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Section A - Rules of Procedures

PART 3 – ARBITRATION AND NEUTRAL EVALUATION AT THE COMMISSION

25. APPLICATION FOR ARBITRATION

25.1 An insured person applying for arbitration (the "applicant") must file a completed **Application for Arbitration** in **FORM C**, which includes:

(a) a description of each issue to be arbitrated, provided the issues were submitted to mediation and failed;

(b) an explanation why any document identified in the Report of Mediator as having been requested by the insurer, has not been provided to the insurer;

(c) a list of other key documents in the applicant's possession to which he or she intends to refer in the arbitration;

(d) a list of key documents the applicant intends to obtain from other sources, including those the applicant requests from the insurer, such as surveillance evidence;

(e) payment of the application filing fee set out in **Section D** of the **Code**;

(f) An indication whether the applicant prefers an oral, electronic or written hearing;

(g) the name, address, telephone number, and (if any) the e-mail address of the applicant; and

(h) the name, address, telephone number, facsimile number and e-mail address of the applicant's representative (if any).

25.2 The applicant must also:

(a) file a copy of the **Report of Mediator** related to the issues to be arbitrated; and

(b) where an evaluation by a private neutral evaluator has occurred, file the **Report of the Neutral Evaluator** or confirmation that the parties have received a copy of it.

25.3 The insured person may request neutral evaluation at the Commission in the **Application for Arbitration**, unless an evaluation by a private neutral evaluator has occurred. Neutral evaluation at the Commission will be conducted according to **Rules 44** and following:

See **Practice Note 6** "Neutral Evaluation at the Financial Services Commission of Ontario" under **Section C** of the **Code**.

25.4 If it appears that an **Application for Arbitration** is incomplete, has been received after the time required for commencing the proceeding has elapsed, exceeds the jurisdiction of the dispute resolution process under the Insurance Act and its Regulations, or is frivolous, vexatious or an abuse of process, the Dispute Resolution Group will:

(a) deliver written notice of the jurisdictional concerns or deficiencies in the **Application** to the applicant and his or her representative; and

(b) hold the **Application** in abeyance for **20 days** from the delivery of the notice.

25.5 Where the applicant does not satisfy the jurisdictional concerns or rectify the deficiencies set out in the written notice within the **20 days** provided under **Rule 25.4(b)**, an arbitrator may reject the **Application**.

25.6 The Dispute Resolution Group will deliver a copy of the completed **Application for Arbitration** to the other parties.

http://www.fSCO.gov.on.ca/en/drs/DRP-Code/Pages/sectiona-part3.aspx#applicationarbitration[17/01/2012 11:42:43 AM]

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26. OPTIONS AVAILABLE TO AN INSURER, INCLUDING NEUTRAL EVALUATION AT THE COMMISSION

26.1 Within **20 days** of receipt by the insurer of the **Application for Arbitration**, the insurer must respond in **one** of the following ways:

- (a) serve and file a **Response by Insurer** in **FORM E**, completed in accordance with **Rule 27**, together with a **Statement of Service** in **FORM F**; or
- (b) if the insured person has requested neutral evaluation at the Commission, the insurer must file an **Agreement to Neutral Evaluation**, in **FORM D**, by facsimile transmission; or
- (c) unless a private neutral evaluation has occurred, the insurer may request neutral evaluation at the Commission by obtaining the written consent of the applicant, and filing an **Agreement to Neutral Evaluation** in **FORM D**, by facsimile transmission.

26.2 Where the parties jointly choose Neutral Evaluation at the Commission, it shall be conducted according to **Rules 44** and following.

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27. RESPONSE BY INSURER

27.1 Where parties do not jointly choose neutral evaluation, the **Response by Insurer** in **FORM E** must include:

- (a) a response to each issue raised in the **Application for Arbitration**;
- (b) a description of any additional issues that the insurer wishes to have arbitrated, provided the issues were submitted to mediation and failed;
- (c) an explanation why any document identified in the **Report of Mediator** as having been requested by the applicant, has not been provided to the applicant;
- (d) a list of other key documents in the insurer's possession to which it intends to refer in the arbitration, including surveillance evidence;
- (e) a list of key documents the insurer intends to obtain from other sources, including those the insurer requests from the applicant;
- (f) an indication whether the insurer prefers an oral, electronic or written hearing; and
- (g) the name, address, telephone number, facsimile number and e mail address of the insurer's representative.

27.2 If it appears that a **Response by Insurer** is incomplete or exceeds the jurisdiction of the dispute resolution process under the *Insurance Act* and its Regulations, the Dispute Resolution Group will:

- (a) deliver written notice of the jurisdictional concerns or deficiencies in the **Response** to the Insurer and its representative; and
- (b) hold the **Response** in abeyance for **20 days** from the delivery of the notice.

27.3 Where the Insurer does not satisfy the jurisdictional concerns or rectify the deficiencies set out in the written notice within the **20 days** provided under **Rule 27.2**, an arbitrator may reject the **Response** and the arbitration will proceed on an uncontested basis.

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28. APPOINTMENT OF AN ARBITRATOR

28.1 Where the Director has not appointed a private neutral evaluator under **Rule 24.3** or a neutral evaluator at the Commission under **Rule 44.1**, the Director will promptly appoint an arbitrator. The Director may also appoint an arbitrator to conduct a pre-hearing or other interim proceeding.

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29. REPLY BY THE APPLICANT FOR ARBITRATION

29.1 Within **10 days** of being served with the **Response by Insurer**, the applicant must reply to any new issues raised by:

- (a) serving a **Reply by the Applicant for Arbitration** in **FORM G** on the insurer and any other parties; and
- (b) filing a copy of the **Reply** together with a Statement of Service in **FORM F**

29.2 The Reply by the **Applicant for Arbitration** is optional where no new issues are raised in the Response by Insurer.

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30. COMBINING APPLICATIONS

30.1 Where two or more **Applications for Arbitration** have been filed and it appears that:

- (a) they have an issue or question of law, fact, or policy in common; or
- (b) the application of this Rule will result in the most just, quickest, and least expensive means to deal with the **Applications**

The Dispute Resolution Group will notify the parties in writing of the intention to:

- (c) combine the proceedings;
- (d) schedule the proceedings to be heard at the same time;
- (e) schedule one or more proceedings to be heard one immediately after the other by the same arbitrator; or
- (f) suspend the scheduling of a proceeding or proceedings until the determination of any one of them

30.2 Where a party objects to a notice made under **Rule 30.1**, the party must promptly notify the Dispute Resolution Group and the other parties involved, in writing, of the objection.

30.3 An arbitrator will consider an objection made under **Rule 30.2** and make an order on such terms as he or she considers just.

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31. SEVERING ISSUES

31.1 Where an arbitrator considers it appropriate, or where the parties agree and the arbitrator approves, the Dispute Resolution Group will notify the parties in writing that an **Application for Arbitration** in **FORM C** is to be divided into distinct issues to be heard separately.

31.2 If more than one final order is made in an application, each order will stand on its own for the purposes of an appeal or a variation/revocation proceeding.

31.3 Where a party objects to a notice made under **Rule 31.1**, the party must promptly notify the Dispute Resolution Group and the other parties involved, in writing, of the objection.

31.4 An arbitrator will consider the objection and may make an order on such terms as he or she considers just.

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32. EXCHANGE OF DOCUMENTS BEFORE PRE-HEARING

32.1 At least 10 days before the pre-hearing discussion, each party must:

(a) exchange all documents identified in the Application for Arbitration and the Response by Insurer, or explain why a document has not been provided;

(b) establish reasonable time frames for the exchange of any remaining documents;

(c) file the key documents the pre-hearing arbitrator will require to understand the issues in dispute;

(d) file a list of outstanding document requests and identify any disputed items.

32.2 Subject to the time lines under **Rule 39**, the parties have an ongoing responsibility to ensure the prompt and complete exchange of documents that are reasonably necessary to determine the issues being arbitrated, including updates to the information previously exchanged and any additional documents obtained.

32.3 Subject to **Rule 39**, an arbitrator may at any time order the production of documents or the giving of information that he or she considers relevant to the determination of the issues in the arbitration, on such terms as he or she considers appropriate.

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33. PRE-HEARING DISCUSSION

33.1 One or more pre-hearing discussions may be held before an arbitrator who will attempt to resolve the dispute, and will assist the parties to prepare for the arbitration by:

(a) identifying and obtaining agreement as to the issues for arbitration;

(b) obtaining agreement as to facts;

(c) deciding any disputes relating to the identification and exchange of documents, making orders and setting time lines for the exchange of outstanding documents;

(d) dealing with procedural and preliminary issues, and requests for interim relief or interim expenses;

(e) identifying the expert and lay witnesses to be called at the hearing and determining the length of hearing;

(f) setting dates for the hearing;

(g) arranging the form in which document briefs or a joint book of documents will be submitted to the hearing arbitrator; and

(h) dealing with any other matters that the arbitrator considers appropriate

33.2 A pre-hearing discussion may be held in person, by telephone conference call, electronically, or by any other means that the pre-hearing arbitrator considers appropriate.

33.3 The Dispute Resolution Group will provide parties with reasonable notice of the date and manner of the pre-hearing discussion.

33.4 The Dispute Resolution Group may also notify the parties that they are to endeavour to agree, within 20 days of the date of the notice, to a date and time for the pre-hearing discussion that is no later than 60 days after the date of the notice and for which the Dispute Resolution Group confirms an arbitrator is available.

33.5 If the parties do not notify the Dispute Resolution Group, within the 20-day time period provided for in a notice delivered under Rule 33.4, that they have agreed to a date and time for the pre-hearing discussion in accordance with that Rule, the Dispute Resolution Group may proceed to schedule a date and time for the pre-hearing discussion without the agreement of the parties, and such date and time shall be binding on the parties unless the Dispute Resolution Group or the arbitrator permit otherwise.

33.6 The pre-hearing arbitrator will confirm the results of the pre-hearing discussion to the parties in writing.

33.7 An arbitrator who presides at a pre-hearing discussion at which the parties attempt to settle some or all of the issues in dispute will not preside at the hearing unless the parties consent.

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34. FAILURE TO COMPLY

34.1 Where a party fails to comply with a time requirement established by these Rules or by order or agreement, or fails to produce documents in compliance with an order or agreement, an arbitrator may:

- (a) order a party to pay expenses (including interim expenses), or deny expenses to a party;
- (b) exclude a document filed;
- (c) impose a new timetable for compliance;
- (d) draw an adverse inference against a party; and
- (e) make such other order as the arbitrator considers just.

34.2 Either party may make a written request for the resumption of a pre-hearing discussion where a party fails to comply with a time requirement established by these Rules or by order or agreement, or fails to produce documents in compliance with an order or agreement.

34.3 The Dispute Resolution Group will attempt to accommodate a party's written request for a resumption of the pre-hearing discussion where practicable.

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35. SETTLEMENT CONFERENCE PRIOR TO SCHEDULED HEARING DATE

35.1 Either party may contact the Dispute Resolution Group to request a settlement conference.

35.2 The party seeking the settlement conference should confirm the consent of all other parties to the settlement conference and provide times and dates for the conference that are acceptable to all parties.

35.3 The Dispute Resolution Group will attempt to accommodate a joint request of the parties for a settlement conference and may assign a mediator or adjudicator to facilitate resolution of the issues in dispute.

35.4 The Dispute Resolution Group or an arbitrator may also initiate a settlement conference, provided the parties consent.

35.5 An arbitrator who facilitates a settlement conference prior to the scheduled hearing shall not preside at the hearing unless the parties consent.

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36. CONFIDENTIALITY DURING SETTLEMENT DISCUSSIONS

36.1 No statements made for the purpose of settlement or any offer to settle made during a pre-hearing discussion or settlement conference shall prejudice any position the parties may take in any subsequent proceeding.

36.2 No person appointed to facilitate the settlement of an issue in dispute before the Dispute Resolution Group shall be compelled to give testimony or produce his or her notes or other documents in a proceeding before the Dispute Resolution Group, in a private arbitration or civil proceeding through the courts, with respect to matters that come to his or her knowledge in the course of exercising his or her duties under these Rules, the *Insurance Act*, or its Regulations.

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37. HEARINGS

37.1 The arbitrator may:

- (a) hold an oral hearing;
- (b) hold a written hearing;
- (c) hold an electronic hearing; or

(d) hold a hearing which combines one or more of the above formats

37.2 The arbitrator will not hold a written hearing where a party satisfies the arbitrator that there is a good reason for not doing so.

37.3 The arbitrator will not hold an electronic hearing where a party satisfies the arbitrator that holding an electronic hearing will significantly prejudice the party.

37.4 **Rules 37.2 and 37.3** do not apply if the only purpose of the hearing is to deal with procedural matters.

37.5 The parties to an arbitration shall be given reasonable notice of a hearing, the manner of the hearing and in the case of a written or electronic hearing, a statement that either party may object to a written or electronic hearing on the grounds set out in **Rules 37.2 and 37.3** (except in the case of a hearing on procedural matters only).

37.6 The Dispute Resolution Group may also notify the parties that they are to endeavour to agree, within **20 days** of the date of the notice, to a date and time for the hearing that is no later than **180 days** after the date of the notice and for which the Dispute Resolution Group confirms an arbitrator is available.

37.7 If the parties do not notify the Dispute Resolution Group, within the **20-day** time period provided for in a notice delivered under **Rule 37.6**, that they have agreed to a date and time for the hearing in accordance with that Rule, the Dispute Resolution Group may proceed to schedule a date and time for the hearing without the agreement of the parties, and such date and time shall be binding on the parties unless the Dispute Resolution Group or the arbitrator permit otherwise.

37.8 The arbitrator will determine all issues in dispute and such other issues as the parties may agree, where mediation has taken place.

37.9 Where notice of hearing has been sent to a party and a party does not attend at an oral or electronic hearing, or participate in a written hearing, the arbitrator may proceed with the hearing in the party's absence or without the party's participation, as the case may be, and the party is not entitled to any further notice in the proceeding.

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38. TIME LINES FOR WRITTEN HEARINGS

38.1 In a written hearing, the arbitrator:

- (a) may, within **30 days** after the last day on which the insured person is entitled to file a **Reply by the Applicant for Arbitration**, request additional materials or written submissions from the parties on any issue or matter in dispute;
- (b) may proceed to determine the issues even though a party has failed to file additional materials or written submissions, if the arbitrator is satisfied that the Dispute Resolution Group has delivered the request for additional materials or submissions;
- (c) will make the order based on the materials and submissions filed;
- (d) will issue an order on the later of:
 - (i) **60 days** after the last day on which the insured person is entitled to file a **Reply**; and
 - (ii) **30 days** after the last day on which the parties are required to file additional materials or written submissions

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39. EVIDENCE

- 39.1 Subject to **Rule 39.2**, all documents, reports (including experts' reports) and assessments to be introduced at a hearing by either party must be served on the other party at least **30 days** before the first day of the hearing.
- 39.2 In extraordinary circumstances, a party may seek an arbitrator's permission to serve a document, report or assessment on the other party for use at a hearing less than **30 days** before the first day of hearing.

39.3 The hearing arbitrator will determine the relevance, materiality, and admissibility of evidence submitted at the hearing, but will not admit evidence at a hearing that:

- (a) would not be admissible in a court by reason of any privilege under the law of evidence; or
- (b) is not admissible under the *Insurance Act*; or
- (c) was not served on the opposing party in accordance with **Rules 39.1 and 39.2**, unless the hearing arbitrator is satisfied that extraordinary circumstances exist to justify an exception.

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40. **SURVEILLANCE EVIDENCE**

40.1 If a party intends to rely on any portion of surveillance or investigative evidence, including videotapes, photographs, reports, notes and summaries of surveillance observations or investigations, at least 30 days before the hearing, the party shall provide:

- (a) the names and qualifications of the persons who secured the investigative or surveillance evidence, the dates, times and places where any surveillance or investigation was undertaken; and
- (b) copies of all videotapes, photographs, investigative reports, notes and summaries taken or prepared in connection with the issues in dispute.

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41. **WITNESSES**

41.1 Each party must provide the other parties with the names of witnesses that the party intends to call and the names of persons the party requires to attend for cross-examination on a report, at least **30 days** before the first day of the hearing.

41.2 Every party must notify a potential witness of the intention to call him or her to give evidence at the hearing at least **30 days** before the first day of the hearing.

41.3 An arbitrator may:

- (a) excuse a witness from attending at the hearing, if the witness was not identified at the pre-hearing under **Rule 33**, or notified at least **30 days** before the first day of hearing under **Rule 41.2**; or
- (b) make such other order as the arbitrator considers just.

41.4 An arbitrator has the power to summon and enforce the attendance of a witness and require him or her to give evidence on oath or otherwise, and to produce documents, records, and things.

41.5 A party may require the attendance of a witness by serving a **Summons to Witness** in **FORM N**, in accordance with **Rule 73**.

See **Practice Note 8** "Attendance of a Witness to an Arbitration Hearing by Summons" found in **Section C** of the **Code**.

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42. **EXPERT WITNESSES**

42.1 If a party intends to introduce a report by an expert, the full name and qualifications of the expert who prepared the report must accompany the report.

42.2 If a party intends to call an expert witness to present evidence at a hearing, that party must serve and file a document setting out the following:

- (a) the full name, address and qualifications of the expert witness;
- (b) the subject matter of the testimony to be presented; and
- (c) the substance of the facts and opinion which the witness will present.

The time lines and requirements set out under **Rule 39** and **Rule 41** apply.

42.3 Where a party does not comply with the requirements of this Rule, an arbitrator may exclude a witness from the hearing or make such other order as the arbitrator considers just.

42.4 No party may call more than two expert witnesses to give opinion evidence at a hearing, unless otherwise ordered by an arbitrator.

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43. REOPENING OF HEARING

43.1 The arbitrator may reopen a hearing at any time before he or she makes a final order disposing of the arbitration.

43.2 **Rules 37 to 42** apply to the reopening as modified by the arbitrator.

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44. NEUTRAL EVALUATION AT THE COMMISSION

44.1 Upon receipt of a completed **Agreement to Neutral Evaluation at the Commission** in **FORM D** and confirmation of the consent of the parties, the Director will:

- (a) suspend the appointment of an arbitrator;
- (b) promptly appoint a person to perform the neutral evaluation; and
- (c) confirm the appointment with the parties.

44.2 Within **30 days** of notice of the appointment of a neutral evaluator from the Director (see **Rule 44.1**), the parties must file a **Joint Statement for Neutral Evaluation at the Commission** in **FORM H** containing:

- (a) a description of the legal and factual issues to be evaluated;
- (b) confirmation that all documents listed in the **Report of Mediator** and all other documents necessary for an evaluation of the issues have been exchanged by the parties; and
- (c) two proposed half-day dates for the neutral evaluation which are no later than **60 days** after the date of the appointment of the neutral evaluator.

44.3 If it appears that the **Joint Statement for Neutral Evaluation at the Commission** has not been completed in accordance with all requirements of **Rule 44.2** or the dispute is otherwise unsuitable for neutral evaluation, the Director will:

- (a) deliver written notice of the deficiencies or concerns identified;
- (b) hold the neutral evaluation in abeyance for **10 days** from the delivery of the notice

44.4 Where a party does not address the deficiencies or concerns within the **10 days** provided under **Rule 44.3(b)**, the Director may terminate the neutral evaluation and promptly appoint an arbitrator.

44.5 In deciding whether a case is suitable for neutral evaluation, the Director shall have regard to the considerations set out in **Practice Note 6** "Neutral Evaluation at the Financial Services Commission of Ontario" found in **Section C** of the **Code**.

44.6 Upon receipt of the parties' completed **Joint Statement**, the Director shall promptly select one of the dates for the neutral evaluation and shall notify the parties of the date, time, and location of the neutral evaluation.

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45. CASE SUMMARY FOR NEUTRAL EVALUATION

45.1 At least **10 days** prior to the date of the neutral evaluation, each party must exchange and file a **case summary** containing:

- (a) a summary of their submissions on the issues to be evaluated; and

(b) copies of the key documents required for an evaluation of each issue.

45.2 The parties shall promptly provide any additional information requested by the neutral evaluator.

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46. **TERMINATION OF NEUTRAL EVALUATION**

- 46.1 A party withdrawing from neutral evaluation must notify the other parties and the Dispute Resolution Group in writing.
- 46.2 Where a party withdraws from neutral evaluation, fails to comply with any of the requirements for neutral evaluation as set out in **Rules 44 and 45**, or fails to attend or participate in neutral evaluation, the Director may terminate the neutral evaluation.
- 46.3 Where neutral evaluation is terminated pursuant to **Rule 46.2**, the Director will promptly appoint an arbitrator by written notice to the parties.
- 46.4 **Rule 33** and following apply to an arbitration hearing conducted after the withdrawal from or termination of neutral evaluation under this Rule.

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47. **OPINION OF THE NEUTRAL EVALUATOR**

- 47.1 Where neutral evaluation proceeds, the neutral evaluator will give the parties an oral opinion on the probable outcome of a proceeding in court or an arbitration.
- 47.2 The opinion given in neutral evaluation is for the purpose of settlement and is confidential.
- 47.3 A neutral evaluator shall not be required to testify in a civil proceeding or in a proceeding before any tribunal respecting the evaluation or respecting information obtained in the discharge of the neutral evaluator's duties.

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48. **REPORT OF THE NEUTRAL EVALUATOR**

- 48.1 The neutral evaluator will promptly provide the parties with a **Report of the Neutral Evaluator** setting out:
- (a) the issues that were evaluated;
 - (b) the issues that were settled; and
- where any issues referred to neutral evaluation were not settled, the neutral evaluator will record:
- (c) the issues that remain in dispute;
 - (d) the insurer's last offer in respect of such issues; and
 - (e) a list of materials requested by the neutral evaluator that were not provided by the parties.
- 48.2 No part of the oral opinion of the neutral evaluator on the probable outcome of a proceeding will be included in the **Report of the Neutral Evaluator**.

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49. **REFERRAL TO ARBITRATION AFTER NEUTRAL EVALUATION**

- 49.1 If any of the issues referred to neutral evaluation are not settled, the Director shall refer the issues remaining in dispute to arbitration **2 business days** after delivery to the parties of the **Report of the Neutral Evaluator**.
- 49.2 The Director will promptly appoint an arbitrator.

49.3 The neutral evaluator will not preside at the arbitration hearing.

49.4 **Rule 37** and following, apply to an arbitration hearing conducted after neutral evaluation is completed and the parties have not settled an issue in dispute.

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