Federal Court of Appeal  Cour d'appel fédérale

Date: 20210526

Docket: A-12-20

Citation: 2021 FCA 101

CORAM: **NADON J.A.**
PELLETIER J.A.
LOCKE J.A.

BETWEEN:

CHARLES FRIEDMAN AND CLAIRE FRIEDMAN

Appellants

and

MINISTER OF NATIONAL REVENUE

Respondent

Heard by online video conference hosted by the Registry on April 12, 2021.

Judgment delivered at Ottawa, Ontario, on May 26, 2021.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: NADON J.A.
LOCKE J.A.

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REASONS FOR JUDGMENT

PELLETIER J.A.

I. Introduction

[1] The Minister of National Revenue (the Minister) received information which suggested that Mr. Charles Friedman and his wife Claire Friedman (collectively the Friedmans) may have failed to declare foreign income. In order to investigate this further, the Minister sent each of

them a letter telling them that an audit would be done, and enclosed a 15 page questionnaire which asked for the details of their property or property under their control. Anxious about the consequences which might flow from answering these questions, the Friedmans consulted counsel. This resulted in an application for judicial review by each of the Friedmans to set aside the Minister's request for information which, in turn, provoked an application by the Minister for an order requiring each of the Friedmans to comply with the request.

[2] In a decision reported as 2019 FC 1583 (the Decision), the Federal Court dismissed the Friedmans' applications for judicial review and made the orders requested by the Minister. This is an appeal from that decision.

[3] For the reasons which follow, I would dismiss the appeal with costs.

II. Facts and Decision under Appeal

[4] The requests for information which the Friedmans received were made pursuant to subsection 231.1(1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the Act), which reads as follows:

231.1 (1) An authorized person may, at all reasonable times, for any purpose related to the administration or enforcement of this Act,	231.1 (1) Une personne autorisée peut, à tout moment raisonnable, pour l'application et l'exécution de la présente loi, à la fois :
(*a*) inspect, audit or examine the books and records of a taxpayer and any document of the taxpayer or of any other person that relates or may relate to the information that is or should be in the books or records of the taxpayer or to any amount	*a*) inspecter, vérifier ou examiner les livres et registres d'un contribuable ainsi que tous documents du contribuable ou d'une autre personne qui se rapportent ou peuvent se rapporter soit aux renseignements qui figurent dans les livres ou registres du

payable by the taxpayer under this Act, and	contribuable ou qui devraient y figurer, soit à tout montant payable par le contribuable en vertu de la présente loi;

[5] The Minister's applications for a compliance order were made pursuant to subsection 231.7(1) which provides as follows:

231.7 (1) On summary application by the Minister, a judge may, notwithstanding subsection 238(2), order a person to provide any access, assistance, information or document sought by the Minister under section 231.1 or 231.2 if the judge is satisfied that	231.7 (1) Sur demande sommaire du ministre, un juge peut, malgré le paragraphe 238(2), ordonner à une personne de fournir l'accès, l'aide, les renseignements ou les documents que le ministre cherche à obtenir en vertu des articles 231.1 ou 231.2 s'il est convaincu de ce qui suit :
(*a*) the person was required under section 231.1 or 231.2 to provide the access, assistance, information or document and did not do so; and	*a*) la personne n'a pas fourni l'accès, l'aide, les renseignements ou les documents bien qu'elle en soit tenue par les articles 231.1 ou 231.2;
(*b*) in the case of information or a document, the information or document is not protected from disclosure by solicitor-client privilege (within the meaning of subsection 232(1)).	*b*) s'agissant de renseignements ou de documents, le privilège des communications entre client et avocat, au sens du paragraphe 232(1), ne peut être invoqué à leur égard.
238(2) Where a person has been convicted by a court of an offence under subsection 238(1) for a failure to comply with a provision of this Act or a regulation, the court may make such order as it deems proper in order to enforce compliance with the provision.	238(2) Le tribunal qui déclare une personne coupable d'une infraction prévue au paragraphe (1) peut rendre toute ordonnance qu'il estime indiquée pour qu'il soit remédié au défaut visé par l'infraction.

[6] The questionnaire sent to the Friedmans asked for information on a variety of issues which could be relevant to the Friedmans' position. Since a question was raised as to the person(s) to whom the questionnaire was directed, it is necessary to describe it more fully.

[7] The questionnaire was included with a letter addressed to each of the Friedmans. The letter referenced the addressee (Mr. or Mrs. Friedman) followed by "Taxation Years 2010-01-01 to 2016-12-31". The first sentence of the letter read "[y]our personal income tax returns and any other related or associated entities have been selected for audit for the above noted period".

[8] Every page of the questionnaire carries the heading "QUESTIONNAIRE FOR THE REVIEW OF AN INCOME TAX RETURN OF AN INDIVIDUAL". On page 1 of each questionnaire, the name and social insurance number of the addressee is listed.

[9] The scope of the questionnaire can be illustrated by a sample question:

> 3.1 Was a member of your *family* a shareholder or member of any *unlisted company*. For greater certainty, please note that a shareholder includes a holder of bearer shares,
>
> - in Canada?
>
> - outside of Canada?
>
> If yes, please provide for each such *unlisted company*:
>
> (i) the name of the *unlisted company*;
>
> (ii) the name of the member of your *family* who held the shares or membership;
>
> (iii) if the *unlisted company* filed income tax returns in Canada, its business number;

> (iv) if the *unlisted company* did not file income tax returns in Canada, and its existence has not been disclosed in the years under review on a T1134-A or T1134-B information return, please provide:
>
> a. its place of incorporation,
>
> b. the percentage interest in the company so held, and
>
> c. financial statements of the company for each fiscal period ending in the years under review.
>
> (emphasis in the original)

[10] To put this question in context, the questionnaire defines "family" as "you, your spouse or common-law partner, and minor children of you, your spouse or your common-law partner, irrespective of who has custody of these children".

[11] The Friedmans initially challenged the request for information on the basis that the procedure under subsection 231.1(1) infringed their right to liberty, and their protection against self-incrimination pursuant to sections 7, 11(*c*), and 13 of the *Canadian Charter of Rights and Freedoms* (the Charter). Subsequently, they applied for and were granted leave to plead that the Federal Court should follow another Federal Court decision on the same issue, *Canada (National Revenue) v. Lin*, 2019 FC 646 [*Lin*], in which the Federal Court dismissed an application for a compliance order pursuant to subsection 232.7(1). In that case, the Court found that "the Letters are addressed to both the individuals and their connected entities. The entities are not specified, and it is not clear who is being audited - the individual Respondents or unnamed entities": *Lin* at para. 31.

[12] The Federal Court began its analysis on this issue by identifying the criteria which must be met before the Court will make a compliance order under subsection 231.7(1). Normally, the Court will look to the request for information to see if the criteria have been satisfied. The criteria are:

> (1) The person against whom the order is sought must be clearly identified as required to provide the requested information;
>
> (2) The person was required to provide the information or documents to the Minister, but did not do so;
>
> (3) The information or documents sought are not protected from disclosure by solicitor-client privilege.
>
> Decision at para. 26

[13] These criteria are taken from subsection 231.7(1) and are reflected in the Federal Court jurisprudence: see *Canada (Minister of National Revenue) v. SML Operations (Canada) Ltd.*, 2003 FC 868, [2003] F.C.J. No. 1111 (QL) at paras. 13-14 [*SML*], *Canada (Minister of National Revenue) v. Chamandy*, 2014 FC 354, 452 F.T.R. 261 at paras. 27-29 [*Chamandy*], *Lin* at para. 22.

[14] The Federal Court reviewed the jurisprudence cited above and noted that in each case, the Court found that there was some uncertainty as to who was being audited. However, the Court reviewed the letters and questionnaires sent to the Friedmans and found that “it is not difficult to see that they are directed at the Friedmans in their individual capacities, nor is it difficult to understand why the CRA would request such information regarding a taxpayer’s related entities in the course of an audit into their foreign assets”: Decision at para. 42.

[15] In coming to this conclusion, the Federal Court acknowledged that the letters were phrased identically to that in the *Lin* case, but expressed uncertainty as to whether the Court in the *Lin* case, had access to the questionnaires that were sent to the taxpayer: Decision at paras. 34-35.

[16] As a result, the Court distinguished the Friedmans' situation from that found in the *Lin* case and held that the criteria for making an order pursuant to subsection 231.7(1) were satisfied.

[17] The Court then addressed the Friedmans' constitutional arguments. They argued that the requests for information infringed their rights because they were a covert criminal investigation in the guise of a civil audit. This allegation was made before counsel for the Friedmans had the opportunity to cross-examine the Canada Revenue Agency (CRA) official who filed an affidavit in support of the CRA's application for a compliance order. As a result of that cross-examination, counsel conceded at the hearing of the application that there was no evidence to support the allegation of a covert criminal investigation. As a result, the Court found that section 11(*c*) of the Charter was not engaged.

[18] The Federal Court next considered the Friedmans' argument that section 13 of the Charter applied to give them immunity in subsequent penal proceedings as a result of their compelled disclosure under the tax administration regime. The Court referred to another Federal Court decision in which this issue arose, *Campbell v. Canada (Attorney General)*, 2018 FC 683 [*Campbell*]. In that case, the Court declined to issue a declaration that the compelled disclosure could not be used against the taxpayer in other proceedings. Since there was no evidence of an

intention to use the compelled disclosure against the taxpayer, there was “no practical need to determine the scope of the protection that the Charter will afford if and when charges are laid against Mr. Campbell”: *Campbell* at para. 17.

[19] In the case of the Friedmans, the Federal Court came to the same conclusion, that is, since there was no live issue as to the use to be made of the compelled disclosure, there was no need to pre-empt the judgment which a court of criminal jurisdiction might be called upon to make should the Crown seek to introduce evidence obtained from an order made pursuant to subsection 231.7(1).

[20] The Friedmans also argued that subsections 231.1(1) and 231.7(1) were unconstitutional because they conflicted with sections 7 and 13 of the Charter. Since the argument as to section 7 was abandoned in this Court, it is not necessary to deal with it in these reasons. As for section 13, the Friedmans argued that subsections 231.1(1) and 231.7(1) were unconstitutional because they did not include terms to the effect that the Minister could not rely upon evidence collected in the course of an audit in later criminal or penal proceedings.

[21] The Federal Court dismissed this argument in one short paragraph:

> Section 13 of the Charter applies when testimony is used to incriminate a person in “other proceedings”. There are no such “other proceedings” at present, and section 13 would only be engaged if and when the Friedmans are charged with a criminal offence.
>
> Decision at para. 69

[22] As a result, the Federal Court dismissed the Friedmans' applications for judicial review and allowed the Minister's application for a compliance order against each of the Friedmans.

III. Statement of Issues

[23] In their memorandum of fact and law, the Friedmans describe the issues in this appeal as follows:

> a. Did the Judge commit an error of law and an error of fact when he decided not to apply the rule of stare decisis and did not conclude that the persons being audited are not clearly identified?
>
> b. Did the judge make an error of law in relying on the standard of review of reasonableness rather than the standard of correctness?
>
> c. Did the judge make a palpable and overriding error of fact and law in concluding that the Charter rights of the Appellants were not infringed by the application by CRA of sections 231.1 and 231.7 ITA?
>
> d. Did the judge make an error of law in refusing to issue a declaratory judgment that the Appellants' declaration would be protected by Article 13 of the Charter?

[24] At the commencement of the hearing of the appeal, counsel for the Friedmans advised the Court that the arguments with respect to sections 7 and 11 of the Charter would not be pursued. As a result, the main issue before the Court was whether subsections 231.1(1) and 231.7(1) of the Act infringed the Friedmans' rights under section 13 of the Charter. Counsel advised that the Friedmans continued to advance the position that the letter and questionnaire which each of them had received were vitiated by the same lack of clarity found in *Lin* and as a result, their appeal should be allowed and the decision of the Federal Court set aside.

[25] Since the Charter argument does not arise if I find that the Federal Court ought to have followed the *Lin* decision, I will deal with that issue first. If that argument fails, I will then consider the constitutional argument.

IV. Analysis

[26] This appeal covers two discrete legal proceedings: the Friedmans' applications for judicial review of the Minister's requests for information pursuant to subsection 231.1(1) of the Act and the Minister's applications for a compliance order pursuant to subsection 231.7(1). These two proceedings would normally call for the application of different standards of review. The Friedmans' application for judicial review would be subject to the administrative law standard, presumptive reasonableness for questions of law and reasonableness for questions of fact or questions of mixed fact and law: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 at para. 16 [*Vavilov*], *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 51. Although the Minister's requests for compliance orders were commenced by notices of application, they are not judicial reviews but are more in the nature of originating motions. As a result, an appeal to this Court would attract the appellate standard of review of correctness for questions of law and palpable and overriding error for questions of fact and questions of mixed fact and law, save for extricable questions of law: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at paras. 8, 10.

[27] This would have been a legitimate reason for keeping the two sets of applications separate. As it turns out, the Friedmans' applications for judicial review raise constitutional

questions, which are reviewed on the correctness standard (see *Vavilov* at para. 17) so that, in this case, the same standard applies in both cases.

[28] With that in mind, I turn to the *Lin* case and its application to the facts of this case. The Friedmans' position is that the Federal Court's purported distinction between the facts of the two cases is unpersuasive so that the Court ought to have come to the same conclusion in this case as it did in *Lin* by virtue of the doctrine of *stare decisis*.

[29] The first point to be made is that the appeal to *stare decisis* is misconceived, though understandable given the references in the jurisprudence to "horizontal *stare decisis*". The doctrine which applies to the judges' treatment of decisions of their colleagues on the same court is judicial comity. The decision of one judge of the Federal Court does not bind the other judges of the Federal Court in the sense that failing to follow the decision of a colleague is an error which justifies appellate intervention. At paragraph 115 of *Apotex Inc. v. Pfizer Canada Inc.*, 2014 FCA 250, [2014] F.C.J. No. 1090 (QL), this Court wrote:

> In contrast, the doctrine of comity or horizontal *stare decisis* is not binding. … Rather, this Court highlighted the uncertainty that is created when two judges of the same court reach distinct results on the same question of law without explanation. It remains that, as shown by *Allergan* [*Apotex Inc. v. Allergan Inc.*, 2012 FCA 308] the only thing that an appellate court can do when this happens is to eliminate the uncertainty by settling the question of law (*Allergan* at para. 53). There is no legal sanction for a judge's failure to abide by comity.
>
> (emphasis added)

[30] This does not mean that judges are free to disregard the decisions of their colleagues. Judicial comity is a doctrine which seeks to promote uniformity and predictability in the law. Litigants and appellate courts expect that judges will consider the decisions of their colleagues

carefully and, if they choose to differ, will explain why. One way of doing this is to distinguish the facts of the two cases or to identify relevant legal principles which were not addressed.

[31] But the failure to do so, or to do it convincingly, while regrettable, is not a basis for appellate intervention. As a result, the use of the expression "horizontal *stare decisis*" to refer to judicial comity is misleading precisely because judicial comity is not enforced by courts of appeal while *stare decisis* is.

[32] As a result, the Federal Court committed no legal error when it declined to follow the *Lin* case. It examined the letters and the questionnaire which the Friedmans received from the CRA and concluded that it was clear who was being audited. The Federal Court came to its own conclusion that the necessary criteria had been satisfied by reference to the documents themselves. This is what it was required to do and it committed no error in doing so.

[33] This is sufficient to dispose of this portion of the case. I turn now to the constitutional questions. I say questions because it appears that the Friedmans have two constitutional objections. They say that subsections 231.1(1) and 231.7(1) are constitutionally invalid because there is no limitation within these provisions which would prevent information produced in response to them being used in subsequent proceedings against the person who provided the information. The Friedmans also say that even if these subsections are constitutionally valid, they are constitutionally inoperative in regards to their situation based on the fact that the information which they provide could potentially be used against them in subsequent proceedings.

[34] The difficulty which the Friedmans cannot surmount is that their arguments lack a factual foundation and, in the case of their request for a declaration protecting them from the risk of subsequent self-incrimination, is premature. On this last point, I adopt with approval the reasons of the Federal Court in *Campbell*.

[35] The jurisprudence is clear (and abundant) that courts should not decide constitutional cases in a factual vacuum. This principle finds recent expression in *Ernst v. Alberta Energy Regulator*, 2017 SCC 1, [2017] 1 S.C.R. 3 at para. 22 where the following appears:

> Where a person challenging a law's constitutionality fails to provide an adequate factual basis to decide the challenge, the challenge fails. As Cory J. put it on behalf of the Court in *MacKay v. Manitoba*, [1989] 2 S.C.R. 357, at p. 366, "the absence of a factual base is not just a technicality that could be overlooked, but rather it is a flaw that is fatal to the appellants' position".
>
> (emphasis in the original)

[36] That said, in an early Charter case, the Supreme Court left open the possibility that a finding of invalidity could be made on the face of the statute or provision:

> However, the principle I am discussing is not absolute. There may be rare cases where the question of constitutionality will present itself as a simple question of law alone which can be finally settled by a motion judge. A theoretical example which comes to mind is one where Parliament or a legislature would purport to pass a law imposing the beliefs of a state religion. Such a law would violate s. 2(*a*) of the *Canadian Charter of Rights and Freedoms*, could not possibly be saved under s. 1 of the *Charter* and might perhaps be struck down right away; see *Attorney General of Quebec v. Quebec Association of Protestant School Boards*, [1984] 2 S.C.R. 66, at p. 88. It is trite to say that these cases are exceptional.
>
> *Manitoba (A.G.) v. Metropolitan Stores Ltd.*, 1987 CanLII 79 (S.C.C.), [1987] 1 S.C.R. 110 at para. 50

[37] One of the reasons that such cases are exceptional is that an apparent conflict between legislation and the Charter may be capable of resolution using the tools available in Charter litigation. This issue was considered in *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698 [*Reference re Same-Sex Marriage*], a reference as to the constitutionality of the *Proposal for an Act respecting certain aspects of legal capacity for marriage for civil purposes* (*Same sex reference*). One of the arguments raised against the proposed legislation was that religious officials would be compelled to perform same-sex marriages contrary to their religious beliefs which would conflict with same-sex couples' right to be free from discrimination. The Supreme Court dealt with this as follows:

> This leaves the issue of whether the *Proposed Act* will create an impermissible collision of rights. The potential for a collision of rights does not necessarily imply unconstitutionality. The collision between rights must be approached on the contextual facts of actual conflicts. The first question is whether the rights alleged to conflict can be reconciled: *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772, 2001 SCC 31, at para. 29. Where the rights cannot be reconciled, a true conflict of rights is made out. In such cases, the Court will find a limit on religious freedom and go on to balance the interests at stake under s. 1 of the Charter: *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, at paras. 73-74. In both steps, the Court must proceed on the basis that the *Charter* does not create a hierarchy of rights (*Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at p. 877) and that the right to religious freedom enshrined in s. 2(a) of the *Charter* is expansive.
>
> *Reference re Same-Sex Marriage* at para. 50

[38] The result is that legislation which, on its face, contains Charter violations may yet be found to be constitutional on the basis of contextual facts and the balancing of interests pursuant to section 1 of the Charter. All this to say that the possibility of fact-free determinations of constitutional invalidity is extremely limited.

[39] In the present case, there are no facts in support of the Friedmans' constitutional arguments; there are merely hypothetical possibilities which may or may not arise. The Friedmans have not developed a factual record beyond establishing that they received the letters and questionnaires in issue from the CRA. As noted earlier, it was conceded that there was no basis for alleging a disguised criminal investigation. This absence of material facts applies to the Friedmans' section 13 arguments. As a result, there is no factual basis upon which this Court might consider the constitutional validity or inoperability of subsections 231.1(1) and 231.7(1) of the Act.

[40] In any event, the issues which the Friedmans wish to raise on a fact-free record have already been addressed to a considerable extent in *R. v. Jarvis*, 2002 SCC 73, [2002] 3 S.C.R. 757 [*Jarvis*]. In that case, the taxpayer, Mr. Jarvis, was asked to provide information pursuant to subsection 231.1(1) of the Act, as a result of the Minister receiving a tip which alleged that he had undisclosed income. An auditor gathered information from the taxpayer and other sources and eventually concluded that there was a significant amount of unreported income. The file was referred internally to the Special Investigations Section whose responsibility it was to determine if criminal charges should be laid. Mr. Jarvis was eventually charged with making false or deceptive statements in an income tax return (paragraph 239(1)(*a*) of the Act) and two counts of willfully evading or attempting to evade payment of taxes (paragraph 239(1)(*d*) of the Act).

[41] At Mr. Jarvis' trial on these charges, an issue arose as to the admissibility of the evidence obtained in the course of the Minister's investigation of his affairs. The constitutionality of the provisions was not in issue but the admissibility of the evidence was challenged on the basis of

section 24 of the Charter. The Supreme Court engaged in a careful contextual analysis of the provisions of the Act and the Charter and established a predominant purpose test to determine if inquiries by the Minister were intended to determine a taxpayer's tax liability or a taxpayer's criminal liability. In the latter case, the relationship between the Minister and the taxpayer was described as an adversarial relationship.

[42] The Court then summarized the relationship between the Minister's audit and investigatory powers as follows:

> The predominant purpose test does not thereby prevent the CCRA [the CRA] from conducting parallel criminal investigations and administrative audits. The fact that the CCRA is investigating a taxpayer's penal liability, does not preclude the possibility of a simultaneous investigation, the predominant purpose of which is a determination of the same taxpayer's tax liability. However, if an investigation into penal liability is subsequently commenced, the investigators can avail themselves of that information obtained pursuant to the audit powers prior to the commencement of the criminal investigation, but not with respect to information obtained pursuant to such powers subsequent to the commencement of the investigation into penal liability. This is no less true where the investigations into penal liability and tax liability are in respect of the same tax period. So long as the predominant purpose of the parallel investigation actually is the determination of tax liability, the auditors may continue to resort to ss. 231.1(1) and 231.2(1). It may well be that there will be circumstances in which the CCRA officials conducting the tax liability inquiry will desire to inform the taxpayer that a criminal investigation also is under way and that the taxpayer is not obliged to comply with the requirement powers of ss. 231.1(1) and 231.2(1) for the purposes of the criminal investigation. On the other hand, the authorities may wish to avail themselves of the search warrant procedures under ss. 231.3 of the ITA or 487 of the *Criminal Code* to access the documents necessary to advance the criminal investigation. Put another way, the requirement powers of ss. 231.1(1) and 231.2(1) cannot be used to compel oral statements or written production for the purpose of advancing the criminal investigation.
>
> *Jarvis* at para. 97

[43] The limitations which the Court imposed on the Minister's use of her audit powers once the taxpayer and the Minister were in an adversarial relationship were based on sections 7 and 8

of the Charter. While *Jarvis* does not deal explicitly with section 13 of the Charter, the case is nonetheless instructive because the Supreme Court found that the principle against self-incrimination found residual expression under section 7 of the Charter as an element of fundamental justice: *Jarvis* at para. 67. To that extent, the procedures described above can be seen as being in accordance with the principle against self-incrimination.

[44] This does not preclude the Friedmans from raising the constitutional invalidity or inoperability of these provisions should the need arise in subsequent proceedings. But at this stage, and on this record, the absence of a factual record and, to a limited extent the decision in *Jarvis*, militate against any interference with the orders made by the Federal Court.

V. Conclusion

[45] As a result, I would therefore dismiss the appeal with costs to the Minister. Counsel for the Minister requested increased costs in light of the Friedmans' abandonment of several of their constitutional arguments at the last minute. While the failure to give more notice is regrettable, as timely notice would have allowed counsel for the Minister to avoid spending time on issues which became irrelevant, the mischief caused is not so serious as to merit increased costs.

"J.D. Denis Pelletier"
J.A.

"I agree
M. Nadon J.A."

"I agree
George R. Locke J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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