Federal Court  Cour fédérale

Date: 20190513

Docket: T-1845-18

Citation: 2019 FC 645

Ottawa, Ontario, May 13, 2019

PRESENT: Mr. Justice Boswell

BETWEEN:

SAFE WORKFORCE INC.

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

ORDER AND REASONS

[1] Two motions are before the Court.

[2] The Respondent, Attorney General of Canada, seeks an order:

1. pursuant to Rule 221 of the *Federal Courts Rules*, SOR/98-106, as amended, striking the Applicant's Notice of Application in its entirety and dismissing its application for judicial review brought under sections 18 and 18.1 of the *Federal*

Courts Act, RSC 1985, c F-7, as amended, with costs in accordance with column III of the Tariff to the Respondent; or

2. in the alternative, if the Court dismisses the motion, then an order extending the time for the Respondent by 14 days from the date of that order to file and serve the documents requested by the Applicant pursuant to Rules 317 and 318.

[3] The Applicant, Safe Workforce Inc., seeks an order:

1. directing the Respondent to transmit the complete certified tribunal record to the Court's Registry and to the Applicant forthwith;
2. granting an interlocutory injunction under Rule 373 to prohibit the Respondent and/or the Canada Revenue Agency from executing the decision dated October 16, 2018 issued by Carolyn Pitcher, Assistant Director, Audit, until judgment is rendered by this Court on the application for judicial review; and
3. for its costs of this motion.

[4] These two motions arise in the context of an audit of the Applicant's Goods and Services Tax/Harmonized Sales Tax [GST/HST] returns for the period from July 2013 to September 2017. The background underlying these motions is as follows.

I. Background

[5] By letter dated March 16, 2018 to Nelson Greenleaves [the Auditor], an auditor with the Canada Revenue Agency [CRA], Audit Division, the Applicant requested disclosure of all information in the possession of the Minister of National Revenue relating to the audit noted

above. In a letter dated March 26, 2018, the Auditor provided partial disclosure of the requested information. In telephone discussions some three weeks later, the Auditor acknowledged that he had provided incomplete disclosure. The Applicant reiterated its request for disclosure of the CRA's complete audit file in a letter to the Auditor dated April 20, 2018.

[6] However, in a letter two weeks later, the Auditor refused to disclose any additional information, alleging that the CRA had provided all vital information and "...since we have provided all vital information, and not received any representations in response, no additional information will be released at this time". Following a service-related complaint to the CRA, the Auditor produced a redacted copy of his diary notes in mid-June 2018. The CRA directed the Applicant to submit a formal request under the *Access to Information Act*, RSC 1985, c A-1 [*ATIA*] to obtain disclosure of any additional information; the Applicant did so on June 21, 2018. While the *ATIA* disclosure was still pending, the Auditor imposed a deadline of July 25, 2018 for receipt of the Applicant's representations relating to the substantive issues under audit.

[7] In a letter dated July 18, 2018, the Applicant informed the Auditor that the *ATIA* disclosure had not yet been received and requested that the submissions deadline be extended to a date after the *ATIA* disclosure; this request was refused by letter dated July 24, 2018. In a second letter dated the same date, the Auditor advised the Applicant that the matter had been referred to the manager's delegate who instructed that "no further action is to be taken on the file until we have met to discuss your representations".

[8] In the Applicant's view, this second letter dated July 24, 2018 granted an extension of time for it to make representations concerning the issues under audit. After this letter, however, the Auditor requested that the Applicant answer a questionnaire and supply additional documentation, which the Applicant did. He also advised that any factual findings and analysis made after the date of the *ATIA* request would not be included in the *ATIA* disclosure. Although the Applicant requested to await the *ATIA* disclosure before proceeding with further steps, the Auditor refused this request and indicated he would be concluding the audit.

[9] By letter dated September 19, 2018 to the Auditor, the Applicant requested that this refusal be brought to the attention of the Assistant Director for formal review and reconsideration. Among other things, the Applicant submitted that since the CRA's directions had prompted the Applicant to resort to the *ATIA* process, it was patently unfair and improper for the Auditor to refuse to await the *ATIA* results before continuing to the next stage of the audit. According to the Applicant, concluding the audit prior to the *ATIA* productions would preclude use of the disclosure information in making submissions and effectively vitiate its statutory rights of access to information.

[10] The Auditor called the Applicant's legal counsel on September 20, 2018 and advised that the Assistant Director had agreed with his original position not to wait for the *ATIA* productions. However, when the Applicant's counsel phoned the Assistant Director, she was not aware of a request to review and reconsider but would look into the matter.

[11] Nearly four weeks later, the Applicant's counsel received confirmation from the Assistant Director that she had reviewed the issues and had decided to uphold the Auditor's decision and not await the results of the *ATIA* disclosure. The Assistant Director indicated in the telephone call on October 15th that she was bound by CRA's policy on the matter, but she did not specify the policy she was relying upon. She advised that the audit would be closed by October 19th. She summarily denied the request by the Applicant's counsel for 30 days to provide written representations and evidence regarding the proposed reassessment.

[12] The Applicant's counsel expressed disagreement with the Assistant Director's decision [the Decision] and requested that it be communicated in writing for the purposes of a possible judicial review. On October 16, 2018 the Assistant Director wrote to the Applicant's counsel as follows:

> This letter is a response to your request for a formal review and reconsideration of the CRA's positions in relation to the above-noted audit case. After carefully considering your request, for the reasons outlined in our telephone conversation on October 15, 2018, we wish to inform you that the audit will be finalized as proposed on February 13, 2018.

[13] Two days after this letter, the Applicant filed a Notice of Application for judicial review of the Decision, requesting: a writ of certiorari; an order quashing or setting aside the Decision and referring the matter back to the Minister for an impartial review and reconsideration; a writ of prohibition and an order of injunction directing that the Minister await at least 30 days after the determination of the judicial review application before concluding her audit of the Applicant; and its costs of the application.

[14] The Minister's legal counsel informed the Applicant in a letter dated October 30, 2018, that no written advance notice would be provided of when the notice of reassessment would be issued. In a letter dated the same date, the Auditor advised the Applicant that the audit had been completed and "in the coming weeks" it would "receive a notice of (re)assessment that will reflect these adjustments".

[15] In response to the Applicant's application for judicial review, the Respondent filed a notice of motion on November 9, 2018, requesting that the application be struck in its entirety or, in the alternative, if the motion was dismissed, an order extending the time for the Respondent by 14 days from the date of that order to file and serve the documents requested by the Applicant pursuant to Rules 317 and 318. On November 13, 2018, the Applicant filed its motion seeking the relief noted at the outset of these reasons.

[16] Although the audit was complete, no notice of reassessment has been provided to the Court, nor did counsel for the Crown or the Applicant inform the Court that a reassessment has been issued.

II. The Motion to Strike

A. *The Respondent's Submissions*

[17] The Respondent says the test for striking a matter is whether, assuming the facts pleaded to be true, it is plain and obvious that the matter is bereft of any possibility of success. Rule 221 allows this Court to strike a pleading, with or without leave to amend, on a motion made without

evidence. According to the Respondent, Rule 221 extends to both actions and applications and a notice of application for judicial review can be struck where it is plain and obvious that, assuming the facts pleaded to be true, the application cannot succeed or that it has no reasonable prospect of success.

[18] The Respondent cites *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250 at para 66 [*JP Morgan*], where the Federal Court of Appeal stated that any of the following qualifies as an obvious, fatal flaw warranting the striking out of a notice of application:

> (1) the notice of application fails to state a cognizable administrative law claim which can be brought in the Federal Court;
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> (2) the Federal Court is not able to deal with the administrative law claim by virtue of section 18.5 of the *Federal Courts Act* or some other legal principle; or
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> (3) the Federal Court cannot grant the relief sought.

[19] The Respondent says the Applicant asks the Court to issue an order to prevent the Minister from carrying out her statutory duties, and that the decision to finalize an audit is one solely for the Minister to make and is not a decision reviewable by this Court. According to the Respondent, the Court cannot grant the order sought and, as such, the Applicant's application cannot succeed and ought to be struck.

[20] The Respondent further says the application for judicial review cannot succeed since there is an adequate, alternative remedy available to the Applicant and for that reason the Applicant's application ought to be struck as it is bereft of any possibility of success. In order to

respect the Tax Court's jurisdiction, the Respondent submits that this Court must look beyond the words used, the facts alleged, and the remedy sought. The Court must ensure that an application is not a disguised attempt to reach a result otherwise unavailable in this Court.

[21] In the Respondent's view, if read holistically and practically it is apparent that the Applicant commenced the application in order to delay the audit process, achieve a favourable tax outcome, and postpone issuance of the notice of reassessment which the Applicant was advised of in February 2018 and again in October 2018.

B. *The Applicant's Submissions*

[22] The Applicant contends that the Respondent has failed to satisfy the high threshold for a court to strike a notice of application for judicial review. There must be a "show stopper" or "knockout punch" before the Court can entertain an application to strike. In view of subsection 18.4(1) of the *Federal Courts Act*, which directs that applications "shall be heard and determined without delay and in a summary way", the Court, according to the Applicant, is reluctant to entertain preliminary motions to strike which have the potential to unduly and unnecessarily delay the expeditious determination of judicial review applications.

[23] In the Applicant's view, the Respondent has failed to show that the present application for judicial review is so clearly improper as to be bereft of any possibility of success. According to the Applicant, the Respondent incorrectly contends that this Court lacks jurisdiction to judicially review the Minister's discretionary decision not to extend time.

[24] The Applicant maintains that this Court has exclusive jurisdiction over an administrative law claim arising from the Minister's wrongful conduct, particularly where there is no challenge to the validity and correctness of a tax assessment. In the Applicant's view it is clear that the Decision was an exercise of the Minister's discretionary authority against the Applicant and, therefore, not appealable to the Tax Court.

[25] Contrary to the Respondent's allegation, the Applicant says the application for judicial review does not ask the Court to direct the conduct of the Minister's audit and prevent the Minister from carrying out her statutory duty under subsection 275(1) of the *Excise Tax Act*, RSC 1985, E-15 [*ETA*], to issue a notice of reassessment. According to the Applicant, subsection 275(1) does not impose a statutory duty on the Minister to issue a notice of reassessment and it is disingenuous for the Respondent to incorrectly equate a request for an extension of time with directing the conduct of the Minister's audit. The Applicant claims extensions of time are routinely granted by the Minister during the course of an audit.

[26] Contrary to the Respondent's unsupported allegation that the application was commenced to achieve a favourable tax outcome, the Applicant says it was commenced to seek redress of the Minister's abuse of discretionary authority and her decision not to extend time fails to meet the minimum standards under administrative law.

C. *Analysis*

[27] In *Marcel Colomb First Nation v Colomb*, 2016 FC 1270, the Court observed that:

> [143] There is no Federal Court rule that deals with the striking of an application, but it is now well-recognized that the Court can dismiss an application in a summary way in exceptional cases. In *JP Morgan* … the Federal Court of Appeal provided the following guidance:
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> > [47] The Court will strike a notice of application for judicial review only where it is "so clearly improper as to be bereft of any possibility of success": *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1995] 1 F.C. 588 at page 600 (C.A.). There must be a "show stopper" or a "knockout punch" – an obvious, fatal flaw striking at the root of this Court's power to entertain the application: [citations omitted].

[28] The Respondent has not, in my view, met this test.

[29] Assuming the facts as alleged in the application for judicial review are true, in my view it is not plain and obvious that the application contains a fatal flaw and should be struck in its entirety, without leave to amend.

[30] In *Bonnybrook Park Industrial Development Co Ltd v Canada (National Revenue)*, 2018 FCA 136, the Federal Court of Appeal described the jurisdiction of the Tax Court of Canada to review discretionary decisions of the Minister as follows:

> [19] … The Tax Court's jurisdiction is limited by statute, and in income tax matters its jurisdiction is generally limited to hearing appeals concerning the correctness of assessments. Its jurisdiction does not extend to judicial review of decisions of the Minister under discretionary relief provisions of the Act [citation omitted] ...

[31] Although the Federal Court of Appeal excluded the possibility of judicial review in this Court when the Minister is criticized for suppressing evidence, it specifically stated in *JP*

Morgan that conduct leading up to an assessment is in the exclusive jurisdiction of this Court (paras 82 and 83). No notice of reassessment has been issued; as such, this Court and not the Tax Court can hear this matter.

[32] The Tax Court's jurisdiction is limited to determining if an assessment is valid and correct; it does not include challenges to the manner by which ministerial powers are exercised or CRA conduct generally. The Federal Court has exclusive jurisdiction to judicially review whether a ministerial discretion was exercised appropriately in the context of a tax audit (*Main Rehabilitation Co Ltd v Canada*, 2004 FCA 403 at paras 6 to 8). The Applicant does not question the correctness of the outcome of the audit in its application for judicial review but, rather, questions the reasonableness of the Minister's refusal to extend discretionary deadlines imposed in the context of an ongoing GST/HST audit of the Applicant.

[33] The Respondent's motion to strike the Applicant's application for judicial review in its entirety and dismiss it is, therefore, dismissed.

III. The Motion for an Injunction

A. *The Applicant's Submissions*

(1) Request for Certified Copy of Material

[34] The Applicant's Notice of Application included a request under Rule 317(1) for a certified copy of material relevant to the application that is in the Minister's possession. The Applicant says the Minister is in breach of Rule 318(1) since she did not transmit the certified

tribunal record [CTR] within 20 days of the request and has yet to do so. According to the Applicant, the Minister's failure to transmit the CTR prejudices its ability to understand the reasons for the Decision and to prepare the substance of its judicial review application. It also impairs the Court's ability to conduct a meaningful review of the Decision.

[35] The Applicant says the Respondent should be ordered to forthwith transmit a complete CTR to the Court's Registry and to the Applicant. The Applicant requests an order extending the time for serving and filing its Rule 306 supporting affidavits and documentary exhibits to a date that is at least 10 days after transmission of the CTR.

(2) Interlocutory Injunction

[36] The Applicant requests an interlocutory injunction directing that the Minister wait at least 30 days after this judicial review application is determined before concluding the audit.

[37] The Applicant says the Court may grant an interlocutory injunction under Rule 373(1) and that the test for an interlocutory injunction requires the Applicant to show: (1) there is a serious issue to be tried; (2) it will suffer irreparable harm if the injunction is not granted; and (3) the balance of convenience is in its favour.

[38] According to the Applicant, the application for judicial review raises serious issues about the reasonableness of the Decision, it is neither frivolous nor vexatious, and it satisfies the low threshold which is the first element of the test.

[39] As to irreparable harm, the Applicant says this can be established where denial of the injunction would result in this proceeding becoming moot and deprive the Applicant of the benefit of its right of appeal. According to the Applicant, the Minister's execution of the Decision would render its application nugatory, would effectively subvert this Court's process for judicial review, and would irreparably harm its right of appeal.

[40] As for the balance of convenience, the Applicant contends that if irreparable harm is found, this will favour the Applicant. In the Applicant's view, the Minister does not stand to suffer any prejudice if the interlocutory injunction is granted until the application is decided by the Court. To the extent that the Minister has concerns about any taxation periods becoming statute-barred, the Applicant says it is willing to provide waivers for the affected periods.

B. *The Respondent's Submissions*

(1) The Minister is not a Party

[41] According to the Respondent, the relief sought by the Applicant on this motion (and in its application) can only be granted as against the Minister of National Revenue. The Attorney General of Canada, the named Respondent, has no statutory or other authority to direct the Minister in the conduct of an audit or when to issue a notice of reassessment.

[42] The Respondent says that, even if the Applicant can persuade the Court to grant the interlocutory relief sought, the Respondent is not able to comply with an order not to execute the Decision. And for this reason alone, the Applicant's motion should be dismissed.

(2) Interlocutory Injunction

[43] In contrast to the Applicant, the Respondent says the first part of the tripartite test for a stay order requires the Applicant to show it has a strong *prima facia* case. In the Respondent's view, the Applicant has not discharged its burden of showing it has a strong *prima facia* case for two reasons.

[44] First, the Applicant is essentially seeking to enjoin the Minister from carrying out her statutory responsibility to assess tax in accordance with the *ETA* and this Court has previously held that such relief is not available. Second, by seeking an injunction against the Minister, the motion is a disguised attempt for the Court to direct the conduct and timing of the audit, and this Court cannot issue injunctions to prevent the Minister from carrying out her statutory duties under the *ETA*.

[45] As to irreparable harm, the Respondent says it is not clear what appeal right the Applicant would lose if the injunction is not granted. The Respondent points out that the Applicant does have a right of appeal once the Minister finalizes the audit and issues a notice of reassessment, and the *ETA* explicitly provides that a registrant may seek a review of a notice of reassessment by filing a notice of objection and, thereafter, by filing a notice of appeal to the Tax Court of Canada.

[46] The Respondent references *RJR-MacDonald Inc. v Canada (Attorney General)*, [1994] 1 SCR 311 at para 64 [*RJR-MacDonald*], where the Supreme Court stated that irreparable harm is

“harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other”. In the Respondent’s view, there is no such harm.

[47] The Respondent notes that the Applicant brought its motion some two weeks after it was notified by letter on October 30, 2018, that the audit was completed, and that a notice of reassessment would issue. The Respondent says the Applicant should not benefit from injunctive relief where it failed through a lack of expediency to take immediate steps to mitigate any alleged irreparable harm as soon as it learned of the Minister’s intended action.

[48] According to the Respondent, the Applicant has not demonstrated that the balance of convenience favours granting the injunction. The Applicant has not provided any evidence that it will suffer greater harm if the injunction is not granted than the Respondent will suffer if the injunction is granted. In the Respondent’s view, the Applicant’s offer of a waiver is an implicit acknowledgement by the Applicant that it is the Minister who will suffer greater prejudice if the injunction is granted.

[49] The Respondent points out that, while the Minister may reassess a registrant at any time, if the Minister reassesses beyond the normal reassessment period the Minister assumes the evidentiary burden of establishing that the registrant, in filing its GST/HST returns, made a misrepresentation attributable to neglect, carelessness, wilful default or fraud. In contrast, a notice of reassessment issued within the normal reassessment period does not place that extra evidentiary burden on the Minister.

C. *Analysis*

[50] I begin by noting that according to the Auditor's letter of October 30, 2018, the "audit period has been completed" and that "in the coming weeks" the Applicant would "receive a notice of (re)assessment". Despite this letter, the Applicant asks the Court to temporarily set aside that audit and prevent the Minister from taking any further action until the judicial review application has been decided.

[51] The three-part legal test for when a court should grant a stay is well-known and is set out in the Supreme Court of Canada's decision in *RJR-MacDonald*. An applicant for a stay must demonstrate that: there is a serious issue to be tried; the applicant will suffer irreparable harm if the stay is not granted; and the balance of convenience favours a stay pending the disposition of a proceeding.

[52] When the outcome of a stay has the result of effectively determining the outcome of a proceeding, a court may give significantly more weight to the question of whether there is a serious issue. For example, in *Toronto (City) v Ontario (Attorney General)*, 2018 ONCA 761, the Ontario Court of Appeal observed that:

> [10] The minimal "serious issue to be tried" component … assumes that the stay will operate as a temporary measure and that the rights of the parties will be finally resolved when the appeal proper is heard. However, *RJR-MacDonald* recognizes that in cases where, as a practical matter, the rights of the parties will be determined by the outcome of the stay motion, the court may give significantly more weight to the strength of the appeal…

[53] Similarly, in *R v Canadian Broadcasting Corp.*, 2018 SCC 5, the Supreme Court (per Justice Brown) stated that, on an application for a mandatory interlocutory injunction:

> [15] … the appropriate criterion for assessing the strength of the applicant's case at the first stage of the *RJR — MacDonald* test is not whether there is a serious issue to be tried, but rather whether the applicant has shown a strong *prima facie* case. A mandatory injunction directs the defendant to undertake a positive course of action, such as taking steps to restore the *status quo*, or to otherwise "put the situation back to what it should be", which is often costly or burdensome for the defendant and which equity has long been reluctant to compel….Such an order is also (generally speaking) difficult to justify at the interlocutory stage, since restorative relief can usually be obtained at trial. Or, as Justice Sharpe (writing extrajudicially) puts it, "the risk of harm to the defendant will [rarely] be less significant than the risk to the plaintiff resulting from the court staying its hand until trial"….The potentially severe consequences for a defendant which can result from a mandatory interlocutory injunction, including the effective final determination of the action in favour of the plaintiff, further demand what the Court described in *RJR — MacDonald* as "extensive review of the merits" at the interlocutory stage.
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> …
>
> [17] This brings me to just what is entailed by showing a "strong *prima facie* case". Courts have employed various formulations, requiring the applicant to establish a "strong and clear chance of success" … Common to all these formulations is a burden on the applicant to show a case of such merit that it is very likely to succeed at trial. Meaning, that upon a preliminary review of the case, the application judge must be satisfied that there is a *strong likelihood* on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice. [Emphasis in original]

[54] In this case, if, on the one hand, the injunction is granted, the Minister will be prevented from finalizing the audit until a later date (assuming that the notice of reassessment has yet to be sent to the Applicant). This would be effectively granting the remedy which the Applicant seeks. In the underlying application for judicial review, the Applicant requests the Minister to await

finalization of the *ATIA* request before finalizing the audit. If the *ATIA* request is finalized and the Applicant can submit this information because the audit is not closed, the Applicant is getting (with the exception of costs) what it requested.

[55] On the other hand, if the injunction is not granted and the application for judicial review turns out to be successful, the Applicant could be made whole, assuming that it submits a notice of objection to the reassessment on closing of the audit. The Minister would reconsider the Decision and could grant an extension of time until the *ATIA* information was provided, and then reassess with submissions based on the *ATIA* information. This would fulfill the Applicant's underlying issue on the judicial review application.

[56] I agree with the Respondent that a higher threshold of a strong *prima facie* case is applicable in this case for the first part of the *RJR-MacDonald* test. In my view, the Applicant has not demonstrated that the application for judicial review raises a strong *prima facie* case for two reasons.

[57] First, while the Applicant raised the lack of written reasons for the Decision to show a denial of procedural fairness, I agree with the Respondent's submission that the reasons were delivered orally over the phone on October 15th; the letter of October 16th was simply a confirmation of the outcome of the Decision.

[58] Second, although the Applicant argues there was a common law responsibility for the Minister to provide disclosure (or to facilitate a process allowing for disclosure, by providing an

extension until the *ATIA* process was completed), I agree with the Respondent's submission that there is no statutory or common law obligation to allow the Applicant to participate in the audit process.

[59] The Applicant's motion for an interlocutory injunction is, therefore, dismissed.

IV. Conclusion

[60] In closing, the Court directs the Respondent to instruct the Minister to transmit the complete CTR to the Court's Registry and to the Applicant within 14 days from the date of this Order.

[61] The time for serving and filing of the Applicant's Rule 306 supporting affidavits and documentary exhibits is extended for 10 days after the Applicant's receipt of the CTR.

[62] In view of the outcome of both motions, there shall be no order as to costs. Each party shall bear their own costs.

ORDER in T-1845-18

THIS COURT ORDERS that:

1. The motion by the Attorney General of Canada pursuant to Rule 221 of the *Federal Courts Rules*, SOR/98, as amended, to strike the Applicant's Notice of Application in its entirety and dismiss its application for judicial review, is dismissed.
2. The motion by the Applicant for an interlocutory injunction under Rule 373 to prohibit the Respondent and/or the Canada Revenue Agency from executing the decision dated October 16, 2018 issued by Carolyn Pitcher, Assistant Director, Audit, until judgment is rendered by this Court on the application for judicial review, is dismissed.
3. The Attorney General of Canada is directed to instruct the Minister of National Revenue to transmit a complete certified tribunal record to the Court's Registry and to the Applicant within 14 days from the date of this Order.
4. The time for serving and filing of the Applicant's Rule 306 supporting affidavits and documentary exhibits is extended for 10 days after the Applicant's receipt of the certified tribunal record.
5. There is no order as to costs.

"Keith M. Boswell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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