IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Lam v. University of British Columbia,* 2013 BCSC 2094

Date: 20131120
Docket: S035269
Registry: Vancouver

Between:

Howard Lam

Plaintiff

And

University of British Columbia

Defendant

And

Arpel Industries Ltd., carrying on business as Arpel Security Systems, Arpel Security Systems Ltd., Arpel Security and Monitoring Ltd., Enerand Holdings Ltd., carrying on business as Caltech Tech Services, Peter Moore, carrying on business as Moore Security Systems, Thermo Forma Inc., Vancouver Coastal Health Authority operating as Vancouver General Hospital and UBC Hospital, Mallinckrodt, Inc. and Sanyo Electric Co., Ltd.

Third Parties

Before: The Honourable Mr. Justice Butler

Reasons for Judgment

Counsel for the Plaintiff:	Arthur M. Grant Sandy Kovacs
Counsel for the Defendant:	Robert B. Kennedy, Q.C. Dylana R. Bloor Ryan J.M. Androsoff
Place and Date of Trial/Hearing:	Vancouver, B.C. May 28-30, 2013
Place and Date of Judgment:	Vancouver, B.C. November 20, 2013

[1] This class proceeding was commenced following damage or destruction to sperm of the representative plaintiff and class members on May 24, 2002 when the supply of electricity was interrupted to the freezer in which it was stored. The freezer, a cryptopreservation unit which stored the cells at temperatures below -130 degrees Celsius, was operated by the University of British Columbia Andrology Lab. In *Lam v. University of British Columbia*, 2010 BCCA 325, the court certified the action as a class proceeding.

[2] The action has had a long and complicated procedural history since the certification order was made. Some explanation of the issue which is before the court is required. The common issues certified included three negligence issues and two contract issues. The contract issues concern the Sperm Bank Facility Agreement (the "Agreement") signed by each class member at the time the sperm was placed in storage. The Agreement contains an exclusion clause which UBC relies upon in defence of the claims. The contract issues were considered to be threshold issues and were ordered to be determined prior to the negligence issues. The two certified contract common issues, as modified by my decision in *Lam v. University of British Columbia* (6 July 2011), Vancouver No. S035269, are:

> Common issue 4. Is the defendant, UBC, entitled to rely on the exclusion clause against any or all of the proposed class members?
>
> Common issue 5. Is the exclusion clause in the contract unenforceable by being contrary to public policy?

[3] A common issues trial to consider the two contract issues was scheduled to commence on May 27, 2013. At the Trial Management Conference held in advance of the trial, the parties agreed that it was not possible or practical to consider both issues at the upcoming trial. However, the parties did not agree as to which, if either, of the issues could be tried. The Trial Management Conference was adjourned to give the parties an opportunity to propose a course of action to advance the litigation of the common contract issues.

[4] The parties then proposed that a "sub-issue" be tried at the scheduled common issues trial. They agree it is necessary to obtain an answer to the sub-issue in order to resolve common issue 4. The parties also agree it is beneficial to determine the sub-issue because, depending on how it is decided, common issue 4 may be completely resolved. The parties proposed that a summary trial proceed to resolve the sub-issue based on an agreed statement of facts. The sub-issue proposed for determination is:

> Is the defendant, UBC, precluded from relying upon the exclusion clause in the Agreement as against the Class members by virtue of the *Warehouse Receipt Act*, R.S.B.C. 1996, c. 481 (the "*WRA*")?

[5] While the applicability of the *WRA* to the Agreement was raised only recently by the plaintiff, I agree that the determination of this sub-issue will advance the litigation. Accordingly, the common issue trial proceeded on the basis of an Agreed Statement of Facts, relevant portions of which include:

1. At all material times, the Defendant was a corporation continued as a university under the University Act, RSBC 1996, c. 468.
2. At all material times, the Andrology Lab was established, directed and operated by a person or persons, one of whom was the Defendant. In this Agreed Statement of Facts, a reference to the "Andrology Lab" is a reference to that person or those persons, as that person or those persons may have changed over time.
3. The Andrology Lab was established in 1982. The Andrology Lab initially operated out of the Koerner Pavillion of the University of British Columbia Hospital. As of 2001, the Andrology Lab operated out of a location at Vancouver General Hospital.
4. The Andrology Lab received, tested, froze and stored specimens of sperm provided by all Class members. Each Class member provided to the Andrology Lab one or more specimens of his own sperm for storage.
5. The Andrology Lab drafted the "Sperm Bank Facility Agreement" (the "Agreement").
6. The following terms were found in all of the Agreements (the sections that varied over time are identified in square brackets) that were provided to the Class members by the Defendant:

SPERM BANKING FACILITY AGREEMENT

THIS IS A LEGAL DOCUMENT. PLEASE READ THIS AGREEMENT CAREFULLY BEFORE YOU SIGN IT BECAUSE BY SIGNING YOU WILL BE AGREEING TO EVERYTHING WRITTEN HERE. IN PARTICULAR MAKE SURE YOU READ AND UNDERSTAND THE EXCLUSION OF OUR RESPONSIBILITY IN ITEMS 6 AND 7.

In this Agreement the words “we”, “our” and “us" refer to the [different wording used in different versions of the Agreement]. The word “Specimen” refers to your sperm specimen which you provide to us, and which is the subject of this Agreement.

1. SERVICES TO BE PROVIDED BY DEPARTMENT

At your request, and on the payment by you of the applicable fees referred to below, we will:

(a) receive the Specimen which must be properly obtained and submitted in a specified container;

(b) test the Specimen only for the motility and number of spermatozoa but NOT for any other reason including genetic or chromosomal disorder or defect or for any disease present in the Specimen;

(c) freeze the Specimen under such conditions and procedures as we consider are appropriate given the resources and technology available to us;

(d) store and maintain the frozen Specimen for a period of at least one year; and

(e) obtain your instructions with respect to continued storage of the frozen Specimen for periods beyond one year, provided that for this purpose, we will only correspond with you at the address shown on the last page of this Agreement or at any other addresses of which you have notified us in writing.

2. FEES

You will be responsible for three categories of fees in connection with our service. These fees are:

(a) Deposit Fee

The amount of this fee is set out in the attached fee schedule and relates to the receipt, testing and freezing and storage of the Specimen in accordance with this Agreement. It is payable upon the receipt by us of the Specimen.

(b) Annual Storage Fee

The amount of this fee is set out in the attached fee schedule and relates to the storage of the Specimen for a one year period. It is due at the time the Specimen is frozen and payable on receipt of invoice, and is due and payable annually

thereafter on receipt of invoice as long as we continue to store the Specimen, whether or not specifically agreed to beforehand by you.

(c) Withdrawal Fee

The amount of this fee is set out in the attached fee schedule and relates to delivery to your physician of any part or all of the Specimen requested by your physician. It is payable at the time of your physician's request for the delivery of the Specimen.

We may at any time change the amount of any one or all of the above fees and you will be required to pay the fee prevailing at the time it is payable.

If you do not pay any applicable fee when due, we will not be required to perform any services for which the fee is intended nor will be under any obligation to continue to perform any duty imposed upon us by this Agreement, and we will be entitled to treat this Agreement as having been terminated by you. We will not send out notices reminding you that a payment is overdue; prompt payment of all fees is your responsibility.

3. USE OF SPECIMEN

During the period that the Specimen is stored with us we are under no obligation to release all or any portion of it to any person other than your physician. Release will only take place after a written request by your physician. It is understood between us that the Specimen is to be used only for the purpose of the artificial insemination of your legal or common-law spouse by a duly authorized physician, but we will have no responsibility or liability whatsoever for the ultimate use of any part or all of the Specimen by your physician or for the method of results of any artificial insemination. Our only responsibility is to test, freeze and store the Specimen, and to deliver it when required.

By signing this Agreement, you authorize us to use small portions of the Specimen from time to time to test the number and motility of spermatozoa for any purpose whatsoever, including research or statistical purposes not related to you, provided that the amount of Specimen we use does not adversely affect the quality and quantity of your Specimen required for the purposes of at least on attempt at artificial insemination.

The above two paragraphs are subject to any order of a court of competent jurisdiction regarding the use, storage, release or disposal of any part or all of the Specimen.

4. WITHDRAWAL OF THE SPECIMEN

You may at any time upon:

(a) payment of the Withdrawal Fee;

(b) delivery by your physician to us of 45 days prior written notice of withdrawal; and

(c) delivery to us of such withdrawal forms or releases as we require;

require us to deliver to your physician within the 45 day notice period any part or all of the Specimen. If the Specimen must be shipped outside of the greater Vancouver area, we will use our best efforts to assure proper carriage (at your own cost), but will not be responsible for any accidents or damage to or loss, theft or willful or negligent destruction of the Specimen which occurs while it is in the carrier's possession.

5. TERMINATION OF AGREEMENT AND DISPOSAL OF SPECIMEN

This Agreement can be terminated by you or us by giving 60 days written notice of termination to the other. It will also terminate automatically if written notice of your death is delivered to us by your personal representative, or if you do not pay a required fee when due.

Upon this termination of our obligations under this Agreement we may dispose of the Specimen in any manner which we in our absolute discretion consider proper, but no Specimen will, without your written consent witnessed in writing, be used or disposed of for the purpose of causing pregnancy in any person by means of artificial insemination.

6. NO WARRANTIES

By signing this Agreement, you acknowledge that neither we nor our successors or assigns nor any of our governors, directors, officers, employees or agents, has made any representations, warranties or assurances to you of any nature or kind whatsoever with respect to the testing, freezing and storage of your Specimen including without limiting the generality of the foregoing any representations, warranties or assurances with respect to:

(a) the viability or motility of your frozen sperm cells or frozen sperm ceils generally or the health or suitability of the Specimen for artificial insemination;

(b) the possibility of successful regeneration or use of the Specimen at any time in the future for the purposes of artificial insemination or for any other purposes whatsoever;

(c) the likelihood of a pregnancy resulting from artificial insemination using the Specimen or the risk or absence of risk of birth defects or miscarriages for any reason whatsoever arising [from] a pregnancy caused by artificial insemination using the Specimen;

(d) the risk or absence of risk of any complications in pregnancy and/or delivery arising out of a pregnancy caused by artificial insemination using the Specimen;

(e) the performance or continued performance of our freezing apparatus or our ability to successfully freeze the Specimen.

By signing this Agreement, you further acknowledge that you understand that there are inherent risks involved in the freezing of sperm for future artificial insemination; that the viability, motility and capacity to fertilized of frozen sperm cells varies from specimen to specimen; that your Specimen will deteriorate with age and storage conditions and that no warranty, guarantee or assurance of any kind whatsoever can be or is made by us with respect to the possibility of successful use of frozen sperm cells for the purpose of artificial insemination.

7. LIMITATION OF OUR LIABILITY

By signing this Agreement you agree that neither we nor our successors or assigns nor any of our governors, directors, officers, employees or agents will be liable to you or anyone else for any destruction of, damage or alteration to or misuse of your Specimen for any reason whatsoever, including:

(a) the improper testing of your Specimen;

(b) improper freezing of your Specimen;

(c) improper maintenance and/or storage of your Specimen in a frozen state, or

(d) improper withdrawal and/or delivery of your Specimen.

This exclusion of our liability extends to any damage, misuse or impropriety caused by or resulting from any malfunction of our freezing equipment (whether for causes within our control or not) or from any failure of utilities, strike, cessation of services or other labour disturbances or any failure or similar occurrence in our or any other laboratory or from any fire, earthquake or other acts of nature beyond our control, or caused by or resulting from any act, omission or negligent conduct on the part of us or our successors or assigns or any of our governors, directors, officers, employees or agents.

> 8. CONFIDENTIALITY
>
> We will agree to take all reasonable steps to ensure that information about your personal identity and the Specimen will be kept confidential, although we may release any information required by law, court order or governmental authority.
>
> …
>
> 10. The Andrology Lab charged the following initial and annual storage fees to Class members over the following time frames:
>
> | | | |
> |---|---|---|
> | a. | $25.00 per year | 1982-1989 |
> | b. | $30.00 per year | 1990-1994 |
> | c. | $40.00 per year | 1995-1998 |
> | d. | $50.00 per year | 1999-2002 |
>
> 11. Each Class member paid at least the initial storage fee. Some Class members failed to pay the subsequent annual storage fees that became due and payable.
>
> 12. The Class members each provided at least one specimen sample of their sperm to the Andrology Lab to be tested, frozen and stored. When a Class member wanted to retrieve one or more of their samples, the Class member would be required to pay an additional fee (the retrieval fee) for its retrieval.

[6] Based on these agreed facts, consideration of the question before the court requires examination of the following issues:

1. Is the *WRA* applicable to the Sperm Banking Facility Agreement (the "Agreement")?

2. If the *WRA* applies, does it preclude the enforceability of the exclusion clause in the Agreement?

[7] The first issue raises a number of sub-issues for possible consideration including:

- Are sperm/sperm samples "goods" as that term is defined in the *WRA*?
- Do principles of statutory interpretation preclude the *WRA*'s applicability?

- Is the defendant UBC, as an operator of the Andrology Lab, "a warehouser" as that term is defined in the *WRA*?

- Were the Agreements issued by the defendant UBC "warehouse receipts" as that term is defined in the *WRA*?

Position of the Plaintiff

[8] The plaintiff says it is clear, on a plain reading of the *WRA* that the provisions in the *Act* apply to the storage of sperm in the circumstances of this case. The plaintiff says sperm samples are "goods" because sperm is property and is not excluded by the definition in the *WRA*. In support of this position, the plaintiff refers to two authorities which have found stored sperm to be property: *Yearworth v. North Bristol NHS Trust*, [2009] EWCA Civ 37; and *Kate Jane Bazley v. Wesley Monash IVF Pty Ltd*, [2010] QSC 118 (Queensland S.C.T.D.) [*Bazley*].

[9] The plaintiff stresses there is no statutory or principled basis upon which to preclude the applicability of the *WRA* in the circumstances of this case. The plaintiff concedes the *Assisted Human Reproduction Act*, S.C. 2004, c. 2, which forbids the sale of sperm, would limit the application of certain provisions in the *Warehouse Lien Act*, R.S.B.C. 1996, c. 480 (the "*WLA*"), namely, the ability of the warehouser to sell the sperm following non-payment of its charges. However, the plaintiff argues this is not relevant to the interpretation or applicability of the *WRA*; the fact that something cannot be sold, does not mean it is not property.

[10] The plaintiff argues that UBC, as an operator of the Andrology Lab, was fulfilling the role of a warehouser. All class members were required to pay the Andrology Lab an annual fee to store the sperm. Therefore, the Andrology Lab was performing the storage service "for reward", a requirement of the *WRA*. In this regard, UBC has conceded its relationship with the class members was one of bailment for reward.

[11] The plaintiff also argues the Agreement, prepared and issued by the Andrology Lab and signed by its representative, is a warehouse receipt. The plaintiff

submits the Agreement meets all of the requirements of a warehouse receipt in s. 2 of the *WRA*.

[12] Finally, the plaintiff argues that if the *WRA* applies, UBC is not entitled to rely on the exclusion of liability clause in the Agreement. He submits the exclusion clause is contrary to the express words in ss. 13 and 2(4)(a) and (b) of the *WRA*. While a warehouser may limit its liability to a predetermined amount, it cannot insert a clause that excludes liability. The exclusion clause in the Agreement purports to exclude liability and so, the plaintiff submits, must be null and void.

Position of UBC

[13] UBC argues the *WRA* does not apply to the storage of sperm by the Andrology Lab. It claims the *WRA* and *WLA* (collectively the "Warehouse Statutes") are to be interpreted and applied as one regime. If that is done, it is necessary to restrict the meaning of "goods" in the Warehouse Statutes to property that is the proper object of trade and commerce.

[14] UBC argues that the Warehouse Statutes are commercial legislation intended to facilitate inter-jurisdictional trade by standardizing the law of warehouse liens and receipts. Although the definition of "goods" may be broad enough to encompass the storage of sperm, its definition should be restricted to property of a merchantable nature. This is what the Legislature intended.

[15] As well, UBC stresses that s. 7 of the *Assisted Human Reproduction Act* prohibits the sale, purchase or advertisement for purchase of sperm or ova. If the Warehouse Statutes are found to apply to the storage of sperm, many sections of the *WRA* and all of the *WLA* would be inapplicable. This suggests the Legislature could not have intended the Warehouse Statutes to apply to the storage of sperm or other human tissue. Otherwise, it would be impossible for a warehouser to exercise its statutory rights under the Warehouse Statutes, without committing a criminal offence under the *Assisted Human Reproduction Act*.

[16] Further, UBC argues the Agreement is not a warehouse receipt for the purposes of the *WRA*. A negotiable warehouse receipt may be sold and purchased as representation of the goods indicated on the receipt. A nonnegotiable receipt may be transferred if the stored goods are sold. UBC submits the Agreement is not capable of purchase, negotiation or transfer, and accordingly, cannot qualify as a warehouse receipt.

[17] UBC argues that if the *WRA* is found to apply, it is not precluded from relying on the exclusion clause in the Agreement. UBC submits that under the *WRA*, parties are permitted to agree to a limitation of damages, and that the exclusion clause in the Agreement does not exclude liability, but limits damages to zero. Therefore, the exclusion clause does not contravene ss. 13 and 2(4)(a) and (b) of the *WRA*.

Issue 1. Is the *WRA* applicable to the Agreement?

[18] Relevant provisions of the *WRA* include the following:

> 1 In this Act:
>
> …
>
> "goods" includes all property other than things in action, money and land;
>
> …
>
> "warehouse receipt"" means an acknowledgment in writing by a warehouser of the receipt for storage of goods not owned by the warehouser;
>
> "warehouser" means a person who, for reward, receives goods for storage.
>
> 2 (1) A receipt must contain all of the following particulars:
>
> (a) the location of the warehouse or other place where the goods are stored;
>
> (b) the name of the person by whom or on whose behalf the goods are deposited;
>
> (c) the date of issue of the receipt;
>
> (d) a statement either
>
> (i) that the goods received will be delivered to the person by whom or on whose behalf the goods are deposited, or to another named person, or

> (ii) that the goods will be delivered to bearer or to the order of a named person;
>
> (e) the rate of storage charges;
>
> (f) a description of the goods or of the packages containing them;
>
> (g) the signature of the warehouser or the authorized agent of the warehouser;
>
> (h) a statement of the amount of any advance made and of any liability incurred for which the warehouser claims a lien.
>
> (2) If a warehouser omits from a negotiable receipt any of the particulars set out in subsection (1), the warehouser is liable for damage caused by the omission.
>
> (3) A receipt must not be considered not to be a warehouse receipt because of the omission of any of the particulars set out in subsection (1).
>
> (4) A warehouser may insert in a receipt issued by the warehouser any other term or condition that
>
> (a) is not contrary to any provision of this Act, and
>
> (b) does not impair the warehouser's obligation to exercise the care and diligence in regard to the goods as a careful and vigilant owner of similar goods would exercise in the custody of them in similar circumstances.
>
> …
>
> 13. A warehouser is liable for loss of or injury to goods caused by the warehouser's failure to exercise the care and diligence in regard to them as a careful and vigilant owner of similar goods would exercise in the custody of them in similar circumstances.

[19] The resolution of this issue requires an assessment of whether provisions of the *WRA* can be interpreted to apply to a storage agreement that was never considered by the parties to be subject to the terms of that Act. I infer the parties did not contemplate the application of the *WRA* to their Agreement because counsel did not raise this issue until years after commencement of the litigation.

[20] The failure of the Andrology Lab, the class members and their counsel to consider the *WRA* either at the time of deposit of the sperm or when the action was commenced is understandable. The Andrology Lab was a specialized facility which undertook clinical and research functions. It did not provide medical services or treatment but conducted research into male reproductive dysfunction. The clinical

work included the storage, analysis and testing of sperm. The Andrology Lab did not store or warehouse any goods or property other than sperm. The class members had the opportunity to use the storage facility to preserve their sperm because each of them was scheduled to undergo chemotherapy treatment for cancer.

[21] Just as the parties did not consider whether the *WRA* applied to the storage of sperm, the *WRA* was not intended, at the time it was passed, to apply to the storage of body parts. When the *WRA* was enacted in British Columbia, technology for the storage of sperm was not in use and the common law did not recognize that sperm or body parts could be property.

[22] The move to develop uniform legislation to deal with rights and obligations of warehouse operators and bailors of stored goods began in the United States around the turn of the 20th century. The *WRA* was enacted in British Columbia in 1945. The predecessor of the *WLA* was enacted in British Columbia in 1920, and the first uniform *WLA* was passed two years later. The acts are uniform legislation and are, accordingly, similar to statutes enacted in the other common law provinces. The Warehouse Statutes provide protection in the form of warehouse liens, to a warehouser whose storage fees are unpaid. The legislation also confirms the status of warehouse receipts as commercial documents to evidence ownership. The *WRA* recognizes both negotiable receipts and nonnegotiable receipts which are also capable of being transferred.

[23] Even though the parties did not contemplate the application of the *WRA* to their storage agreement, on a plain reading of the *WRA* it would appear that sperm is included in the definition of "goods", and that the Agreement meets the definition of "warehouse receipt". There is no question that the Andrology Lab agreed to store the sperm in exchange for payment of annual fees; hence there was a bailment for reward. The *WRA* intended to codify the common law with respect to bailment for reward in the case of nonnegotiable receipts: see *Kruger Products Limited v. First Choice Logistics Inc.*, 2010 BCSC 1242 at paras. 108-112, rev'd on other grounds 2013 BCCA 3. Accordingly, there is a principled basis for the application of the *WRA*

to this bailment. Further, while words in legislation are normally given the meaning they held on the day when the statute was enacted, broad language can be interpreted to apply to circumstances unknown at the time of enactment.

[24] The difficult question of statutory interpretation raised by these circumstances is resolved by application of the modern approach to statutory interpretation best described in the principle espoused by Elmer Driedger in *Construction of Statutes*, 2nd ed. (Toronto, ON: Butterworths, 1983) at 87:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[25] For the reasons that follow, I have determined there is no ambiguity in the definition of "goods" in the *WRA,* and that sperm falls within that definition. The parties have also put in issue the definitions of "warehouse receipt" and "warehouser". Both terms are important to the application of the *WRA* to the circumstances of this case. Whether the Agreement is a warehouse receipt and the Andrology Lab is a warehouser turns largely on the definition of goods. Having concluded that sperm falls within that definition, it follows that the Agreement is a warehouse receipt, and the Andrology Lab is a warehouser.

Analysis

[26] The "Driedger principle" has been adopted in the leading cases of *Re: Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27; and *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, and in many other Supreme Court of Canada decisions.

[27] In order to determine and give effect to the intent of the legislature, courts utilize textual, contextual or purposive analyses. As noted in *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 SCR 601 at para. 10, in each case, the relative effects of these three approaches may vary, but the court must seek to read the provisions in any statute harmoniously:

> … The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

[28] Here, the plaintiff emphasizes a textual approach while UBC contends a contextual or purposive analysis leads to an interpretation which is harmonious with the whole of the *WRA*. I will explain why I conclude that the definition of goods is precise and unequivocal and must play a dominant role in the interpretive process. Further, I will set out why the purposive or contextual analysis does not lead to an interpretation which displaces the plain meaning of the definition.

Textual Analysis

[29] The *WRA* applies to "goods". If that term was not defined, it would be capable of ambiguity. As UBC noted in argument, it has multiple meanings. The definitions in the *Shorter Oxford English Dictionary,* 6th ed. include: "3 Property or possessions" … and "4 Saleable commodities; merchandise, wares…" In *Black's Law Dictionary*, 8th ed, "goods" is defined to mean: "Tangible or movable personal property other than money; esp. articles of trade or items of merchandise…".

[30] However, "goods" is defined in s. 1 of the *WRA* and the definition is extremely broad. It includes "all property other than things in action, money and land" (emphasis mine). The definition is inclusive and not limited, but for the three clear exceptions.

[31] Property as a concept in common law focuses on possession, use and ownership. The definition in *Black's Law Dictionary* for property includes "1 The right to possess, use and enjoy a determinate thing…; the right of ownership… 2 Any external thing over which the rights of possession, use, and enjoyment are exercised…". Property is thus a broad concept which can change over time as our

ability to use and possess external or determinate things changes. It is, without question, a general concept.

[32] In *The Interpretation of Legislation in Canada*, 4th ed. (Toronto, ON: Thomson Reuters, 2011), Pierre-Andre Cote sets out at 277 three principles which guide the application of the grammatical approach to interpretation:

> In the application of the grammatical method, one may be guided by three principles which specify its scope: 1) words must be given their ordinary meaning; 2) words must be given the meaning they had on the day the statute was enacted; 3) adding to the terms of the statute, or depriving them of effect, should be avoided.

[33] With regard to the second of those principles, Cote notes at 285 that:

> As a general rule, the point of reference of a statute should be the time of its enactment. As the role of the interpreter is to recreate the thoughts underlying the text of an enactment, it seems logical to give the words their ordinary meaning at the time of the legislation's adoption, taking into account the context in which they were enacted.

[34] Of course, at the time of enactment of the *WRA*, the legislature would not have considered that sperm was property. There was no technology available for the effective storage of sperm and the common law did not recognize property in body parts or products. However, broad statutory categories can be held to include things unknown when the legislation was passed. Cote explains the rationale for this at 288:

> Not only can a statute apply to situations which did not exist when it was enacted, it can also govern phenomena which were virtually unimaginable at the time. If justified by its aim, and compatible with its wording, a statute can apply to inventions subsequent to its enactment. ... In each case, the court will ask itself if the provision's purpose will justify application to the new invention, and whether the enactment's terms are sufficiently general to permit its application to things unknown at the time of enactment.

[35] The question as to whether sperm is property has been considered by a number of courts. In *Yearworth*, the Court of Appeal (Civil Division) considered a case with some similarity to the present action. The claimants were cancer patients who, before undergoing chemotherapy, provided sperm samples to the defendant

hospital. The sperm were frozen and stored in liquid nitrogen but the samples thawed when the liquid nitrogen levels fell too low. The court rejected the hospital's argument that the common law does not recognize a substance generated by the body as capable of being owned. It concluded the claimants owned the sperm and stated at para. 45:

> In this jurisdiction developments in medical science now require a reanalysis of the common law's treatment of and approach to the issue of ownership of parts or products of a living human body, whether for present purposes (viz. an action in negligence) or otherwise.

[36] In *Yearworth*, the court also concluded there was a gratuitous bailment of the sperm by the claimants, and that the hospital was liable to the claimants under the law of bailment.

[37] In *Bazley*, the Supreme Court of Queensland was asked to determine whether sperm stored by a hospital was property. The sperm was placed in storage when Mr. Bazley was diagnosed with cancer. After his death his wife sought an order preserving the sperm so that she could use it. The hospital took the position under national ethical guidelines that it was required to destroy the sperm as Mr. Bazely had not completed an instruction form transferring the right to use the sperm to his wife. Ms. Bazely argued that the sperm was property which was part of Mr. Bazley's estate and that it passed to her under his will.

[38] After reviewing the relevant common law authority, including *Yearworth* and *Palmer on Bailment*, 3rd ed. (2009), the court concluded at para. 33:

> The conclusion, both in law and in common sense, must be that the straws of sperm currently stored with the respondent are property, the ownership of which vested in the deceased while alive and in his personal representatives after his death. The relationship between the respondent and the deceased was one of bailor and bailee for reward because, so long as the fee was paid, and the contact maintained, the respondent agreed to store the straws.

[39] Two Canadian cases have considered whether sperm or frozen embryos are property. In *C.C. v. A.W.*, 2005 ABQB 290, the court considered whether the respondent who had gifted sperm to the claimant for her to use for the conception of

children could prevent her use of the embryos. The court found the respondent's gift was unqualified and concluded at para. 21 that the fertilized embryos were the claimant's property:

> The remaining fertilized embryos remain her property. They are chattels that can be used as she sees fit. Mr. A.W. is not in a position to control or direct their use in any fashion. They shall be returned to Ms. C.C.. Conversely, as they are not Mr. A.W.'s property and he has no legal interest in them, he is not responsible for paying for their storage. That responsibility lies with Ms. C.C. who owns the embryos.

[40] In *J.C.M. v. A.N.A.*, 2012 BCSC 584, Russell J. relied on the decision in *C.C.* for the proposition that stored sperm is property. She found the reasoning in *Yearworth* to be persuasive and stated at para. 58:

> Further support for this position is found in the *Yearworth* case. This decision provided a much more detailed basis for a finding of sperm as property. As is acknowledged in that case, typically the common law did not allow for human beings, living or deceased, or their body parts and products to be considered property. This was, no doubt, for good reason. However, I agree with the court of appeal's finding that medical science has advanced to a point where the common law requires rethinking of this point.

[41] These cases did not consider whether the term "property", as used in legislation, could include sperm. They were concerned with whether the common law now regards stored sperm or embryos as property. That distinction is of no consequence to the analysis I must make in this case. Courts in a variety of jurisdictions have come to the conclusion that stored sperm is property. I agree with the conclusion arrived at in these cases. The frozen sperm at issue in this case is the property of the class members. The sperm was ejaculated, frozen and stored for the purpose of using it for conception. Applying the current state of the law of property to the definition in the *WRA* leads to a conclusion that frozen sperm is "goods".

[42] The next step in the analysis is to ask if the purpose of the provisions in the *WRA* justifies the application of those provisions to the new definition of property. One of the purposes of the *WRA* was to codify the common law of bailment. Under the common law, a bailee is required to exercise the same care and diligence with

respect to the bailed goods as a careful and vigilant person would exercise over his own similar goods in like circumstances. Sections 2(4) and 13 of the *WRA* effectively accomplish that. There is no reason why these provisions should not be applied to property that can be stored for reward which was not contemplated at the time the legislation was enacted. The purpose of requiring bailees to exercise adequate care and diligence applies equally to all kinds of property that can be stored for reward.

[43] The other step in the Cote analysis is to ask if the legislative provision in question is sufficiently general to permit its application to things unknown at the time of enactment. As I have already noted, the definition of goods is broad and inclusive. In other words, the provision is sufficiently general to apply to things unknown at the time of passage. There is no reason not to apply the provisions of the *WRA* to goods which fall within the current understanding of "all property other than things in action, money and land."

[44] A textual analysis also requires consideration of the enactment as a whole. UBC argues that if "goods" includes sperm, an explicit or implicit conflict is created with other provisions in the *WRA* and the *WLA.* As I set out below, I conclude it is not necessary to consider provisions of the *WLA* when interpreting the provisions in the *WRA*. Moreover, there is no explicit or implicit conflict with other provisions in the *WRA* if "goods" includes sperm.

[45] The thrust of UBC's argument is that the conflict arises because it is an offence to sell sperm. Pursuant to s. 7(1) of the *Assisted Human Reproduction Act*, it is an offence to "purchase or advertise for the purchase of sperm or ova from a donor or person acting on behalf of a donor." If a warehouser could issue a negotiable receipt or a transferrable nonnegotiable receipt for frozen sperm, UBC argues this would mean that the sperm could be sold or transferred. This would be contrary to the *Assisted Human Reproduction Act* and public policy. I reject this submission.

[46] The focus by UBC on the ability of a warehouser of sperm to issue a negotiable receipt is misplaced. It is not an issue in this case because the Agreement does not purport to be negotiable. It is a nonnegotiable receipt. More importantly, the possibility of a warehouser issuing a negotiable receipt for the storage of sperm does not create the kind of conflict that requires "goods" to be interpreted not to include sperm. There is no requirement for a warehouser to issue negotiable receipts – the *WRA* provides for the issuance of nonnegotiable receipts. It also permits the inclusion of terms in a receipt so long as those terms are not contrary to provisions in the *WRA*: s. 2(4)(a). Further, if a receipt purports to be negotiable but another statute makes it an offence to sell the property in question, this would not create an irreconcilable conflict. It would only mean that the holder of the receipt would have to comply with other statutory provisions.

[47] The fact that a nonnegotiable receipt can be transferred similarly does not create a conflict or an absurdity. Rather, the holder of such a receipt could be subject to other laws or regulations. A warehouser who issues a receipt for a special class of goods would likely be aware of the existence of other statutory provisions, just as the Andrology Lab would be knowledgeable about laws relating to the transfer and use of sperm. It is for this reason that the Agreement contained specific provisions regarding delivery and use of the sperm.

[48] By analogy, the fact that it is an offence to transfer firearms except in accordance with law would not result in the conclusion that firearms are not "goods" or that the *WRA* does not apply to the storage of firearms. Rather, any sale or transfer of firearms would have to be made in accordance with other legislative provisions including the *Criminal Code* and the *Firearms Act*.

[49] The fact that sperm cannot be purchased does not prevent it from falling within the definition of "goods" in the *WRA*. It simply reflects the fact that sperm, like other classes of property, is subject to control or regulation by other statutory provisions. If sperm is property that can be stored and for which a receipt can be issued, then it falls within the definition of "goods" in the *WRA*.

[50] In summary, on a grammatical or textual analysis, the frozen sperm specimens covered by the Agreement fall within the definition of goods in the *WRA.* The definition is clear and unequivocal; "goods" is meant to include "all property" with three exceptions. Those exceptions do not apply to sperm and the inclusion of sperm in the definition is not inconsistent with other provisions in the *WRA*.

[51] Nevertheless, I must be careful not to adopt a strictly literal approach to interpretation. I must consider the possibility of coming to a contrary conclusion by applying a purposive or contextual analysis. As noted by Cote, I must ask if a purposive or contextual approach to the provisions in the *WRA* can justify the inclusion of sperm in the definition of property.

Purposive and Contextual Analysis

[52] A strictly literal approach to statutory interpretation has long been rejected by the Supreme Court of Canada. As the court stated in *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 S.C.R. 84 at para. 34, each provision must be read in its entire context:

> The grammatical and ordinary sense of the words employed in s. 70(1)(b) is not determinative, however, as this Court has long rejected a literal approach to statutory interpretation. Instead, s. 70(1)(b) must be read in its entire context. This inquiry involves examining the history of the provision at issue, its place in the overall scheme of the Act, the object of the Act itself, and Parliament's intent both in enacting the Act as a whole, and in enacting the particular provision at issue.

[53] The starting point for this analysis is one I have already made. The definition of goods in the *WRA* is broad and inclusive; it includes all property except for things in action, money and land. The definition is sufficiently general to include items that would not have been considered goods in 1945. The definition of goods in the *WRA* is important, not only to trade and commerce, but to the business of storage. It was intended to codify the law of bailment. It is concerned not only with articles of trade or commerce, but with the storage of "all property". This broad definition suggests that the legislature's intention was to have an open and inclusive definition of goods rather than to restrict the application of the statute.

[54] The definition of goods in the *WRA* is not the same as the definition in the *WLA* which provides that goods "includes personal property of every description that may be deposited with a warehouser as bailee". The difference is instructive for two reasons: first, it suggests that the Warehouse Statutes were not intended to be read together, contrary to UBC's argument. If they were intended to be read together, the definitions would presumably have been the same. Second, the definition of goods in the *WRA* is broader and so must have been intended to apply to a broader range of property items than the definition in the *WLA*.

[55] In its thorough and instructive written submission, UBC outlined the history of legislation intended to standardize warehouse liens and receipts. The American Warehouseman's Association was at the forefront of the movement to pass uniform legislation governing warehouse receipts based on the mercantile, as opposed to the legal view of such receipts. The common law did not recognize warehouse receipts as being in the nature of documents of title. It did not treat receipts as symbolic of the goods they represented and so did not consider them to be similar to bills of lading: H.C. Gutteridge, *Law of Warehouse Receipts in England and America* (1921) 41 Can. L. Times 194 at 197-98. The move to uniform legislation also sought to standardize a warehouser's lien rights which varied from state to state.

[56] UBC summarized the history of the American move to standardize warehouse legislation at para. 73 of its submissions:

> … [I]t is plain that the American counterpart, and predecessor, to the Warehouse Statutes was decidedly commercial and mercantile in scope and nature. The primary purpose of the 1906 Draft *WRA* was to render the law of warehousemen uniform across the country, but it also had as its objects the confirmation of a negotiable warehouse receipt as just that - negotiable - and the protection of those who relied in good faith on warehouse receipts as proof of title to the goods listed therein. As Mohan noted, the legislation also sought to achieve a proper balancing and "guarding" of interests of warehousemen and "all those who deal with warehousemen and with warehouse receipts", including bailors and third-party purchasers of goods via warehouse receipts.

[57] The enactment of uniform legislation in British Columbia came later. In 1920, the first warehouser's lien act was passed but it was amended and passed in a

different form two years later as uniform legislation. Twenty years passed before the movement towards uniform legislation for warehouse receipts gained traction. In British Columbia, the proposed *WRA* was drafted to take into account the *WLA.* The *WRA* did not include provisions regarding warehouser's liens and the *WLA* was amended to be consistent with provisions in the *WRA* regarding negotiable receipts.

[58] The history of the Warehouse Statutes establishes that the two acts were passed for the purpose of standardizing warehouse legislation in order to balance and guard the interests of warehousers and bailors of goods. The *WRA* also brought into law the mercantile practices relating to negotiable receipts and codified the common law regarding bailment for reward.

[59] UBC asks the court to draw two conclusions from this historical analysis. First, it says that the Warehouse Statutes must be regarded as a "cohesive legislative scheme supported by their common origin". Second, it says that when the Warehouse Statues are considered as a whole, the coherence of the legislation would be undermined if sperm is considered to be "goods". Rather, goods must be restricted to the proper objects of trade and commerce.

[60] With regard to the first of these propositions, I accept that the Warehouse Statutes had a common historical impetus. Both were enacted with a view to standardizing laws relating to the warehousing of goods and the rights of bailors and warehousers. But it does not follow from a common origin that the definition of "goods" in the *WRA* needs to be restricted by the provisions in the *WLA*. There are three reasons for not doing so. First, the definitions of goods in the two statutes are different. Second, the statutes were enacted more than 20 years apart in time. Third, while both enactments dealt with warehousers, the subject matter of the two acts is quite distinct. Apart from the other obvious distinction (one applies to warehouser's liens, the other to receipts), the *WLA*, unlike the *WRA,* was not concerned with codification of the common law relating to bailment.

[61] I cannot conclude from a historical analysis that the definition of goods in the *WRA* must be restricted to goods which could be sold by the warehouser to enforce its lien rights. That proposition is a cornerstone of UBC's argument. It says that goods must be "the proper objects of trade and commerce" over which a warehouser has lien rights including the ability to sell the goods for unpaid storage fees. That cannot be correct as it would require the court to modify or restrict the clear definition of goods in the *WRA*.

[62] In addition, the qualification to "all property" suggested by UBC would create confusion and uncertainty. What is meant by the "proper objects of trade and commerce"? As the plaintiff asked, would personal household items such as photographs, personal mementos and used clothing be excluded from the definition? Would it apply to the storage of personal medical devices or medication that cannot be resold? Would it apply to the storage of firearms? There would be large classes of goods which could be stored but could not be resold, or could be sold only with restrictions, or for which there is no market. All of those categories might fall outside of the suggested qualified definition. This would place a limitation on the provisions of the *WRA* which is not justified. The *WRA* was intended to apply where goods are stored for reward and a receipt for those goods is issued by the warehouser. There is no necessity for a further restriction.

[63] The final argument raised by UBC is focused on the moral and ethical concerns around the commercialization of human reproductive material. In argument it referred at some length to the report of the Royal Commission, *Proceed with Care: Final Report of the Royal Commission on New Reproductive Technologies* (Ottawa, ON: Minister of Government Services Canada, 1993 (the "Baird Report"). UBC also made reference to the *Assisted Human Reproduction Act* prohibition against the purchase of sperm and the provisions in the *Human Tissue Gift Act*, R.S.B.C. 1996, c. 211 (the "*HTGA*"). Section 10 of the *HTGA* prohibits the direct or indirect sale of any tissue, a term which is defined so as to include sperm.

[64] UBC submits the approach taken to statutory interpretation by the Supreme Court of Canada in *Harvard College v. Canada (Commissioner of Patents)*, 2002 SCC 76, [2002] 4 S.C.R. 45, should be followed in the present case. In *Harvard*, the question for resolution was whether the *Patent Act* allowed for the patentability of higher life forms. The applicant college applied for a patent on the "oncomouse", a mouse that had been subject to a genetic engineering process that rendered it highly susceptible to cancer. The case turned on the definition of "invention" in the *Patent Act* which was virtually unchanged from the definition contained in the first iteration of the statute in 1869. Invention was defined to mean "any new and useful art, process, machine, manufacture or composition of matter…".

[65] The Court concluded the definition did not encompass higher life forms. The majority was sensitive to the special concerns intrinsic to the patentability of higher life forms which Parliament would presumably want to consider but could not have done so when the *Patent Act* was first passed. At para. 167, the Court expressed these concerns:

> … The patenting of higher life forms raises special concerns that do not arise in respect of non-living inventions. Unlike other inventions, biologically based inventions are living and self-replicating. In addition, the products of biotechnology are incredibly complex, incapable of full description, and can contain important characteristics that have nothing to do with the invention… In my view, the fact that the *Patent Act* in its current state is ill-equipped to deal appropriately with higher life forms as patentable subject matter is an indication that Parliament never intended the definition of "invention" to extend to this type of subject matter.

[66] I reject UBC's submission that a similar analysis in the present case should result in a conclusion that the legislature never intended "goods" to include frozen sperm. The issue in the present case is very different from the issue in *Harvard*. A conclusion that higher life forms could be patentable raises special concerns because of the nature of the rights granted with a patent.

[67] There are no special concerns raised by a conclusion that "goods" includes frozen sperm. Contrary to the submissions of UBC, if the definition of "goods" in the *WRA* applies to sperm, a warehouser does not have the right to purchase or sell

sperm. In the case of a nonnegotiable receipt, such as the one in issue, the *WRA* does not authorize the sale of sperm (the goods in storage) contrary to the *Assisted Human Reproduction Act* or the *HTGA*. The fact that certain property falls within the definition of "goods" in the statute does not impact on other legislative provisions dealing with the property stored in a warehouse. Rather, it establishes certain rights as between warehouser and bailor. It provides a limitation on the terms that might be included in a warehouse receipt.

[68] In conclusion, the definition of goods in the *WRA* includes sperm. There is no ambiguity in the definition whether approached through a textual, purposive or contextual analysis.

[69] Having concluded that sperm is goods, it follows that the Andrology Lab was a warehouser pursuant to the definition in the *WRA*. It accepted the sperm for storage in exchange for an initial fee and annual storage fees. In other words, it received goods for storage in exchange for reward.

[70] The question as to whether the Agreement is a warehouse receipt requires consideration of the definition and the requirements for a warehouse receipt as set out in s. 2 of the *WRA*. The definition is easily met if the sperm falls within the definition of goods. The Agreement is clearly "an acknowledgment in writing" by the Andrology Lab, a warehouser, "of the receipt for storage of goods not owned by the warehouser."

[71] Pursuant to s. 2(1) of the *WRA*, a warehouse receipt must contain all of the following particulars:

> (a) the location of the warehouse or other place where the goods are stored;
>
> (b) the name of the person by whom or on whose behalf the goods are deposited;
>
> (c) the date of issue of the receipt;
>
> (d) a statement either
>
> (i) that the goods received will be delivered to the person by whom or on whose behalf the goods are deposited, or to another named person, or

> (ii) that the goods will be delivered to bearer or to the order of a named person;
>
> (e) the rate of storage charges;
>
> (f) a description of the goods or of the packages containing them;
>
> (g) the signature of the warehouser or the authorized agent of the warehouser;
>
> (h) a statement of the amount of any advance made and of any liability incurred for which the warehouser claims a lien.

[72] With the exception of the requirement in subsection (h), the Agreement contains each of the particulars required by s. 2(1). The location of the Andrology Lab is noted on page 1 of the Agreement. The name of the person storing the sperm is set out on the last page of each Agreement as is the date on which it was issued. The statement as to whom the goods would be delivered to, required by subsection (d) is dealt with in detail in clause 4 of the Agreement. The sperm is to be delivered to the class member's physician upon payment of the withdrawal fee and the provision of notice. The requirement of subsection (d)(i) is met as the Agreement provides that the goods will be delivered to another named person. As the Agreement is not a negotiable receipt, it does not provide that the goods can be delivered to the bearer of the Agreement. The storage charges are set out in the schedule attached to the Agreement as noted at clause 2 and as required by subsection (e). The goods are described as "your sperm specimen which you provide to us". The final page of the Agreement contains a signature line for the representative of the Andrology Lab as required by subsection (g).

[73] The absence of "a statement of the amount of any advance made and of any liability incurred for which the warehouser claims a lien" does not mean that the Agreement is not a warehouse receipt. The Andrology Lab makes no claim for a lien on the basis of any liability incurred and so could not include such a provision. Further, subsection 2(3) provides that the omission of the subsection (1) particulars from a warehouse receipt does not mean the receipt is not considered to be a warehouse receipt.

[74] The Agreement contains sufficient particulars to meet the requirements for a warehouse receipt as set out in s. 2(1) and also meets the definition in s. 1 of the *WRA*. It is thus a nonnegotiable warehouse receipt. The fact that the parties agreed to provide for a further limitation on transferability by way of the delivery requirements in clause 4 of the Agreement does not change that conclusion. Pursuant to s. 2(4), warehousers are permitted to insert other provisions in a receipt which are not contrary to the *Act*.

Issue 2. Does the *WRA* preclude the enforceability of the exclusion clause in the Agreement?

[75] Having concluded the *WRA* applies, clause 7 in the Agreement, which is headed "Limitation of Our Liability", must be examined in light of the obligations of a warehouser established in the *WRA*. The standard of care expected of a warehouser is set out in s. 13:

> 13 A warehouser is liable for loss of or injury to goods caused by the warehouser's failure to exercise the care and diligence in regard to them as a careful and vigilant owner of similar goods would exercise in the custody of them in similar circumstances.

[76] The *WRA* further specifies that a warehouser is not permitted to include a term in a warehouse receipt that is contrary to the *WRA* and cannot contract out of its obligation to take care of the goods it stores. Section 2(4) reads:

> 2(4) A warehouser may insert in a receipt issued by the warehouser any other term or condition that
>
> (a) is not contrary to any provision of this Act, and
>
> (b) does not impair the warehouser's obligation to exercise the care and diligence in regard to the goods as a careful and vigilant owner of similar goods would exercise in the custody of them in similar circumstances.

[77] Read together, s. 13 and s. 2(4)(a) preclude a warehouser from including in its receipt a term or condition that would release the warehouser from liability for failing to meet the requisite standard of care. Section 2(4)(b) further provides that a receipt cannot contain a term which impairs the warehouser's obligation to meet the requisite standard of care. Taken as a whole, these sections ensure warehousers

cannot by contract, cancel or modify the standard of care imposed on them by the *WRA*. If clause 7 of the Agreement is contrary to s. 13 of the *WRA* or clause 7 impairs UBC's ability to meet the standard of care in s. 2(4)(b), then UBC cannot rely on that provision.

Plaintiff's Position

[78] The plaintiff argues clause 7 is contrary to s. 13 because it seeks to exclude the Andrology Lab from all liability. Alternatively, the plaintiff submits clause 7 impairs the Andrology Lab's ability to meet its obligations under s. 2(4)(b) of the *WRA* by providing for a complete exclusion of liability. If either result is found, the plaintiff argues that clause 7 contravenes the *WRA* and cannot stand as an enforceable term of the Agreement.

UBC's Position

[79] UBC contends that clause 7 does not exclude liability. It says that it reflects an agreement between the parties to limit damages to zero in the event of loss or injury to the stored sperm. Understood in this way, UBC submits clause 7 is not contrary to any provision in the *WRA* and does not offend s. 2(4)(b).

Law

[80] In *Evans Products Co. v. Crest Warehousing Co*., [1980] 1 S.C.R. 83, the Court considered whether a provision in a warehouse receipt that limited the amount payable by the warehouser for the loss or damage of goods was contrary to s. 14 or s. 3(4) of the *WRA* (now s. 13 and s. 2(4)). The clause read in part (at 86):

> (f) The liability of the warehouseman arising from legal responsibility shall be limited to the actual value of the loss or damage of the stored goods and in no case shall the liability exceed $50.00 on any one package or stored unit unless the storer, at or prior to the time the goods are placed in storage had declared in writing a value in excess of $50.00 on such package or stored unit and has paid or agreed to pay a charge additional to the base storage rate to cover the excess valuation.

[81] Writing for the Court, McIntyre J. held the provision was not contrary to s. 14 of the *WRA* because it did not permit the warehouser to escape the obligations set

out in s. 14. He concluded the clause did "no more than establish by agreement the maximum amount of damage" payable by the warehouser to the storer in the event of loss or damage to his goods (at 90).

[82] Justice McIntyre then considered if the provision contravened s. 3(4)(b) of the *WRA* by impairing the warehouser's obligation to exercise the degree of care outlined in s. 14. He concluded it did not because even though a limitation of liability may have the effect of "inducing carelessness" it could not negate a statutory obligation to take care (at 93).

[83] In *Katzel v. Tolo Enterprises Ltd*., [1991] B.C.J. No. 734 (S.C.), the court considered whether the warehouser could rely on an exclusion of liability clause after selling the storer's goods for non-payment of storage fees. The clause stated simply, "Totom Storage assumes no responsibility regarding damage to or theft of stored items" (at 2). The warehouser breached the *Warehouser Lien Act*, R.S.B.C. 1979, c. 427 by failing to give notice to the owner prior to selling her goods. The court found that the warehouser failed to meet the requisite standard of care under the *WRA* because it contravened the *WLA* by selling the goods without notice to the storer. As a result, the court held that the exclusion of liability clause in the receipt could not be relied on by the defendant. The court explained at 6:

> Clause 11 of the Totom Storage agreement is contrary to his [the warehouser's] obligation to exercise the care and diligence in regard to the goods as a careful and vigilant owner of similar goods would exercise in the custody of them in similar circumstances pursuant to s. 2(4)(b) and therefore the defendant cannot rely on that clause.

[84] The court did not explain its reasoning for having found the clause in contravention of s. 2(4)(b) without considering s. 2(4)(a). The court's analysis involved an assessment of whether the exclusion clause could apply to preclude a claim against the warehouser for causing the loss of the storer's goods. Having found the clause was an attempt to avoid its statutory duty of care, the court held it could not apply. The case is instructive because the result – the inability to rely on

an exclusion clause – is the same result that would have obtained if the court had found a breach of subsection 2(4)(a).

[85] Given the scarcity of Canadian jurisprudence on this issue, it is instructive to look at how similar exclusion clauses in warehouse receipts have been treated in the United States where similar legislation exists. In *Fireman's Fund American Insurance Company v. Capt. Fowler's Marina Inc*., 343 F. Supp. 347 (1971), the United States District Court (Massachusetts District) found that an exclusion clause in a storage contract was ineffective and could not be relied on when a stored boat was damaged by fire. The court reasoned the exclusion clause, which absolved the marina of any liability was contrary to the *Uniform Warehouse Receipts Act* which provided:

> §3 … A warehouseman may insert in a receipt issued by him, any other terms and conditions, provided that such terms and conditions shall not:
>
> (a) Be contrary to the provisions of this act.
>
> (b) In any wise impair his obligation to exercise that degree of care in the safe-keeping of the goods entrusted to him which a reasonably careful man would exercise in regard to similar good of his own.

Analysis

[86] UBC contends clause 7 is meant to limit damages to zero, not to exclude the Andrology Lab from liability and therefore, like the clause in *Evans Products*, it is not contrary to the *WRA*. I reject that submission. Clause 7 and the impugned clause in *Evans Products* are not analogous. Clause 7 attempts to absolve the Andrology Lab of any and all liability for the storage or use of sperm in their lab. The clause in *Evans Products* limited the amount payable to the owner of the goods but did not seek to extinguish its responsibility to the owner of the goods.

[87] The difference in language between the two clauses is instructive. The clause in *Evans Products* states "[t]he liability of the warehouseman arising from legal responsibility shall be limited" (emphasis mine). By contrast, clause 7 specifies "By signing this Agreement you agree that neither we nor our successors … will be liable to you … [t]his exclusion of our liability extends to any damage …" (emphasis mine).

The two clauses cannot be characterized as having the same intent or effect. The clause in *Evans* limits the amount the warehouser has to pay if loss or damage occurs, while the clause here seeks to completely extinguish any liability on the part of the Andrology Lab. The distinction is not merely semantic. If liability is excluded, it is directly contrary to s. 13 of the *WRA*, which is not permitted by s. 2(4)(a). The Court in *Evans Products* recognized that there is a distinction between clauses excluding and limiting liability, and found that a limitation to the amount of damages payable is permissible.

[88] A review of clause 7 demonstrates the Andrology Lab's thoroughness in detailing situations in which it would not accept responsibility for damage or loss to the stored specimen. The exclusion of liability:

> … extends to any damage, misuse or impropriety caused by or resulting from any malfunction of our freezing equipment (whether for causes within our control or not) or from any failure of utilities, strike, cessation of services or other labour disturbances or any failure or similar occurrence in our or any other laboratory or from any fire, earthquake or other acts of nature beyond our control, or caused by or resulting from any act, omission or negligent conduct on the part of us...

[89] Clause 7 is detailed and explicit. If the Andrology Lab meant to limit the amount payable for lost or damaged sperm, rather than to exclude liability, it would have been a simple matter to state that in the Agreement.

[90] On a plain reading of clause 7, it is clear that it is directly contrary to s. 13 of the *WRA*. As previously noted, s. 13 imposes liability on a warehouser for the loss of or injury to goods caused by the warehouser's failure to exercise the care and diligence that a careful and vigilant owner of similar goods would exercise in the custody of them in similar circumstances. Clause 7 attempts to shield the Andrology Lab from the same liability that s. 13 assigns to it as a warehouser. Clause 7 excludes the Andrology Lab from liability for any acts, omissions or negligent conduct, and covers a wide variety of circumstances including freezer malfunction, labour disturbances, or conduct of its employees. The clause is patently contrary to

s. 13. It does not merely provide a limitation of damages in a manner similar to the warehouse receipt in *Evans Products*.

[91] Having concluded clause 7 is contrary to s. 13 of the *WRA*, I need not consider the s. 2(4)(b) analysis. The Andrology Lab attempted to absolve itself of any and all liability associated with storing the sperm of the Class members, a result that would be directly contrary to s. 13 of the *WRA*. Pursuant to s. 2(4)(a), the Andrology Lab is prohibited from including such a term and so is precluded from relying on it against the plaintiff and class members.

Summary

[92] The provisions of the *WRA* apply to the storage of the sperm specimens of the plaintiff and class members and the Agreement is a warehouse receipt. I also conclude that clause 7 of the Agreement is directly contrary to s. 13 of the *WRA*. The answer to the sub-issue posed for determination is thus:

> Yes, the defendant, UBC, is precluded from relying upon the exclusion clause in the Agreement as against the Class members by virtue of the *Warehouse Receipt Act*, R.S.B.C. 1996, c. 481 (the "*WRA*").

"Butler J."