



SIERRA LEGAL DEFENCE FUND

THE LEGAL TOOLKIT: OPTIONS, STRATEGIES AND TACTICS

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SOME HISTORY

- 1892: Sierra Club founded in U.S. (that's not us)
- 1971: Sierra Club Legal Defense Fund established in U.S. (that's not us either; today they call themselves Earthjustice Legal Defense Fund)
- 1989: Sierra Club of Canada opens its office in Ottawa (nope, that was Elizabeth May, now Stephen Hazell, and company)
- 1990: Sierra Legal Defence Fund founded in Vancouver, Canada (yep, that's us!)
- 1996: Sierra Legal Defence Fund comes to Toronto (that's us too!)
- Sept 1, 2007: Sierra Legal Defence Fund will become Ecojustice Canada (that will be us!)

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The Fine Print

This seminar and related materials do not constitute legal advice. They are simply an overview of environmental law tools and the contents of the materials, lectures, commentaries, and responses to questions are not legal advice. We advise you to seek legal advice for specific questions.

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Non-Litigation Options Litigation Options

- | | |
|---|--|
| <ul style="list-style-type: none"> • Intro: Division of Powers • Freedom of Information • Environmental Assessments • Law Reform & Public Processes • Land Trusts • International Law | <ul style="list-style-type: none"> • Intro: Court System • Civil Proceedings • Administrative Tribunals • Prosecutions • Interventions • Canadian Aboriginal Law |
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NON-LITIGATION OPTIONS

INTRODUCTION:
DIVISION OF POWERS

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DIVISION OF POWERS

- the environment is **shared** jurisdiction (federal & provincial governments)
- factors determining jurisdiction (eg, which level of Court hears a legal challenge):
 - **nature of the problem**, and
 - **agencies involved**

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DIVISION OF POWERS (continued)

- Federal government jurisdiction (s.91, Constitution):
 - Peace, order and good government (POGG);
 - 91(12) Sea Coast and Fisheries;
 - 91(24) Aboriginal Issues;
 - 91(27) Criminal law; and
 - 92 (10) Federal works and undertakings
- Provincial government jurisdiction (s.92, Constitution):
 - 92(5) Management of provincial public lands
 - 92(13) Property and civil rights
 - 92(16) Matters of a local and private nature
 - 92A Non-renewable natural resources

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NON-LITIGATION OPTIONS

FREEDOM OF INFORMATION

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FREEDOM OF INFORMATION (“FOI”)

- tool for accessing government documents.
- applies at all three levels of government:
 - Municipally: Part XX of the *Municipal Government Act*
 - Provincially: *Freedom of Information and Protection of Privacy Act* (provincial departments, agencies, commissions, boards)
 - Federally: *Access to Information Act* (federal departments, ministries agencies, commissions, boards)

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FOI (continued)

How to Make a Request (Apply)

- **Submit** a written request to the FOI Coordinator from the government department/agency **that has the information** you seek
- Don't forget the **application fee** (if required)

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FOI (continued)

Who to Contact

- **FOI Coordinator** (each provincial & federal ministry/agency has one)
- **Nova Scotia:** contact Freedom of Information and Protection of Privacy (FOIPOP) Review Office – **1-866-243-1564** or (902) 424-4684 or www.foipop.ns.ca/
- **Federal:** contact Information Commissioner of Canada – **1-800-267-0441** or 613-995-2410 or www.infocom.gc.ca

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FOI (continued)

“Scoping” Your Request

- **avoid** being too broad or vague
 - eg, avoid unnecessary cost; search and copying fees are often very high
- direct to **specific type** of documents you seek

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FOI (continued)

Response

- FOI Coordinator
 - has **30 days** to respond
 - can apply for an **extension** (written notice and reasons for the extension required)
- if no response received after deadline, it is a “deemed refusal”

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FOI (continued)

Exemptions

- some documents are **exempt** from FOI laws
 - Cabinet records
 - issues of law enforcement or national security
 - covered by solicitor-client privilege
 - other confidential information (eg, business trade secrets)
- exemptions will not be released unless you can show an **overriding public interest**

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FOI (continued)

Appeals of Decision to Deny Access to Information (provincial/municipal)

- **60-day** limitation period (from decision)
- **apply** to FOIPOP Review Office for review
- FOIPOP Review Office often requests mediation before **ruling**
- Once ruling is made, **30 days** to appeal to Supreme Court of Nova Scotia

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FOI (continued)

Appeals of Decision to Deny Access to Information (federal)

- file **complaint** with Information Commissioner (IC)
- IC produces a **report**
- once report is received, may apply to Federal Court of Canada for **review** of decision
- in some cases, IC may take case to court

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FOI (continued)

Resources

Provincial/Municipal

- FOIPOP Review Office: www.foipop.ns.ca/

Federal

- Department of Justice on access to information: canada.justice.gc.ca/en/ps/atip/index.html
- Information Commissioner: www.infocom.gc.ca

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NON-LITIGATION OPTIONS

ENVIRONMENTAL ASSESSMENT

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ENVIRONMENTAL ASSESSMENT (“EA”)

- Environmental assessment process can occur at the provincial and federal level
- Provincial – *Environment Act* and *Environmental Assessment Regulations*
- Federal – *Canadian Environmental Assessment Act*
- Topic will be covered in more detail this afternoon

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NON-LITIGATION OPTIONS

LAW REFORM & PUBLIC PROCESSES

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LAW REFORM & PUBLIC PROCESSES

- convincing **government** to **change** the **law**
- provide **input** into **legislative process** (eg, written brief or oral testimony to legislative committee)
- get **involved** in processes that have **public participation component** (eg, some EAs)
- make use of **petition processes** (eg, under Canada’s **Auditor General Act**)

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LAW REFORM

Legislative Process Resources

- Municipal By-law making powers
- Nova Scotia Legislature
<http://www.gov.ns.ca/legislature/legc//bills.htm>
- Canadian Parliament
www.parl.gc.ca/common/bills.asp?Language=E

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LAW REFORM & PUBLIC PROCESSES (continued)

Provincial options will be covered this afternoon

- **Federal petition** (*Auditor General Act*)
 - to Commissioner of the Environment and Sustainable Development (“CESD”)
 - Request
 - explanation of federal policy
 - investigation of environmental problem
 - examination of enforcement
 - **Resource**
 - CESD Guide to Environmental Petitions: www.oag-bvg.gc.ca/domino/cesd_cedd.nsf/html/guide_e.html

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LAW REFORM & PUBLIC PROCESSES (continued)

Federal petitions/options (*Canadian Environmental Protection Act – “CEPA”*)

- Citizen may request formal **investigation** (s.17), must refer to a CEPA offence
- Minister may recommend adding substance to **list of toxic substances**
- Minister can require **Pollution Prevention Plan** for “listed” toxic substance (s.56)
- **Environmental Protection Compliance Orders** (s.235) can be made by enforcement officers
- Action can be demanded if foreign country’s residents being harmed by pollutant from Canada (s.166)

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LAW REFORM & PUBLIC PROCESSES (continued)

Federal “petitions” (*Species at Risk Act* – “SARA”)

- to Minister of the Environment
- requesting that SARA apply to provincial lands
 - If provincial laws and policies are not sufficient to protect a species at risk, or
 - seeking emergency orders for the protection of species at risk

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LAW REFORM & PUBLIC PROCESSES (continued)

Federal “petitions” – eg, Oil and Gas Subsidies petition

- to Minister of Finance, etc.
- contradiction between subsidies to oil and gas industry in view of Canadian commitment and spending to comply with Kyoto Protocol

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NON-LITIGATION OPTIONS

LAND TRUSTS

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LAND TRUSTS

- Land acquisitions held in trust for future generations
- Conservation easements
- Work directly with willing landowners to negotiate conservation deals to conserve land
- Creative real estate approaches – eg, conservation agreements
- Tax incentives – eg, federal Ecogifts, property tax programs
- Most land trusts focus on conserving biological values
- **Resource:** Nova Scotia Nature Trust (<http://nsnt.ca/>)

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NON-LITIGATION OPTIONS

INTERNATIONAL LAW

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INTERNATIONAL LAW, BI-NATIONAL AND TRI-NATIONAL AGREEMENTS

Commission for Environmental Cooperation (“CEC”):

- established by Canada, Mexico and the U.S.A. under *North American Agreement on Environmental Cooperation* (NAAEC).
- Mandate
 - **foster cooperation** on environment issues
 - **oversee enforcement** of environmental laws by NAFTA parties (eg, prevent trade advantages gained at the expense of the environment)

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INTERNATIONAL LAW (continued) NAAEC – Article 13

- CEC Secretariat may prepare report on any matter within scope of CEC's annual program
- report must NOT relate to alleged failures to enforce environmental laws (That comes under Article 14.)
- Secretariat must first notify Council and may proceed unless, within 30 days of such notification, Council objects by a two-thirds vote.

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INTERNATIONAL LAW (continued) NAAEC – Article 14

- allows citizens' written submissions (petition) to CEC regarding lack of enforcement of domestic environmental law
- CEC Secretariat
 - reviews petition
 - requests response from government
 - may recommend investigation
- investigation is conducted if Council agrees (two-thirds vote)
- another two-thirds vote required to make results of investigation public
- Resource: CEC Submission on Enforcement Matters Guide – www.cec.org/files/PDF/SEM/BringingFacts-Jun02_en.pdf

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INTERNATIONAL LAW (continued)

Inter-American Commission on Human Rights

- Recent petition by Inuit for relief from climate change impacts caused by U.S. emissions
- www.inuitcircumpolar.com/index.php?ID=316&Lang=En

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LITIGATION OPTIONS

INTRODUCTION:
COURT SYSTEM

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COURT SYSTEM

Provincial Court

- Criminal matters and regulatory matters under provincial legislation (prosecutions) and municipal by-law enforcement

(NS) Supreme Court & Court of Appeal

- Civil proceedings (actions and applications), judicial review, appeals, class actions

Resources

- <http://www.courts.ns.ca/>

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COURT SYSTEM (continued)

Federal Court & Federal Court of Appeal

- Claims involving
 - federal government
 - marine and inland fisheries
 - First Nations
- Exclusive jurisdiction over federal boards and tribunals, including ministries

Resources

- www.fct-cf.gc.ca/index_e.shtml
- www.fca-caf.gc.ca/index_e.shtml

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COURT SYSTEM (continued)

Supreme Court of Canada

- All legal matters
- Highest (last) court of appeal

Resource

- www.scc-csc.gc.ca/Welcome/index_e.asp

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LITIGATION OPTIONS

CIVIL PROCEEDINGS

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CIVIL PROCEEDINGS – OVERVIEW

- What's a Civil Proceeding?
- Burden of proof-balance of probabilities
- Citizen's Suits
- Judicial Review
- Alternative Dispute Resolution – Mediation
- Class Actions
- Remedies – Injunctions, Declarations
- Other Issues – Evidence, Standing, Costs, Hiring a lawyer

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What's a Civil Proceeding?

	action	application
starts with:	Statement of claim	Notice of application
started by:	plaintiff	Applicant
evidence:	discoveries, live witnesses	The record of decision, affidavits and cross-examinations
decisions:	motions and trial	motions and hearing
cost	More	less

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What's a Civil Proceeding? (continued)

- **plaintiff** or **applicant** must prove **all elements** of claim/application
 - personal loss or injury,
 - interference with property rights, or
 - some other special damage
- proof based on
 - **oral evidence** (testimony in Court), or
 - **affidavit evidence** (testimony through written material)

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What's a Civil Proceeding? (continued)

Beware!

- **limitation periods** ("expiry dates" for commencing a proceeding)
- In Nova Scotia, the limitation periods depend on
 - **type of proceeding**, and
 - **subject matter**
- *Limitations of Actions Act*, other applicable legislation set out specific timelines

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Citizen's Suits

- civil action permitted by legislation
- Provincial options will be covered this afternoon
- availability in U.S.

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Judicial Review ("JR")

- court challenge to actions/decisions made by government officials/tribunals
- two broad "grounds" for JR:
 - **Illegality of decision**
 - **Unfairness of procedure**
- Provincial government decisions – will be addressed this afternoon
- *Federal Court Act* (federal government decisions-30 days)

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JR (continued)

Beware!

- only evidence considered by a court is **decision record**
- decision record is all material considered by decision-maker
- need material available to decision-maker **before** decision was made

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Alternative Dispute Resolution – Mediation

- **private** and **consensual** decision-making process
 - **impartial** person (the mediator) assists people in conflict to resolve problems
- Do you have to mediate?**
- Not necessarily.
 - Often parties to dispute must agree to mediation.

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Class Actions

- civil proceeding
- started by a **group (class)** of plaintiffs
- against one or more defendants
- In Nova Scotia, no specific class action legislation, but class actions are still possible
- must be "certified" by court to proceed

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Remedies – Injunctions

- Court **order** requiring a party to **refrain from** or to **take a course** of action.
- For environment-related proceedings, generally
 - **prohibit** a party from doing something, or
 - force a party to **undo** something

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Remedies – Injunctions (continued)

- Must meet 3-step legal test to succeed
 1. Is there a **serious issue** to be tried?
 2. Is an injunction **necessary to prevent irreparable harm**?
 3. What is the **balance of convenience**?

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Remedies – Injunctions (continued)

Generally, **NO** injunction against the Crown

- BUT **interim** or **interlocutory** injunction available against Crown agents (including a minister)
- AND where the Crown or agent is acting **unconstitutionally**

Beware!

- applicant for interlocutory injunction may be required to provide an **undertaking as to damages**

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Remedies – Declaration

- Court **statement** clarifying legal status/ rights

Why is it useful?

- not possible to get an injunction against the Crown; however may seek **interim declaratory relief**

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Remedies-damages and remediation

- tort: nuisance, negligence, trespass,
- contract
- evolving: trust, fiduciary duty
- statutory

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Other Issues – Standing

- **legal right** to make legal claim or seek judicial enforcement of duty/right
- must be a **person** (individual or corporation) to gain standing

Types of Standing

- Direct/Private Interest
- Public Interest

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Other Issues – Standing (continued)

- Legal test for public interest standing:
 1. Is there a **serious issue** to be tried?
 2. Is the person applying for standing **directly affected** by the issues or does s/he have a **genuine interest** in them?
 3. Is there **any other reasonable way** for the issue to get to court?
 4. Statutory?

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Other Issues – Costs

- **Reimbursement** for expenses for starting/defending an action.
- General rule: **losing party pays** (own costs and portion of winning party's costs)
 - exception: advanced costs
- Court can order **no costs**
 - eg, **sometimes** a losing party will not have to pay costs if case is in **public interest**

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Other Issues – Hiring a Lawyer

What do lawyers cost?

- Fees and disbursements

How do you find and pay for a lawyer?

- Private Bar
- Public Interest Organizations
- Environmental Law Groups
- Law Society (www.nsbs.ns.ca/public.html)

How do you work with a lawyer – the retainer.

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LITIGATION OPTIONS

ADMINISTRATIVE TRIBUNALS

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ADMINISTRATIVE TRIBUNALS – OVERVIEW

- Quasi-judicial boards
- Given decision-making power by legislation
- Review decisions; hear appeals
- eg, Environmental Assessment Board, Nova Scotia Utility and Review Board, National Energy Board
- standard of review

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LITIGATION OPTIONS

PROSECUTIONS

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PROSECUTIONS

- If you believe an **offence** has been committed, you can:
 1. Report it (possible **Crown** prosecution)
 2. Do it **yourself** (private prosecution)

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PROSECUTIONS (continued)

Private Prosecution

- legal action brought in criminal court by an **individual**
- every individual in Canada has the **right** to **swear an information** (commence a prosecution)
- usually used in respect of an offence under legislation (e.g., under the *Fisheries Act*)

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PROSECUTIONS (continued)

Conducting a Private Prosecution

- Observe an offence.
- Speak to other witnesses and gather evidence (the who, what, when and where).
- Swear an information before a Justice of the Peace
 - requires "reasonable grounds" (accused has committed offence)
- Resource: James S. Mallet, *Enforcing Environmental Law: A Guide to Private Prosecution* (Edmonton: Environmental Law Centre, 2004), see www.elc.ab.ca/publications
- Standard of proof – beyond a reasonable doubt

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PROSECUTIONS (continued)

Conducting a Private Prosecution

Beware!

- Attorney General may step in and **withdraw/stay** your prosecution.
- Costs may be awarded against unsuccessful private prosecutors.

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PROSECUTIONS (continued)

Pros (General)

- expert investigators
- public welfare offences do not require proof of intent
- public and media interest in cases

Pros (Private)

- no need for standing
- no waiting for government action
- may be entitled to portion of monetary penalty (eg, *Fisheries Act*)

Cons (General)

- proof "beyond a reasonable doubt" and evidence of lack of "due diligence"
- no right to "discover" the other side's case

Cons (Private)

- Attorney General may intervene (withdraw/stay)
- expert evidence may be difficult/expensive to obtain
- costs may be awarded against unsuccessful private prosecutors

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LITIGATION OPTIONS

INTERVENTIONS

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INTERVENTIONS

- **group** or **individual** that is **not a party** to a proceeding may **request** to intervene
- intervene as either a **friend of the court** or as an **added party**
- with the Court's leave (permission), can provide **meaningful contribution** to case

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INTERVENTIONS (continued)

- **Group** or **individual** must
 - have an **interest** in the subject matter of the proceedings, or
 - be **adversely affected** by the judgment to be given.
- With **leave**, or by **invitation**, of the court, a group or individual may intervene as a friend of the court for purpose of rendering assistance

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INTERVENTIONS (continued)

- Sierra Legal has intervened several cases, making submissions as to effect Court's decision may have re. environmental protection
 - *Hudson*
 - *Toronto Pesticides*
 - *Hollick*
 - *Imperial Oil*
 - *Canfor*
 - *North Fraser*
 - *Lake Superior*

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LITIGATION OPTIONS

CANADIAN ABORIGINAL LAW

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CANADIAN ABORIGINAL LAW

- Aboriginal peoples have rights as original peoples of Canada
- Aboriginal rights are protected under our Constitution (can be infringed only if absolutely necessary)
- Governments are in a "trust-like" relationship with Aboriginal peoples
 - obliged to consult with Aboriginal groups, and
 - accommodate Aboriginal interests during planning processes
- Honour-of-the-Crown duty to consultation and accommodate is completely outside and different to public consultation process
- Advanced costs orders (*Okanogan*)

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