

Case Comments

Enforcement of Benefits Under The Employment Standards Act. A Single Jurisdiction for Enforcement Affirmed

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I. INTRODUCTION

Before the decision of the Supreme Court of British Columbia in *Macaraeg v. E Care Contact Centers Ltd.*¹ in December 2006, it was common ground that an employee could not claim civilly a remedy or benefit conferred to him or her by employment standards legislation because such legislation was viewed as a "self-contained statute," that exclusively governed the scheme or process for enforcing any contravention of its provisions. However, after the Supreme Court's decision in *Macaraeg*, there were, for a brief period while *Macaraeg* was under appeal, two inconsistent lines of authority on the subject in British Columbia until the Court of Appeal affirmed the pre *Macaraeg* line of authority. The purpose of this article is to critically examine both the Supreme Court's and the Court of Appeal's decisions in *Macaraeg*. In the interest of affording the reader a better understanding of these decisions, by way of a preamble, this article will review instructive cases in British Columbia prior to the Supreme Court's decision in *Macaraeg*.

Although this article assumes that the reader has the requisite knowledge and understanding of the complaint process under the *Employment Standards Act*², a brief review will be undertaken of the provisions governing the time limit for filing a complaint and the limit on the wages recoverable under the ESA, as these provisions are directly relevant to the discussion of the jurisdiction for the enforcement of the benefits conferred to employees under the ESA.

Shafik Bhalloo has been a partner of Kornfeld Mackoff Silber LLP since 2000. His practice is focused on labour and employment law, and on commercial and civil litigation. He is also an Adjudicator on the Employment Standards Tribunal and an Adjunct Professor in the Faculty of Business Administration at Simon Fraser University. Shafik thanks Gareth Carline for his able research assistance and Herb Silber for his instructive comments

¹ 2006 BCSC 1851, [2007] 1 W.W.R. 421, 60 B.C.L.R. (4th) 374, rev'd *Macaraeg* (2008), *infra* note 42 [*Macaraeg* (2006)].

² R.S.B.C. 1996, c. 113 [ESA].

II TIME LIMIT FOR FILING A COMPLAINT AND LIMIT ON THE WAGES RECOVERABLE UNDER THE ACT

In Part 10 of the ESA, section 74 delineates some mandatory time limits for lodging a complaint with the Employment Standards Branch ("the Branch"). If the employee has been terminated from his or her employment, subsection 74(3) requires the employee to deliver the complaint to the Branch within six months of the last day of employment. Where an employee is terminated following a temporary lay-off, subsection 74(3.1) deems the last day of the temporary lay-off as the last day of employment for the purpose of subsection 74(3). If the employee is complaining under sections 8 (no false representations by the employer), 10 (no charge for hiring or providing information to a person seeking employment), or 11 (no fees to other persons for obtaining or assisting in obtaining employment), the complaint must be made to the Branch within six months of the date of the contravention.

If an employee fails to make his or her complaint within the time limit in subsections 74(3) or (4) of the ESA, although the Director of Employment Standards ("the Director") is required initially to accept and review such complaint pursuant to subsection 76(1), the Director has the discretion thereafter to refuse the complaint as out of time pursuant to paragraph 76(3)(a).³ Therefore, once an employee has missed the time limit in section 74 for filing a complaint with the Branch, he or she may be effectively foreclosed from the complaint process under the ESA. It is therefore advisable to any employee desirous of employing the complaint process under the ESA to be vigilant and act within the short time limit available under subsections 74(3) and (4) or be faced with the likelihood of having their complaint rejected.

With respect to claims for wages recoverable by an employee under the ESA, subsection 80(1) limits an employee's claim for wages to the amount that became payable in the period beginning, in the case of a complaint, six months before the earlier of the complaint or the termination of the employment, and, in any other case, to six months before the Director advised the employer of the investigation that resulted in the determination. Subsection 80(1.1) addresses the transition between the old limit that applied to complaints delivered to the Branch before 30 May 2002 and the new shorter limit that applied subsequently. More specifically, as a result of the Legislative Assembly of British Columbia passing the *Employment Standards Amendment Act*⁴ (Bill 48) on 30

³ See *Karbalaeeali v. British Columbia (Employment Standards)*, 2007 B C CA 553, [2008] 2 W.W.R. 226, 73 B.C.L.R. (4th) 295. Prior to that decision, it was common ground that s. 76(3) of the ESA, despite its discretionary language, did not permit the Director any discretion or authority to investigate a time barred complaint. See *Re British Columbia (Director of Employment Standards)*, [1998] B.C.E.S.T.D. No. 335 (QL).

⁴ S.B.C. 2002, c. 42

May 2002, the limit on retroactive liability for wages to be paid by an employer under a Director's determination was reduced from twenty-four months from the date of the complaint or determination to six months, thus effectively reducing the employee's claim for wages to a fraction of the period previously recoverable from an employer.

III. PRE-MACARAEG AUTHORITIES

Having reviewed the relevant provisions of the ESA governing the time limit for filing a complaint as well as the limit on the amount of wages recoverable under the ESA, the question of whether or not an employee is able to pursue a statutory remedy by way of a civil action becomes significant, particularly in the following scenarios:

- (1) Where the employee fails to deliver a complaint to the Branch within six months after the last day of his or her employment; and
- (2) Where the employee, whether or not he or she is within the time limit under the ESA for lodging a complaint, wants to claim wages under the ESA for a period greater than six months before the earlier of the date of the complaint or the termination of employment.

With respect to the first scenario, before the Supreme Court's decision in *Macaraeg*, it was settled law, based on the decision in *Sitka Forest Products Ltd. v. Andrew*,⁵ that an employee was limited to the enforcement scheme provided in the ESA for seeking statutory benefits, and therefore effectively foreclosed from pursuing those benefits if he or she failed to comply with the time limit in the ESA for making a complaint, as a civil action was not an option available to enforce one's statutory rights. In *Sitka*, the employee, a commissioned salesman, was paid monthly draws in advance against his future commissions. The employee had executed an agreement in the nature of a demand promissory note, agreeing to pay the employer, on demand, the difference between commissions he earned and the monthly draws he was paid. At the time of his resignation, the draws paid to the employee exceeded the commissions he had earned by almost \$5,700 and the employer sued him for this amount. The employee, while admitting that he had overdrawn by the amount alleged by the employer, counterclaimed that during his employment he had become entitled to annual holiday pay in an amount slightly in excess of \$16,000 and claimed a set-off against the debt he owed to the employer. In the materials he filed in support of his position, the employee admitted that

⁵ (1988), 32 B.C.L.R. (2d) 62 (S.C.) [*Sitka*]

his claim for vacation pay was based on section 37 of the 1980 ESA⁶ and explained that he was pursuing that statutory claim in his counterclaim because he was past the statutory time limit of six months to file a complaint under section 80 of the 1980 ESA⁷ and therefore the Branch was prevented from assisting him with his claim. Gow J., without any consideration or analysis of the scope and purpose of the 1980 ESA, followed the decision in *Vanderhelm v Best-Bi Food Ltd.*,⁸ and concluded:

I am of the opinion that an employee who seeks the benefit of annual vacation pay pursuant to ss. 36 and 37 of the Act is confined to seeking redress by and through the machinery of the Act. The Act does not confer upon him an independent civil remedy ...⁹

In *Vanderhelm*, the dismissed employee brought an action against his employer for arrears of annual holiday pay allegedly owed to him. As his contract of employment was silent on the subject and there was no common law right to holiday pay, the employee's sole basis for his claim was his statutory right to holiday pay under the governing legislation of the day, the *Annual and General Holidays Act*¹⁰. Section 16 of the AGHA subjected employers to quasi-criminal sanctions for failing to comply with its minimum provision concerning payment of holiday pay to their employees. In particular, section 16 delineated a range of fines for the first and subsequent violations of the statute and minimum terms of imprisonment where the employer failed to pay the fines imposed. The AGHA also required the offending employer to pay its employee all holiday pay owing under the statute. Munroe J., in dismissing the employee's claim for want of jurisdiction, purported to examine the object and provisions of the statute as a whole and stated:

It is settled law, I think, that where a statute creates an offence, and defines particular remedies against the person committing that offence, *prima facie* the party injured can avail himself of the remedies so defined, and no other; but the object and provisions of the statute as a whole must be examined with a view to determining whether it is a part of the scheme of the legislation to create, for the benefit of individuals, rights enforceable by action; or whether the remedies provided by the statute are intended to be the sole

⁶ *Employment Standards Act*, S.B.C. 1980, c. 10, s. 37 [1980 ESA]. This section is comparable to s. 58 of the current ESA. Cf. ESA, *supra* note 2, s. 58

⁷ This section is comparable to s. 74 of the current ESA. Cf. ESA, *supra* note 2, s. 74.

⁸ (1967), 65 D.L.R.(2d) 537, 62 W.W.R 201 (B.C.S.C.) [*Vanderhelm* cited to D.L.R.]

⁹ *Sitka*, *supra* note 5 at 66.

¹⁰ R.S.B.C. 1960, c 11 [AGHA].

remedies available by way of guarantees to the public for the observance of the statutory duty, or by way of compensation to individuals who have suffered by reason of non-performance of that duty¹¹

Both the *Vanderhelm* and *Sitka* decisions have been subsequently followed or referred to in British Columbia in numerous decisions.¹² Among them, *Ferris*, *Burke*, and *A'Hearn* are noteworthy for their analysis.

In *Ferris*, the employee, who had been granted judgment in a wrongful dismissal action against his corporate employer but was unable to satisfy that judgment, applied to have each of the three directors of the corporate employer declared personally responsible for the payment of unpaid wages in an amount not exceeding two months' wages pursuant to subsection 19(1) of the 1980 ESA, then in effect.¹³ Drost Co. Ct. J. followed the reasoning in *Vanderhelm* and *Sitka* and, in concluding that section 19 did not create a civil right of action enforceable by the employee, stated:

Section 19 of the Act imposes on the directors and officers an obligation not known at common law and which is, as was pointed out by the Court of Appeal in *Re Evans*, "subject to strict limits". Upon examination of the "broad social scheme" of the Act as it is described in *Re Evans*, in the light of the authorities cited above, I have concluded that s. 19 does not create a right of action enforceable by an employee in civil proceedings against an employer.

The Act is divided into several parts. Part 2, comprising sections 4 to 25 inclusive, is entitled "Wage Protection". It deals generally with the duties and obligations of an employer to an employee with respect to salaries, commissions or money payable for services or labour. Several sections within Part 2 provide the means whereby the Director of Employment Standards or other officers appointed under the Public Service Act may enforce those duties and obligations.

¹¹ *Vanderhelm*, *supra* note 5 at 538.

¹² See *Ferris v. Kirstiuk*, [1989] B.C.J. No. 186 (Co. Ct.) (QL) [*Ferris*]; *A'Hearn v. TNT Canada Inc.* (1990), 74 D.L.R. (4th) 663 (B.C.C.A.) [*A'Hearn*]; *Canadian Imperial Bank of Commerce v. General Wholesale Products Corp.* [1991] B.C.J. No. 2240 (S.C.) (QL); *Morgan v. Monk Office Supply Ltd.* [1993] B.C.J. No. 1046 (S.C.) (QL); *Mehta v. British Columbia (Director of Employment Standards)*, [1993] B.C.J. No. 1865 (S.C.) (QL); *Burke v. Podollan Construction Ltd.*, [1996] B.C.J. No. 343 (Prov. Ct.) (QL) [*Burke*]; *Lavigne v. Dak Enterprises Ltd.*, [1996] B.C.J. No. 196 (S.C.) (QL); *Dytkowski v. Blasiak Trucking Ltd.*, [1999] B.C.J. No. 549 (S.C.) (QL); *Cox v. Robertson*, [1998] B.C.J. No. 1754 (S.C.) (QL); *Charles v. A & B Sound Ltd.*, [1999] B.C.J. No. 701 (S.C.) (QL); *Wells v. Patina Salons Ltd.*, 2003 BCSC 1731; *Greenwood v. Ballard Power Systems Inv.*, 2004 BCSC 266.

¹³ This section is comparable to s. 96 of the current ESA. Cf. ESA, *supra* note 2, s. 96.

It is the clear intent of the statute that the remedies provided for in the Act are to be enforced by the Director or other officer, not by the individual employee.¹⁴

In *Burke*, the employee worked as a caretaker of a residential property owned by her employer from 1 April 1993 to July 1994. After the employee left her position in July 1994, she discovered that she had been paid less than the minimum provided in the 1980 ESA during her employment. Accordingly, she lodged a claim with the Director and succeeded in obtaining the difference between the minimum wage under the statute and the amount she received in the last six months of her employment. As the Director had no jurisdiction to consider a claim beyond that period, the employee commenced an action in the Provincial (small claims) Court against her employer and pursued a similar claim for the period not covered in the Director's award. Stansfield Prov. Ct. J., in declining jurisdiction to hear the matter, applied the decisions in *Sitka* and *Vanderhelm*, and explained, at great length, his decision to follow the latter authorities:

I find the reasoning of Mr. Justice Gow in [*Sitka*] persuasive, in terms of it being consistent with the usual assumption that if the legislature enacts remedial legislation which includes a process for enforcement that the public are constrained to use that enforcement process ... and because of its foundation in the earlier *Vanderhelm* decision.

That sounds like slavish adherence to precedent, an approach to decision-making which I find objectionable in its abdication of the responsibility to consider what "makes sense" and is "just". If precedent doesn't satisfy those criteria, then there may be a reason why it doesn't apply in the particular case, or there may be a need to advocate a change in the law. But in my view the [*Sitka*] and *Vanderhelm* decisions both make good sense and are just
....

Legislation like the [ESA] constitutes an intrusion into the law of contract. The historical premise of the law was that persons would govern their commercial relationships by agreements, each party to the agreement theoretically ensuring that their needs and objectives are met. Over time it was recognized that some relationships are so unequal in their relative bargaining power that injustice and oppression can result if there is no legislative intervention. Employment relationships are a clear example: experience

¹⁴ *Ferris*, *supra* note 12.

demonstrated that employers could exert a bargaining leverage that resulted in "bargains" which ... were unacceptable. Thus the legislative recognition of trade unions to give collective bargaining strength to certain employees, and minimum employment standards to protect others....

The [ESA] has created certain rights. Some of those rights are substantive, in the sense of being legislated minimum entitlements; some of the rights are procedural, being mechanisms for realizing the substantive rights. Where the legislation creates such mechanisms, in my view, there is no basis to argue that the legislature also intended persons to achieve an [independent] cause of action enforceable in the civil courts. I take that to be the conclusion of Mr. Justice Gow in [Sitka], and of Mr. Justice Monroe in *Vanderhelm*.¹⁵

In *A'Hearn*, the employees were members of the General Truck Driver and Helpers, Local Union 31, employed by T.N.T. All Trans Express ("All Trans"), a transportation and logistics company. The collective agreement governing the employees expired in December 1988. However, the collective agreement provided that after the giving of the notice to commence collective bargaining, the agreement shall continue in force and effect until the union gave notice of strike or the company gave notice of lockout, or the parties concluded a renewal or revision of the agreement or a new collective agreement. Formal bargaining between the parties continued until August 1989 and the union, in October 1989, commenced a lawful strike. Subsequently, after some further failed negotiations between the parties, in November 1989, All Trans gave notice of a group termination to the federal Minister of Labour pursuant to the *Canada Labour Code*¹⁶, advising its operations would cease on a specific date some months later. Thereafter, in 1989, the Unemployment Insurance Commission determined that the employees were entitled to unemployment insurance as they were no longer engaged in a labour dispute. Subsequently, the employees applied to the Supreme Court of British Columbia for a declaration that All Trans had contravened the Code and that they were entitled to be paid severance pay, outstanding wages, vacation and overtime pay. The trial judge, relying, *inter alia*, on the decision of the Supreme Court of Canada in *St. Anne Nackawic Pulp & Paper Co. Ltd. v. Canadian Paper Workers Union, Local 219*,¹⁷ declined jurisdiction to hear the employees' motion and interfere with the labour relations process (the arbitration

¹⁵ *Burke*, *supra* note 12 at paras. 23-25, 36.

¹⁶ R.S.C. 1985, c. L-2 [Code].

¹⁷ [1986] 1 S.C.R. 704, 28 U.L.R. (4th) 1 [*St Anne*]

process) provided in the collective agreement (and which survived the expiration of the agreement). The employees appealed the trial decision, arguing that the collective agreement expired once the union gave strike notice to All Trans and therefore, the collective agreement did not govern their claims. The Court of Appeal rejected the employees' argument stating that the collective agreement did not expire once the strike notice was given by the union. According to the Court of Appeal, the claims of the employees originated under the Code; the collective agreement, and thus the arbitration procedures in the collective agreement, continued to apply to the resolution of all claims under the collective agreement that arose during the term of that agreement. In upholding the trial decision, the Court of Appeal agreed with the trial judge's reliance on the decision of the Supreme Court of Canada in *St. Anne*:

In that case the Supreme Court of Canada made abundantly clear its view that claims originating under labour legislation such as the Code and under collective agreements such as those before us on this appeal are not to be resolved by the courts. A specialized tribunal such as an arbitration board or officials referred to under the Code, and the arbitration panel selected by the parties themselves, are deemed the more appropriate forums for reasons based on public policy. In speaking for the Court in *St. Anne*, Estey J. said ...:

What is left is an attitude of judicial deference to the arbitration process.... It is based on the idea that if the courts are available to the parties as an alternative forum, violence is done to a comprehensive statutory scheme designed to govern all aspects of the relationship of the parties in a labour relations setting. Arbitration, when adopted by the parties as was done here in the collective agreement, is an integral part of that scheme, and is clearly the forum preferred by the legislature for resolution of disputes arising under collective agreements. ... [I]t might be said, therefore, that the law has so evolved that it is appropriate to hold that the grievance and arbitration procedures provided for by the act and embodied by legislative prescription in the terms of a collective agreement provide the exclusive recourse open to the parties to the collective agreement for its enforcement.

Each of the appellants' claims has its foundation in a provision of the Code or the collective agreement. No part of any of the claims rests on common law.¹⁸

Additionally, the Court of Appeal, referring *inter alia* to the decisions in *Sitka* and *Ferris*, commented:

Since *St. Anne* was decided there has been a clear message from this Court and from other courts in Canada that it would be wrong for the Court to assume a jurisdiction parallel to that of specialty labour tribunals and other speciality tribunals to deal with claims such as those forming the subject of this appeal. For the courts to do so would be to frustrate the comprehensive scheme assigned by Parliament to the other tribunals whose sole work is to address and supervise these matters...¹⁹

While the decision in *A'Hearn* did not specifically deal with an individual employment contract or the ESA, the significance of its analysis and comments concerning claims originating under labour or employment legislation and the deference to be paid to the dispute resolution process provided therein arguably cannot be limited to employment relationships governed by collective agreements and the Code. This is particularly so in light of the Court of Appeal's subsequent reference to the decisions in *Sitka* and *Ferris* to illustrate support for its view that there is a pattern of judicial deference to the dispute resolution process in labour or employment legislation.

IV. SUPREME COURT'S DECISION IN MACARAEG

Notwithstanding the decision of the Court of Appeal in *A'Hearn*, in *Macaraeg* the Supreme Court of British Columbia broke from the pattern of cases in British Columbia (and in other provinces) that followed the *Sitka* line of authority and viewed the ESA as a "self-contained statute" that limited the employee from claiming civilly a remedy or benefit conferred to him or her in the ESA.

In *Macaraeg*, the employee, Cori Macaraeg, a customer service representative, sued her former employer, E Care Contact Centres Ltd. ("E Care"), a payday loan company, for wrongful dismissal and unpaid overtime under section 40 of the ESA, arguing that the statutory right to overtime pay was an implied term of her employment contract and therefore, enforceable with her claim for wrongful dismissal. At the time of her hire,

¹⁸ *A'Hearn*, *supra* note 12 at 671-72.

¹⁹ *Ibid.* at 673.

Macaraeg's written contract of employment with E Care was silent on the issue of overtime pay and when she inquired about overtime pay during her employment, her supervisor advised her that E Care did not pay overtime.

E Care brought an application seeking rulings on two points of law, namely: (1) whether the minimum overtime pay requirements of the ESA are implied terms of the contract of employment between E Care and Macaraeg; and (2) whether Macaraeg was entitled to bring a civil action to enforce her statutory right to overtime pay. On the first point, E Care argued that the overtime pay requirements under the ESA were not implied terms of Macaraeg's contract of employment. On the second point, based on the *Sitka* line of authority, E Care argued that courts in British Columbia do not have jurisdiction to determine statutory claims for overtime pay but the Director does under the legislative scheme of the ESA.

In dismissing E Care's application, Wedge J., on the first point of law, extensively relied on the decisions of the Supreme Court of Canada in *Machtinger v. HOJ Industries Ltd.*²⁰ and of the Supreme Court of British Columbia in *Kenpo Greenhouse Ltd. v. British Columbia (Director of Employment Standards)*.²¹ In *Machtinger*, the Court ruled that the termination clauses in the employment contracts of the two employees, which stipulated a period of notice less than that required under the Ontario ESA²² were void for failing to comply with the minimum standards delineated in the statute. Wedge J. referred to the analysis of both Iacobucci J. and McLachlin J. (as she then was) and pointed out that while both approached the matter differently, they came to the same conclusion:

Where notice provisions are rendered void because they do not meet the statutory minimum, they must be replaced by either the statutory minimum notice period or by reasonable notice at common law. In effect, the employment contracts were read as including one right or the other. The Court decided to replace the void provisions with the more generous of the two rights—notice at common law. That result best ensured the attainment of the statute's objects....

The effect of *Machtinger* is that whether the right to notice flows from statute or common law, it is a right sustainable in a civil action for breach of contract. But for the more generous right to reasonable notice at common law, the employees would have had a claim, based on their

²⁰ [1992] 1 S.C.R. 986, 91 D.L.R. (4th) 491 [*Machtinger*].

²¹ (1997), 32 B.C.L.R. (3d) 347, 27 C.C.E.L. (2d) 223 (S.C.) [*Kenpo*].

²² *Employment Standards Act*, S.O. 2000, c. 41 [Ontario ESA].

employment contracts, to the minimum notice requirements of the Ontario ESA.²³

In *Kenpo*, the Court considered a contractual provision in the employee's contract that provided him 12 percent vacation pay on his base salary but no vacation pay on his production bonuses. According to section 37 of the 1980 ESA then in effect, the employee was entitled to vacation pay calculated at 6 percent of his total wages. The Court, after concluding that wages included production bonuses, relied on subsection 2(1) of the statute, which made void any attempt to contract out of the minimum provisions of the legislation, to hold that the provision in the contract waiving vacation pay on the production bonuses was void and ordered the employer to pay the employee 6 percent vacation pay on the production bonuses (while confirming the 12 percent vacation pay on the employee's base salary under the contract). The court effectively implied the minimum statutory terms in the employee's contract of employment.

According to Wedge J., the combined effect of *Machtinger* and *Kenpo* is that:

Terms of an employment contract failing to meet minimum statutory requirements will be replaced by either the common law or statutory requirement, whichever is more generous to the employee. Where no right exists at common law, the void provisions will be replaced by the statutory requirements.²⁴

Accordingly, on the first point law, Wedge J. concluded that the statutory overtime benefits described in the ESA were implied terms of Macaraeg's contract of employment with E Care and that this conclusion was consistent with the decisions in *Machtinger* and *Kenpo*.

On the second point of law, that is, whether Macaraeg was entitled to bring a civil action to enforce her statutory right to overtime pay, Wedge J. pursued a two-stage analysis. In the first stage, Wedge J. reviewed the *Vanderhelm* decision, which the court in *Sitka* followed twenty years later in establishing in British Columbia a settled view for almost two decades thereafter that an employee could not claim civilly a remedy or benefit conferred to her in the ESA. Wedge J. explained that, in *Vanderhelm*, Munroe J. emphasized that the object and provisions of the statute as a whole must be considered in determining whether or not the statute creates rights enforceable by civil action or simply through the scheme created in the statute itself. Wedge J. also observed that in *Vanderhelm*, the statutory regime under consideration by Munroe J., the AGHA, was

²³ *Macaraeg* (2006), *supra* note 1 at paras. 30, 32.

²⁴ *Ibid.* at para. 43.

very different than the ESA. The AGHA imposed quasi-criminal sanctions for failure by employers to comply with its minimum provisions governing holiday pay for employees. The sanctions included fines for the first and subsequent violations of the statute and minimum terms of imprisonment where the employer failed to pay the fines imposed. The AGHA also expressly required the consent of the Minister to commence a claim for relief or remedy under the enforcement scheme of the statute. According to Wedge J., it was the latter provision that led Munroe J. to conclude that no right of civil action existed in respect of the AGHA. In addition, Wedge J. observed that, in *Vanderhelm*, Munroe J. did not consider the issue of implied contractual terms.

With respect to the decision in *Sitka*, Wedge J. noted that Gow J. followed the decision in *Vanderhelm* in context of the very different statutory regime of the ESA without heeding:

the cautionary statement in *Vanderhelm* that the presumption against civil actions is only a *prima facie* presumption, and that the statute in question must be examined as a whole to determine whether the intention of the legislature was to require employees to invoke only the enforcement mechanisms of the ESA to pursue their statutory employment rights.²⁵

Wedge J. also added that the decision in *Sitka* has been followed by the Supreme Court of British Columbia in several subsequent decisions and treated as "conclusive and binding authority"²⁶ for the proposition that employees cannot bring a civil action to recover employment benefits conferred under the ESA, notwithstanding that:

Neither *Vanderhelm* nor *Sitka* considered the question of whether the minimum employment benefits conferred by the statute were implied terms of the employee's employment contract. Nor was that issue considered in any of the subsequent decisions which followed the result in *Sitka*.²⁷

Having explained the basis of the *Vanderhelm* decision and rejected the authority of *Sitka*, Wedge J. then followed the guidance offered by Munroe J. in *Vanderhelm*, in the second stage of her analysis, by examining the object and provisions of the ESA as a whole with a view to determining whether the ESA expressly or by implication precludes Macaraeg from pursuing her claim for overtime pay in a civil action. First, Wedge notes the stated objectives of the ESA in paragraphs 2(a) and (d), namely, "to ensure that

²⁵ *Ibid.* at para. 74.

²⁶ *Ibid.* at para. 76.

²⁷ *Ibid.* at para. 77.

‘employees receive at least basic standards of compensation and conditions of employment’” and to provide ‘fair and efficient procedures for resolving disputes over the application and interpretation of [the ESA]’”.²⁸ Wedge J. then referred to Part 10 of the ESA and specifically to subsection 74(1), which provides that an employee may complain to the director that a person has contravened the ESA and observes that permissive (and not mandatory) language is used in this substantive provision. Wedge J. next refers to section 76, which delineates the Director's obligation to accept and review complaints, and notes that subsection 76(3) affords the Director the discretion to refuse a complaint in circumstances where the employee has commenced a proceeding or obtained a remedy relating to the subject matter of the complaint in another forum such as a court, a tribunal, in arbitration or in mediation. Wedge J. then refers to section 110 of the ESA, which affords the Employment Standards Tribunal exclusivity relating to appeals and reconsiderations under the ESA, and subsection 136(1) of the British Columbia *Labour Relations Code*²⁹, which affords the Labour Relations Board exclusivity to hear and determine complaints under the LRC, and observes that where the legislature wants to confer exclusive jurisdiction to an administrative tribunal it does so in express language and in the case of the ESA no privative clause exists granting exclusivity to the Director or the Branch to determine complaints under the ESA. On the basis of the foregoing observations, Wedge J. finds that:

In summary, there are no provisions contained in the current ESA that preclude an employee from bringing a civil action to recover the minimum employment benefits employers are statutorily required to provide in contracts of employment. The question remains whether such prohibition arises by implication from an interpretation of the ESA in light of its objects.³⁰

Wedge J. subsequently embarks on a review of several noteworthy decisions, including the Supreme Court of Canada's decisions in *Machtinger* and *Re Rizzo & Rizzo Shoes Ltd.*³¹, wherein the objectives and policy considerations underlying employment standards legislation are discussed including the desired approach to interpreting employment standards legislation. Wedge J. concludes:

The case authorities since *Sitka* have clarified the objects of employment standards legislation, which is to ensure that

²⁸ *Ibid.* at para. 79.

²⁹ R.S.B.C. 1996, c.24[LRC].

³⁰ *Macaraeg* (2006), *supra* note 1 at para. 90.

³¹ [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193 [*Rizzo*].

employers provide their employees with the minimum statutory employment rights required by the legislation. Those authorities have also emphasized that the ESA must be read broadly as "benefits-conferring" legislation, and construed generously with its objects in mind.

The current provisions of the ESA, read as a whole, do not grant exclusive jurisdiction to the Director of Employment Standards to decide claims for benefits conferred by the ESA. The same conclusion arises from a consideration of the legislation in light of [its] objects as articulated by the Supreme Court of Canada in authorities such as *Machtinger* [and] *Rizzo*,

Finally, neither *Sitka* nor decisions following *Sitka* addressed the issue of whether the minimum requirements of the ESA are implied terms of employment contracts and, on that basis, *prima facie* within the jurisdiction of the court in an action for breach of contract.³²

Accordingly, Wedge J. rejected the authority of *Sitka* and ruled that the ESA did not prevent Macaraeg from pursuing her claim for overtime pay by way of a civil action for breach of her employment contract, since the overtime pay provision under the ESA was an implied term of Macaraeg's employment contract.

It should be noted that Wedge J., in breaking with the common ground that an employee could not claim civilly a remedy or benefit conferred to him or her by employment standards legislation did not consider the Court of Appeal's decision in *A'Hearn* or the decision of the Supreme Court of Canada in *St. Anne* that the Court of Appeal in *A'Hearn* followed. The decision in *A'Hearn* is particularly noteworthy for its express adoption of the view espoused by the Supreme Court of Canada in *St. Anne* that labour relations legislation provides a code governing all aspects of labour relations and the dispute resolution process provided therein should not be undermined by allowing parties recourse to courts for dispute resolution as this would offend the legislative scheme of labour legislation. As previously noted, while the decision in *A'Hearn* did not specifically deal with an individual employment contract or the ESA, the significance of its analysis and comments concerning claims originating under labour or employment legislation and the deference to be paid to the dispute resolution process provided therein arguably cannot be limited to employment relationships governed by collective agreements and the LRC. *A'Hearn* is also noteworthy for its mention of the decision in *Sitka* as one of many showing a pattern of judicial deference to the dispute resolution

³² *Macaraeg* (2006), *supra* note 1 at paras. 114-16.

process in labour legislation. Therefore, notwithstanding the reasoning in *Macaraeg* for deviating from the authority of *Sitka*, the decision in *Macaraeg* may yet be subject to a challenge in future cases for its failure to consider both the Court of Appeal's decision in *A'Hearn* and the Supreme Court of Canada's decision in *St. Anne*. In addition, *Macaraeg* may also be challenged for its improper reliance on the *Machtinger* decision as the foundation of the latter case is materially different from *Macaraeg's*. In particular, in *Machtinger*, the employee had both common law and statutory rights to notice and therefore it was not a big leap to conclude that once the statutory minimum was not met, the limitation under the contract was void and the employee was entitled to rely on his common law contractual rights. In *Macaraeg*, however, the issue was overtime pay and there is no parallel common law right to overtime. Therefore, the conclusion of Wedge J. that the minimum overtime pay requirements of the ESA are implied terms of the contract of employment between E Care and Macaraeg, to the extent it is based on the analysis in *Machtinger*, is challengeable.

The Supreme Court's decision in *Macaraeg* was followed by the Supreme Court of British Columbia in *Holland v. Northwest Fuels Ltd.*³³ In *Holland*, the employee, Joseph Holland, a truck driver and depot manager, worked over 1,500 hours of overtime between 2000 and 2001 for Tymoschuk Agencies Ltd. ("Tymoschuk") for which he was only paid straight time, contrary to the ESA in force at the time. On 1 October 2001, Tymoschuk sold its business to Petro-Canada Retail Development Centres (Western) Ltd. ("Petro-Canada") and issued a termination notice to Holland and its other employees. Holland, on the same day, entered into a new contract of employment with Petro-Canada who carried on the business under the name of Northwest Fuels Ltd. ("Northwest"). Holland continued to work for Petro-Canada until 31 May 2003, when the latter terminated his employment. In December 2005, Holland commenced an action in contract against Tymoschuk, Petro-Canada, and Northwest for breach of his employment contract and claimed damages for wrongful dismissal and judgment for unpaid overtime. Holland subsequently settled his claims against Petro-Canada and its related company, Northwest, but continued his claim for unpaid overtime against Tymoschuk. Holland's claim for overtime pay, similar to the claim of the Plaintiff in *Macaraeg*, was statutory in nature as it was based on section 40 of the 2001 ESA³⁴. Holland was also out of time to pursue his claim for overtime pay under the 2001 ESA, as section 74 required him to make his complaint in writing to the Branch and deliver it within six months after the last day of

³³ 2007 BCSC 569, 58 C.C.E.L. (3d) 246 [*Holland*].

³⁴ *Employment Standards Act*, R.S.B.C. 1996, c. 113, s. 40, as am. by S.B.C. 2002, c. 42 [2001 ESA]. See S.B.C. 1995, c. 38, s. 40 (in force 21 April 1997-29 November 2002). This is comparable to the section now in force, Cf. ESA, *supra* note 2, s. 40.

his employment but Holland failed to comply with this requirement³⁵. Therefore, Holland was effectively foreclosed from invoking the enforcement scheme of the 2001 ESA to claim overtime pay earned prior to the termination of his employment with Tymoschuk on 1 October 2001.

Tymoschuk, based on the authorities of *Vanderhelm* and *Sitka*, argued that the court was without jurisdiction to adjudicate Holland's claim as it was based on a statutory right—section 40 of the 2001 ESA—and the 2001 ESA was an exclusive code for enforcing statutory claims for overtime pay. Tymoschuk further asserted that it would be unfair and contrary to the legislative intent to imply the statutory right to overtime pay into Holland's employment contract with Tymoschuk and allow him to enforce it in a civil action when he was clearly out of time in asserting that right through the statutory scheme as he had failed to file his complaint within six months of the termination of his employment with Tymoschuk.

Madam Justice Neilson, in rejecting Tymoschuk's arguments, followed *Macaraeg*:

I have considered the analysis in *Macaraeg*, as well as that in *Sitka* and the cases that have followed it. I prefer the reasoning of Madam Justice Wedge in *Macaraeg*. Her analysis of the issues is comprehensive. I concur with her interpretation of the judgments in *Machtinger* with respect to both the policy and the operation of employment standards legislation. In particular, I agree that a necessary inference to be drawn from those judgments is that minimal employment benefits conferred by such legislation are implied terms of an employment contract. As well, I am in accord with the view that *Vanderhelm* advocates a comprehensive review of the governing legislation in determining whether the statutory benefits provided in employment standards legislation are intended to be implicit terms of the employment contract enforceable through a civil action.³⁶

Having ruled on the issue of jurisdiction of the court to consider a statutory claim under the 2001 ESA, Neilson J. next considered Tymoschuk's argument that since Holland brought his claim for overtime pay in 2005, the ESA in force at the time governed his

³⁵ See S.B.C. 1995, c. 38, s. 74 (in force 21 April 1997-29 May 2002). This section remains substantively unchanged. Cf. ESA, *supra* note 2, s. 74.

³⁶ *Ibid.* at para. 37.

claim. More specifically, Tymoschuk argued that paragraph 80(1)(a) of the 2005 ESA³⁷ should be implied into Holland's contract of employment to limit Holland's claim for overtime pay to a period of six months prior to the termination of his employment with Tymoschuk. This six month limitation was the result of an amendment to the 2001 ESA on 30 May 2002, effectively curtailing a more generous provision allowing an employee to claim wages for a period extending 24 months prior to the termination of employment³⁸. Nielson J. in rejecting Tymoschuk's argument stated:

If provisions of employment standards legislation are implied terms of an employment contract, in my view they must be provisions which were in existence when the employment contract was operative. I do not see how a section from a subsequent version of the legislation can be implied retroactively into an employment contract that has ended. I accordingly conclude that, if s. 80(1)(a) were to be found an implied term of the plaintiff's employment contract with Tymoschuk, it would be the version of that section in the 2001 ESA, which is 24 months. The plaintiff is accordingly entitled to recover the full amount of his claim, which spanned two years.³⁹

In light of the ruling of Nielson J. above, it was unnecessary for Nielson J. to consider whether paragraph 80(1)(a) was an implied term of Holland's contract of employment with Tymoschuk, since the applicable version of this paragraph would be the one in the 2001 ESA, which effectively gives Holland full recovery of his overtime claim—i.e., 24 months. However, because of the importance of the issue, Nielson J. expressed an opinion on the matter in *obiter*:

[T]he intent of the legislature was to provide a broad right to overtime in the current ESA, which ensures that an employee will receive the pay mandated by 5.40(1) for any overtime worked. It was not intended to limit entitlement to overtime to one six-month period. ...

[T]he current ESA contemplates a dual process for enforcement of the right to overtime pay. An employee may take advantage of the speedy and inexpensive complaint procedure provided by ... the legislation. There

³⁷ *Employment Standards Act*, R.S.B.C. 1996, e. 113, s. 80(1)(a), as am. by S.B.C. 2006, c.4 [2005 ESA]. This section is unchanged. Cf. ESA, *supra* note 2, s. 80(1)(a).

³⁸ See *Employment Standards Amendment Act*, S.B.C. 2002, c. 42, s. 42 (amending s., 80(1)(a) of the ESA by striking out "24 months" and substituting "6 months"),

³⁹ *Holland*, *supra* note 33 at para. 45.

are many advantages to this, including the fact that the Director investigates and adjudicates the complaint, and acts to enforce payments on an employee's behalf if a violation is found. On the other hand, by choosing that process, an employee will be subject to legislative restrictions such as that in s. 80(1)(a).

Alternatively, an employee may choose to pursue his or her claim to overtime through a civil action. Such a process may be more costly and take longer, but it will be unencumbered by legislative restrictions. Electing this avenue will permit the employee to avoid the unfairness of having to launch two procedures if he or she is also advancing a claim for wrongful dismissal. ...

[T]he six-month limitation in s. 80(1)(a) is related to considerations of procedural efficiency in dealing with complaints made under ... the current ESA. It is not intended to be of general application to all claims for overtime, and it is not an implied term of the plaintiff's employment contract.⁴⁰

The conclusion of Nielson J. that paragraph 80(1)(a) of the ESA is not an implied term of Holland's employment contract with Tymoschuk is not easy to comprehend in light of the conclusion of Wedge J. that the right to overtime pay is a statutory and not a common law right. One would have thought that if the right to overtime pay is statutory only then any statutory restriction such as that contained in paragraph 80(1)(a) would also be applicable to such right and could not be avoided by an employee by simply pursuing his or her overtime pay by way of a civil action as opposed to under the scheme of the ESA. There is nothing in the ESA that would suggest that any statutory benefit, if pursued by way of a civil action, is not subject to the restriction in paragraph 80(1)(a). Moreover, it seems curious to discriminate between employees on the basis of their choice of arena to enforce their claims to minimum benefits under the ESA. If the legislature had intended to so discriminate then it would have spelled it out in the legislation.

Having reviewed the decision in *Holland*, its authority on the issue of the jurisdiction of courts to consider statutory claims under the ESA is equally challengeable with *Macaraeg's* and on the same grounds as the latter. With respect to Holland's conclusion that paragraph 80(1)(a) of the ESA is not an implicit term in an employee's contract of employment, this conclusion, while *obiter*, has very serious and onerous consequences for employers, if it is followed in future decisions. It has the potential to expose

⁴⁰ *Ibid.* at paras. 64-67.

employers to enormous wage claims subject only to the limitation in subsection 3(5) of the *Limitation Act*⁴¹.

V. COURT OF APPEAL'S DECISION IN MACARAEG

The appeal of the Supreme Court decision in *Macaraeg* was heard in December 2007 by a three-panel bench of Chief Justice Finch, Justice Tysoe and Justice Chiasson⁴². The unanimous decision of the panel allowed the appeal and reversed Wedge J.'s decision, effectively re-establishing the *Sitka* authorities.

The Court of Appeal, whose reasons were provided by Chiasson J.A., used the same two-issue approach as Wedge J.:

1. As a matter of law, were the minimum overtime pay requirements of [the ESA] implied terms of the contract of employment between E Care and its employee, Cori Macaraeg?
2. Is Ms. Macaraeg entitled to bring a civil action to enforce her statutory right to overtime pay, or does the jurisdiction to determine such claims lie exclusively with the Director of Employment Standards under the enforcement mechanisms of the ESA?⁴³

On the first issue, Chiasson J.A. began by unravelling Wedge J.'s reliance on the authorities. He held that the *Machtiger* decision was not an authority for implying a term into a contract and was not relevant to Ms. Macaraeg's case. In an indepth analysis, Chiasson J.A. examined the differences in the reasonings of Iacobucci J., who wrote for the majority, and McLachlin J., who had concurring reasons. Mr. Justice Iacobucci expressly rejected considering implying the terms into the contract. Instead, he elected to resolve the issue on the narrower grounds that reasonable notice was a presumption at common law unless rebutted by the terms of the contract:

For the purposes of this appeal, I would characterize the common law principle of termination only on reasonable notice as a presumption, rebuttable if the contract of employment clearly specifies some other period of notice, whether expressly or impliedly.⁴⁴

⁴¹ R.S.B.C. 1996, c. 266, s. 3(5) ("Any other action not specifically provided for in this Act or any other Act may not be brought after the expiration of 6 years after the date on which the right CO do so arose:),

⁴² 2008 BCCA 182, 295 D.L.R. (4th) 358, 77 B.C.L.R. (4th) 205 [*Macaraeg* (2008)]

⁴³ *Ibid.* at para. 31.

⁴⁴ *Ibid.* at para. 31.

In contrast, McLachlin J. found that the attempt to avoid the question of implied terms was illusory. However, she did not imply statutory terms. Rather she implied the common law reasonable notice into the contract and did not deal with the statutory minimums. Reviewing the case in this light, Chiasson J.A. found that in neither set of reasons were the statutory minimums implied into the contract or was the issue addressed. Therefore, *Machtinger* was not a relevant decision on which Wedge J. could rely.

The Court of Appeal similarly discarded Wedge J.'s reliance on *Kenpo*, distinguishing that case on its nature as an appeal of a certificate by the Director of Employment Standards. The appeal concerned the application of the legislation, and Chiasson J.A. held that there was no issue concerning the implication of contractual terms.

Next, Chiasson J.A. addressed the line of authorities from *Stewart v. Park Manor Motors Ltd.*⁴⁵, which included *Kolodziejewski v. Auto Electric Service Ltd.*⁴⁶ The *Stewart* decision supported the approach that the statutory terms created further contractual terms in the employment agreement:

[T]he essential effect of the Act is to introduce a further contractual term into a contract of employment by providing for the granting of an annual vacation or payment in lieu thereof at a stated rate. Thus that amenity becomes by force of the statute a term of the contract between the parties as fully and effectively as if it had been included therein by their own agreement ...The Act plainly creates a statutory contract which should be enforceable in the established Courts in the same manner as any other term of the contract of service unless the statute either expressly or by necessary implication excludes their jurisdiction.⁴⁷

While the *Stewart* decision provided clear support for Wedge J.'s decision, Chiasson J.A. rejected this approach outright. To Chiasson J.A., the question was not whether the legislation removed the right to a civil action, as *Stewart* proposed. Instead, the question is whether the legislation intended that a civil action be available as an exception to the general rule that rights conferred by statute are to be enforced in the statutory regime.

⁴⁵ (1967), [1968] 1 O.R. 234, 66 D.L.R. (2d) 143 (C.A.) [*Stewart*].

⁴⁶ (1999), 177 Sask. R. 197, 174 D.L.R. (4th) 525 (C.A.).s

⁴⁷ *Macaraeg* (2008), *supra* note 42 at para. 44.

In rejecting the *Stewart* decision, Chiasson J.A. chose instead to follow the older decision of the Supreme Court of Canada in *Orpen v. Roberts*⁴⁸ which, interestingly, was followed by *Stewart*, although improperly.

The *Orpen* decision involved a citizen starting an action for the infringement of a city bylaw. The *Municipal Institutions Act*⁴⁹ allowed the city to commence an action, but had no provision to extend that right to a citizen. Mr. Justice Duff, writing for the majority, held:

But the object and provisions of the statute as a whole must be examined with a view to determining whether it is a part of the scheme of the legislation to create, for the benefit of individuals, rights enforceable by action; or whether the remedies provided by the statute are intended to be the sole remedies available by way of guarantees to the public for the observance of the statutory duty, or by way of compensation to individuals who have suffered by reason of the non-performance of that duty.⁵⁰

Approving of this approach, Chiasson J.A. adopted *Orpen* in opposition to the decision in *Stewart*. As will be shown, the *Orpen* decision featured strongly in Chiasson J.A.'s reasons.

Next, Chiasson J.A. dealt with the Alberta Queen's Bench decision in *Beaulne v. Kaverit Steel & Crane ULC*⁵¹. In that decision, the issue was whether the plaintiff's claim for overtime pay was properly before court. Madame Justice Greckol chose to follow the decisions in *Machtinger*, *Stewart*, and *Kolodziejski*. However, she also determined that the overtime payment was, in fact, a term of the contract. Because of this factual finding, Chiasson J.A. concluded that Greckol J. did not have to follow those earlier decisions. He wrote:

In *Beaulne*, the intention of the parties was to provide overtime, but the amount was not specified; it is a fair inference that the parties intended entitlement not less than the statutory minimums. Indeed, to provide less would be void.⁵²

⁴⁸ [1925] S.C.R. 364, [1925] 1 D.L.R. 1101 [*Orpen*].

⁴⁹ R.S.O. 1914, c.192.

⁵⁰ *Orpen*, *supra* note 48.

⁵¹ 2002 ABQB 787, 325 A.R. 237, 219 D.L.R. (4th) 482 [*Beaulne*].

⁵² *Macaraeg* (2008), *supra* note 42 at para. 53.

The distinction made by Chiasson J.A. in avoiding the *Beaulne* decision suggests that where a contract provides a right otherwise granted by the ESA, the Court will infer that the statutory terms are implied as terms of the contract. This inference is based on implying the statutory terms into the intention of the parties who established an overlapping right with the ESA, but failed to specify how that right would be different from the statutory right. This creates the question of how an employer may agree to provide a statutorily required benefit without establishing evidence of an overlapping contractual intention to provide those rights.

Finally, the Chiasson J.A. disagreed with Wedge J.'s interpretation of *Parry Sound (District) Social Service Administration Board v. O.P.S.E.U., Local 324*⁵³ as holding that the ESA was incorporated into collective agreements. Mr. Justice Chiasson found that there were two findings in *Parry Sound* and neither incorporated the ESA into collective agreements. First, *Parry Sound* established that statutory rights created a bundle of rights which could be augmented, but not derogated. This ratio is consistent with *Machtinger*, but Chiasson J.A. found it does not go so far as to imply terms into a contract. Second, the Ontario Labour Board was granted by the labour legislation the power to interpret and apply human rights and employment related statutes. Therefore, a labour arbitrator applied both the terms of the collective agreement and the employment and human rights legislation. This did not imply the terms into the contract.

In particular counterpoint, Chiasson J.A. noted the British Columbia Court of Appeal's earlier decision in *British Columbia Teachers Federation v. British Columbia Public School Employers' Association*⁵⁴, where it also made the distinction between incorporating a statutory provision into collective agreements and granting the Labour Board the power to interpret and apply the statute. In that case, the Court of Appeal examined *Parry Sound* and held that it was not a precedent for the incorporation of human rights statutes into collective agreements.

Rejecting the Wedge J.'s application of the above authorizes, Chiasson J.A. found that there was no basis for implying the term of the ESA into the employment contract. Chiasson J.A. held that "the analysis begins and likely ends with the decision of the Supreme Court in *Orpen*"⁵⁵. In particular, he found that the "benefits-conferring" nature of the ESA was irrelevant as to the implication of the terms into a contract. However, it was relevant to enforcement, and, therefore, if the statutory enforcement mechanism was inadequate, then the recipient should be entitled to a civil action. He concluded:

⁵³ 2003 SCC 42, [2003] 2 S.C.R. 157, 230 D.L.R. (4th) 257 [*Parry Sound*].

⁵⁴ 2005 BCCA 92, 251 D.L.R. (4th) 497, 345 W.A.C. 120.

⁵⁵ *Macaraeg* (2008), supra note 42 at para. 69.

In my view, the judge erred concluding as a general proposition that rights in employment standards legislation are implied by law into employment agreements. The implication of terms is an adjunct to the conclusion, based on a consideration of the legislation as a whole, that the Legislature intended the rights could be enforced by civil action, a conclusion that may be derived from the absence of an effective statutory enforcement regime.⁵⁶

The Court then turned to the second issue: whether the law permitted the enforcement of a civil cause of action for the breach of the ESA terms. Here, Chiasson J.A. re-established the authority of *Sitka* and *Vanderhelm*.

He found that Wedge J. should not have disagreed with these authorities, as they were not in fact relevant to the case at hand. Flowing from its decision on the first issue, Chiasson J.A. rejected Wedge J.'s statement that those cases failed to consider whether the statutory terms were implied into the contract. As shown earlier, Chiasson J.A. concurred with those decisions in disregarding that the statutory terms could be implied.

Further, Chiasson J.A. made reference to the decision in *A'Hearn*, which, as discussed earlier, was not mentioned by Wedge J. The Appellate Court cited extensively from *A'Hearn* and its references to *St. Anne*. These cases confirmed that courts were not to infringe on the jurisdictions parallel to the specialty labour tribunals. Mr. Justice Chiasson concluded that since that decision, the issue of whether legislation precluded enforcement of an implied contractual term in a civil action simply did not arise.

Addressing the approach of Wedge J., Chiasson J.A. found that the key error was in approaching the analysis from the negative with the question, "does the statute preclude a civil action?" The correct approach was from *Orpen* and *Vanderhelm*, which is to ask, "does the statute permit a civil action?" The answer to that question lies in whether the statute provides an "effective mechanism for enforcement."

On the issue of Ms. Macaraeg's overtime, Chiasson J.A. held there was an effective mechanism provided by the statute and no civil remedy was permitted. He reviewed the interplay of the ESA provisions and held that, as a whole, the legislation did not expressly or by necessary implication permit a civil action. In particular, the Court held that section 118 of the ESA, which reads that the statute does not preclude a person's right to an action, was only for the enforcement of rights that exist apart from the statute. Also, the six-month time limit, which had been a factor in the reasons in *Stewart* and

⁵⁶ *Ibid.* at para.78.

Kolodziesjki in concluding the statutory remedies were not adequate, was considered not such an obstacle to enforcement for Ms. Macaraeg although no reasons were given.

Mr. Justice Chiasson reversed the appeal and dismissed Ms. Macaraeg's overtime claim. On 9 October 2008, the Supreme Court of Canada refused the application for leave to appeal⁵⁷, concluding Ms. Macaraeg's case.

VI. OBSERVATIONS AND RECOMMENDATIONS TO PRACTITIONERS

With the *Sitka* line of authorities returned to precedence, the courts, in limiting claims under the ESA to the statutory mechanism provided, favour the employer. However, counsel for employees may find ground in the *Beaulne* decision, and the distinction made by the Court of Appeal in *Macaraeg*, which permitted the term of the ESA to be implied into the intention of the parties. From Chiasson J.A.'s reasons where an employment contract references a benefit, the Court will presume that the parties intended to imply into that contract the relevant terms of the ESA, and a contracted claim would be possible beyond the time limit of the ESA.

Counsel for employers, as a precautionary measure designed to curtail the potential financial liability of their employer clients, may want to suggest to their clients to include a provision in all their employment contracts to limit their liability to employees for wages, overtime, etc. under the ESA to no more than what is payable under the ESA, as if the claim for wages, overtime, etc. were made pursuant to the relevant provisions of the ESA. That is, section 80 of the ESA limits an employer's financial liability to an employee to wages payable in the period beginning six months before the termination of the employment. While section 80 of the ESA, according to *Holland* and *Macaraeg*, is not an implied term in an employment contract, the limitation contained therein can be expressly incorporated in an employment contract at the time the employer hires the employee thereby limiting the employer's liability to the bare minimum provided under the scheme of the ESA and thus discouraging the employee from pursuing a statutory claim civilly as he or she will not recover any more than what is payable under the enforcement scheme of the ESA.

Further, to avoid falling within the potential *Beaulne* exception, employers may wish to include a provision in their employment contracts that expressly denies any contractual agreement overlapping with the rights and benefits conferred on the employee by the ESA. This effort would be to expressly establish that the necessary benefits that the ESA

⁵⁷ Macaraeg v. E Care Contact Centers Ltd., 2008 CanLII 53790

requires the employer to provide are not paralleled by a contractual agreement, the breach of which may be pursued by a civil action.



Shafik Bhalloo has been a partner of Kornfeld Mackoff Silber LLP since 2000. His practice is focused on labour and employment law, and on commercial and civil litigation. He is also an Adjudicator on the Employment Standards Tribunal and an Adjunct Professor in the Faculty of Business Administration at Simon Fraser University.

 sbhalloo@kmslawyers.com

 <http://www.kmslawyers.com/vcard/sbhalloo.vcf>

 604.331.8308