

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Macaraeg v. E Care Contact Centers Ltd.,***
2008 BCCA 182

Date: 20080501
Docket: CA034710

Between:

Cori Macaraeg

Respondent
(Plaintiff)

And

E Care Contact Centers Ltd.

Appellant
(Defendant)

And

Director of Employment Standards

Intervenor

Before: The Honourable Chief Justice Finch
The Honourable Mr. Justice Chiasson
The Honourable Mr. Justice Tysoe

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Place and Date of Hearing:

Vancouver, British Columbia
10 and 11 December 2007

Place and Date of Judgment:

Vancouver, British Columbia
1 May 2008

Written Reasons by:

The Honourable Mr. Justice Chiasson

Concurred in by:

The Honourable Chief Justice Finch
The Honourable Mr. Justice Tysoe

Reasons for Judgment of the Honourable Mr. Justice Chiasson:

Introduction

[1] This case concerns whether the mandatory overtime provisions of the *Employment Standards Act*, R.S.B.C. 1996, c. 113 [the "**ESA**"] are incorporated as a matter of law as terms of non-union employment contracts and whether entitlement to overtime in accordance with such provisions can be pursued by civil court action.

[2] E Care Contact Centers Ltd. is in the payday loan business. It employs approximately 100 people in Surrey, British Columbia, one of whom was the plaintiff, Ms. Macaraeg. She was hired in May 2004 when she signed a written "Offer of Employment" which set out her rate of pay, vacation entitlement and group benefits. The contract said nothing about overtime pay.

[3] Ms. Macaraeg worked long hours, but was told the company did not pay for overtime. After 30 months, she was terminated without cause and given two weeks' pay in lieu of notice. This action resulted. Ms. Macaraeg claims damages for wrongful dismissal for herself and payment of overtime hours for herself and as the representative of a class of E Care's employees who worked, but were not paid for, overtime.

[4] It is common ground that in the absence of an appropriate provision in an employment contract, compensation for overtime is not payable at common law.

[5] E Care brought an application seeking rulings on points of law which were stated by Madam Justice Wedge in paragraph 1 of her reasons (2006 BCSC 1851, 60 B.C.L.R. (4th) 374, [2007] 1 W.W.R. 421, 54 C.C.E.L. (3d) 275) as follows:

1. As a matter of law, were the minimum overtime pay requirements of the *Employment Standards Act*, R.S.B.C. 1996, c. 113 [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*?

[6] In para. 118, the judge concluded payment for overtime in accordance with the mandatory provisions of the **ESA** was an implied term in Ms. Macaraeg’s employment contract with E Care and the **ESA** does not preclude pursuing overtime payments in a civil court action. E Care appealed.

[7] On June 8, 2007, the Director of Employment Standards was granted intervenor status.

[8] For the reasons that follow, I would allow this appeal.

The chambers decision

[9] The judge noted in para. 15 that Ms. Macaraeg intends to seek certification of this action under the **Class Proceedings Act**, R.S.B.C. 1996, c. 50 [the “**CPA**”], but stated it was not necessary for her to consider the **CPA** on the proceeding before her.

[10] The judge noted correctly in para. 16 that Ms. Macaraeg's cause of action is breach of contract. This led the chambers judge to pose two questions in para. 17: one, is the effect of the **ESA** to introduce a right to be paid overtime into contracts of employment; two, if so, is that right enforceable by civil action the same as any other term of the employment contract?

[11] The judge considered carefully the decision of the Supreme Court of Canada in **Machtinger v. HOJ Industries Ltd.**, [1992] 1. S.C.R. 986, and stated in paras. 30 and 32:

Although the concurring judgment of McLachlin J. [as she then was] approached the issue slightly differently, both judgments in *Machtinger* ultimately 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 employment contracts, to the minimum notice requirements of the *Ontario ESA*.

[12] She then reviewed **Stewart v. Park Manor Motors Ltd.** (1967), 66 D.L.R. (2d) 143, [1968] 1 O.R. 234 (C.A.) [cited to D.L.R.], and **Kolodziejski v. Auto Electric Service Ltd.** (1999), 174 D.L.R. (4th) 525, 177 Sask. R. 197, [1999] 10 W.W.R. 543 (C.A.). In para. 39, the judge quoted the Saskatchewan Court of

Appeal's observations in **Kolodziejski** concerning the Ontario Court of Appeal's decision in **Stewart**.

The decision [in **Stewart**] re-states the underlying basis of the employment standards legislation which is to introduce further terms into employment contracts which can be enforced in the same manner as any other contractual term.

[13] The judge then turned to British Columbia and stated in paras. 41 – 43:

[41] In *Kenpo Greenhouses Ltd. v. British Columbia (Director of Employment Standards)* (1997), 32 B.C.L.R. (3d) 347 (B.C.S.C.), this Court considered circumstances in which an employment contract did not meet the minimum requirements of the *ESA*. Leggatt J., after considering *Machtinger*, stated the following at para. 39:

Employers in British Columbia cannot contract out of the minimum requirements of the *Employment Standards Act* [...]. If they attempt to do so, such efforts are void, and the *Employment Standards Act* [...] applies.

[42] Leggatt J. held that contractual provisions purporting to provide less vacation pay than that guaranteed by the *ESA* were void, and that the employee was entitled to the vacation pay specified by the *ESA*. In effect, the statutory requirements became implied terms of the employment contract.

[43] The result in *Kenpo* accords with *Machtinger*, although in the latter case the more generous common law provisions were implied in the contract, on policy grounds, rather than the statutory minimum notice requirements. The effect of *Machtinger* and *Kenpo*, read together, is the following. 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.

[14] In para. 44 and following the judge discussed **Beaulne v. Kaverit Steel & Crane ULC**, 2002 ABQB 787, 325 A.R. 237, 219 D.L.R. (4th) 482, which held

overtime entitlement specified in employment standards legislation is an implied term of contracts of employment.

[15] Reference then was made to ***Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324***, [2003] 2 S.C.R. 157, 2003 SCC 42. In that case the employer had the right under a collective agreement to terminate probationary employees. One such employee who took maternity leave was terminated before the end of her probationary period when she returned to work. She grieved, alleging the termination violated her rights under the Ontario ***Human Rights Code***, R.S.O. 1990, c. H.19. The arbitration panel constituted to hear the grievance concluded it had jurisdiction to do so. The Supreme Court of Canada agreed. The chambers judge in the case at bar stated in para. 55:

The approach of the majority of the Court in *Parry Sound* is the same as that taken by McLachlin J. in her concurring reasons in *Machtinger*. Employment rights of employees conferred by statute are implied by law into employment agreements irrespective of the parties' subjective intentions.

and concluded in para. 63:

On the authorities and the provisions of the *ESA*, I conclude that the statutory overtime benefits described in ss. 35(1) and 40 of the *ESA* are implied terms of Ms. Macaraeg's employment contract with E Care. That conclusion is consistent with the Supreme Court of Canada's decision in *Machtinger*, this Court's decision in *Kenpo*, and the case law from other provinces.

[16] The judge then turned to the second issue: are the implied terms enforceable by court action?

[17] She referred to **Sitka Forest Products Ltd. v. Andrew** (1988), 32 B.C.L.R. (2d) 62 (S.C.) (in Chambers), in which Gow J. dismissed an employee's counterclaim for vacation pay mandated by the then **Employment Standards Act**, S.B.C. 1980, c. 10. In paras. 74-78, the chambers judge refused to follow **Sitka** and a line of authorities based on it because in none of those cases was the legislation considered as a whole as stipulated by Munroe J. in **Vanderhelm v. Best-Bi Food Ltd.** (1967), 65 D.L.R. (2d) 537 (B.C.S.C.). She also observed in para. 77:

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*.

[18] The judge reviewed the legislation and concluded in para. 90 there are no provisions in the **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". She then turned to the objects of the legislation stating, also in para. 90, "[t]he question remains whether such prohibition arises by implication from an interpretation of the **ESA** in light of its objects".

[19] After again considering **Stewart** and **Machtinger** and the Supreme Court's decisions in **Re Rizzo & Rizzo Shoes Ltd.**, [1998] 1 S.C.R. 27, which characterized employment standards legislation as "benefits-conferring", and **Danyluk v. Ainsworth Technologies Inc.**, [2001] 2 S.C.R. 460, 2001 SCC 44, the judge stated in para. 114:

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

and concluded in para. 118:

The *ESA* does not, expressly or by necessary implication, preclude Ms. Macaraeg from pursuing her claim for overtime pay in a civil action for breach of her employment contract.

Positions of the parties

[20] E Care contends the judge erred concluding the **ESA** does not expressly or necessarily preclude Ms. Macaraeg from claiming overtime in a civil action. It says the statutory remedies are the sole remedies.

[21] E Care also asserts the judge erred holding the minimum overtime provisions of the **ESA** are implied terms of Ms. Macaraeg’s employment contract.

[22] In addition to supporting the chambers judge’s reasons, Ms. Macaraeg contends the **CPA** is an independent source of authority for pursuing payment for overtime.

[23] The Director concurs with E Care’s statement of the alleged errors of the chambers judge and contends the **CPA** affords no support for the decision of the chambers judge.

Discussion

Class action

[24] I first address and reject Ms. Macaraeg’s contention the **CPA** is an independent source of authority for pursuing payment for overtime.

[25] The **CPA** is a procedural statute. It confers no substantive rights. (See **Ontario New Home Warranty Program v. Chevron Chemical Co.** (1999), 46 O.R. (3d) 130 at para. 50, 37 C.P.C. (4th) 175 (Sup. Ct. J.), Winkler J. (as he then was); **Reid v. Ford Motor Co.**, 2006 BCSC 712 at para. 26, [2006] B.C.J. No. 993 (QL)). It allows those with a cause of action to pursue their rights collectively through a representative.

Implied terms

[26] The judge’s analysis began with **Machtinger**. In my respectful view, she erred in her consideration of that case. I do not think the case is relevant to the present issue. **Machtinger** was not concerned with the implication of statutory terms into contracts.

[27] In **Machtinger**, the appellants had provisions in their employment contracts providing for notice on termination less than the minimum prescribed by the Ontario **Employment Standards Act**, R.S.O. 1980, c. 137 (the “Ontario **Act**”). One employee agreed to termination without notice; the other to two weeks’ notice. The statute required a minimum of four weeks’ notice. After dismissal, the employees were given four weeks’ pay in lieu of notice.

[28] At trial, Hollingworth J. held the notice provisions in the contract void. He relied on s. 6 of the Ontario **Act**, which provided the civil remedies of employees were not affected by the legislation, and concluded one employee was entitled to seven months' pay and the other to seven and one-half months' pay in lieu of notice. Pay in lieu of notice is the remedy at common law for breach of the implied term of reasonable notice.

[29] The Court of Appeal agreed the contractual provisions were void, but concluded the agreement of the parties to a period of notice less than reasonable notice at common law evidenced an intention not to provide common law reasonable notice of seven and seven and one-half months.

[30] In the Supreme Court, Iacobucci J., writing for the majority, and McLachlin J. (as she then was), writing for herself, agreed the provisions were void.

[31] At p. 998, Iacobucci J. specifically rejected consideration of implied terms, stating:

The parties devoted considerable attention in argument before us to the law governing the implication of contractual terms, and specifically to the relevance of the intention of the parties to the implication of a term of reasonable notice of termination in employment contracts. The relationship between intention and the implication of contractual terms is complex, and I am of the opinion that this appeal can and should be resolved on narrower grounds. 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.

[32] Madam Justice McLachlin disagreed with this analytical approach, stating at pp. 1006-1007:

The cause of action on which the plaintiffs rely is breach of contract, to be more specific, breach of a contract of employment. To succeed each plaintiff must establish: (a) the existence of a term of the contract entitling him to reasonable notice of termination; and (b) that that term was breached by the employer. Iacobucci J. purports to circumvent this algorithm by stating that the case can be resolved on the narrower ground of a “presumption”. But to assist the plaintiffs, that presumption must operate so as to presume the existence of a term of reasonable notice in the contract; otherwise the plaintiffs have no cause of action. To put it another way, a presumption is simply an evidentiary technique by which the elements of a cause of action may be established; it cannot itself stand as an element of a cause of action. So any attempt to avoid the question of implied terms is illusory, as I see the matter.

[33] At pp. 1001-1002, Iacobucci J. posed the question as: “what did the parties intend should the notice provisions be found to be null and void?” He noted there was no evidence with which to answer that question and at p. 1002 quoted from Lysyk J. in *Suleman v. B.C. Research Council* (1989), 38 B.C.L.R. (2d) 208 at 214 (S.C.), rev’d on other grounds, (1990), 52 B.C.L.R. (2d) 138 (C.A.):

I find nothing in the evidence in the present case to warrant the conclusion that the parties, had they turned their minds to the subject, would have agreed to substitute for the void contractual term the minimum period of notice required by statute instead of looking to the common law standard of reasonable notice.

[34] At p. 1004, Iacobucci J. stated, “if an employment contract fails to comply with the minimum statutory notice provisions of the Act, then the presumption of reasonable notice will not have been rebutted”. He then referred to s. 6 of the

Ontario **Act** and concluded the appellants were entitled to reasonable notice and upheld the trial decision.

[35] Madam Justice McLachlin reached the same conclusion, but not on the basis of the intention of the parties. She stated at p. 1012, “the error of the Court of Appeal was to characterize a term properly implied in law as a term to be implied in fact”, and further, “what is at issue is not the intention of the parties, but the legal obligation of the employer, implied in law as a necessary incident of this class of contract”.

[36] The chambers judge in the case at bar stated in para. 30 that where contractual 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”. According to the chambers judge, “[i]n effect, the employment contracts [in *Machtinger*] were read as including one right or the other”. In para. 31, the judge stated that for McLachlin J. “the question of whether the statutory requirements were implied terms of the employment contracts could not be avoided”.

[37] With respect, I see nothing in the decision of the Supreme Court of Canada to support these assertions. The majority refused to base its analysis on a consideration of implied terms. On an analysis focused on intention the majority concluded the parties did not intend the statutory minimum and common law reasonable notice applied. Madam Justice McLachlin reached the same conclusion

based on reasonable notice being an implied common law term. She was not concerned with whether the statutory minimum was an implied term.

[38] In para. 32 the chambers judge stated:

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

[39] Again, with respect, I see nothing in the judgment to support this conclusion.

The action was for breach of contract. Mr. Justice Iacobucci focused on contractual intention and treated reasonable notice at common law as a rebuttable presumption; McLachlin J. considered reasonable notice at common law to be a term implied by law, making the intention of the parties irrelevant. The implication of a statutory minimum as a contractual term was neither an issue nor was it discussed as such.

[40] It was urged on us that policy comments of Iacobucci J. support the conclusion of the chambers judge. In my view, they do not. Mr. Justice Iacobucci simply noted that his conclusion was consonant with policy, not that it was based on policy considerations. In fact, the contractual grounding of his reasoning is illustrated by his comments at pp. 1004-1005:

[...] an employer can readily make contracts with his or her employees which referentially incorporate the minimum notice periods set out in the Act [...]. Such contractual notice provisions would be sufficient to displace the presumption that the contract is terminable without cause only on reasonable notice.

[41] In para. 41, the judge referred to **Kenpo Greenhouses Ltd. v. British Columbia (Director of Employment Standards)** (1997), 32 B.C.L.R. (3d) 347 (S.C.), noting in para. 42 the court in that case had concluded provisions purporting to provide less vacation pay than guaranteed by the **ESA** were void and the employee was entitled to the vacation pay specified in the **ESA**. The chambers judge said, “[i]n effect the statutory requirements became implied terms of the employment contract”, and continued in para. 43:

The result in *Kenpo* accords with *Machtinger*, although in the latter case the more generous common law provisions were implied in the contract, on policy grounds, rather than the statutory minimum notice requirements. The effect of *Machtinger* and *Kenpo*, read together, is the following. 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.

[42] In ***Machtinger***, more generous common law provisions rather than the statutory minimum notice requirements were not implied into the contract on policy grounds. Firstly, the majority refused to imply terms. Secondly, the policy considerations were consonant with, but not the basis for, the result.

[43] ***Kenpo*** was an appeal from a certificate issued by the Director of Employment Standards. Under the legislation, the complainant employee was entitled to 6 per cent vacation pay on bonuses. In the employment contract, the employee agreed to vacation pay calculated at 12 per cent of his base salary and waived his right to any vacation pay on bonuses. The Director ordered vacation pay on salary and bonuses at 12 per cent. In para. 39, Leggatt J. confirmed the waiver of the right to receive

any vacation pay on bonuses was void. In the result, he applied the legislation and concluded the employee was entitled to 6% vacation pay on bonuses as specified by the legislation. There was no issue concerning implication of contractual terms.

[44] In para. 60, the chambers judge stated she agreed “with the reasoning in **Stewart** that the effect of a minimum benefit conferred by employment standards legislation is to introduce a further contractual term into the contract of employment as effectively as if it had been included by agreement of the parties”. There is much in **Stewart** to support this comment. For example, Schroeder J.A. wrote at pp. 146 and 148-149:

It appears to me that the true answer to the position taken by the appellant [that inasmuch as the statute created a right not recognized at common law and at the same time provided a remedy for its enforcement, it enacted and defined a procedure which was summary and exclusive and ousted the jurisdiction of the established civil Courts] is this, that the 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. There is an illuminating discussion by Viscount Haldane upon the scope and effect of rights resulting from a statutory condition of a contract of employment in *Workmen’s Compensation Board v. C.P.R. Co.*, 48 D.L.R. 218 at pp. 221-3, [1920] A.C. 184, [1919] 3 W.W.R. 167. 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.

[...]

My view that the statute should be construed as one which creates a contractual right to vacation or to compensation in lieu thereof is confirmed by the opinions expressed in the English Court of Appeal in *Waghorn v. Collison* (1922), 91 L.J.K.B. 735, and in *Gutsell v. Reeve*, [1936] 1 K.B. 272. [...] I have come to the conclusion that upon its true

construction it was the intention of the statute, as disclosed by its scope and wording, that remedies enforceable in civil Courts should not be excluded. It is abundantly plain that the Act does not purport to take away that jurisdiction either by express words or by necessary implication.

[45] As will be seen, I question this approach to the issue. In my view, the question is not whether the legislation takes away the right to bring a civil action, but whether it intended that civil action be available as an exception to the general rule that rights conferred by statute are to be enforced in the statutory regime (*Orpen v. Roberts*, [1925] S.C.R. 364). In my view, an important indicator of legislative intent is the enforcement regime in the legislation. Although the court in *Stewart* talked generally of the scheme of the legislation and the intention of the legislators, it also had this to say at p. 148:

An examination of the authorities makes it clear that in the determination of this question [whether in any given case an individual can sue in respect of a breach of statutory duty] it ought to be considered whether the action is brought in respect of the kind of harm which the statute was intended to prevent, if the person bringing the action is one of the class which the statute was designed to protect, and if the special remedy provided by the statute is adequate for the protection of the person injured.

[46] The court continued at p. 149, “I can think of many reasons why the remedy provided by the statute might be held to be inadequate” and then reviewed a number of examples, concluding, “[a]n employee in the position of this respondent would thus be left without a remedy”.

[47] At p. 150 the court concluded, “it was the intention of the statute, as disclosed by its scope and wording, that remedies enforceable in civil Courts should not be excluded”.

[48] In **Kolodziejski** the Saskatchewan Court of Appeal followed **Stewart**. In para. 7 the court noted the intervenor in the case asserted the trial judge erred in “concluding the statutory remedies provided adequate protection”. The court had this to say in paras. 27 – 30:

In my opinion, the intention of the Legislature was not to restrict the remedies available to an employee. Among its purposes, the Act ensures that all employees have certain minimum benefits and an expeditious way to enforce the remedies. The intention of the Legislature was not to limit the employee’s right to enforce the prescribed benefits. Thus, I am of the opinion the trial judge erred in placing too narrow an interpretation on the Legislature’s intent.

The trial judge also found the statutory remedies provided the employee with adequate protection. [...]

[...] It is obvious that if the appellant is not allowed to pursue his claim through a civil action the wage assessment process outlined in the *Act* is for him a non-existent remedy.

In my view, it is not the intention of the Legislature to confer a statutory benefit and yet effectively bar the enforcement of that benefit if that employee fails to bring the claim within the year. I find the trial judge erred in finding the statutory remedies grant the appellant adequate protection.

[49] The judge also referred to **Beaulne**, a decision of the Alberta Court of Queen’s Bench. In that case Greckol J. referred to the policy comments of Iacobucci J. in **Machtiger**. She also relied on **Stewart** and **Kolodziejski**, but in my view she did not need to do so.

[50] In para. 70, Greckol J. concluded the employer had promised to compensate the plaintiff for overtime and that this promise became a term of the employment contract. The Alberta **Employment Standards Code**, R.S.A. 2000, c. E-9, provided in s. 3(1) that it did not affect (a) “any civil remedy of an employee or an employer” and (b) “an agreement”. In my view, the case is of little assistance in this matter.

[51] In para. 71, Greckol J. noted the defendant argued “to the extent the claims for overtime are based on the provisions of the *Employment Standards Code*, they are not properly before [the court]”. She rejected this contention on the basis of **Machtinger, Stewart** and **Kolodziejski**. In my view, based on her findings of fact, the simple answer was the claims were not based on the statute. The judge had determined the promise to pay overtime was a term of the employee’s contract.

[52] In para. 75, Greckol J. stated that in **Machtinger** “the common law implied terms for reasonable notice were enforced in the plaintiffs’ civil actions” and quoted from the judgment of Iacobucci J. In my view, this oversimplifies the basis of the majority judgment. Justice Greckol then stated in para. 76:

Similarly, the Court of Appeal of Alberta held in *Blair v. Godwaldt et al.* (1995), 169 A.R. 217, [...], 125 D.L.R. (4th) 732 (C.A.), at 737 [...], that where collective agreements are involved, the *Code* preserves statutory rights and incorporates them into the agreement, while permitting any greater benefits to be provided. [...]

[53] While this may be true of the Alberta legislation, it is not a conclusion that flows from **Machtinger**. The focus of the majority in **Machtinger** was on the intention of the parties. 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 for less would be void. I shall have more to say about **Stewart** and **Kolodziejski**.

[54] The final case considered by the judge in determining whether the overtime provisions were incorporated as terms of the employment contract was **Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324**. In para. 49, she stated, “the Supreme Court of Canada revisited the issue of whether rights of employees conferred by employment-related statutes were implied terms of employment agreements”. In my view, this overstates the scope of the decision.

[55] In **Parry Sound**, a collective agreement gave management the right to discharge probationary employees at its sole discretion and such action was not subject to the grievance and arbitration procedures of the collective agreement. Prior to the conclusion of her probationary period, an employee went on maternity leave. Within a few days of her return to work and while she still was in the probationary period, she was discharged. She grieved the discharge; the grievance ultimately was referred to arbitration. The employer took the position the Arbitration Board did not have jurisdiction to hear the grievance. Based on s. 48(12)(j) of the Ontario **Labour Relations Act, 1995**, S.O. 1995, c. 1, Sch. A, the majority of the Board disagreed.

[56] Section 48(12)(j) provided that the Board had the power “to interpret and apply human rights and other employment-related statutes, despite any conflict between those statutes and the terms of the collective agreement”. On an

application for judicial review the Board's determination was set aside on the basis it did not have jurisdiction.

[57] Although the Ontario Court of Appeal determined the collective agreement had to be read in light of the Ontario **Human Rights Code**, and in a conflict between it and a collective agreement, the **Code** would prevail, the court decided the case on the basis of s. 64.5(1) of the Ontario **Employment Standards Act**, R.S.O. 1990, c. E.14, which stated the Act was enforceable as if part of the collective agreement. The Ontario **ESA** prohibited dismissal because an employee takes pregnancy leave.

[58] In the Supreme Court Iacobucci J. identified in para. 14 the primary substantive question as “whether the substantive rights and obligations of the *Human Rights Code* are incorporated into a collective agreement over which the Board has jurisdiction”.

[59] In the present case, in para. 49 the chambers judge stated the Court “also discussed the statutory rights of employees under other employment-related statutes, and the effect of those rights on employment contracts”. In para. 55 she said:

While the Court was dealing with a collective agreement rather than an individual employment contract, the significance of its analysis concerning the inclusion of statutory rights in employment contracts cannot be limited to employment relationships governed by collective agreements. The approach of the majority of the Court in *Parry Sound* is the same as that taken by McLachlin J. in her concurring reasons in *Machtinger*. Employment rights of employees conferred by statute are implied by law into employment agreements irrespective of the parties' subjective intentions.

[60] With respect, I am unable to agree with these comments.

[61] As noted, McLachlin J. did not decide the case based on the incorporation into a contract of rights conferred by statute.

[62] In para. 53, the judge refers to the reliance of the Supreme Court in **Parry Sound** on its judgment in **McLeod v. Egan**, [1975] 1 S.C.R. 517. That case, like **Parry Sound**, concerned the exercise of management rights contained in a collective agreement. The court in both cases held management rights cannot override rights granted to employees by statute. Although the court in **Parry Sound** used the word “incorporated”, it also used the word “implicit”. Referring to **McLeod**, Iacobucci J. in **Parry Sound** stated in para. 48, “the right of a probationary employee to equal treatment without discrimination is implicit in each collective agreement”.

[63] In my view, the gravamen of the decision is stated in para. 23:

Under a collective agreement, the broad rights of an employer to manage the enterprise and direct the work force are subject not only to the express provisions of the collective agreement, but also to statutory provisions of the *Human Rights Code* and other employment-related statutes.

[64] In **Parry Sound** the court discussed s. 48(12)(j) of the Ontario **Labour Relations Act, 1995** which, of course, expressly empowered the Board to take into account the Ontario **Human Rights Code**. The issue was the Board’s jurisdiction and the court concluded it had express jurisdiction to take into account human rights.

[65] In para. 54, the chambers judge referred to the observation of Iacobucci J. in para. 29 of **Parry Sound**: “[t]he statutory rights of employees constitute a bundle of

rights to which the parties can add but from which they cannot derogate.” This comment is consistent with the court’s decision in **Machtinger** and goes no further. It does not lead to or support the notion that the statutory rights are incorporated as terms in employment contracts.

[66] Although it is clear that the case concerns a collective agreement and the legislation applicable to employment relationships subject to collective agreements, if **Parry Sound** were taken to have a broad implication it would be that employees are entitled to have respected rights conferred on them by laws of general application.

[67] In **British Columbia Teachers’ Federation v. British Columbia Public School Employers’ Association**, 2005 BCCA 92, 251 D.L.R. (4th) 497, leave to appeal to S.C.C. refused, 30883 (September 15, 2005), this Court dealt with an analogous issue: the arbitrability of an allegation school boards violated statutory class-size requirements. Referring to the comments of Iacobucci J. in **Parry Sound**, Lambert J.A. had the following to say:

[30] The word "incorporated" was chosen by Mr. Justice Iacobucci in the first sentence of paragraph 23 rather than "as if they were part of the collective agreement" which were the words that he chose in paragraph 1, though in the second sentence of paragraph 23, which I have emphasized, the employer's right to manage or direct the workforce is said to be subject to the express provisions of the collective agreement and the statutory provisions of the *Human Rights Code* and other employer-related statutes. It does not say that the statutory provisions need only be applied if they are "incorporated" in the collective agreement.

[...]

[33] Perhaps the most important point in interpreting the majority reasons in *Parry Sound* is that the relevant legislation, namely s. 48(12)(j) of the *Labour Relations Act*, neither expressly nor impliedly incorporates the *Human Rights Code* in collective agreements, but instead empowers arbitrators to "interpret and apply *Human Rights* and other employment-related statutes, despite any conflicts between those statutes and the terms of the collective agreement". The power to apply a statute in interpreting an agreement is not normally thought of as incorporating the statute into the agreement.

[34] The analysis is somewhat different with respect to s. 64.5(1) of the *Employment Standards Act* which provides that the *Act* is enforceable against an employer "as if it was part of the collective agreement". So that provision could be said to constitute an express incorporation of the *Act* in the collective agreement.

[35] Perhaps it was the effort to straddle both the human rights issue and the employment standards issue in a single statement representing a single conclusion which caused the Supreme Court of Canada to use the word "incorporate". But since there is no "incorporation" of the *Human Rights Code*, but simply an express power to apply it, and since the decision of the Supreme Court of Canada rests principally on the application of the *Human Rights Code*, I conclude that it is not necessary in deciding whether to apply an employment-related statute to find that the statute has been "incorporated" in the collective agreement.

[Emphasis in original.]

[68] I do not think the authorities to which the chambers judge referred and her analysis of them support her conclusion that the employment rights of employees conferred by employment standards legislation are implied by law into employment agreements.

[69] In my view, the analysis begins and likely ends with the decision of the Supreme Court in *Orpen*. There the court addressed the enforcement of rights granted by statutes in civil actions.

[70] The case was not referred to in *Machtinger*, but it was at the core of the decision in *Stewart*. Schroeder J.A. had this to say at pp. 147 – 148:

Where a statute creates a liability not existing at common law and provides a particular remedy for enforcing it, the question is raised as to whether the particular remedy provided is the only remedy or whether there is, in addition, a right of action for damages or other relief based on the breach of the statutory duty. As statutory duties deal with a great variety of matters of varying degrees of importance and are directed to a number of different objects it is impossible to give a simple, affirmative or negative answer to this question. Everything depends upon the object or intention of the statute. Liability "must, to a great extent, depend on the purview of the Legislature in the particular statute, and the language which they have there employed": *per* Lord Cairns, L.C., in *Atkinson v. Newcastle Waterworks Co.* (1877), 2 Ex. D. 441 at p. 448. The general principle stated by Lord Halsbury, L.C., in *Pasmore v. Oswaldtwistle Urban District Council*, [1898] A.C. 387 at p. 394, upon which the appellant relies, is a familiar one, but as was stated by Lord Macnaghten, at p. 397:

Whether the general rule is to prevail, or an exception to the general rule is to be admitted, must depend on the scope and language of the Act which creates the obligation and on considerations of policy and convenience.

The test was applied by Bankes, L.J., in *Waghorn v. Collison* (1922), 91 L.J.K.B. 735, where he stated at p. 736:

... I think that, looking at the language of the section, and regarding the scope of the Act, the Legislature did not intend the remedy to be exclusive -- namely, procedure before Justices.

That decision involved an interpretation of s. 4 of the *Corn Production Act*, 1917 (U.K), c. 46, which provided that an employer who failed to pay a workman in agriculture the minimum wage fixed by the Act should be liable on summary conviction to a pecuniary penalty and it was held that it did not exclude the jurisdiction of the High Court to entertain a claim for arrears of wages based on the difference between the amount paid and the minimum rate fixed by the Act.

The applicable principles were dealt with by Duff, J. (as he then was), in *Orpen v. Roberts*, [1925] S.C.R. 364 at pp. 369-70, [1925] 1 D.L.R. 1101 at pp. 1105-6:

Where the offence consists in the non-performance of a duty imposed by statute or the non-observance of a prohibition created by statute, then the rule, based upon the Statute of Westminster, 13 Edw. V, c. 50, is, as stated in Comyn's Digest ("Action upon Statute" (F)):

"In every case where a statute enacts or prohibits a thing for the *benefit of a person* he shall have a remedy upon the same statute for the thing enacted for his advantage or for the recompense of a wrong done to him contrary to the law."

Obviously, this leaves it to be determined in each case whether the enactment relied upon was passed for the benefit of the person asserting the right to reparation or other relief; and, assuming that question to be answered in the affirmative, there may still be the general principle to be considered that, to quote Lord Selborne in *Brain v. Thomas*, 50 L.J.Q.B. 662:

"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 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. *Atkinson v. Newcastle Waterworks Company*, 2 Ex. D. 441, at pages 446 and 447.

It was observed by Romer, L.J., in *Solomons v. R. Gertzenstein Ltd.*, [1954] 2 Q.B. 243 at p. 266, that:

No universal rule can be formulated which will answer a question whether in any given case an individual can sue in respect of a breach of statutory duty.

[Emphasis in original.]

[71] To like effect were the comments of Munroe J. in *Vanderhelm v. Best-Bi Food Ltd.*, at p. 538:

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 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 duty; see *Orpen v. Roberts* [...]

[72] The court's decision in *Stewart* is consistent with its conclusion the statutory enforcement mechanism was inadequate (pp. 149 and 150), as is the decision in *Kolodziejski* consistent with the court's conclusions in that case about the adequacy of the enforcement regime at issue (paras. 7, 28 and 30). Reaching a different decision, Munroe J., in *Vanderhelm*, stated at pp. 539 - 540 the legislation "provides a particular mode of enforcing the new obligation". All conclusions were reached after a consideration of the legislation as a whole.

[73] The law is clear: the general rule is there is no cause of action at common law to enforce statutorily-conferred rights. The exception arises when, on a construction of the legislation as a whole, the court concludes the legislators intended that statutorily-conferred rights can be enforced by civil action. An examination of the cases suggests that the rights are not enforced *per se*, that is, standing alone, but are enforced in a recognized cause of action: *Orpen* – an alleged "negative easement (enforceable in the same manner as a restrictive

covenant)”; **Waghorn v. Collison** (1922), 91 L.J.K.B. 735 – claim for wages as a debt; **Stewart** – breach of contract; **Kolodziejski** – breach of contract. In **The Queen in Right of Canada v. Saskatchewan Wheat Pool**, [1983] 1 S.C.R. 205 at 222-223, the court stated that breach of a statute is evidence of negligence:

The use of breach of statute as evidence of negligence as opposed to recognition of a nominate tort of statutory breach is, as Professor Fleming has put it, more intellectually acceptable. It avoids, to a certain extent, the fictitious hunt for legislative intent to create a civil cause of action which has been so criticized in England.

[74] In my view, in ascertaining the intention of the legislators an important indicium is whether the legislation provides effective enforcement of the right conferred by statute. If the statute does so, there is no need for enforcement outside the statute and *prima facie* there is no civil cause of action. If the statutory remedy is inadequate, a logical conclusion is the Legislature intended the right to be enforceable by civil action. If it were not, granting the right would be pyrrhic. It is at this stage of the analysis in the context of employment standards legislation that the issue of implied contractual terms arises.

[75] I do not accept the proposition articulated by the court in **Kolodziejski** at para. 21 when interpreting **Stewart**:

The decision [in **Stewart**] re-states the underlying basis of the employment standards legislation which is to introduce further terms into employment contracts which can be enforced in the same manner as any other contractual term.

[76] The proposition is based, in part, on the characterizing of employment standards legislation as “benefits-conferring” (**Re Rizzo & Rizzo Shoes Ltd.**). In my

view, there is no correlation between “benefits-conferring” and the importation of terms into a contract. There is a relationship between “benefits-conferring” and enforcement. That is, if the statutory enforcement mechanism were inadequate to enforce the conferred benefit, the recipient of the benefit should have recourse to a civil cause of action.

[77] I reject the broad proposition that rights granted by employment standards legislation are implied terms of employment contracts. In my view, the cases relied on by the learned chambers judge do not support such a conclusion. **Machtinger** and **Kenpo Greenhouses** do not concern statutorily-implied terms. While asserting the broad proposition that statutory rights are implied contractual terms, in my view, **Stewart** and **Kolodziejcki** are on much more solid ground insofar as the statutory enforcement regimes in those cases were determined to be unsatisfactory and this afforded the plaintiffs a cause of action for breach of contract. **Parry Sound** concerned the jurisdiction and obligation of arbitrators in a collective agreement setting to apply laws of general application in the context of the exercise of management rights.

[78] 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.

Enforcement and civil cause of action

[79] After concluding the overtime provisions of the **ESA** were implied terms of Ms. Macaraeg's employment contract, the judge posed the question: "[a]re these implied terms enforceable in a civil action for breach of contract?" She concluded in para. 118 the **ESA** does not preclude Ms. Macaraeg from pursuing her claim for overtime pay in a civil action for breach of contract.

[80] In reaching that conclusion the judge rejected a line of British Columbia Supreme Court cases, flowing from **Sitka**, which followed **Vanderhelm**, and held employees do not have a cause of action to enforce rights granted by the province's employment standards legislation. With respect, those cases were not relevant to the conclusion of the judge.

[81] In para. 77, the judge expressed concern that in neither **Vanderhelm** nor **Sitka** did the court consider "whether the minimum employment benefits conferred by the statute were implied terms of the employee's employment contract". In my view, the court in those cases made no error on that account.

[82] It is of interest to note that this Court referred to **Sitka** with approval in **A'Hearn v. T.N.T. Canada Inc.** (1990), 74 D.L.R. (4th) 663 at 673 (B.C.C.A.), as supporting the following observation:

Since [*St. Anne Nackawic Pulp & Paper v. C.P.U.*, [1986] 1 S.C.R. 704] 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 specialty 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 [cases omitted].

[83] In **Sitka** and the cases that followed it, having concluded employees did not have a civil cause of action, the court had no need to consider, and did not consider, whether the rights were implied terms of the employment contract. That being the case, the issue whether the legislation precluded enforcement of implied contractual terms in a civil action did not arise.

[84] In her consideration of the second question, the judge reviewed the legislation, but, in my view, her review was flawed because it approached the issue negatively: does the legislation preclude the civil action to enforce a contractual right? As noted, and as mandated by **Orpen** and **Vanderhelm**, the inquiry is whether the legislation allows pursuance of statutorily-conferred rights in a civil action. In my view, the answer to that question ends the inquiry: if yes, in a case such as this, the right is an implied contractual term and enforceable in an action for breach of contract; if no, the employee is obliged to rely exclusively on the enforcement mechanism in the legislation.

[85] In my view, the answer in this case depends on whether the **ESA** provides an effective mechanism for enforcement of Ms. Macaraeg's right to overtime. I conclude it does.

[86] An examination of the legislation shows it provides a comprehensive administrative scheme for the granting and enforcement of employee rights.

[87] Section 3 deals at length with the relationship between the **ESA** and collective agreements, including in s-s. (3) the incorporation of provisions of the legislation as part of the terms of a collective agreement when the agreement is silent on the particular matter. That is, the Legislature addressed specifically one type of employment contract, but did not address employment contracts in general. The grievance procedures of collective agreements are said to apply and the results of grievance arbitrations are enforceable under the **ESA** (s-s. 3(7) and 3(8)).

[88] Section 74 provides for complaints to the Director of Employment Standards for contravention of the **ESA**. Complaints are investigated by the Director, whose investigative powers were defined in s. 84 by reference to the powers of a Commissioner under ss. 12, 15 and 16 of the **Inquiry Act**. Since June of 2007, s. 84 of the **ESA** sets out in full the Director's power to compel persons to answer questions and order disclosure. The authority to investigate now is given expressly to the Director who can obtain the assistance of the Supreme Court with the added force of potential contempt of court proceedings. If the Director were satisfied there has been a contravention, he can require compliance, which includes the payment of, in this case, overtime wages (s. 79). Pursuant to s. 98, contravention of the **ESA** attracts a fine in addition to the obligation to comply with the Director's determination under s. 79.

[89] The payment of interest is dealt with in s. 88.

[90] There are a number of sections addressing enforcement. Unpaid wages constitute a lien on the assets of persons identified in a determination of the Director.

The lien has priority over other named interests (s. 87). Payment can be obtained from third parties who owe money to a person identified in a determination (s. 89).

[91] Pursuant to s. 91, the Director's determination can be filed in the Supreme Court and is enforceable in favour of the Director in the same manner as a judgment of the court. Section 92 authorizes the Director to seize assets owned or possessed by a person who is required to pay under a determination. Money obtained by the Director is held for the employee.

[92] An appeal to the Employment Standards Tribunal from a determination of the Director is provided by s. 112 and s. 116 authorizes a reconsideration of the Tribunal's orders or decisions.

[93] These provisions present a complete code for the granting and enforcement of statutorily-conferred benefits.

[94] There are a few provisions of the **ESA** that require further consideration: ss. 76(3)(f), 118 and 74(3).

[95] Under s. 76(3) the Director may refuse to accept a complaint, or may terminate a complaint if, "a proceeding relating to the subject matter of the complaint has been commenced before a court, a tribunal, an arbitrator or a mediator". In my view, this does not support an intention to allow a civil action to enforce rights granted by the **ESA**. That proposition begs the question: what proceedings? For example, clearly there is a common law action for wrongful termination of an employment contract. If an employee were to bring such an action, as in this case,

the Director could decline or could discontinue an investigation into a complaint based on the termination liability provisions of the **ESA** because, arguably, the subject matter of the complaint, payment on termination, is before the court. The section does not support the proposition that a civil action is available to pursue statutorily-granted rights that are not available at common law.

[96] Section 118 provides:

Subject to section 82, nothing in this Act or the regulations affects a person's right to commence and maintain an action that, but for this Act, the person would have had the right to commence and maintain.

[97] In my view, this section addresses actions to enforce rights that exist apart from the provisions of the **ESA**; that is, rights a party could enforce regardless of the **ESA**. The section does not open the door to civil actions to enforce rights conferred by the statute.

[98] Section 74(3) requires a complaint to be brought within six months of the last day of employment. Section 80(1) limits the amount of wages recoverable on a Director's determination to six months before the earlier of the date of a complaint or termination or, in cases other than complaints, six months before the date an employer was advised of an investigation. Similar provisions in the legislation under consideration in **Stewart** and **Kolodziejki** influenced the court in those cases to conclude the statutory remedies were not adequate. Considering the **ESA** as a whole, I would not so conclude in this case.

[99] Arguably, these provisions identify the scope of rights granted by the legislation and have nothing to do with enforcement, but even if they were considered to do so, I would not conclude they support the notion the legislators intended to make available enforcement through a civil action. This would result in rights incorporated as terms of employment contracts having a greater reach than their source, a statute, and would enable a party to enforce those rights far beyond the boundaries specified by the legislators.

Summary

[100] In my view, the learned chambers judge erred in concluding that rights granted by employment standards legislation are incorporated into employment contracts as a matter of law regardless of the intentions of the parties. The cases relied on by the chambers judge do not support such a conclusion.

[101] The proper analysis begins with ***Orpen***: did the legislators intend that conferred rights could be enforced by civil action? The answer to the question requires consideration of the legislation as a whole. If it affords effective enforcement of the rights, the general proposition, that statutorily-conferred rights are to be enforced not by court action, but by a statutory mechanism, applies. If the legislation does not afford effective enforcement, the exception to the general rule applies and the rights can be enforced in a civil action. The civil action will be based on recognized causes of action. In the case of rights conferred on employees through employment standards legislation, the rights will be implied terms of the employment contract and enforced through an action for breach of contract.

[102] When a statute provides an adequate administrative scheme for conferring and enforcing rights, in the absence of providing for a right of enforcement through civil action expressly or as necessarily incidental to the legislation, there is a presumption that enforcement is through the statutory regime and no civil action is available.

[103] In this case, the **ESA** provides a complete and effective administrative structure for granting and enforcing rights to employees. There is no intention that such rights could be enforced in a civil action.

Conclusion

[104] A correct analysis would reverse the order of the questions posed by E Care because the answer to the second question flows out of the answer to the first. I would allow the appeal and answer the questions as follows:

1. Ms. Macaraeg is not entitled to enforce her statutory right to overtime pay in a civil action; the exclusive jurisdiction to determine such claims lies with the Director, subject to an appeal to the Tribunal, all pursuant to the provisions of the **ESA**;

2. as a matter of law, the minimum overtime pay requirements of the **ESA** were not implied terms of the contract of employment between E Care and Ms. Macaraeg.

“The Honourable Mr. Justice Chiasson”

I agree:

“The Honourable Chief Justice Finch”

I agree:

“The Honourable Mr. Justice Tysoe”