

# Director's estate liable for unpaid wages arising from oppression

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## Directors and their estates may face increased personal liability for employee wages and related claims beyond the limits established by corporate and employment legislation.

In its recent decision in *El Ashiri v. Pembroke Residence Ltd.* ("El Ashiri"), the Ontario Superior Court of Justice allowed two former employees of privately-held related companies to successfully use the oppression remedy to obtain an order for unpaid wages against the personal estate of the companies' sole director and officer.

This decision is notable because it appears to expand both the scope of a director's personal liability to employees and the basis upon which employees may pursue such claims against directors.

### Constructive dismissal

The plaintiffs were hotel managers who were found to have been constructively dismissed because they had not received basic wages, statutory holiday pay, vacation pay, termination pay and overtime pay, and had not been reimbursed for work-related and medical expenses incurred in the absence of a promised health plan.

Each former manager sued the company that he had worked for, as well as the sole director of that company, for payment of the amounts owed. The plaintiffs alleged that the failure to be paid for the labour and services they provided constituted oppression.

Following the death of the director of the company, the plaintiffs obtained an order to continue their actions against the trustee of his

estate. The plaintiffs then brought a motion for summary judgment, which was unopposed.

### Creditors

The court found that the plaintiffs, as employees who provided labour and services in good faith, were creditors of the corporation. Relying on the Supreme Court of Canada's decision in *People's Department Store (Trustee of) v. Wise* — which held that creditors are proper "complainants" for the purposes of the oppression remedy under the Ontario *Business Corporations Act* (the "OBCA") — the court determined that the employees in this case were entitled to bring an application for oppression.

The court determined that the defendant director, as sole officer and director, had total control over the corporate defendants and must have known when he hired the plaintiffs that he was not in a financial position to pay them what they were owed.

Failing to pay the plaintiffs for extended periods of time, while paying certain preferred creditors, was held to be oppressive, and the plaintiffs' expectations of payment for services rendered were reasonable.

### Relevant legislation

Claims for unpaid wages are typically pursued against employers and directors under either the *Employment Standards Act, 2000* ("ESA") or the unpaid wages provision under applicable corporate legislation, such as the OBCA or the *Canada Business Corporations Act* ("CBCA"). However, a plaintiff's ability to recover under these provisions is subject to certain restrictions.

For example, the OBCA will impose personal liability on a director only if the corporation has been sued for unpaid wages and has failed to pay, or the corporation goes into liquidation, is wound up, or makes an assignment into bankruptcy.

Similar conditions are imposed under the CBCA, with the additional caveat that a director will not be personally liable unless the corporation was sued within six months after the wages were due, or the claim is proven within six months of the liquidation, dissolution, or bankruptcy.

Under the ESA, a claim against a director can only be commenced if the corporation is insolvent, or an employment standards officer has made an order that the employer or director is liable for wages. Further, the ESA, OBCA, and CBCA restrict unpaid wage claims to a maximum of six months and unpaid vacation pay to a maximum of twelve months.

The ESA also expressly excludes claims for termination pay and severance pay. The Supreme Court of Canada, in *Crabtree (Succession de) c. Barrette*, has also held that the CBCA unpaid wages provision expressly limits the amount claimed to debts for "services performed for the corporation," which does not include an amount payable in lieu of reasonable notice. Identical language also appears in the OBCA.

### Significance

In its decision in *El Ashiri*, the court does not explain why the claim was pursued under the oppression remedy or whether other avenues of redress were considered. However, given the statutory and common-law restrictions identified above, the plaintiffs' goal in invoking the oppression remedy appears likely to have been to:

- (i) permit the plaintiffs to recover termination pay;
- (ii) permit the recovery of wages and vacation pay beyond the respective six and twelve month limits under the ESA, OBCA, and CBCA; and
- (iii) ensure liability could be imposed against the director's estate.

See *Directors' and Officers' Liability*, page 38

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

*See Charter Issues, page 39*