Canadian Nuclear Safety Commission | Commission canadienne de sûreté nucléaire
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Developments in the Law - 2014

Introduction

2014 was a big year for legal developments, both in the nuclear sphere and in other areas of the law that can impact what the CNSC does – environmental law, Aboriginal law, and constitutional law – with developments both in Canada and internationally. Within its regulatory sphere, the CNSC saw both the Federal Court decision related to its Darlington Refurbishment environmental assessment (EA) decision (decision upheld), as well as an appeal challenging that Federal Court decision, which will go to the Federal Court of Appeal in 2015. Also in 2014, the Federal Court allowed an application for judicial review of the decision of the Joint Review Panel (JRP) on the EA of OPG's Darlington new build application; 2015 will see the CNSC, the Attorney General of Canada and OPG bring this matter on appeal to the Federal Court of Appeal. Jurisprudence from outside Canada in 2014 shows that it is not only Canada that is dealing with legal issues related to issues like the scope of EA, EA as a planning tool, and how potential impacts of nuclear projects are assessed. As well, we continue to watch American developments, in the wake of the US NRC's August 2014 final waste confidence rule and subsequent legal challenges related to it.

2014 also saw some important developments of a legislative nature in Canada, including the tabling – again – of a draft *Nuclear Liability and Compensation Act*, which accompanies Canada's having signed the IAEA's *Convention on Supplementary Compensation*, a step in the direction toward a global nuclear liability regime. With Japan signing onto the Convention in late 2014, it is anticipated that this international scheme for supplementary compensation will enter into force in April of 2015, a major milestone. Ontario enacted the *Security for Courts, Electricity Generating Facilities and Nuclear Facilities Act, 2014* which addresses, among other things, security at nuclear facilities in Ontario.

The Commission made several decisions of legal significance in 2014, including major licensing decisions and its first statutory reviews of the imposition of Administrative Monetary Penalties (AMPs) on CNSC licensees and workers. A panel of the Commission that is also a Panel under the *Canadian Environmental Assessment Act, 2012*[1] concluded its hearing process related to the Deep Geologic Repository for low- and intermediate-level waste; the Panel's findings, a decision statement by the Environment Minister, and potential licensing action may be anticipated in 2015.

2015 promises to be another year of interesting legal developments, of which the CNSC will be a part. Several decisions are anticipated, and we also watch for statutory amendments that are on the horizon.

[1] S.C. 2012, c. 19. First appointed under the previous EA legislation, the DGR Panel was the subject of a new appointment under the new legislation; the DGR will be the last time a Panel review EA will be undertaken for a nuclear project.

LEGISLATION OF INTEREST

(i) enacted

Federal

Extractive Sector Transparency Measures Act – Bill C-43 imposes obligations on entities that are engaged in the commercial development of oil, gas or minerals to publish annual reports on their corporate websites containing details of specific financial and tax related cash payments to all levels of domestic and foreign governments, including Aboriginal entities. The Bill received Royal Assent on December 16.

Provincial

Security for Courts, Electricity Generating Facilities and Nuclear Facilities Act, 2014 – Ontario Bill 35 repeals the *Public Works Protection Act*, and details the powers relating to security services for restricted access facilities, including nuclear generating facilities. The Bill received Royal Assent on December 11.

(ii) bills in progress

Federal

Energy Safety and Security Act – Bill C-22 – The Act respecting Canada's offshore oil and gas operations will enact the *Nuclear Liability and Compensation Act*, repeal the *Nuclear Liability Act* and make consequential amendments to other Acts. It is set out to govern civil liability and compensation for damages in case of a nuclear incident. As of writing, Bill C-22 is being reviewed by the Standing Senate Committee on Energy, The Environment and Natural Resources.

Incorporation by Reference in Regulations Act – Bill S-2 – This enactment will amend the *Statutory Instruments Act* to provide for the express power to incorporate by reference in regulations, imposing an obligation on regulation-making authorities to ensure that a document, index, rate or number that is incorporated is accessible. The Bill is before the Standing Committee on Justice and Human Rights.

Red Tape Reduction Act – Bill C-21 – This enactment will establish controls on the amount of administrative burden that regulations impose on businesses. As of writing, the Bill has received concurrence at Report Stage in the House of Commons.

Provincial

Protection of Public Participation Act, 2014 – Ontario Bill 52, commonly known as the "anti-SLAPP" (Strategic Lawsuit Against Public Participation) bill, will create a process for getting a proceeding against a person dismissed if it is shown that the proceeding arises from an 'expression' made by the person that relates to a matter of 'public interest'. The Bill was introduced on December 1, and as of writing, is still being considered in the Ontario legislature.

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SIGNIFICANT COMMISSION DECISIONS (CNSC)

- **OPG Bruce Heavy Water Plant** – The Commission issued a licence to abandon to OPG for the Bruce Heavy Water Plant, located on the shore of Lake Huron, near Kincardine, Ontario. OPG has completed the decommissioning of the facility and intends to allow the site to be used for other industrial purposes.

- **Shield Source Incorporated** – The Commission issued a licence to abandon SSI's nuclear substance processing facility located in Peterborough, Ontario, after verifying the successful and complete decontamination of the site.

- **McMaster University** – The Commission renewed for a period of ten years the non-power reactor operating licence for the McMaster Nuclear Reactor located on the university campus in Hamilton, Ontario. The licence is valid from July 1, 2014 until June 30, 2024. (Public hearing date: May 8, 2014)

- **Best Theratronics Ltd.** – The Commission issued to Best Theratronics Ltd. a Class 1B Nuclear Substance Processing Facility Operating Licence for its facility located in Ottawa, Ontario. The licence is valid from July 1, 2014 to June 30, 2019. (Public hearing date: May 8, 2014)

- **AECL's Prototype Waste Facility Licences** – The Commission combined into a single decommissioning waste facility licence, three existing, AECB-granted licences to decommission Atomic Energy of Canada Limited (AECL)'s Douglas Point, Gentilly-1 and Nuclear Power Demonstration facilities, located respectively in Tiverton, Ontario, Bécancour, Québec and Chalk River, Ontario. The licence is valid until December 31, 2034.

- **AECL/CNL licence transfer** – As part of the restructuring of AECL, leading to the Government-Owned, Contractor-Operated (GoCo) model, the Commission transferred the five facility licences issued to AECL – the Chalk River Labs, the Whiteshell Labs, the Port Hope and Port Granby Long-Term Low-Level Radioactive Waste Management Projects, and the Prototype Waste Facilities (noted above) – to Canadian Nuclear Laboratories Limited (CNL), a wholly-owned subsidiary of AECL.

- **Administrative Monetary Penalties (AMPs)** – The Commission reviewed two AMPs that had been imposed by designated officers, both to radiography licensees. These were the first statutory reviews by the Commission of AMPs since the *Administrative Monetary Penalties Regulations* came into force in July 2013. In both cases, the Commission upon review, found that the violations had occurred. Also in each case, the Commission determined that the calculation of the amount of the penalty had not been done in accordance with the regulations, and it corrected the amounts.

CASES OF INTEREST

Supreme Court of Canada (SCC)

Aboriginal Law: Treaty rights, Division of powers - *Grassy Narrows First Nation v. Ontario (Natural Resources)* (July 14) – Although Treaty 3 was negotiated by the federal government, only Ontario has the power to take up lands in the Keewatin area under Treaty 3 for provincially regulated purposes such as forestry. This is confirmed by constitutional provisions, the interpretation of the treaty, and legislation dealing with Treaty 3 lands. The right to "take up" lands exists so long as consultation and accommodation occurs and treaty-protected rights are preserved. The "taking up" power must be exercised in conformity with the honour of the Crown and is subject to the fiduciary duties that lie on the Crown in dealing with Aboriginal interests. If the "taking up" leaves the Ojibway with no meaningful right to hunt, fish or trap in relation to the territories over which they traditionally hunted, fished, and trapped, a potential action for treaty infringement will arise.

Aboriginal Law: Title, Duty to consult - *Tsilhqot'in Nation v. British Columbia* (June 26) – This marks the first time in Canadian law that a declaration of Aboriginal title has been made. The Supreme Court held that the Tsilhqot'in Nation had established Aboriginal title over a large portion of the claim area. In so doing, the Court clarified the test for establishing Aboriginal title, and the implications of such a finding for Aboriginal, provincial and federal governments. The Court confirmed that whether the evidence in a particular case supports Aboriginal title is a question of fact to be determined by the trial judge, and held that the trial judge applied the proper test of "regular and exclusive use of the land".

Access to Information: Disclosure - *Ontario (Finance) v. Ontario (Information and Privacy Commissioner* (May 9) – The Court ruled that legislative policy options prepared in the course of government decision-making process (specifically in this case the opinions of public servants on the advantages and disadvantages of alternative effective dates of legislative amendments), whether communicated or not, are within the meaning of "advice or recommendations" and qualify for exemption from disclosure under Ontario's *Freedom of Information and Protection of Privacy Act*. Given the fact that the wording of the provincial provision at issue is very similar to the parallel provision in the federal *Access to Information Act*, the Court's ruling about the importance of protecting the full and frank exchange of views and advice within the government bureaucracy is well noted.

Labour Law: Privacy - *Bernard v. Canada (Attorney General)* (February 7) – An employee of the Canada Revenue Agency who was not a member of a union, although she was a "Rand Formula employee" (a non-member who benefits from the collective agreement and pays union dues), sought to prevent CRA from disclosing her home contact information to the union. She also argued that disclosure of that information was a violation of her constitutional rights to not associate with the union and to be free of unreasonable search or seizure. Disclosure of the information to the union was found to be necessary for the union to effectively discharge its representational duties under the *Public Service Labour Relations Act*, and information disclosed for this purpose is exempt from the general ban on disclosure of government-held personal information pursuant to the "consistent use" exception. The Court decided that freedom of and from association is not intended to protect against associations which are an inevitable part of membership in a modern democratic community (like the terms and conditions of employment for

members of a bargaining unit). Further, there was no unreasonable search or seizure in this case because the employee did not have an expectation of privacy in the information.

Languages: Airlines – *Thibodeau v. Air Canada* (October 28) – The appellants applied to the Federal Court for damages under the *Official Languages Act* (OLA) and for structural orders in relation to Air Canada's breaches of their right to services in French. Air Canada defended against the claims for damages by relying on the limitation on damages liability set out in the *Convention for the Unification of Certain Rules for International Carriage by Air* (the Montreal Convention). The Supreme Court determined that the Montreal Convention does not permit an award of damages for breach of language rights during international carriage by air. The power under the OLA "to award appropriate and just remedies cannot – and should not – be read as authorizing Canadian courts to depart from Canada's international obligations under the Montreal Convention."

Federal Court of Appeal (FCA)

Judicial Review: Procedural fairness in administrative tribunals – *Re: Sound v. Fitness Industry Council of Canada* (February 24) - Whether an administrative tribunal's procedural arrangements comply with the duty of fairness is for a reviewing court to decide on the correctness standard, but in making that determination it must be respectful of the agency's choices. It is thus appropriate for a reviewing court to give weight to the manner in which an agency has sought to balance maximum participation on the one hand, and efficient and effective decision-making on the other. In recognition of the tribunal's expertise, a degree of deference to an administrator's procedural choice may be particularly important when the procedural model of the agency under review differs significantly from the judicial model with which courts are most familiar.

Constitutional Law (Division of Powers) – Aboriginal Law - *HMTQ et al. v. Harry Daniels et al.* (April 17) – At issue in this case was federal government jurisdiction over Métis and non-status Indians pursuant to the *Constitution Act, 1867*. The Court confirmed that the Métis have been recognized and ought to be considered as a group of native or Aboriginal people who maintained a strong affinity for their Indian heritage captured under s.91(24) definition of "Indians", and the Court declares that the Métis are included as "Indians" within the meaning of section 91(24) of the *Constitution Act, 1867*. On the contrary, the Court found that non-status Indians do not constitute a distinct group, and should not be included in the declaration. The Supreme Court of Canada has granted leave to appeal this decision but a hearing date has not yet been scheduled.

Public Hearing Participation - *Forest Ethics Advocacy Association* v. *National Energy Board* (October 31) – The NEB has devised a process for determining who may intervene in its public hearings, notably that only those with relevant information and expertise or who bring issues that appear to the Board to be directly related and relevant to the project. Three interlocutory motions were brought challenging the NEB's decisions not to allow the participation of various groups and individuals, all of which were dismissed by the FCA. The FCA determined that the NEB should be allowed a significant margin of appreciation in its determination of who may participate in its proceedings.

Federal Court (FC)

Rule 431 Federal Courts Rules – *Court Enforcement Action (NEB)* (April 7) - The NEB brought a motion before the Federal Court asking that it be authorized to take safety-related measures in respect of a Board regulated pipeline over which the Board had previously issued an order, ignored by the company, directing the company to suspend operation of the pipeline. The Court granted the motion, authorizing the NEB to take required safety action on the company's behalf and at the company's expense pursuant to Rule 431 of the *Federal Courts Rules.*

Minister's authority on licensing - *Telus Communications Company v. Canada (Attorney General* (January 2) – Industry Canada (Minister) auctioned off spectrum for commercial mobile systems, and set terms of the auction and conditions on the licences. Telus, affected by the decisions, applied for judicial review of the authority of the Minister respecting the issuance of spectrum licences, arguing that the conditions imposed by the Minister's decisions were in fact eligibility criteria, a matter within the regulation making authority of the Governor-in-Council (GIC). The FC dismissed the application, finding that the Minister had the authority to impose conditions on spectrum licences for the 700 MHz band, including spectrum caps applicable to large wireless service providers such as Telus.

Jackpine Mine Expansion project - *Adam v. Canada (Environment)* (December 9) – Chief Adam of the Athabasca Chipewyan First Nation (ACFN), challenged two federal government decisions pursuant to the *CEAA 2012* in relation to Shell Canada's proposed Jackpine oil sands mine expansion project, claiming that Crown consultation and the resulting accommodations were inadequate. For the project, the GIC determined that the project's anticipated significant adverse environmental effects were "justified in the circumstances." The Federal Court dismissed both challenges, finding that the consultation and accommodation offered had been reasonable.

Provincial Courts of Appeal

Employment Law – Workplace Policies on Harassment and Violence - *Boucher v. Wal-Mart Canada Corp.* (Ontario Court of Appeal) (May 22) – A jury had awarded an unprecedented $1.45M in damages against employer Wal-Mart which was found to be vicariously liable for the harassing actions of one of its employees. The employee was found to be liable in damages for $250K. On appeal, Wal-Mart challenged its liability for, and the amount of, damages. The amount of damages was significantly lowered (to $100K for Wal-Mart and to $10K for the employee) because the original amounts were not found to be rationally required in relation to either the employee or the employer. The Court condemned Wal-Mart for lack of response to the complaint and found that it had not enforced any of the number of relevant workplace policies that it had in place.

Litigation Privilege - *TransAlta Corporation v. Market Surveillance Administrator* (Alberta Court of Appeal) (June 13) – As part of its investigation into whether TransAlta had artificially influenced the price of electricity, the Market Surveillance Administrator requested production of formal documents. TransAlta withheld many on the basis of either solicitor-client or litigation privilege. The Court recognized litigation privilege in a regulatory investigation and gave guidance as to the breadth of litigation privilege: it stated that a party may claim litigation privilege from the outset of the regulatory litigation, and it recognized that litigation privilege may also apply to records prepared for other investigations and proceedings.

First appeal of the Ontario Environmental Review Tribunal (Ontario Court of Appeal) (March 25) – The Minister of the Environment had issued a Renewable Energy Approval (REA) to the respondent Ostrander in relation to a wind energy project (and the road that leads to it) in an area inhabited by Blanding's turtle, an endangered species. The Environmental Review Tribunal (ERT) allowed an appeal, but the Divisional Court then overturned the ERT decision, re-instating the REA. Under the terms of the reinstated REA, Ostrander is prohibited from engaging in construction on the site between May and October –the time of year when the turtles wander from the ponds and nests on the terrain. The Prince Edward County Field Naturalists then sought an injunction to prevent any work being done pending an appeal; their concern was that if the work were to be done prior to an appeal of the re-instatement decision, the turtles' environment would be irreparably harmed and any successful appeal from the order of the Divisional Court would be rendered moot. The Ontario Court of Appeal found that the irreparable harm test was met and granted the order staying the decision of the Division Court pending the determination on leave to appeal. This was not a decision on the merits of the matter.

Provincial Courts

Costs - *Thompson v. Ontario (Attorney General)* (Ontario Superior Court) - Karlene Thompson and a group called *the Empowerment Council, Systemic Advocates in Addictions and Mental Health* unsuccessfully raised a constitutional challenge of Ontario's *Brian's Law*. They had argued that the statute reinforced societal stereotypes by equating mental illness with dangerousness. The Court found against the group and upheld the constitutionality of the law; however, it determined that this was a rare and exceptional case where costs should be awarded to an unsuccessful party. Whereas the general rule is that costs go to 'the winner', the Court has a wide-ranging discretion to determine "by whom and to what extent" costs will be paid. Bringing an issue of public importance to the courts will not automatically entitle a litigant to preferential treatment with respect to costs, but here, the Court found this to be a rare and exceptional case, noting that *Brian's Law* was a significant and controversial law reform that promulgated a radical change in mental health regulation and potentially affected thousands of Ontario's most vulnerable residents.

SLAPPs – Intentional Interference with Economic Relations - Costs - *Resolute Forest Products v. Greenpeace* (July 15) - Resolute Forest Products filed a claim against Greenpeace in May 2013, alleging defamation and intentional interference with Resolute's economic relations. In the claim, Resolute sought $5M in general damages and $2M in punitive damages, as it alleges that Greenpeace published defamatory articles about Resolute, sent those articles to Resolute's customers, and that it threatens and intimidates Resolute's customers, intentionally meaning to interfere with Resolute's economic relations with others. Greenpeace in turn regards Resolute's lawsuit as a SLAPP (Strategic Lawsuit Against Public Participation). When Greenpeace sought to have the claim dismissed on a summary judgment motion (there is no anti-SLAPP legislation in place in Ontario yet), the Ontario Divisional Court upheld the lower court finding that there were sufficient allegations of fact to establish such a wrong, concluding that the claim does indeed adequately disclose a reasonable cause of action, alleging as it does intimidation, threats and the targeting of Resolute's customers. The Court ordered Greenpeace to pay $22K in costs to Resolute, and gave it 10 days to file a statement of defence.

Constitutional Law: Breach of *Charter* – Aboriginal Law - Duty to Consult and Accommodate - *Ktunaxa Nation v. British Columbia (Forests, Land and Natural Resource Operations* (Supreme Court

of British Columbia) (April 3) – This is a judicial review of a Master Development Agreement that contains environmental and economic considerations, approved following environmental assessment in BC. The Court dismissed the Ktunaxa's petition, holding that the Crown had met its duty to consult and did not breach the *Charter*. It confirms that the approach to consultation should not be fundamentally altered because an interest is described as spiritual or a project site is described as sacred. On May 2, the Ktunaxa Nation filed an appeal with the BC Court of Appeal and the hearing is scheduled for March 20, 2015 in Vancouver.

Claim Dismissed – Pinehouse Collaboration Agreement - ***John Smerek et al. v. AREVA Resources Inc, Cameco Corporation, the Northern Village of Pinehouse and the Kineepik Metis Local et al.*** (Court of Queen Bench for Saskatchewan) (September 5) – The claim had attempted to nullify the 2012 Collaboration Agreement between the Village of Pinehouse and the uranium companies. In this decision, all of the named defendants (8 in all, including Canada and Saskatchewan), succeeded in having the entire claim struck. The plaintiffs (39 of them) include 3 that are described as 'organizations', 9 individuals from the Pinehouse area, and the rest from elsewhere. The Court showed no patience for a claim that pleaded almost no material facts necessary to make out any of the causes of action that were asserted. She stated that, whereas an "unrepresented litigant may misunderstand that the court is not the place to have a political discussion", a "lawyer, on the other hand, knows the difference". Because the plaintiffs were represented by counsel, and had nonetheless clearly abused the court's process and wasted its and the defendants' time, each of the eight defendants was entitled to costs in the sum of $2000, "payable from all the plaintiffs jointly and severally".

Boards and Tribunals

Policy Grievance - Random Alcohol and Drug Testing - ***Unifor, Local 707A v. Suncor Energy Inc.*** (Alberta Grievance Arbitration Awards) (March 18) - This arbitration concerns a policy grievance filed by the union against the introduction of random alcohol and drug testing at Suncor Energy Inc. Oil Sands operations. The majority of the members found that the evidence was lacking; making reference to the 2013 *Irving* decision where the SCC affirmed the importance of privacy rights. As of writing, the action filed in the Alberta Court of Queen's Bench to quash the arbitrator's decision is still ongoing.

Liability of Unions – Illegal Strikes - ***Canada Post Corp. and CUPW, Re*** (Canada Industrial Relations Board) (February 10) – Following a ruling by the CIRB that an illegal strike had occurred on two dates, Canada Post sought damages from the union. Case law shows that a union is liable in damages resulting from an illegal work stoppage when union officials or those in a union leadership role are found to be involved in causing the illegal work stoppage. Unions can also be liable for failing to take prompt and appropriate action to bring an illegal stoppage to an end. The Arbitrator ordered the union to pay punitive damages to Canada Post. The union did not appeal.

CASES OF INTEREST – International

US NRC Commissioner – Recusal request – deliberations - On June 25, Beyond Nuclear filed a motion requesting that then-Commissioner Magwood recuse himself from participating in the deliberations in the matter of DTE Electric Co. (Fermi Unit 3 Combined Operating License proceedings) based on the assertion that, having accepted an appointment to serve as the Director General of the OECD Nuclear

Energy Agency to be effective September 1, he was no longer able to consider an appeal in an impartial manner. The Commissioner denied the motion. Decisions are based on procedural fairness and the NRC's usual regulatory procedures. Courts have long held that administrative officers are presumed to be objective and capable of judging a particular controversy fairly on the basis of its own circumstances. Such decisions are not appealable to the Commission but can, however, be reviewed by US courts.

United States District Court for the Eastern District of Louisiana - *Deepwater Horizon decision* (September 4) In a phased trial of the federal lawsuits filed as a result of the 2010 Deepwater Horizon disaster, the Court issued its "Findings of Fact and Conclusions of Law" on 2 federal cases (the ship owner's limitation of liability suit and the US government's claims for civil penalties against BP under both the *Clean Water Act* and the *Oil Pollution Act*). Under the *Clean Water Act*, a person in charge of a vessel from which oil is discharged in violation of the Act is liable to civil penalty ($1100 per barrel of oil discharged to $4300 per barrel). The Court concluded that the spill was the result of BP's gross negligence and willful misconduct.

US Nuclear Regulatory Commission – NPP licensing status – In August, the NRC published a new "waste confidence" rule stating that the continued storage of spent nuclear fuel on the site of a commercial power plant is safe if properly managed; it also ended its moratorium on NPP licensing and license renewals. The consideration of the only geologic repository in the US, Yucca Mountain, was effectively terminated in 2009 when funding for the project was cut; this, in turn, prompted the challenge to the former 'waste confidence' rule that had relied on the Yucca repository plan, resulting in the Court striking it down in 2012. The new rule has been challenged and will be litigated. The petitioners argue that the NRC's EA analysis supporting the new rule fails to meet the standards set by the applicable statutes and that the new rule itself fails to correct the errors identified by the court in the old rule.

United Kingdom Court of Appeal - *An Taisce (the National Trust for Ireland) v. Secretary of State for Energy and Climate Change (SSECC)* (August 1) An Taisce, an Irish NGO, sought judicial review of the decision by the UK's SSECC to grant development consent for the construction of an EPR nuclear power station at Hinkley Point, UK. This decision was the conclusion of an environmental impact assessment (EIA) conducted by the SSECC, resulting in a determination that there was no likelihood of significant effects on the environment by the project. The decision was challenged on two grounds: firstly, the failure to comply with the EU Directive on EIA, which required transboundary consultation; and secondly, that the SSECC erred by relying on the existence of the UK nuclear regulatory regime to fill gaps in current knowledge when he concluded there was no likelihood of significant environmental effects because any remaining gaps would be addressed by the regulatory regime. The evidence in the case, on which the SSECC had relied, indicated that the probability of a major accident in the UK (core meltdown + containment failure) was 4×10^{-9} or one in 2.4 billion per reactor year. Thus, the Court was satisfied the Secretary of State's decision was reasonable, even if the threshold for 'likelihood' were as low as the "absence of reasonable scientific doubt". Furthermore the Court found that there is no reason that precludes the Secretary of State from being able to have regard to, and rely upon, the existence of a stringently operated regulatory regime for future control.

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