

# **ENDING VIOLENCE**

**Association of BC**

## **CONSULTATION ON THE VICTIMS' BILL OF RIGHTS** **Department of Justice Canada**

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# Overview

The Ending Violence Association of BC (EVA BC) was grateful for the opportunity to participate in the Federal Department of Justice Consultation on the proposed Victims' Bill of Rights in Vancouver on July 15, 2013. Please accept this written submission as part of the public consultation process.

EVA BC is an umbrella organization representing over 200 community-based anti-violence programs including Community Based Victim Services, Stopping the Violence Counselling Programs and Outreach Programs, Multicultural Outreach Programs and Sexual Assault/Woman Assault Centres. Programs coming under our umbrella provide critical advocacy and support services to survivors/victims of domestic violence, sexual assault, child sexual abuse and criminal harassment, (including surviving family member of related homicides). In addition to providing training, tools, analysis and best practises for these victim support programs across BC, we are also actively involved in training, policy development and law reform involving many sectors of the justice, child welfare, health and immigrant services sector. Our webpage is: [www.endingviolence.org](http://www.endingviolence.org).

As an organization directly involved with responding to crimes of violence against women and children, many of our comments on the proposed Victims' Bill of Rights will be focussed on the needs of domestic violence, sexual assault, child abuse and criminal harassment. It is our view that in the proposed Victims' Bill of Rights (VBR), particular attention must be paid to the needs of the most vulnerable victims, including highly traumatized victims. Articulating and addressing the needs of a victim of serious personal injury offences such as child sexual abuse, aggravated domestic or sexual assault, (including surviving family members of related homicides) will look different than addressing the needs of a victim of property crime. Nevertheless, it is our belief that if particularly vulnerable and traumatized victims are better served by the proposed Bill, that all victims will ultimately benefit.

There is an immediate need to address the underreporting of sexual offences and domestic violence in Canada. It is our experience at the field level, that a justice system response that provides domestic violence, sexual assault and child sexual abuse victims with adequate information, emotional support, advocacy services, and protection of victim privacy rights<sup>1</sup>, encourages reporting and greater witness engagement with the

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<sup>1</sup> Particularly with respect to sexual offences, the personal sexual and medical history of the victim has been used as a way of discrediting them as witnesses. (Cory, Ruebsaat, Hankivsky & DeChief, 2003; Ruebsaat, 1985; Stanley, 1985 ) While the Criminal Code has been amended to restrict these practices,

court process. The VBR must acknowledge the need for immediate access to specialized support services for highly traumatized victims. This will enhance the justice system's effectiveness and increase public confidence in that system.

The culture of the legal system is challenged by reforms that address victim empowerment and support. (Ad Hoc Federal-Provincial-Territorial Working Group Reviewing Spousal Abuse Policies and Legislation, 2003) While EVA BC supports the development of a national VBR, we also believe that in order to have real impact, the Bill must be accompanied by broader initiatives and support services designed to change the culture of the justice system and to make it more accessible to victims who have historically been marginalized<sup>2</sup>.

There is a great deal of inconsistency in terms of the availability of appropriate victim services in Canada, particularly in rural or remote regions. The VBR should set out minimum benchmarks or standards of victim services which would apply nationally. This may involve federal funding or cost sharing with the provinces/territories which have jurisdiction over the administration of justice.

The VBR initiative should not end with the passage of the legislation. The legislation should be the framework and driving force for a national discussion and active federal engagement with the provinces/territories regarding victims' rights and victim advocacy services. This would help Canada keep pace with existing global human rights standards.

## **RESPONSE TO CONSULTATION QUESTIONS**

### **1. What is the purpose of a Victims' Bill of Rights? What should be its relationship with other federal laws?**

#### **EVA BC Recommendations**

- 1.1 Victims must be included as an integral part of the criminal justice process.

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a *belief* that their personal history will be put on trial still contributes to victims reluctance to report these crimes. (Daylen, Harvey, & O'Toole, 2006)

<sup>2</sup> Marginalized refers to those groups who are particularly discriminated against and who are therefore especially vulnerable to the impacts of domestic violence or abuse and may have particular challenges in accessing services. These groups would include, but are not limited to: Aboriginal women; immigrant and refugee women; women with disabilities; LGBT women; poor women; geographically isolated women; women in the sex trade; and women who live on the street.

1.2 The VBR should lay out a combination of both service rights (to provide the victim with better treatment) and procedural rights (to provide the victim with more of a role in the criminal justice system decision making process). These rights can be grouped under the following themes: access/information, support/advocacy services, protection/safety, a voice, and timeliness.

1.3 Remedies should be available when rights have been breached. See response to question 6 below.

## **What should be the VBR's relationship with other federal laws?**

### **EVA BC Recommendations**

1.4 In addition to including enforceable rights, the VBR should lay out foundational principles to guide the interpretation and application of other related justice system policies and legislation, particularly police and Crown policies and the Criminal Code. The VBR should augment, rather than limit, any rights already included in provincial/territorial victims' legislation such as BC's Victims of Crime Act.

1.5 In terms of information to victims, certain VBR provisions we propose will affect the application of the Privacy Act s. 8(2)(b) [allows information sharing in accordance with any act of Parliament]. Also, our proposals regarding pro-active referral to victim services (including 'community based' victim services) may require an amendment or reinterpretation of the Privacy Act s. 8(2)(m)(i) [limits information sharing to situations where the head of the public body determines that the public interest in disclosure outweighs any invasion of privacy.]

## **2. What are the most important elements that could be recognized as rights in relation to:**

### **Information for victims**

#### **EVA BC Recommendations**

2.1 Victims need to be informed about how the system works so that they can make informed decisions about how they want to participate as the case proceeds. In California, victims are given a handout by police which lists victims' rights, relevant criminal justice system processes

and where they can access support (Marsy's Card [http://police.ucdavis.edu/documents/marsys\\_card.pdf](http://police.ucdavis.edu/documents/marsys_card.pdf)). Providing written information is a useful starting point. But many victims, particularly highly traumatized victims, will need immediate, skilled and competent emotional support before they can decide about their involvement with the legal process. Therefore, in addition to police providing the victim with written information about their rights, we recommend that for victims of serious personal injury offences such as a surviving family of homicide, sexual assault, domestic violence, and child sexual abuse, police should make pro-active referral<sup>3</sup> to community based victims' support services.

2.2 VBR provisions should facilitate *direct* police referrals to Specialized Community Based Victim Assistance Programs in serious personal injury cases such as domestic violence and sexual offences. This would reduce duplication of processes, allow police resources to be directed toward investigation, and most importantly, provide service in a timely manner, thereby increasing victim safety, cooperation in the justice process, and healing. It would also be consistent with a BC provincial policy which designates Specialized Community Based Victim Services programs as the appropriate victim service for victims of power based crimes.

2.3 With respect to information sharing, one of the guiding principles in the VBR should be that "life trumps privacy". In other words, safety for the victim should override privacy protections for the accused/offender where the risk is escalating or is already high. For example, in domestic violence situations there is often ongoing contact between victims and perpetrators. Research has shown that when victims try to leave their violent relationships and get help, the risks actually escalate, at least initially. To keep victims safe in these high risk contexts it is critical that they be given up to date information about the status of the accused/offender at regular intervals so they can work with involved agencies to develop and adapt their safety plans. Victims

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<sup>3</sup> Pro-active referral includes informing victims about specialized domestic violence/abuse victim services, offering to refer victims to these services, helping victims understand the value of the referral, pro-actively contacting the agency on their behalf, offering to accompany them or facilitate their access to the service, and following up to make sure they access the service. For some time, BC victim-service organizations have been advocating for a loosening of privacy restrictions in high risk domestic violence/abuse cases or a broader interpretation of existing privacy provisions to allow for pro-active referral. EVA BC's awareness of the urgent need for referral to specialized domestic violence victim support/advocacy services was heightened in the wake of a number of tragic domestic violence homicides in British Columbia. (Critical Components Project Team, 2008)

support workers also need more than the very basic information that is generally available to the public under the federal Privacy Act.

2.4 The VBR should include a statement that sharing risk-related information - such as the offender's criminal record, protective conditions, behaviour or programs attended in custody and/or date and place of release from custody - is a key aspect of safety planning for victims and for victim service providers who may also be at risk. (This is not an exhaustive list of information the victim and victim service providers may need. For further guidance on the type of information that should be shared, we recommend that the federal government consider the recommendations of the Office of the Federal Ombudsman for Victims of Crime contained in their June 2013 submission on the VBR.)

2.5 The VBR should provide that risk-related information be shared by justice personnel, both with the victim and among appropriate agencies, in a consistent and timely manner and in a form that is accessible to the particular victim. Accessibility of information would require that information be provided in the language of the victim and in formats that are accessible to all victims.

2.6 In order to satisfy Privacy Act s. 8(2)(b) requirements, the VBR should include a provision allowing risk-related information to be shared with the victim and with involved agencies so as to minimize risk, thus satisfying the guiding principle: "life trumps privacy".

2.7 Where victims believe that their VBR rights to information have been violated, they should have the right to make a formal complaint to the Office of the Federal Ombudsman for Victims of Crime.

**NOTE: Appendix One contains further background and a rationale for EVABC recommendations related to information sharing in the VBR.**

## **Participation by Victims in the Criminal Justice System**

### **EVA BC Recommendations**

2.8 The VBR should provide that the victim's immediate needs such as age, gender, possible disability, language issues, and maturity be

taken into account by all justice system and victim services personnel in the context of a criminal case.

2.9 The VBR must include a clear acknowledgement of the need for immediate access to specialized support services for highly traumatized victims of gender based crimes including victims of domestic violence/abuse and sexual offences.

2.10 Consistent with international developments in the area of victims' rights, the VBR should set out minimum benchmarks or standards of victim services which would apply nationally with a focus on the needs of highly traumatized victims<sup>4</sup>. The VBR should acknowledge that victim support is needed both in the immediate aftermath of the crime as well as over the long term. At present, services are inconsistent between provinces and territories and within provinces and territories. Access is particularly problematic in rural or remote areas. Specialized services for victims of sexual offences and domestic violence/assault, are particularly underresourced and have had funding cut in recent years.

2.11 The VBR should recognize victim services, including specialized community based victim services, as statutory services and provide for substantial sustained federal funding for NGOs through the Victims Fund in order to deliver much needed support services and community outreach, with an emphasis on rural and underserved areas of the country. Funded victim services must meet the needs of diverse victims including those who have historically been marginalized by the justice system. Appropriately meeting the needs of diverse victims requires services be provided in a culturally competent manner to: all Indigenous peoples including First Nations, Métis and Inuit; members of immigrant and refugee communities; people with disabilities; LGBT2S; poor women; geographically isolated women; women in the sex trade; and women who live on the street.

2.12 In high risk domestic and sexual violence cases, Crown decisions and submissions must be informed by up to date risk assessment

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<sup>4</sup> Directive 2012/29/EU of the European Parliament and the Council of 25 October 2012 establish minimum standards on the rights support and protection of victims and commits 27 European governments to providing information, support and assistance to all victims of crime.

information, including information provided by the victim either directly or through their support worker. This would include for example: a Crown decision to charge, Crown submissions on bail, Crown's position on bail variance applications, plea negotiations, preparation of pre-sentence reports and Crown submissions on sentence. This is critical in domestic violence/abuse and sexual offence cases where there is often ongoing contact between victim and perpetrator.

2.13 We agree with the VBR recommendation of the Canadian Resource Centre for Victims of Crime, that in serious personal injury cases, victims shall have the right to a review of a decision by police/Crown not to lay charges as well as to a review of a Crown decision not to prosecute. As the Resource Centre submission points out, this right to review is already available to victims in both England and other European Union states under EU Directive 2012/29.

2.14 The VBR should provide that victims of serious personal injury offences have a right to participate in legal processes. Also, where they have specific privacy rights or Charter rights at issue in a case, they should have their interests represented by independent counsel, especially in cases of sexual violence or gender based violence<sup>5</sup>. The VBR should provide for independent legal counsel (via legal aid programs in all provinces and territories) to these victims.

2.15 The federal government should adopt mechanisms for review to help ensure that criminal justice system personnel are accountable with regard to the victim's procedural rights under the VBR during the court process. One possible approach which would allow for judicial review without causing undue delay, is set out in the US Crime Victims Rights Act<sup>6</sup> (CVRA). We recommend that a writ of mandamus be used to allow victims to enforce their procedural rights in Canada.

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<sup>5</sup> BC's Victim's of Crime Act, for example, currently provides for victim representation in O'Connor applications for production of third party records containing the victim's personal information.

<sup>6</sup> Under this act, victims may apply to the district judge in the case that concerns them so that their rights are respected. If the judge refuses, then the victim can go to a higher court via a writ of mandamus. In doing this, they are no longer simply participants in the case but parties to the appeal. The court hearing the application must render a decision within 72 hours. American law explicitly states that non-compliance cannot give rise to a new trial so the victim's remedies are limited which prevents clogging of the system. If the victim's application is rejected then written reasons must be provided.

2.16 EVA BC agrees with the VBR recommendation of the Office of the Federal Ombudsman for Victims of Crime that victims should have the right to an individual assessment to determine their protection needs and, where needs are identified, victims should have the right to appropriate protection measures including testimonial aids. In domestic violence/abuse and sexual offence cases, the need to protect victims from secondary or repeat victimization is critical. In this context, victim protection measures should include things such as:

- Secure waiting areas separate from those of the accused and their family, witnesses and friends during court;
- Measures to prevent information that could lead to the identification of the child victim;
- Allowance for a support person to accompany the victim;
- Access to interviews conducted by a member of the same sex in cases involving gender-based violence;
- Denial of bail or imposition of specific conditions of bail release—such as no contact orders for defendants found to present a danger to the community, or to protect the safety of victims and/or witnesses;
- Measures to avoid visual contact between victims and the accused during testimony, including through the use of technology;
- Measures to ensure that the self representing accused does not cross examine the victim;
- Measures to ensure that the victim can be heard in the courtroom without being present, in particular through the use of appropriate communication technology and;
- Measures to protect the victim’s privacy and identity.

2.17 The VBR should reinforce the victim’s right to present a victim impact statement during sentencing. While the Criminal Code already includes provision for the use of victim impact statements, implementation is inconsistent.

2.18 EVA BC agrees with the recommendation of the Office of the Federal Ombudsman for Victims of Crime that victims be given the right to a speedy trial and a prompt and final conclusion of the case.

2.19 With regard to victim participation in the criminal justice system post-conviction and conditional release, EVA BC agrees with the following recommendations of the Office of the Federal Ombudsman for Victims of Crime:

- Victims shall have the presumptive right to attend parole hearings, except in cases where it may threaten the safety of an offender, individual or institution.
- Victims shall have the right to choose how they will attend a parole board hearing and/or present a victim statement, be it in person, by video or teleconference, via closed circuit television or through the use of other secure, reasonable and available technological means.
- Victims shall have access to safety and separate waiting areas apart from the offender and their family or support persons at any parole hearings or proceedings.
- Victims shall have the right to discuss release conditions and ensure that their views and safety concerns are considered before any conditional release decision is made.
- Victims shall have the right to attend Immigration Review Board<sup>7</sup> hearings, and to submit or read a statement for consideration.

### **Redress for Victims From Offenders**

2.20 EVA BC agrees with the VBR recommendation 5 of Canadian Resource Centre for Victims of Crime. As their submission states: victims suffer significant financial losses as a result of victimization and must be able to recover those losses directly from the offender, as well as access financial assistance from the state to help them with their recovery. Victims of domestic violence and sexual offences (including

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<sup>7</sup> As the federal Ombudsman's submission points out, criminality is a factor that the Immigration Review Board considers to determine whether someone should be deported. Victims should have the right to provide information for consideration in the deportation decision-making process.

surviving family members of related homicides) often suffer serious physical and psychological injuries, some of them lifelong. We agree with the Canadian Resource Centre that the VBR must standardize levels of financial assistance to ensure that all Canadians have equal access in their recovery and healing following violent victimization.

### **Protection for Victims**

2.21 While restorative justice services such as victim-offender mediation and family group conferencing can be of benefit in certain cases, they are not considered safe for victims of power based crimes such as domestic violence and sexual offences. Due to the risk of secondary and repeat victimization, the VBR should not endorse restorative justice or alternative measures in sexual offence or domestic violence/assault cases in the absence of evidence based research that such measures are safe for victims. (For further points on VBR measures to help protect victims, see also EVA BC recommendation 2.16 above.)

### **3. Are there particular points in the criminal justice process when these victim rights should be recognized?**

3.1 EVA BC recommends that in domestic violence and sexual offence cases, victim rights to information and participation must be made available at key points in the case where the potential for greater risk arises and the victim must be advised of these rights at the outset (see EVA BC recommendation 2.1). Key risk management events would include, for example: when legal documents such as civil protection orders are served on the perpetrator, after an arrest is made, before release of the accused either by police or the court, when release conditions are imposed by police or the court, before an application for bail variance is heard, before and during trial, before and during sentencing, before and during parole hearings.

### **4. Should any limitations be attached to the rights included within a Victims Bill of Rights?**

4.1 The higher the risk of repeat victimization, the greater need there will be for victim participation in the justice process and risk management

throughout the case. The higher the degree of personal trauma suffered by the victim, the greater the need for victim support services. Consistent with the European Directive, the VBR must acknowledge that victims of gender based violence and their children require specialized support and protection. The implementation of specific procedural or service rights in the VBR therefore, could be linked to the type of offence or the degree of trauma suffered by the victim. For example, some of the recommendations in this submission such as the right to a review of a Crown decision not to charge, or the right to independent counsel for the victim, only apply in serious personal injury cases. Similarly, the right to certain protective measures only apply after an individual victim assessment.

**5. Should victims of crime have the right to have legal counsel appear on their behalf to assert their rights in criminal proceedings?**

See EVA BC recommendation 2.14

**6. What remedies could be available for a victim following a breach of their right? What should be the impact of a remedy on a validity of a decision or proceedings?**

6.1 Where victims believe that justice system personnel have not complied with VBR rights to information, or where victims believe that the minimum standards of support services have not been satisfied, they should have the right to make a formal complaint to the Office of the Federal Ombudsman for Victims of Crime.

6.2 Where victims believe that their procedural rights during the judicial process have been violated, EVA BC recommends that the VBR allow for a motion for mandamus which, if successful, would allow the court to make an order directing certain remedial steps be taken by those whose actions were found not to be in compliance with the VBR (for more detail, see EVA BC recommendation 2.14).

6.3 See also EVA BC recommendations 2.13 and 2.14, providing for a review of a Crown decision not to prosecute and possible independent representation for the victim in certain situations.

6.4 VBR implementation should include a training strategy to ensure that criminal justice system personnel likely to come into contact with victims such as police, crown, corrections and court staff, as well as victim services personnel, receive both general and specialist training

to a level appropriate to their contact with victims, to increase their awareness of victims' needs and to ensure criminal justice and victim services personnel understand their obligations under the VBR.

## **7. Other comments**

7.1 The VBR should include as one of its fundamental principles, the link between victim safety and the coordination of system and community based responses to crime. Coordination means agencies working together to meet the needs of crime victims and helping them to address risk. In a high or escalating risk situation, the victim will not be safe if one system or agency works in isolation. This can result in critical risk related information being missed and the victim being seriously harmed or killed. Interagency coordination is particularly critical in domestic violence and sexual offence cases where offences are often not reported to police due to mistrust of the criminal justice system. Interagency cooperation is necessary to better protect these victims, and encourage them to engage with the justice system.

## APPENDIX ONE

### Rationale for EVA BC Information Sharing Recommendations

- The social isolation of many sexual and domestic violence victims and their children acts as a serious barrier to them accessing help. Many victims are deliberately isolated from family and friends by their spouses/perpetrators. Many are also isolated by shame, fear of censure by their family or cultural community, language issues, or lack of knowledge about services. Particularly marginalized groups, such as Aboriginal women and immigrant women, require specific strategies and specialized services to meet their particular needs.
- In sexual and domestic violence cases, providing early intervention and support to the victim have been identified as critical to the victim's safety and their ability to participate in the justice process.(Dawson and Dinovitzer, 2001; Justice Institute of BC, 2005; Pratt, 1999; Russell, 2002; Tutty, Ursel and Douglas, in press)
- Lethality assessment screening processes for first responders have identified pro-active referral to specialized domestic violence advocates as a crucial step in assessing current danger and preventing further violence or death. (Campbell, 2001, Maryland Network Against Domestic Violence, 2007)
- Specialized support services also serve a preventative function by helping to support and strengthen the victim's ability to respond to further violence, as well as by helping to break the inter-generational cycle of violence (Light, 2007a & b; National Center for Children Exposed to Violence, 2006; Randall, 2006; Russell, 2002).
- Effective, comprehensive, specialized victim support has been identified as a key component of an effective justice response to domestic violence. (Ad Hoc Federal-Provincial-Territorial Working Group Reviewing Spousal Abuse Policies and Legislation, 2003; Hornick et al, 2005; Light, 2007a & b; Randall, 2006; Russell, 2002; Tutty, in preparation; Tutty, George, Nixon, & Gill, in press; Tutty, Ursel, & Douglas, in press).

The positive effect of such support on women's willingness to testify and their effectiveness as a witness has been well documented (Dawson & Dinovitzer, 2001; Justice Institute of BC, 2005; Pratt, 1999; Russell, 2002; Tutty, Ursel, & Douglas, in press).

- Effective victim support includes timely, proactive referrals, especially to Community-based Victim Services where they exist, rather than waiting for women to ask for services. Many victims may be too traumatized or unaware of available resources to know what to request, or may not be fully aware of the seriousness of their situation.

Over the last 30 years, significant progress has been made in BC in providing specialized services for sexual and domestic violence victims, including a provincial network (EVA BC) of nearly 240 victim service programs. The Specialized Community Based Victim Assistance Programs were set up as a bridge to the justice system for women and children and have specialized training and a mandate to coordinate the legal, medical and psychological aspects of support from a victim-centered perspective. These programs play a critical role in coordinated safety planning. For example, they can:

- Help the woman collect and document information about risk factors
  - Help the woman identify other evidence indicating that the abuser is a high risk to reoffend
  - Support the woman in sharing this information with police and other criminal justice system personnel.
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- There is a need to clarify the relationship between legitimate privacy safeguards on the one hand, and the potential need for police to release certain information quickly in high risk cases, including domestic violence cases, on the other. In order to keep the victim safe, they may need more than the very basic information that is generally available to the public under existing federal privacy provisions.
  - Recent inquests, case reviews and analyses in BC have identified the need for consistent, proactive information-sharing between sectors in domestic violence/abuse cases (Critical Components Project Team, 2008). For example, in the Martina Seymour case, Ms. Seymour survived a near fatal shooting by her ex-partner. Police did not disclose to Ms. Seymour crucial information about her partner's past violence with another partner, citing privacy restrictions. Federal Privacy Commissioner Jennifer Stoddard commented to the media that there is a need for better understanding within the criminal justice system of privacy laws and the public interest. (Harper, 2004)
  - Currently the federal privacy act restricts third party access to personal information without consent. In BC, the Freedom of Information and Protection of Privacy Act was amended in 2011 to allow public bodies to disclose information for the purpose of reducing the risk that someone will be a victim of domestic violence if domestic violence is reasonably likely to occur [FIPPA s. 33.1(1)(m.1)]. This section was enacted in response to domestic violence homicides and subsequent inquests and reviews (Representative for Children and Youth, 2009; BC Coroner's Service, 2010) which determined that inadequate information sharing had contributed to the deaths. Because the provincial FIPPA amendment does not apply to RCMP, there is now inconsistency in police information sharing practices.

RCMP practices and policies are still governed by the far more restrictive provisions of the federal Privacy Act.

- Privacy Act section 8(2)(m) allows for release of personal information only where, in the opinion of the head of the government institution involved, the public interest in disclosure clearly outweighs any invasion of privacy that could result from disclosure. This provision has been narrowly interpreted by the RCMP and other federal agencies making it difficult to share information in such a way that appropriate safety planning can take place (RCMP, 1996).
- Privacy Act section 8(2)(b) allows personal information to be shared without consent in accordance with an act of parliament.

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