# Court of Queen's Bench of Alberta

**Citation: Maciejko v. Condominium Plan No. 9821495, 2012 ABQB 607**

**Date:** 20121010
**Docket:** 1203 00293
**Registry:** Edmonton

2012 ABQB 607 (CanLII)

Between:

**Gerald Maciejko and Sue Maciejko, Betty Mcphee,
John Bakker and Margaret Bakker, Daniel Madoche and Betty Madoche,
Jean Crozier, Aleda Patterson, John McCready and Madge McCready,
Herman Young and Monica Chesney**

Applicants

- and -

**The Owners: Condominium Plan No. 9821495
operating as The Shores**

Respondents

**Corrected judgment:** A corrigendum was issued on October 15, 2012; the corrections have been made to the text and the corrigendum is appended to this judgment.

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**Reasons for Judgment
of the
Honourable Mr. Justice A.W. Germain**

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## 1. Introduction

[1] This decision relates to a dispute between owners in the *Shores Condominium* [Condominium Plan No. 9821495, operating as "***The Shores***"]. ***The Shores*** is a "bare land" condominium. The applicants ["The Owners"] own 8 of 24 bare land units in ***The Shores***. The Respondents, "The Board", represent the ***The Shores*** condominium, as a whole.

[2] ***The Shores'*** bylaws provide that the Board, not the unit owners, has the burden of repair and maintenance of the exteriors of the individual units. These Owners seek an order declaring

that their current condominium property bylaws, which govern the operation of this Condominium are valid, consistent with the governing legislation, the *Condominium Property Act*, R.S.A. 2000, c. C-22 [the "*CPA*"], and should be enforced. The respondents take a contrary position.

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**2. The Background Facts**

[3] ***The Shores***, a condominium plan registered April 8, 1998, was developed as a "bare land" condominium. The housing structures are groups of duplexes which share a common wall and a common roof, and which all look out onto a courtyard. Some units back onto a golf course in the area. All homeowners take an acute interest in their residence as virtually all showed up in court to hear the application and the response. A significant number of current home owners bought from the developer and one senses little turnover in the ownership mix.

[4] When ***The Shores*** was developed, the developer marketed the project as one which would provide "care free", if not expense free, living for mature adults. A restrictive covenant was registered on all 24 titles providing that the condominium corporation had the exclusive right and obligation [emphasis mine] to maintain all areas in the project other than the interiors of individual homes. The restrictive covenant prevented the unit owners from making changes, repairs, or external maintenance to their homes, without the Board's consent.

[5] Living at ***The Shores*** was restricted to persons over 45 years of age. From inception, the bylaws reflected the scheme (despite this being a bare land condominium) that the Board, not the individual unit owners, would be responsible for all of the exterior elements of the units making the condominium, in operation at least, operate much like a traditional condominium, with the owner responsible only for the interior of each unit. This approach was great marketing but probably not sustainable in hindsight, as predictable problems and tensions have evolved as the buildings age.

[6] On September 29, 1998 the statutory condominium bylaws were replaced with project specific bylaws. In October of 2002, new condominium bylaws replaced the earlier version. The 2002 bylaws were amended in 2007, and, as amended, remain in effect at the time of this application. Both the 2002 bylaws and 2007 amendments were intended to deal with an increasing and evolving legal uncertainty that related to the actual management and operation by the Board of this bare land condominium. The uncertainty revolved around how much maintenance a condominium board could accept as a board responsibility, if the proposed property to be maintained was not board property, nor fell within the definition of "common property" in the *CPA*.

[7] Both the 2002 bylaws, and the 2007 amendments, were intended to further lock-in and preserve the marketing scheme by which this condominium was developed and sold to the owners - as a care free maintenance environment for mature adults. The 2007 amendments were also intended to deal with inequities that the "care free" model had created because not all units

in ***The Shores*** condominium project are the same, nor do they all have the same amenities so a 'one-size-fits-all' condominium fee was inequitable if the Board was to continue providing all exterior maintenance.

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[8] When the developers elected to proceed with a bare land condominium in 1998, they anticipated, from a legal point of view, that with a restrictive covenant and a burden created by bylaw they could provide for traditional 'common property like' maintenance, even though in a bare land condominium the exterior structure of individual homes is *not* common property. At the time of this development little, if any, controversy existed about the efficacy of this approach, as bare land condominiums were a relatively new concept in Alberta.

[9] Condominiums include commonly held and private property. The legal structure of a bare land condominium provides that the condominium corporation owns the surrounding land as common property, and the individual owners are fully responsible (or mostly responsible) for their own castles. In a bare land condominium, by reducing the amount of common property, and restricting the board's mandated obligations to only common property, condominium fees are substantially lower since funds do not need to be collected and earmarked for the repair and preservation of common property, because there is little, or none, of it. The usual relationship for a bare land condominium is what the Respondents [a majority of the owners] want today for ***The Shores*** condominium, while the Applicants [the minority ] want what they were sold - "a care free" environment.

[10] The 2002 "bylaw fix" attempted to address the Board's obligation by creating a new and distinct class of property, "the managed property", and then instructing that the Board's obligations were to both care for and repair "managed property" and common property. That included reserve fund requirements. The 2007 amendments tweak this concept.

[11] The current Board opines that it is difficult to manage this property. The units are getting older and each homeowner has a different subjective assessment of what an appropriate standard of care is for the amenities of their individual homes, such as decks, steps, and sidewalks. These items are objectively different than, say, a roof surface, which can exist until an expert says it is no longer sound. In contrast, surface use items are visible daily to the homeowners who may be as concerned with aesthetics as functionality.

[12] In a small condominium with few units and self management, stresses between neighbours can quickly arise. In 2010, armed with a legal opinion that the statutory foundation upon which managed property could be treated as a type of common property was controversial, the Board attempted to achieve consensus that they should return ***The Shores*** to a traditional bare land condominium. The Board did not pursue this option when they sensed that they could not get the 75% majority to amend the bylaws. They have since adopted a more reticent approach, simply delaying or deferring all but essential maintenance.

[13] The Board's growing concern is not a secret. Recent condominium Board meeting minutes refer to this problem, but to date a solution to ***The Shores*** dilemma eludes the owners. Thus this application. The Applicants wish to preserve the *status quo* while the Respondents are looking for indirect court relief to solve the time bomb of increased maintenance, and the potentially questionable legal structure put in place by ***The Shores*** under which this maintenance could be funded.

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[14] This case involves public policy, contract interpretation, statutory interpretation plus the recognition that the owners of ***The Shores*** have made a commitment to that project, and none of them want to live in a dysfunctional project where neighbour is pitted against neighbour. The legal answer may be different than the practical one.

**3. The Position of the Parties**

[15] The Applicants' position is that the *CPA* is a permissive piece of legislation that should allow condominium owners to contract in a democratic way about the manner in which they wish to manage their condominium. The Applicants assert that a reasonable interpretation of *CPA*, ss. 32, 37 and 39 should lead to a judicial ruling that the powers exercised by this Board, through the contractual obligation of the bylaws, are empowered by the *CPA*, and not prohibited by it. In the alternative, even if I do not find empowerment, the Applicants' fallback position is that absent a specific prohibition, any obvious ancillary power should be allowed.

[16] The Respondent asserts that a condominium corporation is not broadly empowered like an individual or a conventional business corporation. Rather, ***The Shores*** was established within the context of the statutory framework of the *CPA*, and the Board cannot assume more powers than are granted by that legislation, nor should the Board presume ancillary powers simply because those are convenient.

[17] Specifically, the Respondent asserts that the Board cannot pre-collect anticipated maintenance expenditures for anything other than common property. If so, then this authority is restricted in a strict manner, and like a taxation statute that authority must be construed narrowly.

[18] This leaves the Board in something of a dilemma. The Respondent asserts that the *CPA* does not give condominium corporations the power to maintain the owners' property but only the corporate and common property. The *CPA* does not permit the Board to establish a parallel reserve fund for property that the condominium itself does not own. Collectively, this means that unless the Board can redefine the scope of ***The Shores***' common property, it has no legal mechanism to meet the objectives under which the condominium was originally structured.

**4. The Condominium Property Act - Then and Now**

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[19] The court expresses its gratitude to E. Mirth Q.C. for providing us with an anecdotal summary of the *CPA*, an Act influenced by both changing attitudes and economics, that has been tested by the boom and bust cycles of the Alberta economy.

[20] In 1966, the Alberta *Condominium Property Act* was a simple piece of legislation imported from the Australian state of New South Wales. It established standard bylaws for those condominiums that did not care to create their own. The *CPA* also set out the principles to integrate a corporate operational scheme with the *Land Titles Act*.

[21] In that first Act only one type of condominium was contemplated, those that we today identify as the 'apartment type' condominium. A three-dimensional survey would be created of the structure and the unit owner would own the interior, starting midway through the walls and ceiling. All of the exterior elements, and the internal components such as elevators, hallways, and utility corridors, would all be common property directly owned by the condominium corporation itself. At that time there were very few purpose-built condominiums, and most original registrations were converted apartment buildings.

[22] The *CPA* was first amended in 1980 and then again in 1983. The 1983 revision introduced the concept of a bare land condominium. A "bare land unit" is defined as land that is situated within a parcel and described as a unit in a condominium plan by reference to boundaries governed by monuments placed pursuant to the provisions of the *Surveys Act*, R.S.A. 2000, c. S-26 respecting subdivision surveys: *CPA*, ss. 1(1)(b), 1(1)(y)(ii).

[23] In 1996 the *CPA* was again amended to introduce significant consumer protection provisions. A crucial amendment for the purpose of this case is CPA, s. 38(1):

> 38(1) A corporation <u>shall</u>, subject to the regulations, <u>establish and maintain a capital replacement reserve fund</u> to be used to provide sufficient funds that can reasonably be expected <u>to provide for major repairs and replacement of</u>
>
> (a) any real and personal property owned by the corporation, and
>
> (b) <u>the common property</u>,
>
> where the repair or replacement is of a nature that does not normally occur annually. [Emphasis added.]

[24] This provision established the requirement for a reserve fund and its scope. This provision forces a condominium corporation to anticipate future expenses, and accumulate funds for those contingencies. Prior to this amendment, condominiums were frequently confronted with major expenses and were without the funds on hand to cover those costs.

[25] Section 38(1) is part of the portion of the *CPA* entitled “Powers and Duties of Corporation” (*CPA*, ss. 37-45). Of that part, ss. 37-39 are the most relevant for the parties’ arguments. Section 37 sets the general duties and authority of the condominium. Section 39 addresses administrative expenses. As previously indicated, s. 38 addresses the operation and use of the reserve fund. Notably, the reserve fund’s purpose is re-enforced by the text of s. 38(3):

> 38(3) The money in the capital replacement reserve fund of the corporation is an asset of the corporation <u>and no part of that money shall be refunded or distributed to any owner of a unit except where the owners and the property cease to be governed by this Act</u>. [Emphasis added.]

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[26] “Common property” is also strictly defined by *CPA*, s. 1(1)(f):

> 1(1) In this Act,
>
> ...
>
> (f) “common property” means so much of the parcel as is not comprised in a unit shown in a condominium plan ...

This condominium Board is placed in a very difficult conundrum, given the maintenance structure intended for this condominium, the restricted definition of common property, and the explicit indication in *CPA*, s. 38(1) as to the possible bases to obtain and expend a reserve fund.

**5. Legal Analysis**

<u>A. Interpretation of Condominium Property Board Powers</u>

[27] The Alberta Court of Appeal has expressed guidance on how to interpret the powers of condominium boards. In ***Condominium Plan No. 8222909 v. Francis***, 2003 ABCA 234, 330 A.R. 297, leave denied [2003] S.C.C.A. No. 446 [“***Waters Edge***”], the dispute was whether the condominium had the right to restructure the manner in which it assessed fees from the condominium unit owners, an authority set out in *CPA*, s. 31(1).

[28] In ***Waters Edge***, the condominium board attempted to act equitably. The project consisted of both townhouses and apartment units. The townhouses were separately metered for utilities, while the apartment units were all serviced through central meters. The board perceived it to be unfair for some owners to pay individual utilities and also contribute to the condominium fees on a condominium property unit basis. The board resolved the inequity by rebating a portion of the condominium fees to those who paid utilities directly.

[29] The Alberta Court of Appeal concluded that the condominium could not assess fees in that manner, that was *ultra vires* to the condominium’s authority (para. 34). In coming to that

conclusion the Court concluded that the scheme of collecting condominium fees was prescribed in the *CPA*, and the argument that the board would have ancillary powers to circumvent this was rejected. I note that this result has some relevance and implications in this application as ***The Shores*** has also adjusted condominium fees in recognition that some units have more repairable amenities.

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[30] Justice Ritter at paras. 25-26 explains this result:

> 25 The second step in the analysis of the ultra vires issue involves an interpretation of s. 31 of the Act read with other provisions of the Act and the Act as a whole. In this respect, the words of the Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act and the intention of the legislature ...
>
> 26 A contextual analysis of the Act reveals that a condominium corporation does not enjoy the same powers of a natural person, as do most business corporations. The Act does not provide for such powers; rather s. 20(4) of the Act states that the Business Corporations Act, supra, which attributes natural person powers to corporations created under it, does not apply to a condominium corporation. [Emphasis added, citations omitted]

[31] This rule was subsequently restated in ***Condominium Plan No. 992 5205 v. Carrington Developments Ltd.***, 2004 ABCA 24, 354 A.R. 371 at para. 9:

> A condominium corporation owes its existence to the Act and can only exercise the powers granted therein. Unlike a business corporation which enjoys the natural person powers ... a condominium corporation operates only within the powers granted by the Act

[32] This would seem to set the authority of a condominium corporation in a strict and restricted manner. However, the Applicants points out that despite statutory limitations on the powers of condominium corporations, they still have ancillary powers to properly, effectively, and fairly run their condominium.

[33] An example of the use of these condominium ancillary powers is in the collection of unpaid condominium accounts, which is an area not specifically prescribed in the *CPA*. In a decision which makes common sense, Master Laycock recently pointed out in ***Condominium Plan No. 8210034 v. King***, 2012 ABQB 127 that a condominium corporation in today’s society must have the ancillary powers to properly run its business affairs. If the result of a restricted characterization of the condominium’s authority had an illogical result, then an ancillary power may be appropriate:

> [40] The Act does not list any types of expenses which cannot be included in an assessment. I do not see any reason to interpret provisions in the Act, which permit the recovery of collection expenses, and authorize a debt action to collect funds expended pursuant to a municipal authority, as prohibiting the inclusion of those expenses in an assessment. It would be odd to interpret these permissive sections in a way which would place a condominium corporation in a worse position to recover expenses, than if those expenses had never been mentioned in the Act [Emphasis added.]

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[34] Of course, that is not exactly the situation faced by ***The Shores***, but there are parallels. What this condominium corporation is empowered to do by bylaw, and has implicitly contracted to do by properly passed bylaw, is to ensure that all units in the condominium corporation are maintained to a standard that is reasonable. To the extent that it reflects the repair and maintenance of a certain amount of private property, nevertheless these contractual obligations relate directly to the betterment and well-being of the condominium corporation and directly to the benefit of all of the owners, both on an individual narrow basis (i.e. their steps and decks are getting repaired), but also on a wider basis because these repairs and services ensure that the entire condominium, visible to all from the court yard, has a consistent condition and appearance, and therefore a consistent value.

[35] There is also the impact of the restrictive covenant, which cannot be ignored. This does not bind the Board, but rather is an agreement among and between the individual owners. Together, they have created a recognized encumbrance of the land of each owner, by which they have implicitly contracted *with themselves* to allow the Board to maintain all units to an appropriate standard.

[36] These are two separate relationships. Between themselves, the unit owners have set a procedure and standards. They instruct the condominium corporation - which they also own - to operate in a certain manner and within their mutual agreement. The restrictive covenant operates, in this sense, in a manner not all that different from a unanimous shareholders’ agreement.

[37] It is one thing to restrict the condominium corporation from non-related business frolics and to narrowly interpret its statutory powers, in that context. It is quite another for the courts to conclude that a condominium corporation cannot by bylaw undertake the repair and maintenance of all of the units. I conclude that there is no legal prohibition from a condominium corporation exercising an ancillary power to keep the condominium that it administers in a good state of repair, even if it means an indirect benefit to an individual owner.

[38] As the Applicants have pointed out, this dispute is not about “enablement”, that is how *can* the condominium corporation do this, but rather this is a question of “entitlement”. I conclude that as the bylaws were properly passed by the owners with the requisite majority (and initially by 100% of the owners), this condominium corporation does have the legal mandate to maintain the units in accordance with the restrictive covenant *and* the bylaws.

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B. Can Some Form of "Reserve Fund" be Established to Fund Costs of the "Managed Property?"

[39] At ***The Shores***, the owners made a valiant effort to create a new class of property, the "managed property", and then oblige the owners by virtue of the bylaws to fund maintenance of that property in an orderly way. That process in effect treats the "managed property" in the same manner as the property that is directly owned by the condominium, the "common property". My conclusion is that this approach is not permitted by the *CPA*.

[40] Irrespective of whether or not the bylaws may authorize (and mandate) the repair and maintenance by the Board of individually owned property, the associated funding of that process cannot follow the same process as the funding and maintenance of common property.

[41] Restating this, *CPA*, s. 38 makes clear that the concept of the reserve fund may *only* be to fund common property. If I had any doubt about the impact of section 38 it is removed completely by s. 38(3), which makes clear that the monies in such a fund *can not be* distributed to an owner of the unit. The *indirect* distribution to an owner by virtue of repairing the owners property is, in fact, a violation in my respectful view of the s. 38(3) prohibition. Despite coming to that conclusion, that does not mean that because there is no vehicle for *pre*-collecting the cost of these bylaw directed repairs, the Board lacks the potential authority (and requirement) to do the repairs.

[42] I have concluded to the contrary. The Applicants seem prepared to accept this bizarre possible result, by arguing that the issue before the court is one of legal entitlement, not practical issues such as funding and pre-collecting the necessary funds.

[43] With regret, I come to the conclusion, as nonsensical as it is, that the Applicants have the entitlement to have their exterior property maintained by the condominium corporation by virtue of the restrictive covenant and the actual bylaws that have been passed by ***The Shores***. The owners have that entitlement, and as a result of the bylaws, ***The Shores*** has that obligation. Each gets the worst of both worlds. ***The Shores*** must maintain the property but cannot pre-collect in any type of reserve fund for that objective. The condominium will have to create some solution where they have the resources to do the repairs and then charge back the owners their condominium fees share. The bylaws prescribe this to be a charge on a unit approach, not a direct cost approach. I accept that this is a bizarre outcome, but it flows from the fact that the reserve fund is established for the repair and maintenance of *common property only*, and there is no other pre-collection concept expressed in the *CPA* to which my attention has been directed.

[44] It would be an inappropriate stretch to conclude that among the condominium's powers is an ancillary authority permitting the pre-extracting of funds that are not needed immediately for the operation of the condominium. Were it so, individual owners would face potential uncontrolled and unregulated demands to prepay all types of futuristic expectations irrespective

of whether or not the eventuality ever came to pass. This is why the elaborate objective “reserve fund” with its parallel structure of checks and balances was devised and implemented when the Legislature amended the *CPA*.

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C. The Business Case

[45] This decision has not been an easy one, as I recognize that this ruling is the worst possible outcome from a business point of view for ***The Shores***. Perhaps the Applicants will rejoice in their victory, but in the long run they and the other owners will suffer as a result of the discord and business disconnect between their condominium, which they wish to operate in a traditional style, and the concept of a bare land condominium. Without being unduly pessimistic, I suggest that despite the outcome of this ruling, this condominium corporation is going to experience increasing difficulties which will adversely affect the value of all of the units in the entire condominium.

[46] This result can only be avoided if all the owners resolve their disagreement. There are no “free repairs”. First, because ***The Shores*** will not have the benefit of a reserve fund-like structure, these “managed property” improvements will have to be funded on a pay-as-you-go basis. Condominium fees will fluctuate greatly. There will be disputes as to whether repairs are necessary, but when a decision is made to repair or replace one owner’s amenities, all of the owners, to protect their own interest, will have to insist on similar repair even if a repair of that kind is not immediately necessary. To avoid strife, the condominium corporation may simply default to repairing or replacing all, when they replace or repair one. Owners who might be prepared to defer repairs must pay for their more anxious neighbours. So it will be for each state of repair. When one roof is shingled, owners not getting new shingles will feel at a disadvantage. Thus unnecessary or premature costs may be incurred on repair.

[47] The Board has already experienced that there is a subjective element to the necessity of repairs and in determination of when a repair is necessary. Sometimes, like “beauty”, the need to repair and maintain is in the eye of the beholder! If the Board reacts with indifference and repairs only on an absolute necessity basis, the condominium will appear to run down. Injuries, liabilities, and subsequent greater costs may occur if repairs are not taken in a timely way. Potential lawsuits both from within and externally may engage ***The Shores*** in more expense. With the benefit of hindsight, and absent a legislative solution, a development that wishes to provide a “care-free living” environment should perhaps be registered as a traditional condominium, with the owners owning and responsible only for the interior. The remainder of the complex, including exterior building aspects, are then common property.

[48] This future strife and disharmony within the corporation will affect the emotional well-being of the owners, and the ability of the owners to sell units. Owners may become unwilling to serve on the Board. This court is not a court of business judgment, nor is this a mediated outcome. In either alternative, I would recommend in the *strongest* possible terms that the bylaws (and perhaps the restrictive covenant) be restructured to create a true bare land condominium.

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[49] This would mean that condominium fees, and management decision-making would be reduced. Each of the owners, subject to getting their improvements approved by the Board, would maintain their home to the standard that they wish. Some would do the work themselves and save money. Others would objectively defer work. Each owner would supervise her own work, to perhaps get better quality, and perhaps provide cost benefits and personal satisfaction.

[50] As important, strife would be reduced. I cannot order that. I am asked to conclude whether or not the condominium corporation has legal ability to maintain homeowner's property based on the bylaws and in furtherance of a restrictive covenant flowing between the owners. I conclude that it does, because it is in the best interests of the entire condominium, and is not specifically prohibited. At the very least, ***The Shores*** has an ancillary power to *make* these repairs. It will then have to extract the funds from the condominium members.

## 6. Judgment

[51] It is not *ultra vires* for ***The Shores*** to maintain the managed property for the betterment of the condominium project. However the condominium may not pre-collect for those repairs by creating a parallel reserve fund for managed property. Although not part of my judgment, I recommend that the Applicants (despite their victory in this ruling) concede the inevitable and assist the Board in evolving to a true bare land condominium with such amendments to the restrictive covenant and the bylaws as may be required. Their alternative is to lobby for legislative amendment.

## 7. Costs

[52] The Applicants have succeeded in this application and are entitled to costs. If the parties need to address costs with me they may do so.

[53] I would be remiss if I did not thank legal counsel for their thorough, comprehensive, and sensitive argument.

Heard on the 9th day of May, 2012.
**Dated** at the City of Edmonton, Alberta this 9th day of October, 2012.

**A.W. Germain**
**J.C.Q.B.A.**

**Appearances:**

Jose Delgado & Jerritt R. Pawlyk
Bishop & McKenzie LLP
for the Applicants

Emmanuel Mirth, Q.C.
Reynolds, Mirth, Richards & Farmer LLP
for the Respondents

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**Corrigendum of the Reasons for Judgment**
**of**
**The Honourable Mr. Justice A.W. Germain**

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Mr. Jerritt R. Pawlyk has been added to the appearances.

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