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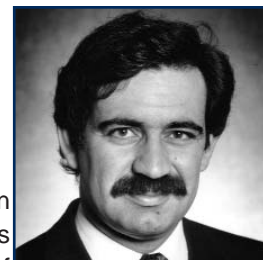
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BROWNFIELDS CHANGES PROPOSED IN ONTARIO: HORIZONTAL SEVERANCES ("PIE CRUSTS") TO BE PROHIBITED?

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The Ontario MOE has proposed several potential changes to legislation primarily designed to introduce greater certainty to Brownfields development. The proposal, available in full on the Environmental Bill of Rights Registry, addresses several concerns that have been raised over the application of the Brownfields Legislation and Regulations that came into effect in 2004. Included in the proposal are clarifications to several of the so-called "re-openers" to a Record of Site Condition that have proven to be problematic thus far.

Ontario's Record of Site Condition regime, provides a limited immunity from further MOE action to persons owning a property against which an RSC has been registered. The Ontario legislation however has often been criticised as allowing too broad a regulatory discretion to circumvent the immunity and 're-open' the possible regulatory obligations of the site owner. The new proposals would place additional limits to existing re-openers, provide greater certainty as to the triggers for the re-openers and presumably, result in a greater willingness of prospective purchasers and developers to consider Brownfield sites in their plans.

Many of the suggested changes will be welcomed. The proposals to limit the re-opener for offsite migration (at least for those not having caused or permitted the original contamination) to situations where that migration in fact exceeds applicable site condition standards would be a significant improvement over the current scheme which theoretically at least allows the RSC protection to be lost where any molecule of a contaminant crosses a property boundary. The fact that the MOE has often stated it would be unlikely to act in such a scenario, is all the more reason for a legislative change that more accurately reflects the regulatory reality.

Another potentially useful change is the proposal to clarify that persons who undertake remediation work at a property should not be considered for that reason alone a person in occupation or in charge management or control of the property. Such a proposal would be welcomed by those in the environmental consulting and remediation fields as it may well diffuse some of the more draconian implications of the *Gemtech* decision discussed in an earlier issue of this publication. Readers may recall that in that decision, the environmental consultant was convicted for a *Fisheries Act* violation at least in part because of actions taken by the consultant in the course of a landfill rehabilitation.

More controversial in the reform package is the suggestion to impose limits on the ability of owners to horizontally sever their lands. Horizontal severance, sometimes also called "pie crust" severance, allows the legal severance of the surface of the land from lands at depth. The concept has long application in the mining field as a way of allowing continuing use of the surface by one owner with simultaneous extraction of minerals from the subsurface by another. The

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common law has developed various principles such as easements to ensure appropriate provision of support to the surface owner and access to the subsurface owner. Recently, the use of this type of severance has received attention as having potential application to contaminated lands. Such a severance might allow financing and development of the relatively clean surface by one owner while leaving liability for the more contaminated subsurface with another. The potential for this device leading to creative solutions for Brownfield sites is intriguing. A person responsible for contaminating a neighbour's land at depth, for instance, might consider a purchase of that subsurface as compensation while allowing ongoing ownership and use of the surface by the neighbour. An option could be granted to the neighbour to repurchase the subsurface lands at the time of re-development which would in turn trigger an appropriate remediation which could then be undertaken at a time of least disruption to users of the surface.

Concerns that this may lead to the subsurface being owned by an assetless "shell" corporation, should be treated no differently than for traditional conveyancing and severance of lands. Ontario has long had retroactive legislation that ensures that former owners of land are not immunised from responsibility simply by conveying to a less viable successor. Concerns that this would immunise future owners of the clean surface from future MOE liability would seem to be hard to justify as a matter of policy. Given that such an owner would never have had any legal interest in the contaminated site (and may well never have had any desire to purchase such an interest in the first place) the effect of prohibiting such a severance may well be to make otherwise attractive Brownfield properties unattractive and undevelopable - exactly the opposite result to what Brownfields legislation tries to achieve.

By proposing to prohibit such severances of contaminated land at such an early stage of its use in Ontario, the legislature may put an early end to what could otherwise prove to be a tremendously flexible mechanism for solving some of the more intractable problems of dealing with contaminated land.

Written submissions to the MOE on the proposals may be made until February 15, 2007.

CONTAMINATED SITES AND BROWNFIELD REDEVELOPMENT IN ALBERTA: WHERE ARE WE NOW?

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Brownfields are a legacy of a century of industrialization - they are abandoned, idle or underutilized commercial or industrial properties where past actions have caused known or suspected environmental contamination, but where there is an active potential for redevelopment. There may be as many as 30,000 brownfield sites in Canada. They include decommissioned refineries, former railway yards, old waterfronts and riverbanks, crumbling warehouses, abandoned gas stations, former drycleaners and other commercial properties where toxic substances may have been used or stored. In 1996, it was reported that there were 50 brownfield sites in Alberta, mostly related to closed down service stations, wood preserving facilities and oil and gas facilities. Today, the number of brownfields in Alberta is unclear. In fact:

... the absence of a publicly available inventory of brownfield sites [in Alberta] is indicative of the many challenges facing brownfield redevelopment. ... This is compounded by the fact that owners and municipalities are reluctant to characterize sites as brownfields for fear of attracting liability, negative public attention or lower property values.

Alberta has been slow to enact legislation to address the various financial, regulatory and liability issues that have traditionally presented barriers to private sector redevelopment of brownfield sites. This may be a result of Alberta's unique brownfield situation compared to other provinces such as Ontario and Quebec that have a much longer history of industrial activity. In larger urban centers, former industrial sites (such as waterfront properties in Toronto), represent prime redevelopment opportunities which may have contributed to comparatively earlier enactment of brownfield legislation in Ontario. In contrast, many brownfield sites in Alberta are associated with the oil and gas industry and occur in remote rural areas where redevelopment pressures are lower.

More recently, Alberta has experienced unprecedented growth and development along with a number of widely publicized matters concerning liability for clean-up of former commercial or industrial sites. In October 2003, Alberta Environment established the Contaminated Sites Stakeholder Advisory Committee (CSSAC) to review Alberta's contaminated land management legislation and make recommendations for improvements and revisions where necessary. Contaminated site regulation, guidelines and other policies, supplemented by recent amendments to the Alberta *Environmental Protection and Enhancement Act* (AEPEA) are currently under development and intended to support the CSSAC recommendations (which, to date, have not been published).

Since 1993, contaminated lands have been regulated under the AEPEA. Remediation orders for contaminated land can be issued under either Division 1 (Releases of Substances Generally) or Division 2 (Contaminated Sites) of Part 5 of the AEPEA. The contaminated sites provisions are much more detailed, especially with respect to liability issues, but are also more cumbersome to administer, as they involve a detailed and lengthy process for moving from designation of contaminated sites to completion of site remediation. Alberta Environment has used the contaminated sites provisions very sparingly, with only five contaminated sites being designated since 1993. In a series of cases in the early 2000s, the Alberta courts held that the substance release orders under Division 1 may be used retroactively to deal with contamination that occurred prior to the enactment of the AEPEA on September 1, 1993. As a result, (and to great controversy), Alberta Environment has made the substance release order its tool of choice in management of contaminated land.

On May 24, 2006, the *Environmental Protection and Enhancement Amendment Act, 2006* (Amendment Act) came into force. Many of the provisions in the *Amendment Act* were aimed at contaminated sites (substance release provisions) and appear to be a result of recommendations made by the CSSAC. Amongst the important amendments are provisions that clarify the retroactive application of the AEPEA. It is now clear that substance release provisions such as the duty to report and duty to remediate are retroactive and will apply, in specified circumstances, to releases prior to the enactment of the AEPEA. Importantly, while the amendments add a new duty to report pre-AEPEA releases, they do not create a corresponding offence and penalty for failing to comply with that duty.

It is also now clear that the Director may issue an environmental protection order for pre-AEPEA releases. However, the Director may only do so where an adverse effect "has occurred or is occurring." The Director may not issue a pre-emptive environmental protection order to prevent an adverse effect from occurring. Restricting the circumstances under which an environmental protection order can be issued for pre-AEPEA releases has been criticized as being inconsistent with other order powers under the AEPEA and the principle of pollution prevention.

Brownfield redevelopment is contemplated by the amendment of section 112 of the AEPEA that deals with the duty to take remedial measures following a substance release before, on or after September 1, 1993. Risk management (i.e. site specific risk assessments) are now an acceptable remedial strategy to deal with contaminated land.

The Year Ahead

In early 2007, Alberta Environment will introduce remediation certificates for petroleum storage tank sites, which will be issued for specific areas, depths and substances. The remediation certificate is intended to provide an incentive to remediate contaminated petroleum storage tank sites by providing regulatory closure after a limited period of liability - a period which has yet to be determined. The goal of Alberta Environment is to start issuing remediation certificates for upstream oil and gas sites later in 2007. In contemplation of privatization of certain government functions (such as remediation review and certification of petroleum storage tank sites), the *Amendment Act* has expanded the range of persons who may carry out the duties of the Minister under the AEPEA. See for example, the revisions to section 17(1) of the AEPEA where "[t]he Minister may in writing delegate to any person any power or duty conferred or imposed on the Minister under this Act."

Alberta Environment is also developing two new guidance documents for contaminated sites. The Tier I Guideline will include all generic remediation endpoints for soil and groundwater. The Tier II Guideline will provide stakeholders with information on the process of deriving a site-specific remediation endpoint that will ensure the protection of human health and the environment.

RECOVERY OF REMEDIATION COSTS

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The *British Columbia Environmental Management Act* ("EMA") gives those persons who have incurred costs of remediation a statutory right of action to recover those costs from responsible persons. There was some question as to whether there were pre-conditions to bringing what is called a "cost recovery" or "allocation" action, but the EMA has been clarified in this regard. A court has power to determine the following:

1. whether a person is a responsible person;
2. whether the costs of remediation are reasonably incurred;
3. the apportionment of costs among the responsible persons;
4. whether the site is a contaminated site; and
5. other such determinations as are necessary to a fair and just disposition of the matter.

In a cost recovery action, all legal and equitable defences may be raised, including any agreements between the parties. A court will consider the following factors in allocating remediation costs among responsible persons:

1. price paid for the property;
2. relative due diligence of the responsible persons;
3. amount of contaminating substances and toxicity attributable;
4. relative degree of involvement by each of the persons in the action; and
5. remediation measures implemented and paid for.

The EMA establishes that cost recovery actions may be advanced whether or not regulatory authorities have determined responsibility for a contaminated site. If remediation efforts have occurred without a determination by the director that the site is contaminated, the person who incurred the costs of remediation may nonetheless commence a cost recovery action.

British Columbia Court of Appeal Rules On Reasonable Costs of Remediation

Canadian National Railway v. ABC Recycling 2006 BCCA 429

The decision by Madam Justice Kirkpatrick that a successful plaintiff, in this case CN, can recover its reasonable actual legal costs incurred in pursuing responsible parties as a component of reasonable remediation costs has been successfully contested.

When this case first came before the courts, the BC Supreme Court considered what constitutes "reasonable costs of remediation" in a cost recovery action. The case arose from a CN property that was contaminated by its neighbour, ABC Recycling. After an initial partial "dig and dump" clean up by ABC, CN took over the remediation process incurring further investigative and remediation costs.

CN's investigation and remediation efforts were undertaken to enable the sale of the property. The investigation revealed that the property was still contaminated. There was no dispute that ABC had caused the contamination of CN lands. In fact, many of the issues common to a cost recovery action were not in dispute. It was agreed that ABC had caused the contamination as a responsible person, and thus was liable for the remediation costs.

The Court in the initial action held that the person bringing the cost recovery action has a burden to prove that the costs were reasonable. Although ABC argued that the clean up costs incurred were excessive, the Court decided otherwise. The Court also held that reasonable costs included not only legal costs associated with the remediation, but also legal costs incurred in the cost recovery action itself. As such, CN managed to recover nearly 95% of its total legal costs, as opposed to the average 25% recovery of actual legal costs.

The victory for CN was short lived. ABC appealed the decision to the British Columbia Court of Appeal. The question in the appeal was whether Section 27 of the *Waste Management Act* (the "Act"), now section 47 of the EMA, provides for the recovery of special costs of a successful action for the expenses incurred by the owner against the responsible party.

In short, Justice Lowry of the Court of Appeal held that section 27 of the Act makes no provision for an order awarding the plaintiff recovery of its reasonable actual legal costs. The decision is one of statutory interpretation.

The original decision of the BC Supreme Court was said to be in line with the underlying principles of the legislation, ensuring that the polluter pays and deterring polluting activities. Entitling CN to its special costs of successfully suing and establishing liability against ABC would provide for speedy remediation of contaminated sites (at para. 182).

However, Justice Lowry disagreed not only with the result, but also with the legal analysis. According to Justice Lowry, the interpretation of "*legal costs*" was not applicable to the circumstances of this case. What was applicable was that the "costs of remediation" as set out in the Act, applied only to legal and consulting costs associated with seeking recovery from "*other responsible persons*".

Justice Lowry turned to the specific facts of the case. Here there were no "*other*" persons responsible for the contamination. There was only ABC.

This case provides a warning to those owners who have spent funds on remediation. The BC Court of Appeal relied on a plain meaning of the language of the Act, further concluding that there was no suggestion that ABC's conduct was in any way reprehensible to justify an award of special costs.

This decision is relatively recent, but what can be immediately deduced is that what constitutes "reasonable costs" of remediation is dependant on the facts of each case. Further, it is apparent that the BC Court of Appeal was not prepared to depart from the normal mandate of awarding a successful litigant approximately ¼ of their actual legal costs.

It will be interesting to see if this decision alters the deterrent impact of the "polluter pays" principle. The decision may provide future defendants the opportunity to argue that the plaintiff should have employed less expensive measures to remediate the contaminated site. Future cases may call into question the expense a plaintiff incurs in dealing with a problem of the defendant's making.

SAVE THE ENVIRONMENT AND TAXES BY DONATING OF ECOLOGICALLY SENSITIVE PROPERTY

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The Canadian Ecological Gift Program allows Canadians with ecologically sensitive land to protect nature and leave a legacy by donating the property or property rights to an eligible charity or the government. This program became even more attractive in the 2006 Federal Budget. As of May 2, 2006, donors will not have to pay tax on the capital gain realized on the donation of ecologically sensitive property. Individual and corporate donors can still claim a tax credit or deduction, respectively, for the value of the gift up to 100% of their net income and carry forward remaining credit or deduction for 5 years.

Ecologically sensitive land is property that currently, or could at some point in the future contribute significantly to the conservation of Canada's biodiversity and environmental heritage. Since the program's inception in 1995 over \$143 million worth of ecologically sensitive property has been donated, protecting 45,000 hectares of land.

In order to receive the tax benefits under this program, first a report on the ecologically sensitive nature of the gift must be filed with the Minister of the Environment. The Minister will assess whether to certify land as ecologically sensitive land. Next, the donor must submit an appraisal report on the fair market value of the land. The fair market value is the most probable price which the property should bring in a competitive in open market on the relevant date, where the buyer and seller are each acting prudently and knowledgeably. After reviewing the report the Minister will issue a Notice of Determination of the fair market value of the gift. Unless disputed, the amount on the Notice of Determination will be the value of the tax credit or deduction to the donor. Then the donation can be made to any level of government or an eligible charity.

To date there are 172 charities eligible to receive these donations. In order to qualify as an eligible recipient a charity must be registered in Canada, have a primary purpose such as "the conservation and protection of Canada's environmental heritage," and apply to Environment Canada. Currently, donations to private foundations do not receive the favorable tax treatment.

Recipients of ecologically sensitive gifts are responsible for maintaining the biodiversity and environmental heritage of the property in perpetuity. Thus, a recipient charity is expected to have a management plan regarding environmental stewardship, monitoring, visitor safety, and remediating environmental hazards. The recipient must also consider the costs of ongoing liability insurance and property taxes. If a charity or municipality disposes of the property or changes the use of the property without the permission of the Minister of the Environment, it must pay a tax of 50% of the fair market value of the land.

While a donor will not have to pay fees to the Minister, nor capital gains tax, there are costs associated with this type of donation, including the survey, the appraisal, and preparation of the legal documents. Donors and the recipient should agree who should pay these costs. Donors should also consider options in which they can retain use of the property either by maintaining a life interest in the property and donating a remainder interest or by donating a covenant, easement or real servitude in respect of the property. While these options generate a tax credit or deduction and serve to ensure the environmental aspects of the land are protected, donors need to be aware that such gifts may limit the donors use of the land and could impact on its resale value.

As the donation process can take months, donors should to start the process early in order to complete the gift with the same calendar year. Lawyers in the Charities and Not-For-Profit Group at Miller Thomson are happy to assist donors and charities navigate the complexities of this gifting program.

JUDICIAL REVIEW OF A DECISION OF THE GOVERNMENT OF QUEBEC TO REFUSE THE ENLARGEMENT OF A WASTE DISPOSAL SITE

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***Compo Haut-Richelieu v. Mulcair*, no. 755-17-000369-044, Superior Court of Quebec, November 17, 2006**

Plaintiff was seeking to enlarge an existing waste disposal site in Saint-Athanase, near Saint-Jean-sur-Richelieu (hereafter a "WDS"), but the Government of Quebec of which Mr. Mulcair was then the Minister of Environment forbade the project by decree. Plaintiff therefore asked the Superior Court of Quebec to annul the government decree and required the Government of Quebec to re-evaluate the issue based on the rules of administrative justice.

The original project for enlarging the WDS, as put forward by the plaintiff, would have for the first seven years permitted 300 000 metric tons annually of waste, to be reduced afterwards to 85 000 metric tons annually following that period. According to the plaintiff, that plan was the only one that was economically viable for the long-term survival of the WDS. It is acknowledged by the parties though that the needs of the region do not exceed 85 000 metric tons annually of waste disposal.

After years of negotiations, expert studies, environmental impact studies, proposals and counterproposals between Quebec's Ministry of the Environment (the Ministry) and the plaintiff, the plaintiff maintained its insistence on having an economically viable project, and would not accept proposals that were lower than 215 000 metric tons annually of waste disposal for the first seven years. The Ministry's final proposal would

have had only 78 000 metric tons annually of waste welcomed in the enlarged WDS, in order to satisfy the latest environmental impact study done on the project. The entire process culminated on the 4th of February 2004, when the government adopted a decree refusing the delivery of a certificate of authorization for enlarging the existing WDS.

By way of letter sent on the 4th of February 2004, the Minister of Environment explained the reasons behind the refusal of the Government of Quebec to deliver the certificate of authorization. These reasons are as follows:

"The safety of the sector, which would have been affected by the truck traffic carrying waste, the quality of life of the residents that live near the site and along the access routes, the tourist and recreational potential of the region and the integrity of Great Wood of Saint-Grégoire, which possesses an exceptional ecological patrimony, were all taken into consideration in the government's decision" [Our translation]

The plaintiff argued that the rules of administrative justice were not followed in the decision not to grant the certificate of authorization and sought the annulment of the decree.

The first question the Court considered is what norm of control it should apply to the government's decision. The Court examined that the decision in question was not a judicial or quasi-judicial decision, but a decision of the Cabinet exercising the executive power of the government. The court noted that section 31.5 of the *Environment Quality Act*, R.S.Q. c. Q-2. (the Act), states that the Government may issue or refuse a certificate of authorization, after considering the environmental impact study:

31.5. Where the environmental impact assessment statement is considered satisfactory by the Minister, it is submitted together with the application for authorization to the Government. The latter may issue or refuse a certificate of authorization for the realization of the project with or without amendments, and on such conditions as it may determine. That decision may be made by any committee of ministers of which the Minister is a member and to which the Government has delegated that power.

The Court, after review of relevant jurisprudence on the issue, explained that the power of the Government here is purely discretionary, and that *patently unreasonable* is the norm of control applicable to decisions taken under section 31.5 of the Act.

In application of that norm of control, the Court found that it did not have to evaluate the worth of documents and other proof that the parties presented before it, or analyze the most optimum business and environmental project for the proposed WDS in Saint-Athanase.

After reviewing the elements considered in coming to the decision not to grant the certificate of authorization, the Court found that the Government's decision was not patently unreasonable. These elements were:

- (1) The fact that the Great Wood of Saint-Grégoire is one of the last Great Woods of the Montérégie region, and would have had 33 of its 458 hectares amputated by the plaintiff's proposed WDS project.
- (2) An endangered species of plant existed precisely within those 33 hectares, and removing it to other parts would have taken it out of its natural habitat, which was not favored by the Ministry of the Environment.
- (3) Considerations relating to the protection of subterranean water supplies.
- (4) Disagreement between the plaintiff and the Ministry of the Environment regarding the buffer zone that should separate the WDS from the outside environment. The plaintiff argued that 50 meter buffer zone should be outside of the 33 hectares while the Ministry of the Environment argued that the buffer zone should be located within the 33 hectares of the WDS.
- (5) Issues of noise pollution, especially regarding increased heavy truck traffic on roads and surrounding byways of the WDS.
- (6) Finally, the 'visual pollution' resulting from a large dune of waste towering over the

scenery and the impact the project may have on the tourist and recreational industries of the region.

The Court also noted out that the project was subjected to eight days of public hearings and that 118 factums were submitted, out of which 116 were opposed to the plaintiff's project, and that the BAPE report (Bureau d'audiences publiques sur l'environnement: "*Bureau of Public Hearings on the Environment*") concluded that the proposed project was "unacceptable".

Considering all these elements along with the discretionary power of the Government in the matter, as set out in section 31.5 of the Act, the Court concluded that the Government's decision was not patently unreasonable. While a project's economic viability is an important factor to consider, the Court explained that this should be considered along with other factors and it held that it was not up to the Court to arbitrate between them and to establish their relative value.

MILLER THOMSON ADDS ANOTHER DEDICATED ENVIRONMENTAL SPECIALIST

Miller Thomson LLP is pleased to announce that, effective February 1, 2007, Sandra Gogal joined our Toronto office as a Partner in our Environmental, Aboriginal Law and Electricity practice groups.

Sandra was named in the National Post's 2006 Legal Survey as an expert in aboriginal and environmental law in Canada. She has worked on aboriginal, environmental and regulatory issues for several years, including as in-house counsel for Newfoundland and Labrador Hydro and the Ontario Ministry of Natural Resources. She has also advised oil and gas companies on aboriginal land claims issues and facilitated and negotiated impact benefit agreements on behalf of mining companies and industrial supply companies. Sandra is currently the National Vice Chair of the Canadian Bar Association, Aboriginal Law Section; a member of the Conference Board of Canada, Round Table for Corporate Aboriginal Relations; and a member of the Aboriginal Minerals Association. She has presented at numerous conferences throughout Canada on the implications of aboriginal law issues in Canada.

Sandra's experience and expertise complement that of the other members of Miller Thomson LLP's environmental, aboriginal and electricity teams and help us continue to provide high level service to our clients in these areas.

WHAT'S HAPPENING AROUND MILLER THOMSON LLP

On March 6, **Tamara Farber** will be presenting on the topic of "Managing Environmental Risks in Real Estate Transactions" at the LORMAN seminar, Real Estate Development From Beginning to End in Ontario.

On March 21, the Montréal office will be hosting a seminar on "Environmental Contamination". Topics to be discussed include:

- Curbside Recycling Program Tarification
- Environmental Due Diligence and the Purchase or Sale Agreement of an Immoveable
- Evaluation of Contaminated Land: Property Tax Implications for Contaminated Sites
- Liability in Environmental Matters: Review of Principles and Recent Jurisprudence

On May 4, **Luc Gratton** will participate as a panelist at the "Third Annual National Environmental Energy and Resources Law Summit" of the Canadian Bar Association.

A web-exclusive comment entitled "Bill-C-35 is smart law" written by **Bruce McMeekin**, was featured in the *Globe and Mail*.

Tony Crossman recently presented at the Environmental Managers' Association of BC on the topic of "The Future of Remediation in BC".

In November, **Rosanne M. Kyle** presented on the topic of "The Importance of Managing Relationships with First Nations" at the the Native Investment and Trade Association conference in Calgary.

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