

**Commission of Inquiry Into Matters
Relating to the Wrongful Conviction of David Milgaard
Honourable Mr. Justice Edward P. MacCallum,
Commissioner**

**Supplemental Written Submissions
on Behalf of the Attorney General of Canada
Representing the Royal Canadian Mounted Police**

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I. RESPONSE TO SUBMISSIONS FROM COUNSEL FOR LARRY FISHER

1. It should be noted in the Fisher submissions, counsel references Detective Lorne Huff as being a member of the Fort Garry RCMP. This is incorrect. Mr. Huff testified at the inquiry and indicated that he was a member of the Fort Garry Police Service from 1961 to 1974 when they amalgamated with the Winnipeg Police Service. (Fisher submissions, page 2) (Transcript p. 13600).
2. Throughout the submissions, counsel indicates that Mr. Fisher cooperated with police and prosecutors in the early 1990's, although somewhat reluctantly and after some hesitation (Fisher submissions page 8). A review of the evidence of former S/Sgt. Rick Pearson indicates that he was of the view that Mr. Fisher was stalling his efforts to investigate further and described his "cooperation" at best as "reluctant". (document 056743 at page 056778, paragraph 159 and at page 056786, paragraph 198).
3. It is evident from S/Sgt. Pearson's ongoing notes that Mr. Fisher's reluctance to cooperate caused him concern. (document 056743 at 056790, paragraph 213). S/Sgt. Pearson expended considerable effort to secure a police interrogation of Mr. Fisher and a polygraph examination (document 056743 at 056794, paragraph 232).

4. Mr. Fisher did eventually agree to a polygraph examination by a private polygraph operator named Mike Robinson (document 056743 at 056784, paragraph 189). The test, however, came back as inconclusive (document 056743 at 056789, paragraph 209). Despite further efforts by authorities, Mr. Fisher would not agree to another polygraph examination. S/Sgt. Pearson took the view that Mr. Fisher's lack of cooperation had a "tinge of suspicion to it" (document 056743 at 056837, paragraph 438).
5. It is respectfully submitted that although Mr. Fisher may have, at times, reluctantly cooperated with authorities, he never did cooperate to the satisfaction of S/Sgt. Pearson which further impeded any reopening into the investigation into the death of Gail Miller.

II. RESPONSE TO SUBMISSIONS FROM COUNSEL ON BEHALF OF T.D.R. CALDWELL, Q.C.

6. Counsel comments upon the RCMP preparing reports in 1969 for the office of the Attorney General in Regina. It is conceded that Mr. Caldwell did not receive the RCMP reports drafted in May of 1969, either from the RCMP or internally through the Attorney General's office where they were filed. RCMP counsel agrees with the submissions on behalf of Mr. Caldwell that it is speculative, at best, as to whether this would have had any impact on preventing the wrongful conviction of David Milgaard (Caldwell submissions, page 12 at paragraph 38).
7. Submissions on behalf of the RCMP specifically address the reporting system of the RCMP in 1969 to the Attorney General's office. Furthermore, as outlined, the SPS were well aware of a possible connection between the Miller murder and the previous sexual assaults (see RCMP submissions, pages 5 – 8 at paragraphs 14, 16, 18, 19, 20 and 21).

8. Counsel for Mr. Caldwell, outlines the fact that Mr. Caldwell never had knowledge of any possible connection between the previous sexual assaults and the murder of Gail Miller. The RCMP reports of May 1969 were based upon information obtained from the SPS. City Police documentation acknowledging the possible connection was also not forwarded to Mr. Caldwell's office. There is no reason to believe that even if the RCMP reports had been provided to the SPS, that they, likewise, would have been forwarded on. Mr. Caldwell's counsel concedes that, in any event, Mr. Caldwell never did receive the whole Miller murder file from the SPS (Caldwell submissions, page 11 at paragraph 36).

III. RESPONSE TO SUBMISSIONS FROM COUNSEL ON BEHALF OF CALVIN TALLIS

9. Counsel also raises a concern that RCMP reports prepared in 1969 did not find their way to either Mr. Tallis, or the Crown file (Tallis submissions, page 15 at paragraph 25). As referenced, the specifics of the RCMP reporting system in 1969 are explained in detail in the original RCMP submissions (pages 5 – 8).
10. It is important to bear in mind that the 1969 Miller murder investigation was conducted by the SPS with part-time assistance from two members of the RCMP, who only assisted for a period of approximately six weeks. As previously outlined, the information pertaining to the prior sexual assaults was a matter that was never investigated by the RCMP. All information referenced in 1969 in RCMP reports was acquired through contact with SPS members and a review of their documentation. The RCMP simply catalogued the views of SPS investigators during the original investigation. There was little reason to provide SPS with a copy of information they had collected as a result of their own investigations.
11. Any disclosure that was to occur in the trial process was a matter for the Crown Prosecutor, Mr. Caldwell, to address. His interaction on gathering such information was appropriately with the SPS who had carriage of the investigation.

IV. RESPONSE TO SUBMISSIONS FROM COUNSEL FOR DAVID AND JOYCE MILGAARD

12. Counsel also references RCMP officer Rasmussen's observation that there was a possibility that "the rapes and the murder were connected". Counsel is critical that reports outlining this "connection" lay **unknown** to Milgaard counsel in the offices of the Saskatchewan Attorney General and the RCMP **until 2004** (paragraph 4 page 8-9 of the Milgaard submissions).

13. Cpl. Rasmussen testified at the Inquiry that the information dealing with the similar sex offences would have come from the Saskatoon City Police (Transcript p. 11570, line 3 and 11579, line 9). Furthermore, it was his belief that the "connection" reference in his report would have been something obtained from the Saskatoon Police Service ("SPS") reports indicating facts of a similar *modus operandi* (Transcript p. 11580-81, line 16). Although an RCMP report detailing the "connection" was not found on Saskatoon Police files it is very evident that the SPS was fully aware of a possible connection between the Miller murder and the previous sexual assaults. Former Saskatoon Police Service Chief, Joe Penkala, testified that the City Police were aware of a possible connection and SPS documentary evidence, dated February 27, 1969 (document 105520), tendered at the Inquiry shows clearly that the City Police Department was looking at the similarity between previous rape occurrences and the Miller murder investigation. In addition, former Chief Penkala wrote a letter to the RCMP crime index outlining the circumstances of the Gail Miller murder and referenced two unsolved rapes prior to the murder involving similar circumstances (document 009299 at 003900). The criticism of the RCMP reports not being provided at a later date to Milgaard counsel is, with respect, misplaced. It is evident from a review of the SPS files that a possible "connection" was considered, documented and investigated by the Saskatoon Police Service. Counsel for the Milgaard effort concedes in their submissions that there were numerous documents generated by the SPS exploring a possible connection (page 36 at paragraph 41 of Milgaard submissions).

14. RCMP reports commenting on a possible "connection" were generated for internal purposes and were forwarded for reporting purposes to the Attorney General of Saskatchewan's office in Regina. These particular RCMP reports were not on RCMP files in the late 1980's and early 1990's when the Milgaard s. 690 applications were being made. These investigation reports were destroyed, as a routine matter, in accordance with RCMP policy (document 023167 at 023210).
15. It should be noted that on September 9, 1993 the RCMP investigators were apprised of several inches of misplaced correspondence relating to the investigation and prosecution of David Milgaard that had been found by Saskatchewan Justice staff in their file room. This material was immediately turned over to the RCMP and it included the reports submitted in May and June of 1969 by RCMP investigators assisting the Saskatoon City Police. These reports were referenced in Insp. Sawatsky's investigation report (document 023167 at 023210).
16. Furthermore, Insp. Sawatsky's investigation clearly illustrates that police reports detailing victim complaints and follow up investigation revealed that the City Police tried to establish a link between the Miller murder and unsolved sexual offences occurring at or about the same time. Insp. Sawatsky's report stipulates:

"This is confirmed in reports submitted by Insp. J. A. B. Riddell, one of the RCMP members assisting the Saskatoon Police. In a report dated 69-03-20, he indicates that the Police were not overlooking the possibility the murderer could be the same person responsible for attacks occurring between 68-10 and 68-11-29" (document 023167 at 023217).
17. Insp. Sawatsky's report also indicates the following:

"Memo from RCMP F. Division C.I.B., Supt. Ross to Deputy Attorney General attaching copy of a RCMP crime report dated 69-03-20 submitted by Insp. J.A.B. Riddell. This three page report is an account of the assistance provided in the Miller murder investigation at the request of Saskatoon City Police. It outlines the history of the case. Brief mention is made of the circumstances of two rapes and one attempted

rape committed in the same area of the City as the Miller murder” (document 023167 at 023301).

18. The assistance provided by the RCMP to the Saskatoon Police Service in 1969 is referenced thoroughly in Insp. Sawatsky’s report. The “connection” is also referenced thoroughly in Insp. Sawatsky’s report. Furthermore, the reporting generated by the RCMP in 1969 referencing the possible “connection” is also noted in Insp. Sawatsky’s report. After editing for privacy concerns, this report was made public and arrangements were made to review the report with counsel for the Milgaard effort. (documents 061361, 061664, 061772, 061773, 061775, 061806) No requests for any further documentation were ever received by the RCMP. It is disingenuous to assert that the RCMP somehow “concealed the RCMP reporting efforts in 1969” when they were explicitly referenced in Insp. Sawatsky’s report.
19. There appears to be a history where the Milgaard effort failed to make appropriate requests for documentation. (See cross-examination of David Asper at page 28377 – line 7; page 28379-80 – line 21; page 28481 – line 12; page 28591 – line 4; page 28591-2 – line 24). There is no record of any requests either to the Government of Saskatchewan, or the RCMP under Access to Information legislation or otherwise.
20. Milgaard counsel submits that there were ample opportunities to reopen the case against David Milgaard. One alleged “failure to do so” stems from Bruce Lefreniere indicating that he contacted the RCMP in 1986 and spoke with Sgt. Simington (page 59 at paragraph 66 and page 60 at paragraph 68 of the Milgaard Submissions).
21. The interaction between Sgt. Simington and Mr. Lefreniere is outlined in detail at page 38 of the RCMP Submissions. It is manifestly clear from Sgt. Simington’s evidence that he was 100 percent certain that if Mr. Lefreniere had mentioned the name Milgaard he would have passed such information to the Prince Albert sub-division of the RCMP. (Transcript p. 14852, line 2). He went on to testify that it would be this sub-division that would then be responsible for any follow up on such information with the Saskatoon City Police. (Transcript p. 14838-39, line 10). It is

correct that the SPS did not commence a re-investigation into the death of Gail Miller in 1996. There is, however, no evidence that the RCMP did not contact the City Police with Mr. Lefreniere's concern.

22. Counsel for the Milgaard effort asserts that all entities involved in a possible reopening of the Miller investigation, to some extent, succumbed to "tunnel vision". Counsel asserts that Insp. Sawatsky headed the RCMP investigation ordered in 1992 and admitted he began his task with the presumption that David Milgaard had killed Gail Miller (Milgaard submissions at paragraph 82 of page 67). It is important to note that the investigation undertaken by Insp. Sawatsky was not a re-investigation of the Miller murder (document 023167 at 023172). Furthermore, the investigation was ordered within a few months following the Reference to the Supreme Court of Canada wherein the Court was careful to indicate that Mr. Milgaard had had a fair trial. Insp. Sawatsky conceded that when he started the investigation he was fully aware that David Milgaard had been convicted, and that the Supreme Court indicated he had the benefit of a fair trial and had not been able to prove his innocence. (Transcript p. 35041-42 at line 24). In such circumstances, it would not be inappropriate for any police officer to be aware of and to some extent be influenced by the conclusions that had been reached during a court process. Nevertheless, Insp. Sawatsky understood the Supreme Court of Canada referenced some new grounds of information and that during the RCMP investigation they would look at any new information that would bear on the issue of either the guilt or innocence of Larry Fisher (Transcript p. 35042 at line 5).
23. In his testimony, former Insp. Sawatsky reiterated that his investigation was not into the guilt or innocence of David Milgaard or Larry Fisher (Transcript p. 35022 at line 15). Nevertheless, in the course of the investigation information was gathered which might bear on the issues of whether David Milgaard was innocent or Larry Fisher was guilty of the death of Gail Miller (Transcript p. 35022 at line 18).

24. Insp. Sawatsky testified that the investigation lasted approximately two years and it was felt there would be an expectation that their report would comment as to whether anything new surfaced that pointed either to Larry Fisher or David Milgaard (Transcript p. 35023 at line 13). In his evidence, he also indicated that it was much more challenging to investigate Larry Fisher because of the lapse of 23 years and more was known of David Milgaard's activities in January of 1969 than Larry Fisher's. (Transcript p. 35041 at line 5).
25. Milgaard counsel asserts that the RCMP was "closed minded" because they did not prepare a draft response in 1997 for the possibility that DNA testing might not match David Milgaard (Milgaard submissions page 70 at paragraph 87). It should be noted that by 1997, when the results were to be released, the Flicker investigation had been inactive for approximately 4 years. There was ample evidence at the Inquiry that the RCMP followed down every possible lead they could in relation to gathering all background information available in furtherance of their criminal investigation. As referenced, due to the lapse of over 20 years, there unfortunately was significantly more evidence that connected David Milgaard to the crime rather than Larry Fisher. There is also no doubt that the RCMP investigation was not directed towards determining the guilt or innocence of David Milgaard or Larry Fisher. Nevertheless, it is well established that the RCMP were proponents of having the DNA testing completed and tried to facilitate that process (document 061461 and Transcript p. 36689-692 line 22).
26. The actual focus of Insp. Sawatsky's investigation was on the numerous allegations brought forward by the Milgaard effort and the investigation task force set out to establish whether the allegations were correct or not (Transcript p. 35250 at line 8). Former Insp. Sawatsky indicated, and it is submitted that his report reflects this approach, that he was fair and open-minded about everything that had been brought forth by the Milgaard effort. He was prepared to investigate all of the allegations with diligence (Transcript p. 35250 at line 21).

27. Counsel for the Milgaard effort submitted that none of the 12 officers that worked with Insp. Sawatsky on the Flicker Investigation found Larry Fisher to be a credible suspect (Milgaard submissions paragraph 82 at page 67). It is evident from the work undertaken by the task force that all avenues were explored with respect to Larry Fisher. Once again, it is important to bear in mind that this was a criminal investigation into police and prosecutorial misconduct. It was not a reinvestigation into the murder of Gail Miller. There was, however, no new evidence uncovered which either exonerated David Milgaard or inculpated Larry Fisher for the murder of Gail Miller (document 023167 at 023173). It is manifestly clear from a review of the Flicker Investigation report that various issues pertaining to Larry Fisher were canvassed and explored by RCMP investigators. A simple review of the issues examined in the report outline the work that was undertaken with respect to Larry Fisher. They include *inter alia*:

- (a) The Saskatoon Police Department connected the Fisher rapes in the Miller murder investigations together from the outset;
- (b) The Saskatoon Police Department in their investigation of the Miller murder showed photograph line-ups to the victims of the Fisher rapes;
- (c) That the Saskatoon Police Department Chief wrote a letter to the Toronto Police Department where he states he read an article in the RCMP Gazette. In this letter he connects the rapes and the Miller murder;
- (d) That the Saskatoon Police Department undertook many other investigative steps to try and identify the Miller murder from the unsolved rape circumstances;
- (e) That the Saskatoon Police Department were split with many members of the plain clothes unit believing the rapist was the murderer and that Milgaard was not responsible;
- (f) That after the conviction of David Milgaard, Larry Fisher was apprehended in Winnipeg and wanted to plead guilty to several rapes in Saskatoon. A homicide detective, Detective Karst, was sent to the interview. That homicide division had never worked on rape files and it would only make sense that a morality member should have conducted the interview;

- (g) That Detective Karst denied ever having met or having interviewed Larry Fisher. Karst later admitted knowing Fisher after Winnipeg Police Department records were obtained and he was confronted. That Karst is lying;
- (h) That all Saskatoon Police Department's documentation on the Fisher interview and the ensuing investigation are missing;
- (i) That all references to Larry Fisher being apprehended for rapes in Saskatoon were kept secret, both from the investigators and from the victims, so as not to arouse concern that Fisher may have killed Miller;
- (j) That Police failed to investigate fully Linda Fisher's statement when she came forward in 1980 identifying Larry Fisher as a possible suspect in the murder of Gail Miller;
- (k) That the Milgaard file was full of references to the Fisher rapes and that Mr. Kujawa should have been concerned about Milgaard's guilt in view of the numerous references to Larry Fisher;
- (l) That Saskatchewan Justice proceeded by direct Indictment against Larry Fisher in the Saskatoon rapes. (Mr. Wolch maintains this is an unusual legal procedure);
- (m) What are the actual blood types of Larry Fisher and David Milgaard? Are they secretors or not;
- (n) What exhibits from Gail Miller are still suitable for forensic analysis? Attempt to interview Fort Garry Police officers who arrested Fisher in 1970 and determine their recollections of his arrest and any mentions he may have made of any offences in Saskatoon;
- (o) Establish when Larry Fisher was arrested in Winnipeg and when charges were laid in Winnipeg. When was he interviewed by Saskatoon detectives and what charges were laid in conjunction with the Saskatoon offences?;
- (p) Mrs. Milgaard stated that a source within the Saskatoon City Police can say that files on Larry Fisher were removed from the file system; Did the source personally observe material in the system which was later not there.

The RCMP investigation addressed numerous allegations that pertained both directly and indirectly to Larry Fisher during the relevant time periods (document 023167 at 023195-204). Simply put, there was no evidence, other than the DNA, that directly

linked Larry Fisher to the murder of Gail Miller (see also the Inquiry testimony of Rick Pearson, Murray Brown and Murray Sawatsky).

28. The allegation is made that none of the Flicker investigators were curious as to what caused Ronald Wilson and Nichol John to recant their original statements. This is unfair. Interviews were conducted with all Saskatoon Police Service members and Calgary Police Officer, Art Roberts, in an attempt to discern what occurred during the course of the interviews. Furthermore, Nichol John was interviewed and numerous attempts were undertaken to interview Ronald Wilson but he refused to meet with the RCMP despite having made allegations of police misconduct during the original SPS investigation (see document 023167 at 023213 and at 023228).
29. The assertion is made that it was somehow “improper” for the RCMP to expend efforts to try and determine if Joyce Milgaard had paid Ronald Wilson to recant (Milgaard submissions paragraph 82 at page 67). This issue was canvassed during the Inquiry and it is evident that what precipitated this query was the assertion made by George Lapchuk who intimated that there was a financial incentive for Mr. Wilson to recant his earlier testimony (document 002131 at 002132). Simply put, it would have been inappropriate for any police agency to not inquire into such an assertion, particularly when Ronald Wilson would not meet with RCMP investigators.
30. A concern was raised that little interest was shown in investigating the circumstances by which exculpatory evidence did not reach David Milgaard’s counsel but there was plenty of interest in who in the Saskatoon Police Department had assisted the Milgaard effort in the 1980’s (Milgaard submissions paragraph 82 at pages 67-68). With respect, this is an unfair characterization. It is well established that the RCMP investigation was into police and prosecutorial misconduct. The Supreme Court of Canada canvassed the issue of disclosure during the trial process and concluded that Mr. Milgaard had been afforded a fair trial. The RCMP reviewed the documentation and interviewed Mr. Caldwell on a number of occasions to determine what had been disclosed and what had not been provided. Nevertheless, at least two specific

allegations were explored by the RCMP during the Flicker Investigation directly related to these points. They are as follows:

- (a) Evidence was withheld from the Defence. Trial jury did not hear all the evidence;
- (b) Non-disclosure of evidence that Ramussen, John, Danchuk and Sharon Williams did not see blood on Milgaard's clothing;

(document 023167 at 023202)

31. The RCMP specifically investigated the allegations of wrongdoing by T.D.R. Caldwell that he concealed facts and was aware of the similarities between the Miller murder and the previous rapes. In addition, the RCMP investigated the allegation that Mr. Caldwell failed to disclose facts commonly made available to Defence counsel prior to trial which may have affected the legitimacy of the conviction. The numerous steps undertaken by the RCMP in this regard are found in the Flicker Investigation report. (document 023167 at 023266 to 296).
32. Counsel asserts that it was somehow "improper" that the RCMP had "plenty of interest in who, in the Saskatoon Police Department had assisted the Milgaard effort in the 1980's" (Milgaard submissions paragraph 82 at pages 67-68). Again, the inference here is that the RCMP was, to some extent, not "playing fair" by following up in this regard. The Saskatoon Police Service source intimated that rape files, relating to Larry Fisher, were being removed or hidden. This issue was initially canvassed by Staff Sgt. Rick Pearson in dialogue with Mr. Asper. On January 13, 1992 Mr. Pearson wrote:

"Asper did say the vetted information is [from] a confidential informant and will not be revealed to me. What concerns me about this is that Mr. Asper makes reference in his correspondence as to how 'intriguing' it is that files have gone missing, possibly, in my opinion, by his own source, yet he seems satisfied with leaving this question as it is. I am not sure if there is more that can be done in this regard." (document 056743 at 056845-46)

Once again, it would have been inappropriate for any police agency not to try and follow up and locate the source in order to ascertain whether in fact Saskatoon Police Service members were hiding/destroying files that were relevant to the investigation at hand.

33. Counsel raises the issue that the RCMP were not concerned that the Saskatoon Police Service failed to locate a document outlining the procedures they used in questioning Nichol John and Ron Wilson during a crucial three day period (Milgaard submissions paragraph 82 at page 68). The Flicker Investigation reveals the extent that the RCMP went to in order to try and gather all the documentation that was available and that could shed any light on an investigation that was now approximately 23 years old. Again, the Flicker Investigation report reveals the extent that RCMP members went to in order to interview all police officers that may have had any dealings with the witnesses involved during the original investigation. (document 023167).
34. It is true that the RCMP wanted to locate the tape recording that Mr. Henderson made during his interview with Mr. Wilson (Milgaard submissions page 68 at paragraph 82). Clearly, the statement of Ronald Wilson was an important one. Again, it would have been negligent for any police agency to not try and gather all the information it could surrounding the recantation. Mr. Wilson would not sit down and conduct an interview with the RCMP. Mr. Henderson would also not agree to an interview with the RCMP. The interview between Mr. Henderson and Mr. Wilson occurred in the summer of 1990. The request for a copy of the tape of the interview was made only two years later. Regardless of what motive one wishes to ascribe, it is always incumbent upon any police agency to take steps to gather all available information. This was done.
35. Counsel asserts that Insp. Sawatsky's investigation team failed to see or to acknowledge that Larry Fisher's *modus operandi* was unique and bore a strong resemblance to the attack on Gail Miller. (Milgaard submissions page 68 at paragraph 83).

36. The RCMP employed the services of Insp. Ron McKay who was the officer in charge of the Violent Crime Analysis Section in Ottawa. Insp. McKay was provided with background information on the murder of Gail Miller and the crimes committed by Larry Fisher. He worked in conjunction with Inspector Kate Lines of the Ontario Provincial Police. The detailed report was relied upon by Insp. Sawatsky's task force. (document 023167 at 023495 – 511). Insp. McKay concluded:

“All things considered, Fisher's behaviour, circa 1968-1970, is not consistent with the behaviour observed within the murder of Gail Miller. This is particularly significant in light of the Nichol's assault that was subsequent to the Miller murder, and wherein he was bitten on the finger by his victim. His only response to this victim resistance was to hit her on the chin to make her let go. This is not the response to such victim resistance I would expect to see in an offender who had previously exhibited the behaviour seen within the murder of Gail Miller. For all these reasons, he is therefore not considered to be a likely suspect in that case.” (document 023508-509).


37. Dr. Rossmo testified at the Inquiry. He agreed that violent crime analysis is not an exact science. It is submitted that Insp. McKay and Insp. Lines report, although to some extent incorrect, was reasonable. It was appropriate for Insp. Sawatsky's team to utilize the expertise within the RCMP and to rely upon the same. A careful analysis was conducted by Insp. McKay and it is unfair to assert that the RCMP were not willing to consider whether the *modus operandi* of Larry Fisher bore a strong resemblance to the attack on Gail Miller. Counsel asserts that the jury trying Larry Fisher for the murder of Gail Miller having heard the same similar fact evidence had no doubt about his guilt. It is also well established that at Larry Fisher's trial the only direct evidence connecting Larry Fisher to the murder of Gail Miller was the irrefutable DNA evidence.

38. The simple fact that such a large proportion of documents utilized in the Milgaard Inquiry were either generated or collected by the RCMP speaks volumes about the extent and thoroughness of their investigations.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Saskatoon, this 28 day of November, 2006.

THE ATTORNEY GENERAL OF CANADA

Per: 
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