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Prior to *El Ashiri*, case law suggested that the oppression remedy was not generally considered appropriate for wrongful dismissal claims. However, as *El Ashiri* proceeded unopposed, it may be that this prior case law was not before the court when it heard the *El Ashiri* case.

As a result of this decision, it would appear that directors and their estates may now face increased

personal liability for employee wages and related claims beyond the limits established by corporate and employment legislation.

REFERENCES: *El Ashiri v. Pembroke Residence Ltd.*, 2015 ONSC 1172, 2015 CarswellOnt 2424 (Ont. S.C.J.); *People's Department Stores Ltd. (1992) Inc., Re*, 2004 CSC 68,

2004 SCC 68, 2004 CarswellQue 2862, 2004 CarswellQue 2863 (S.C.C.); Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16; *Employment Standards Act*, 2000, S.O. 2000, c. 41, s. 80-8; Canada *Business Corporations Act*, R.S.C. 1985, c. C-44; *Crabtree (Succession de) c. Barrette*, 1993 CarswellQue 25, 1993 CarswellQue 155, [1993] 1 S.C.R. 1027 (S.C.C.).

CHARTER ISSUES

Open court principle applied in administrative proceeding

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The open court/open tribunal principle effectively negates the disclosure restrictions of the *Privacy Act* in the context of quasi-judicial administrative proceedings.

In *Lukács v. Canadian Transportation Agency* ("Lukács") the Federal Court of Appeal applied the *Charter*-protected open court principle and held that documents in the record of an administrative quasi-judicial tribunal are open to the public, except if expressly ordered to be confidential.

The provisions of the *Privacy Act* restricting the disclosure of personal information did not apply because the personal information was deemed to be publicly available in the tribunal's record by operation of the open court principle.

This decision has important implications for the confidentiality of business information, especially where an administrative agency wears two hats — acting as both an economic regulator and an adjudicative tribunal. Depending on which hat it is wearing,

the agency may have different disclosure obligations; only in the latter role is it subject to the open court principle.

Agency proceedings

The Canadian Transportation Agency (the "Agency"), like many regulatory bodies, has a dual mandate. First, it acts in an administrative capacity as an economic regulator, including by issuing licences and permits to carriers. Second, it has a quasi-judicial or court-like capacity, acting as a tribunal resolving commercial and consumer transportation-related disputes.

In 2014, the Agency decided a matter regarding problems with a family's flight to Cancun. Dr. Lukács, an air passenger rights advocate, sought a copy of the Agency's full record regarding the Cancun matter. The Agency provided the record but redacted certain documents, removing what it considered to be personal information under the *Privacy Act*.

The Agency refused Dr. Lukács' further requests for un-redacted copies of the documents, asserting that the *Privacy Act* prohibited further disclosure of the information. The *Privacy Act* prohibits (subject to certain exceptions) the disclosure of personal information under the

control of a government institution without the consent of the individual.

Judicial review

Dr. Lukács brought an application for judicial review challenging the Agency's refusal to provide the un-redacted documents. He did so on the basis (among other grounds) that the Agency's adjudicative proceedings were governed by the *Charter*-protected open court principle.

He argued that provisions of the *Privacy Act* were inapplicable to the extent they infringed on the *Charter* right of the public to view the record of the proceeding. The Tribunal agreed with Dr. Lukács and ordered the Agency to provide the un-redacted documents.

Open court principle

The open court principle is a long-standing common-law principle which calls for proceedings to be open to the public. This includes not only the proceedings themselves, but also the record before the court, including the evidence and documents tendered.

In recent years, the Supreme Court has recognized that the freedom of expression guarantee protected by s. 2(b) of the *Charter* incorporates the

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open court principle: the state cannot interfere with an individual's ability to access judicial records and documents.

However, the open court principle, like most *Charter*-protected rights, is not absolute. Courts are permitted to deny access to all (or part) of their record when they determine that disclosure would unduly impair the proper administration of justice.

Nonetheless, court proceedings remain presumptively open. The question in *Lukács* was the extent to which this principle applies to administrative tribunals and its intersection with the *Privacy Act*.

Privacy Act impact

Both parties to the application for judicial review in *Lukács* agreed that the open court principle applied to the Agency in its quasi-judicial capacity. Indeed, the Agency's own rules acknowledged that it "follows the 'open court principle.'" In addition, the Court held that the weight of the jurisprudence supported the applicability of the open court principle to quasi-judicial tribunals.

The question before the Tribunal, therefore, was whether the Agency was nonetheless prohibited by the *Privacy Act* from disclosing the unredacted documents. The *Privacy Act* restricts the use and disclosure of personal information, except in certain circumstances.

These restrictions do not apply to personal information that is "publicly available." The Agency argued that the personal information provided to the Agency was not "publicly available." Rather, when it was provided to the Agency, it was segregated into a "personal data bank" (as defined in the *Privacy Act*) and, thus, shielded from the open court principle.

Public record

The Court disagreed. It reasoned that under the Agency's own rules, all documents (except those subject to a confidentiality order) form part of the

"public record." Analogizing to the judicial context, the Court held that the very purpose of a record was to effectuate transparency:

when a court places documents on its records, it adheres to the open court principle.

This decision has important implications for the confidentiality of business information, especially where an agency wears two hats — acting as both an economic regulator and an adjudicative tribunal.

When there is a concern that the harm from a specific disclosure would necessitate non-disclosure, an affected party may apply for relief in the form of a sealing or confidentiality order. However, unless the burden that must be met to obtain an order of this kind is met,

the open court principle mandates that the record of the court will be available for public access and scrutiny.

Agency's dual mandate

The Court found "no principled reason" to apply a different standard to administrative agencies such as the Agency when acting as quasi-judicial tribunals. Rather, the record of the Agency "performs essentially the same function as the record of a court."

The Court emphasized the importance of the duality of the Agency's mandate. In its capacity as an economic regulator, the Agency was obligated to follow the constraints of the *Privacy Act*, including segregating information into personal data banks. However, once it began to act as a quasi-judicial Tribunal, all such documents were required to be kept

in the public record and became publicly available:

[T]hose documents have left the cloistered confines of such banks and moved into the sunlit Public Record of the Agency ... From the time of their placement on the Public Record, such documents are held by the Agency acting as a quasi-judicial, or court-like body, and from that time they become subject to the full application of open court principle.

Where, as in this case, no party has requested that personal information remain confidential, all information provided to the Agency is publicly available and required to be disclosed, on request, to any member of the public. The Agency's redactions in the documents it provided Dr. Lukács were therefore impermissible.

Having determined the issue on the basis of the intersection between the open court principle and the *Privacy Act*, the Court found that it was not necessary to rule on the constitutional issue that had been raised.

Significance

The open court principle's emphasis on the transparency of judicial proceedings is now recognized as applying equally to both courts and administrative tribunals acting in an adjudicative, quasi-judicial capacity. While the Court did not find the need to make an express constitutional finding, its reliance on the open court principle is itself rooted in the underlying *Charter* value of freedom of expression.

The open court/open tribunal principle effectively negates the disclosure restrictions of the *Privacy Act* in the context of quasi-judicial administrative proceedings. As a result, companies in regulated industries should keep in mind the dual capacity of many regulators, and the potential for disclosure that that dual role entails.

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Information (particularly the personal information of clients, customers or employees) that is confidential when held by the administrative agency in its regulatory capacity can become publicly available when it is used in a proceeding before the administrative agency in its adjudicative capacity.

This information could include personal health information, travel information, financial information or other identifying information.

In these circumstances — or any others in which sensitive personal information has been provided to a dual-function agency — companies should give serious consideration to whether the information is sensitive

and whether its disclosure would be harmful.

If so, it may be advisable to apply to the tribunal as soon as the possibility arises that the agency will play an adjudicative role for an order that the information be treated as confidential and removed from the public record.

REFERENCES: *Lukács v. Canadian Transportation Agency*, 2015 FCA 140, 2015 CarswellNat 1893 (F.C.A.) at paras. 75, 71, 72, 78; *Privacy Act*, R.S.C., 1985, c. P-21, s. 69(2); *Application to proceed in camera*, *Re* (2007), 2007 CarswellBC 2418, 2007 CarswellBC 2419, 2007 SCC 43 (S.C.C.) at para. 31.

BRIEFLY SPEAKING

WHITE COLLAR CRIME: On **June 1, 2015**, the *Extractive Sector Transparency Measures Act* (ESTMA) became law. Designed to reduce international corruption, ESTMA provides for mandatory **reporting obligations for payments made by companies in the oil, gas or minerals development sectors to foreign and domestic governments** (and government officials).

The reporting requirements also apply to payments made by a **foreign company that is Canadian controlled** (as defined in the Act). Companies subject to the Act must be listed on a **Canadian stock exchange**, or have **assets/a place of or do business in Canada**, and meet specific **size thresholds**. Only **payments to a payee in excess of C\$100,000** must be reported. Reports are to be made for **financial years starting after June 1, 2015** and within **150 days** of a company's **financial year-end**. **Non-compliance** with these reporting requirements is an **offence** punishable by up to **C\$250,000** for each day of continued non-compliance.

INTELLECTUAL PROPERTY: The **Federal Court of Canada** has issued a **practice notice** outlining

recommendations to improve proportionality in complex litigation before the court.

The recommendations seek to advance the underlying purpose of the *Federal Court Rules* — to secure the just, most expeditious and least expensive determination of every proceeding — by **modernizing several practices and procedures aimed at improving IP procedures** for litigants.

Included in the recommendations are: **earlier trial judge management; earlier trial dates** for parties on the **short notice wait list; no new demonstrative evidence at trial; and limits on documentary (and oral) discovery, refusal motions, and appeals of interlocutory orders of prothonotaries**.

The practice notice also includes recommendations for **stricter enforcement of the limit on experts**, a possible requirement that parties provide **science and technology primers** to the court prior to trial; and the raising of **ADR options** by the court **throughout the proceeding** where it would lead to the most **efficient disposition** of the action. — Rebecca Schild and Natalie Rizkalla-Kamel, *Gowling Lafleur Henderson LLP*.

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