

Docket: 2002-3098(EI)

BETWEEN:

WORLD INTERNET BROADCASTING NETWORK
CORPORATION INC. AND GLOBAL TREE TECHNOLOGIES INC.,
Appellants,

and

THE MINISTER OF NATIONAL REVENUE,
Respondent.

Appeal heard on September 22, 2003 at Vancouver, British Columbia

By: The Honourable Justice J.M. Woods

Appearances:

Agent for the Appellants: Thomas Kennedy

Counsel for the Respondent: Bruce Senkpiel

JUDGMENT

The appeal in respect of a determination made under the *Employment Insurance Act* is dismissed and the determination of the Minister of National Revenue is confirmed.

Signed at Ottawa, Canada this 19th day of December, 2003.

"J.M. Woods"

J.M. Woods J.

Citation: 2003TCC716
Date: 20031219
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REASONS FOR JUDGMENT

Woods J.

[1] Robert Mackin has a background in broadcasting and became the president of a start up internet broadcasting corporation, World Internet Broadcasting Network Corporation Inc., in the year 2000. This appeal concerns the nature of Mr. Mackin's relationship with World Internet for purposes of the *Employment Insurance Act*. The relationship was governed by a written agreement that expressly denied that Mr. Mackin was an employee. However, when World Internet ceased operations, Mr. Mackin applied for, and was granted, employment insurance benefits. World Internet and its parent corporation, Global Tree Technologies Inc., appeal this decision. Global Tree is a party to the appeal because it paid a part of Mr. Mackin's fee directly and the Minister of National Revenue accordingly concluded that the parent corporation is a deemed employer under the Act.

Whether Mr. Mackin was an employee

Facts

[2] The only person who gave evidence at the hearing was the president of Global Tree, Robert Kennedy. Mr. Kennedy admitted that he was not the person most knowledgeable about this matter accordingly I have had to make inferences

based largely on the written agreement governing the relationship. I would note that the appellants were not the only parties to provide few witnesses. The Crown did not call any witnesses and, in particular, Mr. Mackin did not present evidence in support of his position.

[3] Sometime in 2000, Robert Mackin approached Global Tree about starting an internet-based broadcasting business. Global Tree was a public corporation in the resource industry and had no expertise in broadcasting but it was in a position to provide financing. Mr. Mackin had the knowledge and industry contacts to manage the business and owned a website, MyCityRadio.com, that would be used in the business.

[4] World Internet was a subsidiary of Global Tree formed for the purpose of this new venture which started up about June 1, 2000. The business did not live up to expectations and, on August 8, 2001, Global Tree stopped providing funds and World Internet ceased to operate.

[5] From December 1, 2000, the relationship between Mr. Mackin and World Internet was governed by a written agreement titled "Consultant Agreement." Mr. Mackin, using the trade name Nikcam Holdings, agreed to provide services to World Internet as an independent contractor for a two year period. The duties of the consultant (defined as both Mr. Mackin and Nikcam Holdings) were to act as president of World Internet and to perform the following duties:

In conjunction with and upon approval of the Board of Directors and of the Owner:

- develop an annual operating budget, with projections and assumptions for approval by the Board of Directors ;
- report budget results on a quarterly basis comparing actual to budget;
- be responsible for programming functions of the Owner;
- manage the affiliates program;
- work with the Vice-President of Marketing and Sales to develop and implement local and national advertising programs and to meet advertising budgets;

- work with the Chief Executive Officer and Investors Relations Group of Global Tree Technologies Inc. to assist in the raising of funds;
- maintain a positive and professional atmosphere in the Owner's workplace;
- control development of the MyCityRadio website;

any of these services may, with approval of the Board of Directors of the Owner be delegated to a competent consultant or employee of the Owner.

[6] Under the Consultant Agreement, as amended, Mr. Mackin was to receive a fee of approximately \$7,000 per month, plus GST. The fee was to be increased to \$8,250 in the second year of the term if World Internet had achieved a positive cash flow. Mr. Mackin was also to receive a commission equal to 7 1/2 percent of fees that were to be generated from licensing the website in other cities. The Consultant Agreement also provided that Mr. Mackin was to cause his website to be licensed to World Internet pursuant to a perpetual exclusive license in return for a royalty of 1 1/2 percent of net advertising revenue. A formal license agreement was never entered into.

[7] Mr. Mackin did not own any shares of World Internet but he did have a small number of shares of Global Tree. Mr. Kennedy testified that he and a colleague personally loaned funds to Mr. Mackin for the purchase of these shares on the understanding that the loan would be repaid out of the proceeds when the shares were sold.

[8] Much of Mr. Kennedy's testimony related to describing the acrimonious relationship between Mr. Mackin and the Board of Directors. Most of this testimony is not particularly relevant but it might explain why Mr. Mackin did not testify at the hearing. Mr. Kennedy himself was reluctant to testify. To illustrate the difficulties between the Board and Mr. Mackin, Mr. Kennedy stated that he once asked Mr. Mackin to assist in finding alternate sources of financing for World Internet. When Mr. Kennedy later asked to see the documentation that Mr. Mackin was giving to prospective investors, Mr. Kennedy was shocked to see a proposed reorganization of World Internet in which Mr. Mackin would own 80 percent and Global Tree would own only 20 percent.

Analysis

[9] Whether a person is an employee or independent contractor is generally determined on the facts of the particular case. The general principles are described by Major J. in *Sagaz Industries Canada Inc. v. 671122 Ontario Limited*:¹

[47] ... The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.

[48] It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

[10] Notwithstanding that World Internet entered into what was called a consulting agreement, it is liable for employment insurance premiums if, at law, the relationship with Mr. Mackin was one of employment. The fact that the contract was styled as a consultant agreement is not determinative: *Nametco Holdings Ltd. v. R.* The same can be said of the fact that the agreement was signed in the name of Nikcam Holdings, a business style used by Mr. Mackin.

[11] According to *Sagaz Industries*, the central question is whether Mr. Mackin, as president of World Internet, was carrying on a separate business. In general, I believe it would be difficult for a president of a corporation who has a broad mandate to manage the business to, at the same time, operate a separate business for his own account. The duties that a president owes to the corporation in that capacity would generally be inconsistent with the concept of operating a parallel separate profit-making enterprise. Indeed when Mr. Mackin attempted to do just that by raising funds for a reorganized business, Mr. Kennedy indicated that he was shocked. Clearly in Mr. Kennedy's mind, Mr. Mackin was to act in the corporation's interest only. Accordingly, the fact that Mr. Mackin had a very senior position and was

¹ [2001] 2 S.C.R. 983.

responsible for most aspects of the business strongly negates an independent contractor relationship.

[12] Mr. Kennedy suggested that the fact that Mr. Mackin brought the business concept to Global Tree illustrates that this was not a typical employment relationship. This may be so but it does not assist the appellants in this appeal. The fact that the business was the brainchild of Mr. Mackin and that Global Tree had no expertise in broadcasting makes it even more difficult to maintain that Mr. Mackin was carrying on a separate business. World Internet looked to Mr. Mackin to manage its entire business, except for raising funds, and it would have been incompatible with this relationship for Mr. Mackin to do so as an independent businessman looking to maximize his own profit.

[13] I find that the degree of responsibility for management is the most important factor in this case. The other factors referred to in *Sagaz Industries* as bearing on this question, control, opportunity for profit, financial risk, hiring own workers and ownership of equipment are of less significance and are not inconsistent with a finding that Mr. Mackin was an employee.

[14] As for control, a president of a corporation typically has more autonomy than other employees. Nevertheless, it is clear that Mr. Mackin was under the supervision of the Board of Directors. The Consultant Agreement explicitly provides for this and it is consistent with Mr. Kennedy's testimony. In my view, the control factor is not significant in this case.

[15] As for opportunity for profit, Mr. Mackin did have the opportunity to participate in the success of the venture. His monthly fee would be increased if the venture generated a positive cash flow and he was entitled to a commission based on license fees earned during the term of the Consultant Agreement. He was also entitled to a royalty in return for granting a perpetual license of his website. However, the royalty was to be payable regardless of the termination of the Consultant Agreement and therefore is not tied to the services rendered.

[16] In my view, the potential for Mr. Mackin to participate in the success of the venture is not a significant factor. Incentive-based remuneration is typically an important element in executive compensation and is not inconsistent with an employment relationship.

[17] As for financial risk, the Consultant Agreement has two provisions relevant to this factor:

4.3 The Owner shall not be required to make payment for Services performed or expenses incurred by the Consultant to remedy errors or omissions for which, in the reasonable opinion of the Owner, the Consultant is responsible.

4.4 If the Consultant fails to comply with the Law, and the Owner does anything or pays any monies to rectify any noncompliance, then the Owner may deduct the cost of rectification from any monies then or thereafter due to the Consultant.

[18] These provisions were not mentioned by either party at the hearing and their scope is not clear. The rights of World Internet under them may be somewhat more expansive than the rights of an employer under the implied duty of an employee at common law² but World Internet reasonably would have wanted this protection since the shareholder did not have broadcasting expertise. World Internet's right to sue appears to be limited to the fees owing which may be more restrictive than even common law remedies against an employee. There was no evidence that World Internet sought to invoke these provisions notwithstanding what Mr. Kennedy described as serious breaches of conduct. In my view, the financial risk factor is neutral. The provisions that the parties agreed to are consistent with either an employee or independent contractor relationship.

[19] As for hiring of workers, there is no evidence that Mr. Mackin hired any workers and therefore this factor does not assist the appellants.

[20] The last factor to consider is ownership of equipment. The relevant equipment is office equipment and, generally, it was provided by World Internet. It is not a significant factor.

[21] Looking at the relationship between the parties as a whole, I find that Mr. Mackin was engaged as an employee of World Internet. The significant factor in this case is the responsibility that Mr. Mackin had for World Internet's business. It is a strong indication of an employment relationship. The other factors tended to be neutral, or at least not of sufficient importance to outweigh it.

Whether Global Tree is liable for premiums

² See Stacey Reginald Ball, *Canadian Employment Law*, at 22-55.

[22] The Minister invokes subsection 10(1) of the *Insurable Earnings and Collection of Premiums Regulations* and suggests that Global Tree is liable for a portion of the employment insurance premiums. Subsection 10(1) provides:

10.(1) Where, in any case not coming within any other provision of these Regulations, an insured person works

(a) under the general control or direct supervision of, or is paid by, a person other than the insured person's actual employer, ...

that other person shall, for the purposes of maintaining records, calculating the insurable earnings of the insured person and paying, deducting and remitting the premiums payable on those insurable earnings under the Act and these Regulations, be deemed to be the employer of the insured person in addition to the actual employer.

(emphasis added)

[23] From May to August, 2001 Global Tree paid World Internet's bills directly. Global Tree had been concerned about World Internet's creditors being paid because of a lawsuit against it. Accordingly, during this period Global Tree paid Mr. Mackin's fees directly and the payments were recorded as advances.

[24] The broad scope of subsection 10(1) was recently considered by the Federal Court of Appeal in *Insurance Corp. of British Columbia v. R.*³ Strayer J.A. noted:

[8] ... The proposition is simple enough and its purpose clear: premiums are to be deducted at the source where salary or wages are calculated and administered, and where checks or pay-packets are issued. The term "paid" ought to be interpreted in context, and it is not necessary to examine technical sources in order to attribute to it a meaning that would defeat the clear purpose of the section.

[25] Subsection 10(1) has been applied in circumstances similar to this, where a corporation assumed the payroll of an employer who was experiencing financial difficulties: *Gateway Building & Supply Ltd. v. M.N.R.*⁴ Global Tree likewise assumed the bankroll for World Internet because it was concerned that World Internet's creditor's would not be paid given the lawsuit against it. In these

³ [2002] F.C.J. No. 380 (F.C.A.).

⁴ [1991] T.C.J. No. 521.

circumstances, Global Tree is a deemed employer for purposes of subsection 10(1) of the Regulations.

Conclusion

[26] In applying for employment insurance benefits, Mr. Mackin took a position contrary to the position in the agreement that he had signed. While it is unfortunate that someone can take advantage of the system in this manner, nevertheless that is what the law requires. If there was a reasonable position that Mr. Mackin was an independent contractor, I would be inclined to accept the Appellant's position. The case of *Wolf v. R.*⁵ supports the view that the parties expressed intention should have significance unless it is not supported in law. In this case, the stated intention is not supportable.

[27] The appeal is dismissed.

Signed at Ottawa, Canada this 19th day of December, 2003.

"J.M. Woods"

J.M. Woods J.

⁵ [2002] 3 C.T.C. 3 (F.C.A.).

CITATION: 2003TCC716

COURT FILE NO.: 2002-3098(EI)

STYLE OF CAUSE: World Internet Broadcasting Network Corporation Inc. and Global Tree Technologies Inc. v. M.N.R.

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: September 22, 2003

REASONS FOR JUDGMENT BY: The Honourable Justice J.M. Woods

DATE OF JUDGMENT: December 19, 2003

APPEARANCES:

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