Federal Court Cour fédérale

Date: 20231109

Docket: T-758-23

Citation: 2023 FC 1481

Montréal, Quebec, November 9, 2023

PRESENT: Madam Justice St-Louis

BETWEEN:

S. ROBERT CHAD

Applicant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] On April 13, 2023, the Applicant, Mr. S. Robert Chad, filed a Notice of Application-Proposed Class Proceeding, seeking an order of *mandamus* against the Canada Revenue Agency [CRA]. On June 21, 2023, the Applicant proposed a second Amended Notice of Application-Proposed Class Proceeding [the Notice]. The Respondent, the Minister of National Revenue [the Minister], moves for an order striking the Applicant's Notice in its entirety, without leave to amend.

[2] For the reasons noted below, the Minister's motion to strike the Notice will be granted.

[3] In short, I am satisfied that the Applicant's application for judicial review [the Application] is so clearly improper as to be bereft of any possibility of success because (1) it seeks relief in the form of a *mandamus* the Court cannot grant, as the Minister is under no legal public duty to act, ie, to review documents in her possession (herself or with the assistance of third-parties), to identify and confirm whether those documents are privileged, or again to produce those documents; (2) there exist adequate and effective alternate remedies in the Tax Court of Canada and through the *Access to Information Act*, RSC 1985, c A 1; (3) section 18.5 of the *Federal Courts Act*, RSC 1985, c F-7 ousts the jurisdiction of the Federal Court and prevents the Court from dealing with matters that can be appealed in another forum, here at the Tax Court of Canada; and (4) the Notice does not satisfy the requirements of Rule 301 of the *Federal Courts Rules* (SOR 98/106) [the Rules]. I will also decline the Applicant's request for an open leave to amend.

II. The Amended Notice of Application-Proposed Class Proceeding

[4] In his Notice, dated June 21, 2023, the Applicant states that it is an application for judicial review of the CRA's failure to fulfill its legal obligations to:

(a) S. Robert Chad (the Applicant); and

(b) All individuals who were at any time clients of both:

1) Tom Olson, Bruce Lemons, OL Private Counsel LLC and/or Olson Lemons LLP; and

2) Timothy Hodgins, John Hodgins and/or HFX Markets Ltd

(the Class)

In respect of certain documents potentially protected by solicitor-client privilege.

[5] The Applicant thus applies for a writ of *mandamus* to compel the enforcement of what he alleges are the CRA's positive legal obligations to:

1) review the Documents and identify those with respect to the Applicant and the Class that contain or make reference, directly or indirectly, to communications with a solicitor or any agent, employee or associate of a solicitor;

2) notify the Applicant and the Class of all such documents and provide same to them so that they may assert privilege over those documents in a Court of competent jurisdiction; and

3) refrain from using or inspecting said documents, in any manner whatsoever, until any claims of privilege have been finally determined by a Court of competent jurisdiction

[6] When outlining the grounds for the Application, the Applicant submits that: he and the Class members were clients of Tom Olson and Bruce Lemons, lawyers practicing under *inter alia* the names OL Private Counsel LLC and/or Olson Lemons LLP; he and the Class members received legal advice and other related communications from the firm over the years (paras 4-5); the advice is protected by solicitor client privilege; the Minister received documents protected by solicitor-client privilege in the course of the audit of third parties (para 7); the Minister did not notify the Applicant of the documents it received in the course of the audit of the third parties (para 7); the Applicant appealed an assessment to the Tax Court of Canada (para 9) and became

aware that the CRA had certain documents in its possession (paras 9-10); the Applicant has reasonable grounds to believe the CRA has in its possession further documents protected by solicitor-client privilege (para 11) and the Minister made no efforts to reach out to the Applicant regarding documents in her possession (para 12); the Applicant requested that the CRA fulfill its legal obligations by letter dated November 1, 2022; to date, the CRA has not responded.

[7] In his Notice, the Applicant also submits, as grounds for his application: (1) that the CRA's actions lack justification, transparency, and intelligibility, eroding the public's confidence in our justice system; (2) as established in *Minister of National Revenue v Thornton* 2012 FC 1313 [*Thornton*], that when a government agency comes into possession of documents that appear, on their face, to be privileged, the agency has a positive obligation to: (a) make every effort to contact the privilege holder; and (b) afford the privilege holder the opportunity to assert privilege; and (3) sections 18 and 18.1 of the *Federal Courts Act*, RSC 1985, c F-7.

[8] The Applicant also includes a section in regards to the proposed class proceeding and outlines the conditions set out in Rule 334.16 of the Rules.

[9] Finally, still in his Notice, the Applicant indicates that the Application will be supported by his affidavit and such further and other material as counsel may advise and this Court may deem just.

III. Test applicable on a motion to strike an application

[10] The parties agree that the applicable test is the one set out test in *JP Morgan Asset Management (Canada) Inc v Canada (National Revenue)*, 2013 FCA 250 [*JP Morgan*]. Hence, "The Court will strike a notice of application for judicial review only where it is "so clearly

improper as to be bereft of any possibility of success": *David Bull Laboratories (Canada) Inc. v Pharmacia Inc.*, [1995] 1 F.C. 588 at page 600 (C.A.). There must be a "show stopper" or a "knockout punch" – "an obvious, fatal flaw striking at the root of this Court's power to entertain the application: *Rahman v Public Service Labour Relations Board*, 2013 FCA 117 at paragraph 7; *Donaldson v Western Grain Storage By-Products*, 2012 FCA 286 at paragraph 6; *Hunt v. Carey Canada Inc*., 1990 CanLII 90 (SCC), [1990] 2 S.C.R. 95" (*JP Morgan* at para 47). See also *David Bull Laboratories (Canada) Inc v Pharmacia Inc*, [1995] 1 FC 588, at page 600; *Soprema Inc v Canada (Attorney General)*, 2021 FC 732 at para 26; *Soprema Inc c Canada (Procureur général)*, 2022 CAF 103 at para 10; *Kenney v Canada (Attorney General)*, 2016 FC 367 at para 19.

[11] The question of whether an application is bereft of any possibility of success is to be determined based on the material facts alleged in the notice of application, with the allegations accepted as true (*R v Imperial Tobacco*, 2011 SCC 42 at paras 21-23 [*Imperial Tobacco*]; *Operation Dismantle v the Queen*, 1985 CanLII 74 (SCC), [1985] SCR 441 at paras 3,7.8 [*Operation Dismantle*]).

[12] In *JP Morgan*, the Federal Court of Appeal noted that administrative law authorities from the Supreme Court of Canada and the Federal Court of Appeal have found that any of the following three grounds warrant the striking out of a notice of application as they qualify as obvious, fatal flaws:

1) the notice of application fails to state a cognizable administrative law claim which can be brought in the Federal Court;

2) the Federal Court is not able to deal with the administrative law claim by virtue of section 18.5 of the Federal Courts Act or some other legal principle; or

3) the Federal Court cannot grant the relief sought. (JP Morgan at para 66).

[13] As noted by the Federal Court of Appeal, "[a]ny one of these objections would warrant striking it out" (*JP Morgan* at para 106).

IV. The parties' position

[14] The Minister submits that the Applicant's Application is clearly improper as to be bereft of any possibility of success (*JP Morgan* at paras 47-48*)* for the following reasons:

1) The Application seeks relief the Court cannot grant. For *mandamus* to be available, the Minister must be under a public legal duty to act which is owed to the Applicant whereas here, the Minister is under no public legal duty to review document in its possession (herself or with the assistance of third-parties), to confirm whether those documents are privileged, or to produce those documents. The Minister outlines that the Applicant seeks an order that is vague and imprecise and that the Minister is under no clear legal duty to act mandated by law, either statutory or common law (*Apotex Inc. v Canada (Attorney General)* [1994] 1 FC 742, at p 766 (FCA), aff'd [1994] 3 SCR 1100 [*Apotex*]; *Canada (Attorney General) v Arsenault* 2009 FCA 300 at para 32 [*Arsenault FCA*];. *Willms v Canada (Attorney General of Canada*) 2022 FC 543 at paras 15-20 [*Willms*]);

2) The Federal Court is barred from dealing with the application because there exists adequate and effective alternative recourses, remedies available at the Tax Court of Canada and

through the *Access to Information* (*JP Morgan* at para 82*; Ghazi v Minister of National Revenue* 2019 FC 860 at paras 29-30 [*Ghazi*]). Also, section 18.5 of the *Federal Courts Act* precludes this Court from entertaining the Application insofar as it seeks relief regarding an alleged procedural unfairness in the Minister's issuance of the assessments and the evidentiary foundation supporting those assessments. An application for judicial review that is not a collateral attack on the correctness of an assessment but that is nevertheless focused on the Minister's assessment-related decisions or actions cannot be entertained when an appeal to the Tax Court of Canada would provide adequate and effective recourse to address the Applicant's complaint; and

3) The Notice does not meet the requirements set forth at Rule 301(e) of *the* Rules. As drafted, the Amended Notice of Application largely includes bald and speculative allegations and conclusory statements which cannot support the relief sought and cannot be proven, and does not plead the relevant and necessary facts; it essentially amounts to a fishing expedition.

[15] The Minister asks for costs in the form of a lump sum of 5000.00$, amount akin to the highest level of column III of the Tariff.

[16] The Applicant responds that the Minister has not satisfied the heavy onus to demonstrate an obvious fatal flaw in the Application and that the Minister's motion to strike cannot succeed as:

1) The relief sought – a writ of *mandamus* compelling the Minister to comply with a public, legally enforceable duty – is well-within the remedies available to this Court on an

application for judicial review; and is available. In *Thornton* at para 24, this Court stated, based on the Supreme Court of Canada's decision in *Lavallee, Rackel & Heintz v Canada (Attorney General*) 2002 SCC 61 at para 49 [*Lavallee*] that,

> When an investigating authority comes into possession or otherwise becomes aware of a document or other information that may be protected by SCP, every effort should be made to contact the privilege holder, who should then be given a reasonable opportunity to (i) determine whether a claim of privilege should be asserted, (ii) make such assertion, if he or she decides to do so, and (iii) have the issue judicially decided, if the claim is contested.

The Applicant contends that the public legal duty to act is here grounded in the legal protection afforded solicitor-client privilege – a principle of fundamental justice, which has attained quasi-constitutional status. He adds that the obligation effectively functions as a common law limit to the exercise of delegated power, and applies to all investigating authorities, including the CRA. He adds that when the CRA, in exercising its audit powers pursuant to the *Income Tax Act*, comes into possession of documents that may be privileged, or otherwise becomes aware of a document or information that may be protected by solicitor-client privilege, it has a positive obligation to: (a) make every effort to contact the privilege holder, and (b) afford the privilege holder the opportunity to assert privilege;

2) This Court is not barred from entertaining this Application by virtue of section 18.5 of the *Federal Courts Act* or some other legal principle as there is no adequate, effective recourse elsewhere as:

   i. there is no adequate, effective relief through the Tax Court of Canada. The Application is not a collateral attack on a notice of assessment;

   ii. there is no adequate effective relief through the *Access to Information Act;* and

3) The Notice satisfies the prerequisites imposed by Rule 301 of the Rules*,* the Notice sets out, with sufficient precision, the material facts required to support the writ of *mandamus* sought.

[17] The Applicant asks for costs on a solicitor client basis.

V. Analysis

A. *The Application seeks relief the Court cannot grant*

[18] The Applicant seeks a writ of *mandamus*. A *mandamus* is an extraordinary discretionary remedy. The basic principal requirements for the issuance of a writ of *mandamus* have been stated in *Apotex* at para 55. These requirements are cumulative and they must all be satisfied before this Court can consider issuing a writ of *mandamus* (*Rocky Mountain Ecosystem Coalition v Canada (National Energy Board)*, 1999 CanLII 8615 (FC), 174 FTR 17 at para 16). They include: (1) there must be a public legal duty to act; (2) the duty must be owed to the Applicant; (3) there is a clear right to the performance of that duty; and (4) no alternate remedies exists.

[19] In this case, at least two requirements are not met as there exists no legal public legal duty to act and there exists alternate remedies. I will discuss the latter in the next section.

[20] As Justice Gascon outlined in *Ghaddar v Canada (Citizenship and immigration*) 2023 FC 946 [*Ghaddar*]: "An order of mandamus is an extraordinary remedy pursuant to which the Court "can compel the performance of a clear affirmative legal duty by a public authority" (*Ahousaht First Nation v Canada (Fisheries, Oceans and Coast Guard)*, 2019 FC

1116 at para 73 [*Ahousaht*]). An order of *mandamus* is "the Court's response to a public decision-maker that fails to carry out a duty, on successful application by an applicant to whom the duty is owed and who is currently entitled to the performance of it" (*Wasylynuk v Canada (Royal Mounted Police)*, 2020 FC 962 at para 76 [*Wasylynuk*]). As summarized by Justice Little in *Wasylynuk*, the test for *mandamus* thus "requires careful consideration of the statutory, regulatory or other public obligation at issue, to determine whether the decision-maker has an obligation to act in a particular manner as proposed by an applicant and whether the factual circumstances have triggered performance of the obligation in favour of the applicant" (Wasylynuk at para 76)." (*Ghaddar* at para 18).

[21] The parties agree that the public legal duty can be found either in a statutory provision, such as in *Iris Technologies v Minister of National Revenue*, 2020 FCA 117 or at common law (*Arsenault v Canada (Attorney General*) 2008 FC 492 at para 27, reversed on other grounds *Arsenault FCA*).

[22] The Applicant acknowledged that there exists no statutory or regulatory provision imposing a legal duty on the Minister to act as he proposed. However, he submits that the Courts created a common law duty for the Minister to act, by way of (1) what he acknowledges is an *obiter*, found at paragraph 24 of the Federal Court's decision in *Thornton*, itself referencing paragraph 49 of the Supreme Court of Canada's decision in *Lavallee*; and (2) the Supreme Court of Canada's decision in *Canada (Attorney General) v Chambre des notaires du Québec*, 2016 SCC 20 [*Chambre des notaires*].

[23] I disagree and find, on the contrary, that the Courts have not created the legal public duty to act in the manner requested by the Applicant. First, the circumstances at play in the decisions cited

by the Applicant were very different from the ones at play here. *Lavallee* decided on the unconstitutionality of a *Criminal Code* provision that related to warranted searches of law firms, *Thornton* determined whether the specific documents that were retained were protected by solicitor client privilege, and *Chambre des notaires* related to requirements imposed on notaries and lawyers in the context of requests or audits by the CRA. None of these decisions discussed or created a duty for the Minister to, *inter alia*, review or search her records and verify if the documents that were sent to her could be privileged as the Applicant suggests. In the circumstances at hand here, it is worth noting that the documents are unidentified, they were received by the CRA seemingly from third-parties who are not described as either lawyers or notaries, there are no allegations the documents were seized or required by the CRA, and there are no allegations that anybody objected at the time the documents were sent to/ received by the CRA. Second, there is no indication that the *obiter* found at paragraph 24 of *Thornton* is authoritative, and it is certainly not clear enough to create a legal public duty for the Minister to act as suggested and/or a clear right to the performance of that duty. Third, in any event, none of these cases even discuss, let alone create, a duty for the Minister to search her records and identify documents for privilege, as requested by the Applicant.

[24] Conversely, as the Minister outlines, this Court has already held that the CRA does not have a mandatory or discretionary public legal duty to submit to a third-party privilege review of documents in its possession at a taxpayer’s request (*Willms* at paras 15-20). For that reason, the Court then held that the relief sought by the taxpayer, a writ of *mandamus* compelling the CRA to submit to such a review, was unavailable. For the same reason, the CRA is under no public legal duty to review unspecified documents at a taxpayer’s request in view of providing the taxpayer with the CRA’s opinion as to which documents might be privileged.

[25] The *mandamus* relief the Applicant seeks is clearly not available, there is no legal public duty to act on the part of the Minister. This is an obvious, fatal flaw striking at the root of this Court's power to entertain the application, a knock out punch. As the Federal Court of Appeal found in *JP Morgan* "[i]f a notice of application seeks only remedies that cannot be granted, it must be struck" (*JP Morgan* at para 92).

[26] The motion to strike could be granted on this basis alone. However, I will also examine the other grounds raised by the Minister.

B. *There exist adequate effective alternative recourse*

[27] Section 18.5 of the *Federal Courts Act* ousts the jurisdiction of the Federal Court and prevents the Court from dealing with matters that can be appealed in another forum, in this case, in the Tax Court of Canada (*JP Morgan*). Section 18.5 states that:

> Despite sections 18 and 18.1, if an Act of Parliament expressly provides for an appeal to the Federal Court, the Federal Court of Appeal, the Supreme Court of Canada, the Court Martial Appeal Court, the Tax Court of Canada, the Governor in Council or the Treasury Board from a decision or an order of a federal board, commission or other tribunal made by or in the course of proceedings before that board, commission or tribunal, that decision or order is not, to the extent that it may be so appealed, subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with, except in accordance with that Act.

[28] I agree with the Minister that section 18.5 of the *Federal Courts Act* prevents this Court from entertaining the Application insofar as it seeks relief regarding an alleged procedural unfairness in the Minister's issuance of the assessments and the evidentiary foundation supporting those assessments. In addition, the Notice makes vague references to an audit of third

parties and an assessment of the Applicant's tax liability; it does not, however, provide any basis to support the bald assertion that the Minister has in its possession privileged documents she must search for, identify and provide to him. An appeal to the Tax Court of Canada engages procedural rights that will cure any defects in the process followed by the Minister (*Ghazi* at paras 29–30). Hence, if the Applicant believes that reassessments of tax were supported by documents protected by solicitor-client privilege, he may raise those issues and obtain relief from the Tax Court of Canada in his appeal. The *Income Tax Act* protects against abuses of process by creating a right of objection and subsequent right of appeal, which provides among the greatest procedural protections available by statute and serves to lessen the need for procedural protections from the Federal Court by way of judicial review (*JP Morgan* at para 82).

[29] Furthermore, and even if section 18.5 of the *Federal Courts Act* was found not to apply, the existence of adequate and alternative relief can be raised as a discretionary ground for refusing to undertake judicial review (*JP Morgan* at para 84; *B Powell Ltd. v Canada*, 2010 FCA 61 at paras 30-31; *Strickland v Canada (Attorney General)*, 2015 SCC 37 at para 40) and can be raised as a requirement that must be met for a writ of *mandamus* to be issued (*Apotex)*.

[30] In this case, I am satisfied the Applicant has two avenues of recourse: (1) the *Access to Information Act*, which permits the Applicant to seek documents in the CRA's possession that are relevant to his assessment; and (2) the Tax Court of Canada appeal.

[31] The Applicant has not raised any convincing arguments that a request under the *Access to information Act* is not an adequate recourse to obtain the information he is seeking. Furthermore, during his appeal at the Tax Court, the Applicant could rely on, and may have already relied on, the discovery rules to obtain all documents in the CRA's possession relevant to said appeal, and

ascertain whether or not the Minister has in her possession privileged documents that concern him in prosecuting his appeal. The Applicant had the right to obtain full disclosure of the documents that were considered by the Minister in the course of his own audit (*HSBC Bank Canada v The Queen*, 2010 TCC 228 at paras 13-15), the right to challenge the admissibility of any documents relied on by the Crown on the basis of privilege, and could have challenged the assessments themselves on the basis that privileged documents were relied on in assessing him, if applicable (*JP Morgan* at para 82, citing *Redeemer Foundation v. Canada (National Revenue)*, 2008 SCC 46 at para 28 and *Canada v O'Neill Motors Ltd*, 1998 CanLII 9070 (FCA), [1998] 4 FC 180).

[32] The Notice does not disclose if the Applicant has availed himself of the procedural remedies before the Tax Court of Canada or if he pursued a request under the *Access to Information Act*. The failure to pursue available procedures does not render the remedy inadequate (*Graham v Canada*, 2007 FC 210 at para 19, citing *Lazar v Canada (Attorney General)*, 1999 CanLII 7969 (FC), at para 18 (aff'd 2001 FCA 124); *Ritter v. Canada (National Revenue)*, 2013 FC 411 at paras 23-25 (regarding a taxpayer's failure to avail themselves of their objection and appeal rights under the *Income Tax Act*)).

[33] I am satisfied there exists adequate and effective alternate remedies and that neither the application for judicial review in general, nor the writ of *mandamus* in particular is therefore available to the Applicant. The existence of adequate and effective alternative recourse is a knock out punch and the motion to strike can be granted on this basis.

C. *The Application does not meet the requirements set forth at Rule 301(e) of the Federal Courts Rules*

[34] Mr. Justice Stratas, in *JP Morgan*, reminds us that, "[i]n a notice of application for judicial review, an applicant must set out a 'precise' statement of the relief sought and a 'complete' and 'concise' statement of the grounds intended to be argued: Federal Courts Rules, SOR/98 106, paragraphs 301(d) and 301(e)" (at para 38). Per the Federal Court of Appeal's guidance, in his Notice, the Applicant had to set out a precise statement of the relief sought and a complete and concise statement of the grounds he intended to argue. A "complete" statement of grounds means all the legal bases and material facts that, if taken as true, will support granting the relief sought; and a "concise" statement of grounds must include the material facts necessary to show that the Court can and should grant the relief sought (*JP Morgan* at paras 39-40). It does not include the evidence by which those facts are to be proved. The facts must be stated with some particularity and not be bald assertions. An application founded on unsupported allegations cannot succeed.

[35] The requirements under Rule 301 of the Rules are not merely technical; they ensure among other things that respondents have adequate notice of the case being brought against them so that they can meaningfully respond. Furthermore, the case law confirms that a ground that is not stated in the Notice of Application cannot be raised in the party's memorandum of fact and of law: see for example *Tl'azt'en Nation v Sam*, 2013 FC 226 at paras 6 and 7.

[36] I agree with the Minister that the Notice suffers fatal deficiencies: "[a]s drafted, the Notice of Application largely includes bald and speculative allegations and conclusory

statements which cannot support the relief sought and it essentially amounts to a fishing expedition”.

[37] The Applicant’s allegations in the Notice (such as the mention that certain documents are *potentially* protected by privilege and the Applicant’s allegation that he has “*reasonable grounds to believe* that the CRA possesses further privileged documents”) do not constitute material facts. Hence, they cannot be taken as true, because they are speculative and cannot be proven and therefore cannot support the relief sought (*JP Morgan*, at paras 42-45; *Operation Dismantle* at para 27; *Bigeagle v Canada*, 2023 FCA 128 at para 39; *Jensen v Samsung Electronics Co. Ltd.*, 2023 FCA 89 at paras 38, 52).

[38] Furthermore, as noted during the hearing, the Notice is shrouded in mystery. It does not tell the Respondent basic facts such as who the third parties are, what is the nature of their relationship with the law firms, what service they provided to the Applicant, how these third parties came in possession of the Applicant’s documents, what those documents are, how and under what circumstances said documents were sent to/ received by the CRA, when and how the documents where received by the CRA, if the privilege owner waived, or not, his privilege. The Notice does not tell the Respondent who, when, where, what, and how. Also, the Notice does not contain the necessary legal basis; it does not state or address the applicable test for the issuance of a writ of *mandamus* nor address all the cumulative requirements set out in *Apotex* for its issuance.

[39] The Applicant asserts that his Notice is adequate and conforms to Rule 301 and alternatively asks the Court for leave to amend should the Court concludes otherwise.

[40] The Applicant twice amended his Notice and did not cure the deficiencies. Furthermore, the Applicant has not suggested or proposed any amendments to the Court that could cure the deficiencies that were highlighted. He asks the Court to grant him another kick at the can so to speak, should the Court not be inclined to decide in his favour, until he can get it right.

[41] In any event, I am satisfied that the deficiencies in the Notice are incurable given the circumstances. The deficiencies are not solely inadequacies attributed to drafting; I do not see how they could be amended to satisfy the applicable legal test. I will therefore deny the open leave to amend sought by the Applicant.

VI. Conclusion

[42] Ultimately, as aforementioned, the Federal Court of Appeal has noted that the three factors discussed qualify as obvious, fatal flaws and the presence of any of the three warrants the striking out of the Notice of Application (*JP Morgan* at paras 66, 106).

[43] I am satisfied that the Applicant's Application is so clearly improper as to be bereft of any possibility of success. The Respondent's motion will thus be granted.

JUDGMENT in T-758-23

THIS COURT'S JUDGMENT is that:

1. The Motion to Strike the Amended Notice of Application-Proposed Class Proceeding Application is granted, without leave to amend.

2. Costs are awarded to the Minister of National Revenue as a lump sum in the amount of 5000.00$.

"Martine St-Louis"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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