S.C.C. File No.: 41210

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF QUÉBEC)

BETWEEN:

ATTORNEY GENERAL OF QUÉBEC

Appellant

AND:

BIJOU CIBUABUA KANYINDA and
COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE

Respondents

AND:

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PART I: OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. Considerable progress has been made over the last three decades to conceptualize the constitutional protection against indirect discrimination. However, as this Court has recognized, uncertainty and confusion remain.[1] The notion of "distinction in effect", and more specifically its instrumental "disproportionate impact", continues to trouble the courts and litigants alike.[2]

2. This appeal allows this Court to return to the pressing issue of the applicable methodology for adjudicating adverse effects discrimination claims. It asks this Court to refine the framework and bring further clarity to the *Charter*'s "most conceptually difficult provision".[3]

3. The Attorney General of British Columbia ("AGBC") intervenes to assist this Court in further developing a workable and functional doctrine. In the AGBC's view only refinement is required. A clear analytical framework can be drawn from the existing jurisprudence, with *Fraser* serving as a blueprint.[4]

4. The AGBC submits the examination of whether a law has a disproportionate impact on the basis of a protected ground is distilled into two parts: (1) a *qualitative* assessment; and (2) a *quantitative* assessment. Both are necessary. The qualitative assessment is relatively straightforward; it is the quantitative assessment that requires further examination and guidance.

B. Statement of facts

5. The AGBC takes no position on the facts in this appeal.

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[1] *R. v. Sharma,* 2022 SCC 39 ("*Sharma*") at para. 34.
[2] *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at para. 2.
[3] *Sharma* at para. 34, citing *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, at para. 2.
[4] *Fraser v. Canada (Attorney General),* 2020 SCC 28 ("*Fraser*").

PART II – QUESTIONS IN ISSUE

6. The AGBC intervenes to assist the Court with the articulation of the framework to address the first constitutional question stated by the appellant: Does s. 3 of the *Reduced Contribution Regulation*[5] infringe the right to equality protected by s. 15(1) of the *Charter*?[6]

PART III – ARGUMENT

A. Disproportionate impact is a two-part assessment

7. The first part of the s. 15(1) test asks whether the impugned law, on its face or in its impact, creates a distinction based on an enumerated or analogous ground.[7] In cases of adverse effects discrimination, the claimant must establish this distinction by showing that the law creates or contributes to a disproportionate impact on a protected group based on a protected ground, relative to non-protected individuals.[8]

8. Although seemingly vague, a straightforward framework of "disproportionate impact" is garnered from this Court's jurisprudence. With *Fraser* serving as the blueprint, the test for disproportionate impact is distilled into two parts: (1) a *qualitative* assessment; and (2) a *quantitative* assessment. Accordingly, a court called upon to determine whether a law has a disproportionate impact on a protected group makes the following inquiries:

a. *First*, who is excluded or burdened by the impugned law, and is there a connection between being excluded or burdened and membership in a group protected by s. 15(1) of the *Charter*? (qualitative)

b. *Second*, is the protected group in the excluded or burdened group captured on a disproportionate basis as compared to non-protected individuals? (quantitative)

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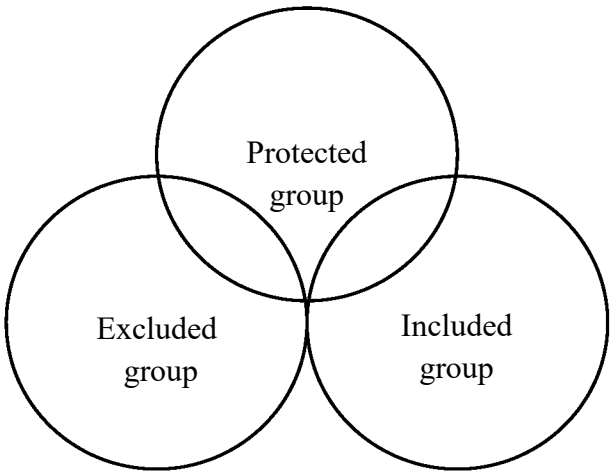
[5] CQLR, c. S-4.1.1, r. 1.
[6] Mémoire de l'appelant, para. 44(1).
[7] *Fraser* at para. 27.
[8] *Sharma* at para. 3; *Fraser* at paras. 30, 51 and 52.

B. <u>Clear and consistent terminology will promote doctrinal clarity</u>

9. It is important to pause here and reflect on the key terms used in this analysis. Indirect discrimination includes claims where the group that is excluded or burdened by the impugned law consists of *more than* just members of a protected group. For instance, in this case, the law excludes a broad group of individuals which inevitably captures a variety of individuals with different characteristics. In addition, the claim requires a comparison between members of a protected group and non-members. To facilitate addressing these concepts, the AGBC proposes the following terms:



a. **Included group:** The group of people who either qualify for the benefits scheme or do not face the burden of the law. For instance, in *Sharma*, the included group was offenders who qualified for conditional sentences; in *Fraser*, the included group was members of the RCMP who were eligible for the favorable pension benefits.

b. **Excluded group:** The group of people who are excluded from the benefits of, or burdened by, the impugned provision. In *Sharma*, the excluded group was offenders ineligible for a conditional sentence; in *Fraser* it was the RCMP members who job-shared.

c. **Protected group:** The group of people who are protected by s. 15(1) of the *Charter* on the basis of a protected ground. In *Sharma* it was Indigenous persons; in *Fraser*, the protected group was women.

10. The degree of overlap will inevitably vary in each context.[9] What is necessary, however, is that the categories of persons affected by the impugned law are defined with precision when assessing disproportionate impact. Otherwise, the exercise can quickly become fraught with confusion. Commonly used terms like "claimant group", "disadvantaged group", or "affected group" can only be useful to the extent that they are clearly defined, but in many cases they are used interchangeably, and thus confusingly.[10]

C. The qualitative assessment

11. The first part of the analysis is a qualitative assessment examining the makeup of the excluded group. The question is whether the excluded group consists of members of a protected group and whether a qualitative connection exists between membership in the protected group and membership in the excluded group. It is functionally the causation element of the analysis. Although it appears complex, it is logically straightforward.

12. Using *Fraser* as an example, recall that the majority found that the excluded group (job-sharers) were predominately women, and at times, exclusively women. The membership of the protected group (women) in the excluded group (job-sharers) was related to the protected ground of sex due to the customary reality of women bearing the overwhelming share of childcare responsibilities and therefore making up the overrepresented population of part-time workers.[11] Relying on this evidence, Abella J., writing for the majority, found "clear association between gender [the protected ground] and fewer or less stable working hours [the excluded group]".[12] The fact that the vast majority of the excluded group were women was, therefore, not a matter of coincidence.

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[9] The degree of overlap may also vary temporally. For example, in *Fraser* there was four years of complete overlap between the excluded group and the protected group: "From 2010-2014, 100 percent of members working reduced hours through job-sharing [the excluded group] were women [the protected group]" (see paras. 10, 97).

[10] For two recent examples see: *Yao v. The King,* 2024 TCC 19 ("*Yao*") at para. 202; and *Flette et al. v. The Government of Manitoba et al.,* 2022 MBQB 104 ("*Flette*") at paras. 188, 203;

[11] *Fraser* at paras. 98-105.

[12] *Fraser* at para. 106.

13. This Court in *Sharma* explicitly stated what the majority in *Fraser* implicitly applied, explaining: "the claimant must establish a link or nexus between the impugned law and the discriminatory impact".[13] In other words, the claimant must establish a connection between the law's impact and membership in a protected group.

14. There must be *something* about the specific exclusion or burden that impacts the protected group in a manner *related* to the protected ground.[14] To do that, the Court must ask *why* the protected group is in the excluded group and that answer may connect the impact of the law to the characteristics of the protected group. In such cases, the causal element is met and not a matter of coincidence or chance. This is not a "but for" causation analysis – i.e. that the claimant did not get the job because of her sex.[15]

15. The factual matrix of *Sharma* is illustrative. The claimant failed to prove a disproportionate impact because she failed to demonstrate that the impact of the benefit exclusion (CSO ineligibility) was related to her protected ground of race.[16] What was required was evidence that the CSO-ineligible offences were tied to Indigenous Canadians (membership in the excluded group) *in a way* related to their race (membership in the protected group).

16. Similarly, in *R. v. Nur*,[17] the Ontario Superior Court of Justice, affirmed by the Court of Appeal, rejected the claim that the mandatory minimum sentence in s. 95 of the *Criminal Code* had an adverse impact on black people because the causal link did not exist. Although the statistical evidence showed that black people made up a disproportionate number of individuals charged under s. 95, the Court explained:

> [79]… It is not difficult to establish that poverty, unemployment, poor housing and weak family structures contribute to the proliferation of gang culture and gun crime. It is also not difficult to establish that these phenomena will attract heavy police attention and will lead to the laying of large numbers of s. 95 charges. Finally, it is not difficult to establish that

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[13] *Sharma* at para. 44.
[14] *Fraser* at para. 106.
[15] *Sharma* at paras. 47-48.
[16] *Sharma* at paras. 43-45, 73, 76.
[17] *R. v. Nur*, 2011 ONSC 4874, aff'd 2013 ONCA 677, aff'd on other grounds 2015 SCC 15.

> anti-black discrimination undoubtedly contributes to many of these underlying society causes. However, none of this establishes that s. 95 itself violates s. 15 of the *Charter*…
>
> [80] The s. 15 arguments advanced by the Applicant and the Intervener could be made in relation to any provision of the *Criminal Code* that results in mandatory imprisonment, for example, the sentence of the offence of murder. If disproportionate numbers of blacks are charged with murder because of the discriminatory impact of poverty, unemployment, poor housing and biased law enforcement decisions, would it be appropriate to strike down the mandatory penalty for murder? Obviously not.[18]

17. In other words, there was no evidence that black persons were s. 95 offenders (membership in the burdened group) as a result of something related to their race (membership in the protected group).

18. What was missing in both *Sharma* and *Nur* was evidence linking race with being an offender of the specific offences captured by the impugned provisions. Or, in the words of this Court in *Taypotat*, evidence of a "relationship" between the law's impact and the protected ground.[19]

19. A useful example of the qualitative assessment at work can be found in the recent case *Metro Taxi Ltd. et al. v. City of Ottawa*,[20] where the claimants argued Ottawa's policies in response to Uber's arrival to the city discriminated against taxi drivers (the burdened group) on the basis of race (the protected ground). Although the class of "taxi drivers" was shown to be predominately racialized, the Court rejected the claim for adverse effects discrimination:

> [326] The taxi industry is an attractive option for new immigrants because of the low barrier to entry. **The Plaintiffs' evidence does not, however, establish a connection between the decision to purchase a taxi plate license and personal characteristics such as ethnicity or immigration status. I do not find that the class members' status as plate holders is intrinsically tied to their status as racialized people and immigrants**. Messrs. Mezher, Mail, Dadi, and El-Feghaly all testified that they were motivated to acquire a plate for investment purposes as well as to generate income. When Mr. Mail arrived in Canada, he first invested in a gas station, and it was not until ten years later that he decided to purchase a taxi plate licence because it was an attractive business opportunity. While I find the stories of Messrs. Mezher, Mail, Dadi, and El-Feghaly impressive**, their individual immigrant experiences and journeys do not allow me to conclude that these inevitably**

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[18] *Nur* at paras. 79-80, adopted by the Ontario Court of Appeal in 2013 ONCA 677 at para. 182.
[19] *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30 at para. 24.
[20] *Metro Taxi Ltd. et al. v. City of Ottawa*, 2024 ONSC 2725.

> **led them to the acquisition of a taxi licence plate. There is evidence that shows that immigrants and racialized people work at a wide variety of occupations in the City of Ottawa.**
>
> [Emphasis added.]

20. The Court identified the burdened group (taxi-drivers), and accepts that a protected group (racialized people) exists within it. The Court then examines whether the protected group's membership in the burdened group (taxi-drivers) is related to their protected ground (race). Unlike in *Fraser*, where the claimants produced evidence linking being a job-sharer with their sex, the claimants did not establish on the evidence that being a taxi-driver was innately connected to race.

21. This Court has clarified that this qualitative assessment does not involve the examination of broad evidence of historical social disadvantage; that is left to the second part of the s. 15(1) test.[21] The law's disproportionate impact is separate and distinct from the question of whether it perpetuates disadvantage.[22] It is possible that membership in an excluded group is also a matter of social disadvantage. But that is not the inquiry.

22. The focus is chiefly on the connection or relationship between the protected ground and the impact of the law – *not* on disadvantage. Focussing on disadvantage will inevitably result in a finding of disproportionate impact because of the advantages associated with being in the included group (e.g. receiving the benefit). This not only conflates the first and second steps of the equality analysis, but it is also antithetical to the principle that s. 15(1) of the *Charter* is not a vehicle to require the state to solve systemic disadvantage and inequality.[23] The correct focus at the first stage is a fundamental lens for any development to the distinction in effects test as the courts will always be faced with groups who face social or historic disadvantage.

23. Without a clear framework, courts will continue to conflate distinction with disadvantage and by extension perform an assessment of the social order and engage in distributive justice. Section 15 does not require the state to enact laws to ameliorate the symptoms of systemic or general inequality. Rather, as this Court has repeatedly held, when the government enters the field

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[21] *Sharma* at para. 69-71.
[22] *Sharma* at paras. 30, 69-71.
[23] *Sharma* at para. 63.

by establishing a benefit, the benefit cannot be withheld *on the basis* of an enumerated or analogous ground.[24]

D. The quantitative assessment

24. The second part of the disproportionate impact analysis is a *quantitative* assessment. This comparative exercise asks whether the impact of the law is disproportionate to protected group members as compared to non-protected individuals.[25] It is a crucial component of the adverse effects discrimination analysis as equality is inherently comparative.

25. There must be some degree of disparity between protected group members and non-protected individuals.[26] However, the precise methodology and degree of disparity is unclear.

26. In *Fraser,* the majority performed the quantitative assessment by implicitly measuring the makeup of women in the excluded group against men in the excluded group.[27] Abella J., writing for the majority, stated it was *predominantly women* (the protected group) who were excluded from the benefit (excluded group), which implicitly suggests a low percentage of men in the excluded group – indeed, for certain years the makeup of the excluded group was "100 percent" women.[28]

27. Several questions were left unanswered by *Fraser* on the appropriate methodology to assess disproportionately: do we always measure the representation of protected group members in the excluded group against non-protected individuals in the excluded group? Do we instead measure the excluded group against the included group? Do we measure the representation of protected group members in the excluded group against their general representation in society? And lastly, and perhaps most importantly, what is the *degree* of disproportionality required to find a distinction in effect?

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[24] Dickson C.J. stated in *Mckinney v. University of Guelph,* [1990] 3 S.C.R. 229; McLachlin C.J. stated in *Auton (Guardian ad litem of) v. British Columbia (Attorney General),* [2004] 3 S.C.R. 657 at para. 41.
[25] *Sharma* at para. 40.
[26] *Sharma* at para. 40.
[27] *Fraser* at para. 97.
[28] *Fraser* at para. 97.

28. On an examination of the jurisprudence, several methodologies emerge:

a. Percentage of protected group members in the excluded group measured against the percentage of non-protected individuals in the excluded group (*Fraser*[29]; *Flette*[30]);

b. Percentage of protected group members in the excluded group compared to the percentages of protected group members in the included group (*Fraser* dissent[31], *Yao*[32], *Begum*[33]); and

c. Percentage of protected group members in the excluded group measured against their representation in the general population (*Jacob*[34]).

29. With the numerous methodologies available to measure disproportionality, the question remains what methodology, or methodologies, ought the Court employ in its examination of disproportionality for the purposes of s. 15(1) of the *Charter*? And, if context drives that answer, can any guidance be provided on how to assess that context?

30. *Jacob*[35] is illustrative. The Ontario Court of Appeal used methodology (c) above to assess whether workers with disabilities suffered disproportionately from the $5,000 income threshold for CERB and CRB. Sossin J.A. held:

> [82] … When one turns to the group of workers who were determined to be not eligible for CERB because they did not meet the income threshold, the evidence prepared using the CSD reveals that **29.8% of this group were workers with disabilities – a significant over-representation as compared with the 16% of workers with a disability generally.**
>
> [83] This distinction tracks the fact that **workers with disabilities are much more likely to earn less than $5,000 than workers without disabilities**. According to Canada's expert, Mr. Reimer, in 2020, 19.5% of disabled workers earned employment income below $5,000, compared with 12.2% of non-disabled workers. Therefore**, disabled workers are 1.6 times (i.e., 60%) more likely than non-disabled Canadian workers** to have employment income below $5,000.

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[29] *Fraser* at paras. 97-102.
[30] *Flette* at para. 180.
[31] *Fraser* at para. 185.
[32] *Yao* at paras. 199-200.
[33] *Begum v. Canada (Citizenship v. Immigration)*, 2018 FCA 181 at para. 83.
[34] *Jacob v. Canada (Attorney General),* 2024 ONCA 648 ("*Jacob*") at paras. 15, 82.
[35] *Jacob* at paras. 82-83.

[Emphasis added.][36]

31. The Court first evaluates the membership of the protected group (workers with disabilities) in the excluded group (workers with less than $5,000 income): 29.8%. The Court then measures that population against the protected group's representation in the workforce generally (29.8% vs. 16%), finding this over-representation to be "significant". This is methodology (c) described above. Interestingly, the Court does not follow the methodology in *Fraser* (method (a) above) and compare the population of protected group members in the excluded group (workers with disabilities who made less than $5,000) against non-protected individuals in the excluded group (workers without disabilities who made less than $5,000). Instead, the Court assesses the likelihood of protected group members of being in the excluded group against non-protected individuals (60% more likely to be excluded).

32. An example of the *Fraser* method can be found in *Flette.*[37] The Manitoba Court of Queen's Bench performed a simple comparison between the number of protected group members in the excluded group and the number of non-protected individuals in the excluded group– while the impugned measures applied equally to all children in Manitoba care, the children in care were predominately Indigenous for the relevant time (88%) and therefore the impact was disproportionate.[38]

33. These methodologies reveal different aspects of the impact and potential impact of the law. Clarity is greatly needed on which methodology to employ. While a malleable and open-ended framework may ensure accessibility to all potential abstractions of indirect discrimination, albeit well-intentioned, such a framework is unworkable. Confusion only serves to limit the equality protection of s. 15(1) through excessive litigation and uncertainty for legislators.

34. *Fraser* instructs that the proper methodology is method (a). This is consistent with both the goals of ensuring that the first step of the s. 15 test is not an onerous hurdle[39] and that the focus of

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[36] *Jacob* at paras. 82-83.
[37] *Flette* at para. 179.
[38] *Flette* at para. 180.
[39] *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17, [2018] 1 S.C.R. 464 at para. 26.

the analysis is on the *effect* of the law. In some cases, like *Fraser* or *Flette*, proving the quantitative aspect will be empirically straightforward. In others, reliance on statistical likelihood may be required.[40]

35. Methodology (b), which compares the percentage of protected group members in the excluded group against the percentage of protected group members in the included group (and implicitly the percentage of non-protected individuals), must be rejected. Considering the makeup of protected group members in the included group directly contradicts this Court's longstanding jurisprudence that differential treatment can occur despite the fact that not all members of the protected group are equally mistreated.[41] Whether some protected group members benefit from the law is not enlightening about the effect of a law on a protected group for the purposes of adverse effects discrimination.

36. With respect to methodology (c), although seemingly useful, it only tells us the representation of protected group members in the excluded group as against their representation in society generally. In order to be comparative, it would require a further examination of non-protected individuals in the excluded group versus their representation in society generally, which would need to be measured against the protected group result. It is unclear what this methodology tells us about the effect of the law that the simple *Fraser* methodology does not.

37. The corollary to the question of the appropriate methodology for disproportionality is the *degree* of disparity required. There must be *some* degree of statistical disparity to meet the threshold required for disproportionality. In *Fraser*, Abella J. writing for the majority, provided some guidance but cautioned against "rigid rules" on this issue:

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[40] See, e.g. *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971) ("*Griggs*") and *Jacob* at para. 83. As discussed above, the Court in *Jacob* relies on the conclusions that workers with disabilities are 1.6 times more likely than non-disabled workers to not meet the income threshold. In other words, the Court finds the protected group was 60% more likely to be in the excluded group than non-protected individuals (workers without disabilities).

[41] See *Centrale des syndicats du Québec v. Quebec (Attorney General)*, 2018 SCC 18 at para. 28.

> [59] There is no universal measure for what level of statistical disparity is necessary to demonstrate that there is a disproportionate impact, and the Court should not, in my view, craft rigid rules on this issue. The goal of statistical evidence, ultimately, is to establish a 'disparate pattern of exclusion or harm that is statistically significant and not simply the result of chance'…[42]

38. Respectfully – this measure matters greatly. For instance, in *Simpson*,[43] the Ontario Superior Court of Justice finds disproportionate impact for students with disabilities without any insight into the *degree* of disproportionality:

> … I find that Ms. Simpson has established that **many** students with disabilities take longer to complete their postsecondary studies than students without disabilities, and that the operation of the CSLP imposes a burden of additional debt on **those** students with disabilities who take longer".[44]

39. The decision in *Simpson* leaves essential questions unanswered. How many students? How much longer?

40. It is this measure that determines the extent to which the court embarks on solving complex issues of social-economic inequality through s. 15(1) of the *Charter*. Undoubtedly, the majority's conclusion in *Fraser* would have been different had the make-up of the excluded group contained only 40% women. What we are left with is language of a "pattern", which suggests more than just one statistic of disparity; it suggests a *series* of statistics demonstrating disparity. *Fraser* also contains language suggestive of a high degree of disparity, such as "statistically significant"[45], "predominately women"[46] and "substantially higher rate".[47]

E. Conclusion

41. In the AGBC's submission, the general principles underlying the constitutional protection against indirect discrimination are clear and a coherent roadmap for conducting the disproportionate impact assessment exists. Only refinement is needed to outline the constitutional

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[42] *Fraser* at para. 59.
[43] *Simpson v. Canada (A.G.) et al.,* 2020 ONSC 6465 ("*Simpson*") at para. 273.
[44] *Simpson* at para. 273 [Emphasis added].
[45] *Fraser* at para. 59.
[46] *Fraser* at para. 97.
[47] *Fraser* at para. 32, citing *Griggs*.

parameters needed for the governments to confidently enter the field to address social inequalities with benefit schemes. This case provides a perfect opportunity for that fine-tuning. Clear methodology and language will not foreclose a contextual assessment at each stage of the analysis, as can be seen from the qualitative and quantitative assessments outlined above.

PART IV – COSTS

42. The AGBC does not seek costs and asks that no costs be awarded against it.

PART V – ORDER SOUGHT

43. The AGBC takes no position with respect to the disposition of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

Ashley Caron
Sergio Ortega
Counsel for the Intervener
Attorney General of British Columbia

Dated at Victoria, British Columbia,
This 7th day of April, 2025.

PART VI: TABLE OF AUTHORITIES

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