Citation: *R. v. Master Corporal K.M. Roche*, 2008 CM 1001

Docket: 200755

STANDING COURT MARTIAL
CANADA
ONTARIO
AREA SUPPORT UNIT KINGSTON

Date: January 18, 2008

PRESIDING: COLONEL MARIO DUTIL, CHIEF MILITARY JUDGE

HER MAJESTY THE QUEEN
v.
MASTER CORPORAL K.M. ROCHE
(Offender)

SENTENCE
Rendered orally

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[1] Master Corporal Roche, the Court having accepted and recorded your admission of guilt in respect of the first charge, punishable under section 130 of the *National Defence Act*, namely, the offence of fraud, contrary to section 380 of the *Criminal Code*, the Court now finds you guilty of this charge and sentences you to imprisonment for a period of 14 days accompanied by a fine in the amount of $2000, payable in 10 equal monthly instalments beginning today.

[2] In *R. v. Généreux*, the Supreme Court of Canada held that "[t]o maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently." The Supreme Court said that in the particular context of military discipline, breaches of discipline must be dealt with speedily and, frequently, punished more severely than would be the case if a civilian had engaged in such conduct. But even if those words are elevated to the level of principles, the instructions given by the Supreme Court do not mean that a military court may impose a sentence composed of a punishment or punishments that would be beyond what is required in the circumstances of a case. In other words, any sentence imposed by a court, whether civilian or military, must always represent the minimum action required.

[3] Master Corporal Roche, in determining what it considers to be the appropriate and minimum sentence in the circumstances, the Court has considered the circumstances surrounding the commission of the offences as set out in the summary of circumstances, the truth of which you have acknowledged, the documentary evidence presented to the Court and the testimony heard. In addition to your own testimony and that of Ms. Goodjohn, the Court heard testimony from your current supervisors, namely, Master Warrant Officer Kleinsteuber and Petty Officer 1st Class Hartson. Finally, the Court considered counsel's arguments and the case law to which they referred. These various elements were considered in light of sections 380.1, 718, 718.1 and 718.2 of the Criminal Code, when those principles are not incompatible with the sentencing regime provided under the *National Defence Act*.

[4] The circumstances of this case show that between November 2005 and January 2006, a period of three months, you defrauded the non-public funds accounting office of the Canadian Forces Base Kingston of $8700 by substituting seven NSF personal cheques payable to the order of "Base Fund" for bills of various denominations. The amounts taken by fraud came from a variety of sources, namely, the mess, the Canex and all the Base clubs. At the time the offence was committed, you were a Resource Management Support clerk and deputy commanding officer of this same non-public funds accounting office. Not only were you in a position of trust with respect to the management of these non-public funds, but you used your position to breach the trust of your organization. It should also be noted that in early January 2006, your supervisor suspected that NSF cheques had been deposited in the account of the financial institution used by the accounting office. She asked you to trace the NSF cheques in question and to take the appropriate measures to recover the funds from the delinquent clients, as this was part of your job. You then informed your supervisor that you could not comply with her request because you could not trace the cheques and the financial institution would not cooperate. Obviously, this was a lie. On March 13, 2006, your supervisor received seven NSF cheques from the financial institution. These cheques had been signed by you. Without informing her, you took your own NSF cheques that had been returned by the bank and placed them in the filing cabinet in your own office, where they were quickly discovered by the police. The police investigation revealed that you had substituted the cheques for currency before the funds were deposited in the financial institution. You were immediately relieved of your duties and transferred to the Base housing services to assume new duties, where to this day you have no financial responsibilities.

[5] According to the evidence heard at the hearing, at the time the offence was committed, your family's financial situation was very precarious, which you say was caused by a gambling addiction to electronic bingo. The result was that you could no longer meet your family's current expenses because of your gambling addiction and the downward spiral that your conduct brought about. According to your testimony, your spouse was unaware of your problems, and you only told him everything once you

had sought help after your scheme was discovered by your supervisor and the investigators. By your own admission, you knew from the start that it was only a matter of time before your supervisor caught on and discovered that the NSF cheques substituted for the cash were your own. As soon as your supervisor discovered your conduct upon confronting you in the presence of the police officers with your own cheques, you were given a very clear message that you were no longer welcome on the work premises and that the relationship of trust with your employer had been broken. It was then that you told your husband not only about the situation you were in, but also about your gambling addiction. Shortly thereafter, you met with Ms. Goodjohn, Team Leader Mental Health Service and Base Addiction Counsellor, who reported her findings, Exhibit 12, to the medical authorities on March 30, 2006. She observed the following, and I quote:

> A Gambling Screen and DSM IV Assessment support the clinical findings of pathological gambling. MCpl Roche would benefit and is currently agreeable for in-patient treatment with a year long follow-up program in order to achieve abstinence-based recovery.
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> MCpl Roche is an open and well-motivated woman who recognizes her desperation, the seriousness of her current mil/legal situation and the need to make significant changes to her lifestyle. She is experiencing a great deal of shame over her illegal behaviour and his keen to "do whatever I need to do get well" and to achieve and maintain a healthy, recovery based (gambling free) life she has great support from her husband at this time.

[6] In accordance with Ms. Goodjohn's recommendations, you agreed to undergo a seven-week inpatient program at the Edgewood Treatment Center in Nanaimo, British Columbia, from March 30, 2006, to May 18, 2006. As shown in Exhibit 11, you successfully completed the inpatient program in question. Upon your return, you completed the year-long obligatory follow-up phase. This phase involves total abstinence from gambling, weekly group meetings, one or more monthly meetings with an addictions counsellor and ongoing care from the treating physician. You also voluntarily attended weekly group meetings with alcoholics anonymous, and Ms. Goodjohn noted the deep commitment you demonstrated during that phase.

[7] The evidence also shows that you decided of your own accord to participate in this program beyond the one-year period ending in December 2007 and that you continued with the program until the end of the year. Ms. Goodjohn and Master Warrant Officer Kleinsteuber, who is also involved in the addiction support groups, were full of praise regarding your involvement at every level with the discussion groups. They testified that you have since made yourself available as a resource person for others fighting the same demons and that you do this with candour and dedication.

Indeed, Ms. Goodjohn's letter dated January 10, 2008, Exhibit 11, is unequivocal regarding your prognosis for continued recovery:

> I believe that should MCpl Roche continue to actively participate in the comprehensive and solid recovery plan she has formulated and instituted, her prognosis for continued recovery is good.

[8] The evidence shows that you and your spouse have since filed for bankruptcy. Although your financial situation remains precarious, you have testified that you are on the right track. As for your performance since these incidents, it has been without reproach; your supervisors hold you in very high esteem and have even recommended that you be promoted to a higher rank on the basis not only of your work, but also of the potential that you have demonstrated over the past two years. However, they were careful to point out that your 2006-2007 performance evaluation report did not take into account the incidents at issue in this Court Martial. The Court does not believe that the outcome of this proceeding will in any way change the opinion they have of you since these events. It seems that you have fully or at least partially regained their trust, although it seems appropriate and legitimate to wonder about the fragility of that trust. Is it sufficiently solid that the military authorities will be prepared to entrust you with the financial responsibilities associated with the position of Resource Management Support clerk with the rank of master corporal or higher, in the short and medium term? It is not for the Court to answer such a question, but the military authorities have the delicate task of striking a balance between the responsible management of human and financial resources.

[9] Finally, the Court accepts your testimony regarding your public apology and the remorse you have expressed for the harm you have caused to all the people affected by your fraud. You have made a formal undertaking to repay in full the amounts you appropriated fraudulently as soon as you have been discharged from bankruptcy.

[10] With respect to the repayment, the documentary evidence as well as your testimony show that you did not undertake until today to repaying the amounts fraudulently taken because of delays in obtaining adequate legal counsel. According to the evidence, you were not charged until September 2006 for a relatively straightforward offence in which you had already admitted to your involvement and the investigation of which was completed by March 2006. Once you had been formally charged, you asked on October 2, 2006, to be represented by counsel from Defence Counsel Services through your chain of command, which informed you two days later that you would receive documentation once the charges had been sent to Ottawa, but that you could communicate with counsel from Defence Counsel Services at any time. Indeed, you did so four times until counsel was formally assigned to you in September 2007, namely, Lieutenant-Colonel Couture, who is present today. It seems the

previously consulted counsel had not received your application and so were unable to help you, including with respect to the issue of whether the measures you wished to take in fall 2006 to repay the $8700 obtained by fraud were well founded. It was only following questioning by Counsel for the Prosecution, Major McMahon, who noted in September 2007 the lack of representation information in the accused's file, that this issue was resolved. During that entire period from October 2006 to September 2007, nothing happened. On September 21, 2007, the Director of Defence Counsel Services informed you in writing that you would be represented by Lieutenant-Colonel Couture, as shown in Exhibit 7. The case was brought to court less than four months later. This completes the summary of circumstances related to the commission of the offence and the relevant evidence filed with the court for the purpose of determining the sentence.

[11] It is recognized that in imposing an appropriate sentence on an accused for the wrongful acts he has committed and in relation to offences of which he is guilty, there are certain objectives having regard to the principles applicable to sentencing, although they vary slightly from one case to another. The weight assigned to them must be adapted to the circumstances of the case and to the individual offender. In order to contribute to one of the essential objectives of military discipline, those objectives and principles may be stated as follows:

> first, the protection of the public, which includes the Canadian Forces;
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> second, the punishment and denunciation of the offender;
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> third, the deterrence of the offender and anyone else from committing the same offences;
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> fourth, the separation of the offender from society, including members of the Canadian Forces, where appropriate;
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> fifth, the rehabilitation and reform of the offender;
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> sixth, the proportionality and seriousness of the offences and the degree of responsibility of the offender;
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> seventh, consistency in sentencing;
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> eighth, the imposition of a custodial sentence only where the Court is satisfied that it is necessary as a last resort; and
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> finally, the Court will take into account aggravating and mitigating circumstances relating to the offender's situation.

[12] In this case, the Court is satisfied that this type of offence merits particularly vigorous denunciation and deterrence when it is committed by a person who betrays his employer's trust through fraud when he is fully or partially responsible for money entrusted to him as part of his normal duties. However, the Court recognizes that the tribunals have a certain amount of discretion in cases where the offender has put his life in order and there is little risk of a repeat offence. Every case is different, but the principles of general deterrence and denunciation must take precedence over the rehabilitation of the offender.

[13] In *The Queen v. St-Jean*, a decision of the Court Martial Court of Appeal reported in CMCA 2000, No. 2, a decision delivered in English, the Honourable Mr. Justice Létourneau highlighted the impact of fraudulent acts within public organizations such as the Canadian Forces. At paragraph 22, he stated the following:

> After a review of the sentence imposed, the principles applicable and the jurisprudence of this Court, I cannot say that the sentencing President erred or acted unreasonably when he asserted the need to emphasize deterrence. In a large and complex public organization such as the Canadian Forces which possesses a very substantial budget, manages an enormous quantity of material and Crown assets and operates a multiplicity of diversified programs, the management must inevitably rely upon the assistance and integrity of its employees. No control system, however efficient it may be, can be a valid substitute for the integrity of the staff in which the management puts its faith and confidence. A breach of that faith by way of fraud is often very difficult to detect and costly to investigate. It undermines public respect for the institution and results in losses of public funds. Military offenders convicted of fraud, and other military personnel who might be tempted to imitate them, should know that they expose themselves to a sanction that will unequivocally denounce their behaviour and their abuse of the faith and confidence vested in them by their employer as well as the public and that will discourage them from embarking upon this kind of conduct.

[14] As I recently pointed out in *R. v. Master Corporal Poirier*, 2007 CM 1023:

> [8] The principles set out by the Court Martial Appeal Court in *St-Jean* as well as in the decisions of *Lévesque, Legaarden* and *Vanier* preceded the amendment to s. 380 of the *Criminal Code* in 2004 where Parliament increased the maximum punishment for the offence of fraud exceeding five thousand dollars from 10 to 14 years. As recognized in *St-Jean*, the principle of general deterrence is the primary aspect that Courts shall emphasize in fraud cases. This is even more so today. The principle of general deterrence must however be weighed with every other sentencing principle and objective. When dealing with offences of employee fraud or substantial commercial fraud, recent jurisprudence by civilian courts and courts of appeal provide useful guidance. In *R. v. Stymiest*, (2006) W.C.B.(2d) 66 (New Brunswick Court of Queen's Bench), McNally J. Enunciated the relative importance of the sentencing principles in fraud related offences and the emphasis that should be placed on one or more principles

when a court must sentence an offender in employee fraud or substantial commercial fraud, at paragraphs 53 and 54:

> [53]The New Brunswick Court of Appeal recently confirmed its view that absent exceptional circumstances, the principles of denunciation and general deterrence trump considerations of an accused's first offender status and positive rehabilitation prospects, generally warranting a sentence of incarceration when dealing with offences of employee fraud or substantial commercial fraud - see *R. v. Kuriya* [2003] N.B.J. No. 336 and *R. v. Steeves* [2005] N.B.J. No. 150.
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> [54] In *R. v. Bogart* (2002), 167 (3d) 390 (Ont. C.A.) The accused was a physician who over a period of seven years submitted false billings to the Ontario Health Insurance Plan totalling nearly $1,000,000.00 At the time of sentencing, the accused continued to practice medicine and continued to treat a large group of devoted patients, many of who were HIV-positive or had AIDS. After a preliminary inquiry, he pleaded guilty to fraud over $5,000.00 and received a conditional sentence of two years less a day and three years' probation. In granting the Crown's appeal of the conditional sentence and substituting a jail sentence of eighteen months, Laskin, J.A. writing for the Ontario Court of Appeal stated:
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> > Two aspects of the need to give effect to general deterrence come into play in this case. First, general deterrence is the most important sentencing principle in major frauds. Second, when general deterrence is "particularly pressing", as it is here, the preferable sanction is incarceration.
> >
> > This court has affirmed that in cases of large-scale fraud committed by a person in a position of trust, the most important sentencing principle is general deterrence. Mitigating factors and even rehabilitation become secondary. In *R. v. Bertram and Wood* (1990), 40 O.A.C. 317, this court observed that most major frauds are committed - as this one was - by well educated persons of previous good character. Thus the court held, at p. 319. The sentences in such cases are not really concerned with rehabilitation. Instead, they are concerned with general deterrence and with warning such persons that substantial penitentiary sentences will follow this type of crime, to say nothing of the serious disgrace to them and everyone connected with them and their probable financial ruin. In *R. v. Gray (L.V.)*, (1995), 76 O.A.C. 387 at 398-399, our court again stressed the need for general deterrence in fraud cases: ...there are a few crimes where the aspect of deterrence is more significant. It is not a crime of impulse and is of a type that is normally committed by a person who is knowledgeable and should be aware of the consequences. That awareness comes from sentences given to others.

[15] Despite the decisions of the Court Martial Appeal Court in *St-Jean, Lévesque, Deg* and *Vanier*, it must be said that since the 2004 amendments to the *Criminal Code* related to the maximum sentence applicable to the offence of fraud where the subject-matter of the offence exceeds $5000 under paragraph 380(1)(*a*) of the *Criminal Code*, Canada's appellate courts have generally imposed prison sentences when the fraud is significant or when it is committed against an employer, whether it took place over a longer or shorter periods.

The courts may impose a custodial sentence on any grounds they consider appropriate to achieve the paramount objectives of general deterrence and denunciation in this type of case, even if the offender has no judicial record, has registered a guilty plea and expressed remorse, has repaid the victims fully or in part, has little chance of re-offending and is known and respected in the community.

[16] In considering what sentence would be appropriate, the Court must take into account the objective seriousness of the offence and the offender's degree of responsibility in light of the aggravating and mitigating factors related to the commission of the offence or the situation of the offender. In assessing the offender's

responsibility in relation to the imposition of an adequate sentence in the case of fraud, the following factors, among others, should be examined: the nature and scope of the fraud and the victim's actual economic or financial losses; the degree of premeditation in the planning and implementation of the fraud; the offender's conduct after the commission of the offence, including the repayment of the victims; whether the offender cooperated with the authorities and pleaded guilty at the first opportunity; the judicial record; the personal gain realized from the fraud; the relationship of authority and trust with the victim; and the motive underlying the commission of the fraud. Some of these factors may be considered aggravating or mitigating circumstances, but this is not the case for those factors arising from the fundamental principle that the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender, as set out in section 718.1 of the *Criminal Code*.

[17] In this case, the following factors aggravate the sentence:

1. The nature of the offence and the maximum sentence provided by Parliament: The offence of fraud where the subject-matter of the offence exceeds $5000 is subject to a maximum sentence of imprisonment for a period of 14 years. Objectively, it is a particularly serious offence.

2. The nature and scope of the fraud, as well as the actual losses incurred by the non-public funds: The facts show that between November 2005 and January 2006, a three-month period, you defrauded the non-public funds accounting office of the Canadian Forces Base Kingston of an amount of $8700 by substituting seven NSF personal cheques payable to the order of "Base Fund" for bills of various denominations. The amounts taken by fraud came from a variety of sources, namely, the mess, the Canex and all the Base clubs. At the time the offence was committed, you were a Resource Management Support clerk and deputy commanding officer of this same non-public funds accounting office. You therefore held a position of trust with respect to the integrity of the non-public funds. The period over which you substituted the NSF cheques for cash indicates that this was not an isolated and impulsive incident. Although it lacked sophistication and was bound to fail in the short term, your scheme was planned and organized, even though you knew you would be caught. In fact, you dug yourself in even further by intercepting your own NFS cheques when they were returned to your supervisor by the financial institution. This may not represent major fraud on a grand scale, but it remains significant in the context of this case because of the nature and source of the amounts for which you were responsible.

3. The degree of premeditation of the fraud: Replacing amounts of money to be deposited in a financial institution with NSF personal cheques over a three-month period clearly shows, in the opinion of this Court, that there was premeditation, even if the scheme used lacked sophistication and was bound to fail.

4. The degree of authority and trust characterizing the relationship between the offender and the victims: As I mentioned earlier, the amounts fraudulently appropriated came from a variety of sources, namely, the mess, the Canex and all the Base clubs. At the time the offence was committed, you were a Resource Management Support clerk and, again, deputy commanding officer of this same non-public funds accounting office. Not only were you in a position of trust with respect to the management of these non-public funds, but you used your position to breach the trust of your organization. This fraud could not have occurred but for the role you played within the accounting office and the relationship of trust that existed between you and your supervisor. The abuse of this trust is a particularly aggravating factor.

5. The personal gain realized by the offender: Even if the amounts were used in part to pay your current expenses, they were mostly depleted to feed your gambling addiction.

[18] The Court considers that the following factors mitigate the sentence:

1. The offender's conduct after the commission of the offence: The Court acknowledges your admission of guilt before this Court and the remorse you have expressed, including your public apology for the harm you caused to the victims of your fraud. The Court believes in your absolute sincerity. Moreover, your performance in your new position has been exceptional and has earned you well-deserved praise. To this we can add your road to recovery, which demonstrates not only your real and sincere efforts to date to deal with the problems associated with your gambling addiction, but also your energy and dedication in helping others recover from similar difficulties. Clearly this has a significant therapeutic benefit for you, but your altruism has provided a real lifeline for people in Kingston's military community who are struggling with addictions.

2. Criminal and disciplinary record: This is your first encounter with the judicial system. You have no prior criminal record or conduct sheet.

3. Your economic and family situation: You are the mother of three children, including a young daughter from a previous relationship for whom you pay child support. Because of your chronic gambling, you and your husband were forced to declare bankruptcy, from which you have not yet been discharged. Your reputation has suffered and you have lost the esteem of people who respected you, such as your former supervisor, Ms. Maxwell.

4. The time elapsed since the commission of the offence and the failure to provide legal counsel as requested in a timely fashion: Two years elapsed between the commission of the offence and the commencement of procedures before the Court Martial, despite the fact that the facts of this case are straightforward and there were no particular difficulties with the investigation. The facts of the case do not extend beyond March 2006. There followed an unexplained delay of six months before a charge was laid against the offender, who immediately expressed her desire to represented by counsel from Defence Counsel Services in October 2006. Although she was able to speak with duty counsel on four occasions before having counsel specifically assigned to her in September 2007, she could not discuss her file usefully, particularly with respect to her desire to put this episode behind her as quickly as possible and repay the stolen amounts, because duty counsel could not provide specific legal advice in the absence of a mandate. For all intents and purposes, she was left on her own on this issue. It is neither possible nor appropriate for this Court to lay the blame with Defence Counsel Services in this case or with the military authorities for misplacing or failing to process Master Corporal Roche's request for representation by counsel. It is enough to note that Master Corporal Roche did not receive the legal support to which she was entitled. Considering that this case is about to be resolved less than four months after the arrival of defence counsel Lieutenant-Colonel Couture, I have no hesitation in finding that there is no valid reason that could have prevented this case from being settled before now in the interests of military justice, both for the accused and for the military authorities. In the circumstances, the delay is not only a mitigating factor, but also an exceptional one.

[19] As for the motive underlying the commission of the offence, the evidence clearly shows that Master Corporal Roche committed the offence for which she has admitted her guilt because she was suffering from a serious gambling problem.

As I said earlier, the therapy she has undergone to deal with this problem is a mitigating factor when it comes to sentencing. That said, the fact that her underlying motive in committing the offence was her gambling addiction cannot mitigate the sentence itself, although it does diminish Master Corporal Roche's degree of responsibility. This approach was recently considered by the Court of Appeal for Saskatchewan in *R. v. Harding*, (2007) 213 C.C.C.(3d) at page 543, in which Mr. Justice Cameron wrote the following for the Court:

> [23] Indeed the trial judge, in having regard for the aggravating and mitigating circumstances, may have regarded the accused's gambling disorder as an extenuating or mitigating circumstance. This is of questionable validity in light of *R. v. McTighe*, and it is even more so if the trial judge in effect took the gambling disorder as serving both to diminish the accused's degree of responsibility, within the contemplation of section 718.1, and to mitigate the commission of the offence and decrease the sentence accordingly, within the contemplation of section 718.2.

[20] Master Corporal Roche has undertaken to repay the full amount of the fraud, and the Court does not intend to repeat the explanation of why this was not done until now. Restitution is part of the sentencing process and may influence the quantum of the period of incarceration. Any civil court with criminal jurisdiction may order that the offender make restitution under section 738 of the *Criminal Code*. This provision is part of the sentencing regime under the *Criminal Code*. It is yet another major shortcoming of the Court Martial's powers that it cannot issue such an order in dealing with similar offences .

[21] The Court paid particular attention to defence counsel's recommendation to consider punishment that does not involvement incarceration in the form of imprisonment, which is generally a punishment of last resort. However, recent legislation and case law do not support such an approach in cases of fraud committed against an employer by an employee abusing a position of trust directly related to the management or supervision of the money or material fraudulently taken. A custodial sentence is required to promote denunciation and deterrence.

Considering the long time elapsed since the offence was committed and Master Corporal's extraordinary efforts over the past two years;

Considering the responsibility of the various parties with respect to the failure to provide her with legal counsel in a timely manner and the effect of this omission on the administration of justice;

Considering that Master Corporal Roche and all of the evidence have eloquently demonstrated her efforts to rehabilitate herself and the critical role she has been playing in the treatment of community members suffering from addictions;

The Court finds that it is not in the interest of justice that she serve the 14-day prison sentence imposed by the Court because she will be much more useful to society outside of a penal institution, continuing her therapy and providing support to others suffering from similar problems. Accordingly, the Court, as the suspending authority, suspends the carrying into effect of the period of imprisonment.

COLONEL M. DUTIL, C.M.J.

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