

Ottawa, Wednesday, June 10, 1998

Appeal No. AP-96-228

IN THE MATTER OF an appeal heard on October 31, 1997,
under section 67 of the *Customs Act*, R.S.C. 1985, c. 1
(2nd Supp.);

AND IN THE MATTER OF a decision of the Deputy Minister of
National Revenue dated December 18, 1996, with respect to a
request for re-determination under section 63 of the *Customs Act*.

BETWEEN

**HIBERNIA MANAGEMENT AND DEVELOPMENT
COMPANY LTD.**

Appellant

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is allowed in part.

Patricia M. Close
Patricia M. Close
Presiding Member

Raynald Guay
Raynald Guay
Member

Charles A. Gracey
Charles A. Gracey
Member

Michel P. Granger
Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-96-228

**HIBERNIA MANAGEMENT AND DEVELOPMENT
COMPANY LTD.**

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

This is an appeal under section 67 of the *Customs Act*. The appellant imported into Canada the “Selantic Evacuation System SES-2,” which, in general terms, is an emergency evacuation system that is designed to be mounted on an offshore drilling rig.

There are two issues in this appeal. The first one is whether the system is properly classified under tariff item No. 8907.10.00 as a floating structure and, more particularly, as an inflatable raft, as determined by the respondent, or should be classified under tariff item No. 8479.89.99 as a machine or mechanical appliance having individual functions, not specified or included elsewhere in Chapter 84, as claimed by the appellant. The second issue in this appeal is whether the system qualifies for the benefits of Code 2360.

HELD: The appeal is allowed in part. In light of the fact that the system is not, in any sense, a floating structure, the Tribunal is of the view that it is not properly classified under tariff item No. 8907.10.00. The Tribunal believes that it is more accurately described as a machine or mechanical appliance having individual functions and should, therefore, be classified under tariff item No. 8479.89.99. However, the Tribunal is not persuaded that the system is an article “of base metal” and, therefore, believes that it does not qualify for the benefits of Code 2360.

Place of Hearing: Ottawa, Ontario
Date of Hearing: October 31, 1997
Date of Decision: June 10, 1998

Tribunal Members: Patricia M. Close, Presiding Member
Raynald Guay, Member
Charles A. Gracey, Member

Counsel for the Tribunal: John L. Syme

Clerk of the Tribunal: Anne Jamieson

Appearances: Bernard J. Collins, for the appellant
Darrell L. Kloeze, for the respondent

Appeal No. AP-96-228

**HIBERNIA MANAGEMENT AND DEVELOPMENT
COMPANY LTD.**

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: PATRICIA M. CLOSE, Presiding Member
RAYNALD GUAY, Member
CHARLES A. GRACEY, Member

REASONS FOR DECISION

INTRODUCTION

This is an appeal under section 67 of the *Customs Act*¹ (the Act) from a decision of the Deputy Minister of National Revenue made under section 63 of the Act. In January 1996, the appellant imported into Canada the “Selantic Evacuation System SES-2” (SES-2), which, in general terms, is an emergency evacuation system that is designed to be mounted on an offshore drilling rig.

There are two issues in this appeal. The first one is whether the SES-2 is properly classified under tariff item No. 8907.10.00 of Schedule I to the *Customs Tariff*² as a floating structure and, more particularly, as an inflatable raft, as determined by the respondent, or should be classified under tariff item No. 8479.89.99 as a machine or mechanical appliance having individual functions, not specified or included elsewhere in Chapter 84, as claimed by the appellant. The second issue in this appeal is whether the SES-2 qualifies for the benefits of Code 2360 of Schedule II to the *Customs Tariff*.

The following is the relevant tariff nomenclature from Schedule I to the *Customs Tariff*:

84.79	Machines and mechanical appliances having individual functions, not specified or included elsewhere in this Chapter.
8479.89	--Other
8479.89.99	----Other
89.07	Other floating structures (for example, rafts, tanks, coffer-dams, landing-stages, buoys and beacons).
8907.10.0	-Inflatable rafts

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1. R.S.C. 1985, c. 1 (2nd Supp.).
 2. R.S.C. 1985, c. 41 (3rd Supp.).

Code 2360 provides relief for:

The following of base metal, of Section XV, XVI, XVII, XVIII, XIX or XX, for use in the construction or equipment of ships, boats or floating structures of Chapter 89, under such regulations as the Minister may make:

Double clutches for power transmission, of a diameter exceeding 46 cm;

Inboard-outboard engine propulsion units;

Jet drives combined with engines;

Navigation lights for vessels of a length exceeding 8 m;

Locks and bars for boat doors;

Hydraulic engines;

Hydraulic power transmission equipment, including valves but excluding actuators of a torque less than 282.5 kNm;

Outboard racing motors;

Power transmission power take-offs;

Propellers, of a diameter not exceeding 23 cm, for outboard or inboard-outboard motors;

Bilge or water pumps;

Rotary twin-screw power pumps of a capacity exceeding 303.1 l/s at a pressure of 3,447.4 kPa;

Alcohol stoves, one/or two-burner, for vessels of a length exceeding 8 m;

V-engine blocks for the marine engines of subheading No. 8407.29;

Parts of the outboard engines of inboard-outboard vessels;

Other goods, of a class or kind not made in Canada.

POSITION OF PARTIES

Evidence

The appellant's representative called as a witness Mr. John J. Henley, Crude Movements Coordinator of the Lifting & Transportation Performance Team at Hibernia Management and Development Company Ltd. Mr. Henley testified that the Hibernia Platform is a gravity-based drilling platform located off the shores of Newfoundland. The lowest deck on the platform is 34 metres above the sea surface. Mr. Henley testified that, in the event of certain emergencies, the crew aboard the platform may require a controlled means of getting off the platform and down to the sea surface, from where they can be picked up by rescue craft or deploy life rafts. Mr. Henley testified that the goods in issue provide that capability.

Through Mr. Henley, the appellant's representative introduced a videotape that showed the SES-2, as installed on the Hibernia Platform, being deployed. It is housed in a steel container. The primary components are a chute, a counterweight attached to the end of the chute, a winch and cable system which is attached to the chute and a base raft. The system is activated by disengaging a brake which holds the winch in place. When that is done, through the force of gravity, the counterweight pulls the chute down to the sea surface. The rate of descent is controlled by a centrifugal brake fitted on the winch. It is this device which prevents the chute and counterweight from free falling to the sea surface. When the counterweight reaches the sea surface, it continues to fall to approximately 10 metres below sea level. At that point, the counterweight pulls a trigger, which releases carbon dioxide from a canister to inflate the base raft. When the chute is fully deployed, the operator re-engages the brake. Crew members may descend through the chute to the base raft. Mr. Henley also indicated that there is a motor gearbox attached to the system to allow the chute to be pulled back up.

Mr. Henley explained that the base raft is not a life raft, in that it has three holes in it where the cables pass through and has no canopy. Mr. Henley testified that the purpose of the base raft is to provide a staging area on the sea surface for evacuating crew members. The preferred course of evacuation would be to pick up crew members in a fast rescue craft (FRC) from the base raft. An FRC would then quickly ferry crew members to a larger standby vessel. If conditions were such that the use of an FRC was impossible, crew members could deploy life rafts from the base raft. Mr. Henley explained that, although the SES-2 can be purchased without life rafts, the appellant elected to make the purchase. These rafts are carried down to the sea surface with the base raft; however, unlike the base raft, they do not inflate automatically. Finally, Mr. Henley indicated that metal components represent 80 percent of the system's total weight.

In cross-examination, Mr. Henley was asked to indicate the parts of the SES-2 that would be in use during an evacuation. He stated that the winch and brake assembly and the cables would be in use because they hold the entire unit together. The chute and base raft would also clearly be in use. He acknowledged that, during an evacuation, the chute itself would not move; crew members would simply be sliding down it. He also stated that the SES-2 does not use electricity to deploy.

Mr. Henley did not agree with counsel for the respondent that the base raft is a life raft. He noted that, under the applicable international conventions which set standards for, among other things, life rafts, the base raft would not qualify. He again referred to the fact that it has three holes in it and no canopy and that it does not contain any rations or any of the other required survival gear and cannot float away from the Hibernia Platform, as it is attached to wires which hold the system in place. Counsel pointed out that the manufacturer's product literature described the base raft as a "25-man open life raft."

In questioning by the Tribunal, Mr. Henley indicated that, when the appellant ordered the SES-2 from the manufacturer, it requested that it include life rafts as part of the system. He testified that the life rafts were produced by a different manufacturer. Mr. Henley added that the appellant could have purchased the life rafts directly from the other manufacturer, but that the appellant wanted the manufacturer of the SES-2 to put the whole package together for it.

The appellant's second witness was Dr. Bruce Colbourne, who was accepted by the Tribunal as an expert in the marine application of wind and wave water. Dr. Colbourne is an engineer and the research group leader for ocean engineering at the Institute for Marine Dynamics, which is part of the National Research Council of Canada. Dr. Colbourne testified that, during deployment, the SES-2 is a simple mechanical mechanism. The counterweight pulls the chute down, and the support cables spool off the winch. The rate of descent is controlled by the centrifugal braking mechanism. Dr. Colbourne stated that, without the winch and centrifugal brake, the chute would free fall, and the boarding platform and life rafts would likely break on impact with the sea surface. Dr. Colbourne stated that, once the system is deployed, there are two forces acting on it. The first would be wind, which, without the counterweight, would blow the chute around, making it difficult to use. The counterweight also serves to stabilize the boarding platform and lessen the effect of the waves.

Dr. Colbourne testified that the action of deploying and retrieving the SES-2 is a mechanical operation. It is carried out by a winch which is a mechanical device. Without the winch, the SES-2 could not function. In Dr. Colbourne's view, the winch is essential to the operation of the SES-2 because it is required to deploy the chute in the event of an emergency. The system must be tested regularly to ensure that it is functioning properly and, to do so, it must be fully deployed and then retrieved. The winch and an electric motor, used for retrieval, are essential to these operations.

In cross-examination, it was suggested to Dr. Colbourne that, when the system is fully deployed, there is no mechanical operation occurring. Dr. Colbourne elaborated on his description of the chute as a machine. He stated that a machine is something that applies a force to cause something to happen. Dr. Colbourne also noted that there are pieces of mechanical apparatus that support the chute while people descend through it. He acknowledged that, by that definition, a simple slide would qualify as a machine.

In response to questions from the Tribunal, Dr. Colbourne stated that the deployment of the SES-2 should not be separated from its use when it is deployed. In his view, it is incorrect to say that the system is a machine while it is being deployed and then ceases to be a machine when fully deployed. The Tribunal also referred Dr. Colbourne to the following definition of “mechanically operated” which is found in Supplementary Note 1 to Section XVI of Schedule I to the *Customs Tariff*:

“mechanically operated” refers to those goods which are comprised of a more or less complex combination of moving and stationary parts and do work through the production, modification or transmission of force and motion.

Dr. Colbourne stated that the SES-2 is mechanically operated within the meaning of that definition. First, in the action of deployment, there are pulleys, a winch, a gearbox and a centrifugal brake, all of which serve to modify the pull of gravity to ensure that the chute descends at an acceptable rate. Once the SES-2 is deployed, the winch resists the force of gravity to hold the chute in place. Finally, the chute itself, by applying a frictional force on people descending through it, modifies the force of gravity.

Counsel for the respondent called as a witness Captain Allen S. Williams, a marine surveyor with the Canadian Coast Guard. The Ship Safety section is responsible for approving lifesaving equipment for use in marine applications. Captain Williams was accepted by the Tribunal as an expert in marine safety. Captain Williams testified that the boarding platform, or base raft, which forms part of the SES-2 is a kind of life raft. He noted that the rubber fabric used in constructing the platform is “almost identical” to that used to construct a life raft. He noted, however, that, unlike a life raft, the platform does not have a canopy or stabilizing pockets underneath it. He also indicated that the platform, as currently constituted, cannot be certified as a life raft. Finally, Captain Williams testified that the chute and the platform are essential components of the SES-2.

In cross-examination, Captain Williams agreed that the SES-2 could function as an evacuation device without the boarding platform, in that it could be used to get personnel from a great height to the sea surface. He also agreed that the SES-2 could not function without its mechanical components and that those components are essential for its operation. On re-direct, Captain Williams stated that he considered that the SES-2 operates mechanically when it is deployed.

Argument

The appellant’s representative argued that the SES-2 is designed to lower a base raft and peripheral life rafts to sea level. The representative submitted that the SES-2 is a machine or mechanical appliance having individual functions and, thus, should be classified under tariff item No. 8479.89.99. The product literature placed on the record by the representative, submitted by counsel, clearly illustrates the mechanical nature of the system. In particular, the representative referred to the winch and related mechanical components which are necessary to lower the chute in a safe and controlled manner. The representative pointed out that Dr. Colbourne testified that, without the winch, brake and cable assembly, the system would not function.

In support of his argument that the SES-2 is a machine or mechanical appliance, the appellant's representative referred the Tribunal to its decisions in *Bernard Monastesse Inc. v. The Deputy Minister of National Revenue*³ and *Canadian Tire Corporation Ltd. v. The Deputy Minister of National Revenue*.⁴ Finally, the representative referred the Tribunal to Supplementary Note 1 to Section XVI of Schedule I to the *Customs Tariff* which provides:

In this Section the term "mechanically operated" refers to those goods which are comprised of a more or less complex combination of moving and stationary parts and do work through the production, modification or transmission of force and motion.

The appellant's representative argued that the SES-2, as a mechanically operated evacuation system whose mechanical aspect is essential for its operation, should be classified under tariff item No. 8479.89.99.

With regard to the second issue in this appeal, whether the SES-2 qualifies for the benefits of Code 2360, the appellant's representative argued very briefly that, because base metal represented over 80 percent of the weight of the SES-2 and because, at the time of importation, it was not being manufactured in Canada, it should qualify for the benefits of Code 2360.

Counsel for the respondent commenced his argument by noting that goods must be classified as they present themselves on importation. After referring the Tribunal to Rule 1 of the *General Rules for the Interpretation of the Harmonized System*⁵ (the General Rules), counsel led the Tribunal through a description of the various components which make up the SES-2. These components include a chute, housing container, winch, cables, boarding platform and four peripheral life rafts. Counsel submitted that, as there is no heading in Schedule I to the *Customs Tariff* which specifically refers to an "evacuation system," Rule 1 of the General Rules is not of assistance.

Counsel for the respondent argued that the classification sought by the appellant was under a "residual" tariff item deep within heading No. 84.79 and that, in that case, goods should be of a similar kind to other goods classified under the same or proximate residual categories. Counsel then pointed out that the various goods named in heading No. 84.79, such as trash compactors, carpet sweepers, mechanical devices for the control of the composition of sterilizing or cleaning solutions and several others, do not in any way resemble an offshore platform evacuation system.

Counsel for the respondent argued that the SES-2 should not be considered a mechanical device because "when it is operating for its intended purpose, there is no mechanical function going on." In counsel's submission, the purpose of the SES-2 is not to be deployed and retrieved, but to evacuate personnel.

Counsel for the respondent submitted that, in deciding whether the SES-2 is a machine, the Tribunal should have regard to the definition of "machine" adopted by the Federal Court of Appeal in *Ingersoll-Rand Door Hardware Canada Inc. v. The Deputy Minister of National Revenue for Customs and Excise*.⁶

3. Appeal No. AP-94-195, October 27, 1995.

4. Appeal No. AP-94-157, October 12, 1995.

5. *Supra* note 2, Schedule I.

6. 80 N.R. 397, Court File No. A-503-86, October 21, 1987.

In argument, counsel for the respondent then returned to the General Rules. He submitted that Rule 2 and Rule 3 (a) have no application in this case. However, counsel submitted that Rule 3 (b), which refers to mixtures and composite goods, was instructive. Rule 3 (b) provides:

Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3 (a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable. (Emphasis added)

Counsel for the respondent submitted that it is the inflatable base raft that gives the SES-2 its essential character. Counsel submitted that, while the chute component is important, the inflatable base raft, which facilitates evacuation, provides the system with its essential character. In the alternative, counsel submitted that the Tribunal should view the base raft and the chute as an integrated unit and classify the system accordingly.

Finally, with respect to Code 2360, counsel for the respondent made two arguments. First, the SES-2 does not fit the description, “[o]ther goods, of a class or kind not made in Canada,” found in Code 2360. In making this argument, counsel again relied on the *ejusdem generis* principle of construction. Second, counsel submitted that the SES-2 cannot be characterized as being made of base metal, as required by Code 2360. Counsel argued, based on the *Explanatory Notes to the Harmonized Commodity Description and Coding System*⁷ (the Explanatory Notes) to Section XV, that, where goods contain two or more base metals or made partly of non-metals, they may be classified as articles of base metal provided that:

- (a) the base metal components predominate in terms of weight; and
- (b) the base metal components give the goods their “essential character.”

In counsel’s submission, the base metal components of the SES-2 do not give it its essential character.

DECISION

The Tribunal is of the view that the appellant is correct with respect to the classification of the SES-2 within Schedule I to the *Customs Tariff*. However, the Tribunal is not persuaded that the SES-2 qualifies for the benefits of Code 2360.

With respect to the first issue, the Tribunal considers that the SES-2 should be classified under tariff item No. 8479.89.99 as a machine or mechanical appliance having individual functions, not specified elsewhere in Chapter 84. The Tribunal comes to this conclusion bearing in mind that it is subsection 10(1) of the *Customs Tariff* that provides that classification of imported goods is to be determined in accordance with the General Rules. The Tribunal is of the view that Rule 1 of the General Rules governs the classification of the SES-2 in this appeal. Rule 1 provides that classification is first determined by the wording of the tariff headings and any relative Section or Chapter Notes. In addition, the Tribunal notes that section 11 of the *Customs Tariff* provides that, in interpreting the headings and subheadings, the Tribunal is to have regard to the *Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System*⁸ and the Explanatory Notes.

7. Customs Co-operation Council, 1st ed., Brussels, 1986.

8. Customs Co-operation Council, 1st ed., Brussels, 1987.

The appellant's representative argued that the SES-2 should be classified in heading No. 84.79 as a machine or mechanical appliance having individual functions, not specified or included elsewhere in Chapter 84. Counsel for the respondent submitted the SES-2 is properly classified in heading No. 89.07 as a floating structure (for example, a raft, tank, coffer-dam, landing stage, buoy or beacon).

Turning first to heading No. 89.07, the Tribunal notes that the heading covers "[o]ther floating structures." The Explanatory Notes to Chapter 89 provide, in part:

This Chapter covers ships, boats and other vessels of all kinds (whether or not self-propelled), and also floating structures such as coffer-dams, landing stages and buoys. It also includes air-cushion vehicles (hovercraft) designed to travel over water (sea, estuaries, lakes), whether or not able to land on beaches or landing-stages or also able to travel over ice.

Consistent with the foregoing, the headings preceding heading No. 89.07 within Chapter 89 cover such items as cruise ships, ferry-boats, barges, fishing vessels, tugs, warships and life boats.

The Explanatory Notes to heading No. 89.07 provide that the heading "covers certain floating structures not having the character of vessels." The examples of "floating structures" provided within the Explanatory Notes include pontoons used for the support of temporary bridges; floating tanks used to contain live fish; floating tanks used in certain harbours to supply ships with oil, water, etc.; coffer-dams used in bridge building; and floating landing stages. In the Tribunal's view, it is immediately apparent when this list is reviewed, and not surprising in light of the wording of heading No. 89.07, that the characteristic common to all of these structures is that they float.

The Tribunal accepts that the landing platform which forms part of the SES-2 and the life rafts which are contained within that platform are capable of floating. It may be that, if these items were imported by themselves, they would be classified within Chapter 89. However, as counsel for the respondent reminded the Tribunal in argument, goods must be classified as they present themselves on importation.

In the Tribunal's view, on importation, the SES-2 was not, in any sense, a floating structure. The evidence before the Tribunal in this appeal is that 80 percent of the weight of the SES-2 is represented by base metals. Given that fact, it is highly unlikely that, if the SES-2 were placed in water, it would remain afloat for any time whatsoever. The evidence indicates that the SES-2 is mounted on the side of the Hibernia Platform. When the chute is deployed, it hangs down to the sea surface and is supported by the winch and steel cable mechanism. In the Tribunal's view, the fact that a floating raft is attached to the end of the chute does not make the SES-2, as a whole, a floating structure. For the foregoing reason, the Tribunal is of the view that the SES-2 cannot be described as a floating structure and cannot, therefore, be classified in heading No. 89.07.

In the Tribunal's view, the SES-2 should be classified in heading No. 84.79 as a machine or mechanical appliance having individual functions. Counsel for the respondent submitted that the Tribunal should adopt the definition of "machine" in the Federal Court of Appeal's decision in *Ingersoll-Rand*. In that case, the Federal Court of Appeal found that:

a machine is a more or less complex combination of mechanical parts, as levers, gears, sprocket wheels, pulleys, shafts and spindles, ropes, chains, and bands, cams and other turning, and sliding pieces, springs, confined fluids, etc., together with the framework and fastenings supporting and connecting them, as when it is designed to operate upon material to change it in some preconceived and definite manner.⁹

9. *Supra* note 6 at 400.

In the Tribunal's view, it is clear, based on the testimony of Mr. Henley and Dr. Colbourne, that the SES-2 is a machine or mechanical appliance. It has a combination of mechanical parts, including a winch, centrifugal brake, cables and pulleys, without which it could not operate. These parts work in combination to lower the chute and platform assembly to the sea surface. Moreover, the SES-2 has an individual function, that of providing a safe and effective means of evacuation from a structure such as the Hibernia Platform.

Counsel for the respondent argued that "when the system is operating for its intended purpose, there is no mechanical function going on." However, in the Tribunal's view, if the mechanical components necessary to deploy and retrieve the system were not present and in good operation, the SES-2 could not perform its intended function. The argument that, in order for an article to be considered a mechanical appliance or machine, mechanical functions must be ongoing and continuous is untenable. By way of illustration, can it be said that a window washing platform for a highrise is not a mechanical device because it is stationary while windows are being washed and only works when changing levels?

The second issue is whether the SES-2 qualifies for the benefits of Code 2360. The appellant's representative argued that the SES-2 qualifies because it is: (1) of base metal; (2) classifiable in Section XVI; and (3) of a kind or class not made in Canada.

In the Tribunal's view, the SES-2 does not qualify for the benefits of Code 2360. The Tribunal agrees with counsel for the respondent's formulation, the first requirement being that the article must be "of base metal." The SES-2 is made up largely of base metal, rubber and certain specialized fabrics.

Base metals and articles of base metal are classifiable in Section XV of Schedule I to the *Customs Tariff*. With respect to articles of base metal, the Explanatory Notes to Section XV provide, in part:

In accordance with Section Note 7, base metal articles containing two or more base metals are classified as articles of that metal which predominates by weight over each of the other metals, except where the headings otherwise require (e.g., copper-headed iron or steel nails are classified in heading 74.15 even if the copper is not the major constituent). The same rule applies to articles made partly of non-metals, provided that, under the General Interpretative Rules, the base metal gives them their essential character. (Emphasis added)

There is no question that base metals predominate by weight over the other materials used in constructing the SES-2. However, the Tribunal is not persuaded that the base metals give the SES-2 its essential character and, thus, that it is an article of base metal. The Tribunal first notes that a significant portion of the weight attributable to base metals comes from the base metals used in constructing the container in which the SES-2 is housed. It is true that the base metal components of the system, in particular, the winch and cable assembly, are required for it to function. However, the SES-2 is designed to evacuate personnel. It is the chute and landing platform together with the winch and cable assembly which allow it to function. If anything, the chute and landing platform provide the SES-2 with its essential character. In simple terms, it is these components which make the SES-2 what it is. Given the relative significance of these components in the operation of the overall system, it cannot be said that the SES-2 derives its essential character from base metals. The SES-2 is, therefore, not "of base metal" and, thus, does not qualify for the benefits of Code 2360.

For the foregoing reasons, the appeal is allowed in part.

Patricia M. Close
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Presiding Member

Raynald Guay
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