" the data. This extraction process renders the data contained on digital devices usable and is not captured by the language of s. 490(13).
- [48] On this issue, the caselaw is clear: as a general rule, police are not presumptively entitled to extract digital data. If I were to accept the Crown's position on this point, I would be ignoring the appellate authorities which have determined that a warrant is needed to extract data from cell phones, computers, and analogous digital devices. In my view, such an interpretation would likely render s. 490(13) constitutionally vulnerable. Applying the appellate authority of *Vu and Craig*, I find that, where data engages an individual's reasonable expectation of privacy, the police are not presumptively entitled to extract data from digital devices.
- [49] Lastly, even where data does not engage a reasonable expectation of privacy, the police are, nevertheless, required to bring the extracted data before the courts. This is because, in British Columbia, extracted data is a "thing" which is captured by the ss. 489 and 490 regime and, therefore, must be brought under judicial supervision via a Form 5.2 Report. The failure to file a Form 5.2 Report may constitute an abuse of process, in violation of s. 7 Charter rights.

- [50] To borrow Duncan J.'s phrasing in *R. v. T.* #1, if I were to accept the Crown's position that extracted data could be retained beyond judicial scrutiny, extracted data would become a bit like the cat in Schrodinger's thought experiment: simultaneously alive and not alive: para. 114. The extracted data would be "alive" in that it is captured by the ss. 489 and 490 regime and the Form 5.2 Report reporting requirements and simultaneously "not alive" in that the police would be allowed to retain the data indefinitely beyond judicial supervision. Both cannot be true.
- [51] In my view, the filing of a Form 5.2 Report indefinitely brings an item under judicial supervision. On this point, I reiterate the remarks of the Ontario Court of Appeal in *R. v. Canary*, 2018 ONCA 304, which were also endorsed in *Bottomley*:
- [45] Section 489.1(1) applies to seizures made both with and without prior judicial authorization: *Backhouse*, at para. 111. The provision fulfills an important purpose, providing the gateway to s. 490 of the Criminal Code: *R. v. Garcia-Machado*, 2015 ONCA 569, 126 O.R. (3d) 737, at paras. 15, 55; *Backhouse*, at para. 112. Section 489.1 should not be conceptualized as a meaningless exercise in paperwork. Filing the initial report under s. 489.1(1) is the act that places the property within the purview of judicial oversight. It provides for a measure of police accountability when dealing with property seized pursuant to an exercise of police powers. This provides an important measure of protection to the party who is lawfully entitled to the property, but also provides a measure of protection to the police who become the custodians responsible for the property seized. Allowing for this type of oversight is particularly important in the wake of warrantless seizures, ones where no prior authorization has been given, meaning the seizures are beyond the knowledge of the judicial system.
- [Emphasis added.]
- [52] This finding also supports the underlying purposes of the s. 490 regime, which, as discussed in *Craig*, is not merely an administrative scheme designed to facilitate the return of seized property. Instead, the s. 490 regime is a mechanism that ensures ongoing judicial supervision of police conduct.
- [53] The s. 490 regime "favours judicial supervision. It is part of a scheme that includes s. 490 and that is designed to regulate state activity that interferes with privacy interests": *R. v. Backhouse*, 2005 CanLII 4937 (O.N.C.A.), 194 C.C.C. (3d) 1 at para. 110.
- [54] With an understanding that the regime favours judicial supervision, I note that once the extracted data is brought under judicial oversight, any subsequent "copies" of this data are also subject to judicial oversight. While the police may, as authorized by law, further extract, copy, or manipulate the data to further their investigation, s. 490(13) does not function to remove any subsequent duplications from judicial oversight. Allowing the police to utilize s. 490(13) as a loophole to remove data from judicial oversight would undermine the purpose of the reporting and supervisory regime.

- [55] In this case, in accordance with a warrant, the RCMP seized Ms. Wang's Mercedes. The RCMP then extracted the data from the EDR. The product of the RCMP's extraction process is not a "copy" and is not captured within the meaning of s. 490(13).
- [56] The RCMP were required to bring the extracted data under the supervision of the courts, via a Form 5.2 Report, which they prepared on April 9, 2024, and a Justice of the Peace signed it on April 15, 2024. In my view, the EDR data is subject to the s. 490 regime in the Criminal Code.

#### Is An Order of Further Detention Warranted?

- [57] In the alternative, the Crown requests an order of continuing detention, in accordance with s. 490(3) of the Criminal Code.
- [58] I am satisfied that an order for the further detention of the EDR data until September 23, 2025, is warranted. The investigation involves a reconstruction of events based on the EDR data, DNA analysis, and will therefore require a number of specialized experts. Accordingly, a relatively brief extension of several months is justified in the circumstances of this case.

"Basran J."

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