Docket: 2005-1232(GST)G

BETWEEN:

ALFRED MIOTTO,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent,

AND

Docket: 2005-1228(GST)G

BETWEEN:

ROD MARUYAMA,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard together on February 19, 2008,
at Vancouver, British Columbia.

Before: The Honourable D.G.H. Bowman, Chief Justice

Appearances:

Counsel for the Appellants:	Kimberley L. Cook
Counsel for the Respondent:	Michael Taylor

AMENDED REASONS FOR JUDGMENT

WHEREAS at page 13, paragraph 43 at the beginning of the first sentence of the Reasons for Judgment, a typographical error was made where it read “Despite

Mr. Cook's very able argument,…" it should have read "Despite **Ms.** Cook's very able argument,…".

These reasons for judgment are issued in substitution for the reasons for judgment signed on March 6, 2008.

Signed at Ottawa, Canada, this 31st day of March 2008.

"D.G.H. Bowman"

Bowman, C.J.

Citation: 2008TCC128
Date: 20080331
Docket: 2005-1232(GST)G

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AMENDED REASONS FOR JUDGMENT

Bowman, C.J.

[1] These appeals were heard together. They are from assessments made under subsection 323(1) of the *Excise Tax Act* ("*ETA*"). Subsections 323(1) and (2) read as follows:

> **323. (1)** *Liability of directors* -- If a corporation fails to remit an amount of net tax as required under subsection 228(2) or (2.3) or to pay an amount as required under section 230.1 that was paid to, or was applied to the liability of, the corporation as a net tax refund, the directors of the corporation at the time the corporation was required to remit or pay, as the case may be, the amount are jointly and severally, or

> solidarily, liable, together with the corporation, to pay the amount and any interest on, or penalties relating to, the amount.
>
> **(2)** *Limitations* -- A director of a corporation is not liable under subsection (1) unless
>
> (a) a certificate for the amount of the corporation's liability referred to in that subsection has been registered in the Federal Court under section 316 and execution for that amount has been returned unsatisfied in whole or in part;
>
> (b) the corporation has commenced liquidation or dissolution proceedings or has been dissolved and a claim for the amount of the corporation's liability referred to in subsection (1) has been proved within six months after the earlier of the date of commencement of the proceedings and the date of dissolution; or
>
> (c) the corporation has made an assignment or a bankruptcy order has been made against it under the *Bankruptcy and Insolvency Act* and a claim for the amount of the corporation's liability referred to in subsection (1) has been proved within six months after the date of the assignment or bankruptcy order.

[2] The sole question is whether the condition in paragraph 323(2)(*a*) has been met that

> "...execution for that amount has been returned unsatisfied in whole or in part;"
>
> ("... et il y a eu défaut d'exécution totale ou partielle à l'égard de cette somme")

[3] The appellants were directors and shareholders of Pacific Landplan Collaborative Ltd. ("Pacific"). It carried on a landscape consulting and design business in Vancouver from 1977 to some time near the end of 1993. The appellant, Mr. Miotto, testified. Mr. Maruyama did not. From his evidence and that of Tracy Johnson, a collections officer with the Canada Revenue Agency ("CRA"), it appears that in 1993 Pacific stopped business and the appellants divided up the assets and equipment and the projects in progress of Pacific and each started his own business.

[4] Rod Maruyama & Associates Inc. and Mr. Miotto started Stonefield Development Corporation. They did not wind up Pacific or take any steps to transfer the assets to themselves. Mr. Miotto stayed at the old premises of Pacific at 303-1120 Hamilton Street in Vancouver where he carried on business. Mr. Maruyama went somewhere else.

[5] They filed no final GST or income tax returns. On June 12, 1998, Pacific was dissolved by the B.C. Registrar of Companies for failure to file its annual returns.

[6] Pacific filed no GST returns and remitted no GST for the periods from May 1, 1991 to January 31, 1995. On May 26, 1999, the Minister of National Revenue issued a "notional" (i.e. estimated) GST assessment against Pacific for the period from May 1, 1991 to January 31, 1995 (the May assessment). Pacific filed GST returns for three reporting periods and on June 28, 1999, the Minister reassessed Pacific in accordance with those returns (the June reassessment).

[7] On July 9, 1999, Pacific's accountant informed the appellants that Pacific owed GST of $35,365.18, plus interest and penalties, and that GST returns had not been filed for the reporting periods from February 1, 1992 to January 31, 1995.

[8] On August 9, 1999, Pacific's accountant filed a notice of objection to the May assessment. On September 16, 1999, Pacific's GST returns for the reporting periods from February 1, 1992 to January 31, 1994 were filed. They were signed by both appellants.

[9] On September 20, 1999, Pacific filed corporate income tax returns for the taxation years ending December 31, 1996 and December 31, 1997. The balance sheets filed with both returns stated that Pacific had no assets.

[10] I might note in passing that all of this activity after June 12, 1998 took place after Pacific had been dissolved by the Registrar of Companies and before Pacific was reinstated on October 18, 1999.

[11] On October 5, 1999, the British Columbia Supreme Court entered an Order dated September 25, 1999, restoring Pacific to the register of corporations and on October 18, 1999, the Registrar restored Pacific to the register for a period of two years.

[12] The Order of the British Columbia Supreme Court stated:

> THIS COURT ORDERS that The Pacific Landplan Collaborative, Ltd. is restored to the register of British Columbia companies for a period of not more than two (2) years, commencing on the date of the filing of a certified copy of this Order with the Registrar of Companies, for the purpose of enabling the Minister of National Revenue to facilitate the assessment and collection of the Goods and

> Services Tax debt owing by The Pacific Landplan Collaborative, Ltd. to the Receiver General for Canada.
>
> THIS COURT FURTHER ORDERS that the Pacific Landplan Collaborative, Ltd. shall be deemed to have continued in existence as if its name had never been struck off the register and dissolved, without prejudice to the rights of any parties which may have been acquired prior to the date on which The Pacific Landplan Collaborative, Ltd. is restored to the register of British Columbia companies.

[13] On October 27, 1999, the Minister reassessed Pacific for GST for the periods from February 1, 1992 to January 31, 1994 (the October reassessment) for net total tax of $24,178.72 as reported in the return. No Notice of Objection was filed to that reassessment and no appeal to the Tax Court of Canada was filed by Pacific.

[14] On December 6, 1999, a certificate showing Pacific's GST debt of $81,168.25 was filed in the Federal Court and the Federal Court issued a Writ of Seizure and Sale.

[15] On September 25, 2001, Ms. Tracy Johnson, the CRA collections officer sent the writ to a bailiff with instructions to execute the writ and satisfy Pacific's GST debt. She also informed the bailiff that it was unlikely that any assets of Pacific would be found. This belief was based on the fact that Pacific had not carried on business since 1993, had been struck off the register in 1998 and had reported that it had no assets in its financial statements for 1995, 1996 and 1997.

[16] The bailiff attempted to execute the writ by attending at Pacific's Registered and Records office and by searching for the directors. The following is taken from the appellant's brief of argument and essentially details the attempts by the bailiff to execute the Writ of Seizure.

> 12. On September 25, 2001 an officer of the Respondent made the following notation in the Respondents records:
>
> "MISCELLANEOUS
>
> SUMMARY FOR EXECUTION OF WRIT
>
> This account came into collections on May 28, 1999.
> The debt is consists of returns filed for periods from 1991-1994.

The company was dissolved for failure to filed on June 12, 1998 and was subsequently restored October 18, 1999.
The two directors of the company are Rod Miles Murayama and Joseph Alfred Miotto. The company was in the business of land planning and site design.
Business was conducted out of an office at 303-1120 Hamilton Street in Vancouver. This is now the office of Stonefield Development Corporation and Observation Mountain Investment Corp. Joe Miotto is a director for both of these companies.
Joe Miotto and Rod Maruyama are the also the directors of Copper Ridge Development Corp. which owns several properties in the Kamloops land title district. It's office is located in Grand Forks, BC.
Joseph Miotto is the half owner of 989 Premier Street in North Vancouver, pid 023-767-375. The 1999 BCAA value was $303,000.
Director's Liability preassessmen letters were sent out to each director. The directors retained counsel, David Gagnon of Harper Grey Easton, who was of the opinion that once the company was struck, the directors ceased to be responsible as there was no legal entity to resign from.

PRIVILEGE CLAIMED

The certificate of restoration expires October 17, 2001 and can only be revived by court order. ***Executing the writs and proceeding with directors' liability circumvent this.*** The directors have the ability to pay.

The collections officer is requesting approval to execute the writ, which is expected to be returned Nulla Bonna. Director's liability will then be pursued.
Collections Officer: T. Johnson
Team Leader: D. Biblow
Group Manager: R. Allen
Referred request for seisure and sale to Mgr. R. Allen.
Recoveries unlikely. Team Leader: DM Biblow.
Approved for Writ issueance, as pre-req for Sect 323 Assmt.
R. Allen, Mgr.
... Sent out bailiff package/cheque."

13. At the time the Writ was being executed the Appellants were in possession of certain assets of the Corporation (the "Assets") which were estimated to be valued at approximately $11,795.

14. On September 27, 2001 an officer of the Respondent made the following notation in the Respondents records:

"Val from Bailiff office called # to reach her is (604) 526-2253

> Says she has some questions re: searches.
> Pls call ASAP"

15. On November 20, 2001 an officer of the Respondent made the following notation in the Respondents records:

> "called bailiff Robert Lynch and asked him to return writs as reinstatement of corporation has now expired. Will discuss with rocco and t/1 about whether the Agency can still proceed with section 323".

16. On February 26, 2002 the Bailiff issued a "Report" to the Respondent detailing the Bailiff's activities in relation to the execution. The Report *inter alia* evidences the following:

    a. The CRA Collections Officer Traci Johnson stated "she felt there were no assets to be seized";
    b. The Bailiff attended the address provided by the Respondent and discovered that it was only the registered and records office and contacted the Respondent to suggest that the Writ should be served on the business and directors, and to request the residential addresses;
    c. Bailiff attended an old address of the Appellant Miotto and only found the current address by checking in the "phone book";
    d. The Bailiff called the Appellant Miotto at his residential address but there was no answer;
    e. The Bailiff attended the Appellant Maruyama's residential address and "pressed buzzer, no answer";
    f. On November 13, 2001 the Bailiff left an update for "Traci...confirmed address good on Beach Avenue. Could get no answer."; and,
    g. "Our file was closed at Creditor's Request and the Writ returned duly endorsed "Unable to locate exigible assets".

17. The back page of the Writ was stamped and initiated by the Bailiff on February 26, 2002, with the notation "UNABLE TO LOCATE EXIGIBLE ASSETS".

[17] Counsel for the appellants argues that the attempts by the bailiff to execute the writ were insufficient and that "execution for that amount" [i.e. Pacific's liability] cannot be said to have been perfected as a condition precedent to issuing a directors' liability assessment under subsection 323(1). She argues that there were assets of Pacific that could have been seized. In fact, the assets that she says could have been seized were office equipment and furniture of Pacific that the appellants divided up and used in their new business.

[18] The third witness for the appellant, Mr. Kavanagh, an experienced auctioneer and bailiff was given, in 2007, a list of office equipment and furniture that was made in 1993 by the appellants when they were dividing up Pacific's assets. He was asked in 2007 to opine what that property was worth on the open market in 1999. He came up with a figure of about $11,000. He never saw the property and did not know if it existed in 1999 or 2007. Counsel for the respondent objected to the report because it had not been served in accordance with the rules respecting expert evidence. I do not question Mr. Kavanagh's qualifications but the evidence establishes precisely nothing. Perhaps in 1999 there may, I repeat may, have been some equipment and furniture around that had been taken by the appellants. Its amount, value, nature, ownership and existence are a matter of pure conjecture.

[19] Counsel for the appellant alleges a number of defects in the conduct of the CRA collections branch and the bailiff which she says resulted in a failure to complete the execution mandated by the writ. Two in particular stand out:

(a) the failure to go to the old premises of Pacific where Mr. Miotto was carrying on his new business and where there might have been some of Pacific's old equipment, and

(b) Ms. Johnson's instructions to the bailiff to return the writ because she thought he could not proceed with the execution after the two year revival of the corporate Lazarus, Pacific, had expired. I suspect she was wrong in thinking that execution cannot continue against a corporation's assets after it is dissolved but I express no concluded view as I was given no argument or authority on this point.

[20] Ms. Cook's argument was most skilful and the research that she has done on what constitutes "execution" is a model of thoroughness and diligence. I agree with her that the steps that constitute conditions precedent to holding a director vicariously liable under section 323 of the *ETA* or section 227.1 of the *Income Tax Act* must be scrupulously followed.

[21] She referred to an early decision in *Grills v. Farah*, [1910] 21 O.L.R. 457, where Riddell J. summarized the law as follows:

> 14 Notwithstanding that the statute had, at least as early as the Joint Stock Companies General Clauses Consolidation Act (1861), 24 Vict. ch. 18, sec. 33, provided a remedy practically the same as the present statutory remedy, for long

sci. fa. continued to be brought in our Courts. Either original action against the shareholder or sci. fa. was resorted to: Gwatkin v. Harrison (1875), 36 U.C.R. 478; Page v. Austin (1876), 26 C.P. 110. But the sci. fa. proceeding died out, and the more convenient method provided by the statute became universal.

15 The Courts had early to consider the meaning of the provision that the shareholder should not be liable before an execution against the company had been returned unsatisfied.

16 In Moore v. Kirkland (1856), 5 C.P. 452, a similar provision in the Railway Act was considered--14 & 15 Vict. ch. 51, sec. 19, afterwards C.S.C. ch. 66, sec. 80, and still in the Railway Act, R.S.C. 1906, ch. 37, sec. 98. Macaulay, C.J., says, p. 457: "The declaration must be taken to allege the return of an execution against the company unsatisfied; and, I think, it forms properly a matter for the jury, whether a return in form was such a return as the statute requires --namely, a return unsatisfied, not pro formâ, but after due diligence to realise the amount out of the effects of the company."

17 In Jenkins v. Wilcock (1862), 11 C.P. 505, Draper, C.J., giving the judgment of the Court, says, p. 508: "I agree the execution must be issued for the purpose of obtaining satisfaction if it can be [21 OLR Page461] had--it is not to be a mere illusory formal proceeding, to give colour to proceedings against a shareholder."

18 These cases are cited with approval in Brice v. Munro, 12 A.R. 453, at pp. 462, 463, 471; and, so far as I can find, the law never has been questioned.

19 In Shaver v. Cotton (1896), 23 A.R. 426, Burton, J.A., at p. 431, says: "... Showing a return of nulla bona to a fi. fa. is by no means conclusive, for it is consistent with such a return that it may have been made at the request of the plaintiff, and without any bond fide effort to look for property." In the present case the so-called return was "made at the request of the plaintiff, and without any bonâ fide effort to look for property."

20 I am not satisfied that there was no property exigible under the writ--but, even if such were the case, I do not think the plaintiff is advanced. "It may be that the company had no goods which were exigible under execution at the time the writ was placed in the Sheriff's hands, but, if there were any, the Sheriff was prevented from seizing and selling them by the plaintiff himself:" per Burton, J.A., in Shaver v. Cotton, at p. 431. In that case the goods, if there were any, were prevented from getting into the hands of the Sheriff by the plaintiff obtaining an order for winding-up--in the present case the Sheriff never was intended to seize any goods, if such there were.

[22] In *Finnigan v. Jarvis*, 8 U.C.R. 210, Chief Justice Robinson in an action against a sheriff for negligence instructed the jury as follows:

> He also told the jury that he could not hold that the sheriff was bound to keep sentinels day and night at a defendant's house, for several days or weeks in succession; for that might in some cases occasion an expense greater than the debt, and one which the sheriff could not be reasonably expected to incur — but that there were many degrees of vigilance between that and a mere going to the house once or twice in order to execute the writ.

[23] In *Massey Manufacturing Co. v. Clement*, 9 M.R. 359, another action against a sheriff for negligence, Bain J. in the Manitoba Court of Appeal said:

> ... I agree that it is the imperative duty of the Sheriff to act upon the power whenever a proper occasion for its exercise arises.

[24] In *Hiscock v. Stafford*, [1984] N.J. No. 321, 46 Nfld. & P.E.I.R. 221, Riche D.C.J. said:

> In the case of Re Bayview Estates (1980), 28 Nfld. & P.E.I.R. 225; 79 A.P.R. 225, Mahoney, J., at page 244 of that judgment, paragraph 44 and 45 states as follows:
>
> "The process of execution is one continuing act. The service of the process by the Sheriff by notice to the defendant (the judgment debtor) and by affixing a notice to the land which is the subject of the writ of fi fa is not enough to constitute execution in itself. Seizure is required in the above defined sense, that is, taking the property into custody of the law in order to sell it and thereby have the money due under the judgment in order to satisfy the judgment. Anything short of that cannot be execution. Levy means the same thing, to take all necessary steps to enforce payment.
>
> Each of the terms, levy, seizure and execution are synonymous in that each signifies the action of the sheriff in carrying out the duty imposed upon him, to seize and sell the property and satisfy the judgment with the money realized. If he has not done that, then he has not executed the writ of fieri facias; he has not completed the task he was ordered to complete."

[25] In *Shaver v. Cotton*, [1896] 23 O.A.R. 426, Burton J.A. of the Ontario Court of Appeal said:

> 26. In cases under the Act authorizing a proceeding by sci. fa. creditors were not entitled to proceed against an individual shareholder until all remedies against the assets of the company were exhausted. This was generally done by shewing a return of nulla bona to a fi. fa., but that is by no means conclusive, for it is consistent with such a return that it may have been made at the request of the plaintiff and without any bonâ fide effort to look for property.

27. On the 2nd of April, 1894, a writ of execution was issued upon the plaintiff's judgment against the goods of the company. On the following day an order for winding-up the company was made on the application of the plaintiff, and the return of nulla bona was made by the sheriff on the 30th of May.

28. It may be that the company had no goods which were exigible under execution at the time the writ was placed in the sheriff's hands, but if there were any the sheriff was prevented seizing and selling them by the plaintiff himself.

29 It would seem, therefore, that the plaintiff had disabled himself from proceeding under the Act.

[26] In *Stevens v. Spencer et al.*, [1929] 3 W.W.R. 129, aff'd [1930] 2 W.W.R. 271, Tweedie J. said at page 145:

. . . The statute making the shareholders liable directly to the creditors provides that they "shall not be liable to an action therefor before an execution against the company shall have been returned unsatisfied in whole or in part and the amount due on such execution shall be the amount recoverable with the costs against such shareholders."

In the case of *Grills v. Farah* (1910), 21 O.L.R. 457, at 460, Mr. Justice Riddell in dealing with the authorities says:

"The Courts had early to consider the meaning of the provision that the shareholder should not be liable before an execution against the company had been returned unsatisfied.

"In *Moore v. Kirkland* (1856), 5 U.C.C.P. 452, a similar provision in the *Railway Act* was considered — 14 & 15 Vict. ch. 51, sec. 19, afterwards C.S.C., ch. 66, sec. 80, and still in the *Railway Act*, R.S.C. 1906, ch. 37, sec. 98. Macaulay, C.J., says, p. 457: "The declaration must be taken to allege the return of an execution against the company unsatisfied; and, I think, it forms properly a matter for the jury, whether a return in form was such a return as the statute requires — namely, a return unsatisfied not *pro forma*, but after due diligence to realize the amount out of the effects of the company."

"In *Jenkins v. Wilcock* (1862) 11 U.C.C.P. 505, Draper, C.J. giving the judgment of the Court, says, p. 508: 'I agree the execution must be issued for the purpose of obtaining satisfaction if it can be had — it is not to be a mere illusory formal proceeding, to give colour to proceedings against a shareholder.

"These cases are cited with approval in *Brice v. Munro* (1885) 12 A.R. 453, at pp. 462, 463, 471; and, so far as I can find, the law never has been questioned.

"In *Shaver v. Cotton* (1896), 23 A.R. 426, Burton, J.A., at p. 431, says: '* * * Showing a return of *nulla bona* to a *fi. fa.* * * * is by no means conclusive, for it is consistent with such a return that it may have been made at the request of the plaintiff, and without any *bona fide* effort to look for property.' In the present case the so-called return was 'made at the request of the plaintiff, and without any *bona fide* effort to look for property.'"

"In regard to the facts of the particular case under consideration by Mr. Justice Riddell he stated in regard to the return:

"I am not satisfied that there was no property exigible under the writ, — but, even if such were the case, I do not think the plaintiff is advanced. * * * in the present case the Sheriff never was intended to seize any goods, if such there were.

"If the Plaintiff could get over this initial difficulty, I think he should recover."

The action was dismissed for that reason. In that case the solicitor had forwarded by mail a writ of execution to a sheriff asking for an immediate return and it was perfectly obvious that in order that an immediate return might be made the sheriff could not ascertain whether or not there were any exigible assets.

Was the plaintiff in this case, through his solicitor, under all the circumstances, justified in having a return of *nulla bona* made and thereupon commencing his action against the directors? The execution had been handed to the sheriff on September 12, 1928, and on October 7 the solicitors wrote to the sheriff:

"We are anxious to realize under this execution without delay and would request that you endeavor to make seizure. If, however, you find there are no goods and chattels available for seizure under the execution, kindly make a return of n*ulla bona* to the Court as soon as possible."

A warrant under the execution was sent to the sheriff's bailiff on October 13. Subsequently, in that month the bailiff reported that everything was under chattel mortgage and that there were some mining props and ties under seizure in other proceedings but they were not of much value. This information was brought to the attention of the plaintiff's solicitor and on October 24 at the request of the solicitor's clerk a return of *nulla bona* was made.

Upon these facts I do not think that it can be said that any *bona fide* attempt to realize the amount of the execution out of the effects of the company had been made. A *bona fide* attempt on the part of the sheriff to enforce an execution involves something more than an honest belief. The solicitor for the plaintiff, the

> sheriff and the bailiff may have honestly believed that there were no assets available. That is not sufficient. The sheriff must exercise due diligence in searching for property and make inquiries of persons who are likely to know — in connection with this execution officers of the corporation — for information concerning the property of the debtor and the result of his search and inquiry must be an accumulation of facts and information from which it may be reasonably concluded that no assets are available in order to justify a return of *nulla bona*.

[41] These venerable authorities are probably still good law but I cannot think they go far enough to assist the appellant. The CRA collections officer quite reasonably believed that Pacific had no assets. Neither she nor the bailiff had any reason to suspect that perhaps some assets of Pacific were still in the possession of the appellants.

[42] Whether an execution is completed is essentially a factual determination. The execution of a writ of *fieri facias* requires reasonable efforts on the part of the bailiff. It does not require perfection. Certainly one could not expect the bailiff or the judgment creditor to be sufficiently clairvoyant to surmise (or even suspect) that some unspecified items of furniture and equipment of questionable provenance and indeterminate value lying around the office of Stonefield Development Corporation might conceivably have belonged at some time in the past to the judgment debtor Pacific. It requires a certain amount of nerve for the directors to challenge the assessments by criticizing the bailiff and the CRA for being remiss in failing to find such items when the directors themselves were responsible for their disappearance into another company and for Pacific's becoming, for all practical purposes, judgment proof. It is somewhat reminiscent of the classic example of chutzpah where a person convicted of murdering his parents asks the court for mercy on the ground that he is an orphan.

[43] Despite **M**s. Cook's very able argument, I think the execution was adequate and the *nulla bona* return was sufficient to warrant the section 323 assessments against the appellant. The respondent conceded that the sheriff's fees of $406.49 should not have been included in the assessment. Therefore, the appeals are allowed and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment only to reduce the assessment by $406.49 plus related interest and penalties. Otherwise, the assessments are confirmed.

[44] The respondent is entitled to her costs on the basis of only one counsel fee in respect of both appellants.

Signed at Ottawa, Canada, this 31st day of March 2008.

"D.G.H. Bowman"

Bowman C.J.

CITATION:	2008TCC128
COURT FILES NOS.:	2005-1232(GST)G 2005-1228(GST)G
STYLE OF CAUSE:	Alfred Miotto and Rod Maruyama v. Her Majesty The Queen
PLACE OF HEARING:	Vancouver, British Columbia
DATES OF HEARING:	February 19, 2008
REASONS FOR JUDGMENT BY:	The Honourable D.G.H. Bowman, Chief Justice
DATE OF JUDGMENT:	March 6, 2008
DATE OF AMENDED JUDGMENT:	March 31, 2008

APPEARANCES:

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Counsel for the Respondent:	Michael Taylor

COUNSEL OF RECORD:

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