

Incarcerating the ‘Inadmissible’: KIHC as an Exceptional Moment in Canadian Federal Imprisonment

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Introduction

It is currently both popular and reasonable to refer to the post-September 11 context as a time of uncertainty and ambiguity, particularly as regards concepts and practices of (in)security (Giroux 2005; Bauman 2006; Ericson 2007). If asked to identify a symbolic representation of this ambiguity and exceptionality in Canada, we could justifiably turn our attention to a small portable recently erected on the grounds of the Millhaven federal penitentiary, where employees of Correctional Services Canada (CSC) are now, through an arrangement with the Canada Border Services Agency (CBSA) supervising non-citizen prisoners who have never been charged with committing crimes. In these exceptional times, for reasons of national security, and as the result of a peculiar confluence of laws, policy, and powers, CSC has found itself in the business of immigration detention.

The Kingston Immigration Holding Centre (KIHC) officially opened and received its first detainees on 24 April 2006. KIHC is located on the grounds of Millhaven Institution, near Kingston, Ontario. Designed expressly to incarcerate non-citizens deemed to be threats to Canada's national security under the Immigration and Refugee Protection Act's (IRPA) security certificate mechanism, KIHC occupies a unique position in the constellation of Canadian penal institutions. It is characterized by a series of contradictions and ambiguities that effectively create a zone of uncertainty, where legal norms and standards of criminal jurisprudence are suspended, rendered inapplicable, or are displaced by administrative immigration procedures under the IRPA.

KIHC and the security certificate mechanism are Canadian examples of a global post-September 11 shift towards extraordinary and legally-murky national security policies and practices, described by Giorgio Agamben (2005) as products of *states of exception* – situations where sovereign power (bare force) renders aspects of the law inapplicable in response to perceived necessities brought about by a state of crisis. Richard Ericson (2007) uses the concept of counter-law to describe states of exception, as they involve the use of laws against law. Colleen Bell (2006: 65), drawing on Agamben's theoretical framework, proposes that the security certificate “functions as a moment of legal exception for the assertion of sovereign power and legitimation.”

Theorizations of security certificates within a *state of exception* framework focus on the zone of exceptionality created around the individuals through the mechanism, and the resulting experience of indefinite detention (Bell 2006). In this article, we take this framing as a starting point, and expand upon it by focusing on the permanent space of normalized exceptionality created by the construction of the KIHC facility. We argue that KIHC's location on the grounds of Millhaven Institution illustrates the contradictions and ambiguities associated with exceptionalized and exceptionalizing security policy and we contend that the construction of this facility symbolizes the entrenchment of the state of exception within contemporary Canadian political practice. Additionally, the creation of KIHC as an exceptional space within the traditional

federal prison system provides further illustration of the creeping and blurring of mandates that has accompanied post-September 11 national security initiatives.

We proceed through three phases. First, we provide an overview of the IRPA immigration security certificate mechanism, and discuss its deployment in the post-September 11 context. We then describe the agencies involved in security certificate detention and the characteristics of the KIHC facility, and note its nature as an exceptional moment in Canadian federal corrections. To contextualize the discussion of KIHC, we then provide an overview of the anti-certificate movement, with specific attention to its depiction of the Kingston Centre. Having introduced the facility and its operations in some detail, we conclude by framing it within a theory of sovereign exceptionality and counter-law (Agamben 1998; 2005; Ericson 2007). We suggest that KIHC represents a concretization of the state of exception, by virtue of its physical presence as an apparatus of border control within the space of a federal penitentiary, its ambiguous jurisdictional status, and, not least, the nature of the incarceration it makes possible. Importantly, the space created by KIHC represents the normalization of the extraordinary, rendering an exceptional process permanent by granting it an institutional setting. Ultimately, we contend that this institution epitomizes the legal, moral, and conceptual problems that have been created by the contemporary politics of exception and human disposability (Bauman 2004).

Security Certificates and the Road to the Kingston Immigration Holding Centre

These are, as Zygmunt Bauman (2005) reminds us, 'liquid times,' and the shifting, transient nature of the modern security control society becomes abundantly apparent when one attempts to capture it in writing. Over the course of this project, the phenomenon under study, security certificate detention in Canada, underwent a series of significant changes, including the release of detainees, subject to the most severe bail conditions in Canadian history and the recent, momentous decision by the Supreme Court of Canada that the existing certificate regime violates the *Charter*. Such developments give the following overview the status of a contextualized snapshot, as opposed to a definitive account.

Canadian immigration law introduced the security certificate in 1991, and the 2001 Immigration and Refugee Protection Act represents the most recent legislative treatment of the mechanism. Since their inception, security certificates have been used less than thirty times – most recently, in the case of an alleged Russian spy, who was briefly detained and subsequently deported. Security certificates are an “exceptional removal tool” (Standing Committee on Citizenship and Immigration 2006a), intended to facilitate the deportation of non-citizen individuals deemed by the Canadian government to represent a threat to the national security of Canada, individuals considered to be involved in organized crime, or suspected war criminals. It should be underscored that security certificates operate within a precautionary logic, governed by suspicion and the allegations of Canadian security intelligence services, quite removed from the adversarial criminal justice system. Since the majority of the certificate process, and particularly the nature of the evidence against the named individual, is kept secret, the validity of the government’s case is never subjected to rigorous

contestation. As an immigration procedure, certificates cannot be applied to Canadian citizens; they apply exclusively to non-citizens, including foreign nationals, permanent residents, and refugees (Bell 2006).

The Supreme Court of Canada (2007: 5), in its recent ruling on *Charkaoui v. Canada*, offered a succinct overview of certificates, as they exist within the current regime:

The Immigration and Refugee Protection Act (IRPA) allows the Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness to issue a certificate declaring that a foreign national or permanent resident is inadmissible to Canada on grounds of security, among others (s. 77), and leading to the detention of the person named in the certificate. The certificate and the detention are both subject to review by a judge of the Federal Court, in a process that may deprive the person of some or all of the information on the basis of which the certificate was issued or the detention ordered (s. 78). Once a certificate is issued, a permanent resident may be detained, and the detention must be reviewed within 48 hours; in the case of a foreign national, the detention is automatic and that person cannot apply for review until 120 days after a judge determines the certificate to be reasonable (ss. 82-84). The judge's determination on the reasonableness of the certificate cannot be appealed or judicially reviewed (s. 80(3)). If the judge finds the certificate to be reasonable, it becomes a removal order, which cannot be appealed and which may be immediately enforced (s. 81).

This detention is effectively indefinite, terminating only with the successful deportation of the detainee, the finding that the certificate itself is inadmissible, or, as has recently been the case, the release of the detainee under strict and similarly-indefinite bail conditions (Bell 2006; Standing Committee on Citizenship and Immigration 2006a).

Security certificate cases operate under a cloud of official secrecy, and are often referred to colloquially as 'secret trials.' The evidence provided by Canadian security services that forms the basis of the government 'case' is not made available to the detainee, or to their legal counsel, and, as such, it is never open to direct challenge in an adversarial setting. Rather, the detainee is provided with a summary of the evidence, omitting three things: "information that would disclose the sources of information, particularly when the safety of the source would be at risk; information that would reveal investigative techniques; and information that was provided in confidence by foreign governments" (Standing Committee on Citizenship and Immigration 2006a). Counsel for the men currently subject to certificates have consistently protested that these summaries provide insufficient details, that key evidence is kept secret and therefore unchallenged (Copeland and Webber 2006).

Where individuals subject to security certificates are detained pending deportation, the IRPA does not discuss the location of this incarceration in any detail. Until recently, security certificate detention took place in a provincial correction facility, such as the Metro West Detention Centre. The conditions at these facilities were the subject of numerous hunger strikes by security certificate detainees, and the construction of the Kingston Immigration Holding Centre – a facility designed exclusively to house security certificate detainees

– was a response to mounting public pressure on the subject (CBSA 2006a; Standing Committee on Citizenship and Immigration 2006a). Permanent residents being held on certificates are entitled to have their detention reviewed by a Federal Court every six months, while foreign nationals are automatically detained pending removal. The considerable length and indefinite duration of the current security certificate detentions – in some cases five or six years and counting – is the primary source of opposition to the mechanism, though the general arbitrariness of the procedure and the secrecy associated with it are also subject to heavy criticism, particularly from within the legal community where the suspension of the legal norm of due process is considered particularly odious.

There are currently five men subject to security certificates, all of them described as threats to Canada's national security, all of them Muslim, and all of them hailing from countries of origin where there is reason to believe that they might be tortured or killed should they return (Bell 2006, Standing Committee on Citizenship and Immigration 2006b). Mahmoud Jaballah has been detained since 2001, and is currently being held at KIHIC. Mohamed Harkat has been subject to a certificate since 2002, and was detained until 2006, at which time he was released on strict bail conditions. Mohammed Majoub has been detained since 2000, and is currently being held at KIHIC. Hassan Almrei has been detained since 2001, and is also currently being held at KIHIC. Adil Charkaoui was detained in 2003, but released on bail in 2005. In each of these cases, the reasonableness of the certificates have been upheld by the Federal Court. In addition to the 'Secret Trial Five,' a sixth man, Manickavasagam Suresh, is currently subject to a certificate, although he has been released on the condition of weekly check-ins with government officials. Suresh was first arrested in 1995, on suspicions of fund-raising for the Tamil Tigers.

The indefinite duration of the detention associated with the cases of the 'Secret Trial Five' derives from the reasonable belief that removal might result in torture. The men hail from Egypt, Algeria, and Syria, and some had applied for refugee status in Canada. Given the human rights records of these states, and given the application of the label 'national security threat' by the Canadian government, the men currently subject to security certificates have appealed that their deportation would violate Canada's obligations as a signatory to the United Nations Convention Against Torture (which prohibits, among other things, removal to torture). Canadian courts have ruled that, in general, removal to torture would also be unconstitutional (Standing Committee on Citizenship and Immigration 2006a). However, the Supreme Court in the *Suresh* case decided that exceptional circumstances might allow removal to probable torture in situations where the national security interests of the Canadian state outweigh the interests of the individual in question, as determined by the Minister of Citizenship and Immigration (Ibid.; Bell 2006). Judicial reviews of the reasonableness of these decisions, of the validity of Pre-Removal Risk Assessments, and of the security certificate mechanism itself have been ongoing intermittently for several years now, and while the courts debate the issues, the members of the 'Secret Trial Five' have remained subject to security certificates. With the exceptions of the Charkaoui and Harkat cases, where courts have ordered release on bail, the current situation amounts to

indefinite detention, as the individuals are deemed too threatening to be set free while the deportation process is halted by concerns over removal to torture.

It is important to note that official discourse of the Canadian state on this subject includes repeated references to a 'third way,' whereby the security certificate detainees voluntarily elect to leave Canada. The current Minister of Public Safety, Stockwell Day, has noted in a Question Period that "[o]ne could say it is a three-sided prison cell. They can leave any time if they want to go back to their country of provenance" (39th Parliament, 1st Session 2006). Alex Neve, Secretary General of Amnesty International Canada, responded to this discourse before the Standing Committee on Citizenship and Immigration (2006b). He proposes that this argument "shows complete contempt for Canada's international human rights obligations," and that the choice to either return to face torture or languish indefinitely in a Canadian detention facility is completely unreasonable (in Standing Committee on Citizenship and Immigration 2006b). The Supreme Court of Canada (2007: 63) has also spoken against the rhetoric of voluntariness, given that "a person named in a certificate of inadmissibility may have nowhere to go."

In its February 2007 ruling in *Charkaoui*, the Supreme Court declared that IRPA security certificates under the current regime are of no force or effect, as they infringe on several sections of the *Charter*. Certificates violate section 7 of the *Charter* – the right to life, liberty, and security of person – specifically because they make possible the indefinite detention of individuals on secret evidence, and because they might result in removal to torture. The Court ruled that the secrecy associated with security certificates violates the right to a fair and impartial hearing, as per the principles of fundamental justice. The process denies named individuals and their counsel the right to know the case against them, a right that the court has decided must come before claims to national security confidentiality (the use of an *amicus curiae* was recommended as a possible solution). The Court also noted that indefinite detention without adequate and regular review has the potential to violate section 9 of the *Charter*, the protection against arbitrary detention, and that the psychological trauma associated with such uncertainty might constitute cruel and unusual punishment. The court suspended its declaration for a year, until 23 February 2008, in order to provide Parliament with sufficient time to arrive at a solution that respects the *Charter*. Paradoxically, this has served to legitimate the current system by granting it a year's reprieve, even though the Court has found the system to be unconstitutional. During this year, the system will continue to operate according to the existing regime, and the current government has already expressed its intent to maintain some form of security certificate detention mechanism, arguing that the *Charkaoui* ruling has not found the "general principle" of security certificates to be flawed (CTV News 2007).

At no point in the *Charkaoui* decision is the current physical site of security certificate detention – the Kingston Immigration Holding Centre – discussed. The Supreme Court seems to engage with security certificate detention and imprisonment largely in the abstract, discussing concepts such as the justification

for indefinite detention and permissible duration of imprisonment without specifically referencing the conditions and context of the KIHC as the carceral space in question. For example, the Court draws on jurisprudence regarding arbitrary imprisonment in a criminal justice context as well as factors governing the constitutionality of immigration detention (Supreme Court of Canada 2007). The precedents set in the referenced cases are of definite importance, but it must be noted that they are derived from a pre-KIHC context, where distinctions existed between sites of federal corrections and sites of immigration detention. KIHC represents a hybrid of these spaces, with unique characteristics, conditions, and institutional relations. The omission of a discussion of this new space from the Charkoui ruling is problematic, though not surprising; the exceptional nature of the facility has consistently escaped acknowledgement and critique by the courts. The following section attempts to address this gap in the debate, by introducing the carceral space of KIHC to the discussion about security certificate detention.

KIHC as an Exceptional Moment in Canadian Corrections

The Canada Border Services Agency was created in 2003, under the jurisdiction of Public Safety and Emergency Preparedness Canada (PSEPC), itself an umbrella organization that took shape as part of the post-September 11 restructuring of the federal national security portfolio. CBSA is responsible for controlling the flow of people and goods across the Canadian border. It is also responsible for detaining and removing individuals who are deemed to pose a threat to Canada's security. Through various partnership clauses outlined in section 5 of the CBSA Act (Department of Justice Canada 2005), the organization can implement inter-government, inter-agency/departmental, and inter-provincial/territorial agreements and arrangements (understandings) that allow them to partake in a range of collaborative activities in the realms of policing, intelligence-gathering and sharing, and security detention. It is through such arrangements that we can begin to make sense of the nebulous existence of the KIHC, a federal immigration prison operating on the grounds of Millhaven Correctional Institution, a penitentiary.

The men being held on security certificates were, prior to the April 2006 transfer to KIHC, vocally complaining about the conditions of their detention at facilities such as the Toronto Metro West Detention Centre, notorious for overcrowding and lacking services (Doyle and Walby forthcoming) that saw both Mohammad Mahjoub and Hassan Almrei engaged in a protracted hunger strike in protest of their treatment. The root of their complaints, and a key source of the public opposition to indefinite detention, was the use of short-term provincial detention facilities – which are only permitted to hold individuals sub-two-year terms – to house security certificate detainees for extended periods of time (Foster forthcoming). The hunger strike created a significant amount of national and international discussion and concern over Canada's indefinite detention policies, and the federal government was pressured to provide guarantees of improved conditions for the four individuals that were being held.

KIHC emerged as the government's response to this atmosphere of criticism. Mary Foster (Ibid.) correctly observes that KIHC's opening must be understood in the context of the larger national debate over the post-September 11 use of immigration security certificates; with Supreme Court decision on *Charkaoui* on the horizon, the 24 April 2006 transfer allowed the state to refute the argument that it was using temporary detention facilities to hold individuals on a long-term basis. This becomes clear if one is to read the news release announcing the opening of the facility which states: "The KIHC reflects the government's commitment to move these individuals from Ontario correctional facilities to a new federal immigration facility" (CBSA 2006). Conspicuous in its absence from official publications is any mention of the legal framework in which the KIHC operates.

In public hearings, representatives of the Canadian government have distinguished the roles of the agencies associated with KIHC by noting that CBSA is the "operational authority," while CSC is the "service provider" (Standing Committee on Citizenship and Immigration 2006a). A clear illustration of this can be seen in the procedures associated with detainee mail, which must be sent to KIHC, care of CSC Regional Headquarters Ontario Region (Justice for Mohamed Harkat 2006).

The departments and agencies responsible for the governance of KIHC have yet to produce publicly available literature detailing the specific policies, procedures, and conditions associated with the facility, which means that any attempt to understand the workings of the institution must be pieced together from a variety of media and activist resources, first-hand accounts, and government committee transcripts. Completed in April 2004, the construction and startup of KIHC cost \$3.2 million with an additional undetermined annual operating budget (Shephard 2007). Depictions of the KIHC facility portray a bleak structure, housed on the grounds of Millhaven Institution, but separated from it by a barbed wire fence (Ibid.: A12). Representatives of CBSA are careful to note that this separation is not accidental; testifying before the Select Committee on Citizenship and Immigration on 24 October 2006, CBSA representative Susan Kramer explains that strict rules are in place to ensure that the three current security certificate detainees at KIHC do not commingle with the "convicted population." Mary Foster (forthcoming) notes that, upon its opening, KIHC was characterized by poor noise insulation, barren cells, curtain-less windows, and inadequate temperature controls (the cause of a hunger strike by detainees). The core structure resembles a portable, with a common area and six television-equipped cells. Outside, a paved yard with a picnic bench is available when the detainees are allowed to leave the main unit. Close by, a second building houses KIHC's gym, small medical facility, and visitors' area (Jaballah *et al.* 2007; Shephard 2007: A12). Medical services are supplied by the personnel of Correctional Services Canada, and medical treatment often involves the detainee making the transition from KIHC to the Millhaven Institution proper, in the accompaniment of guards. The guards themselves are on special assignment from CSC, and their duties differ from the standard work of correctional officers. Susan Kramer of CBSA explains this by saying that "... the cases are different. We're not dealing with convicted detainees, we're dealing with security certificate cases, and as a result there are adjustments and

modifications made to how the centre is operated” (Standing Committee on Citizenship and Immigration 2006a). CSC, in its capacity as ‘service provider,’ is also responsible for food at KIHC, and, as mentioned earlier, for detainee mail and correspondence services.

In an *Open Letter to the People of Canada from the Detainees at Canada’s Guantanamo Bay* (2007), Mahmoud Jaballah, Mohammed Manjoub, and Hassan Almrei – the three certificate detainees currently detained at KIHC – argue that the general experience of indefinite detention is “almost unimaginable psychological torture.” Specific policies and operational procedures (under the jurisdiction of CBSA and CSC respectively) act to aggravate their conditions of detention, according to the three men. In particular, the location of KIHC in Bath, near Kingston and several hours’ drive from Toronto, poses a very real barrier to family visitations, resulting in reduced contact with loved ones. Additionally, the detainees are generally unable to access many of the facilities and services allowed to the ‘regular’ inmates at Millhaven Institution, including a library, educational programs, and periodic trailer visits with families (Jaballah *et al.* 2007). On the subject of programs, CBSA explains that:

The detainees are detained because they are supposedly awaiting removal and because of their security certificates. They’re not being detained for rehabilitation purposes, so our goal is not to rehabilitate them. But at the same time, we recognize that there are some benefits to providing access to certain programs. For example, they get a daily newspaper, and we do allow them to have self-study. There is no formal provision made for education or work, (Standing Committee on Citizenship and Immigration 2006a).

The policy requiring guards to be present during detainee conversations with members of the media is also a source of criticism. On this point, Mahmoud Jaballah, in an interview with Michelle Shephard of the *Toronto Star* (2007: A1), plainly argues that “there’s no privacy here.”

It is of criminological relevance to consider the micro-level techniques of disciplinary power used to control the detainees of KIHC (Foucault 1977/1995). The use of routine practices of hierarchical observation and the maintenance of time tables – both associated with the traditional prison – are reproduced at KIHC, in the form of constant surveillance and regular processes of counting. One of the objections raised by Jaballah, Almrei, and Mahjoub (2007) in their *Open Letter* is the persistence of formal daily head counts, a practice that seems particularly “humiliating and unnecessary” given the current population of three detainees and the maximum possible population of six. Other policies and procedures add to the punitive experience of life in KIHC, including the forced isolation from other Millhaven inmates, the continued politicking around access to medical treatment, and inadequate temperature controls in the living area (see Foster forthcoming; Shephard 2007).

We contend that the KIHC bares many of the characteristics of a federal penitentiary, though it is technically ‘something else.’ It is a carceral space designed for long-term imprisonment, operated on the grounds of a federal penitentiary, by the staff of Canada’s federal corrections department. Additionally, though security

certificate detention is intended to be of a preventive and administrative nature, the experience of incarceration at KIHC is decidedly punitive, particularly given its indefinite nature. The *de facto* penitentiary status of KIHC invites critique through the *Corrections and Conditional Release Act* (Department of Justice Canada 1992). The CCRA is the piece of legislation detailing the mandate of Correctional Service Canada, the agency within the Government of Canada responsible for the operation of federal penitentiaries. A critique of KIHC using the CCRA is, at this point, primarily of heuristic value, of legal significance only if the facility is considered a federal penitentiary, under the jurisdiction of CSC. The involvement of CBSA as the detaining authority has created an effective exception to the rule, however. By virtue of this exception, the CCRA – which governs all other CSC activities – is rendered inapplicable, or at least selectively applicable. Jurisdictional overlap created by state policy – sovereign power – allows KIHC to operate as a prison hidden within a prison, but not subject to the legislation governing prisons.

A penitentiary, according to section 2 of the CCRA (Ibid.) is “a facility of any description, including all lands connected therewith, that is operated, permanently or temporarily, by the Service for the care and custody of inmates.” KIHC is located *on the premises* of Millhaven Institution, and CSC plays an extensive role in the day-to-day operations of the facility, as outlined above. No other federal immigration detention centre occupies a similar space. In their article *The Forgotten Worst Third of the System: The Neglect of Jails in Theorizing Punishment*, Doyle and Walby (forthcoming) note that there exists a number of important legal and operational distinctions between provincial prisons and federal penitentiaries in the Canadian context. Under the CCRA, federal correctional facilities are mandated to house *offenders* – persons having been convicted of a crime – *serving a sentence* of imprisonment of two years plus a day. Section 4(b) of the CCRA also mandates CSC to carry out sentences “having regard to all relevant available information, including the stated reasons and recommendations of the sentencing judge, other information from the trial or sentencing process, the release policies of, and any comments from, the National Parole Board, and information obtained from victims and offenders.” Here again, KIHC represents a departure from the CCRA, in that the detainees are not subject to any sentence.

In 2006, we contacted the CBSA to discuss the jurisdictional issues around the administration of an immigration detention facility on the grounds of a federal penitentiary. A public relations representative for the CBSA – the agency technically in charge of KIHC – advised that we contact CSC directly with our query. CSC’s public relations representative advised us that “Millhaven Institution is located on Federal Crown property. Both Millhaven Institution and the KIHC, a Canada Border Services Agency facility, are under federal jurisdiction and can therefore be housed on the same property.” This statement, while unsatisfying, is useful as an illustration of the ambiguities associated with the operation of the KIHC facility, and of its exceptional status.

Without any agency taking direct responsibility for the operations of the KIHIC, and given the problems that a penitentiary-based immigration detention facility poses within the CCRA, KIHIC begins to look like a legal grey area: deliberately created to solve the problems of long-term detention in provincial jails, but simultaneously exempted from the rules governing federal incarceration. It is effectively the result of a jurisdictional shell game, where the fact of detention has remained constant while the rules surrounding it have been shuffled and blurred to the point of obscurity, under the guise of operational integration and coordination. As Mathiesen (1990) argues, corrections officials utilize *neutralization techniques* to defuse proposed challenges from the outside in order to maintain the status quo. These techniques “vary from the more or less open dismissal of ideas which are in conflict with prevailing system interests to techniques which more subtly and unnoticeably delete them from the agenda” (Ibid.: 37). By not acknowledging their role in the operations of the KIHIC, CSC attempted to neutralize our query by deploying a technique we simply refer to as *passing-the-buck*. The evasiveness of CSC in particular flies in the face of their organizational principles outlined in section 4(c) of the CCRA that states “that the Service enhance its effectiveness and openness through the timely exchange of relevant information with other components of the criminal justice system, and through communication about its correctional policies and programs to offenders, victims and the public.”

Of even greater significance, the ambiguous positions of both CBSA and CSC regarding proprietorship of the KIHIC, allows them to evade accountability with regards to the treatment of detainees. Detainees at KIHIC do not have access to a formal CSC prisoner grievance process, for example, and this situation – again, a departure from standard CSC operating procedures – serves as an illustration of the bifurcation of rights between citizens and non-citizens that has characterized many post-September 11 security policies (see Ericson 2007: 51; Foster forthcoming).

The totality of these developments raises two fundamental developments regarding detention in the Canadian context. First, we have demonstrated that CSC has moved beyond their stated focus of rehabilitation, reintegration, incapacitation, and punishment of convicted offenders sentenced to terms of two years plus a day. By lending their land and administrative services, CSC acts as a sort-of punitive mercenary-for-hire, implicated in the business of arbitrary and indefinite detention of non-citizens on the grounds of national security. The inmates in this facility are awaiting deportation, signalling that CSC has added this function to their operations without acknowledging their role or making changes in the legal framework governing their institutions. Second, it is evident that through the recent legislation and restructuring of the Government of Canada in the vast realm of national security, the CBSA is a prominent player in the business of social control, including detention on the grounds of a federal correctional facility.

In the newly formed two-tiered system of federal corrections/detention, where the rules that apply to *us* (citizens) do not apply to *them* (non-citizens), there exist few checks and balances to protect the rights of

Security Certificate Detainees. The exceptional partnering of the CBSA and CSC – two institutions with very different purposes and mandates – results in a murky set of operating guidelines, where scrutiny and accountability are deflected and deferred.

Immigration detention in Canada is not new, of course. *What is new* is the set of exceptional circumstances that has led to the construction of an immigration detention facility on the grounds of a Canadian federal penitentiary. The significance of this development needs to be underscored: the prison, as an institution, has traditionally been officially tied to a system of procedural justice – unjust and problematic as it may be. Incarceration in a federal penitentiary is *supposed* to be the result of a criminal conviction arrived at in a court of law, and a sentence of over two years. CSC is empowered to supervise inmates, and to deliver correctional programs. ‘Inmate’ means ‘convict,’ ‘convict’ implies ‘conviction,’ and ‘conviction’ implies a trial. This is the basic and fundamental structure of a criminal justice system governed by the rule of law, so obvious that it is rarely stated in the literature on prisons.

But KIHC troubles the obviousness of this structure, in that it introduces a new authorization for the incarceration of bodies, derived not from procedural justice, but from the internal policing of the sovereign border. No process associated with the traditional criminal justice system can account for KIHC, and no criminal sentencing decision can result in an individual’s incarceration in the KIHC facility. Yet despite this, it is – both symbolically and physically – located within the terrain of the Canadian criminal justice system. It is acknowledged by representatives of the Canadian state as an exceptional facility, designed for use in specific exceptional cases (Standing Committee on Citizenship and Immigration 2006a). But if the concept of the ‘exceptional case’ is meant to represent a derogation from the norm or rule, the construction of a facility like KIHC might better be understood as an illustration of the exception becoming the rule (Agamben 2005; Dyzenhaus 2002). It is ostensibly a permanent fixture – in that once additional detention facilities are constructed they are rarely closed – and physical alteration of a pre-existing institutional space and its rules and norms, made possible by the internal application of the form of sovereign power associated with the governance of the border.

For these reasons, KIHC should be understood as an historical and exceptional moment in the history of Canadian corrections. Even if it is closed following the release of the remaining detainees – and that is a possibility, given the outcome of the *Charkaoui* decision and the attitude of the Supreme Court towards indefinite detention – it represents a unique use of the carceral space of the penitentiary, and a clear and deeply concerning departure from ‘normal’ correctional procedure.

Counter-Narratives and Opposition: From 'Guantanamo North' to the New War Prison

How can we make sense of this exceptional moment and ambiguous space? Before proceeding with a theoretical exploration using the concepts of states of exception and counter-law, it is worth considering how KIHC has been framed in public discourse, particularly by the opponents of the security certificate regime. In general, the anti-certificate movement is composed of a loose and dynamic alliance of groups and organizations that coalesce at various times around efforts to oppose immigration security certificates. The core of the movement is built around dedicated anti-certificate 'coalitions' that have emerged around individuals who have been subject to security threat designation. The Justice for Mohamed Harkat Committee and the Coalition of Justice for Adil Charkaoui are the two principal examples. While these groups originally formed to advocate for specific individual cases (see Justice for Mohamed Harkat 2006), they have now become hubs of the movement, and clearing-houses for broader efforts and parallel causes. Around the individual-based advocacy groups, a larger 'Campaign to Stop Secret Trials in Canada' has emerged under the direction of the anti-war group Homes Not Bombs (2006). This campaign serves as an umbrella or framework for the movement. Various anti-war groups, such as NOWAR-PAIX (2006), social justice organizations, such as No One is Illegal (2006), and human rights-based NGOs such as Amnesty International (2006) act in solidarity with the Campaign to Stop Secret Trials, and these organizations, in conjunction with sympathetic professional organizations, faith groups, and unions, comprise the broader anti-certificate movement. It is important to note that the movement, while as geographically dispersed and digitally configured as any social campaign, is fundamentally based on physical meetings and group efforts, largely in Canada's major urban centres, particularly in Ottawa, Toronto, and Kingston, where the 'Secret Trial Five' have been detained (see Smith 2006). Both Bohman (1998) and Calhoun (1998) emphasize the importance of such community-based face-to-face political action to the effectiveness of a public.

The movement employs a variety of tactics, with their overarching strategy being a *counter-discursive* refutation of the Canadian government's claims around security certificates, and of their acceptance within the broader public sphere. By counter-discursive, we refer to the formation of discourses in direct opposition to those advanced by the state through official claims-making or public pedagogy (Giroux 2004). Examples of counter-discursive efforts include the successful insertion of the term 'Secret Trial Five' into the public discourse about security certificates, and the oppositional slogan 'No one is illegal,' a phrase that challenges the differential treatment of non-citizens in the post-September 11 context. Through grassroots campaigns and media advocacy, the anti-certificate movement has sought to reframe the immigration security certificate mechanism in order to problematize it.

The creation of the KIHC facility was met with criticism by the activist community already engaged in opposition to the security certificate mechanism. As the decision to open the centre represents a relatively recent event in the history of the 'secret trial' phenomenon in post-September 11 Canada, a large activist movement was already in place to respond to it. The initial response, and one that has been sustained to the

present, was to refer to the KIHC as 'Guantanamo North,' after the infamous American detention centre at Guantanamo Bay, Cuba. This decision fits with the general character and tone of the anti-security certificate campaigns that have been advocating on behalf of the 'Secret Trial Five' since the advent of the new security certificate regime. The movement (formed from several issue-specific organizations with support from established rights and advocacy groups) has been opposing security certificates on several grounds, condemning them as violations of human rights, evidence of racial profiling, mechanisms of discrimination, and invitations for other nations to develop tiered systems of national security enforcement. Prior to the opening of KIHC, the image of Guantanamo was invoked as a provocative example of a likely horizon given the trajectory that was set by the security certificate regime. As with 'Secret Trial Five,' 'Guantanamo North' has become a recognized and accepted descriptor within the public sphere, appearing regularly in media representations of KIHC (see Shephard 2007).

There are two moments in the depiction of KIHC as 'Guantanamo North,' a descriptive moment and a denunciatory moment. Descriptively, the image attempts to draw attention to the parallels between the two institutions, or rather, to compare KIHC to the archetype of the *new war prison* that Guantanamo represents. Judith Butler (2004) introduces the category of the new war prison as a means of theorizing the post-September 11 global emergence of spaces of detention that rely on exceptional powers, an extraordinary, 'permanent crisis' context, and an overarching narrative of security. Guantanamo, described as a 'legal black hole' (Fletcher 2004) for the detention of American 'enemy combatants' (an exceptional category that serves to strip individuals of legal status), is the most visible and widely-discussed example of the new war prison, although it is by no means the largest. Describing KIHC as 'Guantanamo North' (1) recognizes the embattled legal status of the detainees in both locations; (2) notes the existence of both institutions as exceptions from the 'normal' criminal justice systems of Canada and the United States; (3) reminds us that the present characteristics of both facilities are contingent upon a post-September 11 security context, and that both operate as concretizations of dominant western (in)security narratives; (4) draws a parallel between American and Canadian national security practices, thereby raising the question of Canadian sovereignty and independence, and; (5) places the 'problem' of KIHC within a sphere of oppositional action that has existed since the first mobilizations against the new war prison and its many manifestations. These are effective and largely accurate bases of comparison, particularly if we conceptualize Guantanamo as a particularly prominent example of the broader and diverse phenomenon of the new war prison.

In addition to this descriptive moment, the depiction of KIHC as 'Guantanamo North' is a political act of denunciation, designed to contaminate the Canadian facility with the international controversy and condemnation that have grown in response to the American detention facility at Guantanamo. With few exceptions, global public opinion has made the name Guantanamo synonymous with concepts of rampant executive power, gross human rights violations, the attempt to legalize torture, and the jingoistic 'othering' that characterizes American imperialism (Habermas 2006). Coupled with images of the atrocities at Abu

Ghraib, the pictures of hooded and shackled detainees at Guantanamo have become powerful rallying points for anti-war and anti-imperial politics (not to mention human rights campaigns). Given this discursive baggage, no state would invite comparisons of its actions to the actions of the Americans at Guantanamo Bay. To call KIHC 'Guantanamo North' is to actively seek to circumvent any sanitizing descriptions of the security certificate detention process, and to condemn the facility as being of a piece with the near-universally abhorred space of Guantanamo Bay.

Taking both of these moments into consideration, it is clear that there are advantages for opponents of KIHC in associating it with the label 'Guantanamo North.' Insofar as this association recognizes the parallels between both institutions as manifestations of the new war prison (Butler 2004), the description also carries some analytical benefit for researchers. However, we are concerned that the 'Guantanamo North' descriptor – despite its politico-discursive potency – may direct attention away from the specific and unique characteristics of the Canadian facility, potentially displacing or obscuring opportunities for understanding and critique.

The most obvious and important differences between the institutions relate to their respective locations (and attendant legal implications), the nature of their administration, and the general bases for the detention of the individuals at each site. This is not the place for a detailed comparison of KIHC and Guantanamo Bay – though such a comparison is certainly necessary and worthwhile. Rather, we propose three axes along which marked differences emerge between the facilities, sufficient in detail and implication to warrant divergent oppositional approaches.

At the level of location, Guantanamo occupies a space outside of the national territory of the United States of America, but nevertheless under its control. The initial arguments supporting its status as a 'legal black hole' relied on the limits of the American Constitution as defined by the outer limits of its sovereign domain (Fletcher 2004). While this has since changed, it remains the case that Guantanamo Bay's physical location outside the territorial United States is one of its defining characteristics. Conversely, KIHC exists as a state of exception entirely within the sovereign territory of the Canadian state, and further, as a detention facility within a federal correctional facility. If Guantanamo's exceptionality is obscured by spatial distance, KIHC's exceptionality is hidden in plain sight.

In terms of the administrative apparatus and the justification for detention at work, Guantanamo Bay differs markedly from KIHC. Guantanamo is a military prison, administered by the military to hold 'enemy combatants' – another exceptionalized form of bare life – in the context of the so-called 'war on terror.' Its militaristic function and rationale are unhidden, and the detainees housed at the facility in Cuba are described through a discourse of combat as opposed to a discourse of migration-as-insecurity (Bell 2006). KIHC, on the other hand, is jointly administered by CBSA and CSC, two component organizations of the Canadian

criminal justice system. Security certificates, the basis of detention at KIHIC, are part of a politico-discursive project of securitization that informs but is also separate from the military.

These differences are important to note because they point both efforts at conceptualization/theorization and oppositional politics in significantly different directions. It is not erroneous to compare KIHIC to Guantanamo as they do share certain common characteristics, notably their relationship to post-September 11 security campaigns and their politics of exceptionality. Alex Neve, Secretary General of Amnesty International Canada, in his testimony before the Select Committee on Citizenship and Immigration (2006b), offers a useful basis for comparing the two facilities when he says:

I think the similarity, though, is that both represent instances in which governments have chosen to pursue security practices that contravene a whole range of human rights obligations around detection protection, fair trial guarantees, the guarantee against torture and ill treatment, etc. That's where the similarity is.

We suggest that the broader concept of the new war prison introduced by Butler (2004) might be a fruitful way to cohesively theorize the two sites of detention. The term itself includes references to both a context of conflict (the so-called 'war on terror') and the site of the prison, which makes it particularly attractive as a reminder of the flexibility and universality of the carceral as a space. Additionally, Butler (*Ibid.*: 51) emphasizes the importance of the "legal innovation" of indefinite detention, which "carries implications for when and where law will be suspended, [... and] for determining the limit and scope of legal jurisdiction itself." Indefinite detention is a shared feature of both Guantanamo and KIHIC, but the nature of the exception justifying the detention at both sites is different, pointing to the need for a broader theorization encompassing both, in addition to the other manifestations of post-September 11 indefinite detention around the world.

The new war prison, according to Butler (2004: 55), also represents a convergence of sovereignty and governmentality, organized around the suspension of the rule of law. This is perhaps the most important and attractive aspect of Butler's theorization of indefinite detention, as it draws our attention to the coexistence of the exceptional and the bureaucratic that has characterized contemporary forms of indefinite detention. Butler, drawing on Foucault, describes governmentality as a diffuse set of tactics organized around the management of populations. These tactics can include the instrumental use of law for administrative purposes, as well as the outright suspension of law in certain circumstances. While Agamben's (2005) discussion of the state of exception deals with the suspension of law as an act of sovereign power (discussed in detail below), Butler (2004: 56) reminds us that bureaucrats or "petty sovereigns," through their exercise of powers of judgement, classification, and assessment, are equally central actors in decisions around indefinite detention. This takes place through acts of 'deeming' (*Ibid.*: 59), a term that lends itself to the description of the declaration of inadmissibility associated with Canadian security certificates. By considering both Guantanamo Bay and KIHIC to be examples of the new war prison – each with its own specific characteristics but sharing the features of post-September 11-contextualized indefinite detention, incarceration based on a designated special status, and coexisting processes of governmental management

and sovereign exceptionality – we can understand the two sites as part of a broader global trend, rather than using one site as an archetypal window with which to view the other.

Revisiting the State of Exception

Security certificates are recognized by the state as tools to be used in exceptional cases, for reasons of national security (Standing Committee on Citizenship and Immigration 2006a). Colleen Bell (2006) compellingly argues that the security certificate mechanism can be understood as an example of the state of exception. States of exception, according to Agamben's popular theorization (2005: 23), are zones of indifference, between inside and outside, where sovereign power (bare force) renders aspects of the law inapplicable in response to perceived necessities brought about by crises. In concrete terms, this means the proliferation of policies that replace due process and democratic procedure with sovereign or executive prerogatives. Under the state of exception, "individuals are subject to the law, but not subjects in the law" (Salter 2006), and the state is able to use its fundamental power to decide (whether or not the law applies) to circumvent the separation of powers, and maintain the appearance of legality while subverting fundamental juridical principles (Bell 2006: 75).

The concept of exceptionality emphasizes the interplay between force and law, such that the application of the law can only be understood as an exercise of political power (Agamben 2005: 4). This means that manifestations of the state of exception involve the presence of the law, but only insofar as it serves to legitimize the political actions of the sovereign. Salter (2006: 10) proposes that some states of exception, such as the border, are permanent, existing at all times as examples of the foundational power of the sovereign state to control its territory and population through processes of inclusion and exclusion.

Ericson (2007), in his discussion of *Crime in an Insecure World*, uses the concept of counter-law to discuss and nuance the idea of states of exception. counter-law, he proposes, "takes the form of laws against law. New laws are enacted and new uses of existing law are invented to erode or eliminate traditional principles, standards, and procedures of criminal law that get in the way of pre-empting imagined sources of harm" (Ibid.: 24). Counter-law is therefore not simply (or only) an act of sovereign power, but rather an approach to law that emerges from dominant logics of neoliberal risk management. Precaution, rather than prosecution, is becoming the central purpose of state interventions in matters of security and crime control, and the example of immigration security certificates is a very contemporary, very Canadian illustration of this trend. Through the certificate process – a process consistently argued by the Government of Canada to be grounded in administrative law under the IRPA – fundamental rights are abrogated in favour of the precautionary principle. It is, in the purest sense, an instance of law against law.

Canadian theorists have already conceptualized the IRPA process using the concept of the state of exception. Bell's (2006) theorization of exceptionality focuses on the security certificate mechanism, and on its

application to individual bodies. Her argument draws on Agamben directly, but in its explicit reference to the legal gerrymandering and suspension or circumvention of norms of due process and criminal procedure associated with the certificate process, it fits well with Ericson's (2007) discussion of counter-law. We contend that another layer of exceptionality was added in 2004, with the construction of the KIHC facility to house security certificate detainees. The cutting-out or laying bare of individuals through certificates and the creation of an ambiguous, sovereign space – a border or immigration prison within a prison – combine to create a concretized and seemingly-permanent zone of indistinction within Canadian national security policy.

It is the introduction of the sovereign border to the prison setting that makes KIHC a unique object for criminological inquiry. Contemporary theorists who apply Agamben's work on exceptionality to the border space emphasize the permanence of this site, as opposed to the more ad-hoc manifestations of exceptional executive powers associated with new security policy. Salter (2006) strongly argues against the imagination of the border as an extra-political nowhere, an analysis he sees present in Agamben's *Homo Sacer* (1998). By this, Salter suggests that the *physical space* of the border – the space in which the power to decide is manifested – is central to the practice of territorial sovereignty. This leads him to refute the popular conflation of bordering processes and the border itself, and to reject the claim that the 'border is everywhere' by virtue of the ubiquity of extraordinary state powers (Salter 2006: 13). Notably, he argues that "the potential for deportation, though real and frightening, is not the same as the institutionalized power to ban at the border" (Ibid.).

Certainly, it is important to recognize the particular politico-spatial dynamics that operate at the site of the physical border. But it is also relevant to note that as Adams (2006: para. 4) reminds us, recent expansions of the powers associated with border policing mean "that 'borders' now exist both inside and outside of the territory, as well as along the outer limits of its purported domain." This is not to say that the border is 'everywhere'; rather, it acknowledges that post-September 11 security policies have allowed agents of the sovereign to apply the 'zone of indiscernibility' associated with the border in a variety of additional sites. Security certificates, for example, use the power of (in)admissibility to detain non-citizens on national security grounds. They derive their authority from the sovereign rule over territory. And yet, as Salter would argue, they are moments of exceptionality, rather than permanent sites.

But KIHC, like the border, seems to concretize and render permanent the state of exception. The stated purpose of security certificates is to facilitate the deportation of non-citizens based on a largely-secret executive decision, but at KIHC, deportation becomes indefinite detention, for reasons outlined previously. It is a physical space within the prison where the sovereign power to exclude is translated into the ongoing justification for the deprivation of liberty. The Immigration and Refugee Protection Act associates the power to ban non-citizens from the country on security grounds with the power to detain them, but does not go so

far as to outline the physical site of detention. With the construction of KIHC, however, the institution of the border and the processes associated with it are physically merged with the space of the modern prison. If the border is to be understood as the space where the sovereign decides (in)admissibility, then KIHC represents the manifestation of the power to defer that decision indefinitely. Michelle Shephard of the *Toronto Star* (2007: A12) echoes this notion in her statement that “the permanency of this costly facility also [sends] the signal that the government doesn’t expect their release anytime soon.”

Further, the concept of the state of exception as a zone of indifference accurately describes the operational characteristics of KIHC. This is best illustrated through attempts to answer the question “who runs KIHC?” The web of relations, responsibilities, and powers associated with CSC and CBSA make for a jurisdictional grey area, where exceptionality emerges effectively through the *useful blurring* of laws and policies, rather than their outright suspension. This form of exceptionality can, again, be theorized within Butler’s (2004) concept of the new war prison, as a particular form of governmental-sovereign convergence designed to make possible indefinite detention.

Concluding Remarks

In KIHC, CBSA introduces the sovereign decision of (in)admissibility to the physical and legal space of the prison. In so doing, the states of exception associated with both the border in general (Salter 2006), and security certificates specifically (Bell 2006), are merged, concretized, and normalized. At the same time, the conceptual boundaries of the penitentiary as an institutional space are blurred. The creation of the KIHC – a facility ostensibly operating within the Canadian criminal justice system – is indicative of what Bell (Ibid.) argues is the increasing criminalization of immigration and foreignness in Canada. This signals that sovereign power can decide the (in)admissibility that is associated with the border as a permanent physical space (Salter 2006), while also displacing bordering processes internally to control non-citizens (Adams 2006). Additionally, we have shown that this exercise of sovereign power can both operate alongside and supersede the rules governing the institutional space of the prison.

An exploration of KIHC and the security certificate mechanism in general, raises several additional issues worthy of discussion. Four developments in particular stand out. First, it is clear that the jurisdictional overlap and boundary-blurring that takes place between departments and agencies under PSEPC requires further exploration and clarification. The KIHC as a case study represents a valuable example in this regard, as it lays bare various problems associated with the politics of normalized exceptionality associated with post-September 11 approaches to (in)security, notably in relation to accountability. For instance, the status of KIHC as a facility officially managed by CBSA but operated by personnel of CSC presents a challenge to detainees wishing to launch a formal complaint about the conditions of their detention (Jaballah *et al.* 2007). This is a single example embedded within a larger set of accountability issues that have emerged as a result of the new security assemblages that have been erected across government departments and other

nation-states (see Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar 2006a/2006b).

The KIHC example also encourages us to consider issues of spatialization related to detention facilities, not only in terms of its status as an exceptional space, but in terms of its actual geographical location. The construction of KIHC on the grounds of Millhaven Institution has had a profound impact on the families and close networks of the detainees – none of whom hail from the Kingston area. The costs, both monetary and psychological, of commuting from Toronto to Bath, add additional stresses to the families, who are already dealing with the financial difficulties associated with the incarceration of primary income providers (Standing Committee on Citizenship and Immigration 2006b). The effects of the transfer of the detainees from holding facilities in Toronto and Ottawa to KIHC are well documented in the writings of both the detainees and their families (see Jaballah *et al.* 2007; Justice for Mohamed Harkat 2007). KIHC, then, offers an entry point for a broader discussion of the social costs associated with the geographical location of detention facilities, jails, and prisons.

Additional work also needs to be done on the impact of indefinite detention on the families and communities of detainees. The impact of criminal justice process on families is already the subject of a sizeable body of literature, largely related to court trials and sentencing. Yet, scholarship addressing the impact of imprisonment on the families and loved ones of prisoners is scarce at best. The exceptional and indefinite nature of security certificate detention adds an additional nuance to the experience. Jaballah, Mahjoub, and Almrei (2007) describe the uncertainty associated with their detention as “psychological torture that is almost unimaginable,” and argue that their “families are in prison too.” Certainly, the indefinite detention of a loved one demands a complex set of coping strategies. This is made profoundly clear in the testimony of Mona El-Fouli, wife of Mohamed Mahjoub, before the Standing Committee on Citizenship and Immigration (2006b), where she recounts her effort to explain to her young son that his father is indeed in jail, but is not a criminal. This confusion extends to the schoolyard, where the children of the men detained struggle to explain the absence of their fathers to peers.

It is also important for scholars to critique the uncertainty and fluidity that characterizes the politico-historical context in which KIHC has emerged (see Ericson 2007; Bauman 2005). Richard Ericson’s (2007) descriptor ‘governance through uncertainty’ is apt, as it addresses both the stated precautionary intention of the certificate mechanism and its continuously-fluctuating legal status. New rules and policies, such as the construction of KIHC, outpace governing legislation, only to be called into question by the courts upon review; a context that fits well with Agamben’s (2005) observation that the state of exception conflates the rule and the norm. Recent decisions, notably the February 2007 Supreme Court ruling on *Charakaoui*, are heartening, in that they show that it is possible to resist governance through uncertainty, and even to roll back the state of exception. Despite such developments – and we would argue that they are positive developments

– it is important to note that the discussion about contemporary immigration detention in Canada, including academic work, has yet to problematize KIHC in and of itself. The current public debate focuses the overarching issue of security certificate detention, and that is perhaps as it should be. Scholars of penology and corrections, however, may want to direct additional attention to the exploration of Canada's version of the new war prison (Butler 2004).

In closing, it is important to recognize that despite the Government of Canada's efforts to frame extraordinary policies and practices such as security certificates and arbitrary imprisonment as being necessary in this 'new world,' resistance movements both inside and outside the walls of confinement have had some success in displacing these official narratives. The hunger strikes inside, and the protests, legal challenges, and information campaigns outside, have also resulted in important victories for those stripped of their rights. Scholarship is another necessary site through which unjust and undemocratic measures can be contested (Giroux 2006). Because what is at stake is not only a fundamental component of a democratic way of life – the rule law – but the *lives* of individual human beings rendered disposable by the new politics of (in)security, we can ill-afford another *silence of words* (Beck 2003) where academics fail to discharge their critical faculties when faced with injustice.

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