

Citation: 2009 TCC 144

Docket: 2008-891(CPP)

BETWEEN:

QUADRA PLANNING CONSULTANTS LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

CERTIFICATION OF TRANSCRIPT OF
REASONS FOR JUDGMENT

Let the attached certified transcript of my Reasons for Judgment delivered orally from the Bench at Vancouver, British Columbia on February 12, 2009, be filed.

“Diane Campbell”

Campbell J.

Signed in Ottawa, Canada, this 23rd day of March 2009.

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IN THE TAX COURT

2008-891(CPP)

BETWEEN:

QUADRA PLANNING CONSULTANTS LTD.,

Appellant;

- and -

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Held before Madam Justice Campbell in Courtroom No. 602, 6th Floor, 701 West Georgia Street, Vancouver, B.C., on Thursday, February 12, 2009.

APPEARANCES:

Ms. Michelle Moriartey, Counsel for the Appellant;

Mr. Matthew Turnell, Counsel for the Respondent.

THE REGISTRAR: C. DeSantos

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Per: S. Leeburn

1 **REASONS FOR JUDGMENT**

2 (Delivered Orally from the Bench
3 in Vancouver, B.C. on February 12, 2009)

4 REGISTRAR: Madam Justice.

5 JUSTICE: Thank you. And thank you to
6 both counsel for coming back this morning. I appreciate
7 it.

8 All right. Let the record show that I am
9 delivering oral reasons in the matter of the appeal of
10 Quadra Planning Consultants Ltd., which I heard yesterday.

11 This is an appeal from a determination by
12 the Minister of National Revenue that the workers,
13 Michael McPhee and Larry Wolfe, were employed by the
14 Appellant, Quadra Planning, in pensionable employment
15 during the period January 1, 2005 through to February 28,
16 2007.

17 At the outset of the hearing Respondent
18 counsel advised the Court that the Minister was conceding
19 that one of the workers, Larry Wolfe, was employed as an
20 independent contractor during the period and therefore was
21 not engaged in pensionable employment.

22 The issue concerning the remaining worker,
23 Michael McPhee, is whether he was employed in pensionable
24 employment with Quadra pursuant to the *Canada Pension Plan*
25 during that same period. Both Mr. McPhee and Mr. Wolfe

1 gave evidence and I also heard from Rosemary Basha, the
2 Appeals Officer.

3 The Appellant was incorporated in 1987.
4 Since its incorporation, Mr. McPhee and Mr. Wolfe have
5 each owned 50 percent of the shares. They are the
6 directors and officers of the company although there are
7 no written agreements between them. The company engages
8 primarily in environmental consulting services.

9 Prior to the incorporation of Quadra,
10 Mr. McPhee had operated his own environmental consulting
11 business as a soul proprietor. Both Mr. McPhee and
12 Mr. Wolfe testified that they viewed Quadra as a vehicle
13 that would enable them to compete with larger corporations
14 in the industry to improve their image within the
15 industry, recognizing many potential customers preferred
16 to deal with corporations. It also enabled them to market
17 and work cooperatively with smaller independent
18 consultants.

19 Both Mr. McPhee and Mr. Wolfe agreed that
20 each could provide consulting services to others and that
21 they were not providing these services exclusively to
22 Quadra at all times. Mr. Wolfe testified that he
23 considered Quadra as one umbrella under which they would
24 collaborate to provide their services.

25 During the period under appeal Mr. McPhee

1 provided consulting services through his own
2 proprietorship to the Galiano Institute and in addition he
3 worked three-quarters time as a professor at
4 Douglas College. Both Mr. McPhee and Mr. Wolfe testified
5 that they attracted clients by attending lectures,
6 conferences, workshops, engaging in proposals and
7 maintaining general contacts within the industry. Work is
8 obtained by preparing and submitting project proposals on
9 behalf of Quadra.

10 During this period three proposals prepared
11 by Mr. McPhee were unsuccessful and did not result in a
12 work project. Preparation of proposals take one to two
13 days with more complex proposals taking up to a week to
14 complete. Project preparation involved client contact,
15 developing a project concept, research, budget
16 preparation, preparation of the proposal bid, and in some
17 cases dealing with the hiring of additional sub-contract
18 consultants. The proposals would also contain an estimate
19 of professional fees expected to be incurred together with
20 expenses.

21 The evidence was that Mr. McPhee was never
22 reimbursed by Quadra for the time spent on obtaining or on
23 preparation of these proposals even when they were
24 successful in their bid. The professional fees submitted
25 in these proposals did not include an amount to cover the

1 preparation time and costs.

2 The evidence suggests that both Mr. McPhee
3 and Mr. Wolfe worked independently on their own proposals
4 and contracts in the same manner, but during the relevant
5 period Mr. Wolfe had spent more time pursuing his own
6 interests as a sole proprietor doing fewer projects within
7 the Quadra umbrella.

8 When either Mr. McPhee or Mr. Wolfe wrote a
9 proposal that they successfully obtained, that person
10 would sign the contract and manage the project. Both
11 confirmed that they had little communication in respect to
12 the projects each was conducting. Mr. Wolfe stated that he
13 did not review Mr. McPhee's proposals, review his
14 contracts or the final project reports. He testified that
15 Mr. McPhee did not require his permission to pursue these
16 proposals and indicated that the only communication would
17 be communication on more complex projects. In fact
18 Mr. Wolfe testified that he was not aware of all of the
19 projects which Mr. McPhee engaged in on behalf of Quadra
20 during this period.

21 When the proposals are successful, Quadra's
22 project contracts are fixed price contracts, which are,
23 according to the evidence, typical within the
24 environmental consulting industry. Both Mr. McPhee and
25 Mr. Wolfe testified that as project managers, in regard to

1 their respective projects, they were each paid
2 professional fees, pursuant to the contracts, less a
3 percentage payment retained on each project by Quadra.
4 When either Mr. McPhee or Mr. Wolfe provided more hours on
5 a project than were included in their budgeted costs, they
6 did not bill amounts for this additional time that would
7 be required to complete the project. When repair,
8 correction or adjustments were required after the project
9 was completed Mr. McPhee was responsible to attend to the
10 problem without further compensation by Quadra.

11 Although no assistants were hired during
12 the relevant period, the evidence was that Mr. McPhee
13 would have the right to personally hire an assistant if
14 preapproved by the customer.

15 Mr. McPhee received no overtime or vacation
16 pay, paid leave, or statutory holiday pay. Neither did he
17 receive the usual benefits such as insurance, health,
18 dental or disability.

19 Mr. McPhee and Mr. Wolfe worked from their
20 home offices without compensation by Quadra for such use.
21 Quadra maintains no office space. They also use their own
22 vehicles and cell phones. Computers were supplied by
23 Quadra to each worker. The evidence suggests that office
24 supplies and furniture may have been supplied by both
25 Quadra and the workers.

1 The evidence also revealed that Mr. McPhee
2 had guaranteed a line of credit in Quadra's name. A bonus
3 was also paid to him for the first time in 2006. In
4 addition, the evidence suggests that Mr. McPhee withdrew
5 amounts from Quadra's account, which were in excess of his
6 invoices to Quadra. His evidence was that these amounts
7 were advances.

8 I will turn now to my analysis in this
9 case.

10 I want to state at the outset that this is
11 not a black and white situation. The evidence suggests a
12 lot of grey area and the outcome is dependant primarily on
13 my review and interpretation of the facts before me.

14 I also want to commend both counsel in
15 their presentations. I know you are both relatively new to
16 the arena of the Court setting. But I also know you both
17 spent a lot of time on preparation before coming before
18 me. It does not go unnoticed and I certainly appreciate
19 it. I do expect that both of you will have great futures
20 as practitioners in this Court if the presentations in
21 this appeal are indicative of your future work. So I thank
22 both of you.

23 I want to begin by addressing the factor of
24 the intention of the parties in this appeal. Mr. McPhee
25 and Mr. Wolfe had a meeting of minds when they

1 incorporated Quadra: that they would provide services to
2 the company and be treated as independent contractors.
3 This was also reflected in the reasons they came together
4 in 1987, in that they considered Quadra as a vehicle to
5 provide a more acceptable face to their collaboration in
6 terms of attracting clients and competing with larger
7 corporations within the industry. They each retained their
8 own sole proprietorships and the evidence suggested that
9 over the years they each used those respective
10 proprietorships to complete work in addition to using
11 Quadra.

12 Mr. McPhee maintained a business and GST
13 number and reported business income and expenses on his
14 tax return. Quadra never issued T4s to Mr. McPhee. He
15 always invoiced Quadra for the services he rendered and
16 collected GST on those.

17 The evidence of both Mr. McPhee and
18 Mr. Wolfe was that their common intention and
19 understanding throughout was that they should be
20 considered independent contractors.

21 If intent alone were determinative, then I
22 believe the evidence of both Mr. McPhee and Mr. Wolfe of
23 their understanding of their relationship, together with
24 the fact that they invoiced Quadra for services and
25 charged GST, points to Mr. McPhee being an independent

1 contractor. That is clearly how they viewed themselves in
2 relation to Quadra. In addition, none of the usual
3 employee benefits were paid or provided to either of them.
4 They were only as successful as their next proposal, and
5 if they were unsuccessful over a period of time in
6 obtaining the projects despite the bids, or simply did not
7 pursue proposals at all, then they received no revenue.

8 All of this brings them within the sphere
9 of what we usually think of as independent contractors. I
10 believe it is also clear that where we have a meeting of
11 minds or a common understanding expressed by both parties
12 as to what they intended their relationship with the payor
13 to be, then I cannot ignore the factor of intention.

14 I do not however believe that my analysis
15 ends there because the entire relationship must be
16 considered in light of the evidence to ascertain whether
17 it supports the stated intent of the parties. Therefore
18 although intention is not determinative because both
19 Mr. McPhee and Mr. Wolfe had a common intention, it is one
20 of the factors which must be considered in an overall
21 analysis of their relationship. This means that I must now
22 go to an analysis of the *Wiebe Door* factors in light of
23 the facts before me. (*Wiebe Door Services Ltd. v. M.N.R.*,
24 87 DTC 5025)

25 As Justice Bowman stated in the case of

1 *Lang et al. v. M.N.R.*, 2007 DTC 1754, if an analysis of
2 the *Wiebe Door* factors is inconclusive then a
3 consideration of the findings on intent becomes all the
4 more important and decisive in the circumstances.

5 Now, I turn to the first factor of control.
6 In an examination of any of these factors it must be
7 remembered that Quadra is a separate legal entity with a
8 distinct existence that must be respected. It also makes
9 any analysis a little more complicated because in other
10 decisions regarding employee versus independent contractor
11 status, the worker is not always a shareholder, director
12 and officer of the payor as in this appeal.

13 Mr. McPhee established his own hours and
14 schedule, negotiated contracts independently and signed
15 those without the need to consult with anyone else. In
16 fact Mr. Wolfe confirmed that he was often unaware of
17 Mr. McPhee's projects and the evidence suggests that
18 neither had any right to veto contract work of the other.

19 Mr. McPhee could hire individuals to assist
20 him if he required them. He determined which projects he
21 would or would not pursue. He withdrew money from the
22 Quadra account, which he referred to as advances, as and
23 when he needed funds. In fact, they both worked so
24 independently of each other that Mr. Wolfe was unaware of
25 these advances until just recently. Mr. McPhee also signed

1 a line of credit in respect to Quadra.

2 Of course it is important to remember that
3 it is not the actual control that Quadra could exercise
4 but the right to exercise that control regardless of
5 whether in fact the company did or did not exercise it.

6 Since its incorporation, both Mr. McPhee
7 and Mr. Wolfe treated Quadra as a marketing vehicle in
8 which the two of them could pool their resources and
9 contacts within the industry and further their business
10 interest as sole proprietors. This is reflected in the
11 fact that Quadra had no office. They worked independently
12 of each other for the most part and neither scrutinized
13 the work of the other.

14 None of the usual employee benefits were
15 paid. They established their own hours, chose which
16 contracts they wanted to bid on. The evidence of both
17 Mr. McPhee and Mr. Wolfe suggests that neither could have
18 interfered with the other's projects, nor was there any
19 evidence to suggest that Quadra retained any latent power
20 to control these workers.

21 While it is true that the revenue from the
22 projects flowed through Quadra, there is nothing in the
23 evidence to suggest that the corporation had any right to
24 direct or instruct Mr. McPhee to accept or reject a
25 particular project or to direct how it would be completed

1 after it was accepted. The evidence does not suggest that
2 there was any power in Quadra to control Mr. McPhee in
3 these aspects. In fact, it supports the evidence of both
4 Mr. McPhee and Mr. Wolfe as to the reasons for their
5 initial coming together in the first place and
6 incorporating Quadra. Quadra is a separate legal entity
7 but with two 50 percent shareholders. In light of their
8 conduct toward each other throughout the life of the
9 incorporation, there was very little actual residual
10 control or right to control in the corporate vehicle known
11 as Quadra. But this is not surprising as it reflects the
12 state of intention surrounding the incorporation of Quadra
13 and the conduct of their activities thereafter.

14 I consider the factor of tools to be
15 neutral because the evidence suggests that each party
16 supplied equipment. However, I do consider the home office
17 base to be the item of most importance in this type of
18 business where much of the proposal groundwork required
19 such a workspace to complete the work. This could tip the
20 scale slightly perhaps in favor of an independent
21 contractor status.

22 Although the Respondent suggested that
23 because there was no written agreement it would be a
24 reasonable inference that some of the fees paid to
25 Mr. McPhee on the projects could be considered

1 compensation for home office use, I reject that argument
2 as there was simply nothing in the evidence to suggest
3 such a conclusion. It is mere conjecture.

4 The chance of profit, risk of loss factors
5 must be considered from the perspective of the worker,
6 again not losing sight of the existence of Quadra as a
7 separate legal entity.

8 Mr. McPhee's evidence was that he had to
9 search out clients and then he could spend days working on
10 a proposal which he might not be successful in obtaining.
11 He was not compensated in any manner for these hours nor
12 did he expect to be. This is far removed from an employee
13 situation where the expectation would be for compensation.
14 Certainly his income was dependant on how aggressively he
15 pursued proposal bids and how successful he was in
16 obtaining them: similar again to how independent
17 contractors operate. In fact, Mr. Wolfe testified that he
18 had pursued other areas in the relevant period and
19 consequently his project numbers and revenue were down
20 significantly.

21 Mr. McPhee also risked further loss if
22 clients were unhappy and he had to address these concerns
23 after completion of the projects. Costs associated with
24 this were again his personal responsibility.

25 The extent to which Mr. McPhee shouldered

1 the responsibility for these costs would never be
2 something that typically an employee would agree to
3 undertake without additional compensation. The Respondent
4 suggested that there would be no significant chance of
5 profit for Mr. McPhee because the remuneration was fixed
6 as per the project and the only opportunity to increase
7 the profit might be to complete the work more quickly.
8 However, Mr. McPhee's evidence was that on one project for
9 Fisheries and Oceans Canada he was able to increase his
10 professional fees by successfully reducing the expenses,
11 which he incurred in performing his services, thereby
12 increasing his profit margin. Again this is not typical of
13 an employee/employer relationship.

14 In respect to the integration factor,
15 Justice Bowman in *Lang* cautioned against using this test
16 as it is rarely useful or determinative. Recent case law
17 seems to be moving in a direction that gives less emphasis
18 on this factor. If it is a consideration at all, I believe
19 there are factors pointing in both directions. Were his
20 activities so integrated into those of the corporation
21 that Quadra could cease to exist without his efforts? The
22 answer to this is not as easy as the question appears on
23 its face. There is evidence to suggest that other planning
24 consultants were engaged by Quadra to work on and complete
25 proposals. Some of the documents at Exhibit A-1 included

1 invoices and letter agreements, which an individual by the
2 name of Victoria McFarlane signed as principal on behalf
3 of Quadra.

4 I do not believe this factor assists me in
5 any helpful manner here.

6 In summary, if I view the relationship
7 between Quadra and Mr. McPhee based on intention alone, it
8 falls on the side of independent contractor. If I look at
9 it from the sole perspective of my analysis of the
10 *Wiebe Door* factors then it also points to Mr. McPhee as an
11 independent contractor.

12 When I step back and look at all of the
13 evidence in light of all of these factors and ask "whose
14 business is it?", then I must conclude it is Mr. McPhee's.
15 And this is so despite very able and persuasive argument
16 by Respondent counsel.

17 The appeal is therefore allowed without
18 costs on the basis of the concession by the Respondent
19 that Mr. Wolfe is not engaged in pensionable employment
20 pursuant to the *Canada Pension Plan* and my conclusion that
21 Mr. McPhee is an independent contractor and as a result he
22 is not engaged in pensionable employment with the
23 Appellant, Quadra.

24 That concludes my reasons in the appeal. I
25 thank both counsel again. That is the work for the Tax

1 Court for the day in this week in Vancouver,

2 Thank you very much.

3

4 (PROCEEDINGS ADJOURNED AT 11:30 A.M.)

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I HEREBY CERTIFY THAT THE FOREGOING
is a true and accurate transcript
of the proceedings herein to the
best of my skill and ability.

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S. Leeburn, COURT REPORTER

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CITATION: 2009 TCC 144

COURT FILE NO.: 2008-891(CPP)

STYLE OF CAUSE: Quadra Planning Consultants Ltd.
and The Minister of National
Revenue

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: February 11, 2009

REASONS FOR JUDGMENT BY: The Honourable Justice Diane Campbell

DATE OF ORAL JUDGMENT: February 12, 2009

APPEARANCES:

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