Docket: 2011-16(EI)

BETWEEN:

CAVALIER LAND LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

MARK HOADLEY,

Intervenor.

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Appeal heard on common evidence with the appeal of
Cavalier Land Ltd. *2011-17(CPP)*
on August 25, 2011 at Calgary, Alberta

Before: The Honourable D.W. Rowe, Deputy Judge

Appearances:

| | |
|---|---|
| Counsel for the Appellant: | Jason P. Schlotter |
| Counsel for the Respondent: | Adam Gotfried |
| For the Intervenor: | The Intervenor himself |

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**JUDGMENT**

In accordance with the attached Reasons for Judgment, the appeal is allowed and the decision of the Minister of National Revenue dated October 5, 2010 is hereby varied to find:

Mark Hoadley was not engaged in insurable employment with Cavalier Land Ltd. during the period from January 1, 2009 to October 14, 2009 because he was not employed pursuant to a contract of service.

Signed at Sidney, British Columbia this 19th day of October 2011.

"D.W. Rowe"

Rowe D.J.

Docket: 2011-17(CPP)

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## **JUDGMENT**

In accordance with the attached Reasons for Judgment, the appeal is allowed and the decision of the Minister of National Revenue dated October 5, 2010 is hereby varied to find:

Mark Hoadley was not engaged in pensionable employment with Cavalier Land Ltd. during the period from January 1, 2009 to October 14, 2009 because he was not employed pursuant to a contract of service.

Signed at Sidney, British Columbia this 19th day of October 2011.

"D.W. Rowe"

Rowe D.J.

Citation: 2011 TCC 490
Date: 20111019
Dockets: 2011-16(EI)
2011-17(CPP)

BETWEEN:

CAVALIER LAND LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

MARK HOADLEY,

Intervenor.

## REASONS FOR JUDGMENT

Rowe D.J.

[1] The Appellant, Cavalier Land Ltd. ("Cavalier") appealed from two decisions – both dated October 5, 2010 - issued by the Minister of National Revenue (the "Minister") pursuant to the *Employment Insurance Act* (the "*Act*") and the *Canada Pension Plan* (the "*Plan*") wherein the Minister decided the employment of Mark Hoadley ("Hoadley") from January 1, 2009 to October 14, 2009 was both insurable and pensionable employment because he was providing his services pursuant to a contract of service.

[2] Counsel for the Appellant, counsel for the Respondent and Hoadley agreed both appeals could be heard together.

[3] Steve Sinclair-Smith ("Sinclair-Smith") testified he is the Chief Operating Officer (COO) of Cavalier and all vice-presidents report to him. Cavalier is owned by Divestco Ltd. ("Divestco"). Within the corporate structure of Cavalier, the Land Department acts on behalf of oil and gas companies to acquire the right to occupy

land for the purpose of exploration and development by negotiating for surface rights with the landowners. It also deals with acquisition of Alberta crown surface dispositions, negotiations and acquisition of freehold surface rights, project mapping, freehold mineral leasing, liaison with regulatory agencies, and related activities. Cavalier has a team of Land Agents (“Agents”) located in various centres across Western Canada and retains individual Agents by entering into a written contract, a practise in force during the relevant period. Hoadley was the Agent in the Medicine Hat region of south-eastern Alberta. Sinclair-Smith did not deal directly with Hoadley but is familiar with the corporate policy and procedures for dealing with the 12 to 15 Agents who provide services to Cavalier. In 2007, Cavalier purchased Canadian Landmasters Resource Services Ltd. (“Landmasters”) and brought it into the larger Cavalier corporate structure. According to Sinclair-Smith, the industry standard is to retain independent contractors to carry out the duties of Agent. Sinclair-Smith was referred to a Record of Employment (“ROE”) – Exhibit A-1- dated February 6, 2008 stating that Landmasters was acquired by Divestco on November 28, 2007 and that Hoadley’s final pay period at Landmasters ended on November 30, 2007. Sinclair-Smith stated that Hoadley and Cavalier entered in a written agreement – a copy of which was filed as Exhibit A-2 – with a commencement date of January 1, 2008 and a termination date of December 31, 2008, unless otherwise extended. Although the copy does not contain the signature of a representative of Cavalier, there was no dispute that this form of contract had been executed on behalf of Cavalier and by Hoadley. The terms of said contract did not guarantee the amount of work available – article 1.2 – because Cavalier required the services of Hoadley and other Agents only in response to demand emanating from resource companies. Pursuant to article 2.1, Sinclair-Smith stated it was apparent Hoadley would be providing his services on the understanding that he was an independent contractor and – as set forth in article 2.2 – that he could work for third parties provided it did not interfere nor conflict with his obligations to Cavalier. Pursuant to article 3.4, Hoadley was not eligible to participate in any Cavalier benefit plans and was not entitled to sick leave, vacation pay from Divestco nor any other form of holiday pay. He was responsible for the payment of parking, transportation, expenses – including cell telephone, dues and membership fees. Sinclair-Smith stated the practise followed by Agents was to notify the Land Department if the Agent was taking an extended leave but that was considered to be a matter of professional courtesy. If no notice was given, another Agent was contacted to handle the particular matter. An amending agreement – dated September 23, 2009 – Exhibit A-3 – was signed by Hoadley and Peter Zyla (“Zyla") – on behalf of Divestco – whereby article 3.1 was amended as of October 1, 2009 to reduce Hoadley’s remuneration – by 5% – to $38.00 per hour. Article 3.2 was deleted and replaced with another clause which reduced the number of Hoadley’s billable hours per week for “office time” to 25 hours. However, he

could work a maximum of 40 hours per week when performing a combination of field work and office duties, which remained fixed at a maximum of 25 hours. Hoadley also had to provide an invoice at the end of every two weeks showing the number of hours worked during the month and a description of the work performed. Sinclair-Smith stated that by the end of September, 2009 there was a significant decline in revenue generated in the Medicine Hat region and fewer files were being assigned to that office so the amending agreement was needed to set limits on the hours billed by Hoadley. Sinclair-Smith was referred to an e-mail – Exhibit A-4 – from Zyla to Hoadley which contained a list of employees including Hoadley's wife – Cherith Hoadley ("Cherith") – who worked in the Medicine Hat office. Hoadley is not included as an employee subject to performance reviews but he was requested to complete the "supervisor portion of the review" for Cherith. A bundle of invoices – Exhibit A-5 – submitted by Hoadley to Cavalier pertained to the period from April 12, 2009 to July 20, 2009 and were representative of the invoices and an attached table set forth details of the particular file, hours worked, distance travelled, and information pertaining to expenses.

[4] In cross-examination by counsel for the Respondent, Sinclair-Smith stated the Head Office of Divestco was in Calgary. The company provided software data services to companies exploring for oil and gas and provided Agents who dealt with acquisition of necessary rights pertaining to entry on lands. Divestco has 240 employees and 30 persons who provide services as independent contractors. Cavalier has 28 employees and 15 people who are retained as independent contractors. During the relevant period, Zyla was the Cavalier Vice-President who dealt directly with Agents, including Hoadley. There were 3 Senior Coordinators, Ryan Dallyn, ("Dallyn") John Lanaras ("Lanaras") and Terry Henkleman ("Henkleman") who had been a Coordinator at Landmasters and was one of the owners. Cavalier retained the former office in Medicine Hat. Sinclair-Smith stated he never met Hoadley during the relevant period and was not aware of the day-to-day activities of Cavalier. He was aware that the ROE – Exhibit A-1 – had been issued by Landmasters on February 6, 2008. He understood that Hoadley had been an Agent at Landmasters prior to its acquisition by Cavalier. It was standard practise at Cavalier to offer a contract to Agents in the form of Exhibit A-2. Prior to the acquisition, Landmasters had been a competitor of Cavalier. Sinclair-Smith acknowledged that in the chart contained within the e-mail – Exhibit A-4 – Hoadley is named within the category of someone "Who Coordinates" and "Who Does Reviews." Lanaras, a Senior Coordinator – is listed as John L. under the heading, "Who Else in Review." Sinclair-Smith acknowledged it was not normal for an independent contractor to perform a review of an employee. Sinclair-Smith was referred to a document entitled Divestco Employee Directory and to the entry therein on the last page where Hoadley was listed and his

function described as: Medicine Hat Coordinator and whose supervisor was Lanaras. Hoadley's e-mail address is shown as at: "divestco.com". Sinclair-Smith stated Hoadley represented Cavalier when dealing with landowners.

[5] In re-direct examination, Sinclair-Smith stated he did not know who had compiled the employee list – Exhibit R-1 – but assumed it was someone working in the Information Technology Department who probably did not know the status of certain individuals named therein as its main purpose was to list people who were involved in the overall business of Cavalier. The Medicine Hat office acquired from Landmasters was closed to save expenses and the only people working from that office were Hoadley and his wife – Cherith – who was an employee of Divestco/Cavalier.

[6] In cross-examination by Hoadley – as Intervenor – Sinclair-Smith stated he was not aware that Cavalier had acquired an office in Carlyle, Saskatchewan. His understanding of corporate policy was that Agents administered their own files but did not participate in the daily administration of an office. Cavalier accepted – in good faith – that the hours billed by Hoadley were accurate and the recorded time thereon was billed to the appropriate file, wherever possible. Sinclair-Smith was not aware of specific details of invoices within Exhibit A-5. He did not agree that Hoadley – or any other Agent – had an obligation to advise a supervisor or other person at Cavalier of an intended absence. The practise was that the Senior Coordinator would contact an Agent from another area to perform the necessary duties. He understood that – at some point – the Agent in Edmonton had become an employee and that she had performed certain administrative office duties as well as those undertaken by an Agent. Sinclair-Smith stated he understood it was normal for an Agent to deal with a representative of an oil and gas company directly in the course of negotiations with a landowner.

[7] The case for the Appellant was closed.

[8] Mark Hoadley was called to the stand by counsel for the Respondent. Previously, Hoadley was employed by Landmasters as a Coordinator and Agent in the Medicine Hat office. Landmasters also had offices in three other locations – Carlyle, Edmonton and Calgary. He began working – in 2001 – for the corporation which was owned by his parents and Henkleman. Initially, he worked in the office performing administrative duties until he obtained his Agent's licence in 2006 after which his duties expanded and became more varied. When his father died, the decision was made by the remaining shareholders to sell the company. Prior to his father's death, Hoadley had managed the Medicine Hat office and his wife – Cherith

– also worked in that office. While employed by Landmasters, he was remunerated for overtime work at 1.5 times his regular pay. He recorded the time devoted to work performed as an Agent apart from the role he assumed to administer the office. Hoadley stated that when Landmasters was acquired by Divestco/Cavalier, he understood all Landmasters' staff would be retained. The transition was immediate and there was no delay in receiving payment for his work. The transaction took place on November 28, 2007 and there was no subsequent change in his duties. Hoadley stated he fulfilled three separate roles. First, as Agent he was responsible for duties associated with negotiating rights to land, which services were billed to a particular file. Second, as a Coordinator, he dealt with staff and coordinated the activities of other Agents, when required. As a Coordinator, he dealt directly with the representative of the resource company and coordinated the activities of other Agents, when required. Third, he functioned as Manager of the Medicine Hat office which was open from 8:30 a.m. to 5:00 p.m. and reported to Dallyn or Lanaras. Hoadley stated, "there is a definite crossover in roles." Landmasters had its own client base before being acquired by Cavalier. With respect to the agreement – Exhibit A-2 – Hoadley stated he understood it related to his role as Agent only and had anticipated a separate agreement would be forthcoming with respect to his other roles and associated duties. Hoadley stated he did not think he could have worked for other companies because it would have constituted a conflict and also because when he was not away working as an Agent, he was in the office all day. Hoadley stated he signed the agreement – Exhibit A-2 – because he wanted to be included in Workers Compensation Board coverage, particularly when out in the field performing duties as an Agent. Hoadley acknowledged that he signed the amending agreement – Exhibit A-3 – on September 11, 2009, but informed Zyla that he would be filing an income tax return on the basis he was an employee and had requested a decision on his working status from Canada Revenue Agency ("CRA") and that the amending agreement would be "null and void" upon receiving a Ruling from Canada Revenue Agency that he was an employee. On October 16, 2009, a Rulings Officer notified Cavalier and Hoadley that Hoadley was engaged in both insurable and pensionable employment with Cavalier during the period from January 1, 2009 to October 14, 2009. Hoadley stated that prior to signing the amending agreement – Exhibit A-3 – he had refused to sign an earlier version which had fixed the guaranteed hours of work per week at zero. As a consequence, the next version contained a guarantee to a maximum of 25 hours per week for office work and a total of 40 hours for a combination of those duties and those performed as Agent. Hoadley stated he reported to Zyla, Dallyn or Lanaras – the Senior Coordinator – when another Agent was required to handle a file in the Medicine Hat region. Files could originate in Calgary, Edmonton or Medicine Hat and personality conflicts arose – occasionally – which required an Agent from another office to take over conduct of a file. Dallyn

and Lanaras assigned work originating in the Edmonton and Calgary offices. However, work was also obtained directly through the office in Medicine Hat as Hoadley's father had been in the land agent business for 30 years. Hoadley utilized the Cavalier data base to process the required work. It was necessary to communicate with other Agents to distribute work among members of that group. Hoadley submitted invoices to Cavalier and was paid every two weeks. Until April, 2009, he was paid for statutory holidays but was informed by Zyla that he could no longer receive payment for those days unless he had actually worked. Hoadley stated he needed to hold a licence in Saskatchewan to perform duties there as an Agent as the authorizing legislation differs from that of Alberta. He was supplied with business cards by Cavalier and a photocopy of one was filed – as Exhibit R-2 – on a sheet also containing handwritten notes by Hoadley. The card stated Cavalier was "A Divestco Company" and Hoadley was identified as "Office Manager/Land Agent, Medicine Hat & Carlyle Offices." Hoadley used his own car and cell phone and was reimbursed by Cavalier. The contract with the provider was in the name of Landmasters so Hoadley paid the monthly bill directly and billed Cavalier when submitting his invoices. At some point, a new telephone contract was signed by Cavalier. All expenses associated with the operation of the Medicine Hat office were paid by Cavalier. When that space was occupied by Landmasters, it comprised 5 offices and a reception area to accommodate a total of 7 employees. During the relevant period, the rental was on a month-to-month basis and all arrangements pertaining thereto were between the landlord and a representative of Cavalier.

[9] In cross-examination by counsel for the Appellant, Hoadley was requested to explain the difference in format between the invoices contained in Exhibit A-5 and those filed as Exhibit A-6. Hoadley stated the first page of the invoice in Exhibit A-5 – like those in Exhibit A-6 – was a form produced internally by Cavalier and sent to Hoadley for his use. He prepared the second page which was a chart or table setting forth particulars of specific work performed on particular days and included additional details and comments, as required. Another group of invoices – filed as Exhibit A-7 – were used in the course of a hearing before a tribunal. Hoadley stated that when Landmasters was acquired by Cavalier, he was not informed of any change in his working status except that he would no longer be an employee of Landmasters. When the contract – Exhibit A-2 – was presented to him for consideration, he regarded it as pertaining only to his function as an Agent since it did not deal with any other duties he had performed at Landmasters. With respect to the first invoice – dated April 12, 2009 – in the bundle filed as Exhibit A-5 – Hoadley stated he did not have a Goods and Services Tax ("GST") number and the amount shown thereon for GST was added – by Cavalier – to the amount billed for 97.5 hours work – at $40.00 per hour – together with expenses for the use of his vehicle and telephone. Hoadley

acknowledged he had been informed that Cavalier wanted all Agents to provide services as independent contractors. Hoadley was referred to a bundle of documents with the heading: Time Sheet, Cavalier Land, Mark Hoadley, which were filed as Exhibit I-1. As of April 1, 2008, Hoadley submitted time sheets to Cavalier for which he billed 8 hours each day – 5 days a week – the same working hours as when employed by Landmasters. At that point, there was no description of work performed and the notations of "time in" and "time out" and the total hours per week were identical in each invoice. On the invoice in the bundle covering the period from June 1 to June 30, 2008, Hoadley charged 4.0 hours overtime at 1.5 times his regular rate and was paid for that supplemental work. He also charged – and received payment – for 4.0 hours overtime shown on the invoice for the period from July 1 to July 15, 2008. As had been the practise when working for Landmasters, Hoadley stated he sought payment – by invoice – from Cavalier for statutory holidays and was paid until informed by Zyla that would no longer be acceptable unless he had actually performed some duties on that particular day and even then, the pay would be at the regular rate without the 50% supplement. Hoadley stated he discussed with Lanaras or someone else at Cavalier about entering into an agreement pertaining to those other duties performed by him in the Medicine Hat office but none was forthcoming. As for accepting work from other clients, Hoadley stated he took the position that if someone wanted him to work as an Agent, he accepted but only on the basis that Cavalier would be retained. In his experience having worked in the industry, a competitor would not contact an Agent who was providing services to another land services company. Hoadley stated he was told to inform Cavalier if he had to be absent from the office. Hoadley was referred to a series of e-mails - with an attached sheet entitled: 2009 Medicine Hat Analysis – Exhibit A-8 – exchanged between May 11 and August 31, 2009. Hoadley acknowledged that as of March, 2009, the revenue generated by the Medicine Hat office had declined to the point where operational costs exceeded income. Hoadley stated he suggested that he would accept a fixed salary of $78,000 per year which could save Cavalier approximately $10,000. He considered it would be appropriate to cancel rental of the office space and relocate to Hoadley's residence where he had office space for which use he would bill Cavalier about $500 per month. Cavalier required Hoadley to reduce his paid hours – as Agent – to 25 hours per week and he signed the amending agreement dated September 23, 2009. In response to an e-mail from Zyla dated May 14, 2009, Hoadley – on August 31, 2009 – sent an e-mail – both are on a sheet filed as Exhibit A-9 – in which he pointed out that his wife – Cherith – had health coverage provided to her as a status Indian and Cavalier could eliminate her corporate coverage to save money. He also referred to other cost-saving measures which he calculated as amounting to $34,546.00. On August 26, 2009, Hoadley replied to an e-mail from Zyla – Exhibit A-10 – in which the discussion centred on the operating deficit of the Medicine Hat

office. Hoadley replied that he understood "the need to have a viable office but not at the expense of the employees." Underlining for emphasis, Hoadley wrote, "I have been gainfully employed as full time employee at this office since 2001 and never have been 'just a land agent'. This would be considered constructive demise." Counsel suggested Hoadley had come to regret signing the contract – Exhibit A-2 – and the subsequent reduction of billable hours per week had caused him to consider such reduction as constituting constructive dismissal, a concept applicable to the status of employee. Referring to the amending agreement – Exhibit A-3 – Hoadley stated that above his signature and the date of September 23, 2009 , he had added the handwritten portion which read " … and becomes null and void upon Revenue Canadas (sic) ruling of employment." He stated this wording was present when he returned the amending agreement to Zyla. Hoadley stated he decided to request a decision from CRA about his working status when – in April, 2009 – he was informed by Zyla that he was no longer going to be paid for any statutory holiday unless he worked that day. Hoadley was referred to article 10.1 of the written agreement – Exhibit A-2 – which read:

> This Agreement and any applicable policies established by Cavalier Land from time to time, in its sole discretion, constitutes the whole and only agreement between the parties. No party will have any claim against any other party with respect to any agreement or understanding written or oral made prior to the date hereof.

[10] Hoadley stated he was aware of that wording but "assumed it was part of the hiccups of the sale", referring to the process of merging Landmasters into the Cavalier Land Department. Hoadley stated that when he billed Cavalier for usage of the cell telephone – paid by him to Telus Mobility – those minutes for the described purpose were used by Cavalier to bill the particular client.

[11] The case for the Respondent was closed.

[12] Hoadley testified in his capacity as Intervenor. He reiterated that Cavalier had an office in Carlyle, Saskatchewan. His understanding was that Dallyn, who acted both as an Agent and a Coordinator, was an employee of Cavalier. In response to an e-mail from Zyla – Exhibit I-2 – dated May 26, 2009 – Hoadley stated he completed an employee evaluation on Cherith – found in said exhibit – signed it and remitted same to Zyla on July 15, 2009. Earlier, the same information had been transmitted by telephone to Zyla since the e-mail had referred to the deadline of June 1 for the evaluations. Hoadley stated that because most of the work is performed online, many reviews can be undertaken from a remote location but he was required to complete the report relevant to the Medicine Hat office. In his experience, Agents do not provide office support or perform administrative duties.

[13] In cross-examination by counsel for the Appellant, Hoadley stated that an Agent – Faber – in Carlyle performed the administration work necessary and his time was billed to a specific file. Hoadley stated he would add time to his invoice when it was attributable to duties associated with the role of Coordinator.

[14] Counsel for the Respondent did not have any questions.

[15] Hoadley – as Intervenor - closed his case.

[16] Counsel for the Appellant submitted that while there may have been some misunderstanding arising from time to time between Hoadley and various representatives of Cavalier in the Land Department, that the written contract – Exhibit A-2 – was clear. As clearly stated therein, Hoadley agreed to provide his services as an independent contractor. Further, article 10.1 stated that the written agreement constituted the whole and only agreement between the parties. Counsel pointed out that Hoadley had been employed by Landmasters – a family company – and appeared to not have appreciated nor accepted that this business had been acquired by Cavalier which in turn was a member of the Divestco group of companies. In terms of control, counsel submitted that Hoadley could take time off from work and that there was nothing in the contract to prevent him from doing so, although it was apparent Hoadley felt an obligation to continue to look after the Medicine Hat Landmasters office as he had done for 3 years when his father was ill. Hoadley chose not to offer his services to a third party but was able to do so pursuant to the terms of the contract. Hoadley was an experienced professional Agent and operated according to his own schedule and methods in order to accomplish the required tasks on behalf of Cavalier's oil and gas company clients. Counsel acknowledged there was no risk of loss to Hoadley but pursuant to article 1.3 of the agreement, Cavalier provided no guarantee of work and the term of the agreement expired on December 31, 2008. The main tools utilized by Hoadley to perform his duties as Agent were his vehicle and cell phone, and expenses related thereto were invoiced and he was reimbursed by Cavalier. Counsel submitted that the context of the e-mails exchanged between Hoadley and Zyla in August, 2009, was indicative of Hoadley's desire to transform his status from that of independent contractor to that of employee as evidenced by the suggestion that he receive an annual fixed salary instead of billing for his time at an hourly rate. Counsel submitted the evidence had established the Minister's decisions were incorrect and that the appeals should be allowed.

[17] Counsel for the Respondent submitted the evidence demonstrated Hoadley was not carrying on business on his own account. While the contract – Exhibit A-2 – addressed Hoadley's role as Agent, it did not refer to his other duties as Manager of the Medicine Hat office and the performance of duties associated with that role. Hoadley testified he anticipated these additional duties would be the subject of a further contract or discussion but none was forthcoming. Counsel pointed out the jurisprudence is clear that parties cannot opt out of Employment Insurance coverage pursuant to the *Act* nor participation in the *Plan.* Counsel submitted that all clients were those of the Appellant. Hoadley was not registered for purposes of GST and the managerial functions performed – such as competing a performance review on his wife, a Cavalier employee – were for the benefit of Cavalier. Hoadley did not hire helpers but, in his role as Agent, participated in the process to assign other Agents – if needed – to perform duties in the Medicine Hat region. The office and equipment was owned by Cavalier and Hoadley was reimbursed for expenses arising from the use of his vehicle and cell phone. Counsel submitted there was no chance of profit and no risk of loss. In reviewing the evidence and assessing all of the requisite factors, counsel submitted it was clear the Appellant had not demonstrated that Hoadley was carrying on business on his own account when providing his varied services during the relevant period.

[18] Hoadley – as Intervenor – referred to the evidence that for a certain period he was remunerated at a fixed hourly rate for 8 hours per day, 5 days a week and that his duties included managing not only the Medicine Hat office but also the one in Carlyle. In providing details of his work to Cavalier when submitting an invoice, it should have been apparent that he was performing a managerial role not encompassed by the original contract nor the amendment thereto on September 23, 2009. Hoadley referred to his evidence concerning the acquisition of Landmasters which occurred suddenly without any transition period and the office needed to continue operating – as usual – to satisfy the needs of those Landmasters clients who had become clients of Cavalier.

[19] The Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983 – ("*Sagaz*") dealt with a case of vicarious liability and in the course of examining a variety of relevant issues, the Court was also required to consider what constitutes an independent contractor. The Judgment of the Court was delivered by Major, J. who reviewed the development of the jurisprudence in the context of the significance of the difference between an employee and an independent contractor as it affected the issue of vicarious liability. After referring to the reasons of MacGuigan, J.A. in *Wiebe Door Services Ltd. v. Canada (Minister of National Revenue - M.N.R.)*, [1986] 2 C.T.C. 200 and the reference therein to the

organization test of Lord Denning – and to the synthesis of Cooke, J. in *Market Investigations Ltd. v. Minister of Social Security*, [1968] 3 All E.R. 732 - Major, J. at paragraphs 47 and 48 of his Judgment stated:

> 47 Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. that a persuasive approach to the issue is that taken by Cooke J. in Market Investigations, supra. 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.

[20] I will examine the facts in the within appeals in relation to the indicia set forth in the Judgment of Major, J. in *Sagaz*.

Level of Control:

[21] Hoadley was an experienced Agent and prior to obtaining his licence had worked in the Landmasters Medicine Hat office performing a variety of administrative functions, including acting as Manager for a period of 3 years prior to the sale of the corporation to Cavalier via the Divestco group. He contacted the Senior Coordinator of Cavalier in Calgary – when necessary – but also arranged for the services of another Agent in the Medicine Hat region when required due to client demand. He was able to negotiate directly with a landowner and to report progress or lack of it to a representative of the particular resource company client. With regard to the matter of requiring permission from Zyla or another Supervisor at Cavalier, if he were to be absent, Hoadley testified it was a requirement but it is also likely he followed that practice as a matter of courtesy and practicality since it was necessary to ensure progress was being made on a particular file or group of files. In the modern business world, supervision and control can be accomplished via a myriad of electronic devices. The ability to control the quality of the work rather than controlling its performance by a worker is a significant distinction. In the within appeals, there is little evidence that Zyla, Dallyn or others at Cavalier exercised

control over the activities of Hoadley during the relevant period. He was assigned a task or obtained a client directly and went about achieving the result according to his own methods, experience and instincts as a person experienced in that field and familiar with the area. His background with Landmasters enabled him to function with substantially more knowledge of the region and some clients compared with the personnel at the Cavalier office in Calgary. Hoadley could control his time and apportion it between out-of-office tasks and that portion of the work that was either required or more conveniently performed in the office. Unless he discussed certain matters with Zyla or others in Calgary by cell phone or e-mail, often the precise nature of his activities would not be known until the file was completed, even though he provided some details of his daily duties in the sheet which accompanied his invoices. Although the contract expressly permitted Hoadley to provide his services to third parties when doing so did not conflict with this obligations to Cavalier, I accept Hoadley's explanation that – for most of the relevant period – that was impractical because he was busy and it would not have been acceptable according to his own professional standards as Agent when providing services to oil and gas companies involved in exploration.

Provision of equipment and/or helpers:

[22] The office space and equipment in Medicine Hat had been owned by Landmasters and was acquired by Cavalier. Cherith worked in that office and had the status of employee. Hoadley was requested to complete a performance review on Cherith and return it to Cavalier in Calgary. He did so by telephone and later by filling out the requisite form provided. Hoadley used his vehicle and cell phone and was reimbursed at a fixed rate per kilometer and for that portion of the telephone bill associated with work performed for a Cavalier client. Although there was no direct evidence on the point, it is reasonable to draw the inference that the office had been maintained by Cavalier for reasons other than accommodating Hoadley in his role as Agent and that Cherith performed other duties under the direction of management situated in Calgary.

Degree of financial risk and responsibility for investment and management:

[23] Hoadley was not exposed to any financial risk in the performance of his duties. He had no investment in the Medicine Hat office. However, it is apparent that he assumed the responsibility of managing that office while performing his duties as Agent. The degree to which his presence in the office was required by Cavalier is unclear. One must take into account that Hoadley had been the manager of that office while employed by Landmasters and his wife – Cherith – worked there as a Cavalier

employee. The office was equipped with the necessary furniture, equipment and supplies to enable him to carry out his Agent duties in an efficient manner and he was acting as a representative of Cavalier when dealing with both the landowner and the particular oil and gas company seeking rights of entry or other interests in land. A review of Hoadley's notations on the sheets attached to his invoices – Exhibit A-5 – for the period from March 30 to July 17, 2009 indicates there was a mixture of work performed described as "office hours" or "office time" but entries in the space headed: Details/Comments often referred to dealing with a landowner or various people – including clients – as part of accomplishing the tasks required by a particular file or group of files. Merely because Hoadley utilized the office and equipment in Medicine Hat does not mean he was doing so on behalf of Cavalier directly but was permitted to do so to fulfil his role as Agent. Some duties pertained to the Saskatchewan office including preparation of documents associated with obtaining surface leases or other rights. On May 14, 2009, according to the sheet attached to his invoice – dated May 26 – he spent 8 hours working on a cost appraisal and also cleaned the office, vacuumed, took out garbage, cleaned windows, answered e-mails and the phone. Details in the invoices during the period referred to, indicated a major part of the activity appears to have a direct nexus with Hoadley's role as an Agent and a notation that he spent 8 hours some days to answer phones, send and receive e-mails does not exclude a connection with the functions of Agent. The duties appeared to have been intertwined and as Hoadley stated in his testimony there was a "crossover of roles."

Opportunity for profit in the performance of his tasks:

[24] According to the contract, there was no guarantee of work and the amending agreement established a maximum of 40 billable hours per week, of which no more than 25 could be attributable to functions described as "office time." When it came to the attention of the Calgary office that Hoadley had been receiving payment for statutory holidays, Zyla informed him that he would no longer be paid unless he actually worked and then only at his regular hourly rate. The jurisprudence is clear that working more hours does not constitute a chance of profit in this sense.

The issue of intent:

[25] In several recent cases including *Wolf v. The Queen*, 2002 DTC 6853, *The Royal Winnipeg Ballet v. The Minister of National Revenue – M.N.R.*, 2006 DTC 6323, *Vida Wellness Corp. (c.o.b. Vida Wellness Spa) v. Canada (Minister of National Revenue - M.N.R.*), [2006] T.C.J. No. 570 and *City Water International Inc. v. Canada (Minister of National Revenue – M.N.R.),* [2006] F.C.J. No. 1653, there

was a clearly-expressed mutual intent of the parties that the person providing the services would be doing so as an independent contractor and not as an employee. In other cases, there is a dispute about whether one of the parties agreed at the outset – or thereafter during the course of the working relationship – to provide services in the context of a particular status.

[26] In *Winnipeg Ballet*, there was no dispute by the parties as to their intention and desire to have the working relationship with the payor characterized as that of independent contractor. At paragraphs 61 to 64, inclusive of her judgment, Sharlow, J.A. stated:

> [61] I emphasize, again, that this does not mean that the parties' declaration as to the legal character of their contract is determinative. Nor does it mean that the parties' statements as to what they intended to do must result in a finding that their intention has been realized. To paraphrase Desjardins, J.A. (from paragraph 71 of the lead judgment in *Wolf*), if it is established that the terms of the contract, considered in the appropriate factual context, do not reflect the legal relationship that the parties profess to have intended, then their stated intention will be disregarded.
>
> [62] It is common for a dispute to arise as to whether the contractual intention professed by one party is shared by the other. Particularly in appeals under the *Canada Pension Plan* and the *Employment Insurance Act*, the parties may present conflicting evidence as to what they intended their legal relationship to be. Such a dispute typically arises when an individual is engaged to provide services and signs a form of agreement presented by an employer, in which she is stated to be an independent contractor. The employer may have included that clause in the agreement in order to avoid creating an employment relationship. The individual may later assert that she was an employee. She may testify that she felt coerced into signifying her consent to the written form of the contract because of financial need or other circumstances. Or, she may testify that she believed, despite signing a contract containing such language, that she would be treated like others who were clearly employees. Although the court in such a case may conclude, based on the *Wiebe Door* factors, that the individual is an employee, that does not mean that the intention of the parties is irrelevant. Indeed, their common intention as to most of the terms of their contract is probably not in dispute. It means only that a stipulation in a contract as to the legal nature of the relationship created by the contract cannot be determinative.
>
> [63] What is unusual in this case is that there is no written agreement that purports to characterize the legal relationship between the dancers and the RWB, but at the same time there is no dispute between the parties as to what they believe that relationship to be. The evidence is that the RWB, the CAEA and the dancers all believed that the dancers were self-employed, and that they acted accordingly. The dispute as to the legal relationship between the dancers and the RWB arises because a third party (the Minister), who has a legitimate interest in a correct determination

> of that legal relationship, wishes to assert that the evidence of the parties as to their common understanding should be disregarded because it is not consistent with the objective facts.
>
> [64] In these circumstances, it seems to me wrong in principle to set aside, as worthy of no weight, the uncontradicted evidence of the parties as to their common understanding of their legal relationship, even if that evidence cannot be conclusive. The judge should have considered the *Wiebe Door* factors in the light of this uncontradicted evidence and asked himself whether, on balance, the facts were consistent with the conclusion that the dancers were self-employed, as the parties understood to be the case, or were more consistent with the conclusion that the dancers were employees. Failing to take that approach led the judge to an incorrect conclusion.

[27] In the case of *Dempsey v. Canada (Minister of National Revenue – M.N.R.)*, [2007] T.C.J. No. 353; 2007 TCC 362**,** Hershfield, J. considered the appeal of a service provider who – as a chartered accountant – had entered into a written contract with the payor in which he agreed to perform auditing and professional services in relation to loans and grants made by said payor and to do so as an independent contractor who would submit invoices based on a stipulated daily rate with a maximum amount during the contract period based on a maximum number of days. Pursuant to said contract, the parties agreed the worker would be an independent contractor. The worker submitted invoices each month for the number of hours worked on each day of the month and GST was charged on the relevant amount. In the course of his analysis at paragraph 39, Hershfield, J. commented as follows:

> Analysis
>
> [39] If intentions were determinative of the status of the Appellant's engagement, there would be no doubt that his engagement would be that of an independent contractor. The Appellant not only accepted the status imposed by circumstance and organizational structure but played out the role of an independent contractor until it was no longer to his benefit to do so. He honoured the contract which defined his status by becoming a GST registrant, invoicing his time with GST set out and bidding on new contracts as existing contracts expired. He claimed business expenses on his income tax return and paid no union dues as a public servant. He had no benefits and was not part of the public service pension plan. These were all contractually established, understood and accepted by the Appellant. At the end of the day, he preferred the independent status that this contractual arrangement gave rise to, although when he lost it he seized on the opportunity to deny that which he had accepted for almost 13 years.

[28] Hershfield, J. continued as follows at paragraphs 41 – 44, inclusive:

> [41] Applying the *Wiebe Door* tests the Appellant is clearly an employee. He was engaged in a wholly subordinate position as subject as any professional employee would be to do what his manager required of him. He had no freedom as to how, when or where he performed his services. In virtually every sense he was subject to the control of his manager at WD. He was treated in almost every respect as an employee and held out as one. He did what was asked of him in the context of his position. He had to correct reports as dictated by persons above him and was subject to deadlines. The specific list of duties that the Appellant was contracted to do for WD was an expanding list that covered everything that WD might require of an employee in the position occupied by the Appellant and even then at the direction of his manager, the Appellant did more than the specified duties that he was contracted to perform and he was paid in the normal course for such services. The reason for that is that he was under the complete control of his manager in WD as any employee would be. If control over the worker is the relevant test, the Appellant's engagement status is employment.
>
> [42] The Appellant provided no tools in respect of the performance of his duties. All of the tools were provided by WD. If the provision of tools is the relevant test, the Appellant's engagement status is employment.
>
> [43] The Appellant worked at a fixed rate for fixed hours and had no expenses in respect of the performance of his duties. There is no more entrepreneurial risk of loss or opportunity for profit than any employee working on a fixed term employment contract basis has. That he had no job security at the end of the term of each contract and that he had to bid on each contract are compatible with a series of negotiated term employment contracts. During the term of each contract, work was done for a wage. If this is the relevant test, the Appellant's engagement status is employment.
>
> [44] All the *Wiebe Door* factors point to the Appellant being an employee. This is not a close case where the intentions of the parties can impact the status of the engagement.

[29] Earlier – at paragraph 31 of his reasons, Hershfield, J. commented that “it was pretty much a foregone conclusion that the Appellant’s contract would be renewed as long as the job existed.” In the within appeals, the contract had an expiration date of December 31, 2009 without any inherent expectation it would be renewed. The contrast pertaining to the indicia of control between *Dempsey* and the within appeals is significant and in that case the intent of the contract was inconsistent with the actual working conditions.

[30] In many of these cases, there is a disparity in the negotiating power of the parties and to obtain work, a person will sign an agreement thrust upon them and

accept – reluctantly – the unilaterally imposed status of independent contractor when their intent had been to provide services under a contract of service and to be included on the payroll as a regular employee with the appropriate deductions for EI, CPP and income tax taken from their pay cheque. In the within appeals, that is not so. Hoadley was an experienced Agent, with 8 years experience in the industry, having worked in the family company – Landmasters – where he performed a variety of administrative functions prior to becoming a licensed Agent. A perusal of the details of work performed provided by Hoadley when submitting invoices – within Exhibit A-5 – reveals he was dealing with a variety of matters requiring an understanding of legal issues and contractual obligations. He prepared various documents including directions to pay, offers, releases related to settlements of damages, negotiated with a municipality concerning crossing agreements and dealt with surveyors and others in the course of his work which required an understanding of legal rights, duties and contractual obligations. Hoadley acknowledged he was aware that Cavalier wanted him to provided his services – as Agent – as an independent contractor and understood the wording of the articles comprising said agreement. His characterization of those otherwise legally binding conditions as being merely "part of the hiccups of the sale" is not plausible. Hoadley signed the amending agreement of September 23, 2009, although he did so after advising Cavalier that a ruling on his working status was forthcoming and – in his view – would render that agreement null and void.

[31] The facts are indicative of a breakdown in communications or understanding between Hoadley, the previous manager of the Medicine Hat Landmasters office and the new, larger entity – Cavalier – that itself was part of the Divestco group of companies. It is not surprising that Hoadley continued to perform duties which were not required of him contractually. His wife was the only other worker in that office and she was an employee of Cavalier. He utilized that office space and equipment – with the consent of Cavalier – to perform those tasks necessary to achieving the end result of his role as Agent. Hoadley billed for his hours at the regular rate but was upset by the refusal of Cavalier to continue paying him for a statutory holiday when he had not worked. Hoadley was aware Cavalier was adding the appropriate amount of GST to his invoices and remitting that revised amount to him for each 15-day pay period. He was aware that none of the usual source deductions were being made as had been the case when employed by Landmasters. He had been issued an ROE by Landmasters stating that his last period of employment ended on November 28, 2007 when that corporation was acquired by Divestco. It was obvious to Hoadley that a transition had occurred and that he was not going to be an employee of Cavalier but would have an opportunity to provide his services as Agent – as specified in the contract – effective January 1, 2008. When revenues generated in the Medicine Hat

region declined at the end of March, 2009, Hoadley – in e-mails to Zyla – subsequently made several suggestions to alleviate the shortfall including moving business operations to the Hoadley matrimonial residence. In an e-mail dated May 19, Hoadley suggested Cavalier put him on salary of $78,000 – effective June 1 – which he estimated would save Cavalier the sum of $10,000 per year. The desire to obtain the status of employee stemmed from the reduction of billable time per week and the limit placed on billable office time. Prior to signing the amending agreement on September 23, Hoadley had rejected an earlier version which had the potential to reduce his billable hours per week to zero. In an e-mail to Zyla – Exhibit A-10 – Hoadley stated he had been "gainfully employed as full time employee at his office since 2001 and never have been 'just a land agent.'" Again, this demonstrates that Hoadley was operating as though he was still employed by Landmasters and that the acquisition of that company by Cavalier – through Divestco – was a mere formality, a distinction without any legal difference. The fact is, he had not been employed by Cavalier since 2001 and Cavalier had not regarded him as other than an independent contractor pursuant to the terms of their written agreement.

[32] Hoadley and Cavalier acted in accordance with the written agreement, although there were glitches in communication and other differences arising from the merger of the former Landmasters into the larger entity based in Calgary. The difficulty arising when an individual seeks to retroactively characterize a working relationship is that perceptions are skewed – subconsciously or deliberately – to conform with what one wished had been achieved at the outset. It is a form of buyer's remorse fuelled by hope that this sense of regret combined with disappointment with subsequent events during the working relationship are able to re-write history and vitiate an otherwise legal, binding agreement.

[33] Without the written agreements and the consistent conduct of the parties subsequent thereto, some factors referred to in *Sagaz* pointed to a characterization of Hoadley's working relationship with Cavalier as that of independent contractor, particularly the aspect of control. Also, Hoadley used his vehicle and cell phone which were important tools in the course of carrying out his tasks. When required to act as a Coordinator to obtain or direct the services of another Agent in the Medicine Hat region, sometimes he did so based on his experience without direction from Calgary and billed Cavalier for those particular services at his applicable hourly rate.

[34] In light of the analysis of the relevant factors taken as a whole, it is important to assign appropriate weight to the intention of the parties at the time of Hoadley's initial engagement. I find that intention was apparent at the outset notwithstanding Hoadley's efforts to resile on the written agreement based on his newly-acquired

desire to obtain employment status, capable of bolstering a potential claim of constructive dismissal based on the effect of the amending agreement of September 23, which reduced the amount Cavalier paid thereafter in fees due to a decline in revenue – and resultant deficit - attributable to the Medicine Hat office.

[35] Taking all of the evidence into account and applying the relevant jurisprudence, I am satisfied the Appellant has discharged the requisite burden of proof. Both appeals are allowed and the decisions of the Minister – both dated October 5, 2010 – are hereby varied to find:

> Mark Hoadley was not engaged in either insurable or pensionable employment with Cavalier Land Ltd. during the period from January 1, 2009 to October 14, 2009 because he was not employed pursuant to a contract of service.

Signed at Sidney, British Columbia this 19th day of October 2011.

"D.W. Rowe"

Rowe D.J.

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| CITATION: | 2011 TCC 490 |
| COURT FILE NOS.: | 2011-16(EI) and 2011-17(CPP) |
| STYLE OF CAUSE: | CAVALIER LAND LTD. AND M.N.R. AND MARK HOADLEY |
| PLACE OF HEARING: | Calgary, Alberta |
| DATE OF HEARING: | August 25, 2011 |
| REASONS FOR JUDGMENT BY: | The Honourable D.W. Rowe, Deputy Judge |
| DATE OF JUDGMENT: | October 19, 2011 |

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