Federal Court of Appeal | Cour d'appel fédérale

Date: 20210119

Dockets: A-295-18
A-296-18
A-297-18

Citation: 2021 FCA 5

CORAM: **STRATAS J.A.**
WEBB J.A.
RENNIE J.A.

BETWEEN:

RICHARD AARON BARKLEY, NORMAN CATLOS and MIRIAM BARKLEY

Appellants

and

HER MAJESTY THE QUEEN

Respondent

Heard by online video conference hosted by the registry on October 20, 2020.

Judgment delivered at Ottawa, Ontario, on January 19, 2021.

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: STRATAS J.A.
RENNIE J.A.

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REASONS FOR JUDGMENT

WEBB J.A.

[1] The issue that will be addressed in these appeals is whether legal expenses incurred by an individual to defend a claim that he or she has been overpaid an amount that was included in his or her income from an office or employment are deductible under paragraph 8(1)(*b*) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act).

[2] These three appeals are from the judgments of the Tax Court of Canada. Richard Barkley (Miriam Barkley's husband), Norman Catlos and Miriam Barkley each claimed a deduction for legal expenses in filing their tax returns for 2013. These expenses were incurred in defending a lawsuit that had been commenced against them by the two brothers of Norman Catlos and Miriam Barkley. In assessing the appellants' 2013 taxation year, the Minister of National Revenue denied these deductions for legal expenses.

[3] The Tax Court Judge dismissed the appellants' appeals (2018 TCC 177) with one set of reasons applicable to all three judgments. The three individuals appealed these judgments. Their appeals to this Court were consolidated. File A-295-18 was designated as the lead appeal. These reasons apply to all three appeals. The original of these reasons shall be filed in A-295-18 and a copy thereof shall be filed in each of the other Court files.

[4] For the reasons that follow, I would dismiss the appeals, albeit for different reasons than those provided by the Tax Court Judge.

I. Background

[5] In April 2004, Miriam Barkley acquired control of Tatra Corporation as a result of her father gifting her shares of Tatra. The three appellants are all directors of Tatra.

[6] In September 2011, Brian Catlos and Peter Catlos Jr. (who are brothers of Norman Catlos and Miriam Barkley) commenced a guardianship application in respect of their father in the

Ontario Superior Court of Justice. In this application, Brian Catlos and Peter Catlos, Jr. sought to set aside the transfer of shares of Tatra to Miriam Barkley in 2004. An interim injunction was obtained restraining Miriam Barkley from dealing with the disputed Tatra shares, restricting the appellants from disposing of Tatra's corporate assets, and restricting each appellant's pay to a maximum amount of $10,000 per month. This interim injunction was later set aside.

[7] In March 2012, the Ontario Superior Court ordered a trial on the issue of the validity of the share transfer and ordered that Miriam Barkley's husband, Richard Barkley, be joined as a defendant. A statement of claim was filed in October 2012. As noted by the Tax Court Judge, the remedies sought in this statement of claim included "an order for an accounting and disgorging and equitable tracing of all wages, bonuses, dividends and other monies paid by Tatra to each of the individuals (the herein appellants) since the 2004 transfer". Although the claim refers to dividends, there is no indication that any dividends were paid.

[8] While, in part, the action related to the claim that the wages paid to the appellants were excessive, this was not the only claim that was made in the action. In the endorsement signed by Justice Rady of the Ontario Superior Court on October 16, 2012, the claim was described as follows:

> [5] At the heart of the dispute is a transfer of shares in the family Corporation (Tatra Corporation) from Peter Sr. to Miriam in 2004. Norman, Miriam and her husband Richard say it was a gift, which Brian and Peter Jr. dispute. They say that their father was not competent at the material time.

[9] In the later endorsement dated July 25, 2014, the same Justice described the subject matter of the lawsuit as follows:

> [8] […] the subject matter of this lawsuit is the validity of an *inter vivos* gift from Peter Catlos Sr. to his daughter Miriam Barkley of all but one of his shares in Tatra Corporation.

[10] These endorsements indicate that the subject matter of the lawsuit was focused on the share transfer and not the overpaid remuneration.

[11] These appeals arise as a result of the claim for legal expenses for the 2013 taxation year that were incurred by the appellants in defending the claims being made against them in the lawsuit referred to above. In 2013, each appellant claimed the full amount of these legal expenses as a deduction in computing their income from an office or employment.

II. Decision of the Tax Court

[12] The Tax Court Judge appears to have accepted that paragraph 8(1)(*b*) of the Act could apply to a situation where an employer or former employer was seeking a return of income that had previously been paid. In paragraph 21 of his decision, he noted that:

> I have described the factual circumstances in *Fenwick* [*Fenwick v. The Queen*, 2008 FCA 370], which are suggestive of the factual scenario in the present three appeals. First, Sharlow, JA observed at paragraph 7 of her reasons for judgment that she was in agreement with Woods, J. that this provision "has a relatively narrow scope", within the bounds of its actual wording. Nevertheless the FCA justice did accept for purposes of the appeal before her, without deciding, the conclusion of Woods, J. that the provision should be applicable not just for a taxpayer seeking payment of salary or wages from an employer or former employer, but as well in situations where the employer or former employer was seeking return of such income.

[13] However, in paragraph 22 he noted that, in this case, the claim that the appellants were overpaid was not being made by Tatra (the person who paid these amounts) but rather by the two brothers of Norman Catlos and Miriam Barkley:

> Now that is a bit of a different proposition in the context of the present wording where "employer or former employer" is not specified. I am not ready to say that this provision now can mean that a third party to the employment or office holding relationship, seeking from the appellants, as in the appeals at bar, disgorgement of their income from office or employment likewise comes under the paragraph 8(1)(*b*) umbrella. That would move the entire focus of paragraph 8(1)(*b*) away from the office holding or employment relationship.

[14] His final conclusion in paragraph 28 was:

> Accordingly on the basis of *Fenwick*, and notwithstanding the able submissions of Mr. Thompson for the appellants, I conclude that the claimed legal expenses reach beyond the scope of paragraph 8(1)(*b*), which "has a relatively narrow scope" and as such it does not extend to corporate claims with manifold remedies sought on such bases as unjust enrichment and breach of fiduciary obligation.

[15] It is not entirely clear whether one of the bases on which the Tax Court Judge dismissed the appeals was that the claims that were being defended by the appellants were not claims brought by the person who paid the appellants (as set out in paragraph 22 of his reasons). His concluding paragraph suggests that the type or substance of the claims and the bases for such claims resulted in the legal expenses not being deductible, without any reference to his comments in paragraph 22.

III. Issue and Standard of Review

[16] The appellants submit that the legal expenses were wholly applicable to the claim for overpaid remuneration. The Crown submits that the legal expenses were not wholly applicable to this claim. Since the appellants did not raise an alternative argument that part of such expenses could reasonably be regarded as applicable to this claim, this issue was not considered by the Tax Court.

[17] The underlying premise in the appellants' argument that the legal fees in question are deductible is that paragraph 8(1)(*b*) of the Act permits a taxpayer, in computing his or her income from an office or employment, to deduct an amount for legal expenses incurred to defend a claim that such taxpayer was overpaid. Whether this paragraph would permit such a deduction is a question of law, for which the standard of review is correctness (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235). If, correctly interpreted, this provision does not permit such a deduction, then these appeals must be dismissed. The analysis in these reasons will focus on the interpretation of this provision.

IV. Analysis

[18] As noted above, these appeals arise as a result of the deductions for certain legal expenses claimed by the appellants in computing their income from an office or employment. The deductions that may be claimed by a taxpayer in computing income from an office or

employment are restricted to only those contained in section 8 of the Act. Subsection 8(2) of the Act provides:

(2) Except as permitted by this section, no deductions shall be made in computing a taxpayer's income for a taxation year from an office or employment.	(2) Seuls les montants prévus au présent article sont déductibles dans le calcul du revenu d'un contribuable tiré, pour une année d'imposition, d'une charge ou d'un emploi.

[19] Since the appellants each claimed the legal expenses in issue as a deduction in computing their income from an office or employment, the right to claim this deduction must be found in section 8. In these appeals, the only relevant provision in section 8 is paragraph 8(1)(*b*) of the Act:

8. (1) In computing a taxpayer's income for a taxation year from an office or employment, there may be deducted such of the following amounts as are wholly applicable to that source or such part of the following amounts as may reasonably be regarded as applicable thereto	**8.** (1) Sont déductibles dans le calcul du revenu d'un contribuable tiré, pour une année d'imposition, d'une charge ou d'un emploi ceux des éléments suivants qui se rapportent entièrement à cette source de revenus, ou la partie des éléments suivants qu'il est raisonnable de considérer comme s'y rapportant:
[…]	[…]
(*b*) amounts paid by the taxpayer in the year as or on account of legal expenses incurred by the taxpayer to collect, or to establish a right to, an amount owed to the taxpayer that, if received by the taxpayer, would be required by this Subdivision to be included in computing the taxpayer's income;	*b*) les sommes payées par le contribuable au cours de l'année au titre des frais judiciaires ou extrajudiciaires qu'il a engagés pour recouvrer un montant qui lui est dû et qui, s'il le recevait, serait à inclure en vertu de la présente sous-section dans le calcul de son revenu, ou pour établir un droit à un tel montant;

[20] The legal expenses were not incurred to collect any amount owed to the appellants or to establish any right to any amount owed to the appellants that has not already been paid to the appellants. The appellants submit, however, that "the legal expenses were incurred to establish a right to the employment remuneration paid to them by Tatra" (paragraph 38 of the appellants' memorandum of fact and law). As noted above, the statement of claim included allegations that the appellants had been overpaid by Tatra.

[21] The question of law that needs to be addressed is whether legal expenses incurred by an officer or an employee to defend a claim that such person was overpaid are deductible. Since, for the purposes of the Act, an employee includes an officer (subs. 248(1) of the Act), for ease of reference the expression "employee" will be used in these reasons.

[22] The interpretation of the provisions of the Act is to be based on a textual, contextual and purposive analysis (*Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601 at para. 10).

[23] In submitting that the text of paragraph 8(1)(*b*) of the Act permits a deduction for legal expenses incurred in defending a claim that an employee has been overpaid, the appellants rely mainly on the decision of the Tax Court in *Chagnon v. The Queen*, 2011 TCC 268, [2011] D.T.C. 1205. In *Chagnon*, the Tax Court Judge relied on the *obiter* comments of the Tax Court in *Fenwick v. The Queen*, 2008 TCC 243, [2008] D.T.C. 3523. The Tax Court in *Chagnon* noted:

> [15] I agree with the *obiter* comments of Woods J. in *Fenwick* that paragraph 8(1)(*b*) is capable of being interpreted, and should be interpreted, as extending to legal expenses incurred by an employee in order to retain salary already paid

> when that employee is faced with litigation seeking to reclaim such amount. In such a case the point in controversy remains the employee's legal entitlement to the salary, and the employee is seeking to establish his right to the salary.

[24] An employee, who is defending a claim brought by his or her employer that he or she has been overpaid, is seeking to establish that he or she had the right to be paid the amount that was paid. The right in issue, however, is not a right to an amount that, at the time of the litigation, is owed to the employee. Rather, it is the right to have been paid what has already been paid. Once the amount was paid, the employer no longer owed the amount to the employee. If the claim against the employee is successful, then the employee will owe an amount to the employer.

[25] The *obiter* comments in *Fenwick* to which the Tax Court was referring are:

> [22] I would first comment about the word "owed" in s. 8(1)(*b*). The respondent submits that the use of this word suggests that Parliament had in mind legal disputes concerning unpaid remuneration. If this interpretation is correct, it would be fatal to this appeal because the Hemispheres' lawsuit had nothing to do with unpaid remuneration.
>
> […]
>
> [25] I have trouble with the limited interpretation of the word "owed" suggested by the respondent because it is difficult to see why Parliament would want to make a distinction based on whether the remuneration has been paid or not. It seems to make more sense in this context to interpret the word "owed" as equivalent to "earned."
>
> [26] It is not necessary that I reach a conclusion on this, however, because in my opinion the expenses incurred by the appellant do not qualify for the deduction for other reasons.

[26] In dismissing the appeal to this Court in *Fenwick v. The Queen*, 2008 FCA 370, [2009] D.T.C. 5013 this Court commented:

> [8] It is an open question whether paragraph 8(1)(*b*) also applies to legal expenses incurred by an individual who is being sued by an employer or former employer for reimbursement of an overpayment of salary or wages. For the purposes of this appeal, I will assume without deciding that paragraph 8(1)(*b*) could apply in those circumstances. However, Justice Woods held, and I agree, that paragraph 8(1)(*b*) is not intended to permit legal expenses to be deducted when they are incurred in litigation involving a claim for damages involving disputes other than those arising from the terms of employment, merely because the defendant's entitlement to particular remuneration is an element of the claim.

[27] In order to read paragraph 8(1)(*b*) of the Act to include legal expenses incurred in relation to a claim where the remuneration has already been paid, it was necessary to "interpret the word 'owed' as equivalent to 'earned'". It is, however, far from clear that Parliament intended such an interpretation. This Court's role is to determine the interpretation of this provision that was intended by Parliament.

[28] In any event, these cases were decided based on a different wording of paragraph 8(1)(*b*) of the Act than is applicable in these appeals. In 2013, paragraph 8(1)(*b*) of the Act was amended (*Technical Tax Amendments Act, 2012*, S.C. 2013, c.34, subs. 172(1)). The amendment was effective for payments made in 2001 and thereafter (subs. 172(4)). However, since the judgments in these cases were rendered in 2008 and 2011, these cases were decided before the amendments were adopted.

[29] The previous version of paragraph 8(1)(*b*) of the Act that was before the Courts in *Fenwick* and *Chagnon* was:

8. (1) In computing a taxpayer's income for a taxation year from an office or employment, there may be deducted such of the following	**8.** (1) Sont déductibles dans le calcul du revenu d'un contribuable tiré, pour une année d'imposition, d'une charge ou d'un emploi ceux des éléments

amounts as are wholly applicable to that source or such part of the following amounts as may reasonably be regarded as applicable thereto	suivants qui se rapportent entièrement à cette source de revenus, ou la partie des éléments suivants qu'il est raisonnable de considérer comme s'y rapportant :
[…]	[…]
(*b*) amounts paid by the taxpayer in the year as or on account of legal expenses incurred by the taxpayer to collect or establish a right to salary or wages owed to the taxpayer by the employer or former employer of the taxpayer;	*b*) les sommes payées par le contribuable au cours de l'année au titre des frais judiciaires ou extrajudiciaires qu'il a engagés pour recouvrer le traitement ou salaire qui lui est dû par son employeur ou ancien employeur ou pour établir un droit à ceux-ci;

[30] It is important to compare the current wording with the former wording that was considered in *Chagnon* and *Fenwick*. The deduction permitted under each provision is for:

Former Wording:	**Current wording:**
[…] legal expenses incurred by the taxpayer to collect or establish a right to salary or wages owed to the taxpayer by the employer or former employer of the taxpayer	[…] legal expenses incurred by the taxpayer to collect, or to establish a right to, an amount owed to the taxpayer that, if received by the taxpayer, would be required by this Subdivision to be included in computing the taxpayer's income

[31] In my view, the change in wording is significant. The revised wording makes it clear that the only deduction that is permitted is for legal expenses incurred in relation to amounts that have not yet been received by the taxpayer. Both provisions refer to amounts owed to the taxpayer. *Fenwick* and *Chagnon* suggest that there was ambiguity in relation to whether legal expenses incurred to establish a right to salary or wages owed to the taxpayer could include such expenses incurred to defend a claim that a taxpayer was overpaid. Whether such ambiguity existed in the previous version is now a moot point.

[32] The addition of the wording “if received by the taxpayer, would be required by this Subdivision to be included in computing the taxpayer’s income” removes any doubt with respect to whether it was only intended to apply to unpaid remuneration. By linking “if received” to “would be required […] to be included in computing the taxpayer’s income”, the only relevant amounts are those that have not yet been received, but if such amounts are received in the future, then they would be required to be included in income. If the words “if received” were intended to include an amount that had already been received, then, in addition to stating that the amount “would be” required to be included in income, the provision would have to state that such amount “was required to be included in income”.

[33] In *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, 179 D.L.R. (4th) 577, the Supreme Court of Canada noted:

> [50] This Court has on many occasions endorsed Driedger’s statement of the modern principle of statutory construction: “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”. See *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21. This rule is no different for tax statutes: *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, at p. 578.
>
> [51] However, this Court has also often been cautious in utilizing tools of statutory interpretation in order to stray from clear and unambiguous statutory language. In *Canada v. Antosko*, [1994] 2 S.C.R. 312, at pp. 326-27, this Court held:
>
> > While it is true that the courts must view discrete sections of the *Income Tax Act* in light of the other provisions of the Act and of the purpose of the legislation, and that they must analyze a given transaction in the context of economic and commercial reality, such techniques cannot alter the result where the words of the statute are clear and plain and where the legal and practical effect of the transaction is undisputed.

> In discussing this case, P. W. Hogg and J. E. Magee, while correctly acknowledging that the context and purpose of a statutory provision must always be considered, comment that "[i]t would introduce intolerable uncertainty into the *Income Tax Act* if clear language in a detailed provision of the Act were to be qualified by unexpressed exceptions derived from a court's view of the object and purpose of the provision": Principles of Canadian Income Tax Law (2nd ed. 1997), at pp. 475-76. This is not an endorsement of a literalist approach to statutory interpretation, but a recognition that in applying the principles of interpretation to the Act, attention must be paid to the fact that the Act is one of the most detailed, complex, and comprehensive statutes in our legislative inventory and courts should be reluctant to embrace unexpressed notions of policy or principle in the guise of statutory interpretation.

[34] As noted by the Supreme Court of Canada, in interpreting the Act, courts cannot replace clear statutory language with their own view of what policy might or should apply. Therefore, even though a court may be of the view that the provision should apply to situations where the remuneration has already been paid, as well as those where it has not yet been paid, the choice of restricting the deduction for legal expenses to only the latter situation is for Parliament to make, and in my view, it did make that choice.

[35] The language is clear that the deduction is only available for legal expenses incurred to collect or establish the right to amounts that, if received, would be included in income. It does not apply to legal expenses incurred to allow a taxpayer to retain amounts that have already been paid.

[36] The context and purpose do not alter this result. In the context of deductions allowed in computing income from an office or employment, as noted in paragraph 18 above, only the limited deductions included in section 8 are allowed. Parliament has chosen to restrict the deductions available to employees. There is nothing in the context that would suggest that

Parliament intended a broader deduction for legal expenses under paragraph 8(1)(*b*) of the Act than the words suggest.

[37] The history of this provision is relevant in ascertaining its purpose. For any payment of legal expenses made prior to 1990, the deduction permitted by paragraph 8(1)(*b*) of the Act was restricted to:

amounts paid by the taxpayer in the year as or on account of legal expenses incurred by him in collecting salary or wages owed to him by his employer or former employer	les sommes payées par le contribuable dans l'année à titre de frais judiciaires ou extrajudiciaires engagés par lui en recouvrement du traitement ou salaire qui lui est dû par son employeur ou son ancien employeur

[38] There was no doubt that prior to 1990 no deduction was permitted for legal expenses incurred by an employee in defending a claim that such employee had been overpaid.

[39] In 1990 (*An Act to Amend the Income Tax Act and Other Acts*, S.C. 1990, c. 39, s. 2), this paragraph was amended to include legal expenses incurred to establish a right to salary or wages owed to the taxpayer. The revised wording as adopted in 1990 is set out in paragraph 29 above. In the Technical Notes released in 1989, the explanation provided for the amendment was:

> June 1989 TN: Paragraph 8(1)(*b*) provides for a deduction to a taxpayer in respect of legal expenses incurred by the taxpayer to collect salary or wages. Paragraph 8(1)(*b*) is amended to conform with the language in new paragraph 60(o.1) (which provides for the deduction of legal expenses to collect retiring allowances and pension benefits) and, as a consequence, to ensure that deductible legal expenses include those incurred to establish a right to salary or wages owed to the taxpayer. Awards or reimbursements in respect of such legal expenses would be included in income under new paragraph 6(1)(*j*).

[40] There is nothing in this Technical Note that suggests that the amended version was intended to expand the deduction available to include legal expenses incurred to defend an action to recover overpaid salary or wages. Stating that the paragraph was amended to conform with the then new paragraph 60(o.1) "which provides for the deduction of legal expenses to collect retiring allowances and pension benefits" supports a finding that the purpose of the provision was only to allow a deduction for legal expenses incurred in relation to amounts not yet paid. Prior to collecting unpaid remuneration, it may well be necessary for the employee to first establish the right to such unpaid remuneration. There is nothing in the Technical Notes, however, suggesting that the provision was being amended to expand the category of deductible legal expenses to those incurred by an employee to defend a claim that such employee had been overpaid.

[41] When this paragraph was further amended in 2013 (to adopt the current wording that is set out in paragraph 19 above), the Technical Notes stated:

> Oct. 24, 2012 TN (Part 5 — technical): Paragraph 8(1)(*b*) allows the deduction of amounts paid by the taxpayer to collect or establish a right to salary or wages owed to the taxpayer by the taxpayer's employer or former employer.
>
> Concern has been expressed that where an amount is not owed to the employee directly by the employer, any legal expenses incurred by the taxpayer would not be deductible under paragraph 8(1)(*b*), even though the amount, <u>when received</u>, would be taxable as employment income. This would be the case, for example, with respect to legal fees incurred by a taxpayer to collect insurance benefits under a sickness or accident insurance policy provided through an employer.
>
> Paragraph 8(1)(*b*) is amended, effective for amounts paid after 2000, to allow a deduction for legal expenses incurred by a taxpayer to collect, or establish a right to collect, an amount that, if received, would be included in computing the taxpayer's employment income.
>
> [emphasis added]

[42] The language again contemplates future payments to the employee, not expenses incurred to retain what has already been paid. The use of the conditional “if received” in the amended paragraph instead of “when received”, could, arguably, accommodate a situation where an individual was unsuccessful in either establishing such right to unpaid remuneration or in collecting the amount owing. The receipt of remuneration is required for the amount to be included in income from an office or employment (section 5 of the Act). As a result, by referring to amounts that “if received” would be required to be included in income, legal expenses incurred in unsuccessful attempts to establish a right to unpaid remuneration or collect such unpaid remuneration would arguably be deductible even though the unpaid remuneration is not included in income.

V. Conclusion

[43] As a result, in my view, paragraph 8(1)(*b*) of the Act does not allow an employee to claim a deduction for legal expenses incurred to defend a claim related to an amount that an employee has already received. The legal expenses incurred by the appellants, even to the extent that such legal expenses may reasonably be regarded as applicable to the claim that they were overpaid, are not deductible under paragraph 8(1)(*b*) of the Act. It is not, therefore, necessary to consider the other arguments that are raised in these appeals.

[44] I would dismiss the appeals. As the appeals were consolidated with one appeal book, one memorandum of fact and law, one joint book of authorities and one set of oral submissions equally applicable to all three appeals, I would award the Crown one set of costs.

"Wyman W. Webb"
J.A.

"I agree
David Stratas J.A."

"I agree
Donald J. Rennie J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEALS FROM JUDGMENTS OF THE TAX COURT OF CANADA DATED AUGUST 28, 2018, CITATION NO. 2018 TCC 177

DOCKETS:	A-295-18, A-296-18 AND A-297-18
STYLE OF CAUSE:	RICHARD AARON BARKLEY ET AL. v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	HEARD BY ONLINE VIDEO CONFERENCE HOSTED BY THE REGISTRY
DATE OF HEARING:	OCTOBER 20, 2020
REASONS FOR JUDGMENT BY:	WEBB J.A.
CONCURRED IN BY:	STRATAS J.A. RENNIE J.A.
DATED:	JANUARY 19, 2021

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