

Docket: 2006-366(EI)

BETWEEN:

FORCE & LUMIÈRE ÉLECTRIQUES INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

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Appeal heard on January 15, 2007, at Montréal, Quebec  
Before: The Honourable Justice Alain Tardif

Appearances:

Counsel for the Appellant: Donald N. Kattan

Counsel for the Respondent: Marie-Claude Landry

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### **JUDGMENT**

The appeal under subsection 103(1) of the *Employment Insurance Act* ("the Act") is allowed on the basis that the worker was not employed under a contract of service within the meaning of paragraph 5(1)(a) of the Act; consequently, the decision of the Minister of National Revenue is set aside in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 7th day of February 2007.

"Alain Tardif"

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Tardif J.

Translation certified true  
on this 25th day of October 2007.  
Mavis Cavanaugh, Reviser

Citation: 2007TCC25

Date: 20070207

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### **REASONS FOR JUDGMENT**

Tardif J.

[1] This is an appeal from a decision dated November 22, 2005, in which the Minister of National Revenue ("the Minister") decided that the work done by Nasrat Al-Bashir from April 13, 2003 to April 16, 2004, had been performed under a contract of service.

[2] According to the decision, the work had been done for Force & Lumière Électriques Inc., which categorically denies the existence of such a contract of service and maintains that the work was done by Mr. Al-Bashir under a partnership contract in his capacity as an independent contractor.

[3] The facts relied upon in making and confirming the decision under appeal are set out in paragraph 7 of the Reply to the Notice of Appeal and read as follows:

[TRANSLATION]

- (a) The Appellant, incorporated on December 18, 1990, operates a general contracting business in the construction field. (**admitted**)

- (b) Pierre Tamine was the Appellant's sole shareholder. **(admitted)**
- (c) The worker is trained as a civil engineer. **(admitted)**
- (d) The worker rendered services to the Appellant as a representative and, subsequently, as a technical project advisor. **(denied)**
- (e) The worker appears to have begun working for the Appellant in March 2002 under an oral agreement. **(denied)**
- (f) As a technical advisor, the worker's duties were to look after the bids, to meet the suppliers and to ensure that the construction materials were delivered on time. **(denied)**
- (g) The worker worked only on the "Szeto" construction project as a project manager. **(admitted)**
- (h) The worker did not have to respect a specific work schedule, but had to contact clients and subcontractors of the Appellant during normal business hours. **(admitted)**
- (i) The worker worked under the direction and supervision of Pierre Tamine. **(denied)**
- (j) The worker remained under contact with Mr. Tamine and had to report regularly to him orally and in writing. **(denied)**
- (k) The worker used his car in connection with his work and personally bore all associated costs. **(admitted)**
- (l) The Appellant supplied the worker with an office, the equipment and the office supplies, as well as a cellular telephone. **(denied)**
- (m) According to the initial agreement, the worker was to receive annual remuneration varying from \$45,000 to \$50,000. **(denied)**
- (n) In order for the worker to receive remuneration, the Appellant demanded that the worker register his own business. **(denied)**
- (o) On July 22, 2003, the worker registered his business under the name Conseils et Services Nasrat. **(admitted)**

- (p) During the period at issue, specifically, between July 23, 2003 and December 1, 2003, the worker received four cheques from the Appellant, for a total of \$19,800, payable to his business. **(admitted)**
- (q) No salary was paid to the worker or to his business between December 2003 to April 2004. **(admitted)**
- (r) The worker filed a complaint with the Commission des normes du travail to recover unpaid wages from the Appellant. **(admitted)**

[4] The Appellant admitted to the facts set out in subparagraphs (a), (b), (c), (g), (h), (k), (o), (p), (q) and (r) and denied the others, namely (d), (e), (f), (i), (j), (l), (m) and (n).

[5] The two parties to the disputed work contract submitted totally contradictory evidence; the decision essentially depends on whose version is the most credible and plausible.

[6] Pierre Tamine, the sole shareholder and director of the Appellant corporation, began by explaining that he operated this business, which did electrical work even though it had permits to do general contracting work.

[7] In late 2001, the Appellant corporation was operating in this field when Mr. Tamine met Nasrat Al-Bashir in a parking lot next to the Appellant's office.

[8] The two both spoke Arabic and quickly became close; they met more and more frequently until one day, they discussed business and realized that their training and skills in the construction field were synergistically complementary.

[9] According to Pierre Tamine, an oral agreement was entered into under which the two new friends would do certain construction work together as partners in a joint venture.

[10] The agreement was based on 50/50 profit-sharing. According to Mr. Tamine, it was clear that the corporation would not reimburse any expenses, would not provide an office and would not pay a salary and that its sole obligation was to give Nasrat Al-Bashir 50% of the profits made on any project, and, the agreement coincided roughly with the commencement of a project.

[11] Mr. Tamine produced the Appellant's financial statements and claimed that the Appellant never agreed to pay Nasrat Al-Bashir a salary markedly higher than what Mr. Tamine himself received.

[12] In actuality, Nasrat Al-Bashir was asked to work on a single, very specific project: the "Szeto" construction project, in which Mr. Al-Bashir clearly played a very important role; this was firmly established by the numerous documents tendered in a bundle as Exhibit I-5. Moreover, the fact that Nasrat Al-Bashir worked was not disputed by the Appellant, who admitted to Mr. Al-Bashir's involvement.

[13] During the entire period at issue, the only payments made to Nasrat Al-Bashir were four cheques bearing the following dates and amounts:

Date	Cheque Number	Amount
(1) July 23, 2003	0592	\$10,000
(2) July 23, 2003	0598	\$2,200
(3) October 28, 2003	0680	\$1,600
(4) December 1, 2003	0740	\$6,000
	TOTAL	\$19,800

[14] According to Mr. Tamine's version, these amounts were advances. However, I found it quite surprising that nearly \$20,000 worth of advances were made at a time when it was neither clear nor certain that the project would generate profits of more than \$40,000, that is to say, at least double the amounts advanced.

[15] On November 15, 2004, Nasrat Al-Bashir commenced legal proceedings (Exhibit A-2) before the Commission des normes du travail to recover the sum of \$55,854.24, plus the amounts received and described in paragraph 13 of this judgment, on the basis that he had never been paid for most of his work.

[16] Following those legal proceedings, a settlement was reached under which the Appellant corporation agreed to pay \$4,000 to buy peace and avoid a long and costly trial.

[17] For his part, testifying at the Respondent's request, Nasrat Al-Bashir spoke in different terms altogether. He stated that he worked as a salaried employee for Pierre Tamine and that his salary was to be between \$40,000 and \$50,000 per year.

[18] In actuality, several months went by before he received the advances or amounts set out in paragraph 13 of this judgment. Given his absolute trust in Mr. Tamine, he maintained that he had a little personal money at the beginning of the project and so was patient in the sense that he agreed to work without pay during the days and weeks following the performance of the work. He also stated that he was never reimbursed for any of his expenses.

[19] He stated that the corporation, which had been registered on July 22, 2003, and to which the four cheques in paragraph 13 hereof were made payable, was incorporated at the express request of Pierre Tamine. This was, according to him, a condition to his receiving the money—a seemingly plausible explanation, because the two biggest cheques were dated July 23, the day after the incorporation.

[20] As for the business name declaration (Exhibit A-4), he stated that it was made at Pierre Tamine's request, because he did not want to have to make any source deductions. He also explained that he had an office in the house of Nasrat Al-Bashir.

[21] In my opinion, I would not be exaggerating by stating that Messrs. Tamine and Al-Bashir made profoundly different, even contradictory statements.

[22] The evidence established that Nasrat Al-Bashir had made efforts to obtain an official identity document of his, namely a citizenship certificate, replaced. His explanation for the loss was that he had to travel abroad regularly.

[23] On cross-examination, he stated that he worked continuously for the Appellant, except for the duration of his statutory vacations.

[24] When asked to explain the difference between the two versions, he stated that his lawyer had made up the explanation for his absences from Canada.

[25] As for Mr. Tamine, he maintained that the famous form had been filled out by an intern at his office and that he had essentially reproduced in French Mr. Al-Bashir's explanations.

[26] As for the questions regarding the manner in which he treated the income, or advances, he was unable to answer them, except to state that he had not yet filed his income tax return for the year 2003.

[27] This is not a case in which the testimony of one witness is totally credible and the testimony of the other witness is not at all credible; this is a case in which one must take several elements and facets into consideration in order to be able to determine that the balance of evidence adduced favours one version over the other.

[28] From the outset, this approach makes the Appellant's case harder to prove, because the Appellant bears the burden of proof. However, the evidence adduced by the parties points to certain objective facts that are clearly important in assessing whether one version is more credible and plausible than the other.

[29] I noted the following facts:

- The fact that Nasrat Al-Bashir worked for months without receiving a cent is very unusual;
- The fact that he commenced legal proceedings to recover a colossal amount of unpaid salary and later signed an agreement under which he received a frankly minimal amount of less than 10% of the claim, namely \$4,000, is also very unusual;
- Nasrat Al-Bashir, through the Commission des normes du travail, claimed more than \$50,000, even though he had already received \$19,800, which totals nearly \$70,000 in salary, whereas he stated that the agreement called for a salary ranging from \$40,000 to \$50,000 per year, already a considerable amount given the Appellant's ability to pay;
- He incurred automobile expenses that he neither claimed nor obtained from the Appellant;
- He did not file an income tax return for the years 2002 and 2003;
- He signed a declaration in support of an application for a copy of a citizenship certificate, an application whose contents completely contradict his version of the facts, which is that he worked continuously without leaving Canada, whereas his claim alleges that he is often outside Canada;
- He stated that the application was filled out by his lawyer, whereas Mr. Tamine claimed that this was done by an intern;

- If one accepted Nasrat Al-Bashir's allegations, it would mean that Mr. Tamine agreed to pay him a salary that is higher than what he himself was paid by the corporation.

[30] In addition, it is also important to take certain elements other than these facts into consideration. Mr. Al-Bashir, a well-educated man who clearly knew the consequences of self-employment as opposed to salaried employment, agreed to register a business name even though this was, according to him, the idea, or even the requirement, of Mr. Tamine.

[31] For the same reasons as those set out in the preceding paragraph, he agreed that all the cheques that he received would be payable to the corporation that he agreed to create.

[32] In support of his case, the Respondent made three main arguments.

[33] First of all, a voluminous document (Exhibit I-5) was produced. The document is certainly a source of interesting information, specifically, that Nasrat Al-Bashir had clearly played a very important role, but also an ongoing one. This fact is not, however, irreconcilable with the position of the Appellant, who acknowledges the contribution of and genuine work done by Nasrat Al-Bashir for the "Szeto" construction project.

[34] Secondly, the fact that Nasrat Al-Bashir signed and received several documents certainly shows that he did significant work. However, it does not validate his argument that this was a contract of service.

[35] The meaning of Exhibit I-1, the draft, and Exhibit I-2, the final version, both of which were considered to be determinative elements by Nasrat Al-Bashir, given that he agreed to settle his claim of over \$50,000 for \$4,000, could be that he wanted to protect his rights in connection with a future employment insurance benefit claim.

[36] Lastly, the stakes are considerably higher for Mr. Al-Bashir than for the Appellant.

[37] Indeed, the Respondent stands to obtain a substantial amount of employment insurance benefits as a result of these proceedings, whereas the Appellant would essentially have to repay the employment insurance premiums, which are undoubtedly much lower than the benefits ultimately payable.



[38] Both Mr. Tamine and Mr. Al-Bashir are highly educated people with experience and expertise in the construction field.

[39] Considering this, one should not underestimate the value and the legal meaning of certain acts, the name of the payee of the cheques, and the creation of a business by Mr. Al-Bashir. These elements alone, while important in ascertaining the intent of the parties, might not be determinative, but do paint a portrait of this case that other facets confirm.

[40] I am referring in particular to the fact that expenses were not reimbursed, that Mr. Al-Bashir used his car for several months without receiving a thing, that he accepted an insignificant sum in settlement of a claim of more than \$50,000, that he worked for months without receiving anything, etc.

[41] For all these reasons, I find that the evidence, on a balance of probabilities, favours the Appellant, in the sense that the version of the facts of the sole shareholder, Pierre Tamine, is more plausible and, above all, more reasonable and credible.

[42] Consequently, I allow the appeal on the basis that the work done by Nasrat Al-Bashir from April 13, 2003 to April 16, 2004, was performed pursuant to a contract of enterprise as a partner, not as an employee.

Signed at Ottawa, Canada, this 7th day of February 2007.

"Alain Tardif"

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Tardif J.

Translation certified true  
on this 25th day of October 2007.

Mavis Cavanaugh, Reviser

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REASONS FOR JUDGMENT BY: The Honourable Justice Alain Tardif  
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Appearances:

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Counsel for the Respondent: Marie-Claude Landry

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