September 2013

Ontario fine-tunes EASR approvals process and extends phase-in deadlines

The Ontario Ministry of the Environment (MOE) has proposed a series of amendments to its Environmental Activity and Sector Registry (EASR) process. Rather than applying for an Environmental Compliance Approval (ECA), businesses must register prescribed activities – which are typically well understood and have minimal environmental impacts – on the web-based registry system. The regulatory amendments would reduce administrative overlap between the streamlined EASR and the more onerous ECA, expand the types of activities that are eligible for the EASR, amend the noise rules for standby generators, and extend the phase-in deadlines. Posted on the Environmental Registry (EBR #011-9631) on August 23, 2013, the deadline for public comment is October 7, 2013.

New EASR Activities and Exemptions

MOE proposes expanding the list of prescribed heating and standby power systems so that "the ministry can refocus case-specific technical review resources to more complex approval applications." The list of EASR-eligible heating systems would be expanded to include associated ventilation, cooling and refrigeration equipment. An HVAC system with cooling towers would be subject to additional eligibility and operating requirements. Small dust collection systems (in retail locations and schools), laboratory fume hoods (in schools), and the indoor operation of arc-welding equipment (for light maintenance only) are added to the list of EASR activities. Ontario Regulation 524/98 would be amended to exempt certain activities

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Congratulations!

Donna Shier is named *Best Lawyers'* 2014 "Lawyer of the Year" for Environmental Law in Toronto.

In its 2014 edition, *Best Lawyers* once again recognizes Willms & Shier partners, **John Willms, Donna Shier, Marc McAree, Chuck Birchall** and **Julie Abouchar** in the category of Environmental Law. **Julie Abouchar** is also recognized by *Best Lawyers* in the category of Energy Regulatory Law.

John Georgakopoulos is named one of the finalists for Lexpert's *Rising Stars - Leading Lawyers Under 40*. We are also proud to announce that John was recently called to the bar in Alberta.

- Chambers & Partners names Willms & Shier one of the "Best of Canada" in Environmental Law
- Lexpert rates Willms & Shier Consistently Recommended, Environmental Law
- Who's Who Legal lists Willms & Shier in the *Environment* chapter of Who's Who Legal: Canada 2013

For more details on these and other accomplishments, visit our website.

that produce negligible amounts of air contaminants, including battery charging areas for electric vehicles (such as forklifts), fruit ripening areas, and business copy centres.

EASR v. ECA

To avoid duplication, O. Reg. 346/12 (Heating Systems and Standby Power Systems) would be amended to better differentiate between EASR-eligible sites and more complex facilities (such as mines or factories) that still require an ECA. Proponents would be permitted to register in the EASR only if all of the activities at a site are EASR-eligible. If other activities, such as process emissions, require an approval under the *Environmental Protection Act*, s.9, then all of the activities at the site would no longer be prescribed for EASR. Phase-in provisions will allow sites with s.9 approvals currently registered in the EASR to continue to remain registered and even add new activities (from the expanded list) if they prefer.

Noise standards for standby generators

Standby power systems would have to meet the performance standards for air emissions (i.e., US EPA Tier 1 standards) and noise (a maximum of 75 dBA at 7 metres) to be eligible for EASR registration. If not, an ECA would be required, "which would be issued on the basis of a ministry review of an application to determine appropriate case-specific conditions of approval." The noise standard only applies if the generator is located less than 50 m away from the property boundary of the nearest noise receptor. According to the EBR posting, "this additional flexibility accounts for generators that are located further away from receptors and the related mitigation to noise due to reduction in sound that occurs over distance."

Deadlines extended for EASR registration

Currently, EASR-eligible activities subject to an existing ECA do not have to be registered on the EASR for up to five years from the date the applicable EASR regulation came into force. To provide more time for facilities to elect to register on EASR, the proposed amendments would extend this deadline an additional five years, as follows

- O. Reg. 346/12 (Heating and Standby Power Systems) – October 31, 2021
- O. Reg. 347/12 (Automotive Refinishing) – October 31, 2021
- O. Reg. 349/12 (Printing) – November 18, 2022
- O. Reg. 351/12 (Waste Management Systems) – November 18, 2022

Kitselas First Nation Case: Ottawa appeals decision of its own Specific Claims Tribunal

The federal government is trying to quash one of the first rulings of the Specific Claims Tribunal (Tribunal) it established to fast track and resolve difficult First Nations land and compensation claims. In February 2013, the Tribunal ruled that Kitselas First Nation held a valid interest in a small parcel of land along the Skeena River and the Crown had failed to act in the "best interests" of the claimant in excluding the land from the band's reserve. The Union of BC Indian Chiefs has also applied for leave to intervene in the Kitselas Judicial Review.

According to its application for Judicial Review, filed with the Federal Court of Appeal in March 2013, the government will argue that the Tribunal made a series of errors in both fact and law in concluding the band held a "cognizable interest" in the lands and that the Crown breached its fiduciary duty at the time the reserves were created in the late 19th century. If the Appeal Court agrees, it could throw the claims adjudication process into disarray and severely limit the level of compensation owed First Nations in resolving specific claims.

In 1891, the Joint Indian Reserve Commission established a series of reserves for the Kitselas First Nation, one of seven Tsimshian groups that have occupied the Skeena Valley of northwest British Columbia for at least the last 4,000 years. In drawing up the reserve boundaries, the Commission excluded Gitaus, the site of an

ancient Kitselas village built alongside a sand bar overlooking the Skeena River. At the time, the 10.5 acre property was occupied, in part, by a Hudson's Bay Company storehouse. In April 2000, the First Nation filed a claim with the Minister of Indian Affairs and Northern Development that was formally rejected in October 2009. Kitselas First Nation subsequently filed a Declaration of Claim with the Tribunal on September 29, 2011.

Established in October 2008, the Tribunal is a joint initiative of the Federal Government and the Assembly of First Nations to make binding decisions on the validity of, and compensation for, specific claims. An independent adjudicative body, the Tribunal is composed of up to six federal judges drawn from Superior Courts in the provinces, and can make monetary awards to a maximum value of $150 million per claim.

The Tribunal found the evidence that the claimant had occupied and made use of the Gitaus site was "stronger than that of most if not all of the land that was allotted" to the reserves and, therefore, Kitselas had a cognizable interest in the site. Further, the Crown had assumed discretionary control of this interest at the earliest stage of the reserve creation process and had a fiduciary duty to ensure that Gitaus was allotted as part of the reserves (with the exception of the one acre requested by Hudson's Bay for its storehouse).

The Tribunal found that the Crown, through the actions of its Joint Indian Reserve Commission, had "failed to act reasonably and with diligence as regards the best interest of the Kitselas peoples" and that the claimant has established a breach of legal obligation of the Crown due to the non-inclusion of the Gitaus land. The compensation component of the claim will not proceed until the parties have exhausted any rights for Judicial Review.

> "The outcome of this Judicial Review will profoundly impact all First Nations in British Columbia, and the prospects for a meaningful and lasting reconciliation with the Crown since the Federal Court's decision in this review will be binding on the Tribunal in its consideration of all future specific claims by First Nations. If Canada is able to minimize its responsibilities as a fiduciary, it will succeed in limiting the scope and level of redress and compensation it owes First Nations with specific claims across Canada."
>
> – BC Assembly of First Nations, June 27, 2013

Review Tribunal overturns approval to protect rare turtle

For the first time, the Environmental Review Tribunal (ERT) has revoked a decision of the Director, Ministry of the Environment (MOE) to approve a proposed nine turbine wind energy project. The ERT determined that the Prince Edward County Field Naturalists had shown that, notwithstanding the mitigation measures proposed, the project would cause "serious and irreversible harm" to the Blanding's turtle at the project site and surrounding area (ERT Case 13-002/13-003).

The species is globally endangered and threatened in Ontario, and its presence met the second branch of the very limited rights of appeal in section 145.2.1 of the *Environmental Protection Act*. However, the Tribunal rejected the argument that the project would cause serious harm to human health, either directly or indirectly at a decibel level of 40 dBA.

The Ostrander Point Wind Energy Park, located entirely on Crown land about 15 kilometres south of Picton, would have had a total installed nameplate capacity of 22.5 megawatts. The 135 metre high turbine towers would have required concrete platforms, 5.4 kilometres of on-site access roads, overhead distribution lines, and a parking/maintenance yard at the north end of the site.

The site is home to a wide variety of plant and animal life, including the provincially threatened Blanding's turtle and whip-poor-will, and is a migratory corridor for birds, bats and the Monarch butterfly. It is identified by the Ministry of Natural Resources as a candidate area of natural and scientific interest.

ERT says site contains "critical habitat"

The Tribunal determined that the proponents' plans (including mortality monitoring, blade feathering and shut down of individual turbines, a radar early detection system, a 200 m set-back from Lake Ontario, and increasing the turbine cut-in speeds when bats are active) would mitigate serious or irreversible harm to migrating birds and bats. It also found that damage to sensitive vegetation, while serious, would not be irreversible. The ERT noted that the site had recovered from past use by the military for tank maneuvers and as a testing range.

However, the ERT found that the site contains a network of wetlands, "critical habitat" for the Blanding's turtle, and that open public access to the property at all times post-construction would create conditions that would cause serious and irreversible harm to the species.

While the ERT has allowed the first successful appeal of a Renewable Energy Approval (REA), the decision leaves intact earlier ERT decisions finding that wind farms, operating in accordance with their REAs, do not cause direct or indirect serious harm to human health. Nor was the Tribunal persuaded that the project would cause serious and irreversible harm to other sensitive plant life, animal life or the natural environment. The test for successfully appealing a REA remains very strict and will only be decided on a case-by-case basis. The applicant has since appealed the ERT decision to Divisional Court. Stay tuned.

Revised REA Guide clarifies 'duty to consult' requirements

The Ontario Ministry of the Environment (MOE) has finalized a step-by-step guide to assist applicants, First Nation and Métis communities, the public and regulatory agencies to better understand the Aboriginal consultation requirements that must be met before obtaining a Renewable Energy Approval (REA) under O. Reg. 359/09.

The draft *Aboriginal Consultation Guide for Preparing a Renewable Energy Approval Application* was originally posted to the Environmental Registry for 90 days public comment back on August 2, 2011, with the final Notice appearing almost two years later on September 4, 2014 (EBR #011-3698). The guide does not apply to waterpower projects, which are governed by a Class Environmental Assessment, as well as certain permits and approvals required from MOE and Ministry of Natural Resources.

In response to comments, MOE added some discussion on "accommodation" and the Crown's duty to consult Aboriginal communities, as well as information on encouraging "community level capacity building" and the potential "reasonable costs" for which industry may be responsible. The guide stresses that applicants must engage Aboriginal communities about proposed projects "in ways that will be meaningful and in ways that facilitate effective and timely information exchange."

While the Crown is delegating certain procedural aspects of its duty to consult to REA applicants, the Ministry retains discretionary power to require or undertake additional consultation steps or processes to satisfy that duty.

To assist in community review, MOE "requests" that applicants provide their final consultation report to Aboriginal communities before or upon an REA application submission to MOE. It also clarified that while "on-going dialogue is appropriate," consultation must be completed before an REA approval decision in accordance with the "standards or procedures regarding knowledge shared by a community." MOE has added information to the guide specifying its role in facilitating consultation discussions, providing information and assistance to all parties, and assisting in dispute resolution.

Will water charges more than triple for major users in Ontario?

Long criticized for charging large water users a pittance for the trillions of litres of water they withdraw from Ontario's lakes, rivers and aquifers each year, the Ontario Ministry of the Environment (MOE) is considering adopting a "full cost recovery" model to increase revenues and underwrite a greater portion of its water quantity management costs.

Currently large commercial and industrial water users pay just $3.71 for every million litres of water used within a calendar year, generating approximately $200,000 per year. If forced to cover the full administrative and management costs related to their withdrawals, the current fee could more than triple.

Ontario Regulation 450/07 (Charges for Industrial and Commercial Water Users), under the *Ontario Water Resources Act*, was intended to recover at least a portion of the costs of provincial water quantity management programs. The regulation defines a Phase 1 industrial and commercial water user as a facility that uses more than 50,000 litres of water a day. Phase 1 facilities fall into one

of seven categories, including produce canning facilities, ready-mix concrete manufacturers, makers of bottled waters and other beverages, and a variety of manufacturers where water is incorporated into their product. Under the regulation, MOE must review the charge every five years.

According to the findings of the Regulatory Water Charges Review, the province spent $16.2 million on water quantity programs to promote the conservation, protection and sustainable use of Ontario's waters in 2012. It is estimated approximately $750,000 of those costs could be attributed to Phase 1 facilities, with the remainder related to other industrial and commercial water users or other sectors. The shortfall was due largely to the difference between the allowable withdrawals in the facilities' permits to take water and their more modest actual water usage totals.

MOE says it will "consider the findings of the review in future water charges policy development and will consult with stakeholders on future options for water charges."

Anti-SLAPP bill to discourage strategic lawsuits against public participation

The province of Ontario has introduced legislation designed to discourage "strategic lawsuits against public participation" or SLAPPs, which have been used to stifle public debate and intimidate opponents with potentially crippling legal bills.

Bill 83, the *Protection of Public Participation Act, 2013*, would create a fast track review process for dismissing a proceeding alleged to be strategic in nature. The Bill, which incorporates many of the recommendations of the final report of the Anti-SLAPP Advisory Panel appointed by the Attorney General in 2010, passed First Reading on June 4, 2013. It is currently in Second Reading debate.

In a typical SLAPP lawsuit, one party claims that another has damaged his or her reputation, usually through a claim of defamation. Most of these suits have little or no merit, and are often dropped before proceeding to trial. According to Attorney General John Gerretsen,

> This is truly a made-in-Ontario solution that will balance the protection of public participation and freedom of expression with the protection of reputation and economic interest.

Within 60 days of receiving a request to dismiss, the court must apply a three-step test to determine whether or not the lawsuit should be allowed to proceed.

- First, the defendant would have to show that the suit arose because of the defendant's expression on a matter of public interest.
- If so, then the plaintiff would have to show that the suit has substantial merit and that the defendant has no valid defence in the proceeding.
- Finally, the court would consider whether the harm suffered (or potentially suffered) by the plaintiff was more important than the continuation of the public discussion of the matter of public interest involved in the case. Where the plaintiff has suffered little harm, the case would be dismissed, but where the harm is more serious, the case would be allowed to continue.

Hupacasath First Nation:

Court says no to free trade review

The Federal Court has dismissed an application by Hupacasath First Nation (HFN) for a judicial review of the pending *Canada-China Foreign Investment Promotion and Protection Agreement* (CCFIPPA). The Hupacasath had argued that Canada must engage in a process of consultation and accommodation with First Nations prior to ratifying or taking other steps that will bind Canada for the next 15 years under the free trade agreement.

HFN, representing some 300 band members on five reserves near Port Alberni on Vancouver Island, says the CCFIPPA could prevent the band from "exercising its rights to conserve, manage and protect lands, resources and habitats in accordance with traditional Hupacasath laws, customs and practices." In addition, disputes over resource use between HFN and companies with Chinese investors would be resolved by the application of international trade and investment law, which HFN believes does not provide the same protections for Aboriginal rights and title as Canadian constitutional law.

However, the Court determined that the potential adverse impacts that the CCFIPPA may have on asserted Aboriginal rights due to changes in land and resource regulation in Canada are "nonappreciable and speculative in nature." It also found that HFN had not established "the requisite causal link between those alleged potential adverse impacts and the CCFIPPA." HFN intends to appeal the decision.

If a judge dismisses a proceeding, the moving party is entitled to costs on the motion and in the proceeding on a full indemnity basis, unless the judge determines that such an award is not appropriate. Damages may also be awarded if the judge finds the responding party brought the proceeding "in bad faith or for an improper purpose." However, if the judge does not dismiss a proceeding, the responding party is not entitled to costs on the motion, unless the judge determines otherwise.

Bill 83 amends two other Acts

In addition to the amendments to the *Courts of Justice Act*, a new section 25 is added to the *Libel and Slander Act*, which states that any qualified privilege that applies to an oral or written communication on a matter of public interest between two or more persons who have a direct interest in the matter applies regardless of whether the communication is witnessed or reported on by the media or other persons.

Finally, the *Statutory Powers Procedure Act,* s.17.1, is amended to provide that submissions for a costs order must be made in writing, unless a tribunal determines that it is likely to cause a party to the proceeding significant prejudice. This amendment would primarily apply to administrative tribunals.

> **Anti-SLAPP Bill aids judicial interpretation**
>
> The amendments to the *Courts of Justice Act* contained in Bill 83 include a 'purpose clause' for the benefit of judicial interpretation.
>
> 137.1(1) The purposes of this section and sections 137.2 to 137.5 are,
> (a) to encourage individuals to express themselves on matters of public interest;
> (b) to promote broad participation in debates on matters of public interest;
> (c) to discourage the use of litigation as a means of unduly limiting expression on matters of public interest; and
> (d) to reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action.

Alberta proposes streamlined Aboriginal consultation policy to ensure 'duty to consult' is more transparent

Alberta's new, draft guidelines for Aboriginal consultation set out a streamlined four-stage process for assessing the impacts of "all strategic and project-specific Crown decisions" that may adversely impact both Treaty rights and traditional uses of lands. The *Government of Alberta's Corporate Guidelines for First Nations Consultation Activities* were released August 16, but won't take effect until the province's new Aboriginal Consultation Office is set up, likely sometime this fall.

An accompanying, draft *Consultation Process Matrix* places tighter timelines on assessment, notification and consultation activities. The draft guidelines and matrix are posted on the province's Aboriginal Relations website (www.aboriginal.alberta.ca/1.cfm).

Step 1: Pre-consultation Assessment

When a project or initiative involving land management or resource development is proposed, Alberta's Consultation Office will conduct a preliminary assessment of the magnitude, scope, timing, location and duration of the proposed activity, as well as its potential adverse impacts on Treaty rights and traditional uses, to determine

- whether the project requires consultation
- which First Nations to notify
- what level of consultation is necessary in the circumstances
- whether or not to delegate procedural aspects of consultation to project proponents.

The initial assessment may be done on a case-by-case, project or class basis, in accordance with the *Consultation Process Matrix*, which establishes three project categories. A Level 1 project would have no adverse effects on Treaty rights or

traditional activities and, as such, no further action is required. A Level 2 project would have only "low" adverse effects, and procedural aspects of the consultation will be delegated to the proponent. Finally, the Consultation Office will ordinarily consult directly on Level 3 projects. Eventually operational matrices, setting out specific projects or activities under each of the levels, will be developed to replace the draft Matrix.

Step 2: Notification and Response

The pre-consultation assessment should be completed within 10 days of receiving an application for assessment. Once a consultation trigger has been identified and the scope of consultation determined, the affected First Nation(s) will be notified. In turn, those First Nations will have up to 15 days (in the case of a Level 2 project) or 20 days (for a Level 3 project) to formally respond to the notification and "clearly identify the potential adverse impacts on Treaty rights and traditional uses." These deadlines may be extended under certain conditions, such as amendments made by a proponent to a project or information submitted by one of the parties on potential impacts beyond those covered in the original assessment.

Step 3: Consultation

Upon receipt of a response to notification, either the Consultation Office or the proponent (depending on the project level) "will engage in a dialogue with the First Nation" to determine the details of the potential impacts and whether or not the impacts can be mitigated. For Level 2 projects, consultation may continue for up to 20 working days from date of the First Nation's response, while a Level 3 project consultation may continue for up to 45 working days. Again these deadlines may be extended if, for example, the proposed undertaking must comply with provincial/federal regulatory processes or hearings are required (among other grounds).

Step 4: A Decision on Adequacy

Once consultation is completed, the proponent must submit its consultation records to the Consultation Office (Office) in order to assess "the adequacy of consultation." The Office may also ask the First Nation to provide their consultation records. If the parties agree on a mitigation strategy, the Office will then work with the regulatory authority to determine whether the proposed strategy could result in any unintended regulatory complications. If they do not agree, the nature of the disagreement and all attempts to resolve it must be documented by both parties for consideration.

The Office has up to 5 days (for a Level 2 project) or 10 days (for a Level 1 project) to assess the adequacy of consultation and report its decision to both the proponent and the First Nations in writing. If the consultation is held to be inadequate, further consultation will be required.

According to the new policy, the negotiation of a consultation process agreement between Alberta and a First Nation is "one tool to maintain the integrity of the process." If it is not possible to come to some arrangement cooperatively, the province will rely on the compulsory disclosure process enabled by the recently passed *Aboriginal Consultation Levy Act* (see story, page 8). Sanctions will be developed for proponents who fail to comply.

Which Crown decisions are subject to consultation?

A revised version of The Government of Alberta's *Policy on Consultation with First Nations on Land and Natural Resource Management, 2013* clarifies which provincial Crown decisions are subject to the new consultation rules. Only those that directly involve the management of land, water, air, forestry, or fish and wildlife will be assessed for potential consultation including

- Provincial regulations, policies, and plans that may adversely impact First Nations Treaty rights and traditional uses
- Decisions on projects relating to oil and gas, forestry, and other forms of natural resource development that may adversely impact First Nations Treaty rights and traditional uses.

Matters not subject to this Policy will include:

- Leasing and licensing of rights to Crown minerals
- Accessing private lands to which First Nations do not have a right of access for exercising their Treaty rights and traditional uses
- Crown decisions on policy matters that are unrelated to land and natural resource management
- Emergency situations that may impact public safety and security.

The policy will not take effect until Alberta's Aboriginal Consultation Office is operational later in 2013. Alberta Aboriginal Relations will be engaging First Nations and other stakeholders in working sessions "critical to effective Policy implementation." In the meantime, Alberta's current policy (adopted in 2005) remains in effect.

Meet Willms & Shier Legal Experts at these Upcoming Events		
Oct. 9	**The Six-Minute Environmental Lawyer 2013**, Law Society of Upper Canada, Donald Lamont Learning Centre, Toronto	**Donna Shier** is chair, **John Georgakopoulos** discusses hydraulic fracturing or "fracking," and **John Willms** presents "Dealing with Your Environmental Consultant."
Oct. 17	**RemTech 2013**, the 12th annual Remediation Technologies Symposium Banff, Alberta	**John Georgakopoulos** presents "Vapour Intrusion, " a discussion of the regulatory framework in Canada and the US, as well as a review of recent case law and litigation.
Oct. 23	**The Ring of Fire — Hot or Cold?** Ontario Bar Association OBA Conference Centre, Toronto	**Katherine Koostachin** is the moderator at the OBA Aboriginal Law Section's evening program; with development stalled, how will the parties use this time to ensure maximum benefits flow from the ultimate development of the Ring of Fire?
Nov. 25-27	**Environmental Compliance Essentials**, Mississauga Grand Banquet and Convention Centre, Mississauga	**Julie Abouchar** provides an overview of the federal, provincial and municipal water and wastewater regulatory regime, **Marc McAree** presents a due diligence case study on *Regina v. Imperial Oil*; and **Richard Butler** discusses the impact of spills, Ministry inspections and enforcement. **John Willms** co-chairs the full-day session "Waste (not): Preparing for Ontario's new Waste Reduction and Product

Levy would support Aboriginal consultation

Alberta's recently enacted *Aboriginal Consultation Levy Act* is intended to ensure that First Nations and other identified Aboriginal groups have adequate funding and capacity to fully engage in future land use consultations. The levy, which is to be set through regulation, will be paid by proponents of resource development projects and land management activities that might adversely impact the exercise of Treaty rights or certain traditional uses of land. Disbursements would be made from the newly established Consultation Levy Fund. According to the Minister of Aboriginal Relations, the idea for a levy arose during discussions with First Nations and industry during the development of the province's new consultation policy (see story on page 6), although many Aboriginal representatives said they received no notice of the bill and opposed it strongly. The draft legislation was introduced into the Alberta Legislature on May 8, quickly passed after minimal debate and received Royal Assent on May 27, 2013. However, the Act has yet to be proclaimed in force.

Under section 8, the Minister may require a proponent to provide "third party personal information, records and other documents, including copies of agreements relating to consultation capacity and other benefits pertaining to provincial regulated activities" to assist in determining the amount of the grant to be provided, as well as to plan and facilitate any required Crown consultation. While the Act states that these documents, which could include Impact Benefit Agreements, will remain confidential, the Minister may publish in aggregate form any information collected under the Act. The section 8 authority would not extend to other business agreements that industry and First Nations may enter into. Some jurisdictions such as Nunavut already require that Impact Benefit Agreements be provided to the regulator. While many companies and Aboriginal communities welcome making these negotiated agreements more widely available, others point to reasons to maintain confidentiality. We will be watching closely as this is rolled out in Alberta.

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