Date: 20071016

Docket: T-2284-06

Citation: 2007 FC 1058

Ottawa, Ontario, October 16, 2007

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

KENNETH ADAM GATES,
JOHN JAMES ST. JEAN,
RICHARD ARLISS FOX,
NEIL ROBERT SIMPSON AND
SHELDON KENNETH SHALER

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] Justice Blanchard had issued an interlocutory injunction prohibiting Correctional Service Canada (CSC) from allowing the temperature at the Temporary Detention Unit (TDU) at Matsqui Institution to drop below 20 degrees Celsius between the hours of 08:00 a.m. and 12:00 midnight

and 16 degrees Celsius between the hours of 12:00 midnight and 08:00 a.m. pending the final disposition of this application for judicial review. This is the judicial review which underlies Justice Blanchard's decision in which he found the serious issue to be whether the Applicants were required to use the internal complaint procedure before applying to this Court for relief.

II. FACTUAL BACKGROUND

[2] The TDU is a holding area in the Matsqui Institution which holds parolees who have been returned to custody as a result of parole violations. Typically, inmates in the TDU spend a short period of time in the unit ranging from a few days to a few weeks.

[3] The Applicants, with the exception of St. Jean, have been relocated to other facilities and none are in the TDU. The Applicants attempted to suggest that some of them might be transferred back to the TDU – an entirely speculative assertion. The purpose of the argument is to suggest that the issue in this case is not academic. Given the nature of TDU inmate holdings, the principles in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, would apply and the Respondent quite properly does not seek to strike this judicial review on the grounds of mootness.

[4] The problem related to the TDU is systemic and could possibly apply to a number of current and potential inmates. The problem is that because inmates smoke in their cells, contrary to an unenforced policy of CSC, the unit has to be ventilated to clear the smoke. Apparently, there are no fans to accomplish this task.

[5] In order to ventilate the TDU, the doors of the unit have to be opened. This, the Applicants say, is done with such persistence and regularity that the unit becomes unhealthily cold. As well, the inmates are denied extra blankets or clothing to keep them warm during these periods – particularly in winter – when the TDU becomes very cold. It is alleged that the rear doors of the unit are kept open all day and sometimes all night – the suggestion is that this is done for purposes of causing more discomfort than is necessary to rid the TDU of smoke.

[6] A number of the Applicants suffer from illnesses (i.e. HIV/AIDS or Hepatitis C) which makes them particularly sensitive to cold and where the cold aggravates their illness.

[7] The Applicants submitted evidence from Environment Canada showing that between December 2006 and mid-March 2007 temperatures could range from the low-teens Celsius to as low as -12 degrees, although typically in the range of 0 degrees.

[8] The Applicants submitted their direct evidence which was not directly challenged. This evidence included the allegation that they were denied permission to wear outdoor clothing indoors, that additional clothing/blankets were denied and that oral and written complaints were not acted upon.

[9] The Respondent's evidence was from the Acting Correctional Supervisor of the TDU, who addressed the real health need to ventilate the unit of smoke, the difficulty created by inmates smoking indoors (there is no outdoor "no smoking" policy yet) and that extra clothing and blankets

were offered to inmates. The affiant's evidence consisted of substantial hearsay evidence without any indication of the source of such evidence, including the absence of any complaints from inmates.

[10] Justice Blanchard issued his order on substantially the same evidence regarding the inmates' complaints as was before this Court, particularly as the evidence relates to the harm experienced by the Applicants and other inmates. Justice Blanchard's order was in effect during the winter of 2007 and there is no evidence that it was not effective or overly burdensome to comply with.

[11] There was some suggestion put forward by the Respondent's counsel that a new policy imposing a complete smoking ban would be imposed by April 2008 which would eliminate the need to ventilate the TDU. No direct evidence on this point was put forward but I accept counsel's word that such a ban may be forthcoming. The future imposition of this ban only affects the scope of the remedy.

[12] The Respondent's legal obligation to provide a safe and healthy environment for inmates and staff are set forth in ss. 70, 86 and 87 of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (CCRA). Section 70 reads:

70. The Service shall take all reasonable steps to ensure that penitentiaries, the penitentiary environment, the living and working conditions of inmates and the working conditions of staff members are safe, healthful and free of	70. Le Service prend toutes mesures utiles pour que le milieu de vie et de travail des détenus et les conditions de travail des agents soient sains, sécuritaires et exempts de pratiques portant atteinte à la dignité humaine.

> practices that undermine a person's sense of personal dignity.

[13] It is axiomatic that people need heat in winter – a concept not likely to be challenged. The duty to provide a safe and healthy living environment includes providing adequate heat.

[14] The obligation imposed on CSC to provide a healthy environment is set forth particularly in s. 83 of the *Corrections and Conditional Release Regulations*, S.O.R./92-620 (Regulations):

83. (1) The Service shall, to ensure a safe and healthful penitentiary environment, ensure that all applicable federal health, safety, sanitation and fire laws are complied with in each penitentiary and that every penitentiary is inspected regularly by the persons responsible for enforcing those laws.	83. (1) Pour assurer un milieu pénitentiaire sain et sécuritaire, le Service doit veiller à ce que chaque pénitencier soit conforme aux exigences des lois fédérales applicables en matière de santé, de sécurité, d'hygiène et de prévention des incendies et qu'il soit inspecté régulièrement par les responsables de l'application de ces lois.
(2) The Service shall take all reasonable steps to ensure the safety of every inmate and that every inmate is	(2) Le Service doit prendre toutes les mesures utiles pour que la sécurité de chaque détenu soit garantie et que chaque détenu :
(a) adequately clothed and fed;	a) soit habillé et nourri convenablement;
(b) provided with adequate bedding;	b) reçoive une literie convenable;
(c) provided with toilet articles and all other articles necessary for	c) reçoive des articles de toilette et tous autres objets nécessaires à la propreté et

personal health and cleanliness; and	à l'hygiène personnelles;
(d) given the opportunity to exercise for at least one hour every day outdoors, weather permitting, or indoors where the weather does not permit exercising outdoors.	d) ait la possibilité de faire au moins une heure d'exercice par jour, en plein air si le temps le permet ou, dans le cas contraire, à l'intérieur.

[15] When disputes arise between the CSC and an inmate, the Regulations provide for a complaints and grievance process in ss. 74-82 (attached as Annex A to these Reasons). Particularly germane to this judicial review is s. 81 which contemplates an inmate pursuing both the complaints and grievance process as well as other legal remedies.

81. (1) Where an offender decides to pursue a legal remedy for the offender's complaint or grievance in addition to the complaint and grievance procedure referred to in these Regulations, the review of the complaint or grievance pursuant to these Regulations shall be deferred until a decision on the alternate remedy is rendered or the offender decides to abandon the alternate remedy.	81. (1) Lorsque le délinquant décide de prendre un recours judiciaire concernant sa plainte ou son grief, en plus de présenter une plainte ou un grief selon la procédure prévue dans le présent règlement, l'examen de la plainte ou du grief conformément au présent règlement est suspendu jusqu'à ce qu'une décision ait été rendue dans le recours judiciaire ou que le détenu s'en désiste.
(2) Where the review of a complaint or grievance is deferred pursuant to subsection (1), the person who is reviewing the complaint or grievance shall give the offender written notice of the decision to defer the review.	(2) Lorsque l'examen de la plainte ou au grief est suspendu conformément au paragraphe (1), la personne chargée de cet examen doit en informer le délinquant par écrit.

[16] The Applicants' evidence is that at least one of them filed a written complaint, others made oral complaints and yet others were told that the complaints process did not apply to inmates in the TDU because they were considered members of the outside community – presumably because they were parolees. In any event, no action was taken on those complaints made until counsel became involved, late in the process.

[17] The Applicants contend that the CSC violated the CCRA and Regulations, violated their s. 7 and s. 12 *Charter* rights and violated the *Canadian Human Rights Act* (CHRA). The Respondent, aside from denying any violation and/or jurisdiction in this Court to consider the rights issues under the *Charter* and CHRA, says that this Court should decline jurisdiction to hear this matter because of the existence of a grievance procedure.

III. ANALYSIS

[18] The principal issue is whether the Court should decline to hear this matter because the Applicants did not utilize the internal complaints process. This is an issue of law which concerns this Court's jurisdiction and an interpretation of the legislation. As such, the standard of review is correctness.

[19] Although standard of review was not a particular focus of this judicial review, to the extent that the Court must consider the actions and decisions of the CSC officials in respect of the matter of ventilating the TDU, the standard of review is reasonableness. The Regulations, in s. 81,

contemplate alternative remedies other than the complaint process, which suggests low deference. The specifics of when and how to maintain healthy conditions engages the expertise of CSC officials and therefore suggests greater deference. However, the particular issue, the temperature and availability of clothes and blankets, is largely a rights-based dispute and suggests less deference. Finally, the dispute is one of mixed law and fact which again suggests reasonableness. All of these factors taken together lead to the conclusion that, in these circumstances, the standard of review is reasonableness.

A. *Violation of CCRA – Complaints Process*

[20] On the substantive matter of whether there was a breach of the obligation to provide a healthy environment – particularly that of heat in winter - the evidence is contradictory. The Court is mindful of the incentives and motives of persons in the position of the Applicants to make fanciful allegations. However, the allegations have a sufficient “ring of truth” that they must be assessed on the basis of the evidence in respect of each allegation.

[21] The allegations are that the rear doors of the TDU were left open, that the cells became cold and that blankets and outdoor clothing were not made available or permitted. These allegations are supported by affidavit of first-hand witnesses.

[22] The difficulty with the Respondent’s contrary evidence is that it is so remote that it does not substantially rebut the Applicants’ case. There was no evidence from persons who were present, e.g. guards, to counter the Applicants’ evidence.

[23] Justice Blanchard accepted that the harm claimed by the Applicants occurred and I see no reason to depart from that finding particularly where the record on this aspect is largely the same.

[24] Having concluded that the Applicants had at least a ground of complaint, the issue is whether this matter should be dealt with by this Court in light of the existence of a comprehensive grievance procedure mandated by the Regulations.

[25] Justice Pelletier, while on the Trial Division, in *Marachelian v. Canada (Attorney General) (T.D.)*, [2001] 1 F.C. 17, had to deal with a similar issue. The learned judge recognized that there had to be exceptions to the general rule that an inmate had to exhaust internal remedies before seeking Court relief.

[26] In my view, the Court should not lightly interfere with the complaints process. There are strong policy and statutory reasons for requiring inmates to use this process. It is in cases of compelling circumstances, such as where there is actual physical or mental harm or clear inadequacy of the process that a departure from the complaints process would be justified (this is not an exhaustive list of the circumstances justifying departure from the usual process).

[27] As recognized in *May v. Ferndale Institution*, [2005] 3 S.C.R. 809, the complaints process is not a complete statutory code. While not dealing with freedom issues, as in *Ferndale*, the Court is faced with health issues which are serious matters. In addition, the factual background as to cold

temperatures in the TDU is not substantially challenged which gives credence to the health concerns brought on by cold temperatures.

[28] As outlined earlier in these Reasons, s. 81 specifically contemplated an inmate seeking alternative legal remedies to those internal remedies. It is consistent with this regulatory scheme that, where there are urgent substantive matters and evident inadequacy in the internal procedures, it is open to the Court to consider the issue of remedial action.

[29] Because there are potential health issues and that the problems are seasonal, there is a need to resolve these complaints quickly. The prison complaint process has been criticized as slow and inadequate – see the *Annual Report of the Office of the Correctional Investigator 2005-2006* and the *Report of the Commission of Inquiry into Certain Events at the Prison for Women in Kingston* by the Honourable Louise Arbour.

[30] While there is a process for "prompt" action on complaints to shorten the usual grievance process of 6-12 months, the process is uncertain and depends to some extent on how the complaint is classified by CSC. This particular complaint is classified by the Respondent as one related to temperature and therefore not of great priority. The Applicants classify it is one of health deserving of greater priority.

[31] In submissions, not rebutted, the Applicants contend that priority complaints can take up to six months to resolve and, at a minimum, 12 weeks to process. Persons held in the TDU, such as the

Applicants, are held there for less than this minimum time, making the complaint process for any such complainant academic. The Respondent has not shown that the complaint process is adequate in these circumstances.

[32] Any alternative remedy must be timely and effective. There is no evidence that in respect to this complaint, or even complaints of a similar type, the process meets either criterion.

[33] Lastly, there is no assurance that complaints will be acted upon. There is evidence that these complaints were not. Four of the five Applicants claim that they complained – sometimes orally, sometimes in writing. Recognizing the frailties inherent in this type of allegation, the Respondent has presented no evidence that directly challenges these events or even the plausibility that these complaints were made. There is no evidence of a mechanism that assures that complaints reach the responsible person.

[34] The Court is left in the position, if the Respondent's submissions are accepted, of rejecting sworn evidence, not challenged or rebutted with plausible contrary evidence. One could ask rhetorically – on what basis would the Court reject this sworn evidence other than its sense that such allegations are easy to make and that there is motive to do so?

[35] In my view, this is a thin basis for rejecting evidence. The Applicants are no longer in the TDU and gain nothing from pursuing their complaint. If they are successful, the most that is

achieved is a continuance of Justice Blanchard's order that other inmates in the TDU receive heat in winter - hardly a motive for perjury.

[36] In all these circumstances, I find that this is a proper case for departing from the requirement to follow the complaint process. I further find that based on a balance of probabilities, the Applicants' complaint is made out and that the Respondent failed to meet its statutory obligations and did not behave reasonably.

[37] Given that Justice Blanchard's interim order was effective, it should be continued with minor adjustment. The Respondent rightly is concerned that even a minor deviation from the temperature settings could be a breach of a court order. Therefore, a materiality provision will be inserted in the final order.

[38] In the event that the Commissioner imposes a policy which eliminates the need to ventilate the TDU or there are other substantial changes of circumstance, the Respondent may apply to vacate this Order.

B. *Charter*

[39] Given the result in this case, it is not necessary to decide the *Charter* aspect of this judicial review. This is not a case where the *Charter* issue had to be raised first with the Commissioner; however, this is a case which can be decided without deciding a constitutional matter. The established jurisprudence is that in such instances, a court should decline to pronounce on *Charter*

rights. (*Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3)

C. *Canadian Human Rights Act*

[40] The Applicants would have this Court make a finding that there is a breach of rights under the CHRA without that matter proceeding to the Canadian Human Rights Commission. Even if the Court has jurisdiction, I would decline to exercise it because the Applicants can complain to the Commission and because this Court has granted relief which addresses the core of the Applicants' complaint.

IV. CONCLUSION

[41] The Applicants' judicial review for a declaration and mandatory injunction will be granted upon terms contained in the Judgment. The Applicants shall have their costs as per the Judgment.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The Respondent, through Correctional Service Canada, has failed to meet the requirements of s. 86(1)(a) and 87(a) of the *Corrections and Conditional Release Act* and s. 83 of the *Corrections and Conditional Release Regulations* from approximately December 8, 2006 until the order of Justice Blanchard dated February 2, 2007.

2. Until this Order is varied or rescinded, Correctional Service Canada is prohibited from allowing the temperature at the Temporary Detention Unit at Matsqui Institution in Abbotsford, British Columbia, to drop, materially or for any significant period of time, below 20 degrees Celsius between the hours of 08:00 a.m. and 12:00 midnight and 16 degrees Celsius between the hours of 12:00 midnight and 08:00 a.m.

3. The Applicants shall have their costs in accordance with Column V of the Federal Court Tariff.

"Michael L. Phelan"
Judge

ANNEX A

Corrections and Conditional Release Regulations, S.O.R./92-620

74. (1) Where an offender is dissatisfied with an action or a decision by a staff member, the offender may submit a written complaint, preferably in the form provided by the Service, to the supervisor of that staff member.

(2) Where a complaint is submitted pursuant to subsection (1), every effort shall be made by staff members and the offender to resolve the matter informally through discussion.

(3) Subject to subsections (4) and (5), a supervisor shall review a complaint and give the offender a copy of the supervisor's decision as soon as practicable after the offender submits the complaint.

(4) A supervisor may refuse to review a complaint submitted pursuant to subsection (1) where, in the opinion of the supervisor, the complaint is frivolous or vexatious or is not made in good faith.

(5) Where a supervisor refuses to review a complaint pursuant to subsection (4), the

74. (1) Lorsqu'il est insatisfait d'une action ou d'une décision de l'agent, le délinquant peut présenter une plainte au supérieur de cet agent, par écrit et de préférence sur une formule fournie par le Service.

(2) Les agents et le délinquant qui a présenté une plainte conformément au paragraphe (1) doivent prendre toutes les mesures utiles pour régler la question de façon informelle.

(3) Sous réserve des paragraphes (4) et (5), le supérieur doit examiner la plainte et fournir copie de sa décision au délinquant aussitôt que possible après que celui-ci a présenté sa plainte.

(4) Le supérieur peut refuser d'examiner une plainte présentée conformément au paragraphe (1) si, à son avis, la plainte est futile ou vexatoire ou n'est pas faite de bonne foi.

(5) Lorsque, conformément au paragraphe (4), le supérieur refuse d'examiner une plainte,

supervisor shall give the offender a copy of the supervisor's decision, including the reasons for the decision, as soon as practicable after the offender submits the complaint.

il doit fournir au délinquant une copie de sa décision motivée aussitôt que possible après que celui-ci a présenté sa plainte.

75. Where a supervisor refuses to review a complaint pursuant to subsection 74(4) or where an offender is not satisfied with the decision of a supervisor referred to in subsection 74(3), the offender may submit a written grievance, preferably in the form provided by the Service,

75. Lorsque, conformément au paragraphe 74(4), le supérieur refuse d'examiner la plainte ou que la décision visée au paragraphe 74(3) ne satisfait pas le délinquant, celui-ci peut présenter un grief, par écrit et de préférence sur une formule fournie par le Service :

(a) to the institutional head or to the director of the parole district, as the case may be; or

a) soit au directeur du pénitencier ou au directeur de district des libérations conditionnelles, selon le cas;

(b) where the institutional head or director is the subject of the grievance, to the head of the region.

b) soit, si c'est le directeur du pénitencier ou le directeur de district des libérations conditionnelles qui est mis en cause, au responsable de la région.

76. (1) The institutional head, director of the parole district or head of the region, as the case may be, shall review a grievance to determine whether the subject-matter of the grievance falls within the jurisdiction of the Service.

76. (1) Le directeur du pénitencier, le directeur de district des libérations conditionnelles ou le responsable de la région, selon le cas, doit examiner le grief afin de déterminer s'il relève de la compétence du Service.

(2) Where the subject-matter of a grievance does not fall within the jurisdiction of the

(2) Lorsque le grief porte sur un sujet qui ne relève pas de la compétence du Service, la

Service, the person who is reviewing the grievance pursuant to subsection (1) shall advise the offender in writing and inform the offender of any other means of redress available.

personne qui a examiné le grief conformément au paragraphe (1) doit en informer le délinquant par écrit et lui indiquer les autres recours possibles.

77. (1) In the case of an inmate's grievance, where there is an inmate grievance committee in the penitentiary, the institutional head may refer the grievance to that committee.

77. (1) Dans le cas d'un grief présenté par le détenu, lorsqu'il existe un comité d'examen des griefs des détenus dans le pénitencier, le directeur du pénitencier peut transmettre le grief à ce comité.

(2) An inmate grievance committee shall submit its recommendations respecting an inmate's grievance to the institutional head as soon as practicable after the grievance is referred to the committee.

(2) Le comité d'examen des griefs des détenus doit présenter au directeur ses recommandations au sujet du grief du détenu aussitôt que possible après en avoir été saisi.

(3) The institutional head shall give the inmate a copy of the institutional head's decision as soon as practicable after receiving the recommendations of the inmate grievance committee.

(3) Le directeur du pénitencier doit remettre au détenu une copie de sa décision aussitôt que possible après avoir reçu les recommandations du comité d'examen des griefs des détenus.

78. The person who is reviewing a grievance pursuant to section 75 shall give the offender a copy of the person's decision as soon as practicable after the offender submits the grievance.

78. La personne qui examine un grief selon l'article 75 doit remettre copie de sa décision au délinquant aussitôt que possible après que le détenu a présenté le grief.

79. (1) Where the institutional head makes a decision respecting an inmate's

79. (1) Lorsque le directeur du pénitencier rend une décision concernant le grief du détenu,

grievance, the inmate may request that the institutional head refer the inmate's grievance to an outside review board, and the institutional head shall refer the grievance to an outside review board.

celui-ci peut demander que le directeur transmette son grief à un comité externe d'examen des griefs, et le directeur doit accéder à cette demande.

(2) The outside review board shall submit its recommendations to the institutional head as soon as practicable after the grievance is referred to the board.

(2) Le comité externe d'examen des griefs doit présenter au directeur du pénitencier ses recommandations au sujet du grief du détenu aussitôt que possible après en avoir été saisi.

(3) The institutional head shall give the inmate a copy of the institutional head's decision as soon as practicable after receiving the recommendations of the outside review board.

(3) Le directeur du pénitencier doit remettre au détenu une copie de sa décision aussitôt que possible après avoir reçu les recommandations du comité externe d'examen des griefs.

80. (1) Where an offender is not satisfied with a decision of the institutional head or director of the parole district respecting the offender's grievance, the offender may appeal the decision to the head of the region.

80. (1) Lorsque le délinquant est insatisfait de la décision rendue au sujet de son grief par le directeur du pénitencier ou par le directeur de district des libérations conditionnelles, il peut en appeler au responsable de la région.

(2) Where an offender is not satisfied with the decision of the head of the region respecting the offender's grievance, the offender may appeal the decision to the Commissioner.

(2) Lorsque le délinquant est insatisfait de la décision rendue au sujet de son grief par le responsable de la région, il peut en appeler au commissaire.

(3) The head of the region or the Commissioner, as the case

(3) Le responsable de la région ou le commissaire,

may be, shall give the offender a copy of the head of the region's or Commissioner's decision, including the reasons for the decision, as soon as practicable after the offender submits an appeal.

selon le cas, doit transmettre au délinquant copie de sa décision motivée aussitôt que possible après que le délinquant a interjeté appel.

81. (1) Where an offender decides to pursue a legal remedy for the offender's complaint or grievance in addition to the complaint and grievance procedure referred to in these Regulations, the review of the complaint or grievance pursuant to these Regulations shall be deferred until a decision on the alternate remedy is rendered or the offender decides to abandon the alternate remedy.

81. (1) Lorsque le délinquant décide de prendre un recours judiciaire concernant sa plainte ou son grief, en plus de présenter une plainte ou un grief selon la procédure prévue dans le présent règlement, l'examen de la plainte ou du grief conformément au présent règlement est suspendu jusqu'à ce qu'une décision ait été rendue dans le recours judiciaire ou que le détenu s'en désiste.

(2) Where the review of a complaint or grievance is deferred pursuant to subsection (1), the person who is reviewing the complaint or grievance shall give the offender written notice of the decision to defer the review.

(2) Lorsque l'examen de la plainte ou au grief est suspendu conformément au paragraphe (1), la personne chargée de cet examen doit en informer le délinquant par écrit.

82. In reviewing an offender's complaint or grievance, the person reviewing the complaint or grievance shall take into consideration

82. Lors de l'examen de la plainte ou du grief, la personne chargée de cet examen doit tenir compte :

(a) any efforts made by staff members and the offender to resolve the complaint or grievance, and any recommendations resulting therefrom;

a) des mesures prises par les agents et le délinquant pour régler la question sur laquelle porte la plainte ou le grief et des recommandations en

découlant;

(b) any recommendations made by an inmate grievance committee or outside review board; and

b) des recommandations faites par le comité d'examen des griefs des détenus et par le comité externe d'examen des griefs;

(c) any decision made respecting an alternate remedy referred to in subsection 81(1).

c) de toute décision rendue dans le recours judiciaire visé au paragraphe 81(1).

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2284-06
STYLE OF CAUSE:	KENNETH ADAM GATES, JOHN JAMES ST. JEAN, RICHARD ARLISS FOX, NEIL ROBERT SIMPSON AND SHELDON KENNETH SHALER and ATTORNEY GENERAL OF CANADA
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DATED:	October 16, 2007

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