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Condominium Plan No. 8210034 v. King

The Owners: Condominium Plan No. 8210034, Plaintiff and John Frederick Mcewen King, Defendant

The Owners: Condominium Plan No. 7710205, Plaintiff and Effat Mohamed and Samia Mohamed, Defendants

The Owners: Condominium Plan No. 0812315, Plaintiff and TRL Capital Inc., Defendant

The Owners: Condominium Plan No. 0213078, Plaintiff and Michael Ranger, Defendant

The Owners: Condominium Plan No. 8910451, Plaintiff and Barbara Louise Boychuk, Defendant

Alberta Master

Master J.T. Prowse

Heard: September 22, 2011 - January 18, 2012

Judgment: February 23, 2012

Docket: Calgary 1101-09263, 1101-13040, 1101-11978, 1101-06854, 1001-09185

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John Frederick McEwen King, for himself

Richard I. John, for Plaintiff, The Owners: Condominium Plan No. 7710205

Samia Mohamed, for herself

Richard I. John, for Plaintiff, The Owners: Condominium Plan No. 0812315

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Subject: Property

Municipal law.

Real property.

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**Master J.T. Prowse:**

1 The issue addressed in these reasons is the nature and ranking of a condominium corporation's claim against owners of units in the condominium complex. The governing legislation is the *Condominium Property Act*, R.S.A. 2000, c.22 (the "Act"). Statutory charge, contractual charge or unsecured claim

2 Condominium corporations, in the cases before me, have commenced actions against unit owners to collect amounts owing to them by unit owners.

3 In order to assist in the collection of amounts owing, some of the corporations have enacted bylaws, which I will refer to as "enhanced collection bylaws", that:

- allow the inclusion of all types of expenses, including collection expenses, in assessments issued to units whose owners caused those expenses. This is done in order that the burden of those expenses will fall on the defaulting owners, and not on the owners as a group, and in order to have such claims qualify for the statutory charge securing assessments under sections 39 and 41 of the Act,
- purport to create a contractual charge in favour of the corporation to secure claims for revenues not received by the corporation, such as fines or rentals.

4 The question then becomes whether these enhanced collection bylaws are *intra vires* of a corporation. This issue arises because condominium corporations are created by the Act. They do not have the power of natural persons and can only exercise the powers granted to corporations by the Act: *Francis v Condominium Plan No. 8222909*, 2003 ABCA 234, 2003 CarswellAlta 1092, 11 R.P.R. (4<sup>th</sup>) 161, [2003] 11 W.W.R. 469, 330 A.R. 297, 19 Alta.L.R. (4<sup>th</sup>) 263.

**Principles of statutory interpretation and public policy**

5 Enhanced collection bylaws obviously increase the rights of the corporation against the unit owners. What approach should the court take in interpreting the Act?

6 We are not dealing with two parties, a condominium corporation and a unit owner, with adverse interests. Here each unit owner is part of the corporation: section 25(2)(a) of the Act. All unit owners have an interest in seeing the corporation successfully collect debts owing to it.

7 If an economic downturn results in numerous owners not paying their assessments, and the collection expenses incurred are not secured by a statutory charge, then the inability to recoup these expenses could lead to a severe hardship for the remaining unit owners who are keeping up their payments. Having debts owed to the condominium corporation washed away during foreclosures or bankruptcies of defaulting unit owners is not in the interest of unit owners as a collective, and it is unfair to those unit owners who continue to pay assessments.

8 Fairness between owners is one of the objects of the Act, something evidenced by section 67 of the Act which allows the court to overturn conduct which is unfairly prejudicial to, *inter alia*, a unit owner or group of unit owners. As the Supreme Court of Canada stated in *Rizzo Shoes Ltd.*, [1998] 1 S.C.R. at par. 21, the approach to be taken in statutory interpretation is that:

... the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

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9 Is there a public policy which should inhibit the court from upholding bylaws which add expenses such as collection expenses to the assessments owing by defaulting unit owners, particularly because assessments rank prior to pre-existing mortgages against the units? Would such recognition discourage lenders from providing mortgages to unit owners? My experience is that secured lenders in Alberta have typically believed that they ranked behind condominium corporations' claims for collection costs. The evidence of this is the common practice of lenders in paying out such costs when requested to do so by a condominium corporation, and adding it to the mortgage balance. This state of affairs has not resulted in a refusal of secured lenders to make mortgage loans to condominium owners.

10 Lenders might well balk at the thought of large fines ranking ahead of them, but, as I will indicate later in these reasons, the collection of fines is not entitled to a statutory charge capable of ranking in front of a lender's existing mortgage.

11 If the corporations' claims are unsecured, then the unit owners as judgment debtors are entitled to exemptions from execution under the *Civil Enforcement Act*, as are all judgment debtors. If the corporations' claims are secured then those exemptions do not apply, and the unit owners cannot shelter the first \$40,000 of equity from the corporations' claim against the unit. Is this against public policy? I think not. The Act itself makes corporations secured for unpaid assessments and interest on assessments. It is only additional expenses such as collection expenses that we are considering here. As well, the loss of exemptions on claims for things such as collection expenses is something which prospective unit owners can consider when choosing to buy a unit in a corporation with enhanced collection bylaws.

12 In my view, the Act should be interpreted in a broad and liberal way, and in a manner conducive with the successful operation of condominium corporations. However, it must also be kept in mind that broad, liberal, and remedial interpretations do not permit the courts to ignore words that are part of an enactment: see *Francis*, supra, para.30.

13 In these reasons I will first deal with bylaws which attempt to include all types of expenses in the assessments issued against units. I will then deal with bylaws which purport to grant a contractual charge to the corporation to aid in the collection of unpaid fines and rentals.

#### **Expenses which may be included in assessments**

14 Condominium corporations collect contributions from the owners of units to cover expenses of the corporation. These contribution levies are usually referred to as "assessments". These assessments typically include monthly assessments, and occasional special assessments for large, unexpected expenses.

15 Usually the assessments are levied according to the unit factor of the each unit. The unit factor of a unit is determined when it is created, and is usually proportionate to the square footage of a unit. Units with more square footage are typically assigned higher unit factors when the condominium plan is filed. While assessments are usually based on unit factors, the Act was amended in 2000 to allow assessments to be based on other factors.

16 Subsection 39(8) of the Act creates a statutory charge in favour of the condominium corporation to enforce collection of assessments. Section 41 of the Act creates a statutory charge to collect interest on overdue assessments. A corporation can use foreclosure proceedings to enforce these statutory charges.

17 The statutory charges create a 'super priority' because they rank in front of prior registered mortgages against the unit (see section 39(12) of the Act). As the statutory charges exist pursuant to the Act, there is no need for the bylaws to create the charges (although the bylaws must establish the applicable interest rate on overdue assessments).

18 A corporation can only assess units for expenses incurred or to be incurred by the corporation. Therefore, any attempt to "roll in" to an assessment the corporation's claims for unpaid fines or unpaid rent will fail. This is because

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the language of section 39(1)(a) makes it clear that the purpose of levying contributions (assessments) is to establish a fund "for administrative *expenses* sufficient, in the opinion of the corporation, for the control, management and administration of the common property ..."

19 It is uncontroversial that, under section 39(1)(a) of the Act, a corporation can look at expenses incurred, or to be incurred, and assess units to pay those assessments. Typical examples would be the cost of maintaining the common property, lawn maintenance, snow removal etc.

20 What the corporations before me have done is enact bylaws saying that one particular type of expense, the expense of collecting overdue unit factor assessments, will be assessed not against all units pro-rata, but instead will be assessed only against the defaulting unit which caused the expense. Is this type of bylaw *ultra vires*? Three arguments might be raised against the validity of such bylaws, as follows:

(a) Only physical differences in a unit can justify a larger or smaller assessment for that unit, compared with another unit with an identical unit factor. Bylaws which purport, for example, to add to an assessment of one unit the collection expenses incurred with respect to that unit, are invalid as they result in two otherwise identical units having different assessments.

(b) As the Act entitles a corporation to recover certain expenses, and also permits a specific method by which the corporation can collect some expenses, bylaws are not valid which purport to include those types of expenses in the assessment of a unit.

(c) Where the Act expressly secures unpaid interest with a statutory charge, but makes no similar provision for unpaid collection expenses, this demonstrates that unpaid collection expenses were not intended to be secured.

#### **Unequal assessments of identical units**

21 Prior to amendments made to the Act in 2000, a condominium could only assess a unit according to the unit factor of that unit.

22 The Act was amended in 2000 to allow contributions to be assessed, *if provided for in the by-laws*, on a basis other than in proportion to the unit factors [see section 39(1)(c)(ii)]. Was this 2000 amendment intended to allow the corporation to levy a contribution against one unit arising from the conduct of its owner in not paying regular assessments? Alternatively, was the amendment simply intended to address the situation where the physical circumstances of a particular unit or units made disproportionate contributions fair?

23 An example where the physical circumstances of a particular unit or units were held to require disproportionate contributions is found in the decision of Master Laycock in *934859 Alberta Inc. v. Condominium Corp. No. 031 2180*, 2006 CarswellAlta 999, 2006 ABQB 589, 406 A.R. 210. In that case it was held inappropriate to assess, proportionate to unit factors, the janitorial costs of maintaining an elevator lobby and corridor used only by unit owners with second floor units.

24 An example where the conduct of a particular unit owner was used as a basis for disproportionate contributions is found in the decision in *Condominium Plan No. 982 2595 v. Fantasy Homes Ltd.*, 2006 CarswellAlta 542, 2006. In that case Master Smart upheld a condominium by-law which assessed an owner of a unit, who happened to be the developer, with liability for a contribution consisting of the remediation costs resulting from deficiencies in the construction of the condominium complex. When this ruling was appealed to the Alberta Court of Appeal, it was disposed of on other grounds: see *Condominium Plan No. 982 2595 v. Fantasy Homes Ltd.*, 2010 CarswellAlta 176, 2010 ABCA 39, 87 C.L.R. (3d) 1, 474 A.R. 267.

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25 In my opinion, the 2000 amendments to the Act allow a condominium corporation to pass a bylaw authorizing it to levy assessments against a particular unit for expenses incurred as a result of the conduct of that unit owner, such as collection expenses. There is no reason to limit the 2000 amendments to situations where the physical characteristics of the units mandate disproportionate assessments. If the conduct of one unit owner has led to increased expenses, why should that unit owner not be responsible for those expenses? Why should his/her neighbours in the complex have to pay them? There is nothing in the wording of the 2000 amendments which would require such an inequitable outcome.

**Bylaws which purport to add certain claims to an assessment, where those types of claims are dealt with specifically in the Act**

26 It is clear that a corporation can issue assessments, under section 39(1)(a) of the Act, to recoup expenses incurred in the management and administration of the corporation. The Act does not expressly prohibit any specific types of expenses from being included in an assessment.

27 However, the Act does contain specific provisions with respect to certain types of expenses, for example, collection expenses. Do these specific provisions implicitly shelter those types of expenses from inclusion in an assessment?

28 The two specific provisions I will consider are sections 42 and 39(1)(d) of the Act. In light of section 42 of the Act, can collection expenses be included in assessments?

29 Condominium corporations require funds to administer the common property, to pay insurance premiums and to discharge any other obligations of the corporation. They can issue assessments to raise these funds. If assessments are unpaid, incurring collection expenses to collect them is, in my view, part of the administration of the common property.

30 Section 42 of the Act deals specifically with collection expenses. It states:

**Where a corporation takes any steps to collect any amount owing under section 39, the corporation may**

(a) recover from the person against whom the steps were taken all reasonable costs, including legal expenses and interest, incurred by the corporation in collecting the amount owing, and

(b) if a caveat is registered against the title to the unit, recover from the owner all reasonable expenses incurred by the corporation with respect to the preparation, registration, enforcement and discharge of the caveat.

31 Section 42 is useful to a corporation because it creates an entitlement to recoup collection expenses even if the bylaws do not themselves create that entitlement.

32 Section 42 deals with the corporation's entitlement to collection expenses, not with how the corporation can recover collection expenses. Accordingly, I do not think that there is a conflict between section 42 and the inclusion of these expenses in an assessment. With respect, I disagree with the conclusion of Master Smart to the contrary in *Condominium Corp. No. 0425177 v. Jessamine*, 2011 ABQB 644, 2011 CarswellAlta 2013, para 28.

***In light of section 39(1)(d) of the Act, can expenses required by a bylaw or municipal authority be included in assessments?***

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33 Section 39(1)(d) deals with the recovery by the corporation of certain expenses incurred by the corporation with respect to a unit. It states:

[the powers of a corporation include the following]

... (d) to recover from an owner by an action in debt any sum of money spent by the corporation

(I) pursuant to a bylaw, or

(ii) as required by a municipal authority or other public authority

in respect of the unit or common property that is leased to that owner under section 50

34 As can be seen, section 39(1)(d) does specifically provide a method for the collection of such debts, namely, an action in debt. In my view, this provision does not implicitly prohibit a corporation from including these expenses in the assessment of a unit. With respect, I disagree with the conclusion of Master Schlosser to the contrary in *Condominium Plan No. 872287 v. Callaghan*, 2011 ABQB 638, 2011 CarswellAlta 2011 at para 9.

35 I can best illustrate my view on this topic by giving a hypothetical example. Assume a municipality passes a bylaw requiring the condominium corporation to install a sprinkler type fire suppression system in the common areas and in all the units. This then becomes an "obligation of the corporation", and the expenses incurred could, on the face of it, be included in assessments made against the unit owners. Assume the corporation spends \$10,000 per unit on the fire suppression system, and then levies a special assessment of \$10,000 per unit to recover this expenditure.

36 Is this \$10,000 assessment *ultra vires* of the corporation because section 39(1)(d) states that the \$10,000 could have been collected by an action in debt? I fail to see why a permissive section, giving the right to sue in debt, is in conflict with the general power of a corporation under section 39 to levy assessments in order to pay expenses, such as this expense of \$10,000 per unit.

37 In support of this view, I would refer to section 39(2) of the Act which gives the corporation the right to sue in debt for an unpaid assessment. Nobody would argue that this right to sue in debt takes away the corporation's right to use its statutory charge (under section 39(8) of the Act) to collect that same debt. Where the Act expressly secures unpaid interest with a statutory charge but makes no similar provision to secure unpaid collection expenses, this demonstrates that unpaid collection expenses were not intended to be secured

38 Section 41 of the Act secures the payment of unpaid interest with a statutory charge, by deeming the amount owing for unpaid interest to be an assessment (contribution). The very next section, section 42, deals with unpaid collection expenses, but does not provide for a similar statutory charge. Does this demonstrate that there is no intention in the Act to secure unpaid collection expenses? In my view, the answer to this question is no, for the following reason.

39 Unpaid collection expenses are expenses, and can be included in assessments for that reason alone. Uncollected overdue interest is not an 'expense' and for that reason cannot be included in an assessment. It is for that reason that there was a need to deem unpaid interest to be an assessment (contribution), and thus covered by a statutory charge.

#### **Conclusion regarding the inclusion of expenses in assessments**

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

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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 at all.

#### **The recovery of unpaid rent by means of a contractual charge**

41 In addition to recovering expenses by way of assessment, condominium corporations also pass bylaws creating a contractual charge to assist them in collecting debts owed to them for things such as unpaid rent. Unlike a statutory charge, a contractual charge would rank behind existing registered mortgages against the unit in question.

42 Unpaid rent claims can arise, for example, where the condominium corporation rents common property to a unit owner upon which the unit owner parks a motor vehicle.

43 Section 50 of the Act expressly allows for a condominium corporation to rent out common property to a unit owner. I believe that, inherent in this, is the right of a condominium corporation to take steps to collect unpaid rent.

44 What many condominium corporations have done to collect unpaid rent is to pass a bylaw which grants a contractual charge against the unit to support payment. The bylaws form a contract between the condominium corporation and all the unit owners: see subsections 32(2) and 32(6) of the Act. I know of no reason why obtaining this contractual charge should be considered *ultra vires* of the corporation.

#### **The recovery of unpaid fines by means of a contractual charge**

45 A condominium corporation is given the responsibility for the enforcement of its bylaws (section 37(1) of the Act). It is expressly given the right to impose monetary sanctions on owners, tenants and invitees of the owners or tenants who fail to comply with the bylaws: see section 35(1) of the Act.

46 Section 36 of the Act deals specifically with fines levied against a unit owner for breach of the bylaws. It not only entitles the corporation to pursue fines, but sets out in considerable detail a procedure by which the corporation can collect those fines.

47 Subsection 36(1)(a) allows the corporation to take proceedings under Part 4 of the *Provincial Court Act* up to the monetary limits of the Provincial Court, which is currently \$25,000. Subsection 36(1)(b) allows the corporation to take similar proceedings in the Court of Queen's Bench, but, oddly, only for a claim of not more than \$10,000. The Court of Queen's Bench is authorized by subsection 36(3)(b) to grant injunctive relief.

48 Significantly, subsection 36(7) of the Act provides that "an action taken against a person under this section does not restrict, limit, or derogate from any other remedy that an owner or the corporation may have against that person". In my opinion, this allows a corporation to secure its claim for unpaid fines by way of a contractual charge, if the wording of the bylaws clearly purports to do so.

#### **Procedure to follow in determining the priority of claims of a condominium corporation**

49 Given the conclusions set out above, it is my view that claims made by a condominium corporation should be evaluated as follows:

1. Firstly, if the claim is for a typical assessment, or overdue interest on such assessment, then the claim is protected by the statutory charges under section 39 and section 41 of the Act. There is no need for any review of the bylaws in this regard, other than to confirm the interest rate chargeable on overdue assessments. That interest rate

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is capped by regulation, and the current cap is 18% per annum.

2. If the claim is for other *expenses* incurred with respect to a particular unit ('expenses' does not include uncollected revenue such as fines or rents) then the bylaws of the corporation have to be examined to determine if they allow these expenses to be included as part of the assessment against that particular unit. If the bylaws are clear in this regard then these individually assessed expenses, and overdue interest on them, are covered by the statutory charges under section 39 and 41 of the Act.

3. Claims which do not fall under item 1 or item 2 may be subject to a contractual charge pursuant to the bylaws of the corporation. For example, some bylaws I have examined grant a charge against units to secure all amounts owed by that unit owner to the corporation. If adequately worded, this contractual charge would cover things such as collection expenses not brought under item 2, unpaid fines, unpaid rents, etc.

4. Any claims which do not fall under items 1, 2, or 3 are unsecured.

#### **Applicability of the principles discussed above to the specific cases before the court**

##### ***The Owners: Condominium Plan No. 8210034 v John Frederick Mcewen King***

50 Condominium Corporation 8210034 commenced foreclosure proceedings to collect unpaid monthly assessments, interest on those overdue assessments, unpaid parking, and collection expenses, including legal fees of the foreclosure proceedings.

51 The Act provides that unpaid monthly assessments and interest on them (the requirement to pay interest and the interest rate are in the bylaws) are secured by the statutory charge.

52 The unpaid parking claim is not an expense of the corporation and is not entitled to the statutory charge.

53 With respect to collection expenses, the bylaws do not purport to include these in the assessment of the defaulting owner. However, the bylaws purport to grant a contractual charge to secure all debts owing to the corporation. This covers collection expenses and unpaid parking rent.

54 The corporation's statutory charge for unpaid assessments and interest are protected by the statutory charge, which ranks prior to registered mortgagees. The corporation is a secured creditor for unpaid parking rent and collection expenses, including legal fees, but this charge ranks subsequent to current registered mortgagees.

55 The corporation is entitled to a six month redemption order with respect to unpaid assessments, interest thereon, parking fees and collection expenses, including legal fees to be assessed on notice to Mr. King as he appeared in these proceedings.

##### ***The Owners: Condominium Plan No. 7710205 v Effat Mohamed and Samia Mohamed***

56 Condominium Corporation 7710205 commenced foreclosure proceedings to collect unpaid monthly assessments, an unpaid special assessment, and collection expenses, including legal fees of the foreclosure proceedings.

57 The Act provides that unpaid monthly assessments and unpaid special assessments and interest on them (the requirement to pay interest and the interest rate are in the bylaws) are secured by the statutory charge.

58 With respect to collection expenses, including legal fees, the bylaws of the corporation provide that these



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expenses are to be added onto the next monthly assessment of the owner. This is effective to secure these claims with the statutory charge.

59 The corporation is entitled to a six month redemption order covering all amounts due from Effat Mohamed and Samia Mohamed. The legal fees are to be assessed ex parte.

***Condominium Corporation No. 0812315 v TRL Capital Inc.***

60 Condominium Corporation 0812315 commenced foreclosure proceedings to collect unpaid monthly assessments, an unpaid special assessment, and collection expenses, including legal fees of the foreclosure proceedings.

61 The Act provides that unpaid monthly assessments, unpaid special assessment, and interest on them (the requirement to pay interest and the interest rate are in the bylaws) are secured by the statutory charge.

62 With respect to collection expenses, the bylaws do not purport to include these in the assessment of a defaulting unit owner, nor do the bylaws purport to grant a contractual charge in that regard.

63 The corporation is therefore an unsecured creditor with respect to collection expenses and legal fees.

64 The corporation is entitled to a six month redemption order with respect to unpaid assessments and interest thereon, and judgment for the collection expenses, including legal fees to be assessed ex parte.

***Condominium Corporation No. 0213078 v Michael Ranger***

65 Condominium Corporation 0213078 commenced foreclosure proceedings to collect unpaid monthly assessments, unpaid NSF fees, and collection expense, including legal fees of the foreclosure proceedings.

66 The Act provides that unpaid monthly assessments and interest thereon (the requirement to pay interest and the interest rate are in the bylaws) are secured by the statutory charge.

67 With respect to collection expenses, the bylaws do not purport to include these in the assessment of the defaulting owner. However, the bylaws purport to grant a contractual charge to secure all debts owing to the corporation.

68 The corporation's statutory charge for unpaid assessments and interest are protected by the statutory charge, which ranks prior to registered mortgagees. The corporation is a secured creditor for NSF fees and collection expenses, including legal fees, but this charge ranks subsequent to current registered mortgagees.

69 The corporation is entitled to a six month redemption order with respect to unpaid assessments, interest thereon, NSF fees and collection expenses, including legal fees to be assessed ex parte.

***The Owners: Condominium Plan No. 8910451 v Barbara Louise Boychuk***

70 Condominium Corporation 8910451 commenced foreclosure proceedings to collect unpaid assessments and collection expenses, including legal fees of the foreclosure proceedings. The unpaid assessments were brought up to date following protracted litigation, and the corporation's legal fees were assessed at \$15,968.54. These legal fees have not been paid.

71 The bylaws of the corporation of the corporation provide that the unpaid collection costs, including legal fees, are to be added onto the next monthly assessment of the owner. This is effective to secure these claims with the stat-

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utory charge. The corporation is entitled to a six month redemption order, including further legal fees of the proceedings taken subsequent to the proceedings for which legal fees have already been assessed. These further fees are to be assessed on notice to Ms. Boychuk as she appeared in these proceedings.

**Costs**

72 The costs awarded herein are to be assessed on the basis of normal or usual costs for proceedings of this type, and are not to reflect additional costs incurred because of the 'test case' nature of these proceedings.

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