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COVID-19: ISSUES FOR LOCAL GOVERNMENT AS EMPLOYERS

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I. INTRODUCTION

As the COVID-19 pandemic continues, local government employers are grappling with their obligations to provide services in light of the safety and operational issues created by COVID. They have been working to protect employees, clients and the public from infection, while navigating financial challenges caused by the pandemic. Employees are understandably anxious about being exposed to COVID and about the uncertainty created by this pandemic. At the time of the writing of this paper, COVID numbers are increasing and new restrictions are being put in place by the Provincial Health Officer.

In this paper we will discuss employment issues that are continuing to arise during this pandemic, including an employee's right to refuse unsafe work, *Employment Standards Act* leaves related to COVID, human rights and the duty to accommodate health concerns and family obligations, and personal privacy obligations under the *Freedom of Information and Protection of Privacy Act*.

II. AN EMPLOYEE'S RIGHT TO REFUSE UNSAFE WORK: THE COVID-19 CONTEXT

British Columbia's workers' compensation legislation gives employees the right to refuse to perform unsafe work. It is important for local governments to understand that right, and how it applies, especially in the time of COVID-19.

Section 3.12 of the *Occupational Health and Safety Regulation*, BC Reg. 296/97 (the "*Regulation*") establishes an employee's right to refuse unsafe work. In fact, that section requires employees to refuse unsafe work as follows:

> 3.12(1)
>
> A person must not carry out or cause to be carried out any work process or operate or cause to be operated any tool, appliance or equipment if that person has reasonable cause to believe that to do so would create an undue hazard to the health and safety of any person.
>
> Emphasis added

The WorkSafeBC Guidelines regarding the right to refuse unsafe work describe the right as "both a fundamental right and responsibility held by workers", and states that the refusal of unsafe work is "an integral element in ensuring work is carried out safely".

The term "hazard" in Section 3.12(1) has the same meaning as set out in Section 1.1 of the *Regulation*:

> … a thing or condition that may expose a person to a risk of injury or occupational disease.

In determining whether a hazard is undue, WorkSafeBC has adopted the Oxford Dictionary definition of "undue":

> Unwarranted, inappropriate, excessive or disproportionate.

As a result, an "undue hazard" is a thing or condition that may expose an employee to an excessive or unwarranted risk of injury or occupational disease.

The term "reasonable cause to believe" indicates that whether or not an undue hazard exists will be assessed using an objective standard. The assessment will be made from the perspective of a reasonable person considering relevant and available information, and exercising good faith and judgment, and will take into account the worker's training and experience.

The rest of Section 3.12 of the *Regulation* sets out a procedure to follow if an employee refuses to perform work that they consider to be unsafe, as follows:

1. The employee must immediately report the unsafe condition to their supervisor or employer;

2. The supervisor or employer receiving the report must immediately investigate the matter and

   (a) ensure that any unsafe condition is remedied without delay, or

   (b) if their opinion is that the work is not unsafe, they must inform the employee who made the report;

3. If the worker continues to refuse to carry out the work, the supervisor or employer must investigate the matter in the presence of the worker who made the report, and in the presence of:

   (a) A worker member of a joint occupational health and safety committee;

   (b) A worker who is selected by a trade union representing the reporting employee; or,

(c) If there is no joint committee or the worker is not represented by a trade union, by any other reasonably available worker selected by the reporting employee.

4. If the investigation still does not resolve the matter and the employee continues to refuse to perform the work, both the supervisor and employer, and the worker must immediately notify a WorkSafeBC officer, who must investigate the matter and issue orders as necessary.

A WorkSafeBC prevention officer tasked to investigate a refusal to perform unsafe work will make a full assessment of the circumstances on a case by case basis. The prevention officer will inspect the work areas, processes, equipment, and practices associated with the work refusal. If the prevention officer upholds the employee's assertion of unsafe work, the officer will issue an inspection report setting out the safety violations, and will make the necessary compliance orders.

If the prevention officer finds that an undue hazard does not exist, they will inform the parties, and issue an inspection report stating that an undue hazard has not been identified.

When an employee has a health condition which increases the likelihood that they would suffer an illness or injury in the situation alleged to be unsafe, their increased susceptibility will be considered in the assessment of whether they have reasonable cause to believe that the performance of the work would cause an undue hazard to their health and safety. For a work refusal to be justified, there must be a clear connection between the alleged undue hazard, and the susceptible worker's health condition. An employer is entitled to ask the susceptible employee for medical evidence confirming the effect of the hazard on the employee's health. According to the WorkSafeBC Guidelines, the employee should be removed from the situation alleged to be an undue hazard, while the employee obtains the requested medical evidence.

In the context of COVID-19, local governments may be faced with refusals to perform allegedly unsafe work due to a lack of appropriate COVID-19 protocols, or the failure to provide personal protective equipment ("PPE") when social distancing is not possible. They may also be faced with a refusal to perform work at the workplace, and requests to work from home, in circumstances in which the reporting employee is or is not a susceptible employee. Employees with compromised immune systems and elderly employees are at increased risk of developing COVID-19 and experiencing severe symptoms. In any of those situations, if an unsafe work report is made, a local government must follow the process set out in Section 3.12 of the *Regulation* to assess whether there is a valid refusal to perform unsafe work.

If the claim of unsafe work is valid, local governments must be prepared to remedy those aspects of their work processes that are unsafe, perhaps through the provision of PPE, or modifying the work procedures to reduce employee contact with each other or the public. Local governments should also be prepared to allow COVID-19 susceptible employees to work

from home if possible, to reduce the risk that they will contract COVID-19. However, as noted below, employers are only required to accommodate an employee to the point of undue hardship.

We recommend that local governments adopt policies regarding employees' right to refuse unsafe work, and the processes that will be followed if an employee makes an unsafe work claim. We also recommend that local governments train their managers and supervisors as to the proper procedure to follow in the event of an unsafe work report. Employers also need to ensure that supervisors and managers are available to receive unsafe work reports and to conduct the required investigations. This is particularly important in organizations that operate 24 hours a day. In those operations, unsafe work reports could happen at any time of the day or night, and unsafe work investigations cannot always wait until normal business hours.

Further, making the organization's COVID-19 Safety Plan available to employees, training employees on the Safety Plan, and remaining open to employee / union suggestions for improving the Plan, will ensure that employees know and understand the steps that their employer is taking to provide a safe workplace in relation to COVID-19, and should decrease the likelihood that unsafe work reports will occur.

Another important point that local governments should know is that employers are prohibited from retaliating against employees who refuse to perform unsafe work. Section 3.13 of the *Regulation* states that:

> (1) A worker must not be subject to prohibited action as defined in section 47 of the OHA provisions of the *Workers Compensation Act* because the worker has acted in compliance with section 3.12 or with an order made by an officer.
>
> (2) Temporary assignment to alternative work at no loss in pay to the worker until the matter in section 3.12 is resolved is deemed not to constitute prohibited action.

Section 47 of the *Workers Compensation Act* defines "prohibited action" as:

> 47(1) … any act or omission by an employer or union, or by a person acting on behalf of an employer or union, that adversely affects a worker with respect to
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> (a) any term or condition of employment, or
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> (b) any term or condition of membership in a union.

(2) Without restricting subsection (1), prohibited action includes any of the following:

(a) suspension, layoff or dismissal;

(b) demotion or loss of opportunity for promotion;

(c) transfer of duties, change of location of workplace, reduction in wages or change in working hours;

(d) coercion or intimidation;

(e) imposition of any discipline, reprimand or other penalty;

(f) the discontinuation or elimination of the job of the worker.

Local governments should be careful to avoid taking actions that could be construed as retaliatory against employees who have made unsafe work reports. We recommend that local governments seek legal advice before disciplining or dismissing an employee shortly after they have made an unsafe work report.

III. *EMPLOYMENT STANDARDS ACT* COVID-19 LEAVE OF ABSENCE

In addition to unsafe work reports, a local government may also be faced with circumstances in which employees are unable to attend work at all for significant periods of time due to COVID-19. Early on in the pandemic, the provincial government amended the BC *Employment Standards Act* (the *"ESA*") to include a COVID-19 related leave of absence. Section 52.12 of the *ESA* provides that an employee is entitled to unpaid leave for as long as one of the following circumstances related to COVID-19 applies to them:

1. The employee has been diagnosed with COVID-19 and is acting in accordance with the instructions or order of a medical health officer, or with the advice of a medical practitioner, a nurse practitioner or a registered nurse;

2. The employee is in quarantine or self-isolation in accordance with

(a) an order of the provincial health officer,

(b) an order made under the *Quarantine Act* (Canada),

(c) the guidelines of the British Columbia Centre for Disease Control, or

(d) guidelines of the Public Health Agency of Canada;

3. The employer, due to the employer's concern about the employee's exposure to others, has directed the employee not to work;

4. The employee is providing care to their minor child or dependent adult child, including because of the closure of a school or daycare or similar facility;

5. The employee is outside the province and cannot return to British Columbia because of travel or border restrictions;

6. A prescribed situation exists relating to the employee.

At the time of writing this paper, no additional situations making an employee eligible for COVID-19 leave have been prescribed by regulation, and there are no decisions of the Employment Standards Tribunal regarding COVID-19 leave.

An employer is entitled to ask an employee seeking an unpaid COVID-19 related leave of absence to provide proof that one of the above circumstances applies to the employee. However, an employer is prohibited from requesting a note from a medical practitioner, a nurse practitioner or a registered nurse as part of that proof (s. 52.12(5) of the *ESA*).

The COVID-19 leave provisions of the *ESA* are temporary, and may be repealed by an order of the Lieutenant Governor in Council.

IV. COVID-19 AND HUMAN RIGHTS

The COVID-19 pandemic has created new challenges for employers in BC, particularly in relation to the duty to accommodate employees who are unable to physically attend at work during COVID-19 because of a medical condition. As local governments face requests for accommodations from employees who have health concerns or family challenges, employers must be mindful of their obligations under the *Human Rights Code*, RSBC 1996, c. 210 (the "Code"). The Code protects employees in British Columbia from adverse treatment that is related to certain personal characteristics, including disability. In this section of the paper, we will address what the Code's requirements are, and what employers can do to address employment issues arising under the Code.

The Code prohibits discrimination in employment in section 13, which states:

(1) A person must not

(a) refuse to employ or refuse to continue to employ a person, or

(b) discriminate against a person regarding employment or any term or condition of employment

> because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person.

The legal test for whether discrimination has taken place is set out in *Moore v. British Columbia (Ministry of Education)*, 2012 SCC 61 at paragraph 33. Complainants must show:

1. They have a characteristic that is protected by the Code (one of those listed in s. 13(1) above, such as age);

2. They have experienced an adverse impact (such as a termination, or demotion); and,

3. The protected characteristic was a factor in the adverse impact.

Once complainants have met that burden, respondents must justify their conduct under one of the exemptions allowed under the Code (for example, by showing their conduct was based on a *bona fide* occupational requirement, such as a need to provide a safe work environment).

The most obvious group who could argue discrimination in this pandemic are people who have COVID. For their complaints to succeed, they would need to establish that COVID is a physical disability. A physical disability is a condition that impairs a person's ability to carry out the normal functions of life. It does not include colds or flus, because they are short-lived. The Human Rights Tribunal – the quasi-judicial body that adjudicates complaints under the Code – has not yet determined that COVID is a disability.

The BC Human Rights Commissioner has issued a policy statement on COVID (available at https://bchumanrights.ca/key-issues/covid-19/). This document is not legally binding, but it provides guidance on how the Tribunal may address COVID related cases. The policy statement says (at page 5):

In this time of rapidly changing circumstances, neither the Human Rights Tribunal nor the courts have had time to weigh in on whether COVID-19 amounts to a disability. However, in my view as BC's Human Rights Commissioner, it does. The seriousness of this illness – and the potential stigma that attaches to it – make it more akin to the legal protections that apply to HIV than to the common cold. Therefore, discrimination on the basis of someone having (or appearing to have) COVID-19, is prohibited under the Code except where the duty bearer can justify such treatment (for example, to prohibit or diminish the transmission of the virus).

As stated by the Commissioner, this is her view; this is not the law. The Human Rights Tribunal currently has about 50 COVID-related complaints but only one decision has been issued and it did not resolve whether COVID is a disability.

The Tribunal's single decision related to COVID, *Gehman v. Seyffert*, 2020 BCHRT 180, was issued on October 6. It is not an employment decision, but it does consider the issue of whether COVID is a disability. In this case, the Tribunal rejected an application to dismiss a complaint that a tenant had been discriminated against due to a physical disability. The complainant did not actually have COVID. Ms. Gehman, who rented a room in Mr. Seyffert's home, worked in the Downtown Eastside of Vancouver. Mr. Seyffert became fearful that Ms. Gehman would be exposed to COVID and bring it into his home. He first restricted her access to certain parts of the house, then evicted her.

Mr. Seyffert argued that the Tribunal should dismiss Ms. Gehman's complaint because COVID is not a physical disability. Because this decision was not on the merits but rather to determine whether the Tribunal should hear the case, the Tribunal did not have to determine the issue. However, the Tribunal referenced the Commissioner's statement above and said that the Tribunal could find that COVID is a disability. Further, it found that Ms. Gehman's complaint was not about her having COVID, but rather the stigma that attaches to COVID. The complaint was about a perceived physical disability, which is protected under the Code.

Mr. Seyffert argued that if his actions were discriminatory, they were justified because he was afraid for his health. The Tribunal found this argument was not enough for him to succeed with his application that this complaint should be dismissed without a hearing. Mr. Seyffert was required to show how he was vulnerable, what he knew about COVID at the time, what conversations he had with Ms. Gehman, and what options he considered. None of that information had been provided.

This case illustrates how fears around COVID, and reacting to those fears without considered decision making, is risky for employers. If an employer is concerned about risk either from an employee or to an employee, the employer must carefully gather information and consider all options before restricting that employee's work or access to the workplace. For example: since age is a protected characteristic under s. 13, an employer could not simply order all employees over a certain age to stay home.

Employees may request accommodations if they have COVID or an underlying health condition that makes them vulnerable to COVID. We recommend employers assume that the Tribunal will ultimately find that COVID is a physical disability, and provide accommodations to these employees (as usual, to the point of undue hardship to the employer). The steps to assess employee accommodation requests will be familiar to employers, as part of their existing duty to accommodate processes.

Decisions should be based on current public health information and recommendations; Worksafe BC protocols; and medical information from the employee. When employees are anxious about safety at work but not actually ill, we recommend employers engage in discussions about their concerns, and highlight safety measures in place. Never assume an employee is being unreasonable; employees may have invisible conditions, such as diabetes or a history of chemotherapy, that place them at risk.

What types of accommodations are available? By this time, most of us have seen changes in how we work: moving work home; providing barriers to transmission such as masks and plexiglass; work reassignments; shift changes; and different use of technology. Employers should also consider changes to policies on absenteeism: for example, removing quarantine periods from days counted as absences.

As noted above, employees have access to indefinite unpaid leave under s. 52.12 of the *ESA*. Employees are eligible for job protected leave if they have COVID or are unable to work for COVID-related reasons, such as being in self-isolation or having to care for family members. Under the *ESA*, employers may request "reasonably sufficient proof" that the employee is covered by the circumstances listed in the *ESA*, but that proof may not be a medical note.

Despite the *ESA*, an employer is still able to request medical information to support paid leaves or accommodations at work. In March and April, provincial and federal governments encouraged employers to allow medical leave without asking for notes, but they have not repeated this recently. Public health agencies are still asking employers to reconsider their need for medical notes at this time, given the stresses on the health care system in some areas. We recommend employers ask for notes only where necessary.

COVID leave under the *ESA* does not replace an employer's obligation to accommodate employees in the workplace. It is a last resort, given it is unpaid. However, it provides options for employees who are dealing not with their own disabilities, but those of their family members. An employer's legal obligations under the Code are less clear in this area. Employees can be given access to vacation banks or other paid leaves if they cannot work due to family obligations, but is an employer obligated to accommodate those employees? Under the current law, probably not.

Family status is a protected characteristic under s. 13(1) of the Code, but the recent case law on family status discrimination has set a very high bar for succeeding with a claim. Most challenges with child care or elder care are not protected under the Code and employers do not have a legal duty to accommodate them. While the Human Rights Commissioner has said that "protections related to family status <u>may</u> require employers to take all actions short of undue hardship to accommodate family care giving responsibilities where an employee is unable to cover the necessary care through other means" (emphasis added), at this time there is no obligation for employers to accommodate employees with those challenges.

V. COVID-19 AND EMPLOYEE PRIVACY ISSUES

Local governments are still required to balance their need to provide a safe workplace during COVID with an employee's right to privacy. While the balance undoubtedly tips towards the collection and disclosure of personal information regarding COVID, the privacy provisions in the *Freedom of Information and Protection of Privacy Act* ("FOIPPA") still apply and an employer must still take care to request, use and disclose only the information it needs to maintain a safe workplace. Local governments must also ensure they continue to protect personal information in their custody and control, as more employees are working remotely.

Under FOIPPA, local governments are required to collect and disclose the least amount of personal information about their employees as possible in order to meet their objective of providing safe workplaces during COVID. Information about an employee's medical information is considered very sensitive, such that there are strict limits on what medical information an employer is permitted to collect and disclose. Public bodies are not relieved of their privacy obligations under FOIPPA because of COVID, but will be justified in collecting and disclosing more personal information than normally permitted when dealing with COVID related illness.

A. WorkSafe Obligations

WorkSafe rules regarding COVID Safety Plans contain guidance about what information an employer is entitled to collect and disclose in order to identify and manage the risks of COVID. While employers have the responsibility for the health and safety of all of their employees, workers under the *Workers Compensation Act* are also responsible for taking reasonable care to protect their own health and safety and the health and safety of other people at their workplace.

Under current WorkSafe rules, employers are required to develop a policy to manage the workplace during COVID, including policies about who can be at the workplace and how to address illnesses that arise in the workplace. Under the WorkSafe protocols issued for municipalities, local governments are required to develop and communicate COVID policies prohibiting the following employees from attending at the workplace:

- Anyone who has symptoms of COVID;
- Anyone directed by public health to self-isolate;
- Anyone who has been identified by public health as a close contact of someone with COVID; and
- Anyone who traveled outside of Canada within the last 14 days.

Employers are also required to have a plan to deal with workers who may start to feel ill while at work. Therefore, a local government would be entitled to information from employees that allows it to meet its WorkSafe obligations. Local governments must also ensure there is a confidential process established to handle that collection of employee personal information in light of the above COVID policy requirements.

With the above balancing of FOIPPA and the obligation to provide a safe workplace in mind, we will address the following issues:

1. Is an employee required to disclose the results of a COVID test?

2. What information can be shared if an employee tests positive for COVID?

3. How to manage employees who are suspected of displaying COVID related symptoms?

4. What is an employer's right to medical information? and

5. Are mandatory temperature checks permitted?

B. Positive Reporting

A key question is whether a local government can require an employee to disclose that they have tested positive for COVID. Given the current contact tracing efforts, an employer should be notified by the applicable health authority if an employee has tested positive for COVID. Therefore, the issue arises as to whether an employer can require an employee to disclose the results of a COVID test before the employer is contacted by the health authority, given the potential delays involved with contact tracing. The advantage to such disclosure is that it allows the employer to take earlier steps to contain the potential COVID exposure and mitigate the impact of a positive COVID test. This would include deep cleaning of a worksite or requesting that the employee's co-workers self-monitor for COVID symptoms or work remotely for a period of time.

At this time, there is no health order or WorkSafe rule that requires an employee to advise their employer of a positive COVID test. Therefore, there is a risk that such a requirement is a breach of the local government's privacy obligations under FOIPPA, given that employers are not generally entitled to an employee's medical diagnosis. We recommend that local governments, as part of their workplace COVID policy, request/strongly encourage employees to advise the local government if they test positive for COVID test. It is likely that most, if not all, employees will advise their employer as soon as possible in order to protect their co-workers.

C. Information Sharing Following a Positive COVID Test

Employers have an obligation to protect, as much as possible, the identity of an employee who has tested positive, and any specific information relating to the employee's medical condition or symptoms. We recommend that employers not identify an employee who has tested positive for COVID, without their express written consent, unless it is required to do so as part of mandatory contact tracing to identify which other employees need to self-isolate or monitor for symptoms. Your local health authority should be able to provide guidance on what information needs to be communicated in the workplace if an employee has tested positive for COVID. As the pandemic continues, any stigma with a positive COVID test should lessen. Again, many employees will likely consent to the reasonable disclosure of their identity in order to protect their co-workers.

D. Employees Who Display COVID Related Symptoms

Employers can reasonably request that an employee disclose whether they have symptoms associated with COVID. If an employer has reasonable grounds to be concerned that an employee is at work and has COVID related symptoms, the employer will be within its rights to ask for further information and use that information to determine whether the employee can remain in the workplace.

At the time of writing this paper, an order for certain health regions has been issued by the Provincial Health Officer containing new workplace safety obligations, including a requirement to review COVID safety plans and perform daily health checks. Under this order, employers in the applicable health regions are required to ensure that employees who work from a location other than their home have completed a daily health check for COVID symptoms. The order further stipulates that if an employer is not satisfied that a worker has done a daily health check, the employer must not permit the worker to attend at the workplace.

E. Right to Medical Information

Another issue that can arise is an employer's right to medical information when an employee requests sick leave or a workplace accommodation due to COVID. As noted above, there are restrictions in the *ESA* related to an employee's requirement to provide a medical note in relation to the new COVID leaves. Outside of this specific restriction, employers are generally entitled to medical information to substantiate that an employee is entitled to access sick leave benefits and to facilitate a requested accommodation. However, employers are only entitled to certain medical information, and must use the least intrusive means possible to obtain the medical information required.

While employers may be entitled to information about whether an employee has tested positive for COVID, we recommend that local governments be reasonable about what information they require from employees. Given current contact tracing efforts by health authorities, we do not recommend that a local government require an employee to provide written proof of a positive test, unless it has a reasonable basis to be concerned the employee is not being truthful.

Employees are required to cooperate with employers to facilitate requests for accommodation in the workplace. This includes providing employers with the information necessary to determine what accommodation, if any, an employer can reasonably provide in the particular circumstances. Therefore, an employer is entitled to medical information from employees who are requesting an accommodation due to COVID, such as working remotely. The employer is entitled to confirmation that the employee has a disability/medical condition that increases their risk if they contracted COVID and information on ways this risk can be mitigated. As with all requests for accommodation, the employer is not entitled to know the employee's specific disability or medical condition.

F. Temperature Checks

Temperature checks are not required under WorkSafe, which means that a mandatory temperature check policy in the workplace may be a breach of FOIPPA and the *Human Rights Code*. This will depend on the nature of the worksite and the potential risk of the spread of COVID, and whether there has been a COVID outbreak. There are also serious safety issues that need to be considered before implementing this type of requirement, including the safety of those administering the thermometer. Therefore, we recommend that you obtain legal advice before proceeding with mandatory temperature checks in the workplace.

G. Working Remotely

As more employees are working remotely because of COVID, the Office of the Information and Privacy Commissioner has issued a guidance document called "Tips for public bodies and organizations setting up remote workspaces", which can be found on its website. This document contains practical guidelines for employees to follow if they are working remotely, such as the use of passwords and encryption, using work email accounts for all work-related emails, taking the least amount of personal information from the workplace, and proper storage of any paper files.

As noted above, employers are not required to allow an employee to work from home simply because they are anxious about COVID. That being said, we encourage employers to talk with employees about their concerns. If an employee is requesting an accommodation involving working from home, the employee will be required to provide sufficient information, including medical evidence, establishing that they suffer from a disability and about whether the employer can facilitate continued attendance in the workplace through other measures (i.e.,

physical distancing, changing hours of work, etc.). The employer would then assess this information to determine whether it can offer an alternative reasonable accommodation to working remotely and whether working remotely would constitute an undue hardship.

VI. CONCLUSION

Balancing the obligations to provide a safe workplace, managing the anxiety and fear created by this pandemic, and ensuring that privacy obligations are met will continue to be challenging for local governments. Ongoing communication with employees about the safety and notification protocols in place and the employer's expectations is critical. As with all labour and employment issues, local governments need to ensure they do not make employment decisions based on assumptions. Rather, these decisions need to be made taking into account the particular circumstances and health orders in place at that time.

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