Docket: 2008-101(IT)G

BETWEEN:

WINSTON BLACKMORE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on January 23, 24, 25, 26, 30, 31,
February 1, 2, 6, 7, 8, 9, 10, 27, 28, 29, March 1 and 2, 2012
at Vancouver, British Columbia

Before: The Honourable Justice Diane Campbell

Appearances:

Counsel for the Appellant:	David R. Davies Natasha S. Reid
Counsel for the Respondent:	Lynn M. Burch David Everett Selena Sit

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ORDER

WHEREAS at the conclusion of the presentation of the evidence by both parties, the Respondent, as part of its case, indicated that it intended to read into the evidence certain questions and answers from the examination for discovery of Winston Blackmore;

AND WHEREAS the Appellant brought an application pursuant to subsection 100(3) of the *Tax Court of Canada Rules (General Procedure)* to introduce into evidence other portions of the examination for discovery in respect to three of the

Respondent's read-ins, referred to more specifically in the Appendix attached to these Reasons;

AND WHEREAS submissions were heard from each of the parties;

IN ACCORDANCE with my attached Reasons, I order that the Appellant's proposed additional read-ins, respecting numbers 2 and 3 as referenced in the attached Appendix, will be allowed into evidence.

Signed at Ottawa, Canada, this 2nd day of April 2012.

"Diane Campbell"

Campbell J.

Citation: 2012 TCC 108
Date: 20120402
Docket: 2008-101(IT)G

BETWEEN:

WINSTON BLACKMORE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

RULING ON APPELLANT'S MOTION RESPECTING ADDITIONAL READ-INS

Campbell J.

[1] At the close of the evidence in the above-noted appeals, and at the commencement of the Respondent's proposed read-ins of portions of Mr. Blackmore's examination for discovery evidence, the Appellant's Counsel made a request for the introduction into the record of additional read-ins from the examination, pursuant to subsection 100(3) of the *Tax Court of Canada Rules (General Procedure)* (the "*Rules*").

[2] The following table outlines briefly the Appellant's proposed additional read-ins together with those read-ins of the Respondent:

#	Respondent's Read-in	Appellant's Requested Read-in
1	Examination for Discovery of the Appellant on March 11, 2010: Pages 66-67 – Q402-409	Examination for Discovery of the Appellant on March 11, 2010: Pages 65-66 – Q398-401

#	Respondent's Read-in	Appellant's Requested Read-in
2	Examination for Discovery of the Appellant on March 12, 2010: Pages 77-78 – Q363-368	Examination for Discovery of the Appellant on March 12, 2010: Pages 78-80 – Q369-374 Pages 82-84 – Q394-400
3	Appellant's responses to undertakings dated June 30, 2010: Undertakings 597 and 661	Examination for Discovery of the Appellant on March 11, 2010: Page 64 – Q389-391

[3] The Appendix, attached to my Reasons, sets out more fully those portions of the Respondent's read-ins in respect of which the Appellant's Counsel brought their Motion together with the Appellant's proposed additional discovery read-ins.

[4] Subsection 100(3) of the *Rules* provides:

> **100.** (3) Where only part of the evidence given on an examination for discovery is read into or used in evidence, at the request of an adverse party the judge may direct the introduction of any other part of the evidence that qualifies or explains the part first introduced.

This Rule permits a Judge to allow the introduction of additional portions of the discovery evidence at the request of the adverse party where those additional portions would qualify or explain the initial portions that are read-in. The use of the word "may" in this Rule indicates that there is no absolute right in an adverse party to have additional portions of the examination introduced into evidence.

[5] Chief Justice Rip, in *Glaxosmithkline Inc. v The Queen*, 2005 TCC 120, [2005] T.C.J. No. 109, at paragraph 2, of Appendix I, in dealing with an application for additional read-ins pursuant to subsection 100(3), compared the similarity of this Rule to Rule 289 of the *Federal Courts Rules* in the following manner:

> [2] … This subsection is similar to section 289 of the *Federal Courts Rules,* headed "qualifying answers", and permits evidence to be read-in if "the Court considers is so related that it ought not to be omitted".

[6] Chief Justice Rip in *Glaxosmithkline* quoted from the decision of the Federal Court of Appeal in *Canada (Minister of Citizenship & Immigration) v Odynsky*, [1999] F.C.J. No. 1389, where the Court stated at paragraph 6, that

> [6] …"to ensure that evidence from a transcript of examination for discovery which is read in as evidence at trial is placed in proper context so that it is seen and read fairly, without prejudice to another party that might arise if only a portion of the content relevant at to a fair understanding of the evidence read in is given."

[7] To determine whether a proposed additional portion of discovery evidence should be allowed in because it "qualifies or explains" pursuant to subsection 100(3) of the *Rules*, Chief Justice Rip, at paragraph 4, summarized the factors he considered as follows:

- continuity of thought or subject-matter;
- the purpose of introducing the evidence in the first instance and whether it can stand on its own; and
- fairness in the sense that the evidence should, so far as possible, represent the complete answer of the witness on the subject-matter of the inquiry so far as the witness has expressed it in the answers he has given on his examination for discovery.

[8] Appellant's Counsel relied on a recent decision of Justice Boyle in *Morguard Corporation v The Queen*, 2012 TCC 55, [2012] T.C.J. No. 48, which had been released the week preceding the hearing of these present submissions on read-ins. Justice Boyle, while in agreement with the approach taken in *Glaxosmithkline*, concluded that this Court's Rule 100(3) has a broader scope than the Federal Court's Rule 289 as set out in the *Odynsky* decision and relied upon by Chief Justice Rip in *Glaxosmithkline*.

[9] Justice Boyle, at paragraph 9 of the Appendix, states that Rule 100(3) is not narrowly restricted to the completeness of the deponent's responses to a specific question that is read in but that it "…can extend to all of the deponent's answers to questions on the particular subject matter in appropriate circumstances." If I read the *Morguard* decision correctly, he seems to be interpreting Rule 100(3) in a manner broad enough to allow additional read-ins for clarification, not only with respect to the specific answers given to a specific question, but also to the "subject matter" of the proceedings generally.

[10] Of course, one of the problems in applying such a broad interpretation to subsection 100(3) is that parties may attempt to use read-ins as a method of getting evidence in "by the back door" when such evidence should have been properly put before the Court through the witness that is giving evidence during the hearing. Although it is not clear from the *Morguard* decision, I would suggest that Justice Boyle, when referring to "subject matter" in his reasons, must have intended that the additional read-ins should be related and limited to the subject matter of the deponent's answers given in the examination for discovery proceedings and not apply generally to the subject matter covered in the discovery proceedings as well as the hearing. Even if I am correct in applying this more restrictive approach, the *Morguard* decision still places a much broader interpretation on subsection 100(3) than the courts have previously followed.

[11] I prefer the approach taken in *Glaxosmithkline* because I do not believe that subsection 100(3) is susceptible to the very broad interpretation that the Appellant, in relying on the *Morguard* decision, would have me apply. In addition, although Justice Boyle would have allowed the additional read-ins based on procedural and substantive fairness, it appears from the *Morguard* reasons, at paragraph 12 of the Appendix, that the parties resolved this issue on their own after Justice Boyle communicated to the parties that he was "…not inclined to read anything further into the Chief Justice's reasons and considerations set out in *GlaxoSmithKline* and was inclined to apply them as written…". This seems to indicate that, although one can assign a broader scope to subsection 100(3), in the practical application of 100(3) he would ultimately rely upon the considerations set out in *GlaxoSmithKline*.

[12] My conclusions in respect to these three categories of proposed additional read-ins consider whether there is a genuine nexus or connection between the Respondent's read-ins and the Appellant's proposed additional read-ins. Consequently, as suggested in subsection 100(3), my approach, in determining if the Appellant's additional read-ins qualify or explain the Respondent's read-ins, took into consideration the following: whether the Court could be mislead by the omission of this portion of the examination for discovery; whether the additional read-ins amounted to evidence that should have been addressed through the Appellant's testimony during the hearing; and, whether the evidence fairly represented the entire response of the witness on the subject matter of that response to the Respondent's read-ins given during the discovery proceedings.

<u>Read-In #1</u>

[13] These proposed additional read-ins are not permitted because, although they are related generally to the broad topic of employees of the corporation, they deal specifically with the wages/salary paid to those employees while the Respondent's read-ins deal only with the employment of family members. The proposed additional read-ins do not qualify or explain the Respondent's read-ins because they are in respect to an entirely different area within the broader topic. I find no connection between these two areas. In any event, I note that Winston Blackmore, in cross-examination, was questioned with respect to the wages paid to family members.

Read-In #2

[14] I am allowing these additional read-ins into evidence because they explain why Mr. Blackmore made no representations to his banks respecting the UEP Trust. They provide me with a more complete picture and there is certainly a connection between them.

Read-In #3

[15] These additional read-ins also provide a more complete picture and, therefore, I am allowing them into evidence. The Respondent's read-ins deal with possible corporate documentation that could establish an agency relationship between the corporate shareholders and the community. The additional read-ins relate to a potential agency relationship and provide further clarification by addressing obligations of the shareholders to the corporate profits. Again there is a connection and continuity between these read-ins.

[16] In summary, the Appellant's additional read-ins, numbers 2 and 3, will be allowed into evidence, but number 1 will not be permitted.

Signed at Ottawa, Canada, this 2nd day of April 2012.

"Diane Campbell"

Campbell J.

APPENDIX

READ-IN #1:
Examination for Discovery of the Appellant (March 11, 2010)

Appellant:

398	Q. Approximately how many people did the company employ in the years between 2000 and 2006?
	A. We employed every person that we could in our community. In 1988 there was a designation by B.C. Social Services that they would not fund anyone who lived in Bountiful, and consequently if we had people who had a special need then I would create them a job, be it ever so humble. So I think we had as many people employed at least in the summer. When the school kids came off we created jobs for them as up to a hundred, maybe even more in the summer.
399	Q. And were they paid minimum wage or less than that?
	A. They were paid on the basis of a share-and-share-alike basis which our congregation was practising as a part of our faith.
400	Q. So they weren't being paid minimum wage?
	A. I don't think minimum wage was even a consideration in our formula.
401	Q. It would have been too expensive?
	A. Not necessarily. It's just that they would then have had more money at their disposal than their parents had. So if they were getting congregational care then that's how we applied it. Plus, they didn't have the same pressure on them either.

Respondent:

402	Q. Okay. So when you say that you employed everyone that you could, for the most part did the company employ members of your extended family?
	A. We employed members of our community; our congregation, plus others.
403	Q. Okay. And that would include your brothers?
	A. Yes.
404	Q. Your children?
	A. Yes.
405	Q. Your brothers' children?
	A. Yes.
406	Q. Children of uncles and children of cousins?
	A. Mm-hmmm.

407	Q. And that’s what I mean by extended family?
	A. Community members.
408	Q. But most of those community members, if not all of them were, in fact, part of your extended family, weren't they?
	A. Well, I'm related to everyone, I think.
409	Q. In Bountiful?
	A. In Bountiful.

READ-IN #2:
Examination for Discovery of the Appellant (March 12, 2010)

Respondent:

363	Q. Now, without taking you to the individual documents, you would agree with me that a number of properties, real properties, that you acquired that you dealt with between 2000 and 2006, either in your own right or in respect of the company, a lot of those properties were mortgaged; right?
	A. They all were, I think.
364	Q. They were all mortgaged. I understand that you would be the person to go to the bank and obtain those mortgages; is that fair?
	A. Yes, or we assumed mortgages, so.
365	Q. And in either case did you ever make any representation to any of the bankers that you were dealing with or any of the lenders that you were dealing with that the properties at issue being mortgaged were actually impressed with a trust either in favour of the Bountiful members, or the UEP Trust, or anyone else?
	A. No one ever asked.
366	Q. So that's, no, you never disclosed…
	A. Yeah.
367	Q. You never made that representation?
	A. No.
368	Q. And the reason you didn't is because no one specifically asked?
	A. I would have to say yes to that.

Appellant:

369	Q. And would you really expect your average person to know about any of that

	-- or any of those events or facts? Unless you told them, how would they know?
	A. Why would I tell them?
370	Q. Why wouldn’t you?
	A. Well, why would I?
371	Q. It would just complicate things?
	A. I don’t know. I just can’t recall whether I would or whether --
372	Q. To be fair, though, I think we're in agreement you dealt with -- either in your own capacity or as the directing mind of the company, you dealt with a number of mortgages of properties over the years; it wasn't just one or two?
	A. But every person that I've dealt with as a bank knows about Bountiful since 1990, '91. They watch the news the same way you do. They read the articles the same way you have. It's generated half the questions. They look at all of that and they know that Winston Blackmore is, oh, the Bishop of Bountiful, and so when I go in there and see them I would just imagine that they already know about me, and there's not a whole bunch that I have to tell them. They know -- I'm sure since 1990 they know about the United Effort Plan -- I mean '91.
373	Q. How do you know that?
	A. How would I not know that? Everybody else does. In my view, every last person I've ever ran across knows about all that stuff.
374	Q. Okay. But how would you expect them to know that it was your view that every single piece of real property that you were mortgaging was, in turn, impressed with some kind of trust in favour of either the community of Bountiful or the UEP Trust? How would you expect them to know that?
	A. I've dealt with three bankers. They all have binders like this and all about --
…	
394	Q. So the question was how could you -- what did you base your expectation on that they would know the ins and outs of the trust claim that you're now making in respect of the community of Bountiful and the UEP Trust?
	A. And I was just in the process of saying that everyone of them had a binder of every clipping that they could find on us, about us, news-related clippings, and from time to time when I went in there, they would discuss those with me, and I'm sure our conversation included the fact that we live in a community kind of living.
395	Q. All right. But did you ever expressly tell any of these three bankers that any property that you purportedly owned in your own right or that the company purportedly owned in its own right, were actually impressed with a trust in favour of the larger Bountiful community or this UEP Trust in Utah?
	A. I think that they considered that that increased their security, being a community-driven congregation.

396	Q. Were they aware of the fact that the UEP Trust was enmeshed and had been enmeshed for some period of time in complicated litigation?
	Mr. DAVIES: I don't think he can speak to their knowledge on that.
	Ms. BURCH:
397	Q. Did you discuss that with them?
	A. I can’t recall.
398	Q. And how do you know what they had in their binder?
	A. They showed me.
399	Q. And were there articles that they showed you from their binder respecting the nature of the trust claim that you're making in these proceedings?
	A. I'm not aware of that, but I know that they showed me everything Daphne (phonetic) ever wrote or whoever the previous people were.
400	Q. And was Daphne, Daphne Braun (phonetic)? Is that the person, the Vancouver Sun reporter that you're referring to?
	A. Yeah.

READ-IN #3:
Appellant's Answer to Undertakings (June 30, 2010).

Respondent:

UT 597	Q. Review the corporate filings of the Company and confirm that none of them show the Company acting as agent, and if the corporate filings of the Company show that the Company was acting as agent, to provide copies of those filings.
	A. We have reviewed the minute book of the Company. The minute book contains corporate filings for taxation years 2001 through 2004 and 2006. The minute book does not contain any corporate filings for taxation year 2000. None of the corporate filings contained in the minute book show that the Company was acting as agent.
UT 661	Q. Produce copies of any document stating that Mr. Blackmore and the other shareholders of the Company held the shares of the Company as bare agent and mere nominee for the benefit of the community of Bountiful.
	A. We have reviewed the minute book of the company. Mr. Blackmore has searched his records. No documents have been located which state that Mr. Blackmore holds the shares of the Company as bare agent and nominee for the benefit of the community of Bountiful.

Appellant:
Examination for Discovery of Appellant (March 11, 2010).

389	Q. Okay. Are there any written agreements as between you and your brothers respecting how the profits from J.R. Blackmore & Sons must be spent or applied?
	A. No.
390	Q. And there was no obligation on the part of any of you to act in any specific manner with respect to the profits of the company?
	A. We acted for the good of our community. We were the nucleus of our community, our congregation. So that's how we've lived our lives.
391	Q. But there's nothing in writing stipulating any obligations that you had in that respect?
	A. Not that I know of.

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COURT FILE NO.:	2008-101(IT)G
STYLE OF CAUSE:	WINSTON BLACKMORE AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	January 23, 24, 25, 26, 30, 31, February 1, 2, 6, 7, 8, 9, 10, 27, 28, 29, March 1 and 2, 2012
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DATE OF ORDER:	April 2, 2012

APPEARANCES:

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