

**COURT OF APPEAL FOR ONTARIO**

BETWEEN:

**NELL TOUSSAINT**

Plaintiff  
(Respondent)

and

**ATTORNEY GENERAL OF CANADA**

Defendant  
(Appellant)

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**FACTUM OF THE APPELLANT**

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October 12, 2022

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**COURT OF APPEAL FOR ONTARIO**

B E T W E E N :

**NELL TOUSSAINT**

Plaintiff  
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and

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Defendant  
(Appellant)

**FACTUM OF THE APPELLANT**

**PART I – PARTIES AND ORDER APPEALED FROM**

1. The Defendant appeals from the Order of Justice Perell (the “Motions Judge”), dated August 17, 2022, on a motion to strike the Plaintiff’s Statement of Claim. The Motions Judge dismissed the motion to strike, and in addition,
  - (a) declared that the Plaintiff’s claim was within the jurisdiction of the Ontario Court;
  - (b) declared that the Plaintiff’s claim timely, and not barred by the [\*Limitations Act\*](#);
  - (c) ordered that the Defendant could not rely on a limitations defence;<sup>1</sup> and
  - (d) made findings of fact regarding the discoverability of the Plaintiff’s cause of action.<sup>2</sup>

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<sup>1</sup> Order of Justice Perell, dated August 17, 2022 (the “Order”), Appeal Book, Tab 2

<sup>2</sup> Order, Appeal Book, Tab 2; Reasons, Appeal Book, Tab 3, at paras. 10, 90, 114, 206, and 208

## **PART II – OVERVIEW**

2. On a motion to strike the Plaintiff's Statement of Claim, the Motions Judge granted relief in the nature of a motion to strike parts of the Statement of Defence, without notice to the Defendant, before a Defence had been filed. The Motions judge made final determinations regarding the merits of the Plaintiff's claim; the merits of the Defendant's defences; and the credibility of facts alleged in the Statement of Claim.

3. The Motions Judge exceeded his jurisdiction on a motion to strike; erred in law by making final orders and declarations on a pleadings motion; and violated procedural fairness by granting relief, without notice, that the parties had not requested.

## **PART III – FACTS**

4. The Plaintiff commenced an action by Amended Statement of Claim issued October 14, 2020, further amended on May 25, 2021 (the "Statement of Claim").<sup>3</sup>

5. The Plaintiff seeks damages, Charter declarations and other related relief. In very brief summary, the Statement of Claim alleges that:

- (a) The Plaintiff entered Canada as a visitor in 1999, and remained and worked in Canada after her status had expired. She suffered serious medical issues while in Canada;
- (b) In 2009, the Plaintiff applied for, and was denied medical coverage under Canada's Interim Federal Health Program ("IFHP"). Through 2009 – 2012, the Plaintiff sought judicial review of this decision in the Federal Courts and the Supreme Court, without success;

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<sup>3</sup> Statement of Claim, Appeal Book, Tab 5

- (c) In 2013, the Plaintiff filed a complaint with the United Nations Human Rights Committee (“UNHRC”). In 2018, the UNHRC released its views, in which it found that Canada had violated the Plaintiff’s rights under the International Convention on Civil and Political Rights (“ICCPR”), and that Canada should compensate the Plaintiff;
- (d) The Plaintiff sought compensation from Canada following the release of the UNHRC’s views. Canada refused to compensate the Plaintiff. The Plaintiff commenced the underlying action.<sup>4</sup>

6. The Defendant brought a motion to dismiss the action or strike all or parts of the Statement of Claim. The grounds for the motion included:

- (a) That the Statement of Claim discloses no reasonable cause of action;
- (b) That the action is statute barred by the [Limitations Act, 2002](#);
- (c) That the action is frivolous and vexatious, and an abuse of process;
- (d) That the court has no jurisdiction over parts of the relief claimed in the Statement of Claim.<sup>5</sup>

7. There was no evidence filed on the motion.

8. The Plaintiff did not argue on the motion that the Defendant should be precluded from raising a limitations defence. To be clear, the Plaintiff did not invite the Defendant to include a limitations defence in the Statement of Defence. The Plaintiff’s position on the motion was that there was no limitations issue, and that the action should not be struck because of any limitations issue.<sup>6</sup> The Plaintiff argued that any limitations issues should not be decided on a motion to strike, and should be left to be decided as a defence in the action.<sup>7</sup>

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<sup>4</sup> Statement of Claim, Appeal Book, Tab 5

<sup>5</sup> Notice of Motion, Appeal Book, Tab 6

<sup>6</sup> Plaintiff’s Factum, Appeal Book, Tab 8, at paras. 82-85

<sup>7</sup> Plaintiff’s Factum, Appeal Book, Tab 8, at para. 86

9. The Defendant accepted the facts in the Statement of Claim as true for the purposes of the motion to strike only.<sup>8</sup>

10. The motion to strike was heard on June 13, 2022, by video conference. On August 17, 2022, the Motions Judge released Reasons For Decision (the “Reasons”), dismissing the motion.<sup>9</sup>

11. In his Reasons, the Motions Judge:

- (a) Declared that the Plaintiff’s claim was within the jurisdiction of the Ontario Court;<sup>10</sup>
- (b) Declared that the Plaintiff’s claim timely, and not barred by the [Limitations Act](#);<sup>11</sup>
- (c) Ordered that the Defendant could not rely on a limitations defence;<sup>12</sup>
- (d) Made findings of fact regarding the discoverability of the Plaintiff’s cause of action.<sup>13</sup>

12. The Motions Judge ordered that the Defendant deliver a Statement of Defence on or before September 26, 2022, without raising a limitations period defence.<sup>14</sup>

13. On September 14, 2022, after a case management conference to settle the form and content of the Motions Judge’s order, the Motions Judge issued the order appealed from.<sup>15</sup> At the same time, he issued a File Direction extending the time to file the Statement of Defence and the Defendant’s costs submissions

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<sup>8</sup> Defendant’s Factum, Appeal Book, Tab 7, at para. 3

<sup>9</sup> Reasons, Appeal Book, Tab 3

<sup>10</sup> Reasons at paragraphs 10, 90, 206, Appeal Book, Tab 3

<sup>11</sup> Reasons at paras. 10, 90, 206, Appeal Book, Tab 3

<sup>12</sup> Reasons at paras. 10, 90, 208, Appeal Book, Tab 3

<sup>13</sup> Reasons at paras. 114, Appeal Book, Tab 3

<sup>14</sup> Order, Appeal Book, Tab 2

<sup>15</sup> Order, Appeal Book, Tab 2

by ten days.<sup>16</sup>

14. On October 3, 2022, this Court issued an order staying the effect of the order appealed from, pending the disposition of this appeal.<sup>17</sup>

## PART IV – ISSUES AND ARGUMENT

### A. MOTIONS JUDGE INTENDED TO MAKE FINAL ORDERS

15. A decision to dismiss a motion to strike is typically an interlocutory order. The judge finds that the claim is *not* devoid of any chance of success, and the action continues: there has been no ruling made on the actual merits of any claim or defence.

16. In this case, however the Motions Judge stated in his Reasons that he was making final determinations of the rights of the parties:

*[90] Because, as foreshadowed above, Ms. Toussaint's Amended Statement of Claim is not being struck out and this action will be proceeding to the completion of the pleadings and to the interlocutory stages of the proceeding, which might include a motion for summary judgment by either side, **apart from my conclusions that: (a) this court has jurisdiction; (b) Ms. Toussaint's claims are timely and not statute-barred; and (c) Ms. Toussaint has not contravened the rules of pleading, nothing that I shall say is meant to be a determination of the merits of Ms. Toussaint's claim or Canada's defence.***<sup>18</sup> [emphasis added]

17. In plain English, the Motions Judge said that his findings about jurisdiction, “timeliness” and limitations were meant to be determinations about the merits of the claim and defence, and to have effect beyond the pleadings stage.

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<sup>16</sup> File Direction, Appeal Book, Tab 4

<sup>17</sup> Endorsement of Justice Trotter, dated September 28, 2022, Appeal Book, Tab 11

<sup>18</sup> Reasons, at paragraph 90; see also Reasons at paragraph 206, Appeal Book, Tab 3

18. In [Prescott & Russell \(United Counties\) v David S. Laflamme Construction Inc.](#),<sup>19</sup> this Court held in determining whether an order is final, one must examine the terms of the order, the motions judge's reasons for the order, the nature of the proceedings giving rise to the order, and other contextual factors that may inform the nature of the order:

*The distinction between a final and interlocutory order for the purposes of determining the appropriate appellate forum is not always easy to make... In the present context, the order will be said to be final if it deprives WSP of a substantive defence. If WSP can no longer rely on the Limitations Act defence, the order is final. However, if WSP can raise the Limitations Act defence at trial, the order is not final.*

19. The Motions Judge's Order in this case clearly sets out final declarations and orders as to the rights of the parties.<sup>20</sup>

#### **B. LEGAL ERROR – GRANTING A MOTION TO STRIKE PARTS OF THE DEFENCE BEFORE DEFENCE FILED**

20. The Motions Judge erred by granting relief in the nature of a motion to strike parts of the Statement of Defence, before a Statement of Defence had been filed.

21. A number of cases involving summary judgment refer to a type of order known colloquially as “boomerang summary judgement”. A party moves for summary judgment, the evidence and arguments are exchanged, and at the hearing, the judge grants summary judgment – for the other side. This Court has held that a motions judge is entitled to grant such relief, *provided that the parties*

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<sup>19</sup> [Prescott & Russell \(United Counties\) v David S. Laflamme Construction Inc.](#), [2018 ONCA 495](#) at [para. 7](#)

<sup>20</sup> Order, Appeal Book, Tab 2



are on notice that it is a possible outcome. If the parties are not on notice, it is an unfair result, and may be overturned on appeal:

[12] *The motion judge's grant of judgment in favour of Mr. Drummond was not a fair and just determination on the merits on the motion...*

[13] *The lack of procedural fairness on the motion is a sufficient basis to allow the appeal and set aside the Judgment in favour of Mr. Drummond.*<sup>21</sup>

22. The Motions Judge in this case has granted a “boomerang motion to strike” two of the Defendant’s possible defences, on jurisdiction and limitations. The Defendant had no notice of this. It is especially unfair since the judge is pronouncing on the merits of the defence before the Statement of Defence has been filed.

23. The Motions Judge’s decision could also be characterized as relief in the nature of summary judgment in favour of the Plaintiff, or determination of an issue of fact or law before trial. None of that relief was in issue on the motion. It is unfair for the judge to have decided motions that were not before him, without evidence, and without notice.

[37] *...where a party claims that a motion judge has made binding determinations of fact or law, this court has said that a court proposing to exercise its powers to make such determinations under either rule 20.04(4) or (5) should specifically invoke the rule and that, reference to the rule, as well as the particular determination made, should form part of the formal order: Ashak, at paras. 8, 11, 13; Skunk v. Ketash, 2016 ONCA 841, 94 C.P.C. (7th) 141, at paras. 35-36.*<sup>22</sup>

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<sup>21</sup> *Drummond v. Cadillac Fairview Corporation Limited*, [2019 ONCA 447](#) at [paras.12-13](#)

<sup>22</sup> *Salewski v. Lalonde*, [2017 ONCA 515](#) at [para. 37](#)

## C. LEGAL ERROR – LIMITING DEFENCES BEFORE DEFENCE FILED

### 1) Precluding any limitations defence

24. The Motions Judge exceeded his jurisdiction and erred in law by making an order which precludes the Defendant from raising any limitations defence.

25. A motion to strike is brought under [Rule 21.01](#), which states that “A party may move before a judge to strike out a pleading on the ground that it discloses no reasonable cause of action or defence”, and that “the judge may make an order or grant judgment accordingly”.<sup>23</sup> The plain wording of the Rule suggests that there are two possible outcomes: that the motion is struck or that it is not:

*The principles that inform the determination of a defendant’s motion to strike under Rule 23.01(1)(b) are well settled and can be summarized as follows: (1) **the only question for judicial resolution is whether it is plain and obvious that the Statement of Claim fails to disclose the essential elements of a cause of action tenable at law.** There is no suggestion in the relevant Rules that the judge may also, without notice, make determinations of the legal issues to be raised in the balance of the action.<sup>24</sup> [emphasis added]*

26. This Court has held, in the context of a motion for summary judgement, that

*[50] ... **the motion judge could not properly have made a final determination of the limitations issue in favour of the appellants prior to the close of pleadings** and without the benefit of a more fulsome record. In these circumstances, his reasons for dismissing the appellants’ motion should not be read as a final determination of the limitations issue in favour of the respondent giving rise to res judicata or issue estoppel.<sup>25</sup> [emphasis added]*

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<sup>23</sup> Rules of Civil Procedure, [Rule 21.01](#)

<sup>24</sup> Sewell v. ING Insurance Company of Canada, [2007 NBCA 42](#) at [para. 26](#)

<sup>25</sup> Salewski v. Lalonde, [2017 ONCA 515](#) at [para. 50](#); see also *Derenzis v. Johnson*, [2021 ONSC 5136 \(CanLII\)](#) at [para. 65](#)

27. In the words of the [Salewski](#) decision, the Motions Judge's final determination of the limitations issue in this case was not properly made, and should be set aside.

**2) Precluding any jurisdictional argument**

28. Likewise, the Motions Judge also exceeded his jurisdiction and erred in law by declaring that the Plaintiff's claim was within the jurisdiction of the Ontario Court.

29. The Defendant argued on the motion that the Plaintiff was attempting, in this action, to reverse the initial decision to deny her benefits under the IFHP in 2009,<sup>26</sup> and that the Plaintiff was attempting to reverse an administrative decision not to grant her compensation following the release of the UNHRC's views in 2018.<sup>27</sup>

30. The Defendant argued that these aspects of the claim were properly the subject of judicial review before the Federal Court. The Defendant asked that these aspects of the claim be dismissed under [Rule 21.01\(3\)\(a\)](#), on the ground that the Ontario court lacked jurisdiction over the subject matter.<sup>28</sup>

31. The Motions Judge could have simply dismissed this aspect of the Defendant's motion. The motions judge went further however, and ruled that "the action is within the jurisdiction of the Ontario Court".<sup>29</sup>

32. The Defendant repeats and relies on the principles and jurisprudence cited on the limitations issue.

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<sup>26</sup> Defendant's Factum, Appeal Book, Tab 7, at paras. 82-85

<sup>27</sup> Defendant's Factum, Appeal Book, Tab 7, at paras. 69-73

<sup>28</sup> Notice of motion, Appeal Book, Tab 6, at para. 13

<sup>29</sup> Order, Appeal Book, Tab 2

33. As with the limitations issue, by relying on [Rule 21.01\(3\)\(a\)](#) on the motion to strike, the Defendant was not inviting the Motions Judge to make a positive determination on the issue of the Court's jurisdiction. The Motions judge erred by treating the motion to dismiss part of the claim as if it were a motion to determine an issue of fact or law.

34. Further, the Motions Judge did not distinguish between the plaintiff's claims relating to the 2009 decision refusing her benefits, and her claims relating to the UNHRC's 2018 views. The Motions Judge made a blanket declaration, with respect to the entire claim, that it was within the Ontario Court's jurisdiction.<sup>30</sup>

35. The Motions Judge exceeded his jurisdiction and erred in law by making an order which precludes the Defendant from raising any jurisdictional defence.

#### **D. LEGAL ERROR – GRANTING RELIEF WITHOUT NOTICE**

36. The Motions Judge acted unfairly and erred in law by granting relief, without notice, which prejudices the Defendant's defence of the action, when neither party had requested the relief.

37. It is well established where a Motions judge makes an order that the parties did not contemplate, there has been procedural unfairness, and the order should be set aside on appeal.<sup>31</sup>

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<sup>30</sup> Order, Appeal Book, Tab 2

<sup>31</sup> *Abdullahi v. C.A.S. of Toronto*, [2021 ONSC 5832](#), at paras. [29](#), [32](#), citing *Drummond v. Cadillac Fairview Corporation Limited*, [2019 ONCA 447](#) at paras. [13](#) and [14](#); see also *Marshall v. Reid*, [2018 ONSC 648](#), at [paras. 28-29](#) (appeal from a Family Court order)

## E. LEGAL ERROR – MAKING FINDINGS OF FACT ON A MOTION TO STRIKE

38. The Motions Judge erred by making orders and declarations based on findings of fact regarding the discoverability of the Plaintiff's cause of action on a pleadings motion, without evidence, before the Defendant had responded to the factual allegations in the Statement of Claim.

39. This Court has held that a judge on a pleadings motion is in no position to make determinations of fact:

*[33] The appellants' position on the motion was that the unjust enrichment claims could be struck as statute-barred under rule 21.01(1)(a) because it is plain and obvious from a review of the statement of claim that no additional facts could be asserted that would alter the conclusion that a limitation period has expired. If the motion judge accepted that position, it was the appellants' assertion that he could properly find the unjust enrichment claims were statute-barred.*

*[34] However, even assuming that assertion is correct, it does not follow that, if he rejected the appellants' submissions, **the motion judge could make a binding declaration that the limitation period had not expired. That is because the motion judge was not in a position, on a pleadings motion, to make binding determinations of fact. At best, he could posit circumstances in which the limitation period would not have expired. His reasons must be read in this context.***<sup>32</sup>

40. On the issue of the "discoverability" of the cause of action, the Motions Judge found that:

*It is plain and obvious that Ms. Toussaint did not have the knowledge necessary to advance her claims against Canada until after Canada unequivocally indicated that it disagreed with the Views of the United Nations' Human Rights Committee and that occurred on September 15, 2020.*<sup>33</sup>

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<sup>32</sup> *Salewski v. Lalonde*, [2017 ONCA 515](#) at [paras. 33-34](#)

<sup>33</sup> Reasons, Appeal Book, Tab 3, at para. 114

41. This Court has held in a number of cases that it is not appropriate for a Motions Judge to make rulings in a pleadings motion on potentially disputed issues of fact:

*[33] Thus, a factual dispute about the discovery date of a cause of action precludes the use of rule 21.01(1)(a) to determine whether a limitation period subject to discoverability has expired, because this rule is limited to determining questions of law raised by a pleading. If the parties have joined issue on disputed facts on the limitations issue, the preferable procedure might be a motion for summary judgment under Rule 20, which provides the court with certain fact-finding powers: Kaynes, at para. 80; Brozmanova v. Tarshis, [2018] O.J. No. 3097, 2018 ONCA 523, 81 C.C.L.I. (5th) 1, at paras. 21, 23 and 35; and rule 20.04(2.1).<sup>34</sup> [emphasis added]*

42. This Court has specifically held that discoverability issues should rarely, if ever, be decided on a motion to strike unless pleadings are closed and the facts are undisputed.<sup>35</sup>

43. The “plain and obvious” test on a motion to strike applies to the law, and whether the legal causes of action alleged are supportable. The Motions judge improperly applied the “plain and obvious” threshold to the facts set out in the Statement of Claim. What the Motions Judge has done, effectively, before the Defendant has filed a Defence, is to say that “this fact alleged by the Plaintiff cannot be gainsaid or denied”.

44. After a motion to strike, it is possible that a Defendant will deny every fact pleaded in a Claim. A Defendant may eventually show that some or all of the facts are entirely inaccurate. In this case, the Defendant certainly did not concede that the Plaintiff did not know she could seek *any* remedies until September 2020.<sup>36</sup>

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<sup>34</sup> *Beaudoin Estate v. Campbellford Memorial Hospital*, [2021 ONCA 57](#) at [para. 33](#)

<sup>35</sup> *Kaynes v. BP p.l.c.*, [2021 ONCA 36](#), at [para. 74](#)

<sup>36</sup> Defendant’s Factum, Appeal Book, Tab 7, at paras. 76, 81


45. The Motions judge relied on this finding of fact to preclude the Defendant from raising a limitations defence. The Defendant repeats that the Motions Judge's order precluding a limitations defence should be set aside.

## PART V – ORDER REQUESTED

46. The Defendant requests an Order:
- (a) Striking the Motions Judge's Order that Canada shall have forty days to deliver its Statement of Defence, without raising a limitations period defence, and substituting an order that the Defendant deliver its Statement of Defence within twenty days of this Court's decision.
  - (b) An order striking the Motions Judge's declaration that the action of the Plaintiff is within the jurisdiction of the Ontario Court;
  - (c) An order striking the Motions Judge's declaration that the Plaintiff's action is timely, and not barred by a limitation period.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto, October 12, 2022.

  
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David Tyndale / Asha Gafar  
Of Counsel for the Defendant (Appellant)

TO: Registry Office  
Court of Appeal for Ontario



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Lawyers for the Plaintiff (Respondent)

## CERTIFICATE AND TIME ESTIMATE

Counsel for the Defendant (Appellant) hereby certifies

1. That an order under subrule 61.09(2) (original record and exhibits) is not required in this appeal.
2. That the Defendant estimates that one hour will be required for the Defendant's oral argument

Dated at Toronto, October 12, 2022.



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David Tyndale / Asha Gafar  
Of Counsel for the Defendant (Appellant)

## SCHEDULE A – LIST OF CASE LAW

1. *Abdullahi v. C.A.S. of Toronto*, [2021 ONSC 5832](#) at paras. [29](#), [32](#).
2. *Beaudoin Estate v. Campbellford Memorial Hospital*, [2021 ONCA 57](#) at para [33](#).
3. *Derenzis v. Johnson*, [2021 ONSC 136](#) at [para. 65](#).
4. *Drummond v. Cadillac Fairview Corporation Limited*, [2019 ONCA 447](#) at paras. [12](#), [13](#), [14](#).
5. *Kaynes v. BP p.l.c.*, [2021 ONCA 36](#) at [para 74](#).
6. *Marshall v. Reid*, [2018 ONSC 648](#), at paras. [28-29](#).
7. *Prescott & Russell (United Counties) v. David S. Laflamme Construction Inc.*, [2018 ONCA 495](#) at [para. 7](#).
8. *Salewski v. Lalonde*, [2017 ONCA 515](#) at paras. [33](#), [34](#), [37](#), [50](#).
9. *Sewell v. ING Insurance Company of Canada*, [2007 NBCA 42](#) at [para. 26](#).

## **SCHEDULE B – LIST OF STATUTES AND REGULATIONS**

1. [Limitations Act, 2002](#), S.O. 2002, c. 24, Sched. B.
2. [Rules of Civil Procedure](#), R.R.O. 1990, Reg. 194, [R. 21.01](#).

NELL TOUSSAINT  
Plaintiff (Respondent)

AND

ATTORNEY GENERAL OF CANADA  
Defendant (Appellant)

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**COURT OF APPEAL FOR ONTARIO**

Proceeding Commenced at Toronto

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**FACTUM OF THE  
APPELLANT**

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