Date: 20080218

Docket: T-1042-07

Citation: 2008 FC 199

Ottawa, Ontario, February 18, 2008

PRESENT: THE HONOURABLE MADAM JUSTICE DAWSON

BETWEEN:

THOMAS OLLEVIER

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Thomas Ollevier is a Defence Scientist (DS) at Defence Research and Development Canada (DRDC). He leads the radar-band electronic countermeasures technique group.

[2] In October of 2005, DRDC issued a call letter to its various research establishments setting in motion the performance review process for its employees.

[3] In response, Mr. Ollevier sought a promotion from the DS-4 to DS-5 level.

[4] In April of 2006, the Human Resources Management Committee of DRDC (Selection Board) assessed all the candidates for promotion to the DS-5 level.

[5] As part of the promotion process, each candidate was assessed on the basis of individual merit against the DS Promotion and Salary Advancement Guidelines, being Part IV of the DS Salary Administration System (DS SAS Guidelines). The DS SAS Guidelines set out, and provide the rationale for, the seven characteristics used to assess candidates for promotion at each DS level. The seven characteristics are: knowledge and experience; personal interactions and communication; creativity; productivity; impact; recognition; and responsibilities. For each of the characteristics, there are one or more performance indicators. This regime is a career progression model, whereby each candidate for promotion is measured against established standards of competence and not against the competence of other candidates.

[6] The Selection Board did not choose Mr. Ollevier for promotion to the DS-5 level because it concluded that he failed to meet the performance indicator for the characteristic of creativity. Specifically, the Selection Board noted that "there was not a sufficiently documented, consistent multi-year history of externally recognized higher than normal levels of personal scientific creativity and innovation."

[7] Mr. Ollevier appealed that decision to an Appeal Board established by the Public Service Commission (Appeal Board). The Appeal Board dismissed Mr. Ollevier's appeal on May 7, 2007. This is an application for judicial review of that decision.

Legislative Framework

[8] Mr. Ollevier's application for promotion was considered under the former *Public Service Employment Act*, R.S.C. 1985, c. P-33 (former Act). Under the former Act, appointments were to be made according to merit. Section 10 of the former Act recognized that merit could be assessed on the basis of either relative or individual merit. Section 10 provided:

10(1) Appointments to or from within the Public Service shall be based on selection according to merit, as determined by the Commission, and shall be made by the Commission, at the request of the deputy head concerned, by competition or by such other process of personnel selection designed to establish the merit of candidates as the Commission considers is in the best interests of the Public Service.	10(1) Les nominations internes ou externes à des postes de la fonction publique se font sur la base d'une sélection fondée sur le mérite, selon ce que détermine la Commission, et à la demande de l'administrateur général intéressé, soit par concours, soit par tout autre mode de sélection du personnel fondé sur le mérite des candidats que la Commission estime le mieux adapté aux intérêts de la fonction publique.
(2) For the purposes of subsection (1), selection according to merit may, in the circumstances prescribed by the regulations of the Commission, be based on the competence of a person being considered for appointment as measured by such standard of competence as the Commission may establish, rather than as measured against the competence of other persons.	(2) Pour l'application du paragraphe (1), la sélection au mérite peut, dans les circonstances déterminées par règlement de la Commission, être fondée sur des normes de compétence fixées par celle-ci plutôt que sur un examen comparatif des candidats.

[9] Subsection 21(1.1) of the former Act provided for a right of appeal to the Appeal Board. Subsection 21(1.1) stated:

21(1.1) Where a person is appointed or about to be appointed under this Act and the selection of the person for	21(1.1) Dans le cas d'une nomination, effective ou imminente, consécutive à une sélection interne effectuée

appointment was made from within the Public Service by a process of personnel selection, other than a competition, any person who, at the time of the selection, meets the criteria established pursuant to subsection 13(1) for the process may, within the period provided for by the regulations of the Commission, appeal against the appointment to a board established by the Commission to conduct an inquiry at which the person appealing and the deputy head concerned, or their representatives, shall be given an opportunity to be heard.	autrement que par concours, toute personne qui satisfait aux critères fixés en vertu du paragraphe 13(1) peut, dans le délai fixé par règlement de la Commission, en appeler de la nomination devant un comité chargé par elle de faire une enquête, au cours de laquelle l'appelant et l'administrateur général en cause, ou leurs représentants, ont l'occasion de se faire entendre.

Issues

[10] Mr. Ollevier raises two issues in this application for judicial review.

[11] First, Mr. Ollevier argues that the Appeal Board erred by failing to overturn the decision of the Selection Board on the ground that it acted beyond its jurisdiction by amending the requirements for promotion to the DS-5 level. Specifically, Mr. Ollevier says that the Selection Board added the requirement that he have a particular volume of peer-reviewed publications.

[12] Second, Mr. Ollevier argues that the Appeal Board breached the rules of procedural fairness by failing to consider two of his submissions. Those submissions were that:

(i) the Selection Board only considered his peer-reviewed publications and ignored his non-peer-reviewed publications; and

(ii) the Selection Board assessed the candidates before it against different standards, given that his qualifications were strikingly similar to those of another candidate who was promoted to the DS-5 level.

Standard of Review

[13] Mr. Ollevier argues that the first issue concerns the interpretation of the DS SAS Guidelines and whether those guidelines permitted a decision to be based solely on the volume of a candidate's peer-reviewed publication record. This is said by Mr. Ollevier to be a question of law, reviewable on the standard of correctness.

[14] The Attorney General relies on *Barbeau v. Canada (Attorney General)* (2002), 219 F.T.R. 210 at paragraphs 22 and 25, where it was found that the interpretation of the experience requirement in a statement of qualifications raised an issue of mixed fact and law. It follows, the Attorney General submits, that the interpretation of the creativity performance indicator by the Appeal Board is also a question of mixed fact and law, reviewable on the standard of reasonableness.

[15] I am required to apply the pragmatic and functional approach to decide the proper standard of review to be applied to the first issue raised by Mr. Ollevier. This involves consideration of four factors: the nature of the appeal or review mechanism; the purpose of the relevant statute and the particular provision in issue; the nature of the question under review; and the expertise of the decision-maker.

[16] Turning to the first factor, which is the nature of the appeal or review mechanism, the Federal Court of Appeal, in *Davies v. Canada (Attorney General)* (2005), 330 N.R. 283 (F.C.A.), conducted a pragmatic and functional analysis to determine the appropriate standard of review for an Appeal Board's decision. That decision is applicable in the present case because the statutory review mechanism is almost the same. In both cases, the right of appeal was provided by section 21 of the former Act.

[17] The Court of Appeal noted the absence of any privative clause or statutory right of appeal and observed that the decision of an Appeal Board may be judicially reviewed under section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7. The Court of Appeal also considered the existence of section 21.1 of the former Act, which provided as follows:

21.1 Despite the *Federal Courts Act*, an application to the Federal Court for relief under section 18 or 18.1 of that Act against a decision of a board established under subsection 21(1) or (1.1) shall be transferred to the Federal Court of Appeal if the parties to the application so agree or if the Federal Court of Appeal, on application by any of those parties, so orders on the basis that the sound administration of that part of the Public Service over which the deputy head concerned has jurisdiction would be unduly prejudiced by delay if the matter were heard and determined by the Federal Court and subject to an appeal to the Federal Court of Appeal.	21.1 Malgré la *Loi sur les Cours fédérales*, une demande de réparation présentée, en vertu des articles 18 ou 18.1 de cette loi, à la Cour fédérale contre une décision du comité visé aux paragraphes 21(1) ou (1.1) est renvoyée à la Cour d'appel fédérale soit sur consentement des parties, soit, à la demande de l'une d'elles, sur ordonnance de celle-ci rendue au motif que le délai d'audition devant la Cour fédérale et la Cour d'appel fédérale éventuel serait préjudiciable à la bonne administration du secteur de la fonction publique relevant de la compétence de l'administrateur général en cause.

[18] At paragraph 15 of its reasons in *Davies*, the Court of Appeal concluded the absence of a privative clause, in conjunction with section 21.1 of the former Act, suggested a less deferential standard of review.

[19] The next factor is the purpose of the statute and the particular provision in issue. The objective of the former Act and the purpose of section 21, which allows for appeal to the Appeal Board, are the same in this case as in *Davies*. There, at paragraphs 11 through 13 of its reasons, the Court of Appeal found the legislative purpose of the former Act in general, and section 21 in particular, was to safeguard the public interest by ensuring that appointments in the public service are based on merit. The purpose of the right of appeal to the Appeal Board is to prevent an appointment that is contrary to the merit principle. This factor, in the view of the Court of Appeal, suggested that deference is owed to the Appeal Board.

[20] The next factor is the nature of the question. In my view, the first issue raised by Mr. Ollevier may be framed more succinctly as whether the Appeal Board erred in finding that the Selection Board properly interpreted the performance indicator for the characteristic of creativity. This required the Appeal Board to interpret the performance indicator in the context of the whole of the DS SAS Guidelines. That, in my view, is a question of law. Where the question is a legal one, less deference is generally accorded, particularly where, as in this case, the proper construction of the creativity performance indicator has significance for future DS-5 candidates.

[21] The final factor is relative expertise. As stated above, the Appeal Board was required to interpret the performance indicator for creativity in the light of the entire DS SAS Guidelines. In

my view, the performance indicator and other relevant provisions of the DS SAS Guidelines have no particularly special or technical meaning. What is involved is simply determining whether the Selection Board amplified the stated requirements, which it is entitled to do, or whether the Selection Board amended the stated requirements, which it is not. This issue of interpretation does not, in my view, engage any special expertise of the Appeal Board. Further, as the Court of Appeal noted in *Davies*, not all individuals who sit on Appeal Boards have legal training. For these reasons, I conclude that, on the basis of relative expertise, the decision of the Appeal Board should be reviewed on a less deferential basis.

[22] Having reviewed the four relevant factors, it is necessary to reach a conclusion about the standard of review to be applied to the first issue raised by Mr. Ollevier.

[23] All but one of the factors points to a less deferential standard of review. The only factor that counsels deference is the purpose of the statute and the appeal provision. However, upon considering that the proper construction of the creativity performance indicator has a broader application than just this case, that Parliament chose not to enact a privative clause to protect decisions of the Appeal Board and that the legal nature of the question does not engage the decision-maker's expertise, I conclude that the first issue requires review of the Appeal Board's decision on the standard of correctness.

[24] It is not necessary to conduct a pragmatic and functional analysis in connection with the second issue raised by Mr. Ollevier. It is always for the Court to decide whether an administrative

decision-maker complied with its duty of procedural fairness. No deference is owed to the Appeal Board.

Did the Appeal Board err by failing to overturn the decision of the Selection Board because it amended the stated qualifications for the DS-5 level?

[25] As noted above, this issue requires consideration of whether the Appeal Board erred by finding that the Selection Board properly interpreted the performance indicator for the creativity characteristic.

[26] I begin by considering Mr. Ollevier's submission that a representative from the DRDC conceded before the Appeal Board that he met the creativity requirement as written in the DS SAS Guidelines.

[27] The performance indicator for creativity is set out in the DS SAS Guidelines under the heading "Assessment of DS-5 (Defence Science) State of Professional Development Through Performance Indicators" and provides as follows:

> Has a consistent multi-year record of conceiving and employing highly innovative ideas to advance a scientific or defence analysis field or to exploit the application of technology or defence analysis for client requirements.

[28] Mr. Ollevier's counsel relies on paragraph 38 of the reasons of the Appeal Board to support his contention that the DRDC conceded that Mr. Ollevier met the creativity criterion. There, the Appeal Board wrote:

> The Board is not arguing that Mr. Ollevier has not demonstrated a “multi-year record of conceiving and employing highly innovative

> ideas to advance a scientific or defence analysis field or to exploit application of technology of defence analysis for client requirements". What the Board is saying is that he has not completed his work through publication and peer review.

[29] For the following reasons, I do not accept that such a concession was made.

[30] First, I believe that, read fairly, paragraph 38 of the reasons of the Appeal Board sets out a legal position articulated by the employer — not a concession of fact. The statement is found under the heading "Department's response", where the Appeal Board summarizes the employer's response to Mr. Ollevier's allegations. Nowhere in its reasons does the Appeal Board discuss what would be such a significant admission of fact.

[31] Second, and more importantly, the transcript of proceedings before the Appeal Board forms part of the record before the Court. During oral argument, counsel for Mr. Ollevier could not point to any testimony adduced by a DRDC representative that contained the purported concession. The existence of such a concession is also inconsistent with the following response of the chairperson of the Selection Board in testimony before the Appeal Board:

> If I said that we felt that Mr. Ollevier met the creativity requirements and that the issue was publication, then that was certainly a misspeak on my part and is not consistent with the notes I provided you.

[32] I now turn to consider whether the Appeal Board erred by finding that the Selection Board properly interpreted the creativity performance indicator. This, in turn, calls for consideration of whether the Selection Board impermissibly amended the stated requirements. It is settled law that a selection board cannot "tamper with the basic qualifications prescribed by the Department by adding to them or changing part of them in such a way as to limit the factors which could come into

play in the judging and ranking of the candidates." A selection board "may at the most be involved in a mere reasonable elaboration of the requirements suggested by the original qualifications." See: *Canada (Attorney General) v. Blashford*, [1991] 2 F.C. 44 (C.A.) at paragraphs 5 and 27. See also: *Barbeau*, cited above, at paragraph 43.

[33] For ease of reference, I repeat the performance indicator for creativity at the DS-5 level, as set out in the DS SAS Guidelines:

> Has a consistent multi-year record of conceiving and employing highly innovative ideas to advance a scientific or defence analysis field or to exploit the application of technology or defence analysis for client requirements.

[34] The minute sheet prepared by the Selection Board, which reflects the comments made during its consideration of Mr. Ollevier's application, records the following:

> However, after due consideration of the evidence presented in the PER, they were not able to support your promotion to DS-5. As noted in 2003, the committee felt there was not a sufficiently documented, consistent multiyear history of externally recognized higher than normal levels of personal scientific creativity and innovation.

[35] At paragraph 32 of its reasons, the Appeal Board wrote:

> I find that the Promotion Board was well within its authority when it interpreted the Performance Indicator related to Creativity as "a sufficiently documented, consistent multi-year history of externally recognized higher than normal levels of personal scientific creativity and innovation" and came to the conclusion that the appellant did not meet the requirement. The allegation is dismissed. [emphasis added]

[36] It can be seen that the concepts of "sufficiently documented", "externally recognized", and "higher than normal" are not contained in the creativity performance indicator as written in the DS SAS Guidelines.

[37] The Attorney General submits that the need for external peer-reviewed publications is a reasonable, logical, and proper elaboration of the creativity performance indicator. The Attorney General argues that it is not an amendment. Reliance is placed upon paragraphs 16 and 17 of the DS SAS Guidelines.

[38] Those paragraphs provide as follows:

> Communicating the Valued Outcomes of Defence Scientific Research Development and Analysis [DSRDA]
>
> 16. The valued outcomes of DSRDA are the new knowledge or insights gained from the research or analysis, and the items, systems, techniques or tactics developed. The various means of communication are simply the ways of making these outcomes known to clients, stakeholders and peers. Poor communication can seriously reduce the impact of otherwise excellent DSRDA. The reverse is not the case. Thus reports, formal scientific literature publications and oral presentations are vital, though just part of the evidence that must be used to assess a DS's State of Professional Development. Through these means of communication, the DS also enhances the reputation of DRDC. At all DS levels, reports, formal scientific literature publication (or equivalent, having external peer review) and oral presentation of results of all activities will remain a key requirement for all DSs, consistent with their assigned roles. In some DSRDA areas, the work of a DS may be too sensitive to publish in the open scientific literature. This sensitivity will often be a result of security classification, but may also be because high value intellectual property needs to be protected. When the results of work are sensitive, DSs should seek alternative equivalent means to expose their work to broader peer review. This may, for example, be through classified multi-lateral fora of allied government defence partners. In exceptional, extreme cases, even this type of exposure

> may not be possible. Advancement of DSs will not be hindered if these restrictions are placed upon them.
>
> 17. Written reports and formal publication serve several purposes:
>
> - To provide a corporate record of DSRDA conducted by a DS.
> - To be an important DSRDA client delivery vehicle.
> - To provide professional recognition and peer review of defence science expertise within national and international defence scientific communities and, where possible, with the broader scientific community.
> - To present DSRDA proposals to the complete range of potential clients.
>
> Reports and formal scientific literature publications should normally seek to satisfy at least the first three of these functions. Some documents, reports, and scientific literature publications may support more than one function, but DSRDA reporting may often need to be specifically tailored to a single audience or function.
>
> Without appropriate documentation, a DSRDA project is incomplete.
>
> Oral communication is an important complement to written records. It is often the most rapid way of providing results prior to written reporting, particularly to clients, and is also an effective vehicle through which interactive peer review takes place. [emphasis added]

[39] Imbedded in these paragraphs are the concepts that:

- reports and formal scientific literature publications are "just part" of the evidence that must be used to assess professional development;
- the publication of externally-reviewed formal scientific literature, or its equivalent, is a key requirement for all DSs, along with reports and oral presentations of research results;
- some work may be too sensitive to publish in open literature;

- where the results of work are sensitive, alternate equivalent means should be used to expose work to broader peer-review;
- the career advancement of DSs will not be hindered where their work is too sensitive to publish in open literature; and
- oral communications are an effective vehicle for interactive peer-review.

[40] The Selection Board appears to have interpreted the measure of a candidate's creativity to be the number of their peer-reviewed publications. The Appeal Board found that the Selection Board was entitled to interpret creativity as "a sufficiently documented, consistent multi-year history of externally recognized higher than normal personal scientific creativity." In my view, for the following reasons, this interpretation of creativity is not a "mere reasonable elaboration" of the performance indicator.

[41] The DS SAS Guidelines, in paragraphs 16 and 17, notes that formal scientific literature publications are "just part" of the relevant evidence and that things such as reports and oral presentations are also key requirements. Alternate equivalent means of publication are to be used where, as in Mr. Ollevier's case, the work produced is sensitive.[1] In my view, by requiring that Mr. Ollevier establish a consistent multi-year history of externally-reviewed scientific publications, the Selection Board changed the requirements of creativity by limiting the factors that could evidence creativity. Read properly, the DS SAS Guidelines provide that externally-reviewed publications are evidence of creativity — not determinative of creativity. The Appeal Board erred in finding that the Selection Board was entitled to interpret the performance indicator for creativity as it did.

[42] I find support for this conclusion in the prior decision of the Appeal Board in *Re Valdur Pille*, 02-DND-00597. There, a DS argued that the Selection Board had amended the guidelines by requiring candidates for promotion to have authored peer-reviewed scientific publications. The appeal was dismissed because the evidence established that the Selection Board considered such scientific publications to be only one source of information when determining whether a candidate had demonstrated sufficient creativity. Thus, in that case, the Appeal Board was unable to find that the Selection Board "tampered" with the stated requirements for promotion. In the present case, for the reasons set out above, the Selection Board did tamper with the requirements for promotion, and the Appeal Board erred by upholding its narrow and restrictive interpretation of the creativity performance indicator.

[43] Before leaving this issue, I note that an unreasonable decision is one where the reasons for the decision do not withstand a somewhat probing examination. See: *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, [1997] 1 S.C.R. 748 at paragraph 56.

[44] Here, the reasons of the Appeal Board at paragraph 27 properly note that external peer-review is part of the evidence used to assess a DS candidate's creativity. However, at paragraph 32 of its reasons, the Appeal Board concludes that the Selection Board correctly interpreted creativity as a sufficiently documented, externally-recognized record of innovation. The reasons interpret the creativity performance indicator to be a particular volume of peer-reviewed publications, notwithstanding the direction contained in the DS SAS Guidelines as set out above at paragraph 38. By failing to resolve this inconsistency, I find that the reasons of the Appeal Board do not withstand

a somewhat probing examination. As such, the decision does not withstand scrutiny even on the more deferential standard of reasonableness.

Did the Appeal Board breach the requirements of procedural fairness by failing to consider two submissions made by Mr. Ollevier?

[45] In view of my conclusion on the first question, it is not necessary to deal with this issue. However, for the sake of completeness, I will deal briefly with the Appeal Board's alleged failure to deal with two submissions made by Mr. Ollevier.

[46] First, I observe that counsel for the Attorney General did not challenge Mr. Ollevier's assertion that procedural fairness required that all of his submissions be addressed by the Appeal Board in its reasons.

[47] It is not necessary for me to decide whether, as a mater of law, procedural fairness required the Appeal Board to address in its reasons the two submissions made by Mr. Ollevier in this case. I acknowledge jurisprudence such as *Scheuneman v. Canada (Attorney General)*, [2000] 2 F.C. 365 (T.D.) at paragraphs 21 through 27, aff'd on this point (2000), 266 N.R. 154 (F.C.A.) at paragraph 2, leave to appeal to Supreme Court of Canada refused [2001] S.C.C.A. No. 9 (QL). However, for the purpose of this application, I assume, without deciding, that a duty existed on the part of the Appeal Board to address these submissions.

[48] The first submission said to have been ignored by the Appeal Board is Mr. Ollevier's argument that the Selection Board erred by considering only his peer-reviewed publications when assessing creativity.

[49] At paragraphs 33 and 34 of its reasons, the Appeal Board set out Mr. Ollevier's submissions on this point. At paragraphs 43 and 44, the Appeal Board provided the nub of its analysis with respect to that submission. There, it wrote:

> 43. The evidence adduced by the department demonstrated that the appellant had limited publications and peer reviews of his work since 2003, when he was advised that he had to document his multi-year record of innovative ideas. This evidence was not contradicted by the appellant. Moreover, the appellant admitted that he had not "published" in the pure sense since most of his work was classified. The department also stated that DSs have published classified work, had their work assessed by external peer review and had been promoted; a statement not contradicted by the appellant.
>
> 44. It is in evidence that the appellant had known for some time that he had to document his work; for reasons only known to him he neglected to do so. I am satisfied that the Board was not unreasonable in its assessment of Mr. Ollevier and that it applied the same standards in assessing his qualifications. The allegation is dismissed.

[50] The Appeal Board did not accept Mr. Ollevier's argument that his work had been sufficiently documented and peer-reviewed through non-published means. I have not been persuaded that it failed to consider his submission.

[51] The second submission alleged to have been ignored by the Appeal Board is the argument that the Selection Board assessed Mr. Ollevier against a standard different than that applied to other candidates. Mr. Ollevier claimed that, because another candidate with a record similar to his was

promoted to the DS-5 level, his application must have been assessed differently by the Selection Board.

[52] At paragraph 42 of its reasons, the Appeal Board set out Mr. Ollevier's contention that the promotion requirements were applied differently in assessing his qualifications. At paragraph 44, the Appeal Board found that the Selection Board applied the same standards when assessing Mr. Ollevier's qualifications and, at paragraph 65, the Appeal Board wrote that "[n]o evidence was presented by the appellant to demonstrate that he was assessed against a different standard than the other candidates or that the promoted employees did not meet the standards established by the department." Again, I have not been persuaded that the Appeal Board failed to consider Mr. Ollevier's submission on this point.

Conclusion

[53] For these reasons, the application for judicial review is allowed.

[54] Each party sought costs in the event that they were successful. In my view, costs should follow the event. If not agreed, costs should be assessed based upon the midpoint of Column III of the table to Tariff B of the *Federal Courts Rules*, SOR/98-106.

1. On the point of the sensitive nature of Mr. Ollevier's work, the Appeal Board noted at paragraph 9 of its reasons:

> In this case, the appellant's [Performance Evaluation Report] was "classified" and therefore, not provided to Board members ahead of time. Furthermore, one member lacked the appropriate security clearance and thus could not participate in the assessment. Consequently, the Appellant's [Performance Evaluation Report] was reviewed by 9 members rather than 10 for the other employees. As Chair of the Board, Dr. Walker provided the members with enough time to review the appellant's [Performance Evaluation Report] and obtained verbal confirmation that members did form an initial opinion.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is allowed, and the decision of the Appeal Board dated May 7, 2007, is hereby set aside.

2. The matter is referred back to the Appeal Board for reconsideration by a differently constituted panel in accordance with this judgment.

3. The Attorney General shall pay to Mr. Ollevier his costs. If not agreed, those costs should be assessed based upon the midpoint of Column III of the table to Tariff B of the *Federal Courts Rules*.

"Eleanor R. Dawson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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