

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Macaraeg v. E Care Contact Centers Ltd.,***  
2006 BCSC 1851

Date: 20061213  
Docket: S-062055  
Registry: Vancouver

Between:

**Cori Macaraeg**

Plaintiff

And

**E Care Contact Centers Ltd.**

Defendant

**Brought Pursuant to the *Class Proceedings Act*, R.S.B.C. 1996, c. 50**

Before: The Honourable Madam Justice Wedge

## **Reasons for Judgment**

Counsel for the Plaintiff

Daniel B. Gleadle

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Date and Place of Trial/Hearing:

October 10 - 11, 2006  
Vancouver, B.C.

**I. INTRODUCTION**

*Nature of the Application*

[1] E Care Contact Centers Ltd. [“E Care”] has brought an application pursuant to Rule 34 of the **Rules of Court**, B.C. Reg. 221/90 seeking rulings on the following points of law:

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**?

*The Dispute*

[2] Ms. Macaraeg has brought a wrongful dismissal action against E Care. She seeks damages in lieu of reasonable notice and payment for the overtime hours she worked during her employment.

[3] British Columbia, like all other jurisdictions in Canada, has legislated basic standards of compensation and conditions of employment for most employees through the provisions of the **ESA**. The requirements of the **ESA** cannot be waived

by agreement (unless by collective agreement substituting similar benefits). Section 4 of the **ESA** provides as follows:

4 The requirements of this Act and the regulations are minimum requirements and an agreement to waive any of those requirements, not being an agreement referred to in section 3(2) or (4) [collective agreements], has no effect.

[4] The current provisions of the **ESA** governing an employer's obligation to pay overtime premiums are contained in Part 4 of the **ESA**. The relevant provisions, ss. 35(1) and 40, provide as follows:

35 (1) An employer must pay an employee overtime wages in accordance with section 40 if the employer requires, or directly or indirectly allows, the employee to work more than 8 hours a day or 40 hours a week.

...

40 (1) An employer must pay an employee who works over 8 hours a day, and is not working under an averaging agreement under section 37,

- (a) 1 1/2 times the employee's regular wage for the time over 8 hours, and
- (b) double the employee's regular wage for any time over 12 hours.

(2) An employer must pay an employee who works over 40 hours a week, and is not working under an averaging agreement under section 37, 1 1/2 times the employee's regular wage for the time over 40 hours.

(3) For the purpose of calculating weekly overtime under subsection (2), only the first 8 hours worked by an employee in each day are counted, no matter how long the employee works on any day of the week.

[5] E Care did not pay overtime to Ms. Macaraeg for the hours she worked beyond 8 hours per day or 40 hours per week. Ms. Macaraeg says the minimum overtime pay requirements under the **ESA** are implied terms of her employment contract and are thus enforceable by this Court along with her claim for wrongful dismissal.

[6] E Care says the minimum overtime pay requirements under the **ESA** are not implied terms of employment contracts.

[7] Further, says E Care, the law in this province is well-settled: The courts do not have jurisdiction to hear claims for overtime pay based solely on an employee's statutory right to overtime. Instead, the Director of Employment Standards has exclusive jurisdiction under the **ESA** to deal with claims for overtime pay under the enforcement mechanisms of the statute.

## **II. BACKGROUND**

[8] For the purpose of providing a context for the issues to be determined in the application, and for that purpose only, I have relied on the following facts.

[9] E Care is in the payday loan business. Its head office is in Manitoba. It also has offices in Surrey, British Columbia, where it employs approximately 100 employees.

[10] E Care hired Ms. Macaraeg in May of 2004 to work as a Customer Service Representative. At the time of her hire, she signed a written "Offer of Employment", which set out her rate of pay (\$27,600 per annum), paid vacation entitlement (2

weeks per annum after 12 months of employment, as stipulated by the **ESA**), and a group benefits plan. The document was silent on the issue of overtime pay.

[11] Ms. Macaraeg alleges that shortly after her employment with E Care commenced, she began working long hours. She says she routinely worked 12 hours per day during the week and 8 hours on Saturdays. When she inquired as to overtime pay, she was told by her supervisor that E Care did not pay overtime rates for extended work days.

[12] Ms. Macaraeg acknowledges there is no evidence to suggest any practice on the part of E Care to pay overtime rates for extended days of work, nor did E Care ever agree to pay overtime.

[13] Ms. Macaraeg's employment was terminated without cause in February of 2006. After 30 months of employment, she was given two weeks' pay in lieu of notice.

[14] Ms. Macaraeg commenced an action for wrongful dismissal. In that action, she claims damages in lieu of reasonable notice (including overtime premiums during the notice period) and payment for the overtime hours she worked during her employment with E Care.

[15] Ms. Macaraeg has also made the claim for overtime on behalf of a class of E Care employees pursuant the **Class Proceedings Act**, R.S.B.C. 1996, c. 50 [the "**CPA**"], and will seek, at a future date, to have that claim certified as a class proceeding. As I have concluded that the issues arising in this application do not

require consideration of the provisions of the **CPA**, I will not refer to that aspect of the claim any further.

### **III. DISCUSSION**

#### *Introduction*

[16] An employee who alleges a breach of the terms of his or her employment contract may bring a civil action in court. The cause of action is breach of contract.

[17] An employee who alleges a breach of his or her right to the minimum employment terms required by the **ESA**, where the employment contract is silent with respect to those terms, may bring a claim to the Director of Employment Standards under the enforcement mechanisms of the **ESA**. It is less clear whether that employee can also bring a civil action, based on the employment contract, to enforce the minimum statutory employment rights. Two questions arise in that context. First, is the effect of the minimum employment rights conferred by the **ESA** to introduce further contractual terms into an employee's employment contract? Second, if so, are those statutory rights enforceable by way of a civil action in the same manner as any other term of the employment contract?

[18] I will address those questions in turn.

#### ***1. Are statutory employment rights implied terms of employment contracts?***

##### *The law concerning implied terms*

[19] Courts in several jurisdictions have considered the effect of statutory employment rights on contracts of employment.

[20] The Supreme Court of Canada considered the issue in **Machtiger v. HOJ Industries Ltd.**, [1992] 1 S.C.R. 986 [**"Machtiger"**]. That case involved the dismissal of two individuals employed by a car dealership. The employees' written contracts with their employer contained termination clauses permitting termination with less notice than that required as a minimum under the **Employment Standards Act**, R.S.O. 1980, c. 137 [the "**Ontario ESA**"]. The contracts contained clauses allowing the employer to dismiss without cause. In the case of one employee, dismissal was without notice, and, in the case of the other, dismissal was on two weeks notice. Under the **Ontario ESA**, the employees were entitled to four weeks notice. The **Ontario ESA** prohibited waiver of its minimum requirements.

[21] The employees had both worked for the employer for a period of seven years at the time of their termination. After they were dismissed, the employer paid each of them the equivalent of four weeks salary. The employees brought an action for wrongful dismissal. The trial judge held that the termination clauses were void and that the employees were entitled to reasonable notice of termination under the common law. He concluded that the period of reasonable notice was 7 months for one employee and 7 1/2 months for the other.

[22] The Court of Appeal ((1988), 66 O.R. (2d) 545) reversed the judgments, holding that while the clauses were void, the parties had never intended to include in the contracts the common law requirement of reasonable notice on termination. In the absence of an implied term of reasonable notice in the two contracts, the employees were limited to the minimum notice period conferred by the **Ontario ESA**.

[23] On further appeal, the Supreme Court of Canada had little difficulty concluding that the clauses were void because they provided for a shorter notice period than that required by the **Ontario ESA**. The more difficult question was the employees' entitlement to notice once the offending clauses were struck. Mr. Justice Iacobucci, writing for the majority, stated the issue as follows at 996:

If an employment contract stipulates a period of notice less than that required by the *Employment Standards Act*, R.S.O. 1980, c. 137, is an employee who is dismissed without cause entitled to reasonable notice of termination, or to the minimum period of notice required by the Act?

[24] The employment contracts appeared to be an attempt to contract out of the minimum notice period required by the **Ontario ESA**. As such, said Iacobucci J. at 996:

...[T]he question posed by this appeal is deceptively simple: of what significance is an attempt to contract out of the minimum notice requirements of the Act?

[25] Iacobucci J. began the analysis by characterizing the common law principle of termination on reasonable notice as a presumption which could be rebutted if the contract clearly specified some other period of notice that complied with the minimum requirements of the statute. He then turned to the relevant policy considerations underlying employment standards legislation, bearing in mind that every employment statute must receive the interpretation best ensuring the attainment of its objects (s. 10 of the **Interpretation Act**, R.S.O. 1980 c. 219). Iacobucci J. described the main objective of the legislation as follows:

The objective of the Act is to protect the interests of employees by requiring employers to comply with certain minimum standards, including minimum periods of notice of termination.

(**Machtinger** at 1003)

[26] Iacobucci J. concluded at 1004 that the approach most consistent with the objects of the **Ontario ESA** was one in which the employee is entitled to reasonable notice at common law where an employment contract fails to comply with the minimum notice requirements of the statute. That result, he said, would encourage employers to comply with the employment standards legislation. Further, it would not “disproportionately burden” employers (**Machtinger** at 1005) because they may avoid the more onerous result by entering into employment contracts incorporating the minimum notice periods stipulated in the legislation. The notice provisions would then be converted from a statutory floor to a ceiling, and be sufficient to displace the presumption of reasonable notice.

[27] Iacobucci J. observed, at the conclusion of his analysis at 1006, that he need not “revisit” earlier judgments of the court regarding terms of contracts implied by law.

[28] McLachlin J. (as she then was), in a concurring judgment, framed the issue slightly differently at 1007 of **Machtinger**:

[I]n the absence in a contract of employment of a legally enforceable term providing for notice on termination, on what basis is a court to imply a notice period, and, in particular, to what extent is intention to be taken into account in fixing an implied term of reasonable notice in an employment contract?

[29] To answer the question, McLachlin J. reviewed the law governing implied contractual terms. She noted that the intention of the contracting parties is not relevant to contractual terms that are implied as a matter of law. Requirements for reasonable notice in employment contracts are terms implied by law and, as such, the intentions of the parties were not relevant. The notice provisions in the employment contracts were void because they did not meet the minimum requirements under the statute. McLachlin J. concluded that in the absence of the minimum notice provisions required by statute, the common law right to reasonable notice must be implied by law.

[30] Although the concurring judgment of McLachlin J. approached the issue slightly differently, both judgments in *Machtiger* 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.

[31] In the view of McLachlin J., the question of whether the statutory requirements were implied terms of the employment contracts could not be avoided. That is because the presumption of reasonable notice is not, of itself, a cause of action. The plaintiffs in *Machtiger* could not succeed in their action unless reasonable notice was a term of their contract:

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 the 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.*

(*Machtinger* at 1006, emphasis added)

[32] 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*.

[33] The question of whether minimum employment rights conferred by statute are implied terms of employment contracts was directly addressed many years earlier by the Ontario Court of Appeal in *Stewart v. Park Manor Motors Ltd.* (1967), 66 D.L.R. (2d) 143 (Ont. C.A.) [*“Stewart”*].

[34] In *Stewart*, an employee brought a civil action to recover holiday pay to which he was entitled under the *Hours of Work and Vacations with Pay Act*, R.S.O. 1960, c. 181. That legislation contained quasi-criminal enforcement provisions. An employer who failed to comply with the provisions of the statute was

liable, on summary conviction, to a fine. In the event of a conviction, the employer was also liable to the employee for the minimum holiday pay provided by the statute.

[35] The issue before the Court was whether the employee was limited to enforcing his rights under the statute rather than having the option of bringing a civil action for recovery of his holiday pay. Schroeder J.A., writing for the Court, said the following at p. 147:

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.

[36] Schroeder J.A. concluded that the statutory right to holiday pay became a term of the employment contract, which was enforceable by way of a civil action unless the statute expressly, or by necessary implication, excluded the court's jurisdiction:

It appears to me that the true answer to the position taken by the appellant 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. ...* 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.

(**Stewart** at pp. 148 - 149, emphasis added)

[37] In **Kolodziejski v. Auto Electric Service Ltd.** (1999), 174 D.L.R. (4th) 525, 177 Sask. R. 197 (Sask. C.A.), the Saskatchewan Court of Appeal considered the issue of statutory rights implied by law in employment contracts. An employee brought a civil action to recover vacation pay specified by the **Labour Standards Act**, R.S.S. 1978, c. L-1. He brought the civil action because his claim was beyond the six month limitation period for recovery using the machinery provided by the legislation. The action was dismissed by the trial judge on the basis that the claim was based exclusively on a statutory right and thus beyond the court's jurisdiction.

[38] The Saskatchewan Court of Appeal, referring to **Machtiger** and **Stewart**, concluded that the trial judge was wrong. Lane J.A., writing for the Court, referred to the purposive approach taken in **Machtiger** to the interpretation of employment standards legislation. He also noted that the **Stewart** decision dealt squarely with the issue of enforceability of statutory employment rights in a civil action for breach of contract.

[39] Lane J.A. concluded at para. 21 that at the heart of the decision in **Stewart** was the recognition that the benefits conferred by the legislation are, in effect, part of every employment contract and enforceable as such:

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.

[40] Subsequent decisions of the Saskatchewan courts have applied the principles in **Kolodziejski**, and found statutory requirements to be implied terms of employment contracts:

In my view, the reasoning in the Kolodziejski case implicitly supports the proposition that a purely statutory liability such as overtime pay can be the subject of a claim in the courts, even though it is not tied to or bundled with a common law claim. *It rests on the court's jurisdiction in matters of contract, and to determine breach of contractual terms, notwithstanding that the contractual terms have been deemed into effect by statute: **Watson v. Wozniak (c.o.b. W5 Eld'r Care Homes)** (2004), 252 Sask. R. 153 at para. 22, 2004 SKQB 339.*

(Emphasis added)

[41] In **Kenpo Greenhouse 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, supra*. If they attempt to do so, such efforts are void, and the *Employment Standards Act, supra*, 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.

[44] The issue of whether statutory overtime benefits are implied terms of employment contracts was considered more recently by Greckol J. of the Alberta Court of Queen's Bench in **Beaulne v. Kaverit Steel & Crane ULC** (2002), 219 D.L.R. (4th) 482, 2002 ABQB 787 [**Beaulne**]. The plaintiff brought a claim for wrongful dismissal. A subsidiary issue was the plaintiff's entitlement to overtime pay for extended hours she worked during her employment. There was no provision for overtime pay in the employment contract, but the plaintiff's employer advised her verbally that she would be compensated for overtime with pay or time in lieu. There was no discussion about the amount of the overtime pay. The plaintiff worked overtime hours for approximately one and a half years without receiving any compensation or time in lieu. It was not until her termination that she sought payment for the overtime hours worked as part of her wrongful dismissal action.

[45] The employer argued that to the extent the overtime claim was based on the provisions of the **Employment Standards Code**, R.S.A. 2000, c. E-9, it was beyond the jurisdiction of the court and must be pursued under the legislation.

[46] Greckol J. rejected the employer's argument. She found there was a verbal agreement concerning overtime that was void due to its failure to specify the minimum overtime benefits under the Alberta legislation. Relying on **Machtinger**, **Stewart** and **Kolodziejski**, Greckol J. held that the minimum requirements of the statute were implied terms of the employment contract.

[47] With respect to the **Machtinger** decision, Greckol J. said the following at para. 78:

In construing a contract of employment, as in the present case, the Court must construe the contract as informed by the prevailing law. The effect of the Code is that any imposition by the employer of a contractual term that overtime will vaguely be compensated by a pay increase is void. Further, the Code provisions that mandate overtime pay for hours worked beyond the statutory threshold, and that set the rate at which such overtime hours will be paid, are incorporated into the Plaintiff's contract of employment.

And, at para 81:

The availability of civil process for employees to enforce their employment contracts, including terms incorporated from the Code, is consistent with the purposes of the Code, which were so clearly articulated by Iacobucci J. in **Machtinger** ...

[48] Greckol J. noted there were two appellate court decisions – **Kolodziejski** and **Stewart** – supporting the plaintiff's position that she was entitled to enforce her overtime claim, based on the statutory minimum under the statute, in her civil action for wrongful dismissal. At para. 86, Greckol J. said the following:

The court in **Kolodziejski** held that despite the differences between the Ontario and Saskatchewan Acts, the reasoning in **Stewart** was still valid. The effect of the employment standards legislation was to introduce further terms into employment contracts which can be enforced in the same manner as any other contractual term.

[49] In the case of *Parry Sound (District) Social Services Administration Board v. Ontario Public Service Employees Union, Local 342*, [2003] 2 S.C.R. 157, 2003 SCC 42 [*“Parry Sound”*], the Supreme Court of Canada revisited the issue of whether rights of employees conferred by employment-related statutes were implied terms of employment agreements. The case considered the non-discrimination provisions of the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19 [the *“Human Rights Code”*], but the Court also discussed the statutory rights of employees under other employment-related statutes, and the effect of those rights on employment contracts.

[50] The employment contract under consideration was a collective agreement. The plaintiff, a unionized employee, took maternity leave before the end of her probationary period. When she returned from maternity leave, the employer terminated her. The collective agreement contained a clause permitting the employer to terminate probationary employees and precluding any challenge of the termination by grievance. The union grieved the termination on the basis that it was in violation of the employee’s right, guaranteed by the *Human Rights Code*, to equal treatment in employment matters without discrimination on the basis of family status.

[51] The majority of the arbitration panel concluded that it had jurisdiction to hear the matter because a section of the Ontario *Labour Relations Act, 1995*, S.O. 1995, c. 1 Schedule A, empowered arbitrators to “interpret and apply” the *Human Rights Code*. That decision was overturned by the Ontario Divisional Court: (2000), 131 O.A.C. 122 (Ont. Div. Ct.). The Ontario Court of Appeal restored the arbitration

decision ((2001), 54 O.R. (3d) 321 (Ont. C.A.)), but on the basis of provisions of the Ontario **Employment Standards Act**, R.S.O. 1990, c. E.14.

[52] In argument before the Supreme Court of Canada, the Union argued that the protective sections of the **Human Rights Code** were implicit in the collective agreement. The Court, in its majority reasons, focussed on that issue. At para. 21, Iacobucci J., writing for the majority, said this:

Consequently, the critical issue to be determined at the arbitration hearing was whether or not the substantive rights and obligations of the *Human Rights Code* are incorporated into each collective agreement over which the Board has jurisdiction.

And, at para. 23:

For the reasons that follow, it is my conclusion that the Board was correct to conclude that the substantive rights and obligations of the *Human Rights Code* are incorporated into each collective agreement over which the Board has jurisdiction. 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.

[53] Central to the result of the majority in **Parry Sound** was the Court's reliance on its decision in **McLeod v. Egan**, [1975] 1 S.C.R. 517, a leading case regarding the effect of employment standards legislation on the content of collective agreements:

[It is] important to consider carefully what it was that made the collective agreement in *McLeod* objectionable: In *McLeod*, the collective agreement did not expressly state that the employer was authorized to require overtime beyond 48 hours a week. ... The collective agreement was objectionable because the powers it extended to the employer were sufficiently broad to include the power to violate its employees' rights under s. 11(2) of the ESA, 1968.

(**Parry Sound** at para. 27)

[54] At para. 29, Iacobucci J. observed that **McLeod** stood for the proposition that there are certain terms and conditions of employment implicit in employment agreements irrespective of the intentions of the contracting parties: “The statutory rights of employees constitute a bundle of rights to which the parties can add but from which they cannot derogate.”

[55] 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 **Machtiger**. Employment rights of employees conferred by statute are implied by law into employment agreements irrespective of the parties’ subjective intentions.

*Application of the authorities to the present case*

[56] In the present case, it was common ground that an employee may advance a claim for overtime pay in a civil action so long as there is a term in the employment contract addressing the matter of overtime. It was also common ground that if the contractual term concerning overtime fails to meet the statutory minimums set by the **ESA**, it is void by operation of s. 4 of the **ESA**. For ease of reference, I will reproduce the relevant part of s. 4 again here:

4. The requirements of this Act and the regulations are minimum requirements and an agreement to waive any of those requirements...has no effect.

[57] The employment standards legislation under consideration in **Machtinger** contained a provision identical to s. 4 of the **ESA**. The employees in that case brought their claim for reasonable notice on the basis of their employment contracts. The cause of action was breach of contract. The notice provisions of their contracts were void because they did not meet the minimum statutory requirements for notice upon termination. There was a statutory right to a minimum notice period and an independent right at common law to reasonable notice. The Court read the employment contracts as though they contained the common law notice requirements and held that the employees were entitled, as part of their contract of employment, to reasonable notice. It did so because the common law right was more generous than the statutory minimum.

[58] E Care argued that **Machtinger** is distinguishable because there was a pre-existing common law right on which the employees could rely to advance their claim once the inadequate notice provisions were rendered void, whereas in the present case the only right to overtime is one arising from statute.

[59] That distinction, in my respectful view, is not a principled one. As a matter of law, every employment contract must contain certain minimum benefits. Whether the benefit is conferred by statute or the common law is not relevant to the question of whether the benefit is an implied term of the employment contract. The reasoning in **Machtinger** does not suggest otherwise. In **Parry Sound, Kolodziejski**, and **Stewart**, the rights read into the contract were purely statutory rights.

[60] I agree 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.

[61] The conclusion in **Stewart** was adopted by the Courts in **Kolodziejski** and **Beaulne**, both having had the advantage of the analysis of the Supreme Court of Canada in **Machtiger**. It is the conclusion I have reached in the present case.

[62] E Care argued that if employment contracts are read to include the minimum overtime benefits conferred by the **ESA**, then they must also be read to include all other provisions of the statute concerning overtime, such as the provisions permitting the employer to enter into averaging agreements with its employees. I do not agree. The **ESA** provides for certain mandatory minimum requirements that cannot be waived. One such requirement is enhanced pay for overtime hours worked by an employee. The statute also offers certain optional mechanisms. For example, an employer may, with the employee's agreement, avail itself of the overtime averaging provisions to average the employee's hours of work over a defined period of time. That, however, is simply an alternative means of compliance with the minimum overtime pay requirements, one the employer and employee may or may not wish to pursue. The **ESA** specifically provides that an averaging agreement will not be interpreted as a waiver under s. 4 (see s. 37(14)). If the employer does secure an averaging agreement with an employee, the terms of that agreement become the terms of the employment contract.

[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 **Machtiger**, this Court's decision in **Kenpo**, and the case law from other provinces.

**2. Are these implied terms enforceable in a civil action for breach of contract?**

[64] Having decided that the overtime provisions of the **ESA** are implied terms of the employment contract, I now turn to the question of whether Ms. Macaraeg's claim for breach of these implied terms can be brought in a civil action. The answer to that question involves an examination of the provisions of the **ESA** as a whole.

[65] In **Vanderhelm v. Best-Bi Food Ltd.** (1967), 65 D.L.R. (2d) 537 (B.C.S.C.) [**"Vanderhelm"**], Munroe J. considered the approach to be adopted in interpreting employment legislation.

[66] In **Vanderhelm**, an employee who had been dismissed from his employment sought payment for arrears of annual holiday pay for the years 1960 to 1966. At the time, the statute governing an employee's entitlement to holiday pay was the **Annual and General Holidays Act**, R.S.B.C. 1960, c. 11 (renamed by 1966, c. 2) [**"Annual and General Holidays Act"**]. The employee's claim was based solely on his statutory right to holiday pay; his contract of employment was silent on the issue, and there is no common law right to holiday pay. At the outset of the trial, the defendant employer took the position that the Court was without jurisdiction to entertain the claim.

[67] Section 16 of the **Annual and General Holidays Act** provided the enforcement mechanism for the minimum holiday pay standards under the statute. Similar to the legislation in **Stewart**, the **Annual and General Holidays Act** imposed quasi-criminal sanctions for failure by employers to comply with its minimum provisions concerning holiday pay for their employees. Failure to comply with the provisions of the statute was an offence and the employer was liable, on summary conviction, to a fine. If convicted of the offence, the employer was also liable to the employee for all holiday pay to which he or she was entitled under the statute. Further, the statute expressly provided that the consent of the Minister was required before proceedings could be commenced for recovery of holiday pay.

[68] Munroe J. observed that where the statute creates an offence, and provides particular remedies if the offence is proven, then *prima facie* the injured party must seek recourse only through the enforcement mechanisms established by the legislation. However, Munroe J. emphasised that the provisions of the statute must be considered in their entirety to determine whether the scheme or purpose of the statute is to create rights enforceable by civil action, or exclusively through the mechanisms established by the legislation:

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*, [1925] 1 D.L.R. 1101 at p. 1108, ...

(*Vanderhelm* at p. 538, emphasis added)

[69] ***Orpen v. Roberts***, [1925] S.C.R. 364, to which Munroe J. referred, is a decision of the Supreme Court of Canada dealing with the issue of whether a civil remedy is available for the breach of a statutory right. In that case, a ratepayer applied for an injunction to halt the construction of a building allegedly in breach of municipal bylaws which were passed under statute. The legislation invoked by the ratepayer as the basis for her claim for injunctive relief had, at one time, provided that either the municipality or a ratepayer could apply to the courts for an injunction in the circumstances. However, there had been a subsequent amendment which gave only the municipality the right to seek an injunction. The Supreme Court of Canada concluded that the statute, read as a whole, did not confer on the ratepayer the right to bring a civil action, particularly as the legislation had specifically provided for that remedy before being amended.

[70] Munroe J. considered the provisions of the ***Annual and General Holidays Act*** as a whole. He concluded that no right of civil action existed, primarily because s. 20 of the statute expressly required the consent of the Minister to commence a claim for relief under the enforcement mechanisms of the statute.

[71] The approach in ***Vanderhelm*** requires that the provisions and objects of the legislation be examined as a whole to determine whether they preclude enforceability of the statutory benefits in a civil action. Munroe J. did not consider

the issue of implied contractual terms, but his approach to the interpretation of the legislation is consistent with that taken by the Court in **Stewart**.

[72] The result in **Vanderhelm** was followed twenty years later by Gow J. in **Sitka Forest Products Ltd. v. Andrew** (1988), 32 B.C.L.R. (2d) 62 [**"Sitka"**]. The statute under consideration was the **Employment Standards Act**, S.B.C. 1980, c. 10 [the "**1980 ESA**"], quite a different statutory regime from that considered by Munroe J. in **Vanderhelm**. In **Sitka**, an employer brought an action for recovery of commissions paid to an employee prior to his dismissal and before he had earned them. The employee counterclaimed for unpaid vacation pay, relying not on any contractual right, but only on his statutory rights under the **1980 ESA**.

[73] Gow J. dismissed the employee's counterclaim for vacation pay, citing **Vanderhelm** as follows at p. 64:

As Munroe, J. said in *Vanderhelm v. Best-Bi Food Ltd.* ..., commenting upon the then *Annual and General Holidays Act*, where a statute confers upon an employee a new right, and provides a particular mode of enforcing the new right, "the remedies provided by the statute are intended to be the sole remedies available to individuals who have suffered by reason of a breach of said statute on the part of their employers" such a statute is construed as not conferring on the employee a cause of action "enforceable in the civil Courts."

[74] Notably, Gow J. did not refer to 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. He did refer to

certain provisions then in force under the **ESA**, which specified that where the Director of Employment Standards issued a certificate of wages owing, the debt was owed only to the Director, and not to the individual employee. He also referred to a provision stipulating that unpaid wages constituted a lien or secured debt in favour of the Director only; no debt was owed directly to the employee.

[75] On those bases, Gow J. concluded that the plaintiff could not advance a counterclaim in the civil action on the basis of his statutory rights.

[76] Since the decision in **Sitka**, this Court has concluded on several occasions that employees cannot bring a civil action to recover employment benefits conferred by the **ESA**, even where the claim for such benefits is made in the context of a civil action for wrongful dismissal. **Sitka** has been treated in all subsequent decisions as conclusive and binding authority on the issue. In none of those decisions were the current provisions of the **ESA** considered as a whole.

[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**.

[78] The first question, then, is whether the current provisions of the **ESA** expressly or by necessary implication preclude the bringing of a civil action to recover the benefits the statute guarantees. The answer to that question is contained in the provisions of the **ESA** rather than the decisions that have followed **Sitka**.

The relevant provisions of the **ESA**

[79] One of the stated objectives of the **ESA** is to ensure that employees “receive at least basic standards of compensation and conditions of employment” (s. 2(a)). Another is to provide “fair and efficient procedures for resolving disputes over the application and interpretation of [the **ESA**]” (s. 2(d)).

[80] Part 10 of the **ESA** is entitled “Complaints, Investigations and Determinations.” It includes s. 74, which states, in part, the following:

74 (1) An employee, former employee or other person *may* complain to the director that a person has contravened

(a) a requirement of Parts 2 to 8 of this Act ...

...

(2) A complaint must be in writing and must be delivered to an office of the Employment Standards Branch.

(3) A complaint relating to an employee whose employment has terminated must be delivered ... within 6 months after the last day of employment.

(Emphasis added)

[81] Section 74(1), which deals generally with the substantive right of an employee to file a complaint, is permissive in nature. The permissive language is distinct from the mandatory language of the procedural requirements in subsections (2) and (3).

[82] Part 10 also includes s. 76, which deals with the obligation of the Director to accept complaints filed by employees, and the discretion to refuse complaints where the employee has initiated proceedings or obtained a remedy in another forum.

Section 76 states, in part, the following:

76 (1) Subject to subsection (3), the director must accept and review a complaint made under section 74.

...

(3) The director *may refuse* to accept, review, mediate, investigate or adjudicate a complaint or may stop or postpone reviewing, mediating, investigating or adjudicating a complaint if

...

- (f) *a proceeding relating to the subject matter of the complaint has been commenced before a court, a tribunal, an arbitrator or a mediator,*
- (g) *a court, a tribunal or an arbitrator has made a decision or an award relating to the subject matter of the complaint.*

(Emphasis added)

[83] Section 118, contained in Part 14 (General Provisions), preserves pre-existing rights. The section states, in part, the following:

118 ... [N]othing 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.

[84] Section 118 does not, in my view, operate to preclude an employee from seeking recovery of statutory benefits in a civil action. The section merely preserves the right to sue for breach of contract even if a similar substantive right is conferred by the statute.

[85] The words “but for this Act” in s. 118 preserve the right to bring any action extant at common law. A claimant whose employment contract contains overtime pay provisions, for example, would be entitled to bring a civil action to recover overtime pay despite the provisions in the **ESA** concerning overtime. Section 118

does not bar civil actions for overtime compensation. To the contrary, it preserves actions: *Fuggle v. Airgas Canada Inc.*, 2002 BCSC 1696 at para. 30 [*"Fuggle"*].

[86] Section 118 contemplates that claimants will have alternative means to enforce their employment rights.

[87] It is important to note that the **ESA** contains no provision expressly granting the Director exclusive jurisdiction to determine claims with respect to the minimum standards of compensation conferred on employees by the statute. It does contain a privative clause, but only with respect to decisions of the Employment Standards Tribunal. The Tribunal hears appeals from determinations by the Director. Section 110(1) provides as follows:

110 (1) The tribunal has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined in an appeal or reconsideration under Parts 12 and 13 and to make any order permitted to be made.

(2) A decision or order of the tribunal on a matter in respect of which the tribunal has exclusive jurisdiction is final and conclusive and is not open to question or review in any court.

[88] Where the legislature wishes to confer jurisdiction exclusively on an administrative tribunal, it usually does so in express terms. An example is the jurisdictional clause contained in the **Labour Relations Code**, R.S.B.C. 1996, c. 244:

Jurisdiction of board

136(1) Except as provided in this Code, the board has and must exercise exclusive jurisdiction to hear and determine an application or complaint under this Code and to make an order permitted to be made.

...

Jurisdiction of court

137(1) Except as provided in this section, a court does not have and must not exercise any jurisdiction in respect of a matter that is, or may be, the subject of a complaint under section 133 or a matter referred to in section 136, and, without limitation, a court must not make an order enjoining or prohibiting an act or thing in respect of them.

[89] The **ESA** has no similar exclusive jurisdiction clause.

[90] 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.

*The objects of the **ESA***

[91] **Sitka** was decided in 1988. Since that time, the Supreme Court of Canada has issued several decisions concerning the importance of interpreting employment standards legislation in a purposive manner, taking into account its objectives.

[92] In **Machtinger**, the Court held that the policy considerations underlying the legislation are several. First, said Iacobucci J. at 1003, the objective of the legislation is to “protect the interests of employees by requiring employers to comply with certain minimum standards”. With respect to that objective, the court went on to say the following:

The harm which the Act seeks to remedy is that individual employees, and in particular non-unionized employees, are often in an unequal

bargaining position in relation to their employers. As stated by Swinton, *supra*, at p. 363:

...the terms of the employment contract rarely result from an exercise of free bargaining power in the way that the paradigm commercial exchange between two traders does. Individual employees on the whole lack both the bargaining power and the information necessary to achieve more favourable contract provisions than those offered by the employer, particularly with regard to tenure.

The Court went on to say:

Accordingly, an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protections to as many employees as possible, is to be favoured over one that does not. In this regard, the fact that many individual employees may be unaware of their statutory and common law rights in the employment context is of fundamental importance.

(***Machtiger*** at 1003)

[93] Iacobucci J. observed at 1004 that if the only sanction employers faced for failure to comply with the minimum notice requirements of employment legislation is an order that they *minimally* comply, they would have little incentive to enter into employment contracts complying with the legislation. Thus, he said, the legislation must be interpreted in a way that encourages employer compliance from the outset of the employment relationship.

[94] The Supreme Court of Canada again had occasion to consider the objectives of employment standards legislation in ***Re Rizzo & Rizzo Shoes Ltd.***, [1998] 1 S.C.R. 27 [***Rizzo***]. The Court characterized the legislation as “benefits-conferring” legislation which must be interpreted broadly. At para. 36, Iacobucci J. stated the following:

Finally, with regard to the scheme of the legislation, since the ESA is a mechanism for providing minimum benefits and standards to protect the interests of employees, it can be characterized as benefits-conferring legislation. *As such, according to several decisions of this Court, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant ... It seems to me that, by limiting its analysis to the plain meaning of [the provisions] of the ESA, the Court of Appeal adopted an overly restrictive approach that is inconsistent with the scheme of the Act.*

(Emphasis added)

[95] In **Kolodziejski**, the Court reviewed the policy considerations underlying employment standards legislation in Saskatchewan. Citing **Machtinger**, Lane J.A. emphasized the vulnerability of individual employees in their relationship with the employer, the frequency with which employees are unaware of their statutory rights, and the need for an interpretation of the legislation that will encourage employers to comply with their legal obligations.

[96] In **Beaulne**, Greckol J. followed the purposive analysis undertaken by the Court in **Stewart**. She observed, in addition, that requiring a claimant to pursue some claims (such as for reasonable notice) in a civil action, and other claims (such as the statutory right to overtime) through the enforcement mechanisms of the statute, would be oppressive and at odds with the purpose of the statute:

In my view ... the Code was not intended to be enforced exclusively through its own process. Wrongful dismissal or other actions which claim breach of Code-mandated contractual terms are actions brought in respect of the kind of harm the statute was intended to prevent; the claimants in such cases are of the type the legislation was designed to protect; and the special remedy in the Code is not adequate for the protection of the persons injured. It is not adequate because some express contractual terms and some terms implied by common law may be more beneficial to the employee than some Code-mandated

terms, such as an express or implied reasonable notice period compared to the statutory notice period required on termination. It would be in the best interests of the claimant to pursue civil remedies respecting the former contractual terms. To require such claimants to pursue some contractual terms through civil process and others through the employment standards process would work hardship upon the claimants, place unnecessary strain on resources and would be at cross purposes with the clear intention of the legislation.

(*Beaulne*, para. 87)

[97] Greckol J. concluded that the Alberta **Employment Standards Code** did not preclude an employee from bringing a civil action to enforce his or her statutory employment rights. The provisions of the Alberta legislation are substantially the same those contained in the **ESA**.

[98] It has also been observed that one of the objectives of employment standards legislation is to provide employees wishing to pursue claims for statutory employment benefits with an expeditious and inexpensive alternative to the courts. While the enforcement mechanisms of the statute may provide such an alternative to a civil action, they are not the exclusive means of enforcing statutory rights unless that result is clear from a reading of the statute as a whole.

[99] In *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, 2001 SCC 44 [*"Danyluk"*] the Supreme Court of Canada considered the question of issue estoppel in the context of a claim made by an employee for unpaid wages and commissions under the **Employment Standards Act**, R.S.O. 1990, c. E.14. Before the claim had been adjudicated, the employee commenced a civil action claiming damages for wrongful dismissal, unpaid wages and commissions. The claim brought under the statute was subsequently dismissed. The employee elected not

to pursue a statutory appeal, and carried on with her wrongful dismissal action. The employer argued that the employee was estopped from continuing to seek recovery of the unpaid commissions in the civil action.

[100] Binnie J., writing for the Court, concluded that the preconditions to the operation of issue estoppel had been met. However, he listed a number of factors to be considered when determining whether to exercise discretion to refuse to apply the legal doctrine. One of those factors was the purpose and objects of the legislation. At para. 73, Binnie J. said the following:

[T]he purpose of the ESA is to provide a relatively quick and cheap means of resolving employment disputes. Putting excessive weight on the ESA decision in terms of issue estoppel would likely compel the parties in such cases to mount a full-scale trial-type offence and defence, thus tending to defeat the expeditious operation of the ESA scheme as a whole. This would undermine fulfilment of the purpose of the legislation.

[101] After considering all of the objectives of the legislation, the Court in **Danyluk** concluded the legislature did not intend to create an exclusive forum for the pursuit of employment claims.

[102] A similar issue was considered by this Court in **Fuggie**, *supra*, in which Burnyeat J. said the following at para. 32:

The purpose of the [ESA] is to have in place a relatively “quick and cheap” means of resolving employment disputes. The procedures established under the [ESA] do not really contemplate nor should they contemplate the procedures that would be available to litigants under the Rules of Court. That being the case, it cannot be said that the purpose of the [ESA] is to provide a claimant with all of the advantages that would be available if the dispute was to be resolved in civil litigation.

[103] The Court in **Stewart** was also alive to the policy considerations underlying the legislation when concluding that employees were entitled to bring civil actions to enforce minimum employment rights conferred by statute. The Court considered the following factors. Employees may be hesitant to prosecute their employer. The legislation provided for compensation only if the employer was first convicted of an offence under the statute. The statute required that the employee enforce his or her rights within six months after the entitlement to vacation pay arose, whereas an employee bringing a civil action had a much longer period of time within which to bring the claim.

[104] Since the decision of the Court of Appeal in **Stewart**, Ontario courts have on several occasions ruled that employees have the right to pursue claims for statutory employment benefits by way of civil action. The Ontario **Employment Standards Act, 2000**, S.O. 2000, c. 41, currently contains provisions (ss. 97(1) and (3)) which permit an employee to commence a civil action for recovery of the statutory benefits so long as no complaint has been filed under the statute. However, those provisions were not contained in the legislation at the time **Stewart** was decided. They reflect the approach taken in Ontario since the **Stewart** decision.

[105] As noted by Binnie J. in **Danyluk**, the purpose of the **ESA** is to provide an expeditious and inexpensive means of resolving employment disputes. The **ESA** gives the employee an alternative to the more cumbersome, costly and time-consuming process of a civil action. The Director has a broad range of investigative and remedial powers not available to the courts. As a result, most employees with complaints about non-payment of statutory benefits will likely elect to pursue their

claims under the **ESA**. Employees who choose to do so will have all of the enforcement mechanisms under the **ESA** available to them. The *quid pro quo* is that they will then be bound by all provisions of the statute, including the six month time limit within which complaints must be brought.

[106] While most employees will likely opt to proceed under the enforcement mechanisms of the **ESA**, the statute does not expressly or impliedly prohibit an employee from commencing civil proceedings to enforce his or her statutory rights, whether or not the claim is part of a wrongful dismissal action.

[107] E Care relied on the case of **Seneca College of Applied Arts and Technology v. Bhaduria**, [1981] 2 S.C.R. 181 [**Seneca College**] for the proposition that when a statute provides a right, and machinery to enforce that right, claimants may only proceed under the statute.

[108] The matter under consideration by the Supreme Court of Canada in **Seneca College** was a discrimination complaint. The **Ontario Human Rights Code**, R.S.O. 1970, c. 318 created statutory rules prohibiting discrimination, and an enforcement scheme to remedy breaches of those rules. Ms. Bhaduria suffered discrimination at the college, and instead of seeking a remedy under the statute, brought a civil action.

[109] The Supreme Court of Canada held that the statute did not create an independent cause of action. It created only certain rights enforceable under the statute:

It is common ground that there is no known case in this country, at least in common law jurisdictions, where such a tort is recognized on either of the two grounds on which it was posited by the plaintiff-respondent; nor were counsel able to produce any instance in a comparable foreign jurisdiction.

(**Seneca College** at 182)

[110] By contrast, Ms. Macaraeg's claim is one for breach of certain terms of her employment contract, terms which are implied by law in the contract. It is a claim rooted in a well-recognized cause of action. The importance of this distinction was made clear by the Supreme Court of Canada:

There is, in my view, a narrow line between founding a civil cause of action directly upon a breach of a statute and as arising from the statute itself and founding a civil cause of action at common law by reference to policies reflected in the statute and standards fixed by the statute.

(**Seneca College** at 188)

[111] That the terms of the employment contract arise from the policies reflected in the statute, and the standards fixed by the statute, does not change the contractual nature of Ms. Macaraeg's claim. For that reason, **Seneca College** is not applicable to this case.

Must this Court continue to follow the decision in **Sitka** (and subsequent decisions of this Court following **Sitka**)?

[112] In **Re Hansard Spruce Mills Ltd.**, [1954] 4 D.L.R. 590 (B.C.S.C.) Wilson J. delineated the circumstances in which a judge of this Court may give a judgment departing from that of another judge on the same issue. Those circumstances are well known, but bear repeating here. Wilson J. said the following at p. 592:

I will only go against a judgment of another Judge of this Court if:

- (a) Subsequent decisions have affected the validity of the impugned judgment;
- (b) it is demonstrated that some binding authority in case law, or some relevant statute was not considered;
- (c) the judgment was unconsidered, a *nisi prius* judgment given in circumstances familiar to all trial Judges, where the exigencies of the trial require an immediate decision without opportunity to fully consult authority.

If none of these situations exist I think a trial Judge should follow the decisions of his brother Judges.

[113] The first of the above circumstances is engaged in the present case, as subsequent decisions have affected the validity of **Sitka** and more recent decisions of this Court following the result in **Sitka**.

[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.

[115] 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**.

[116] 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.

[117] For these reasons, I have concluded that I should not follow previous decisions of this Court on the issue of whether an employee may, in the context of the current provisions of the **ESA**, bring a civil action to pursue his or her statutory employment rights.

## **VI. Summary**

[118] I have concluded the following:

1. It was an implied term of the employment contract between E Care and Ms. Macaraeg that she would be paid overtime compensation in accordance with the mandatory requirements of the **ESA**.
2. 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.

“C.A. Wedge, J.”  
The Honourable Madam Justice C. A. Wedge