Federal Court  Cour fédérale

Date: 20140127

Docket: T-769-11

Citation: 2014 FC 91

[UNREVISED ENGLISH CERTIFIED TRANSLATION]
Ottawa, Ontario, January 27, 2014

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

CONSEIL DE LA NATION HURONNE-WENDAT

Applicant

and

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Overview

[1] From 1985 to 2008, the Department of Indian Affairs and Northern Development, represented herein by Her Majesty the Queen (the Department), funded the full amount of the employer's contribution to the defined pension benefit plan of the employees of the Conseil de la Nation Huronne-Wendat (the Council). Following the Department's decision to cap its contribution to the funding of this pension plan and the other defined pension benefit plans still in place in Aboriginal communities as of April 8, 2008, the Council brought this action in damages in order to

recover its shortfalls for the years 2008 to 2013. At the time of the hearing, the quantum of the Council's claim was established, by consent, in the amount of $134,128.90.

[2] The Council alleges that the Department had a contractual, if not an extracontractual, obligation to continue to bear the actual cost of the employer's contribution to its employees' pension plan in the absence of a decision to the contrary by the Treasury Board. Before the hearing, the Council also based its claim on the Canadian government's fiduciary obligation toward Aboriginal peoples and sought a mandatory order of the Court to require the respondent to continue funding the full amount of its contribution to its employees' pension plan. This last argument and the application for a mandatory order have been abandoned.

[3] The Department advances as a preliminary argument that because the Council is asking the Court for an order depriving its decision of its effects for the years 2008 to 2013, it should have first applied for judicial review of that decision within the time limits set out in subsection 18.1(2) of the *Federal Courts Act*, RSC (1985), c F-7. On the merits, the Department submits that it respected all of its contractual obligations and committed no act or omission to which extracontractual liability could attach, and in any case, its decision to cap its funding of the employer's contribution to the pension plan of the Council's employees is a purely political one, made as an exercise of its spending power in Aboriginal affairs, which means that it cannot be a source of liability for the State.

Factual background

[4] To understand the background to this case, one must go back to the late 1970s, when the Department transferred to the various Indian band councils the responsibility of providing various government services to their members. Because the objective was to create a true Aboriginal public service, the Department decided to fund the employer's contribution to the various employee pension plans of the band councils and other Aboriginal employers to enable them to attract and retain qualified employees and provide similar social benefits to those provided by other levels of government. At the time, employers could choose between a defined contribution pension plan and a defined benefit pension plan. In 1979, the Atikamekw Montagnais Council implemented the *Native Benefits Plan* (the NBP), a defined benefit pension plan that currently has 85 participating employers and manages half a billion dollars in assets.

[5] The Council joined the NBP in 1985 and, like the other 84 employers who are currently members of the NBP, it benefited from coverage of the actual cost of its employer contribution to the plan until April 1, 2008.

[6] In 1991, the Treasury Board approved the Department's request to authorize new terms and conditions and additional funds for band employee pension plans. At the time, there were only four defined benefits pension plans (currently there are three), including the NBP, all of the other employers having originally opted for a defined contribution pension plan.

[7] The Treasury Board decision states that the upper limit for departmental funding is set at 5.5% of eligible employee payroll, while the employee's share of the cost must be at least equal to

the employer's share. However, for defined benefit pension plans, the decision involves the following:

- authorization to continue funding the four defined benefit plans ("The Native Benefits Plan", . . .) under their existing form and subject to the specific exemptions in the guidelines appearing in Appendix I; and
- maintenance of the status quo, retroactive to June 30, 1989, for the existing funding components of these four plans in accordance with Appendix I, Section B, with respect to the employer's share, the employee's share and the timing of locking in the employer's share.

[8] Appendix I contains the following excerpt:

> 7. On June 27, 1989, the department completed a detailed examination and analysis of the various options available to reduce the potential negative effects of the program terms and conditions arising from the setting of a maximum-level of contribution by the department. The Department of Indian Affairs and Northern Development (DIAND), in consultation with the Department of National Health and Welfare (NHW) which also contributes to the cost of those plans, concluded that the best solution would be to consider these four defined benefit plans as exceptions to the basic program terms and conditions and maintain the status quo for the funding of these plans by the departments.
>
> . . .
>
> 10. In the context, DIAND and NHW are proposing to exempt the four defined benefit pension plans from only those specific requirements of the program terms and conditions which impact directly on these plans. An exemption would permit the retention of the status quo for these pension plans, in their current form, with respect to the level of contribution of the departments toward the employer's share (i.e. based upon triennial actuarial valuations) and the timing of vesting of benefits and locking-in the employer's share.

[9] This is the first decision of the Treasury Board specifically authorizing the Department to cover the employer's share of contributions to the various Aboriginal pension plans.

[10] In 2005, the Treasury Board approved the Department's new Band Employee Benefits Program (BEBP), which remains in effect to this day. The Treasury Board's authorization was valid

until March 31, 2008, but it has been renewed on an annual basis in the meantime, in the absence of any major changes made to the BEBP by the Department.

[11] The BEBP Policy also states that the Department may contribute to the pension plans of Aboriginal employers and fund their share of the costs of these plans up to 5.5% of the employee's salary, subject in particular to the condition that the employee's share be at least equal to the employer's share.

[12] Again, the Treasury Board authorized the Department to exempt the three defined benefit pension plans from some of the conditions of the BEBP, including the cap of 5.5% of the employee's salary and the obligation that the employee's share of the cost be at least equal to the employer's share.

[13] At the time, the Department was still funding the actual cost of the employer's contribution to the NBP, which included four categories of employee. For example, for Category 2-Aboriginal Employees, the employee's share of contributions was 7.5% of his or her salary, while the employer's share of contributions was 13.65% of the employee's salary (1.82 times the employee's contribution).

[14] In 2007, the employees of the Department's regional office were informed by the central office that no further funds would be transferred to the regional office to fund the increase in the employers' contribution to the NBP and that if the regional office opted to continue funding the

actual cost of the employer's share of the two defined benefit plans in effect in Quebec (the third being in Manitoba), the money would have to be taken from its existing budget, as indexed.

[15] Marie-Claude Leclerc, Capacity Development and Governance Manager in the Department, explained that during an audit of NBP management carried out in 2006-07, some anomalies were identified and corrected, resulting in a certain amount of savings. She also explained that it was the end of a period of heavy growth in the number of employees eligible for the NBP, which had obviously had the effect of increasing the employers' share of the costs.

[16] The regional office was faced with two choices: either finding the money elsewhere or capping the employer's contribution to the two defined benefit pension plans in effect in its territory. The latter option was selected, and funding was capped in accordance with the payroll of December 31, 2007, subject to the indexing factor in the regional budget and to variations recommended by the actuary to the employer's contribution rate (see the letter dated May 31, 2007, from the Regional Director of the Department to the Council, Exhibit D-12).

[17] That reservation is somewhat ambiguous. Although letter D-12 clearly deals with the actuary's recommendation regarding the employer's contribution rate (for example, 13.65% of the salary for Category 2-Aboriginal Employees), the Department claims that it dealt instead with the mark-up rate recommended by the actuary (e.g. the factor of 1.82 in the example above).

[18] Regardless, because the growth in payroll had plateaued to some extent, Ms. Leclerc believed that the impact of the cap on the employers would be limited overall.

[19] Ultimately, the shortfalls in 2008 and 2009 were relatively small: $6,576.97 and $2,337.00 respectively (see Exhibit R-28).

[20] However, Sylvain Picard, General Manager of the NBP since 1995, explained that no change to the contributions had been required until an increase was recommended by an actuary in 2010 in order to cover a solvency deficiency in the NBP. Rather than increasing the mark-up rate applied to the employee's contribution to calculate the employer's contribution, the directors of the NBP, as of April 1, 2012, increased the employee's contribution rate. Still using the example of Category 2-Aboriginal Employees, the employee's contribution rate increased from 7.5% to 8.5% of his or her salary, while the employer's contribution increased from 13.65% to 15.47% (8.5% X 1.82).

[21] Obviously, the increase in the employer's contribution rate in 2010 had a direct impact on the shortfall for employers contributing to the NBP for the years 2010 to 2013, including that of the Council. The shortfall was in the amount of $42,932.77 in 2010, $26,992.89 in 2011, $27,659.80 in 2012 and $27,629.47 in 2013 (see Exhibit R-28).

[22] Currently, taking into account the 2008 cap, interpreted as suggested by the Department (namely, that it would cover any variation recommended by the actuary to the mark-up rate applicable to the employer and not to its contribution rate), the Department is funding 90% of the contribution of the 85 employers participating in the NBP, including the Council.

Issues

[23] In light of an order issued following the pre-hearing conference chaired by Richard Morneau, Prothonotary, and the submissions made before this Court by counsel for the parties, the issues in this dispute can be summarized as follows:

1. Was an application for judicial review the appropriate procedural vehicle for invalidating the administrative measure taken by the respondent, namely, the cap implemented in 2008? If so, is this remedy time-barred?
2. Did the respondent undertake a formal contractual obligation toward the Council to fund in full its contribution to the defined benefit pension plan of its employees? If so, has there been a breach of contract?
3. In the alternative, is the respondent extracontractually liable to the Council?

Analysis

Was an application for judicial review the appropriate procedural vehicle for invalidating the administrative measure taken by the respondent, namely, the cap implemented in 2008? If so, is this remedy time-barred?

[24] In abandoning the mandatory order that it had originally sought, which was meant to deprive the 2008 decision, establishing a cap, of its effects for the future, counsel for the Council believed he was rendering moot the Department's preliminary argument. Beyond its strategic aspect, the Council's decision to abandon such an order follows logically from a realistic and pragmatic analysis of its theory of the case. According to the Council, because the respondent's contractual undertaking arises from the 2005 decision of the Treasury Board, the latter may render a different decision for the future at any time. A mandatory order would therefore be risky.

[25] However, the Council recognizes that in order to respond to the third issue raised in this case, namely, whether the respondent has committed an act or omission engaging its extracontractual liability, the Court must analyze the lawfulness of the decision to set a cap.

[26] The Department is not abandoning its preliminary argument, submitting that because the practical purpose of this dispute is to have the cap eliminated, even for a limited time, the applicant was required to bring an application for judicial review under section 18 of the *Federal Courts Act*, RSC 1985, c F-7, which it failed to do within the time limits set out in that statute.

[27] The Department is inviting this Court to distinguish this case from the decisions of the Supreme Court of Canada in *Canada (Attorney General v Telezone Inc*., [2010] 3 SCR 585 [*Telezone*], and *Manuge v R*, [2010] 3 SCR 672 [*Manuge*], in which, it argues, the link between the validity of the administrative decision and the damages claimed by the applicants was less direct than in this case. In *Telezone*, it was not a case of depriving the administrative decision of its effects, given that the decision in question to grant four telecommunications licences instead of six remained in effect. The appellant in *Manuge*, through an application for leave to bring a class action, was claiming damages on the basis of an alleged violation of subsection 15(1) of the *Canadian Charter of Rights and Freedoms*.

[28] With respect, I do not share the Department's view. The primary distinction between an application for judicial review and a claim for damages (apart from the procedural vehicle) is the nature of the remedy or remedies sought. It is always open to the applicant to seek the performance of an obligation by equivalence rather than specific performance. In many cases, specific performance is impossible given, for example, the resulting impact on the rights of third parties. In *Telezone*, an order whose purpose was to invalidate a decision by Industry Canada would have affected, to some extent, the rights of third parties, the four licence holders, who had contracted with

the Government in good faith. In this case, the Council is not asking that the decision be deprived of its effects for the 84 other employers participating in the NBP or for the employers participating in the other two defined benefit pension plans.

[29] It is possible to invoke the unlawfulness of an administrative decision as a source of the State's contractual or extracontractual liability. "If the plaintiff has a valid cause of action for damages, he or she is normally entitled to pursue it" (*Telezone*, above, at para 76). In Quebec civil law, the plaintiff who invokes a fault (contractual or extracontractual), damage and a causal link between the two should also be entitled to bring an action in damages against the State. The Council's action in damages, the ultimate private remedy, in based primarily on a breach of contract. It therefore appears to me that the Department is proposing a rather artificial distinction.

[30] The Department also submits that the validity of an administrative decision should not be analyzed outside the context of an application for judicial review, as the Court would not have the benefit of the certified record of the administrative tribunal or decision maker.

[31] In the context of a claim for damages, the parties are masters of their own evidence, subject to its lawfulness and relevance, and they may file any exhibits on which they wish to base their arguments and call the necessary witnesses to enlighten the Court. This procedural argument by the Department should therefore not prevail over the merits of the Council's claim.

[32] In any case, as indicated by Justice Binnie in *Telezone* at paragraph 18, "[t]his appeal is fundamentally about access to justice." This is especially true when, as in this case, there is no need to distinguish the Court's exclusive jurisdiction from its concurrent jurisdiction.

Did the respondent undertake a formal contractual obligation toward the Council to fund in full its contribution to the defined benefit pension plan of its employees? If so, has there been a breach of contract?

[33] According to the Council, the respondent's contractual undertaking is rooted in the 2005 decision of the Treasury Board, and the terms and conditions of that undertaking can be found in the BEBP Policy (Exhibit R-4). It adds that in the body of documents produced by Department officials, both before and after 2005, the officials confirmed the binding nature of the undertaking, or at least their understanding of it. Essentially, the Council is arguing that the Department formally undertook a contractual obligation to fund its contribution to the NBP in full, including any variation of that contribution based on increases to its payroll or on the actuarial valuation of the plan. The survival and integrity of the NBP depended on this undertaking.

[34] In addition to the wording of the BEBP Policy itself (the Treasury Board's decision being too recent and therefore unavailable), the Council is basing its position on several documents issued by the Department. Examples include the fact that the two defined benefit pension plans in effect in the province of Quebec were exempted from a freeze on the funding of the BEBP imposed by the Department for the 1996-1997 fiscal year (Exhibit D-7), the reasons provided in support of this exemption (Exhibit R-25), and the clarifications provided in March 1998 to the regional offices of Quebec and Manitoba (Exhibit R-19). In all of these documents, the Department reiterates the Crown's commitment to continuing to [TRANSLATION] "provide the funds to cover the employer's

share of registered 'defined benefit' pension plans in accordance with actuarial valuations and verified payroll records."

[35] The same argument was used by the Department's regional office in Quebec when, in March 2007, it tried to persuade the central office not to apply the proposed cap to the two defined benefit pension plans in effect in Quebec (Exhibit R-26).

[36] According to the Council, as soon as the Treasury Board approved the BEBP on behalf of the Queen's Privy Council for Canada, in accordance with the authority contained in paragraph 7(1)(*c*) of the *Financial Administration Act*, RSC (1985), c F-11 (FAA), the Department became contractually bound by its contents. The Council therefore submits that the Treasury Board's authorization constitutes a unilateral contract, as per article 1380 of the *Civil Code of Québec* (CCQ), and that its terms and conditions are set out in the BEBP Policy.

[37] While it is true that the State's contracting powers and public spending powers are subject to authorization by legislation (*Larocque v Canada (Minister of Fisheries and Oceans)*, 2006 FCA 237 at paras 15 and 17), in this case authorization from the Treasury Board, it does not follow that such authorization is sufficient to constitute a source of contractual obligations. There must also be a meeting of the minds with respect to the essential elements of the contract.

[38] In the section entitled "Program Overview", the BEBP Policy sets out the following:

> [The department] <u>may contribute</u> toward the cost of the eligible employer's share of pension and benefits plans for eligible employees delivering services pursuant to an eligible program.

> The department may contribute toward private pension plans, Canada/Quebec Pension Plan . . . . Funding levels are based on the following rates:
>
> > (a) The department may contribute to an eligible employer an amount up to a total of the sum of 5.5% . . . of eligible employee payroll toward the employer's share of contributions to an employer-sponsored pension plan . . . .
>
> . . .
>
> The employee's share of the cost of employer-sponsored pension plans will be at least equal to the employer's share contributed by [the department].
>
> Only the three existing defined benefit pension plans may vary from the levels specified above (see Annex-3: Terms and Conditions for Existing Defined Benefit Pension Plans).
>
> . . .
>
> The [BEBP] program can be funded through a Contribution, a *Flexible Transfer Payments* and an *Alternative Funding Arrangement* authority. [Emphasis added.]

[39] In the section entitled, "Eligible Recipients", the following passage appears:

> In the following specific instances only, certain of the [BEBP] program criteria do not apply:
>
> . . .
>
> > (b) Notwithstanding the terms and conditions described here which apply to the [BEBP], there are three defined benefit pension plans which pre-existed the current [BEBP]. In order to enable their continuance, they have been allowed limited exemption from four specific areas. Variations from certain terms and conditions, as described in Annex-3: Terms and Conditions for Existing Defined Benefit Pension Plans, applies to these plans. [Emphasis added.]

[40] Finally, Annex-3 provides the following:

> . . . In this context, [the department] exempted the three defined benefit pension plans from only those specific requirements of the

> program terms and conditions which impact directly on these plans. The exemption permits the retention of the *status quo* for these pension plans, in their current form, with respect to the level of contribution of the department toward the employer's share (i.e. based upon triennial actuarial valuations) and the timing of vesting of benefits and locking-in the employer's share. [Emphasis added.]

[41] In the Council's case, this policy was implemented, for all of the relevant period, through limited-term Comprehensive Funding Arrangements (CFAs) [Exhibits D-5 and D-6], which covered funding for various programs, including the BEBP. Each of these arrangements, duly signed by the Council, contains a clause incorporating the reservation contained at section 40 of the FAA to the effect that any payments under the contract are subject to the availability of funds for the fiscal year in which the commitments would come in course of payment. In the CFAs signed after April 1, 2008, the funding amounts for the BEBP reflect the cap, as interpreted by the Department, and are therefore set at about 90% of eligible employee payroll.

[42] Neither the text of the BEBP Policy nor the contents of the CFAs reflect a unilateral contractual undertaking by the Department to cover the actual cost of the Council's share of its employees' pension plan. The Council submits that the CFA, as a vehicle of undertaking, is inconsistent with the source of the undertaking, which is the BEBP Policy. I, however, am of the view that the vehicle is consistent with the policy, since without the exemption authorized in 2005, the Department would have exceeded the Treasury Board's authorization to fund the employer's contribution up to 5.5% of the employee's salary, as long as the employee's share of the cost is at least equal to the employer's. This interpretation of the exemption is confirmed by the analysis of the policy applicable to defined contributions plans. The text is clear: "The department may contribute to an eligible employer an amount up to a total of the sum of 5.5% . . . of eligible

employee payroll . . .". It seems obvious that there is nothing to prevent it from paying a lower amount. Appendix I contains an exemption relating to this maximum rather than a formal undertaking to take responsibility for the employer's full share of the cost of the defined benefit pension plans.

[43] Indeed, it would have been surprising for the Department to make such a contractual commitment without a defined term in a context in which it was not the employer. As admitted by Sylvain Picard, General Manager of the NBP, when the decision was made in 2010 to raise the contribution rate of Category 2-Aboriginal Employees to 8.5% and that of the employers to 15.47%, other reductive measures could have been applied, such as changing the age of retirement or the indexation rate for benefits (50% rather than 100%). The Department has no control over the choice of reductive measures available to cover a shortfall, nor does it have any control over the total payroll, the second variable in the equation. If the Court were to accept the Council's position, these elements would have a significant impact on the Department's financial commitments, without any intervention possible by the latter.

[44] The Council submits that the CFAs duly signed by a Council representative are contracts of adhesion. However, it has not specified what the consequences would be of such a characterization in the circumstances of this case. It has not identified any external clauses (art 1435 CCQ) or any illegible, incomprehensible (art 1436 CCQ) or abusive clauses (art 1437 CCQ). The mere fact that a contract is a contract of adhesion does not suffice to allow the adherent to repudiate its validly given consent.

[45] The decisions of the Federal Court of Appeal (FCA) and this Court in *Canada (Attorney General) v Simon*, 2012 FCA 312 [*Simon*] and *Attawapiskat First Nation v R*, 2012 FC 948 [*Attawapiskat*], are of no assistance to the Council. In those two cases, the FCA and this Court essentially confirmed that the application or interpretation of a CFA between an Indian band and the Government could give rise to a public law remedy such as an application for judicial review, given the *sui generis* nature of the relationship between the Government and the Aboriginal bands. In this case, the Council opted for the private law remedy of a claim for damages, a remedy whose availability in the circumstances is recognized by the FCA in *Simon*, above, at paragraph 30.

[46] In that case, the council was criticizing the Department for unilaterally modifying, without prior consultation, the guidelines to which the duly signed funding agreement referred. The FCA, which was hearing an appeal against an interlocutory injunction order, carefully noted at paragraph 34 of its reasons that "neither these reasons nor the reasons of the judge should be seen as expressing a favourable or unfavourable opinion on any of the issues raised by the parties in the underlying judicial review application" (note that this application for judicial review was allowed by the Court of November 4, 2013—2013 FC 1117—and that an appeal was filed on December 13, 2013).

[47] In *Attawapiskat*, the situation was very different from the case at hand, in that the Department was relying on a default clause contained in a comprehensive funding agreement to appoint a third-party manager to the band council. In the context of an application for judicial review, the Court had to interpret the agreement to determine whether, given the relationship between the Government and the Aboriginal bands, the decision was excessive. In that case,

members of the community were facing a severe housing crisis, a fact that raised several issues of public interest.

[48] In this case, the Council is claiming neither a unilateral change to the content of the CFAs nor an abuse of right by the Department, and it is not even claiming that the case has a significant public dimension with a very serious, exceptional effect on the rights or interests of a broad sector of the population.

[49] I therefore conclude that, during the relevant period, the parties were bound by their various CFAs and that these were consistent with the spirit and letter of the BEBP Policy, as approved by the Treasury Board.

In the alternative, is the respondent extracontractually liable to the Council?

[50] The Council submits that if the BEBP Policy does not represent the terms and conditions of a contractual undertaking on the part of the Department to continue covering the actual cost of its contribution to the NBP, until the Treasury Board decides otherwise, the undertaking expressed in the Policy still represents a source of extracontractual liability, and its breach by the Department has engaged the Department's liability to the Council. It adds that, having chosen to transfer the responsibility for managing the various governmental programs to the Indian band councils, the Department must apply that decision diligently (Patrice Garant, Philippe Garant and Jérôme Garant, *Précis de droit des administrations publiques*, 5th ed, Éditions Yvon Blais 2011, page 350). The Council characterizes the 2008 decision to cap funding for the employer's contribution to the NBP

as an unreasonable exercise by the Department of its executive power. In its view, this represents a breach rendering the Department extracontractually liable.

[51] The Department's response is that the impugned decision is purely political in nature and therefore not subject to interference from the courts. It adds that if the Court decides that this was an operational decision or the implementation of a policy, the Department has committed no breach, given that the BEBP Policy does not contain an obligation to cover the actual cost of the employer's contribution to the BEBP.

[52] Because the alleged actions occurred in Quebec, the *Crown Liability and Proceedings Act*, RSC 1985, c C-50, and articles 1376 and 1457 of the CCQ are applicable (*Canadian Food Inspection Agency v Professional Institute of the Public Service of Canada et al*, [2010] SCR 657 at paras 25 and 26).

[53] The Court's interpretation of the contents of the BEBP Policy (paragraphs 42 and 43 of these Reasons) is sufficient to dispose of the Council's argument that the failure to respect the undertaking contained in the Policy engages the Department's extracontractual liability.

[54] When analyzed in its historical context, the Council's position engenders a certain amount of sympathy. Today it must face the financial consequences of a choice of pension plan made at a time when the available funds enabled the Department to fund its contribution in full. This is probably what caused the employees of the Department's regional office to spend so much energy attempting to maintain the status quo. However, as mentioned above, because the Department is not

the employer and because it has no control over the total payroll or any reductive measures that could be taken to cover an operational or solvency deficit with respect to the pension regime, deciding to cap its funding, as it did in 2008, particularly given that it is covering any variation in the employer's contribution rate recommended by the actuary, is a reasonable decision that constitutes sound stewardship of public funds.

[55] In any case, this decision is a purely political one that cannot give rise to the intervention of this Court outside the context of contractual obligations (*Montambault c Hôpital Maisonneuve-Rosemont*, 2001 CanLII 11069 (QC CA) at para 77).

Conclusion

[56] For the reasons given, I am of the view that the Council's action in damages should be dismissed with costs.

JUDGMENT

THE COURT ORDERS that

1. The action of the Conseil de la Nation Huronne-Wendat is dismissed;

2. Costs are awarded to the respondent.

"Jocelyne Gagné"
Judge

Certified true translation
Francie Gow, BCL, LLB

FEDERAL COURT

SOLICITORS OF RECORD

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