

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HIS MAJESTY THE KING

- and -

BILLY JOHN McNEELY

REASONS FOR DECISION
of the
HONOURABLE DEPUTY JUDGE B.E. SCHMALTZ

Heard at: Yellowknife, Northwest Territories
Date of Decision: September 22, 2022
Date of Hearing: September 7, 2022
Counsel for the Accused: Roopa Mulherkar
Counsel for the Crown: Morgan Fane

[Sections 7, 8, and 9 of the *Charter* Application]

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A. INTRODUCTION

[1] Billy John McNeely is charged with operating a motor vehicle with a blood alcohol level over .08, (s. 320.14(1)(b)), and with resisting arrest (s. 129(a)).

[2] Mr. McNeely brought an Application alleging that his rights under s. 7, 8, and 9 of the *Charter* were breached, and seeks a remedy under s. 24(2) or 24(1) of the *Charter*.

[3] Mr. McNeely's trial began on September 7, 2022 as a blended trial and *voir dire*, with the evidence called to be applied to both the *Charter* Application and the trial. The matter was adjourned to September 22, 2022, when I gave my decision on the *Charter* Application. The following are the written reasons for that decision.

B. EVIDENCE

B.1 Cst. Snow

[4] On agreement, a transcript of Cst. Snow's evidence from an earlier trial on this matter was entered as Exhibit 1 on this trial.

[5] On April 20, 2020, Cst. Snow was a member of the RCMP, stationed in Yellowknife, NT, and had been a member for approximately 7.5 years.

[6] On April 20, 2020, Cst. Snow was on duty, and driving a marked police vehicle, partnered with Cst. Stuckless. At approximately 10:20pm, Cst. Snow noticed a vehicle known to him driving in front of him. Cst. Snow knew the vehicle was owned by Mark Ryan, he knew the vehicle was not registered, and it had an incorrect license plate on it. Cst. Snow testified that the vehicle also had multiple safety violations.

[7] Cst. Snow followed the vehicle for a number of blocks. Cst. Snow believed the vehicle was speeding, though he was not able to say how fast the vehicle was going. In following the vehicle Cst. Snow was of the impression that the driver of the vehicle had noticed his police vehicle and was trying to get out of the area, or to evade the police.

[8] After following the vehicle a short distance, Cst. Snow turned on his emergency lights and attempted to close the distance between his police vehicle and the suspect vehicle. The suspect vehicle came to a stop behind Grayling Apartments, and Cst. Snow pulled in behind it with his emergency lights activated. Cst. Snow exited his vehicle, and the driver of the suspect vehicle also got out of the vehicle. Cst. Snow immediately told the driver to get back in the vehicle. Cst. Snow quickly realized the driver was Billy McNeely who was known to Cst. Snow.

[9] As to Mr. McNeely's movements after he got out of the vehicle, Cst. Snow testified as follows:

And once he exited he was I'll say stumbling, unsteady on his feet, moving away from the vehicle and kind of yelling at me that he wasn't driving the vehicle. He continued towards Grayling Manor ... or and shortly thereafter I yelled out to him to stop. And then he started running with, yeah, like he had a purpose to get away from the area. ... at this point [I] started chasing him, yelled out to him that he was under arrest. The alley was extremely — like obviously it's the spring of the year and everything's melting, so it was extremely, extremely in icy the back alley area.

[10] Cst. Snow testified that at that point, Mr. McNeely was under arrest for obstruction. Further he testified that Mr. McNeely was going to be detained for the purposes of an investigation, "whether it be Traffic Safety Act, or what turned into an impaired."

[11] The DashCam video from Cst. Snow's vehicle was entered as Exhibit 2 on the trial. The video starts from some point when Cst. Snow was following the vehicle,

and goes until the point where Mr. McNeely gets out of the vehicle, starts walking away from the vehicle, slowly at first, and then faster into a run followed by Cst. Snow, until both of them are out of the range of the video.

[12] On viewing the video, the vehicle Cst. Snow was following may have been driving fast, though that is difficult to tell; the vehicle may well have been trying to avoid the police as it seems to be making a number of turns, but it also appears to be signaling and slowing down to make the turns. When the vehicle turns into the alley behind Grayling Apartments it appears to be driving normally and stops when the police vehicle with its emergency lights on pulls into the alley behind it. When the driver, recognized as Billy McNeely, gets out of the vehicle, he is not stumbling or staggering, he walks straight for a short distance and then breaks into a run; Mr. McNeely does appear to be holding something in the pocket of his jacket as he runs. Cst. Snow immediately chases after him. The chase is only seen on the video for a short distance.

[13] Cst. Snow testified that the entire time Mr. McNeely was running, Mr. McNeely had his hand jammed into his hoodie pocket and appeared to be holding onto something. It was Cst. Snow's opinion at that point that Mr. McNeely was running because he was in possession of a weapon of some sort, and that is why Mr. McNeely continued to run.

[14] After approximately 100 to 200 metres, Cst. Snow was able to get ahold of Mr. McNeely, and trip him, causing Mr. McNeely to fall onto the sidewalk. Mr. McNeely continued to struggle, and would not comply with Cst. Snow's commands or instructions as Cst. Snow continued to try to restrain Mr. McNeely and get control of the situation.

[15] Cst. Snow was concerned about the situation, he was by himself, and he still did not know if Mr. McNeely had any weapons in his possession. Cst. Snow then punched Mr. McNeely in the face in an effort to distract Mr. McNeely, and thereby allow Cst. Snow to place Mr. McNeely in handcuffs. The punch to the face was ineffective and Mr. McNeely continued to struggle while Cst. Snow continued to try to apprehend him and get control of the situation. "Mere seconds" after Cst. Snow punched Mr. McNeely in the face, Cst. Snow detected the "clear extreme odor of liquor" coming from Mr. McNeely's breath. Cst. Snow testified: "And given my position I also didn't have access to any of my police options, but with that being said, he also had full access to ... all my police intervention options given our close proximity."

[16] The struggle continued. Cst. Snow was concerned that the situation could get out of control if it was not stopped, and testified that “if this fight or struggle didn’t end or stop ... I was going to be hurt or possibly killed.” Cst. Snow then placed Mr. McNeely into a “carotid control”, or chokehold. Cst. Snow placed his arm around Mr. McNeely’s neck and put a slight bit of pressure on while telling Mr. McNeely that he had to place his hands behind his back; Mr. McNeely complied, and Cst. Snow placed Mr. McNeely in handcuffs.

[17] Cst. Snow was then able to call for backup. While Cst. Snow had Mr. McNeely on the ground, Cst. Snow told Mr. McNeely that he was under arrest for resisting, impaired driving, and flight from police.

[18] Cst. Fanning and Cst. Sylvestre arrived within two minutes. When Cst. Snow was getting Mr. McNeely to his feet, he noted that his own hand was injured and bleeding, and he handed Mr. McNeely off to Cst. Fanning and Cst. Sylvestre, “and they took care of him from there.” Cst. Snow then returned to his vehicle, and went to the Detachment. When Cst. Snow got to the Detachment, he went and took care of his injuries, while the other officers continued the investigation. Cst. Snow had no further dealings with Mr. McNeely other than to serve him with documents and an appearance notice when Mr. McNeely was released at approximately 6:00am on April 21, 2020.

B.2 Cst. Fanning

[19] Cst. Fanning was a member of the RCMP, who at the time of trial was attached to the Yellowknife Major Crimes Unit.

[20] On April 20, 2020, he was a member of the Yellowknife Detachment, and on duty. Cst. Fanning, partnered with Cst. Sylvestre, was driving in downtown Yellowknife when a radio call for assistance was received from Cst. Snow. Cst. Snow advised that an individual had fled from Cst. Snow at a traffic stop, and gave his location. Cst. Fanning and Cst. Sylvestre immediately attended the scene arriving within two minutes.

[21] Cst. Fanning got out of his vehicle and assisted Cst. Snow, taking custody of Mr. McNeely and taking him to Cst. Fanning’s police vehicle, where Cst. Sylvestre took custody of Mr. McNeely. Cst. Fanning saw Cst. Sylvestre search Mr. McNeely, and heard Cst. Sylvestre read Mr. McNeely his *Charter* rights, reason for his arrest, breath demand, and caution. Cst. Fanning did not know how Cst.

Sylvestre came to read Mr. McNeely his rights and make the breath demand, he was not aware of how Cst. Sylvestre “was provided with that direction.”

[22] Cst. Fanning did not notice any injuries on either Cst. Snow or Mr. McNeely. Cst. Fanning and Cst. Sylvestre returned to the Detachment with Mr. McNeely.

[23] At the Detachment, Cst. Fanning conducted three Observation Periods while Mr. McNeely waited to give a total of 3 successful samples of his breath. Cst. Fanning testified that he noted a slight odor of liquor when he was in close proximity to Mr. McNeely; he did not notice any odor of liquor in the vehicle when Mr. McNeely was taken to the Detachment, though that may have been due to the Plexiglas or “silent patrolman” separating the front seat from the back seat. Cst. Fanning did not make any notes of smelling a faint odor of liquor coming from Mr. McNeely, or any signs of impairment at all, and nor did he mention any odor or signs of impairment in his general report of this incident, but testified that this was just one thing he “now recalled” from the incident.

[24] Cst. Fanning did not notice anything out of the ordinary during the observation periods he conducted with Mr. McNeely; he testified that Mr. McNeely’s speech was fine and he spoke in coherent sentences, though he was not able to recall what he talked about with Mr. McNeely.

B.3 Cpl. Stuckless

[25] Cpl. Stuckless was a member of the RCMP, and on April 20, 2020, he was stationed in Yellowknife. He was the Qualified Breath Technician who took samples of Mr. McNeely’s breath on April 20, 2020. There were no issues with respect to the Certificate of a Qualified Technician; Cpl. Stuckless was called to explain why it was necessary to take three breath samples. With respect to the *Charter* Application, Cpl. Stuckless’s evidence as the Qualified Technician is not relevant.

[26] Cpl. Stuckless was also with Cst. Snow when Cst. Snow was following the vehicle that Mr. McNeely was driving. Notably Cpl. Stuckless did not realize Cst. Snow was following the vehicle before Cst. Snow pulled the vehicle over behind Grayling Apartments.

B.4 Agreed Statement of Facts

[27] An agreed Statement of Facts was entered as Exhibit 4 on this hearing. The agreed facts relevant to this hearing are as follows:

- On April 20, 2020, at approximately 10:10pm, Cst. Snow requested radio assistance for a male that ran away from him;
- Cst. Sylvestre and Cst. Fanning attended the location where Cst. Snow and Mr. McNeely were;
- Upon arrival Cst. Sylvestre saw Cst. Snow half mounted on Mr. McNeely;
- Mr. McNeely was escorted to Cst. Sylvestre's vehicle, and was searched before being placed in the vehicle;
- At 10:21pm Cst. Sylvestre read Mr. McNeely his section 10(a) and (b) *Charter* rights, the police caution from his G Division RCMP card for resisting arrest and impaired operation of a motor vehicle. At 10:27pm Cst. Sylvestre read the section 320.28(1)(a) demand to Mr. McNeely from his G Division card.

[28] That was the evidence called that is relevant to the *Charter* Application on this matter.

C. Section 9 of the *Charter*

[29] After careful review of the evidence, I find Cst. Snow had several valid reasons to stop the vehicle being driven by Mr. McNeely. Cst. Snow believed the windshield of the vehicle was damaged to the point that the vehicle should not be on the road; Cst. Snow knew the vehicle to be unregistered; and, Cst. Snow knew the vehicle had an incorrect plate on it. Cst. Snow followed the vehicle for some distance and believed the vehicle was speeding, all of which lead him to activate his emergency lights and pull the vehicle over. The fact that it was of interest to Cst. Snow to conduct a traffic stop does not detract that from the valid reasons that Cst. Snow had to stop the vehicle, that is, to ensure the vehicle was fit to be on the road, that the vehicle was registered, and that the license plates on the vehicle were correct.

[30] Upon stopping the vehicle, Mr. McNeely got out of the vehicle and Cst. Snow told him to get back into the vehicle. Mr. McNeely then ran from Cst. Snow and

Cst. Snow chased after him. Cst. Snow was conducting a valid traffic stop, and it was not open to Mr. McNeely to simply vacate the vehicle and walk or run away from the police. When he ran away from Cst. Snow, Cst. Snow had grounds to arrest Mr. McNeely for obstruction. Having grounds to arrest Mr. McNeely, the subsequent arrest and detention of Mr. McNeely did not violate Mr. McNeely's right not to be arbitrarily detained pursuant to section 9 of the *Charter*.

D. Section 7 of the *Charter*

[31] Section 25 of the *Criminal Code* states:

25(1) Everyone who is required or authorized by law to do anything in the administration or enforcement of the law

...

(b) as a peace officer ...

...

is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

[32] Cst. Snow was in a very difficult and dangerous situation. He had a duty to apprehend a suspect who ran from the police at a routine traffic stop, and the suspect appeared to be holding on to something in the pocket of his jacket as he ran. Cst. Snow's belief that the suspect may have a weapon was not unreasonable in the circumstances. As Cst. Snow testified: "... being the police, we have to protect the public..., and [in] the event that he does have a weapon, ... I'm the one that has to run after him and to ensure nobody else ... gets hurt."

[33] This was a dangerous situation - a foot chase in the dark, through back alleys, and then even when Mr. McNeely was caught, tripped, and taken down he continued to struggle or resist Cst. Snow and refused to comply with Cst. Snow's directions to place his hands behind his back to be handcuffed. Cst. Snow's actions of first punching Mr. McNeely to try to distract or stun Mr. McNeely, had no effect. Mr. McNeely then got in a position where Cst. Snow believed Mr. McNeely could get to his feet if the struggle continued, and the situation would become more dangerous. At this point Cst. Snow placed Mr. McNeely in a carotid hold, or a chokehold, and used a slight bit of pressure, upon which Mr. McNeely complied

with Cst. Snow's directions, Cst. Snow was able to hand cuff Mr. McNeely, get control of the situation and call for backup.

[34] Cst. Snow's fear that if the struggle did not end or stop, and being alone, and believing that Mr. McNeely may have a weapon, his fear that he was going to be hurt or possibly killed was reasonable. The force that Cst. Snow used to gain control of the situation was not excessive or unreasonable in all of the circumstances. I find that Mr. McNeely's right under section 7 of the *Charter*, that is the right not to be deprived of life, liberty, and security of the person except in accordance with the principles of fundamental justice, has not been breached.

E. Section 8 of the *Charter*

[35] On April 21, 2020, a number of samples of Mr. McNeely's breath were taken pursuant to a breath demand made by Cst. Sylvestre pursuant to s. 320.28(1)(a) which states:

320.28(1) If a peace officer has reasonable grounds to believe that a person has operated a conveyance while the person's ability to operate it was impaired to any degree by alcohol or has committed an offence under paragraph 329.14(1)(b), the peace officer may, by demand made as soon as practicable,

- (a) require the person to provide, as soon as practicable,
 - (i) the samples of breath that, in a qualified technician's opinion, are necessary to enable a proper analysis to be made by means of an approved screening instrument,

[36] Mr. McNeely submits that the taking of his breath samples was a violation of his rights under s. 8 of the *Charter*, that is, to be secure against unreasonable search and seizure.

[37] As the Supreme Court held in *R. v. Collins*, [1987] 1 S.C.R. 265, a search must be authorized by law to be reasonable; the authorizing law must itself be reasonable; and the search must be carried out in a reasonable manner.

[38] The circumstances leading up to the seizure of Mr. McNeely's breath on April 20, 2020, were as follows: Cst. Snow, who was driving his police vehicle partnered with Cst. Stuckless, noted a truck that he recognized driving in Yellowknife. Cst. Snow followed the vehicle as he knew that the truck was not registered, had improper plates, and a very badly cracked windshield. Cst. Snow believed the

truck was driving faster than vehicles drive in Yellowknife, but could not say how fast it was going. The truck made a number of turns leading Cst. Snow to suspect that it was trying to evade the police, or get out of the area. Cst. Snow eventually turned on his emergency lights and the truck pulled over behind Grayling Apartments. Cst. Snow pulled in behind the truck, and the driver of the truck, Mr. McNeely, got out of the truck and started to walk and then run away from Cst. Snow.

[39] Footage from Cst. Snow's DashCam shows the truck driving, Cst. Snow's emergency lights going on, the truck pulling over behind Grayling apartments, Mr. McNeely getting out, walking a brief distance, and then running away, and Cst. Snow chasing after Mr. McNeely for a short distance before they are out of range of the DashCam.

[40] From watching the video, I do not find Mr. McNeely's driving "erratic" as Cst. Snow testified, though Mr. McNeely may have been driving fast. But other than possibly the speed, there was nothing unusual about Mr. McNeely's driving - he signaled when making turns, appeared to slow down to turn, and executed the turns properly. I do not find that Mr. McNeely was stumbling or unsteady on his feet when he got out of the truck and moved away from Cst. Snow, as Cst. Snow testified; nor do I find that Mr. McNeely was staggering as Cst. Snow recorded in his General Report prepared during this investigation.

[41] Cst. Snow chased Mr. McNeely for approximately 100 to 200 metres before Cst. Snow was able to trip Mr. McNeely, and after the struggle as outlined above, Mr. McNeely was handcuffed. During the struggle when Cst. Snow was in close proximity to Mr. McNeely, Cst. Snow detected a clear, extreme odor of liquor coming from Mr. McNeely's breath.

[42] Once Cst. Snow handcuffed Mr. McNeely, and had him on the ground, Cst. Snow told Mr. McNeely that he was under arrest for resisting, impaired driving, and flight from police.

[43] When Cst. Fanning and Cst. Sylvestre arrived, Cst. Snow handed Mr. McNeely off to them to continue the investigation. Cst. Snow had injured his hand during the struggle with Mr. McNeely, and he returned to the RCMP detachment to tend to his injury. Other than serving documents on Mr. McNeely and releasing him at 6:00am the following morning, Cst. Snow had no further dealings with Mr. McNeely.

[44] Cst. Snow testified that when the truck Mr. McNeely was driving was pulled over, Mr. McNeely was going to be “detained for the purpose of an investigation, whether it be the Traffic Safety Act, or what turned into an impaired.” Further, when he turned Mr. McNeely over to Csts. Fanning and Sylvestre, “they took care of him from there.” And when he returned to the detachment, he took care of his injury “while the other officers continued the investigation.”

[45] It is agreed that Cst. Sylvestre searched Mr. McNeely, read Mr. McNeely his section 10(a) and (b) *Charter* rights and police caution, and further read the section 320.28(1)(a) breath demand to Mr. McNeely. Cst. Fanning, who arrived at the scene with Cst. Sylvestre and was right beside Cst. Sylvestre when Cst. Sylvestre dealt with Mr. McNeely, did not know how Cst. Sylvestre was provided with “that direction”, that is, to *Charter* and caution Mr. McNeely, and read him the breath demand. Further there is no evidence in any form that Cst. Sylvestre was provided with “that direction”. Cst. Sylvestre did not testify on this trial.

[46] There is no evidence at all as to what, if anything Cst. Sylvestre was told before he read the breath demand to Mr. McNeely. No evidence at all as to what, if any, further investigation was done by Cst. Sylvestre, or by Cst. Fanning before Cst. Sylvestre read Mr. McNeely the breath demand. And no evidence that Cst. Snow even spoke to Cst. Sylvestre or Cst. Fanning.

[47] I do not know what grounds, if any at all, Cst. Sylvestre had to demand that Mr. McNeely provide samples of his breath.

[48] Section 320.28(1) requires a peace officer to have reasonable grounds to believe that a person has operated a conveyance, i.e. a motor vehicle in this case, while the person’s ability to operate a motor vehicle was impaired to any degree by alcohol, and then a peace officer may demand that the person provide samples of his or her breath.

[49] In this case there is no evidence that Cst. Sylvestre first, knew Mr. McNeely had been operating a motor vehicle; second, there is no evidence that Cst. Sylvestre had reasonable grounds, or any grounds at all, to believe that Mr. McNeely’s ability to operate a motor vehicle was impaired by alcohol.

[50] This is not a case where Cst. Sylvestre’s grounds were lacking or minimal, but put bluntly, on the evidence before me, Cst. Sylvestre’s grounds were non-existent.

[51] The Crown submits that I may draw an inference that Cst. Sylvestre was told by Cst. Snow what Cst. Snow's grounds were, because Cst. Sylvestre arrested Mr. McNeely and made the demand. That is flawed circular reasoning - he needs grounds to make a demand, he made a demand, therefore he must have had grounds.

[52] Cst. Snow did not testify that he advised Cst. Sylvestre of his grounds for a breath demand, Cst. Snow did not testify that he directed Cst. Sylvestre to make a breath demand, or take a breath sample. Cst. Fanning was present at the scene, and he testified that he did not know how or why Cst. Sylvestre came to demand that Mr. McNeely provide a sample of his breath.

[53] Again, there is no evidence of Cst. Sylvestre having any grounds at all to make the breath demand, and therefore the breath demand was not authorized by law. The taking of samples of Mr. McNeely's breath was clearly in breach of his section 8 *Charter* right, that is, to be secure against unreasonable search and seizure.

F. Section 24(2) of the *Charter*

[54] Section 24(2) of the *Charter* states:

24(2) Where ... a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this *Charter*, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[55] In determining if the admission of the Certificate of a Qualified Technician would bring the administration of justice into disrepute, I must consider the seriousness of the *Charter* infringing state conduct; the impact of the breach on the *Charter* protected interests of the accused; and society's interests in adjudication on the merits.

F.1 Seriousness of the State Conduct

[56] This is a difficult case, because speaking candidly it appears to be a case where the evidence is missing, but may exist. It may be that the Crown has chosen not to call witnesses, and instead put evidence in by way of an Agreed Statement of Facts. But I cannot speculate on what that evidence might be. The Crown called all of the police officers directly involved in this investigation except for the officer who made the breath demand. And none of the officers who testified were asked, or

could say, what they had told Cst. Sylvestre, if anything, that Cst. Sylvestre may have been able to rely on for his reasons for making the demand.

[57] In this case the evidence before me establishes that Cst. Sylvestre made a breath demand to Mr. McNeely based on no grounds at all.

[58] Another difficulty in this case arising from the lack of evidence is the consideration of whether or not the officer was acting in good faith. There is no evidence before me as to why Cst. Sylvestre made the breath demand. One may want to assume or infer that there must have been some valid reason for Cst. Sylvestre to make the demand. But to do that would be to speculate and be unfair to Mr. McNeely. This was a warrantless search and the Crown has the burden of proving the search was reasonable. It would be wrong to find that the search must have been reasonable as there is no evidence that it was not. When the police demand a sample of a person's breath with no grounds at all, with no evidence that the officer even knew the person had been driving, at the very least the public would be shocked by such behaviour. The admission of evidence obtained in such a way, would definitely negatively impact the public's confidence in the criminal justice system. I find this a very serious breach.

F.2. Impact of the *Charter* Breach

[59] Turning to the impact of a groundless search on Mr. McNeely's *Charter* protected interest. The impact is serious. Admitting evidence gathered by a groundless search essentially strips the protection offered to Mr. McNeely by section 8 of the *Charter*, or to any member of the community.

F.3 Adjudication on the Merits

[60] Society does have a strong interest in adjudication of criminal cases on the merits. Excluding the evidence of the Certificate in this case would essentially leave the Crown with no evidence on the count of driving over .08. But at the same time, society has a strong interest in knowing that our *Charter* rights have meaning, and in being assured that the Crown's onus of proving that a warrantless search is reasonable is a serious duty of the Crown, and must be satisfied by evidence of such.

G. Conclusion

[61] In all of the circumstances I find that the admission of the evidence, that is the certificate, in a case where no evidence has been lead to justify a breath demand, no evidence has been lead of any grounds the officer may have had, to admit the evidence resulting from an unreasonable search would clearly bring the administration of justice into disrepute.

[62] The evidence of the Certificate of a Qualified Technician is not admissible on the trial.

B.E. Schmaltz
Deputy Judge of the Territorial Court

Dated at Yellowknife, Northwest
Territories, this 6th day of
October, 2022

R. v. McNeely, 2022 NWTTC 05

Date: 2022 09 22

File: T-1-CR-2020-000811

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REASONS FOR DECISION

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