
CANADA / JUDGMENT

Bown v. Badior

2019 BCSC 2381

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Supreme Court of British Columbia

DECIDED

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2019 BCSC 2381 Bown v. Badior

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bown v. Badior,

2019 BCSC 2381

Date: 20191105

Docket: E174555

Registry: Victoria

Between:

Alana Bown

Claimant

And:

David Badior

Respondent

Before: The Honourable Mr. Justice G.R.J. Gaul

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant:

K. Richardson

S. Miller

Counsel for the Respondent:

B. Kitzke, appearing as Agent for

R. Doell

Place and Date of Hearings:

Victoria, B.C.

October 3, 4, 28 and 29, 2019

Place and Date of Judgment:

Victoria, B.C.

November 5, 2019

- [1] THE COURT: By notice of application filed 16 April 2019, the claimant Ms. Bown seeks three orders. First, she seeks an order for an interim distribution of \$165,000 from what she maintains is the family property in this action. Second, she seeks an order for interim spousal support. Finally, she seeks an order that the respondent, Mr. Badior, return various identified items to her.
- [2] The parties agree that they had a marriage-like relationship. However, they do not agree upon the dates of that relationship. Ms. Bown says she and Mr. Badior began cohabitating in April 2006. Mr. Badior says the marriage-like relationship began in December 2007. While the evidence on this point clashes, it is not a critical issue for the present application. What is critical is the date the parties ended their relationship. Ms. Bown says that date is July 2017, while Mr. Badior says it is June 2011.
- [3] The separation date is critical because Ms. Bown commenced this family law action on 30 November 2017 and s. 198 of the Family Law Act, S.B.C. 2011, c. 25 [FLA] requires a party seeking an order relating to family property or spousal support to commence an action within two years after separating from the other party. This means if Mr. Badior is correct and the parties separated in June 2011, Ms. Bown's action is out of time and statute-barred from proceeding. However, if Ms. Bown is correct and the parties did not separate until July 2017, then her action was brought in time and she can proceed with it.
- [4] On the first day of what turned into a four-day hearing, I adjourned to the trial list Mr. Badior's application filed 27 May 2019, that sought a declaration that Ms. Bown is not a spouse pursuant to s. 198(2)(b) of the FLA. I did so because it was not possible for me to decide the issues, given the significant clash in the evidence. It is something that, in my view, needs to be decided at trial.
- [5] In addressing Ms. Bown's application, I have kept in mind that this is an interim application and not one that will result in a final order. I say this because the jurisprudence makes it abundantly clear that interim applications like this one are summary in nature and provide

rough justice at best. Moreover, the court must exercise caution when considering whether to grant an order compelling one party to pay a sum of money to another party prior to trial where there is a real risk that the receiving party may not be able to repay it if it is found at trial that they were not entitled to the money.

- [6] In *L.G.B. v. M.A.C.M.*, 2005 BCSC 1786, Mr. Justice Barrow allowed an appeal from a master's order granting the plaintiff interim spousal support. The issue in contention was whether the plaintiff was a spouse within the meaning of the Family Relations Act, R.S.B.C. 1996, c. 128, the predecessor to the present FLA. Justice Barrow reviewed the case authorities that address applications for interim relief when there is an argument with respect to status or the entitlement, and observed:
- [14] From the foregoing, four points may be distilled. First, given the limitations of both time and evidence which necessarily constrain interim applications, caution should be exercised before descending into the merits of an issue. The greater the need to resolve contested issues of fact, especially those going to a threshold issue as in this case, the more likely it is that the decision ought not to be made on an interim basis.
- [15] Second, the need for caution is all the greater when, as a result of an interim order, money will be paid and there is an issue as to whether it can be recovered following a trial if it is determined that the recipient is not entitled to the funds.
- [16] Third, and related to the first, where an interim issue requires a determination of credibility, there is a risk that such a finding may embarrass the trial judge when called upon to make findings of credibility in relation to the very same issue. When this is so, even greater circumspection is required before making such an order.
- [17] Finally, to minimize the mischief inherent in the first and third of these observations, interim decisions should only be made where it can be said that a *prima facie* case for entitlement has been made out.
- [7] Ms. Bown says the evidence before the court should satisfy me that there is a *prima facie* case that she and Mr. Bador were cohabitating in a marriage-like relationship up until the summer of 2017. While she acknowledges that the relationship was a tumultuous one and there were periods when they were not living under the same roof, those elements alone do not equate to a separation or end of the relationship for the purposes of the FLA. Pointing to the voluminous quantity of emails and correspondence that are before me in evidence, counsel for Ms. Bown argues there is a reasonable prospect that a judge at trial, if this matter goes to trial, will conclude that the parties were in a marriage-like relationship up until the summer of 2017.
- [8] Having addressed this threshold issue, counsel for Ms. Bown submits that Ms. Bown requires the interim distribution to provide her with the means to continue the family law action, and further submits that, given the nature and value of the assets that will be subject to division between the parties, the \$165,000 being sought will not significantly impact Mr.

Badior. The same analysis applies to an order that he pay Ms. Bown interim spousal support. That is, she legitimately requires the interim payment to maintain her modest living, and Mr. Badior has the means to provide modest spousal support.

- [9] For his part, Mr. Badior maintains that Ms. Bown has not shown a *prima facie* case that she is entitled to a portion of any of the alleged family assets or to any spousal support. This position is premised primarily on the argument that her action was commenced well after the expiry of the two-year statutory limit imposed by the FLA. As I have indicated, that issue has been adjourned to the trial list to be decided in a different forum, and not in a summary format on a chambers application.

Has Ms. Bown shown a *prima facie* case of entitlement?

- [10] In my opinion, Ms. Bown has made out a *prima facie* case of entitlement to a division of some of what is said to be family property and to interim spousal support. The trial judge may well reach an entirely different conclusion once they have had the benefit of *viva voce* evidence, including cross-examination. However, for the purposes of this summary interim determination, I accept that there is an arguable case that Mr. Badior and Ms. Bown were in a common law marriage-like relationship up until the summer of 2017.
- [11] There is, in my view, a reasonable possibility or prospect that Ms. Bown will be able to prove, on a balance of probabilities, using the email correspondence that is presently before me and the *viva voce* testimony of those who have sworn affidavits as well as other potential witnesses, that the parties' relationship ended when she says it did; that is, the summer of 2017, and therefore her action is not statute-barred.
- [12] While not determinative of the issue, I also find that the conflict in Mr. Badior's own pleadings arguably supports Ms. Bown's position with respect to the date of the parties' separation. I will say no more with respect to that, as that will be an issue for the trial judge to weigh and determine.
- [13] Having concluded that there is a *prima facie* case of entitlement at this stage, I now turn to whether the relief sought ought to be granted.

Should there be an order for an interim distribution?

- [14] Section 89 of the FLA governs this question. That section reads:

89. If satisfied that it would not be harmful to the interests of a spouse and is necessary for a purpose listed below, the Supreme Court may make an order for an interim distribution of family property that is at issue under this Part to provide money to fund
- (a) family dispute resolution,
 - (b) all or part of a proceeding under this Act, or

- (c) the obtaining of information or evidence in support of family dispute resolution or an application to a court.

[15] In considering whether to make an order of interim distribution, the court must be satisfied that it is necessary so that each party can properly prepare and advance their respective positions on a relatively even footing. Specifically, the applicant, Ms. Bown, must show that she is in need of the funds in order to continue with her action, and she must also show that Mr. Badior has the means of making a distribution and that such a distribution will not jeopardize his ability to present his own case. Support for this proposition is found in the reasons of Mr. Justice G.P. Weatherill in *Bartch v. Bartch*, 2017 BCSC 210.

Is there a justified need?

[16] On the evidence before me, I am satisfied that Ms. Bown has a genuine need for an interim pre-trial distribution, so that she may take her claim against Mr. Badior to trial. I conclude this because she is of very limited financial means and she already owes her legal counsel a significant sum.

[17] Ms. Richardson and Ms. Miller, acting as counsel for Ms. Bown on this application and as agent for Mr. Darren Hart, counsel of record for Ms. Bown, have indicated that they can no longer carry Ms. Bown's case without some form of monetary compensation for their work or some hope of obtaining some if this matter goes to trial.

[18] From the summer of 2017 until January 2019, Ms. Bown was unable to maintain gainful employment and relied upon a monthly social assistance payment of \$710 as her main source of income. In February 2019, she was declared a person with disability, and since then she has been receiving a monthly disability pension of \$1,235.

[19] According to counsel for Ms. Bown, Ms. Bown's annual income from this pension will be approximately \$14,825. This is indeed a very modest annual income. Against this, the evidence suggests that her monthly expenses are approximately \$2,023, for an annual total of approximately \$24,275.

[20] This is a particularly difficult case and to a degree an astonishing situation. I say astonishing given the amount of debt Ms. Bown has accumulated since the start of this action. Moreover, the parties have spent four days arguing the issues before me. Counsel for Ms. Bown submitted 19 pages of written submissions and 14 pages of appendices. Counsel for Mr. Badior submitted 29 pages of written submissions plus a 12-page review of the case authorities. There are 25 affidavits, nine of which were sworn by Ms. Bown, five by Mr. Badior. It is no wonder that this summary proceeding took four days to conclude.

[21] What is equally surprising is the amount of Ms. Bown's legal fees. It is not for me to comment on whether the fees that she has incurred are appropriate or not, but the evidence shows that:

- a) In November 2017, Ms. Bown retained Ms. Miller as her lawyer.

- b) In doing so, she paid Ms. Miller a \$1,000 retainer.
- c) Ms. Miller left Hart Legal in October 2018 and now works with Brooke A. MacLeod Law Corporation. However, Hart Legal continues to do work on Ms. Bown's file and as of February 2019, Darren Hart has been Ms. Bown's counsel of record.
- d) As of 18 October 2019, Ms. Bown owes Hart Legal, the firm with which Ms. Miller once worked, \$64,773 in unpaid legal fees and disbursements.
- e) As of 18 October 2019, Ms. Bown owes Ms. Miller and/or Brooke A. MacLeod Law Corporation an additional \$58,657 in unpaid legal fees and disbursements.

[22] This means Ms. Bown has already accumulated approximately \$123,500 in legal fees and disbursements. I cannot help but note that although these fees have been incurred, no examination for discoveries have been conducted and no trial date is set. As for court appearances, as best as I can determine there has only been a Judicial Case Conference, the present application of Ms. Bown's and the application of Mr. Badior's that was adjourned on the first day of hearing.

[23] The materials before me suggest that a trial of this matter will take between five and ten days. During submissions, it was suggested that perhaps it will take fifteen days. In my respectful opinion, it would be troublesome if the issues in dispute, as clearly defined as they are, take more than ten days to be addressed. The big issue will be whether Ms. Bown is statute-barred from obtaining any relief. If that defence fails, then the next big issue will be what constitutes family property for the purposes of division between the parties, given Mr. Badior's claim that much of the property should be excluded pursuant to the FLA.

[24] Counsel for Ms. Bown estimates that another \$60,000 in legal fees will be incurred if this matter goes to a ten-day trial. This includes senior counsel fees for Mr. Hart and junior counsel fees for Ms. Miller and Ms. Richardson, and does not include the fees associated with the four days that have been spent before me on these applications.

[25] It is because of these significant outstanding legal accounts that Ms. Bown seeks a distribution of \$165,000. According to counsel for Ms. Bown, \$123,500 would go to pay the fees and disbursements already incurred on her behalf, and the balance will be used to prepare and go to trial, recognizing that there will be a shortfall that counsel will again have to cover until judgment is rendered.

[26] Leaving aside for a moment the nature and extent of her debts, especially those owing to her lawyers, in my opinion, Ms. Bown has clearly shown a genuine need for an interim distribution. Without a reasonable financial foundation going forward, Ms. Bown is faced with the prospect of abandoning her claims, acting on her own as a self-represented litigant, or hoping that counsel will continue to assist her, knowing there is a risk that they may not get paid anything at the end of this case.

Can Mr. Badior make an interim distribution and will it jeopardize his ability to present his case?

- [27] There is no dispute that all of the assets that could be considered family assets for the purposes of division between the parties are registered in Mr. Badior's name or in his possession. Ms. Bown has very few material assets and no financial assets to speak of. In 2017, she sold her 2009 Ford pickup truck for \$11,000. That appears to have been the last of her material assets.
- [28] Mr. Badior is employed with the Western Maritime Institute and, according to his most recent financial statement, his annual income is approximately \$90,757. Mr. Badior is also the registered owner of two pieces of real property; property which he maintains the court should find is excluded property under the FLA.
- [29] Finally, Mr. Badior has also approximately \$640,000 invested in RRSPs, again something that he says should be excluded or a portion excluded under the FLA. These are all issues to be determined at trial.
- [30] In *I.F. v. R.J.R.*, 2015 BCSC 793, Madam Justice Ballance analyzed the question of the potential harm resulting to the party ordered to make an interim distribution and observed:
- [192] The blunt purpose of s. 89 is to assist economically disadvantaged spouses to access justice in matrimonial disputes; it is meant to help level the litigation playing field that is so often skewed when one spouse controls all or the majority of the wealth and assets. Application of s. 89 calls for a purposive interpretation, where the need of the applicant spouse to receive an interim distribution and the potential entailing harm to the other spouse are evaluated contextually with an eye on the larger objectives endorsed by the FLA.
- [193] In my opinion, the plain meaning of the phrase "harmful to the interests of the spouse" in s. 89 contemplates actual or potential economic harm, and is likely broad in its scope. Determination of the presence of harm requires the court to reasonably anticipate and then assess the consequences that may flow from the interim order being sought. . . .
- [194] In cases where the applicant may be precluded from entitlement to the family property based on a pre-existing agreement, the notion of being harmful to the other spouse's interests could also take the form of the court permitting a distribution so as to enable the funding of an unmeritorious claim. A reasonable way to attenuate that manifestation of harm is to require the applicant to show there is a reasonable prospect of success of impeaching the subject agreement. The claimant in the case at hand has satisfied that hurdle.
- [31] Ms. Bown has satisfied me that on a prima facie consideration, she has status and entitlement.

- [32] In my opinion, there will be some financial inconvenience for Mr. Badior and there may be financial consequences for him as well. However, I find he has the means to make an interim distribution to Ms. Bown so as to level the playing field and allow Ms. Bown to proceed to trial. I say this recognizing the fact that he may not be able to recover the amounts paid to her in the event he is successful at trial.
- [33] While I have not concluded Ms. Bown's claim is bound to win, neither have I found it is bound to lose. In my opinion there is a reasonable case to present and a modest distribution will allow the case to be adjudicated at trial. It may also permit a mediated or negotiated settlement of the parties' dispute.
- [34] I say "modest", because I do not agree with or accept counsel for Ms. Bown's submissions when it comes to the amount of the distribution. Ms. Bown's lawyers have invested an enormous amount of time into her case. Whether the fees being claimed for that work are appropriate is a question that may need to be resolved in a different forum at a later date. Most certainly, it is not for me to do so on this application.
- [35] What I am trying to do, much as Mr. Justice G.C. Weatherill did in *Chung v. Harrison*, 2018 BCSC 1258, is find a way to do justice between both parties and allow for the adjudication of the parties' claims in a fair, speedy, and efficient manner. Moreover, it must provide Ms. Bown with a reasonable sum that will allow her and her counsel to proceed with her claim, without it being so large that it creates an unfair burden or penalty on Mr. Badior, especially given that it is unlikely that Ms. Bown will be able to repay the amount in the event she is unsuccessful at trial.
- [36] Counsel for Ms. Bown submits that approximately \$64,500 in additional funding is required to get Ms. Bown's matter to a ten day trial. In my opinion, a ten day trial would be more than sufficient to conclude this matter. It should take less as, in my view, the issues are clear and the litigation of them should not entail a complex procedure. It may well be that strategic decisions need to be made by Ms. Bown and her counsel, and that may well entail Mr. Hart taking a less-active role and Ms. Miller or Ms. Richardson taking a greater role.
- [37] In my opinion, an interim distribution of \$50,000 is the appropriate amount in the present case. Again, as Justice Weatherill did in *Chung*, I am ordering that the funds be used for the legal fees and disbursements associated with getting this matter to trial or settlement, and not the fees and disbursements that have already been incurred. In other words, this distribution is not to be used to pay down the significant legal fees that have already been accumulated. Those fees and disbursements can be accounted for and addressed at a later date, at the end of the case. The distributed funds are to be used solely for fees and disbursements incurred after today's date for getting this matter resolved, either by agreement or at trial.

Interim spousal support

- [38] Section 165 and 216 of the FLA govern this issue.

- [39] While Ms. Bown's claim for spousal support from Mr. Badior is definitely not a slam dunk or sure thing, I cannot say it is entirely without merit. Having reviewed all of the materials and having considered counsel's submissions and the case authorities they have provided, I accept that there is an argument to be made and it is for a trial court, after hearing and considering all of the evidence, to decide whether the argument is persuasive.
- [40] In *Robles v. Kuhn*, 2009 BCSC 1163, Master Keighley articulated the following factors that ought to be considered on applications for interim support:
- [12] On interim support applications, the application of these provisions must be qualified by certain established considerations:
1. On applications for interim support the applicant's needs and the respondent's ability to pay assume greater significance [citation omitted];
 2. An interim support order should be sufficient to allow the applicant to continue living at the same standard of living enjoyed prior to separation if the payor's ability to pay warrants it [citation omitted];
 3. On interim support applications the court does not embark on an in-depth analysis of the parties' circumstances which is better left to trial. The court achieves rough justice at best [citation omitted];
 4. The courts should not unduly emphasise any one of the statutory considerations above others;
 5. On interim applications the need to achieve economic self-sufficiency is often of less significance;
 6. Interim support should be ordered within the range suggested by the Spousal Support Advisory Guidelines unless exceptional circumstances indicate otherwise [citation omitted];
 7. Interim support should only be ordered where it can be said a *prima facie* case for entitlement has been made out [citation omitted];
 8. Where there is a need to resolve contested issues of fact, especially those connected with a threshold issue, such as entitlement, it becomes less advisable to order interim support [citation omitted].
- [41] Ms. Bown has an annual income of approximately \$14,825. Mr. Badior's income is \$90,757. Ms. Bown, in my view, has shown a *prima facie* case that she is entitled to spousal support. She also has shown a clear need for the support. I find Mr. Badior can make interim payments, which I do not foresee, I underscore, going on for many months. I say that because this matter needs to be resolved, either by agreement or by trial. Counsel have been advised by the court during this hearing that there are ten day and fifteen day blocks of time within the next four months or so where this matter can be heard and resolved. I have said previously that ten days, in my view, would be sufficient to have the matter reserved

concluded.

- [42] In my view, this matter should be concluded within the next six months. Moreover, in my view, it is appropriate, given her needs, his ability to pay, and the fact that this matter can be resolved over the next few months, that effective this month, that is November 2019, Mr. Badior pay Ms. Bown \$1,200 in monthly interim spousal support.

Return of chattels

- [43] Ms. Bown seeks the return of various chattels that she says she left at the residence she once shared with Mr. Badior. The evidence is slim and unconvincing on this application with respect to the nature of the items and the justification to grant the order sought. This issue is better left to be resolved by agreement of the parties or at trial.

Order

- [44] For all of the foregoing reasons, I am making the following order:

- a) Paragraph 1 of the notice of application is granted. There will be an interim distribution of claimed family property by Mr. Badior to Ms. Bown in the amount of \$50,000. This amount is to be used for the purposes articulated in s. 89 of the FLA. Moreover and specifically it is strictly for legal fees and disbursements incurred on Ms. Bown's behalf after today's date, including but not limited to legal fees and disbursements associated with any negotiated settlement of the parties' respective claims and/or legal fees and disbursements associated with taking those claims to trial. Any remaining balance at the conclusion of this matter can be used by Ms. Bown and her counsel in the event the parties reach such an agreement. In the event the trial judge orders costs to Ms. Bown, then the balance can be applied to those costs. In the event that Mr. Badior is successful at trial, and unless the parties agree otherwise, any balance is to be returned to Mr. Badior.
- b) Paragraph 3 of the notice of application is granted. Mr. Badior will pay Ms. Bown interim monthly spousal support of \$1,200 commencing this month. His first payment will be on November 15, 2019, unless the parties agree otherwise. Again, unless otherwise agreed by the parties, Mr. Badior's future monthly payments will be made on the 15th of each month.
- c) Paragraph 2 of the notice of application, that is the request for an interim order for the distribution of household chattels, is denied. Distribution of any of those household chattels is to be determined by agreement of the parties or at trial.

- [45] Those are my reasons. Ms. Miller, you are counsel for the applicant. Any clarification?

- [46] MS. MILLER: I'm sorry, can you say that again?

- [47] THE COURT: Any clarifications required?

- [48] MS. MILLER: No, nothing.

[49] THE COURT: Mr. Kitze?

[50] MR. KITZE: I'm sorry, what was the question?

[51] THE COURT: Any clarifications required?

[52] MR. KITZE: No, I think I've got it all. Well, I can get it from the registry. The only thing I didn't quite understand was when you were reading the final terms for the judgment number one, something about if there was money left over?

[53] THE COURT: Right.

[54] MR. KITZE: Can you just clarify?

[55] THE COURT: So there is \$50,000 going to the - there will be a \$50,000 distribution.

[56] MR. KITZE: Yes.

[57] THE COURT: Going from Mr. Badior to Ms. Bown.

[58] MR. KITZE: Understood that.

[59] THE COURT: For the purposes of going forward. So if the parties resolve the issue and do not go to trial.

[60] MR. KITZE: Yes.

[61] THE COURT: Then the funds can go towards the fees incurred in reaching that agreement -

[62] MR. KITZE: Up to that point in time.

[63] THE COURT: Up to that point in time, and any balance goes back to Mr. Badior.

[64] MR. KITZE: Thank you.

[65] THE COURT: That is one of the scenarios. If the parties reach a negotiated settlement and do not go to trial.

[66] MR. KITZE: Yes.

[67] THE COURT: If the matter goes to trial and Ms. Bown is successful and she is awarded her costs, any remaining balance, if there is a remaining balance, can be applied to the costs that Ms. Bown has been awarded.

[68] MR. KITZE: Okay, I understand.

[69] THE COURT: If Ms. Bown is unsuccessful at trial, then any remaining balance, if there is any, goes back to Mr. Badior.

[70] MR. KITZE: Understood.

[71] MS. MILLER: I do have one further question.

- [72] THE COURT: Yes.
- [73] MS. MILLER: If we could set out a timeline for this payment to be made into trust at Hart Legal?
- [74] THE COURT: What would you suggest?
- [75] MS. MILLER: Ten or fourteen days or is - ten days, is that - I don't know if that's -
- [76] THE COURT: Have you raised that with counsel?
- [77] MS. MILLER: No. Perhaps we could be generous and say twenty-one days?
- [78] THE COURT: Mr. Kitze?
- [79] MR. KITZE: I don't know what he has to liquidate or sell to do it. I have no instructions on that, so I don't know what he would do.
- [80] THE COURT: Here is what I will do. Given that the issue has not been addressed previously, I am going to leave it to the parties to address between themselves. It seems realistic, Mr. Kitze, and you can tell Mr. Doell this and you can tell your client this, that twenty-one days seems to be a reasonable amount of time. I am not ordering twenty-one days. I am going to let the parties work that out.
- [81] What I will order is that if the parties cannot reach an agreement within fourteen days, agreement on the timeframe, then, Ms. Miller, you have leave to apply -
- [82] MS. MILLER: Okay.
- [83] THE COURT: - for directions. Okay, and I will remain seized of that one issue.
- [84] MR. KITZE: Thank you.
- [85] THE COURT: Any submissions on costs or is it going to be - is it agreed, costs in the cause?
- [SUBMISSIONS ON COSTS AT 9:53:54 TO 10:02:31 A.M.]
- [86] THE COURT: Okay, Ms. Bown requested three things on this application: an interim distribution of \$165,000; interim spousal support; and the return of certain identified chattels.
- [87] Although Ms. Bown was successful in showing she had a prima facie case and need for an interim distribution, she was unsuccessful in getting the amount she was seeking. In fact, she received a little less than a third of what she was seeking, so I cannot say she was entirely successful on that facet of her application.
- [88] She was unsuccessful in obtaining an order relating to the chattels. This, in my view, was the least important of the three issues before me.

[89] She was successful in obtaining an order for interim spousal support, although for a little bit less than she was asking for, given my finding that her income had increased a bit. In my view, there was split success on this issue.

[90] In my opinion, costs should be in the cause.

"G.R.J. Gaul J."

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