

Case Name:
R. v. C.N.H.

Between
Regina, and
C.N.H. and P.B.

[2006] B.C.J. No. 782
2006 BCPC 119
Vancouver Registry No. 19731-1

**British Columbia Provincial Court
(Youth Justice Court)
Vancouver, British Columbia
Dhillon Prov. Ct. J.**

Heard: February 21, 2006.
Judgment: March 29, 2006.
(48 paras.)

Constitutional law — Canadian Charter of Rights and Freedoms - Legal rights — Life, liberty and security of person — Principles of fundamental justice — Procedural rights — Right to make full answer and defence — The constitutional challenges to the Criminal Code provisions permitting young witnesses to testify via the use of close circuit television were dismissed — In the case at bar, the use of CCTV afforded the accused a full right to cross-examination of the witnesses, which was not compromised by having the witness out of the physical presence of the accused, as the technology permitted the "virtual presence" of the witness in the courtroom — Canadian Charter of Rights and Freedoms, ss. 7 and 11(d) — Criminal Code, s. 486.2.

Criminal law — Offences — Offences against person and reputation — Assault — Causing bodily harm — The constitutional challenges to the Criminal Code provisions permitting young witnesses to testify via the use of close circuit television in this case involving allegations of assault causing bodily harm were dismissed.

Criminal law — Evidence — Witnesses — Examination — Cross-examination — The constitutional challenges to the Criminal Code provisions permitting young witnesses to testify via the use of close circuit television were dismissed — In the case at bar, the use of CCTV afforded the accused a full right to cross-examination of the witnesses, which was not compromised by having the witness out of the physical presence of the accused, as the technology permitted the "virtual presence" of the witness in the courtroom.

The constitutional challenges to the Criminal Code provisions permitting young witnesses to testify via the use of close circuit television were dismissed — During the trial of the two young offenders, who were both accused of assault causing bodily harm, two Crown witnesses, each

under 18 years old, applied for testimonial accommodation so they could testify outside the courtroom through the use of close circuit television and within the presence of a witness support person — The accused challenged the constitutionality of this provision, alleging that the section violated their rights under ss. 7 and 11(d) of the Canadian Charter of Rights and Freedoms in that it was "overbroad and overreaching" as it mandated that the testimonial accommodation shall be granted on application, without the court making any determination or inquiry as to the necessity of such assistance — They argued that such an order would interfere with their right to cross-examine the witnesses or effectively communicate with their counsel, thereby impairing their right to make full answer and defence to the charges — HELD: The constitutional challenges were dismissed — The accuseds had not established a breach of their right to a fair hearing under s. 7 — In the case at bar, the use of CCTV afforded the accused a full right to cross-examination of the witnesses, which was not compromised by having the witness out of the physical presence of the accused as the technology permitted the "virtual presence" of the witness in the courtroom — If the technological quality proved to be sub-standard, the court retained an overriding discretion to require the personal attendance of the witness in court — There was also no merit to the suggestion that the legislation placed a constitutionally impermissible burden on the accused — It did not affect the burden of proof on any substantive aspect of the criminal prosecution.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, s. 7, s.11(d)

Criminal Code, s. 276, s. 486.2

Cases cited:

Case Authority Submitted

Bradley v. Bradley, [1999] B.C.J. No. 2116 (B.C.S.C.)

R. v. Gibson, [2003] B.C.J. No. 812 (B.C.S.C.)

R. v. Heynan et al, [2000] Y.J. No. 6 (Yuk. Terr. Ct.)

R. v. K.D.T., 2006 BCCA 60

R. v. L.(D.O.) (1993), 85 C.C.C. (3d) 289 (S.C.C.)

R. v. Levogiannis (1993), 85 C.C.C. (3d) 327 (S.C.C.)

R. v. McLean, [2002] Y.J. No. 88 (Yuk. Terr. Ct.)

R. v. Milot, [1994] B.C.J. No. 1111 (B.C.S.C.)

R. v. Potvin (1989), 47 C.C.C. (3d) 289 (S.C.C.)

R.v. Wormell, 2005 BCCA 328

Re: Motor Vehicle Act, [1985] 2 S.C.R. 145

R. v. Oakes, [1986] 1 S.C.R. 103

R. v. Seaboyer, R. v. Gayme, [1991] 2 S.C.R. 577

R. v. Raj, [2002] B.C.J. No. 678 (B.C.S.C.)

R. v. Young, 150 C.C.C. (3d) 317 (Sask. Queen's Bench)

Little Sisters Book and Art Emporium v. Canada, 150 C.C.C. (3d) 1 (S.C.C.)

Other Material

* **An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act - Bill C-2**

* **Parliament's Consideration of Bill C-2, A Summary**

* **Section 486: Testimonial Accommodations - Equipment Demonstration: Setup and Use (a DVD)**

* **Bill C-2: A New Law for Canada's Child Witnesses** (2005), 32 C.R. (6th) 48

* **Child Witness Project** of Queen's University - The Brief on Bill C-2 submitted to the House of Commons Committee, March 24, 2005

* **CBA Submission on Bill C-2**, April 2005

* **Child Witnesses in Canada: Where We've Been, Where We're Going** - Child Witness Project, London 2002

* **Children as Witnesses** - Thinking Beyond the Box, Results of a Roundtable in B.C., 2000

* **Testimonial Aids of Children: the Canadian Experience with Closed Circuit Television, Screens and Videotapes** (2001), 44 Crim. L.Q. 461, by Nicholas Bala

* **A Consultation Paper: Child Victims and the Criminal Justice System**, The Department of Justice Canada (November 1999)

* **Court Design Issues Affecting Children and Other Vulnerable Witnesses**, A Background Study, March 1997

* **Australia Law Reform Commission Report No. 63: Children's Evidence: Closed Circuit TV**, 1992

* **United Nations Guidelines and Principles**, 2005

* **International Bureau for Children's Rights Guidelines**, 2003

Counsel:

Counsel for the Crown: Kristen Gagnon and Mary T. Ainslie

Counsel for C.N.H.: Leonard Kompa

Counsel for P.B.: Michael J. Connaghan

¶ 1 **DHILLON PROV. CT. J.**— C.N.H. and P.B. are young persons charged with the offence of assault causing bodily harm to C.W., contrary to s. 276(b) of the *Criminal Code*.

¶ 2 Two Crown witnesses, each under 18 years of age, have applied for testimonial accommodation, being the right to testify outside the courtroom through the use of close circuit television (CCTV) and within the presence of a witness support person. These applications for testimonial accommodation are made pursuant to s. 486.2 of the *Criminal Code*, which became law on 2 January 2006.

¶ 3 Section 486.2 reads:

Testimony Outside court room - witnesses under 18 or who have a disability
486.2(1) Despite section 650, in any proceedings against an accused, the judge or justice shall, on application of the prosecutor, of a witness who is under the age of eighteen years or of a witness who is able to communicate evidence but may have difficulty doing so by reason of a mental or physical disability, order that the witness testify outside the court room or behind a screen or other device that would allow the witness not to see the accused, unless the judge or justice is of the opinion that the order would interfere with the proper administration of justice.

Conditions of exclusion

- (7) A witness shall not testify outside the court room under subsection (1) . . . unless arrangements are made for the accused, the judge or justice and the jury to watch the testimony of the witness by means of closed-circuit television or otherwise and the accused is permitted to communicate with counsel while watching the testimony.

¶ 4 The accused young persons challenge the constitutionality of s.486.2(1). They contend that the section violates their rights under s. 7 and s. 11(d) of the *Canadian Charter of Rights and Freedoms*. They join together in this application to seek a declaration that s. 486.2(1) be of no force and effect, or alternatively, that their proceeding be exempted from its provisions.

¶ 5 Specifically, they assert that s. 486.2(1) is "overbroad and overreaching" because it mandates that the testimonial accommodation *shall* be granted on application, without the court making any determination or inquiry as to the necessity of such assistance. The accused say that this places the onus on them to show that the order would interfere with the administration of justice, rather than on the applicants to show, on balance, that the aid is warranted in all the circumstances.

¶ 6 The accused further submit that an order permitting the witnesses to testify outside the courtroom through CCTV, as is being sought in this case, would interfere with their right to cross-examine the witnesses or effectively communicate with their counsel, thereby impairing their right to make full answer and defence.

¶ 7 The Crown submits that allowing child witnesses to testify outside the courtroom by means of a closed-circuit television does not interfere with cross-examination or the ability to convey full answer and defence. Additionally, Crown says that s. 486.2(1) does not impose any legal or evidentiary burden on the accused that violates a *Charter* right. It is related solely to procedural matters and is therefore constitutional.

Constitutional Considerations

¶ 8 Does s. 486.2(1) offend the guarantees set out under s. 7 or 11(d) of the *Charter*?

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
11. Any person charged with an offence has the right
 - (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

¶ 9 An applicant alleging breach of a *Charter* right must establish that his or her interest falls within the ambit of s. 7. The issue is whether the legislation directing the use of a testimonial aid for a child witness under s. 486.2(1) adversely affects an accused's right to life, liberty, and security of the person. If the interest is not within s. 7, the analysis proceeds no further.

¶ 10 In a s. 11(d) complaint, the court must determine if the trial is rendered unfair by the legislative directive under s. 486.2(1). Here, the issue would be whether the mandatory use of the testimonial aid renders the trial unfair by impacting on an accused's rights set out in s. 11(d) to be presumed innocent and to have a fair and public hearing by an independent and impartial tribunal.

¶ 11 In considering these issues, I start first with the Parliamentary objective in enacting s. 486.2 and next consider case law on the efficacy of testimonial aids at trial. Lastly, I consider case law on the constitutional merits of legislation permitting the use testimonial aids.

Parliament's Objective and Purpose in Enacting Bill C-2

¶ 12 The legislative objective of s. 486.2 is to facilitate and improve the participation of child and other vulnerable witnesses in the criminal justice system. Previously, s. 486(2.1) was permissive, not mandatory, and required an evidentiary foundation to support the necessity of a testimonial aid order. The earlier provisions, Bill C-15 drafted in 1988, read as follows:

[A] court *may* order that the complainant or witness testify outside the court room or behind a screen or other device that would allow the complainant or witness not to see the accused, *if the judge or justice is of the opinion that the exclusion is necessary* to obtain a full and candid account of the acts complained of from the complainant or witness.

(emphasis added)

¶ 13 The Crown presented this court with a number of research papers and treatises (see Appendix) on the treatment of child witnesses and child victims in the criminal justice system which provide a context for the recent legislative changes. In brief, the writings say that since 1988 when legislation permitted the discretionary use of screens or CCTV, the utilization rate of such testimonial aids has been low. The Crown submits that social science literature establishes that it is now generally accepted that a testimonial aid assists a child to give full and candid testimony. However, court applications for testimonial aids have not been routinely made for systemic and procedural reasons.

¶ 14 When applications were made under the predecessor legislation, they were lengthy, often requiring the child witness or an expert witness to testify to establish an evidentiary foundation for the use of the aids. Such applications used valuable resources including witness and court time, and resulted in inconsistency in outcome. For a child witness, a preliminary application was often lengthy, intimidating and tiring.

¶ 15 Nicolas Bala in his submissions on Bill C-2 amendments to the *Criminal Code* and the *Canada Evidence Act*, presented to the House of Commons on behalf of the Child Witness Project in March 2005, noted as follows:

However, these provisions [testimonial aids] are used too infrequently in Canada, and in particular too little use is made of closed circuit television. Use of screens is often ineffective. Even if a child cannot see the accused because a screen is used, children often find it difficult to communicate in (what for them) is a very large, strange and intimidating setting . . . Greater use needs to be made of closed circuit television, which removes the child from the courtroom while testifying.

...

Adolescents can be extremely self-conscious, and shy away from being the "center of attention," especially around strangers and be very worried about how others will view them. Thus, the proposed s. 486.2(1) in Bill C-2 is a welcome improvement in the law, providing that if requested by the Crown prosecutor, a child under the age of 18 "shall" testify from behind a screen or via closed circuit television, "unless the judge . . . is of the opinion that the order would interfere with the proper administration of justice."

One of the major problems with the use of screens and close circuit television is that the issue of their use is too often only addressed when the child is about to take the witness stand. At present, the child and professionals are uncertain as to whether the judge will grant the application, and do not have an opportunity to adequately prepare for court. The uncertainty can cause children great anxiety. There needs to be a provision for the early application and resolution of the question of whether such devices can be used.

¶ 16 It is fair to say that Mr. Bala's comments pertain predominantly to the child witness in child sexual abuse prosecutions, and not to the child witness or young person in a typical youth criminal justice proceeding. However, he notes that the presumptive benefits of testimonial aids could be said to apply to all child or vulnerable witnesses.

¶ 17 I accept that Parliament's purpose and objective in enacting Bill C-2 was to make testimonial aids more readily available to young or vulnerable witnesses in criminal matters, and in particular to minimize the stress and trauma to children and adolescent witnesses by ensuring greater certainty prior to the hearing as to the mode of giving testimony.

Efficacy of CCTV as a Testimonial Aid

¶ 18 Crown has provided to the court a DVD disc prepared by the Ministry of Attorney General, Criminal Justice Branch, titled "Section 486 - Testimonial Accommodations - Equipment Demonstration: Setup and Use."

¶ 19 I have found useful and informative the DVD overview of the various available testimonial aids, including a screen or CCTV, and the procedures for their use in court when s. 486.2 orders are made.

¶ 20 Crown submits that, as the DVD demonstrates, testimony by CCTV provides a 'live feed' of images and sound which can not be manipulated, edited, or intentionally distorted. It permits real-time transmission of a witness's verbal and physical responses to questioning, including hesitations, pauses, intonations and gestures. Although the use of CCTV blocks the witness's view of the accused, who remains in the courtroom, it does not interfere with the accused's view of the witness who is visible on the CCTV screen. In short, the witness is in the "virtual presence" of judge and the accused.

¶ 21 Crown notes that CCTV technology has already been used to good effect in criminal matters where witnesses have testified through video link. In *R. v. Heyman et al*, [2000] Y.J. No.

6 (Yuk. Terr. Ct.) Stuart C.J. noted at para. 315 that the court did not have any significant difficulty in evaluating the video link testimony of eight witnesses and found that the use of camera angles and close up views enhanced the court's ability to evaluate demeanour.

¶ 22 It is fair to say that the type and quality of the audio and video technology used in transmitting the witness's testimony will determine if the testimony is indeed within the "virtual presence" of the accused and the judge. Davies J. in *R. v. Gibson*, [2003] B.C.J. No. 812 (B.C.S.C.) had two different experiences in hearing and seeing the testimony of two witnesses by video conference. In one, the size of the screen negatively impacted the court's ability to observe the witness. In the second, the technology was acceptable and his Lordship noted as follows:

[5] . . . I could clearly see and observe the witness, Ms. Yelich, including her facial expressions and her body language. In fact, I would go so far as to say that a well-placed camera may accentuate the expressions of a witness under cross-examination. Cross-examination of that witness was effective.

¶ 23 In *Bradley v. Bradley*, [1999] B.C.J. No. 2116 (S.C.) the court permitted witness testimony by remote video but commented that if problems became apparent after the provisional reception of such evidence, the matter was open for reconsideration.

¶ 24 I further note that a trial judge is duty bound to ensure respect for, and protect the integrity of, the administration of justice in both a procedural and substantive sense. If the use of the testimonial aid interferes with the proper administration of justice (i.e. by poor equipment, a technological malfunction or because of difficulty in controlling a witness outside the courtroom) a judge or justice could truncate the use of the aid so as to minimize interference with the proper administration of justice.

¶ 25 Crown concedes that it lies within the discretion of the trial judge to deny or truncate the continued use of the video link or other testimonial aid if technological or other problems develop.

Ruling on the Constitutionality of Section 486.2

¶ 26 In answering constitutional questions raised in this application, I take guidance from two cases decided by the Supreme Court of Canada in 1993 which considered the use of testimonial aids. One related to the use at trial of prior video-taped evidence of a child witness under s. 715.1 of the *Criminal Code* [*R. v. L.(D.O.)* (1993), 85 C.C.C. (3d) 289] and the other dealt with the presentation of evidence with the use of an in-court screen under s. 486(2.1) of the *Code* [*R. v. Levogiannis* (1993), 85 C.C.C. (3d) 327]. The Supreme Court held in each case that the use of testimonial aids did not violate sections 7 or 11(d) of the *Charter*. The testimonial aids were found to be constitutionally permissible.

¶ 27 It was argued in *R. v. L.(D.O.)* that the admission into evidence at trial of prior videotaped statements of a child witness, without the safeguards and controls found in the traditional trial process of giving *viva voce* testimony, was contrary to the principles of fundamental justice. To that argument, the Supreme Court said at pages 312-313:

One must recognize that the rules of evidence have not been constitutionalized into unalterable principles of fundamental justice. Neither should they be interpreted in a restrictive manner which may essentially defeat their purpose of seeking truth and justice.

...

It would seem contrary to the judgments of our court (Seaboyer and B.(K.G.), [1993] 1 S.C.R. 740) to disallow evidence available through technological advances, such as videotaping, that may benefit the truth-seeking process. Consequently, adherence to such strict rules as suggested by the respondent, besides not being constitutionally required, may result in valuable information not being brought to the court's attention.

¶ 28 The Supreme Court concluded that s. 715.1 of the *Code* provided a different means of giving evidence. It continued to fully protect the rights of the accused both at common law and under the *Charter*, including the right to challenge the witness by cross-examination or to seek court rulings on the admissibility of evidence. The use of videotaped testimony under s. 715.1 did not infringe the accused's s. 7 rights.

¶ 29 The Supreme Court also found unpersuasive the accused's assertion that out-of-court videotaped statements admitted into evidence at trial denied him the guarantee of a public hearing under s. 11(d) of the *Charter*. The Court commented as follows at page 318:

Out-of-court statements are admitted into evidence in judicial proceedings every day without any suggestion that the trial is unfair or not public. Further, the fact that the child's testimony is on videotape, in my opinion, in no way colours the accused's guilt or innocence.

¶ 30 In *Levogiannis, supra*, Madam Justice L'Heureux-Dubé considered whether the use of a screen blocking the complainant's view of the accused breached the accused's s. 7 right to "face his accuser." The Learned Justice stated at p. 333:

The examination of whether an accused's rights are infringed encompasses multifaceted considerations, such as the rights of witnesses, in this case children, the rights of accused and courts' duties to ascertain the truth. The goal of the court process is truth-seeking and, to that end, the evidence of all those involved in judicial proceedings must be given in a way that is most favourable to eliciting the truth.

¶ 31 The Supreme Court held in *Levogiannis* that the purpose and effect of s. 486(2.1) did not render the trial procedure fundamentally unfair to the accused because the screen did not obstruct the accused's view of the complainant and all other usual trial procedures were available, including full cross-examination of the complainant.

¶ 32 On the issue of an accused's right to face one's accuser, the Supreme Court said that this is not an absolute right, and absence of face-to-face confrontation during trial does not infringe any principle of fundamental justice.

¶ 33 Parliament is entitled to undertake reform of the law of evidence and, in relation to s. 486.2, has consulted widely on how to improve the experience of child and other vulnerable witnesses in the criminal justice system. The Supreme Court of Canada has said that the rules of evidence have not been cast as constitutionally protected principles of fundamental justice. Additionally, as is well noted in *Levogiannis, supra*, an accused has no constitutional right to face-to-face confrontation of a witness. Although s. 486.2 provides a procedural directive as to the manner in which child testimony may be given, it does not preclude the accused from using the full arsenal of procedural and substantive rights at his disposal in the adversarial system.

¶ 34 In the case at bar, the use of CCTV affords the accused a right to a full cross-examination of the witness. This right is not compromised by having the witness out of the physical presence of the accused because the CCTV technology permits the "virtual presence" of the witness in the courtroom. As Crown has submitted, "a witness testifying via CCTV is still giving *viva voce*, real time, cross-examinable evidence the credibility of which can be contemporaneously assessed."

¶ 35 As has been noted by courts which have received CCTV or video evidence, the quality of evidence can be equal to or better than *viva voce* in person testimony particularly if technological enhancement is available. If the technological quality proves to be substandard, the court retains an overriding discretion to require the personal attendance of the witness in court.

¶ 36 For the foregoing reasons, I conclude that the applicants have not established that their right to a fair hearing under s. 7 is infringed because Parliament mandates under s. 486.2(1) that all witnesses under age 18, who so wish, may testify with a testimonial aid.

¶ 37 I turn next to the allegation that s. 486.2 "unfairly shifts the burden on the accused to show that the order would interfere with the proper administration of justice."

¶ 38 In my view, s. 486.2 does not place any burden on the accused which jeopardizes fair trial rights. It calls on the Crown to satisfy the prerequisites of age of the witness, and the remaining conditions under of ss. 486.2(7). The Court must be satisfied that proper arrangements have been made for the contemporaneous receipt by the judge and the accused of out-of-court testimony, and for the accused to communicate with counsel during the testimony.

¶ 39 The legislation creates a presumptive rule that witnesses under the age of 18, if they apply, will be granted the right to testify with the use of a testimonial aid unless the court is "of the opinion" that such an order will interfere with the proper administration of justice. As discussed above, there is a valid legislative basis for requiring the presumptive or mandatory order, given the lack of success in affording aids to child witnesses under the predecessor legislation.

¶ 40 In order to preclude the imposition of a testimonial aid, which is presumptive under s. 486.2, the judge must form the opinion that the order would interfere with the proper administration of justice. I am of the view that a judge who forms such an opinion becomes "satisfied" as to that particular state of affairs. I note that the B.C. Court of Appeal, in *R. v. Wormell* (2005), 198 C.C.C. (3d) 252, 2005 BCCA 328 said that where the word "satisfy" is

used, it is not appropriate to import into that term the idea of a burden of proof in the traditional sense.

¶ 41 Section 486.2 preserves the trial judge's discretion to refuse such an order if the judge forms the opinion, whether from her or his own enquiries or from matters raised by the Crown or the accused, that the proper administration of justice may be adversely affected. This, in my view, does not place any undue burden on the accused and does not affect the accused's rights to a fair trial.

¶ 42 In conclusion, I find no merit to the assertion that the legislation places a constitutionally impermissible burden on the accused. The legislation does not affect the burden of proof on any substantive aspect of the criminal prosecution. Ultimately, the Crown is still required to prove each element of the offence to the criminal standard.

¶ 43 The difference between s. 486(2.1) discussed in *Levogiannis, supra*, and s. 486(2) under consideration here is that the former permitted the use of a testimonial aid for specifically enumerated offences. Under the new provision, any person under the age of 18 years testifying in a criminal proceeding, regardless of the offence being tried, can avail herself, as of right, to the use of a testimonial aid.

¶ 44 This section will have a particular impact on matters in Youth Justice Court where, aside from the accused young person, commonly the complainant and a majority of trial witnesses can be young persons. Youth Justice Court judges face the prospect of trials where almost all participants may testify outside the courtroom using CCTV or other testimonial aids, whether the case is serious sexual assault, a petty theft, or a schoolyard scuffle.

¶ 45 Crown counsel has advised the Court that it will be their invariable practice, in all Youth Justice Court matters where a witness under age 18 is scheduled to testify, to provide to the young person an application form for a s. 486.2 order. In my view, it remains the duty of counsel who are charged with preparing and presenting the evidence of a young witness to both encourage and provide the option for testimony in open court where practicable.

¶ 46 I conclude that s. 486.2 mandating the use of testimonial aids to assist a child witness to testify outside the presence of the accused is constitutionally permissible. I am not persuaded that the use of a testimonial aid, per se, interferes with or deprives an accused of life, liberty or security of the person or impairs his or her right make full answer and defence.

¶ 47 Accordingly, the application of C.N.H. and P.B. alleging a breach of their s. 7 and 11(d) *Charter* rights is dismissed.

DHILLON PROV. CT. J.

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Appendix

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- * **A Consultation Paper: Child Victims and the Criminal Justice System**, The Department of Justice Canada (November 1999)
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- * **Australia Law Reform Commission Report No. 63:**

Children's Evidence: Closed Circuit TV, 1992

- * **United Nations Guidelines and Principles**, 2005
- * **International Bureau for Children's Rights Guidelines**, 2003

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