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# CHRISTIAN LEGAL FELLOWSHIP NATIONAL CONFERENCE

Mississauga – September 27, 2019

## ESSENTIAL CHARITY LAW UPDATE


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<p><b>Essential Charity Law Update</b></p> <p><b>By Terrance S. Carter, B.A. LL.B., Trademark Agent</b> tcarter@carters.ca 1-877-942-0001</p> <p>© 2019 Carters Professional Corporation</p> <table border="0"><tr><td data-bbox="259 833 645 882">CARTERS PROFESSIONAL CORPORATION TOLL FREE: 1-877-942-0001</td><td data-bbox="652 833 1209 882">Ottawa Toronto Orangeville <a href="http://www.carters.ca">www.carters.ca</a> <a href="http://www.charitylaw.ca">www.charitylaw.ca</a> <a href="http://www.antiterrorism.ca">www.antiterrorism.ca</a></td></tr></table>		CARTERS PROFESSIONAL CORPORATION TOLL FREE: 1-877-942-0001	Ottawa Toronto Orangeville <a href="http://www.carters.ca">www.carters.ca</a> <a href="http://www.charitylaw.ca">www.charitylaw.ca</a> <a href="http://www.antiterrorism.ca">www.antiterrorism.ca</a>
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<p><b>OVERVIEW OF THE TOPICS COVERED</b></p> <ul style="list-style-type: none"><li>• Political Activities and Public Policy Dialogue And Development Activities (“PPDDAs”)</li><li>• 2019 Federal Budget Highlights</li><li>• Advisory Committee on the Charitable Sector</li><li>• Report of the Special Senate Committee on the Charitable Sector</li><li>• Recent CRA Publications and Programs</li><li>• Corporate Law Updates</li><li>• Anti-money Laundering / Anti-terrorism Financing</li><li>• Federal Legislation Update</li><li>• Case Law of Interest</li></ul> <p><a href="http://www.charitylaw.ca">www.charitylaw.ca</a> <span style="float: right;"><a href="http://www.carters.ca">www.carters.ca</a></span></p>

## POLITICAL ACTIVITIES AND PUBLIC POLICY DIALOGUE AND DEVELOPMENT ACTIVITIES (“PPDDAs”)

- Amendments to the *Income Tax Act* in Bill C-86, *Budget Implementation Act, 2018, No. 2*
  - Bill C-86 that received Royal Assent on December 13, 2018 included amendments to the *Income Tax Act* (“ITA”) to remove the “substantially all” test that had restricted registered charities from devoting no more than 10% of their resources on permitted political activities that were ancillary and incidental to their purposes, including gifts to other charities
  - However, Bill C-86 kept the prohibition on charities from the “direct or indirect support of, or opposition to, any political party or candidate for public office”

- Bill C-86 added a new definition of charitable activities that includes “public policy dialogue and development activities carried on in furtherance of a charitable purpose”
  - Explanatory notes clarified that charities’ participation in “public policy dialogue and development activities” (“PPDDAs”) is “without limitation”
- Bill C-86 also provides that PPDDAs do not become non-charitable collateral purpose
- Amendments to the ITA did not define “public policy dialogue and development activities”
  - The explanatory notes though stated that PPDDAs “generally involve seeking to influence the laws, policies or decisions of a government, whether in Canada or a foreign country”

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- On January 21, 2019, CRA released draft CG-027 Public Policy Dialogue and Development Activities by Charities (the “Draft Guidance”) together with a new Q&A webpage on PPDDAs by charities
  - The Draft Guidance states that “public policy” means the laws, policies, or decisions of a government, whether in Canada or a foreign country
  - PPDDAs are activities of the charity to participate in the public policy development process, or facilitate the public’s participation
  - Definition of PPDDAs confirmed to include “seeking to influence the laws, policies, or decision of a government, whether in Canada or a foreign country,” as well as other activities, including disseminating information or research to the public

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- The Draft Guidance confirmed that the ITA places no limits on the quantum of PPDDAs
- As such, charities may devote up to 100% of their total resources on PPDDAs, provided that the PPDDAs further the charity’s stated charitable purpose
- However, PPDDAs as a means to achieve a charitable purpose, cannot become the purpose itself
  - E.g., “charitable purpose” cannot “refer to influencing the laws, policies, or decision of a government”
  - Rather, the purpose has to be a charitable purpose at common law, with PPDDAs simply being utilized as a means to achieve that purpose

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- In addition, PPDDAs, when considered together with the charity’s stated purpose, must provide a public benefit
- However, charities continue to be prohibited from “directly or indirectly support or oppose a political party or candidate for public office,” examples of which are provided in the Draft Guidance
- Examples of direct support or opposition, include:
  - “endorsing a candidate over social media”
  - “telling people on a charity’s website not to vote for a political party”
  - “making a donation to a political party or a candidate’s election campaign”

- Examples of indirect support or opposition:
  - “a charity’s internal planning documents explicitly confirm that it will oppose a political party that takes a different view on a certain policy issue...”
  - “the internal minutes of a meeting of the directors of a charity record their explicit decision to oppose a candidate in a provincial election...”
- The Draft Guidance also requires that a registered charity with a website or blog, “must monitor these platforms, and remove messages that support or oppose a political party or candidate for public office” or post a notice that “messages that support or oppose a political party or candidate will be removed”

- Examples of allowed activities:
  - Communicating about policy issues
    - PPDDAs can occur at any time, either in or outside of an election period, provided they do not identify a political party or candidate even if it is the same as a political party
  - Informing the public about policy positions of political parties and candidates
    - Registered charities can, “[p]ublish on its website or social media platforms... the policy positions of all political parties...” provided it does so in a neutral fashion
    - Hold all candidates debates
    - Provide the voting record for all MPs or other level of government on an issue

- The Draft Guidance also clarifies the application of the ITA to representatives of a charity involved in politics during “personal time”:
  - Must be done carefully
  - Registered charities cannot “use its resources, such as office space, supplies, phone, photocopier, computer, or publications, and human resources such as employees or volunteers, to support that individual’s personal political involvement”
  - Representatives are suggested to “indicate that their comments are personal rather than the views of the charity”

- The Draft Guidance notes that registered charities need to be aware of the intersection with other legal requirements, such as:
  - Federal and provincial lobbying and election legislation
  - The common law in different provinces, as applicable, although the Draft Guidance is unclear on this point
- While PPDDAs have been an important legislative development for charities, there are some areas of caution:
  - Watch for mission drift in charitable purposes
  - Charities will need to keep books and records of their PPDDAs, particularly minutes of board meetings
  - T3010 and T2050 require that a charity must describe PPDDAs concerning how those activities relate to their charitable purposes

## 2019 FEDERAL BUDGET HIGHLIGHTS

- Federal Budget 2019 was presented on March 19, 2019
- **Journalism:**
  - Budget 2019 proposed measures to support Canadian journalism:
    - Permits certain news organizations to register as “qualified donees” under the ITA, as of January 2020
    - Makes available a 25% refundable tax credit on salary or wages paid to eligible newsroom employees of qualifying organizations
    - Makes available a temporary 15% non-refundable tax credit for “eligible digital subscriptions”

- Some of the requirements for any of these incentives to apply, include:
  - Journalism organization must be classified as a “qualified Canadian journalism organization” (“QCJO”) within meaning of the ITA
  - A QCJO will need to meet eligibility requirements to be developed by an independent panel of experts from the Canadian journalism sector
  - A QCJO must engage primarily in the production of original news content on general interest matters
  - To be eligible as a qualified donee, a QCJO will also need to meet the narrow definition of “qualifying journalism organization”, in which event it could be registered as a “registered journalism organization”

- **Stock Options:**
  - Budget 2019 proposed to limit the use of the current employee stock option regime for high-income individuals employed at large, long-established, mature firms
  - In this regard, the Federal Government tabled a Notice of Ways and Motion to amend the ITA on June 17, 2019
  - A Backgrounder was also published to expand on the commentary provided in Budget 2019
  - The direct consequence of the new rules, if adopted by the new government, would be to disallow the additional deduction for charitable donations of securities acquired under an employee stock option agreement above the vesting limit of \$200,000



- **Social Finance Fund:**
  - Further details to establish the Social Finance Fund proposed in the 2018 Fall Economic Statement, providing up to \$755 million on cash basis over a period of 10 years to provide charities, non-profits, and other social purpose organizations with access to new funding, and connections to private investors
  - The proposed investment of \$50 million over two years in the Investment and Readiness stream, which would assist social purpose organizations to successfully participate in the social finance market would commence starting in 2019 – 2020

- **Donations of Certified Cultural Property:**
  - Proposal to amend the *Cultural Property Export and Import Act* and the ITA to remove the requirement of “national importance” to qualify for enhanced tax incentives for donations of cultural property
- **Health Proposals:**
  - Creation of a national Canadian Drug Agency
  - Proposal to expand list of healthcare services and medical products exempt from GST/HST under the *Excise Tax Act*
  - Medical expense tax credit for expenses incurred to access cannabis for medical purposes after October 17, 2018

## ADVISORY COMMITTEE ON THE CHARITABLE SECTOR

- 2018 Fall Economic Statement released on November 21, 2018 by the Department of Finance announced the government's commitment to establish a permanent Advisory Committee on the Charitable Sector
- The Advisory Committee is to regularly consult with charities and advise the government with respect to important issues facing the charitable sector
- On August 23, 2019, the Honourable Diane Lebouthillier, Minister of National Revenue announced the full membership of the Advisory Committee, which is comprised of 3 senior Government officials (2 from the CRA, and one from Finance Canada), as well as 14 appointed sector members

## REPORT OF THE SPECIAL SENATE COMMITTEE ON THE CHARITABLE SECTOR

- On January 30, 2018, the Senate of Canada appointed a Special Committee to study the impact of federal and provincial laws governing charities, and the charitable sector on Canada
- In its year-long study, the Special Committee heard from various sector and government witnesses on an ongoing basis starting in April 2018 through to April 2019
- The final report, *Catalyst for Change: A Roadmap to a Stronger Charitable Sector* was released on June 20, 2019, and made 42 recommendations to the Government of Canada

- Of the 42 Recommendations, some key ones of interest are:
  - Tax Court of Canada be given jurisdiction for hearings *de novo* over appeals from Charities Directorate decisions
  - Current three categories of charities to be replaced by two categories, being public and private charities
  - Replace direction and control with an “expenditure responsibility test”
  - Review ITA provisions regarding charities every five years
  - Pilot project to study eliminating capital gains tax on charitable donations of private company shares and real estate
  - Consider means of ensuring that charities do not languish in donor-advised funds
  - Review of “ineligible individual” provisions in the ITA

## RECENT CRA PUBLICATIONS AND PROGRAMS

- On January 11, 2019, the CRA published its “Report on the Charities Program 2016 to 2018”, which provides a review of statistics of registered charities, as well as programs and other resources implemented by the CRA over the past three years
  - The number of applications for charitable status decreased from 3,306 to 3,142
  - The number of charitable registration decreased from 1,693 to 1,569
  - Total number of revocations, including voluntary, after audit, and other revocations, increased from 1,372 to 1,562

- CRA states that it will be working on compliance related projects including:
  - “Reviewing the boards of registered charities to identify whether there are concerns related to ineligible individuals
  - Reviewing activities involving the acquisition and construction of real estate to ensure such activities further a charitable purpose
  - Reaching out to registered charities that have not been active for several years to confirm that they still meet the requirements for registration
  - Continuing to make automated courtesy calls to notify charities that the due date for filing their completed annual information return is approaching”

- On March 8, 2019, the CRA published an information website, entitled “Virtual Currency”, along with a *Guide for cryptocurrency users and tax professionals*, providing compliance guidelines on digital/virtual currencies
- On June 1, 2019, the CRA launched new digital services through My Business Account, as a product of the Charities IT Modernization Project (“CHAMP”), including:
  - Online filing of T3010 charity returns
  - Ability to update certain information about charity electronically, including addresses and list of directors
  - New online application for charitable status and discontinuing Form T2050 as of September 30, 2019
    - There are some differences between the questions on the online form and Form T2050
    - Paper Form T1789 may still be obtained from CRA

## CORPORATE UPDATE – FEDERAL

- On October 4, 2018, Corporations Canada announced a new online service to obtain a certificate of compliance or a certificate of existence for a NFP that is incorporated under the *Canada Not-for-Profit Corporations Act* (“CNCA”)
- The final *Regulations Amending the Canada Not-for-profit Corporations Regulations* and *Regulations Amending the Canada Cooperatives Regulations* were published on June 17, 2019, and will come into force on January 15, 2020
  - Amendments to the CNCA *Regulations* generally focus on fees and online services, including an escalator clause to periodically adjust fees, similar to the *Cooperatives Regulations*, which also focus on changes to service fees

## CORPORATE UPDATE – ONTARIO

- Ontario government has indicated early 2020 for proclamation of Ontario *Not-for-Profit Corporations Act, 2010* (“ONCA”), but exact timing remains uncertain
- As of December 10, 2018, charities and not-for-profit corporations incorporated under the *Ontario Corporations Act* must keep, at their head office, a register of ownership interests in real property in Ontario along with certain supporting documents
- In December 2018, the government announced a joint consultation and review of the *Co-operative Corporations Act* by Ministry of Finance and Ministry of Government and Consumer Services

## CORPORATE UPDATE – BRITISH COLUMBIA (BC)

- **BC Public Benefit Companies:** On May 16, 2019, Bill M 209, *Business Corporations Amendments Act (No. 2), 2019* received Royal Assent
  - Bill M 209, similar to its predecessor Bill M 216, will amend the BC *Business Corporations Act* to introduce “benefit companies” as a new category of corporations
  - Benefit companies pursue social and environmental goals, rather than just profit, and must include a benefit statement
- **Consultation on Proposed Societies Act Amendments:** On August 23, 2019, the BC Ministry of Finance ended its consultation on 36 proposed amendments to address ambiguities, omissions and inconsistencies in the BC *Societies Act*, as well as transition from the previous *Society Act* to the current Act

## ANTI-MONEY LAUNDERING / ANTI-TERRORISM FINANCING

- On June 21, 2019, Bill C-97, *Budget Implementation Act, 2019, No. 1* received Royal Assent, which included:
  - Amendments to the PCMLTFA, allowing the Governor in Council to make regulations defining “virtual currency” and “dealing in virtual currencies”, and to amend disclosure provisions relating to designated information
  - Amending the *Criminal Code* to criminalize reckless concealment of the origin of funds
- On July 10, 2019, *Regulations Amending Certain Regulations Made Under the Proceeds of Crime (Money Laundering) and Terrorist Financing Act, 2019* introduced a number of requirements for prescribed entities, including:
  - Maintaining “large virtual currency transaction records” indicating the receipt of amounts of \$10,000 or more in virtual currency in a single transaction

- Requirement for financial entities to verify the identity of each authorized user and maintaining records regarding every “prepaid payment product account”
  - This would include, for example, accounts tied to prepaid cards programs, and permitting funds or virtual currency of \$1,000 or more to be added in a 24-hour period, or be maintained in the account
  - But would exclude accounts tied to prepaid payment products, which would include disaster relief prepaid cards, used for purposes of humanitarian aid by registered charities

## FEDERAL LEGISLATION UPDATE

- **PIPEDA Reforms:** On November 1, 2018, the *Digital Privacy Act* came into force, establishing mandatory data breach reporting and recordkeeping requirements by organizations under the *Personal Information Protection and Electronic Documents Act* (“PIPEDA”)
  - A new Division 1.1 “Breaches of Security Safeguards” was added to PIPEDA, in addition to the *Breach of Security Safeguards Regulations*
- On May 21, 2019, the Innovation, Science and Economic Development Canada Minister Navdeep Bains launched the Digital Charter to lay the foundation in modernizing privacy rules in Canada, in addition to proposing reforms to PIPEDA

- **Canada Elections Act:** Bill C-76, *An Act to amend the Canada Elections Act and other Acts and to make certain consequential amendments* came into force on June 13, 2019
  - *Canada Elections Act* now imposes reporting requirements on third parties that engage in “partisan activities, partisan advertising, and election surveys,” in addition to “election advertising”
    - Regulated activities during both the election period, and the pre-election period are now covered

- **Trademarks Act:** On June 17, 2019, significant amendments to the *Trademarks Act* came into force, some of which are as follows:
  - Definition of “trademark” was greatly expanded
  - Elimination of the requirement for actual use to have occurred prior to proceeding to registration
  - Addition of requirement to classify goods and services based on the Nice classification system, and a class-based government fee system for filing and renewal
  - Trademarks will be examined for distinctiveness
  - Term of registration and subsequent renewals reduced from 15 years to 10 years
  - A simplified process for registering marks in multiple jurisdictions around the world



- **Consultation on Proposed *Uniform Informal Public Appeals and Crowdfunding Act*** (“Proposed Uniform Act”): The Uniform Law Conference of Canada (“ULCC”), which seeks to promote uniformity of legislation among the provinces, released a Consultation Paper on the Proposed Uniform Act
  - The Proposed Uniform Act revises the *Uniform Informal Public Appeals Act*, which was released by the ULCC in 2011 and has been adopted in Saskatchewan and implemented in the Internet crowdfunding campaign involving the Humboldt Broncos incident in 2018
  - In this regard, ULCC is seeking feedback from interested persons and organizations until January 15, 2020

## CASE LAW OF INTEREST

- ***The McKay Cross Foundation v ICSS, 2018 ONSC 6422 (October 30, 2018)***
  - Application to dismiss a claim made by plaintiffs for return of a \$100,000 donation to a registered charity, *Innovative Community Support Services*
  - Court considered the evidence and agreement between both parties to determine if donated funds were specific purpose charitable funds
  - Court found that donation was made with no strings attached; agreement was “too vague to be enforceable” and email exchanges did not indicate that donation was for a specific purpose
  - Charities and donors should enter into proper gifting agreements prior to donations being made, especially if gift is intended to have specific purpose

- ***Friends of Toronto Public Cemeteries Inc. v Mount Pleasant Group of Cemeteries (“MPGC”), 2018 ONSC 7711 (December 31, 2018)***
  - Plaintiffs claimed that MPGC was a trustee of the cemeteries, had improperly appointed directors, and was not in compliance with its governing legislation
  - Court examined MPGC’s complicated corporate and trust history going back to 1826 and found that
    - MPGC was subject to the trust and governance provisions of its 1826 and 1849 Acts
    - The current directors of MPGC had not been validly appointed as trustees in accordance with its 1849 Act

- MPGC continues to hold its assets as trustee of the trust created by 1826 Act and amendments
- Trust administered by MPGC is a charitable trust
- MPGC is a trustee subject to the CAA
- The funding and operation of visitation centres and funeral homes are beyond the scope of the stated purpose of a “cemetery or cemeteries or places for the burial of the dead”
- The Court stated that
  - “...a blanket statement that *no* charitable corporations hold their assets in trust is simply too broad to be sustained.”
  - “Care must be taken to examine the corporate and trust history to determine what conclusion best fits the facts.”

- ***Hemming v Jazz.FM 91 Inc, 2018 ONSC 7781 and 7783 (December 14 and 21, 2018)***
  - Case arose from a dispute between an incorporated registered charity and a group of dissident members seeking a membership list, including email addresses, in accordance with the statutory provisions of the Ontario *Corporations Act*
    - Charity refused to release members' email addresses arguing obligation to protect its members' privacy
  - Court ordered charity to provide email addresses
    - In doing so, the court also ordered costs be paid by the charity to convey message that the best way to deal with a dissident group is at the members' meetings and not misusing the corporation's money by "tossing roadblocks in the way of democracy."

- A week later, officers of the charity appeared before the Divisional Court, requesting stay of the order
  - The court ordered disclosure of the email addresses on the basis that it does not cause harm and that "[l]evelling the playing field for dissidents enhances member democracy"
- This case serves as a reminder for charities to comply with the statutory obligation to provide membership lists, and the willingness of the court to read the statute in favor of the members' rights in a dispute

- **Cases on the Importance in Maintaining Adequate Books and Records**
  - ***Ark Angel Foundation v MNR, 2019 FCA 21 (January 30, 2019)***
    - In this case, Ark Angel’s charitable status was revoked by the CRA because the Foundation had failed to maintain adequate books and records under s.230(3) of the ITA, and failed to devote all of its resources to charitable purposes, in part when it paid consultation fees to a director
    - In upholding the CRA’s decision, the court reminded of the need to maintain adequate books and records to allow the CRA to be able to assess whether the charity was in compliance with ITA obligations

- ***Many Mansions Spiritual Center Inc v MNR, 2019 FCA 189 (June 24, 2019)***
  - The Federal Court of Appeal upheld the CRA’s decision to revoke Many Mansions’ charitable status for failure to comply with various requirements of the ITA, including failing to maintain adequate books and records; conferring a private benefit to its pastor; and engaging in activities inconsistent with its charitable object
  - The court emphasized the importance of maintaining adequate books and records, which is a foundational obligation for significant charitable privileges

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- ***Promised Land Ministries v R*, 2019 TCC 145 (June 28, 2019)**
  - Tax Court of Canada upheld CRA’s decision to suspend the receipting privileges and qualified donee status of Promised Land Ministries for one year, for failing to maintain proper books and record, including invoices, receipts, and vouchers, for expenditures made on activities outside of Canada, and for failing to comply with a compliance agreement from a CRA audit
- These 3 cases confirm the importance for charities to maintain proper books and records for the CRA to be able to assess compliance with the ITA’s requirements
  - Failure to do so may lead to the suspension or revocation of the charitable status, or other penalties by the CRA

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- ***Lascaris v B'nai Bithr Canada*, 2010 ONCA 163 (March 4, 2019)**
  - Defamation lawsuit arising from a tweet and an article published online by the respondent charity, stating that appellant, a then-candidate in the 2015 federal election, had advocated on behalf of terrorists
  - Disagreeing with the motion judge’s conclusion that this was a strategic lawsuit against public participation, the appeal court remitted the matter back to the Superior Court
    - In doing so, the court stated that accusing any person of supporting terrorists is a serious and damaging allegation, likely to cause harm to a person’s reputation
  - This case is an important reminder for charities to adopt and implement appropriate operational policies, such as a social media or a communications policy, that carefully consider the legal risks of using social media.

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- ***Faas v CAMH*, 2019 ONCA 192 (March 11, 2019)**
  - The Faas Foundation and its principal (“Faas”) made an application under s.6 of the *Charities Accounting Act* for a court order directing the OPGT to investigate how a public foundation and registered charity, CAMH, used the funds (\$1mil) donated by Faas
  - In upholding the motion judge’s decision, the court found no error in the motion judge’s decision not to exercise the court’s discretion to make an order under s.6(3) of the CAA, as it was not of the opinion that the public interest would be served by an OPGT investigation
  - The court also agreed with the motion judge that absent evidence of financial misdeeds, Faas had no right to a detailed accounting of CAMH’s program and use of funds

- ***Chouman v Omar Al-Farooq Islamic Society*, 2019 BCSC 754 (May 15, 2019)**
  - The BC Supreme Court granted oppression remedy against three societies governed by the BC *Societies Act* and five individuals purporting to act on behalf of the societies, on the basis that by failing to follow the Societies’ by-laws and removing the petitioners as directors and members to gain control of the societies was oppressive and unfairly prejudicial behaviour
  - The respondents could not excuse their failure to follow the Societies’ by-laws by calling their behavior a mere failure to adhere to technical formalities
  - This case serves as a reminder that it is essential to comply with corporate law requirements outlined in the general operating by-law of an organization, and to do so in a reasonable and fair manner

- ***Watto v Immigration Consultants of Canada Regulatory Council, 2019 FC 1024 (July 30, 2019)***
  - The Federal Court held that the discipline section (s.158) of the CNCA does not restrict the power to discipline a member or to terminate their membership to only “the directors, the members or any committee of directors or members of a corporation”
  - While the wording of the section may be construed narrowly, a broader interpretation was more consistent with the CNCA
  - Further, if Parliament had intended to limit the power to discipline members or circumscribe the class of persons who may exercise this power, it would have done so expressly

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