Docket: 2009-1561(IT)G

BETWEEN:

MORGUARD CORPORATION,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on May 2, 3 and 4, 2011, at Toronto, Ontario.

Before: The Honourable Justice Patrick Boyle

Appearances:

Counsel for the Appellant:	Clifford L. Rand David Muha Christopher Slade
Counsel for the Respondent:	Elizabeth Chasson Justin Kutyan Ernesto Cáceres

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JUDGMENT

The appeal from the reassessment made under the *Income Tax Act* with respect to the Appellant's taxation year ended November 30, 1997 is dismissed, with costs, in accordance with the reasons for judgment attached hereto.

Signed at Ottawa, Canada, this 24th day of February 2012.

"Patrick Boyle"

Boyle J.

Citation: 2012 TCC 55
Date: 20120224
Docket: 2009-1561(IT)G

BETWEEN:

MORGUARD CORPORATION,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Boyle J.

[1] The Appellant launched an unsuccessful take-over bid in June 2000 for Acanthus Real Estate Corporation ("Acanthus"). Within a period of weeks, it lost the target in a take-over battle to an affiliate of the Caisse de dépôt et placement du Québec, it sold its nearly 20% position in Acanthus to the successful bidder, and it received a $7.7 million break fee from Acanthus.

[2] The issue to be decided in this case is whether the so-called "break fee" received by the corporate taxpayer in respect of its unsuccessful attempted acquisition in 2000 of a public company should be characterized as an income receipt or a capital receipt, and, if it was capital, whether it was a capital gain or a non-taxable capital receipt akin to a windfall. The Appellant's principal position is that it was a non-taxable capital receipt though counsel for the Appellant was careful to avoid the term "windfall".

I. Preliminary Evidentiary Point: Rule 100

[3] An issue arose in the course of the this trial relating to the scope of Rule 100 dealing with a party's right to read into evidence portions of the other party's answers on discovery and the other party's right to request that additional portions of the

discovery be read in to qualify or explain the portions read in. This issue was resolved during the trial process. For ease of reading, my comments on this issue are set out in the Appendix hereto.

II. Facts

[4] The objective material facts of this case are straightforward, not complicated, not particularly unusual or at all unique in the present business world, and they are not particularly nuanced. There is no real material dispute as to the objective material facts although each party emphasized different aspects. There is little material disagreement between the experts who testified about take-over bids including break fees. There is no need for findings of credibility.

[5] The taxpayer is a Canadian public corporation. Prior to the years in question, it was named Acklands Limited ("Acklands"). Subsequent to the years in question, it was renamed Morguard Corporation ("Morguard"), following its take-over of Morguard Investments Ltd. described below. In the years in question, it was named Acktion Corporation ("Acktion").

[6] Acklands and its affiliates were in the automotive parts and industrial products distribution businesses. After many years in these businesses, Acklands decided to fully exit its existing businesses and to sell all of its automotive and industrial holdings for cash. It did this while Mr. Rai Sahi was its Chairman and Chief Executive Officer as well as a significant shareholder. In consultation with Acklands' significant institutional shareholders, Acklands, under Mr. Sahi's leadership, renamed itself Acktion and set out to use the significant cash proceeds from the sale of its existing entities to acquire controlling ownership positions in a number of real estate companies that owned and managed residential and commercial rental properties.

[7] Acktion sold all of its car parts and industrial products holdings. They were fully divested before the start of the 2000 take-over bid in question. Consistent with its new business strategy, Acktion did not sell its existing real estate subsidiary which owned the warehouses and store locations used by its then owned businesses. These properties were only leased to the new buyers.

[8] Acktion started to implement its new business strategy of assembling direct or indirect ownership of, or controlling positions in, real estate companies several years prior to the year in question. In early 1997, Acktion acquired directly or indirectly a

40% position in Goldlist Properties Inc. (“Goldlist”) upon its initial public offering. Acktion increased its position in Goldlist to 49% in 1998 and to 66⅔% in 1999. In 1997, Acktion acquired a significant position in Morguard Real Estate Investment Trust (“Morguard REIT”) and it increased that position in 1999 to over 50% of the units of Morguard REIT. In 1997, Acktion also acquired a significant position in common shares and convertible debentures of Revenue Properties Company Limited (“Revenue Properties”). Revenue Properties and Morguard REIT were both publicly traded. In 1998, Acktion acquired a 19.2% common-share position in Acanthus upon its initial public offering. In 1998, Acktion purchased 100% of Devan Properties Ltd. (“Devan”) from London Life Insurance Company and its senior management shareholders. Devan owned and managed a number of shopping centres. The following year, the Devan properties were rolled into Morguard REIT for additional units. In late 1998, Acktion acquired 100% of Morguard Investments Ltd. (“MIL”), Canada’s largest real estate investment advisory firm for pension funds.

[9] Acktion made other real estate acquisitions. By early 2000, Acktion had assembled direct or indirect interests in 244 properties comprising over 38 million square feet and worth over $3 billion. This included its almost 20% position in Acanthus. In addition, Acktion’s subsidiary MIL managed another 196 properties comprising 26.5 million square feet and worth almost $2 billion.

[10] The break fee involved in this appeal arose out of Acktion’s attempted acquisition of all of the shares of Acanthus in 2000. Subsequently, in late 2000, Acktion made a hostile bid to increase its position in Revenue Properties to in excess of 40%. This closed in 2000; indeed, Acktion used the moneys received from Acanthus to acquire the additional shares of Revenue Properties once that bidding turned friendly.

[11] As mentioned, subsequent to its acquisition of MIL, the taxpayer changed its name from Acktion to Morguard. This change of name occurred subsequent to the years in question.

[12] Acktion’s initial 19.2% position in Acanthus was acquired in 1998. It was Acktion’s intention to increase this position. Its first step was to have Goldlist approach the Board of Directors of Acanthus to discuss a possible bid in the range of $7.50 per share. The Board of Acanthus was not interested in supporting such a bid.

[13] Acktion made an unsolicited take-over bid for all of the remaining shares of Acanthus in June 2000 at a price of $8.00 payable in cash or Acktion shares.

[14] On June 23, 2000, following negotiations between Acktion and the Special Committee of the Board of Directors of Acanthus, Acktion and Acanthus entered into a pre-acquisition agreement in order to give support and deal protection to Acktion and its bid. The pre-acquisition agreement provided that the Board of Acanthus would support a revised Acktion bid at $8.25 per share. In the pre-acquisition agreement, Acanthus agreed, amongst other things, not to solicit other bids, to recommend acceptance of Acktion's bid unless a more favourable bid was received, and to waive Acanthus' shareholders rights plan which had the effect of deterring hostile or unsolicited bids in certain respects (and included what was described as a poison pill).

[15] As part of the pre-acquisition agreement, Acktion had negotiated a break fee of $4.7 million that would be payable to it by Acanthus if a better offer was received from a third party and the Board of Directors of Acanthus withdrew its support of the Acktion bid and approved or recommended the new bid.

[16] A joint press release by Acktion and Acanthus was made on June 23, 2000. The take-over bid circular was mailed by Acktion to the shareholders of Acanthus on June 27, 2000.

[17] On June 27, 2000, an unsolicited third party bid for all of the shares of Acanthus at $8.50 cash was made. The bidder was CADIM, a company owned by the Caisse de dépôt et placement du Québec. Acanthus notified Acktion of the CADIM bid. Acktion advised it would not support the CADIM bid with its almost 20% of Acanthus. The Acanthus Board did not decide to support the initial CADIM bid.

[18] On June 29, 2000, CADIM revised its bid to $8.75 per share. Again Acktion determined that it would not support CADIM's revised bid and would not sell its Acanthus shares to CADIM pursuant to the revised bid. Since its initial bid, Acktion had acquired additional Acanthus shares increasing its shareholdings to 19.9%.

[19] On June 30, 2000, Acanthus notified Acktion that it would be supporting the revised CADIM bid as a superior proposal to that of Acktion. On that day Acanthus withdrew its support of the Acktion bid and paid the $4.7 million break fee to Acktion.

[20] Acktion then advised Acanthus that it would be prepared to further revise its bid. Acktion and Acanthus negotiated further revisions to the pre-acquisition agreement. On July 2, 2000, Acktion and Acanthus entered into an amending agreement that provided, amongst other things, that Acktion would increase its bid to

$9.00 per share, that any superior offer from a third party would have to be for at least $9.30 per share, that Acktion would have the right to match any superior offer, and that the break fee was increased to $7.7 million. Upon signing the amending agreement, Acktion returned the $4.7 million break fee to Acanthus.

[21] On July 7, 2000, the revised Acktion offer was made to Acanthus' shareholders.

[22] On July 18, 2000, Acanthus advised Acktion that CADIM intended to make an enhanced offer at $9.30 per Acanthus share.

[23] Acktion determined that it would not increase its offer price further but would seek to maximize the price for which it would support and sell its 19.9% position in Acanthus to CADIM. Mr. Sahi contacted CADIM's President and negotiated a revised bid price of $9.40 at which Acktion would support a CADIM bid and sell its Acanthus shares to CADIM.

[24] On July 21, 2000, the Board of Directors of Acanthus notified Acktion that it had determined that CADIM's new bid at $9.40 per share was a superior bid, terminated the amended pre-acquisition agreement, and enclosed a $7.7 million certified cheque in payment of the break fee.

[25] On the same day, Acktion entered into a lock-up agreement with CADIM committing to sell its shares to CADIM. Acktion realized a gain of $4.8 million on its sale to CADIM of its Acanthus shares.

[26] The Chairman and CEO of the taxpayer, Mr. Sahi, was the taxpayer's only material witness. Notably, no one who negotiated or renegotiated the break fee was called to testify. Mr. Sahi testified that he was not personally involved in negotiating either the initial $4.7 million break fee or the revised $7.7 million break fee. He was focused on price and winning the bid in order to acquire Acanthus. While a break fee obligation may deter other bidders since it affects the value of the target to a third party, Mr. Sahi was not involved in negotiations at this level. However, it is clear that the break fee was negotiated by Acktion and was renegotiated to a significantly higher amount by Acktion following the CADIM bid. These negotiations would have been attended to by other members of Acktion's management team and by its outside advisors, including its investment bankers and its lawyers. Mr. Sahi said his own involvement would have been limited to being assured that the break fee was on normal terms, including as to amount, for such a transaction.

[27] The evidence of the experts called by both parties is that the initial $4.7 million break fee was within the commercial range of break fees normally payable in comparable corporate take-over bids. The revised $7.7 million fee was at the high end of the range and perhaps exceeded somewhat that expected range.

[28] In Acktion's 2000 Annual Report, the Chairman reported that Acktion was committed to enhancing shareholder value by focusing on its core real estate business and capitalizing on market opportunities that became available. He went on to write that Acktion realized its objective on a number of opportunities in 2000 that resulted in increased net income and cash flow in the year which included the $7.7 million break fee received from Acanthus and the $4.8 million gain Acktion realized on the sale of its Acanthus shares into the CADIM competing bid.

[29] The taxpayer had never before, nor has it ever since, received a break fee. All of its other public take-over bids appear to have been successful. The taxpayer has never sold any of the positions it acquired in real estate companies other than its 19.9% interest in Acanthus.

III. Analysis

[30] It is absolutely clear on the facts and evidence of this case, and I find expressly, that this particular taxpayer negotiated its rights to, and received, the break fee as an integral part of, and in the ordinary course of, its regular commercial business operations and activities. Throughout the relevant period, this taxpayer's continuing and recurring business included acquiring significant controlling positions in public real estate companies. Its acquisitions of its Acanthus shares and its take-over bid for Acanthus fit this same pattern even though the take-over was unsuccessful and resulted in the consolation prize of a $7.7 million break fee and a $4.8 million gain on the sale of its Acanthus shares. This taxpayer was not a white knight sought out by a reluctant target in response to an unsolicited or hostile bid. A break fee received by a taxpayer in the latter circumstances who was not generally an acquirer or a bidder itself as part of its regular commercial business activities may well require a different analysis and have different tax consequences than this taxpayer in respect of the receipt of a break fee.

A. *Non-Taxable Capital Receipts/Windfalls*

[31] Morguard's primary position in this appeal is that it received the break fee as a non-taxable capital receipt.

[32] The leading decision addressing the law applicable to the characterization of receipts as windfalls not subject to tax is that of the Federal Court Appeal in *The Queen v. Cranswick*, [1982] 1 F.C. 813, 82 DTC 6073. Justice Bowie of this Court had occasion to review the *Cranswick* factors in *Lavoie v. The Queen*, 2009 TCC 293, 2009 DTC 1183. Bowie J.'s decision, including his application of the law set out in *Cranswick*, was upheld by the Federal Court of Appeal: 2010 FCA 266.

[33] In *Cranswick*, the Federal Court of Appeal considered seven factors that were all relevant although none conclusive. These were:

1. Was there an enforceable claim to the payment?

2. Was there an organized effort to receive the payment?

3. Was the receipt sought after or solicited in any manner?

4. Was the payment expected to be received?

5. Was there any foreseeable element of recurrence?

6. Was this a customary source of income to the taxpayer?

7. Was this in consideration of, or in recognition of, property, services or anything else provided or to be provided by the taxpayer either as a result of any activity or pursuit of gain carried on by the taxpayer or otherwise?

[34] In Morguard's case, its receipt of the break free completely fails factors 1, 2, 3, 4 and 7. Factor 5 could be argued both ways since break fees are a normal part of contested and friendly take-over bids. With respect to factor 6, it can at least be said that similar break fees were a customary potential source of income given Morguard's business acquisition strategy. There is no doubt that, having considered and balanced the *Cranswick* factors, Morguard did not receive a non-taxable windfall.

[35] The taxpayer's argument is somewhat more nuanced, perhaps out of necessity, than to follow a traditional windfall analysis. Morguard argues that the break fee received should first be characterized as being on capital account and not income account. Next, it argues, the capital receipt did not relate to a disposition by it of any property and thus cannot give rise to a taxable capital gain. Finally, it argues that none of the other provisions of the *Income Tax Act* brings such a capital receipt unrelated to a disposition of property into income. It can be noted that in order for a receipt to be characterized as a windfall applying the *Cranswick* factors, one would also have to meet each of these three elements of Morguard's argument in order not to be taxable and to be characterized as a windfall in any event.

[36] As described in detail below, even this nuanced argument of the taxpayer cannot succeed as I do not accept that the break fee should properly be characterized as a capital receipt. In any event, I remain of the view that the traditional *Cranswick* analysis is the correct one to be followed in the case of a business-related receipt and in this case gives rise to a clear and correct answer on this aspect.

B. *Income vs. Capital*

[37] Issues of income versus capital characterization are often not particularly predictable. There are not always easily applicable bright line tests. Indeed, at times the case law with respect to income versus capital characterization can appear difficult to reconcile based solely upon the written reasons and each side can find cases which appear to support their positions. In cases such as these in particular, I find it useful to heed the observation of Montesquieu about orators not trying to make up with length what they may lack in depth. Little will be gained in this particular case by delving into weighing the similarities and dissimilarities in a myriad of detailed factual cases.

[38] It is sufficient in my mind to set out the proper legal test for identifying or distinguishing capital and income receipts, and to have regard to those cases which have considered essentially similar payments. Since it is now settled (at least as a general rule) under the modern view of characterizing business income that break fees such as those involved in this case are ordinarily deductible business expenses to the payor, I must address if or when it is appropriate to regard such fees as ordinary business income to the recipient.

[39] More detailed descriptions of the whats and whys of break fees can be found in the expert reports filed by each party and in *CW Shareholdings Inc. v. WIC*

Western International Communications Ltd. (1998), 39 O.R. (3d) 755, [1998] O.J. No. 1886, especially at page 771.

[40] The leading modern case on the characterization of extraordinary or unusual receipts in the business context is acknowledged to be that of the Supreme Court of Canada in *Ikea Ltd. v. Canada*, [1998] 1 S.C.R. 196, 98 DTC 6092, affirming 96 DTC 6526 (FCA) and 94 DTC 1112 (TCC). At issue was whether a so-called "tenant inducement payment" made to Ikea by one of the landlords of its stores was received by Ikea on income or capital account. The Supreme Court of Canada found it to be on income account, as had both Courts below.

[41] The approach, reasoning and general legal conclusions set out in the much earlier decisions in *Neonex International Ltd. v. The Queen*, 78 DTC 6339, and in *Firestone Management Limited v. M.N.R.*, 65 DTC 587, relating to the characterization of amounts paid in connection with an unsuccessful acquisition attempt must be reviewed and regarded with care in light of the approach set out much more recently by the Supreme Court of Canada in *Ikea*.

[42] In *Ikea*, the trial judge, Bowman J. as he then was, found that the receipt should not be considered to be linked to the capital purpose or expenditures of assembling the long-term leaseholds that were necessary to its business but were necessary incidents of the conduct of the Appellant's business. Similarly, in Morguard's case, I find it most appropriate to view the potential and actual receipt of break fees and other amounts that become payable to it pursuant to an agreement negotiated by it in connection with a potential acquisition pursued in accordance with its particular commercial business strategy to be expected incidents, however occasionally actually received, of its business. It would be too narrow and isolated an approach or analysis that would link such receipt solely to a particular long-term acquisition, even moreso in the case of unsuccessful attempted acquisitions. The break fee was an amount received in the course of Morguard's business and commercial activities and its chosen business structure and strategy in much the same way as dividends, rents or management fees might be received. The amount once paid was Morguard's cash to use in its business as it wished. Clearly, by the time of the negotiation of the amendment of the pre-acquisition agreement to increase the break fee substantially from $4.7 million to $7.7 million, the potential of receiving the break fee had become an integral, if perhaps secondary, purpose of the pre-acquisition agreement. Its increasing likelihood of receipt would reasonably be expected to have been one of the principal purposes of renegotiating the break fee provision in that agreement.

[43] In the Supreme Court of Canada, Justice Iacobucci expressly acknowledged the great assistance of Justice Bowman's lucid and comprehensive reasons with which he substantially agreed. Further, he was of the view that Bowman J. was entirely correct in finding as a fact that the payment was clearly received and inextricably linked to Ikea's ordinary business operations, and further that no question of linkage to a capital purpose could even be seriously entertained. Applying the approach endorsed by the Supreme Court of Canada in *Ikea* (at paragraph 33) to the facts in this case, the receipt by Morguard of the break fee should be regarded as an income receipt. There is no greater linkage to a capital purpose in this case than in *Ikea*.

[44] Most recently the Federal Court of Appeal in *Imperial Tobacco Canada Limited v. Canada*, 2011 FCA 308, 2012 DTC 5003, reiterated the principles for distinguishing capital and income payments. In addition to referring to several of the older cases referred to by the courts in *Ikea*, the Federal Court of Appeal referred to *Shoppers Drug Mart Limited v. The Queen*, 2007 TCC 636, 2008 DTC 2043. Both *Imperial Tobacco* and *Shoppers Drug Mart* involved extraordinary payments in the course of a capital reorganization of a business, hence giving rise to the need to decide if the payment was more closely linked to the capital transactions or to the business itself. The cases raised similar issues to those raised in *Ikea* and in this case, and were decided in a manner consistent with the *Ikea* approach.

[45] In *BJ Services Company Canada, the successor to Nowsco Well Service Ltd. v. The Queen*, 2003 TCC 900, 2004 DTC 2032, this Court characterized a break fee paid by a target corporation in similar circumstances to be part of the regular day-to-day business of a public corporation and hence deductible. See also *Boulangerie St-Augustin Inc. v. The Queen*, 95 DTC 164 (TCC), affirmed 97 DTC 5012 (FCA), and *International Colin Energy Corporation v. The Queen*, 2002 DTC 2185 (TCC). *BJ Services*, *International Colin Energy* and *Boulangerie St-Augustin* represent a sensible, sound and economically realistic approach to the characterization of expenses incurred by a corporation in an unsuccessful attempted acquisition. A comparable analysis and approach giving rise to an income characterization will not necessarily always be appropriate for a break fee recipient. In cases such as Morguard's, where the recipient is essentially in the business of doing acquisitions and take-overs, a similar approach grounded in law and in common sense to that of the Court in *BJ Services* is appropriate, provides further context for the analysis in this case, and further confirms that, on a proper application of the *Ikea* approach, the break fee received by Morguard was income to it as its ordinary business activities included trying to make corporate acquisitions such as its bid for Acanthus resulting in the break fee.

[46] For the above reasons, the taxpayer's appeal should be dismissed. In the circumstances there is no need for me to decide upon the merits of the Respondent's other arguments that either the *surrogatum* principle or paragraph 12(1)(*x*) would require that the break fee be included in Morguard's income. However, I should state at least that I am unable to conclude that the totality of the evidence supports a finding that the entire $7.7 million break fee was intended to be a reimbursement of Morguard's costs and expenses of mounting the bid or to serve as a proxy or approximation for such costs and expenses. Further, it is not clear to me that a break fee is sufficiently akin to a damage or compensation award for purposes of considering the *surrogatum* principle.

[47] The taxpayer's appeal is dismissed with costs.

Signed at Ottawa, Canada, this 24th day of February 2012.

"Patrick Boyle"

Boyle J.

APPENDIX

[1] An issue arose in the course of the this trial relating to the scope of Rule 100 dealing with a party's right to read into evidence portions of the other party's answers on discovery and the other party's right to request that additional portions of the discovery be read in to qualify or explain the portions read in. This issue was resolved during the trial process.

[2] The Respondent duly gave notice of its intention to read in portions of its discovery of the Appellant's nominee. The Appellant duly gave notice of those further passages that it felt qualified or explained the passages to be read in by the Respondent. At trial the Respondent chose not to read into evidence all of the passages of which it had given notice. When the Appellant sought to read into evidence the further passages of which it had given notice, the Respondent objected. All of the additional passages the Appellant wanted to read in had been identified in its notice as qualifying passages in the Respondent's notice that the Respondent ultimately chose not to read into evidence at the trial. This required a consideration of whether the Appellant's desired additional read-ins qualified or explained the Respondent's read-ins as required by Rule 100(3). The manner in which the issue of compliance with Rule 100(3) arose in this case also gives rise to some considerations of fairness between the parties.

[3] The questions that the Respondent read in, which gave rise to this procedural dispute, cover topics upon which the deponent Mr. Sahi gave evidence at trial. Both parties had the opportunity, and availed themselves of it, to ask Mr. Sahi what they wished on the subject matter in direct examination, cross-examination, and re-direct. It is the Respondent's position that nonetheless, Rule 100 gives it the unrestricted opportunity to read in more from Mr. Sahi on the topic even where there was no uncertainty, ambiguity or inconsistency in his testimony at trial. This was not challenged by the Appellant. However, the Respondent maintains that the Appellant is only allowed very restricted opportunity to read in additional passages relating to the same subject matter.

[4] The relevant paragraphs of Rule 100 provide as follows:

> [*Tax Court of Canada Rules (General Procedure)*]

USE OF EXAMINATION FOR DISCOVERY AT HEARING	*UTILISATION DE L'INTERROGATOIRE PRÉALABLE À L'AUDIENCE*
100. (1) At the hearing, a party may read into evidence as part of that party's own case, after that party has adduced all of that party's other evidence in chief, any part of the evidence given on the examination for discovery of	**100.** (1) Une partie peut, à l'audience, consigner comme élément de sa preuve, après avoir présenté toute sa preuve principale, un extrait de l'interrogatoire préalable :
(*a*) the adverse party, or	*a*) de la partie opposée;
(*b*) a person examined for discovery on behalf of or in place of, or in addition to the adverse party, unless the judge directs otherwise,	*b*) d'une personne interrogée au préalable au nom, à la place ou en plus de la partie opposée, sauf directive contraire du juge,
if the evidence is otherwise admissible, whether the party or person has already given evidence or not.	si la preuve est par ailleurs admissible et indépendamment du fait que cette partie ou que cette personne ait déjà témoigné
. . .	[…]
(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.	(3) Si un extrait seulement d'une déposition recueillie à l'interrogatoire préalable est consigné ou utilisé en preuve, le juge peut, à la demande d'une partie opposée, ordonner la présentation d'autres extraits qui la nuancent ou l'expliquent.

[5] Rule 100(3) was very well-described by the Chief Justice of this Court in the Appendix to his reasons in *GlaxoSmithKline Inc. v. The Queen*, 2008 TCC 324, 2008 DTC 3957. The Respondent seeks to qualify our Chief Justice's description of the considerations applicable to this Court's Rule 100(3) by reference to decisions of the Federal Court regarding that Court's Rule 289.

[6] The Chief Justice did consider the *Odynsky*[1] and *Fast*[2] decisions and Federal Court Rule 289 in *GlaxoSmithKline*. He acknowledges that the two rules serve the same purpose.

[1] *Canada (Minister of Citizenship and Immigration) v. Odynsky*, [1999] F.C.J. No. 1389 (QL).
[2] *Canada (Minister of Citizenship and Immigration) v. Fast*, 2002 FCT 542, [2002] F.C.J. No. 819 (QL).

[7] Our Rule 100 and the Federal Court Rule 289 may serve the same purpose but they are worded quite differently and appear to have differing scopes, are structurally different in their application, and are open to differing interpretations. The Federal Court Rule and how that Court has interpreted it informed the analysis and decision in *GlaxoSmithKline* and continue to be relevant considerations. However, courts are entitled to develop their own practices with respect to their own rules — just as they are entitled to set their own rules.

[8] I fully agree with the specific detailed approach of Rip C.J. in *GlaxoSmithKline* to determine whether the desired additional read-ins are truly connected and qualify or explain the subject matter of the adverse party's read-ins. In applying Rule 100(3), I had regard to:

1) whether the desired additional read-ins share continuity of thought or subject matter addressed by the deponent in the portions of the discovery read in by the adverse party;

2) whether the portion read in by the adverse party can stand on its own and fulfill the purpose for which the adverse party read them into evidence; put another way, would the additional read-ins either advance or complete, or discredit or frustrate, the adverse party's purpose?

3) whether the desired additional read-ins provide the Court with the opportunity to arrive at a more complete understanding of what the deponent said on the particular subject matter in question in the totality of the answers given in his or her examination for discovery and reflect fairness to both parties.

[9] In paraphrasing the Chief Justice's reasons in *GlaxoSmithKline* in the above manner, I am particularly mindful that, in his third consideration, the Chief Justice said the scope of the search for completeness should be having regard to the deponent's "answers" on discovery on the "subject matter" and not to the deponent's specific answer to the specific question being asked and which was read in by the adverse party. This satisfies me that our Court need not approach our Rule 100 as the Federal Court may approach its similar but different Rule 289. Specifically, Rule 100(3) is not narrowly restricted and limited to the completeness of the deponent's answer to the specific question read in but can extend to all of the deponent's answers to questions on the particular subject matter in appropriate circumstances. In this regard, our Court's Rule 100(3) may have a broader scope of consideration than that of the Federal Court's Rule 289 as set out in *Odynsky* and

Fast, and in its more recent decision in *Weatherford*[3] released subsequent to *GlaxoSmithKline*. This does not derogate from the fact that both rules serve a similar purpose.

[10] The application of the *GlaxoSmithKline* considerations does not mean that all answers of a deponent on the same subject matter will always be permitted under Rule 100(3). However, in a case such as this, where the subject matter of the Respondent's read-ins was fully addressed by the deponent in his testimony-in-chief and in cross-examination in the courtroom, the Respondent is not suggesting that the read-ins demonstrate any inconsistency, and the Respondent read in from the discovery for the purpose of insuring that the Court has a clearer picture of what was said on the topic that might not have been as clear from the courtroom testimony of the deponent, the party reading in can expect an uphill battle when complaining that the Appellant's desired additional read-ins would only serve that same purpose.

[11] The Respondent maintains expressly that the crux of its position is that Rule 100(1) gives it the right to read in portions of the discovery that repeat the deponent's courtroom testimony on a subject using different words but Rule 100(3) does not allow the Appellant to do the same thing with its additional read-ins in response. Basic fairness tells me that, even if that were correct as a general rule, in this case that would be a wrong result and outcome on topics fully addressed by the deponent in his testimony in court in a consistent and understandable fashion.

[12] Having communicated to the parties in response to the objection that I 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 without regard to anything he did not say about the Federal Court's decisions in *Odynsky* and *Fast*, much less what the later *Weatherford* decision said, the parties were able to resolve the issue of the Appellant's desired additional read-ins themselves and we were able to proceed with the trial.

[13] In short, the topic in question was well-ploughed at trial, the Respondent chose to plough that same field again with its read-ins from discovery, and if I am to have a fair and complete understanding of all of the essentially similar manners in which a field can be ploughed, I think procedural and substantive fairness is best accomplished in such a case by hearing the Appellant's additional read-ins on the same subject matter.

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[3] *Weatherford Artificial Lift Systems Canada Ltd. v. Corlac Inc.*, 2008 FC 1271.

CITATION:	2012 TCC 55
COURT FILE NO.:	2009-1561(IT)G
STYLE OF CAUSE:	MORGUARD CORPORATION AND HER MAJESTY THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATES OF HEARING:	May 2, 3 and 4, 2011
REASONS FOR JUDGMENT BY:	The Honourable Justice Patrick Boyle
DATE OF JUDGMENT:	February 24, 2012

APPEARANCES:

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