

CASE COMMENTARY

MACARAEG V. E CARE CONTACT CENTERS LTD.: SHORTCOMINGS OF THE BRITISH COLUMBIA COURT OF APPEAL'S ANALYSIS

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INTRODUCTION

At issue in *Macaraeg v. E Care Contact Centers Ltd.*¹ (“*Macaraeg* (BCCA)”) was whether rights conferred in employment standards legislation could be implied as a matter of law into an employment contract and, if so implied, could then be enforced in a civil action. The British Columbia Court of Appeal’s unanimous decision rejecting both of these positions is troubling for several reasons. First, by failing to distinguish between a civil action arising from breach of contract and one arising from breach of statutory duty, it may be argued that the Court embarked upon a misguided analysis for determining whether rights conferred by employment standards legislation can be implied into employment contracts. Second, the Court’s assessment of the adequacy of the administrative structure in place to enforce statutory employment rights is inconsistent with the object of employment standards legislation, as it fails to recognize the ways in which the current enforcement regime insufficiently protects employees’ interests and encourages the breach of minimum employment standards by unscrupulous employers. The decision creates several practical difficulties for employees in British Columbia. In effect, it puts an onus on employees to know their statutory rights so that they are in a position to either negotiate such rights into employment contracts as express terms (which can then be enforced in a civil action), or to enforce them using existing statutory remedies.

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1. *Macaraeg v. E Care Contact Centers Ltd.*, 2008 BCCA 182 (QL) [*Macaraeg* (BCCA)].

The following is the background of the case. The complainant, Ms. Macaraeg, had been hired by E Care Contact Centers Ltd. (“E Care”) in May of 2004 and had signed a written employment contract which set out her rate of pay, but was silent on the issue of overtime pay. From July 2004 to February 2006, Ms. Macaraeg regularly worked overtime hours: more than 8 hours per day and more than 40 hours per week. When Ms. Macaraeg inquired as to her entitlement to overtime pay, she was informed by her supervisor that E Care did not pay overtime rates for extended work days. However, under sections 35(1) and 40 of the British Columbia *Employment Standards Act*² (“BC ESA”), Ms. Macaraeg was entitled to overtime pay. Ms. Macaraeg’s employment was terminated without cause in February 2006. She was given two weeks’ pay in lieu of notice. Ms. Macaraeg brought an action for wrongful dismissal. She claimed damages in lieu of reasonable notice for herself, and payment for overtime hours for herself and as the representative of a class of E Care employees.

At the British Columbia Supreme Court, *Macaraeg v. E Care Contact Centers Ltd.*,³ (“*Macaraeg* (BCSC),” Justice Wedge ruled on two points of law: first, whether the minimum overtime pay requirements of the BC ESA were implied terms of law in the contract of employment between Ms. Macaraeg and E Care; and second, whether Ms. Macaraeg was entitled to bring a civil action to enforce her statutory right to overtime pay, or whether such an action was precluded by statutory ouster. After reviewing several case authorities, notably the SCC’s decision in *Machtlinger v. HOJ Industries*⁴ (“*Machtlinger*”), and the decisions of several provincial appellate courts involving similar cases,⁵ Wedge J. concluded that the mandatory overtime pay requirements of the BC ESA were implied terms of the employment contract. Justice Wedge further held that the BC ESA did not preclude Ms. Macaraeg from pursuing her claim for overtime pay in a civil action for breach of her employment contract.

On appeal, however, the Court of Appeal unanimously overturned the Superior Court’s decision. Justice Chiasson, writing for the Court, concluded that Ms. Macaraeg was not entitled to enforce her statutory right to overtime pay, since the exclusive jurisdiction to determine such claims lies with the Director of Employment Standards (“the Director”) under the enforcement mechanisms of the BC ESA. And as a result, the overtime pay requirements of the BC ESA could not be implied terms of the contract of employment between Ms. Macaraeg and E Care.

The Court of Appeal’s path in reaching this conclusion is perplexing. First, the Court’s failure to separate a civil cause of action based on breach of contract from one based on breach of statutory duty led it to depart from established contract law principles governing the implication of contractual terms as a matter of law. Second, the Court’s assessment of the enforcement remedies under the BC ESA was far removed from the policy objectives underlying employment standards legislation, leading it to a conclusion that is at odds with the practical realities that many employees face in the employment relationship. Both of these positions create a series of impediments for employees in British Columbia seeking to enforce their statutory right.

2. *Employment Standards Act*, R.S.B.C. 1996, c. 113 [“BC ESA”].

3. *Macaraeg v. E Care Contact Centers Ltd.*, 2006 BCSC 1851 (QL) [*Macaraeg* (BCSC)].

4. *Machtlinger v. HOJ Industries*, [1992] 1 S.C.R. 986 (QL) [*Machtlinger*].

5. *Stewart v. Park Manor Motors Ltd.*, [1967] O.J. No. 1117 (C.A.) (QL) [*Stewart*]; *Kolodziejski v. Auto Electric Service Ltd.*, [1999] S.J. No. 276 (C.A.) (QL) [*Kolodziejski*]; *Beaulne v. Kaverit Steel & Crane ULC*, [2002] A.J. No. 1066 (Q.B.) (QL) [*Beaulne*].

I. CONFLATING THE COMMON LAW ACTION FOR BREACH OF CONTRACT AND THE COMMON LAW ACTION FOR BREACH OF STATUTORY DUTY

The Court of Appeal seems to have failed to apply the distinction between common law and statutory rights of action in its reasoning. Justice Chiasson correctly noted, “in the absence of an appropriate provision in an employment contract, compensation for overtime is not payable at common law.”⁶ He further noted that where general statutory rights exist, they may be enforced in a civil action as breach of statutory duty, or where those rights are incorporated into a contract, as breach of contract. Yet, Chiasson J.A.’s analysis, which concluded that Ms. Macaraeg could not seek compensation in a civil claim, appears to merge these two foundations for a civil action. By doing so, his reasoning appears inconsistent with established principles of contract law, as articulated by Justice McLachlin (as she then was) in *Machtinger*.

As McLachlin J. noted in her concurring judgment in *Machtinger*, the test for when a term can be implied into a contract as a matter of law is necessity.⁷ She added that the test for “necessity” is whether the term “was necessary in a practical sense to the fair functioning of the agreement, given the relationship between the parties.”⁸ In *Machtinger*, at issue was whether the common law right of reasonable notice was an implied term in an employment contract. Justice McLachlin concluded that since a legal duty to provide reasonable notice of termination had been imposed on contracting parties by the law for many years, it was clearly a “necessary condition” in the employment relationship.⁹

It is not difficult to conceive how a statutory duty imposed on employers for several years, such as the duty to provide overtime pay, could be considered an implied term as a matter of law. A recognized objective of employment standards legislation is that it seeks to redress the imbalance of bargaining power between employers and employees, which so often prevents employees from achieving more favourable contract provisions than those offered by employers, by imposing certain minimum standards to ensure the fair functioning of the employment agreement.¹⁰

Indeed, this appears to be the inference drawn by Wedge J. in *Macaraeg* (BCSC) and affirmed by the court in *Holland v. Northwest Fuels Ltd.*¹¹ (“*Holland*”). Justice Wedge recognized that McLachlin J.’s judgment in *Machtinger* was concerned with the implication of the common law right to reasonable notice; however, she astutely noted that in the absence of such a common law right, McLachlin J. would have concluded that the statutory minimum right to notice was an implied term of the employment agreement.¹²

6. *Macaraeg* (BCCA), *supra* note 1 at para. 4.

7. *Machtinger*, *supra* note 4 at paras. 51-53. Justice McLachlin essentially affirmed the test for the implication of a term as a matter of law as suggested by Le Dain J. in *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711, relying on the decision of the House of Lords in *Liverpool City Council v. Irwin*, [1977] A.C. 239.

8. *Ibid.* at para. 52.

9. *Ibid.* at para. 54.

10. Katherine Swinton, “Contract Law and the Employment Relationship: The Proper Forum for Reform” in Barry J. Reiter & John Swan, eds., *Studies in Contract Law* (Toronto: Butterworths, 1980) 357 at 363.

11. *Holland v. Northwest Fuels Ltd.*, 2007 BCSC 569 at para. 22 (S.C.) (QL) [*Holland*].

12. *Macaraeg* (BCSC), *supra* note 3 at para. 32. It should be noted, however, that Wedge J.’s comment concerned both the majority and concurring judgments of Iacobucci J. and McLachlin J. respectively.

The Court of Appeal ultimately rejected Wedge J.'s interpretation of *Machtinger*, distinguishing that case on the grounds that it did not concern the implication of statutory rights. While this conclusion itself may be criticized as a narrow reading and interpretation of *Machtinger*, it may be argued that a much larger and more problematic issue is the Court of Appeal's approach in determining whether overtime statutory requirements were implied terms in Ms. Macaraeg's employment agreement as a matter of law.

To critically analyze the Court of Appeal's approach to this issue, it is necessary to briefly revisit the litigation context of *Macaraeg* (BCSC). Justice Wedge presided over an interlocutory motion whereby E Care had made an application for a ruling on two points of law under Rule 34 of the British Columbia *Supreme Court Rules*.¹³ As previously mentioned, the two points of law were the following:

1. As a matter of law, were the minimum overtime pay requirements of the [BC 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 [BC ESA]?¹⁴

When Wedge J. came to her conclusion on the first point of law, namely that the statutory requirements were implied terms of the employment contract as a matter of law, it was unnecessary for her to consider the second point of law, namely, whether the BC ESA precluded a civil action to enforce that contractual right. Once a term has been implied into a contract of employment as a matter of law, and is breached by an employer, it may be enforced in a civil action as breach of contract. As the Saskatchewan Court of Queen's Bench noted in *Watson v. Wozniak (c.o.b. W5 Eld'r Care Homes)*, if employment standards are implied into a contract of employment, then "[i]t rests on the court's jurisdiction in matters of contract ... to determine [whether there has been a] breach of contractual terms, notwithstanding that the contractual terms have been deemed into effect by statute."¹⁵ Justice Wedge echoed this proposition in *Macaraeg* (BCSC) where she stated: "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."¹⁶

For greater certainty that the implication of a statutory right into a contract of employment can be enforced in a civil cause of action for breach of contract, s. 118 of the BC ESA provides, in part:

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.

13. British Columbia, *Supreme Court Rules*, B.C. Reg. 221/90. Rule 34(1) states: "A point of law arising from the pleadings may, by consent of the parties or by order of the court, be set down by requisition for hearing and disposed of at any time before the trial."

14. *Macaraeg* (BCSC), *supra* note 3 at para. 1.

15. *Watson v. Wozniak (c.o.b. W5 Eld'r Care Homes)*, 2004 SKQB 339 at para. 22 (QL) [*Watson*].

16. *Macaraeg* (BCSC), *supra* note 3 at para. 59.

Relying on *Fuggle v. Airgas Canada Inc.*¹⁷ (“*Fuggle*”), Wedge J. noted that s. 118 of the BC ESA preserves the right of an employee to bring any action existing at common law, such as breach of contract. She cited the example of overtime pay provisions being express terms in a contract, and thus enforceable under the common law action for breach of contract. Arguably, the same proposition would apply where a statutory overtime pay requirement is an implied term in a contract.

Despite this finding, Wedge J. went on to consider the second point of law put before her by E Care, namely whether the BC ESA precluded Ms. Macaraeg from enforcing her statutory right to overtime pay in an action. However, in doing so she acknowledged, albeit in passing, that it was not necessary to determine the second point of law once statutory rights are found to be implied terms of an employment agreement. She noted that “the minimum requirements of the [BC] ESA are implied terms of employment contracts and, on that basis, *prima facie* within the jurisdiction of the court.”¹⁸ However, by considering the second point of law, Wedge J. appears to have led the Court of Appeal astray in its own analysis of the issue.

Before considering the Court of Appeal’s analysis, it is important to distinguish between a statutory requirement giving rise to a cause of action at common law for breach of contract and a cause of action arising from breach of statutory duty. With respect to breach of statutory duty, it is well established that there is no independent cause of action for breach of statutory duty at common law.¹⁹ As articulated in *Orpen v. Roberts* (“*Orpen*”) and *Vanderhelm v. Best-Bi Food Ltd.* (“*Vanderhelm*”), where a statute confers a right, and defines particular remedies to enforce that right, *prima facie* the right-bearing party can only avail themselves of the statutory remedies, and no other.²⁰ However, as a *prima facie* presumption, it is rebuttable if, on an examination of the impugned statute as a whole, it may be determined that it was the intention of the legislature to create rights enforceable by civil action.²¹ Courts have attempted to ascertain the intention of the legislature by considering whether the legislation provides an effective enforcement of the right conferred by statute.²² If the statute does, there is no need for enforcement external to the statute, and thus no civil cause of action.²³

Significantly, the test in *Orpen* is specific to the issue of whether a civil action is available for damages or other relief based on the breach of a statutory duty, and does not concern instances where a statutory right has been implied into a contract as a matter of law.

In *Macaraeg* (BCCA), however, the Court of Appeal failed to acknowledge this, possibly because Wedge J. did not clarify that the two points of law she considered were separate and independent of one another: the first, involving the implication of statutory rights as a matter of law, concerned a civil cause of action for breach of *contract*; whereas the second, in-

17. *Fuggle v. Airgas Canada Inc.*, 2002 BCSC 1696 (QL) [*Fuggle*].

18. *Macaraeg* (BCSC), *supra* note 3 at para. 116.

19. See e.g. *Seneca College of Applied Arts and Technology v. Bhaduria*, [1981] 2 S.C.R. 181; *Orpen v. Roberts*, [1925] S.C.R. 364 (QL) [*Orpen*]; *Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205; *Vanderhelm v. Best-Bi Food Ltd.* [1967] B.C.J. No. 180 (S.C.) (QL) [*Vanderhelm*].

20. *Orpen*, *ibid.* at 4; *Vanderhelm*, *ibid.* at para. 3.

21. *Vanderhelm*, *ibid.*

22. See *Stewart*, *supra* note 5 at paras. 8-9; *Kolodziejski*, *supra* note 5 at paras. 28-30; *Macaraeg* (BCCA), *supra* note 1 at para. 74.

23. *Macaraeg* (BCCA), *ibid.*

volving an examination of legislative intent (to which Wedge J. also applied *Orpen*), concerned a civil cause of action for breach of *statutory duty*.

Instead, Chiasson J.A. viewed the presumption articulated in *Orpen* as the starting point for determining whether the statutory overtime pay requirements could be implied into Ms. Macaraeg's employment contract; thus, in effect, conflating a cause of action based on breach of statutory duty and a cause of action based on breach of an implied term of a contract. As Chiasson J.A. noted,

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.²⁴

Relying on this process of inquiry, Chiasson J.A. distinguished the findings of the Ontario Court of Appeal in *Stewart v. Park Manor Motors Ltd.* ("*Stewart*") and the Saskatchewan Court of Appeal in *Kolodziejski v. Auto Electric Service Ltd.* ("*Kolodziejski*"), wherein each court held that rights conferred by employment standards legislation were implied into contracts of employment,²⁵ by noting that "statutory enforcement of regimes in those cases were determined to be unsatisfactory and this afforded the plaintiffs a cause of action for breach of contract."²⁶

With respect, it is arguable that Chiasson J.A. may have erred in his analysis. What may be inferred from McLachlin J.'s judgment in *Machtiger* (BCSC) is that the test for the implication of a term in an employment contract as a matter of law, even where that term derives from statute, is necessity. It is not, as Chiasson J.A. suggests, whether the legislature intended outside enforcement of the statutory right. The implication of a term into a contract involves the principles of contract law, not statutory interpretation. Had the issue in *Macaraeg* (BCSC) only concerned the maintenance of an action for breach of statutory duty, the Court of Appeal's analysis of the adequacy of the statutory enforcement regime would have been correct.

Alternatively, the Court of Appeal could have applied the test of necessity to determine whether the statutory overtime pay provisions could be implied into Ms. Macaraeg's employment contract as a matter of law. Ironically, had Chiasson J.A. engaged in such an analysis, that is, had he examined whether the statutory right to overtime pay was necessary in a practical sense to the fair functioning of the agreement, he might have looked to the adequacy of the enforcement regime in the BC *ESA* and come to the same conclusion about the implication of the statutory terms. In other words, since Chiasson J.A. found that the BC *ESA* provides a sufficient mechanism to enforce employees' rights to overtime pay, it would not be "necessary" to imply such rights into an employment agreement. But let there be no confusion, this is not the approach that the Court of Appeal took. Justice Chiasson, with respect, misapplied the test for determining whether a civil action can exist based on a breach of statutory duty to determine whether a statutory right was implied into an employment agreement as a matter of law. Interestingly, the Court of Appeal's analy-

24. *Ibid.* at para. 84.

25. *Stewart*, *supra* note 5 at para.10; *Kolodziejski*, *supra* note 5 at para. 21.

26. *Macaraeg* (BCCA), *supra* note 1 at para. 77.

sis of the enforcement scheme of the BC *ESA* may have been relevant had it actually applied the test of necessity for the implication of contractual terms.

So what does it mean for employees in British Columbia that the Court of Appeal concluded that the rights conferred by the BC *ESA* are not implied into employment agreements as a matter of law? It means that if employees want to enforce a statutory right in a civil action (for example, a right to overtime pay), they will have to ensure that some express term in the employment contract addresses that issue. If the term violates the BC *ESA*, it is very likely that a court will then enforce the minimum standards set out in the legislation.²⁷ However, this assumes that employees have an awareness of their statutory rights and the bargaining power to negotiate such minimum standards. For Ms. Macaraeg, this was clearly not the case: her contract was silent on the issue of overtime pay and when she inquired as to whether she was entitled to such a benefit her employer denied having a statutory duty. The Court of Appeal's decision forces employees like Ms. Macaraeg to rely on the enforcement mechanisms under the BC *ESA*, which, as will become evident in the following section, can be of limited value.

II. APPLYING *ORPEN*: ASSESSING THE OBJECT OF THE BC *ESA* AND THE ADEQUACY OF ITS ENFORCEMENT

Although the Court of Appeal appears to have erred in its analysis of whether the statutory overtime provisions were implied terms in Ms. Macaraeg's employment contract, the Court's assessment of the object and provisions of the BC *ESA* is still relevant in determining whether a breach of an employer's statutory duty is actionable, independent of a breach of contract claim. As mentioned above, the test set out in *Orpen* and *Vanderhelm* for determining whether a statutory right may be enforced outside of the statutory regime involves an examination of the object and provisions of the statute as a whole to ascertain whether the legislature intended external enforcement.

In the Court of Appeal's review of the BC *ESA*, it examined the object of the Act and the adequacy of its enforcement provisions. Justice Chiasson concluded that the BC *ESA* provided a "complete and effective administrative structure for granting and enforcing rights to employees."²⁸ With all due deference, Chiasson J.A.'s analysis is troubling in two respects. First, too little emphasis was placed on the intention of the legislature in discerning the object of the BC *ESA*. In *Machtlinger*, Jacobucci J., writing for the majority, stated the following:

The objective of the Act is to protect the interests of employees by requiring employers to comply with certain minimum standards ...

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

27. In *Macaraeg* (BCCA), *supra* note 1 at para. 53, Chiasson J.A. cited the case of *Beaulne*, *supra* note 5, where an employer had made an oral promise to pay an employee for her overtime, but because an amount was not specified, the promise was in breach of the Alberta *Employment Standards Code*. The Court found that the provision for overtime was therefore void and implied the minimum overtime pay provisions required by the statute.

28. *Macaraeg* (BCCA), *ibid.* at para. 103.

may be unaware of their statutory and common law rights in the employment context is of fundamental importance.²⁹

This articulation of the objectives of employment standards legislation was affirmed and supplemented in *Re Rizzo & Shoes Ltd.* (“*Rizzo*”), wherein Iacobucci J. stated that the employment standards legislation could be characterized as “benefits-conferring legislation” and, as a result, “it ought to be interpreted in a broad and generous manner” with any ambiguity in its interpretation being resolved in favour of the employee.³⁰

It follows that, under the *Orpen* test, a court should use the policy objectives of employment standards legislation to inform its assessment of the adequacy and comprehensiveness of a statute’s administrative regime. Relevant questions to aid such an analysis could include whether the statutory regime encourages employers to comply with the BC *ESA*, or whether the provisions sufficiently protect employees who are unaware of their statutory rights.

Justice Chiasson acknowledged this policy-driven approach where he noted, “[t]here is a relationship between [the objective of] ‘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.”³¹ However, in his review of the enforcement regime in the BC *ESA*, Chiasson J.A. appears to have abandoned this sentiment as he examined the provisions of the Act in a mechanical fashion without regard for the policy objectives of the legislation. For example, Chiasson J.A. noted that s. 74(3) of the BC *ESA* requires a complaint to be brought within six months of the last day of employment. Further, s. 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 the date of termination. In *Stewart and Kolodziejski*, similar provisions were interpreted to signify that the statutory remedies were not adequate.³² Yet, Chiasson J.A. disagreed and simply stated that “[c]onsidering the [BC] *ESA* as a whole,” the provisions provide sufficient enforcement without further explanation as to how he reached such a conclusion.³³

This finding appears inconsistent with the objectives of employment standards legislation as articulated by Iacobucci J. in *Machtinger* and *Rizzo*. The interpretation has the effect of barring the enforcement of a benefit conferred by the legislature in cases where employees are not aware of their statutory rights. Consider, for example, Ms. Macaraeg, who was working overtime on a regular basis for 19 months. When she inquired as to whether she was entitled to overtime pay, she was told by her supervisor that E Care did not pay overtime rates for extended work days. It is likely that it was not until Ms. Macaraeg’s employment was terminated and she sought legal advice that she became aware of her entitlement to overtime pay. However, under the statutory recovery regime her claim would only be for the last six months of overtime that she worked. Further, had she waited more than six months to bring a complaint to the Director, she would not be entitled to any remedy under the BC *ESA*. E Care, however, has benefited from not paying Ms. Macaraeg for her months of overtime, without penalty. How can such a provision be deemed “adequate” when it fails

29. *Machtinger*, *supra* note 4 at paras. 31-32.

30. *Re Rizzo & Shoes Ltd.*, [1998] 1 S.C.R. 27 at para. 36 (QL) [*Rizzo*].

31. *Macaraeg* (BCCA), *supra* note 1 at para. 76.

32. *Stewart*, *supra* note 5 at para. 11; *Kolodziejski*, *supra* note 5 at paras. 29-30.

33. *Macaraeg* (BCCA), *supra* note 1 at para. 98.

to protect the interests of employees and fails to encourage employers to comply with the minimum standards of the BC ESA?

The second troubling aspect of Chiasson J.A.'s analysis is his apparent oversight of certain amendments that were made to the BC ESA in 2002³⁴ that have had a significant impact on the enforcement of statutory rights. For instance, Chiasson J.A. described the “investigative powers” of the Director and essentially concluded that the Director provides an adequate enforcement of employees’ statutory rights.³⁵ However, as Fairey notes, because of the 2002 amendments, “[t]he Director is no longer required to ‘investigate’ every complaint received, only to ‘accept and review’ complaints.”³⁶ In addition, Chiasson J.A. seems to have ignored the fact that s. 76 of the BC ESA replaces the once active investigation of complaints with a mediation process designed to obtain settlement agreements.³⁷ As a result, he failed to consider how, in practice, such an enforcement procedure not only undermines the minimum statutory benefits conferred to employees, but also creates incentives for employers to breach the BC ESA.³⁸

In the context of mediation, the imbalance of power between employers and employees is likely to be reproduced as most employees act on their own without legal representation. In contrast, employers will often have legal counsel present and, therefore, may be able to exert greater pressure on employees to accept a settlement that is less than what the BC ESA prescribes.³⁹ Moreover, given that the choice for employees is to either accept a settlement or run the risk that their claims will be unsuccessful in an adjudicative hearing following the failed mediation, they may be more likely to accept a settlement.⁴⁰

Further, such an enforcement procedure does not encourage employers to comply with the BC ESA. In fact, the opposite is true. Unscrupulous employers may be encouraged to breach the BC ESA if they know that an employee’s complaint is more likely to lead to a mediated settlement, rather than a formal investigation. It is, therefore, curious that Chiasson J.A. did not consider these amendments in his analysis.

In short, had Chiasson J.A. adhered more closely to the *Orpen* test and placed greater emphasis on the policy objectives underlying the BC ESA when examining the adequacy of the enforcement regime, including the mediation and settlement agreement process, his conclusion may have been different.

Incidentally, it is telling that, before the Court of Appeal overturned the decision of Wedge J., there was a uniform response to *Macaraeg* (BCSC) in the legal community in British Columbia. Law firms representing employers were quick to release commentaries that

34. *Employment Standards Amendment Act*, S.B.C. 2002, c. 42.

35. *Macaraeg* (BCCA), *supra* note 1, at paras. 88, 93.

36. David Fairey, *Eroding Worker Protections BC’s New ‘Flexible Employment Standards* (Vancouver: Canadian Centre for Policy Alternatives, 2005) at 21. See BC ESA, *supra* note 2 at s. 76(1).

37. Fairey, *ibid.* at 7, 21, 32. See BC ESA, *ibid.*, s. 78.

38. This is not to suggest that resolution of disputes between employers and employees by way of mediated settlement does not have its advantages. As Fairey observed from his discussions with Employment Standards Branch staff, the mediated settlements were particularly advantageous if (i) employees needed some of the money owed with a degree of urgency, (ii) the facts surrounding the complaint were unclear and dispute, or (iii) both the employer and employee were partly in the wrong. See Fairey, *ibid.* at 22.

39. *Ibid.*

40. *Ibid.*

warned employers to ensure that their policies and practices were in strict compliance with the BC *ESA*. This raises the question: if employees' interests and rights were being adequately protected under the current statutory enforcement regime, as Chiasson J.A.'s conclusion suggests, then why do so many employers fail to comply with the BC *ESA*?

In conclusion, the shortcomings of the Court of Appeal's analysis and ultimate decision are not merely significant from an academic perspective, but have real-life implications for employees in British Columbia. For example, by limiting the enforcement of statutory rights to the scheme set out in the BC *ESA*, particularly the six month limitation period on bringing a complaint and assessing damages, an onus is put on employees to know their statutory rights and take the initiative to either negotiate them into an agreement or be restricted to enforcing them under the BC *ESA*. Such an effect is entirely inconsistent with the object of employment standards legislation which is to protect the interests of employees, who are often unaware of their employment rights, while encouraging employers to comply with the minimum requirements of the BC *ESA*. Furthermore, an enforcement regime that, in some cases, perpetuates the power imbalance between employers and employees only hinders employees from securing the minimum rights that they were unable to effectively bargain for at the outset of the employment relationship.