COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Lam v. University of British Columbia,*
2015 BCCA 2

Date: 20150106
Docket: CA041447

Between:

Howard Lam

Respondent
(Plaintiff)

And

University of British Columbia

Appellant
(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 Chiasson
The Honourable Mr. Justice Frankel
The Honourable Madam Justice Bennett

On appeal from: An order of the Supreme Court of British Columbia,
dated November 20, 2013 (*Lam v. University of British Columbia*,
2013 BCSC 2094, Vancouver Docket S035269).

Counsel for the Appellant: J.J. Arvay, Q.C. and R.J. Androsoff

Counsel for the Respondent: A.M. Grant and D.A. Goldberg

Place and Date of Hearing: Vancouver, British Columbia
September 30, 2014

Place and Date of Judgment: Vancouver, British Columbia
January 6, 2015

Written Reasons by:
The Honourable Mr. Justice Chiasson

Majority Reasons Concurring in the Result by:

The Honourable Madam Justice Bennett (p. 29, para. 83)

Concurred in by:
The Honourable Mr. Justice Frankel

Summary:

This is a class action brought by men who deposited their sperm with the appellant. The respondent is the representative of the class. The sperm was kept in a freezer that malfunctioned, damaging or destroying the sperm. The appellant raised an exculpatory clause in the contract of storage against the respondent. He contends it offends the Warehouse Receipt Act [WRA]. The parties agreed to have a sub-issue tried to determine whether the appellant could rely on the WRA. The issue at trial and on appeal was whether frozen human sperm is "property" for the purposes of the WRA. The trial judge held that it was and that the appellant was precluded from relying on the exclusion clause.

Held: Appeal dismissed, majority reasons of Bennett J.A. agreed to by Frankel J.A concurring in the result. Per Chiasson J.A.: For the purposes of the WRA, human sperm is "property". The task is to determine the meaning of "goods" in the WRA. As of the date the class members deposited their sperm, medical science had advanced to the point where sperm could be considered to be property. The judge concluded correctly that the plain meaning of goods in the WRA includes human sperm. He also undertook a purposive or contextual analysis and correctly reached the same conclusion. The decision of the Supreme Court of Canada in Harvard College does not support reading into the definition of goods in the WRA a limitation that goods are only property that can be traded in the market place. Majority (per Bennett J.A. and Frankel J.A.): The definition of sperm as "property" is limited to the WRA in this case. After applying a framework weighing the rights of the donors and the legislative restraints imposed on the donors, each of the donors had ample rights in relation to his own sperm specimen that invested him with ownership of the specimen sufficient to be defined as "property" and meet the definition of "goods" under the WRA.

Reasons for Judgment of the Honourable Mr. Justice Chiasson:

Introduction

[1] The issue on this appeal is whether frozen, human sperm is "property" for the purposes of the *Warehouse Receipt Act,* R.S.B.C. 1996, c. 481 [*WRA*].

Background

[2] The respondent, Howard Lam, is the representative plaintiff in a class proceeding against the appellant. The members of the class had cancer and before undertaking radiation treatment stored their frozen sperm in an ultra-cold freezer located in the appellant's Andrology Laboratory.

[3] In 1997, the respondent provided samples of his sperm for storage in the freezer. In May 2002, it was discovered that the freezer had suffered a power interruption which damaged or destroyed the stored sperm.

[4] At the time they deposited their sperm for storage, members of the class signed a Sperm Bank Facility Agreement ("Facility Agreement"). It required depositors to pay a deposit fee, an annual storage fee and a withdrawal fee, all of which were fairly modest. The agreement also stated:

> 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….
>
> ….
>
> 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.

[5] The appellant relies on the exclusion of liability in clause 7, against which the respondent raises s. 2(4) of *WRA*:

> 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.

[6] The parties agreed to have the following sub-issue tried:

> Is the [appellant] 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*")?

[7] The trial judge answered the question "yes".

Trial judgment

[8] The judge set out issues and sub-issues for decision:

> [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 [appellant], as an operator of the Andrology Lab, "a warehouser" as that term is defined in the *WRA*?
> - Were the Agreements issued by the defendant [appellant] "warehouse receipts" as that term is defined in the *WRA*?

[9] He then stated the positions of the parties noting at para. 10 that the appellant "conceded [that] its relationship with the class members was one of bailment for reward". The core position of the appellant at trial and on appeal is that the *WRA* and the *Warehouse Lien Act*, R.S.B.C. 1996, c. 480 [*WLA*], are one regime, and that "[i]t is necessary to restrict the meaning of 'goods' in the Warehouse Statutes to property that is the proper object of trade and commerce": para. 13.

[10] The judge set out relevant provisions of the *WRA* as follows:

> 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.

He then considered whether the *WRA* applied to the Facility Agreement.

[11] The judge concluded that the parties did not contemplate the application of the *WRA* at the time the class members signed the Facility Agreement because the issue was not raised until well into the present litigation. He also observed that at the time the *WRA* was enacted it was not intended to apply to the storage of sperm because "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": para. 21.

[12] In the judge's view, "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'": para. 23. Turning to his analysis, the judge began with the applicable legal principles:

> [26] The "Driedger principle" has been adopted in the leading cases of *Re: Rizzo & Rizzo Shoes Ltd.*; and *Bell ExpressVu Limited Partnership v. Rex* 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* 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[s] 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 [the appellant] 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.
>
> [Citations omitted.]

[13] The judge addressed the fact that the storage of human sperm was not contemplated at the time the *WRA* was enacted, stating:

> [32] In *The Interpretation of Legislation in Canada*, 4th ed. (Toronto, ON: Thomson Reuters, 2011), Pierre-[André Côté] 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, [Côté] 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. [Côté] 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.

[14] He then referred to several fairly recent cases that concluded sperm is property: *Yearworth v. North Bristol NHS Trust*, [2009] EWCA Civ 37; *Kate Jane Bazley v. Wesley Monash IVF Pty Ltd*, [2010] QSC 118 (T.D.); *C.C. v. A.W.*, 2005 ABQB 290; *J.C.M. v. A.N.A.*, 2012 BCSC 584, and concluded:

> [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".

[15] The judge continued his analysis stating:

> [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 [Côté] 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."

[16] The judge observed that the thrust of the appellant's argument was that it is an offence under the *Assisted Human Reproduction Act,* S.C. 2004, c. 2, to sell human sperm. If a warehouser were to issue a negotiable receipt or a transferrable non-negotiable receipt for frozen human sperm, the sperm could be sold, creating a conflict between the *WRA* and the *Assisted Human Reproduction Act.* The judge rejected the appellant's submission, stating:

> [46] The focus by [the appellant] 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.
>
> …
>
> [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*.

[17] At the end of his textual analysis, the judge concluded:

> [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 [Côté], 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.

He added:

> [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.

[18] The judge began his contextual and purposive analysis by observing that the "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": para. 53. In his view, the definition of "goods" in the *WRA* differed from that in the *WLA*. He rejected the appellant's argument that the two statutes had to be read together. In the judge's view, the definition of "goods" in the *WRA* "is broader and … must have been intended to apply to a broader range of property items than the definition in the *WLA*": para. 54.

[19] The appellant's submission detailing the history of warehouse legislation was reviewed by the judge. He then stated:

> [59] [The appellant] 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 [the appellant]'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 [the appellant] 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.

[20] He considered the appellant's argument at para. 63 dealing with "the moral and ethical concerns around the commercialization of human reproductive material" and addressed the appellant's reliance on *Harvard College v. Canada (Commissioner of Patents)*, 2002 SCC 76, [2002] 4 S.C.R. 45:

> [64] [The appellant] submits the approach taken to statutory interpretation by the Supreme Court of Canada in *Harvard College v. Canada (Commissioner of Patents)* 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 [the appellant]'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 [the appellant], 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.
>
> [Citation omitted.]

[21] The judge concluded that "the definition of goods in the *WRA* includes sperm": para. 68. In his view, whether approached through a textual, purposive or contextual analysis there is no ambiguity in the definition. The appellant was a warehouser. It received goods for storage in exchange for reward.

[22] The judge then discussed whether the Facility Agreement was a warehouse receipt. He began by noting the particulars that a warehouse receipt must contain and then addressed the contents of the Facility Agreement stating:

> [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).

[23] It was the judge's view that failure to comply with (h) was of no consequence and that, in any event, s. 2(3) of the *WRA* states that the absence of a particular does not mean the document is not a warehouse receipt. He concluded that the Facility Agreement is a non-negotiable warehouse receipt.

[24] As to the effect of the *WRA* on the exclusion clause, the judge stated:

> [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 [the appellant]'s ability to meet the standard of care in s. 2(4)(b), then [the appellant] cannot rely on that provision.

[25] After reviewing the submissions of the parties and applicable authorities, the judge found:

> [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*.

[26] He concluded at para. 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, [appellant], 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*").

<u>Positions of the parties</u>

[27] In its factum, the appellant asserts that the judge erred:

> 25. … in law in his application of the Driedger approach to statutory interpretation of the *WRA* in:
>
> (a) ascribing undue weight to the "plain meaning" of the statutory language and insufficient weight to contextual, historical, and other indicators of legislative intent;
>
> (b) declining to read and interpret the Warehouse Statutes together as legislation *in pari materia*;
>
> (c) equating the presence of a statutory definition with the absence of ambiguity;
>
> (d) omitting to distinguish previous cases concluding that sperm constitutes "property" on the basis of the dissimilar legal contexts in which that question was considered; and
>
> (e) distinguishing *Harvard College* from the instant case.

That is, the judge erred in concluding that human sperm is property for the purposes of the *WRA*.

[28] At the hearing of the appeal, the appellant advanced a number of additional positions: fairness; retroactive application of the inclusion of human sperm in the definition of property; the appellant is not a warehouser; and the Facility Agreement is not a warehouse receipt.

[29] In his factum, the respondent states that "the issue on appeal is simply whether the learned trial judge correctly interpreted and applied the provisions of the *WRA* to the facts as set forth in the Agreed Statement of Facts".

[30] At the hearing, counsel for the respondent addressed the additional positions of the appellant, albeit somewhat under protest.

<u>Discussion</u>

General

[31] The agreed statement of facts states that the Andrology Laboratory was established in 1982; the factums of the parties state this was in 1981. The material does not state when the Facility Agreement was put in place. The laboratory purchased its first ultra-cold electrical freezer in 1987 and in 1993

purchased the ultra-cold electrical freezer at issue in this proceeding "and began to use it for sperm-banking purposes". The respondent deposited his sperm in August 1997. The agreed statement of facts states that class members were charged initial and annual storage fees beginning in 1982.

[32] There can be much emotion about the question being addressed on this appeal – the appellant charged little for its services and potentially faces a significant exposure; the class members potentially lost the opportunity to procreate and are faced with a provision that may deny them compensation. Although the result likely will be disquieting for one side or the other, the task of the courts is to determine the legal rights of the parties.

[33] Although it is understandable that counsel will discover additional arguments when finally preparing to present an appeal, it is appropriate to inform the other side and the Court of these matters in advance of the hearing of the appeal. The failure to do so may have unexpected and unfortunate consequences.

[34] During the hearing, counsel for the appellant referred to s. 21(1) of the *WRA* which states:

> (1) A person to whom a nonnegotiable receipt is transferred acquires, as against the transferor,
>
> (a) the title to the goods, and
>
> (b) the right to deposit with the warehouser the transfer or a duplicate of it.

[35] Because the Facility Agreement does not appear to vest title to sperm in the doctor to whom the sperm would be transferred, counsel contended that the Facility Agreement is not a warehouse receipt. The respondent noted that the effect of s. 21 is not before us on this appeal and that s. 21 is not a definitional section. I agree.

[36] It is not in issue that if the Facility Agreement is a warehouse receipt, the limitation clause is unenforceable by operation of ss. 2(4) and 13 of the *WRA*. As the judge observed, "[w]hether the Agreement is a warehouse receipt and the Andrology Lab is a warehouse turns largely on the definition of goods": para. 25.

Is human sperm property for the purposes of the *WRA?*

[37] The question addressed and answered by the trial judge was whether the appellant was precluded from relying on the exclusion clause in the Facility Agreement by the provisions of the *WRA*. This engaged s. 13 of the *WRA* which states:

> 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.

[38] From s. 13 one moves to s. 2(4) which permits the inclusion by a warehouser of additional terms

in a warehouse receipt which are:

> (a) … not contrary to any provision of this Act, and
>
> (b) [do] 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.

[39] These provisions lead to a consideration of the definitions of "warehouser" and "warehouse receipt". Sections 13 and 2(4) and the definitions use the defined term "goods". The definition is:

> "goods" includes all property other than things in action, money and land.

[40] In my view, it is not necessary to determine whether the definition of "goods" in the *WRA* differs from, or is broader than, that in the *WLA*. The definition in the *WLA* –"includes personal property of every description that may be deposited with a warehouser as bailee" – merely tracks the definition of goods in the *WRA*, which excludes "things in action, money and land".

[41] The question in this case becomes: is human sperm property?

a. The judge did not err in his interpretative approach to statutory language.

[42] The appellant asserts that the interpretative process must not be driven by the plain meaning of statutory language, but must reflect the contextual and historical context of the legislation. At the time the *WRA* was enacted, human sperm was not property and in Canada today it is not capable of being traded in the market place because it would be illegal to do so.

[43] The appellant states that the judge erred in concluding that the definition of goods in the *WRA* is precise and unequivocal "without reference to, and before embarking on, a contextual analysis". It states that the judge's determination "coloured his contextual analysis, causing him to place undue weight on 'plain meaning' and insufficient weight on contextual and historical facts": para. 31.

[44] At para. 27, the judge quoted from *Canada Trustco Mortgage Co. v. Canada,* 2005 SCC 54, [2005] 2 S.C.R. 601 at para. 10: "When the words of a provision are precise and unequivocal, the ordinary meaning of the words play[s] a dominant role in the interpretive process". It seems to me that this is a clear indication that the judge was entitled to consider whether the definition of goods was precise and unequivocal before embarking on a contextual analysis. He was satisfied that the definition of goods was clear and unequivocal. He stated at para. 50:

> … "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*.

[45] In reaching this conclusion, the judge undertook a very thorough analysis of the language of the enactment and the case law relevant to it. I agree with his analysis and conclusion.

[46] The appellant refers to the fact that, at the time the *WRA* was enacted, human sperm would not have been property. The judge was alive to this, but as quoted previously, he referred to Mr. Côté's text which confirmed that legislation may apply to "situations which did not exist when it was enacted" and can "apply to inventions subsequent to its enactment": para. 34.

[47] The Supreme Court of Canada also has endorsed a flexible approach to terms in legislation to ensure that the law speaks to contemporary circumstances: *R. v. Perka*, [1984] 2 S.C.R. 232 at para. 80; *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807.

[48] It often is stated that court decisions merely declare the law, that is, state what the law always has been. The following is an interesting observation on that proposition:

> The theoretical position has been that judges do not make or change law: they discover and declare the law which is throughout the same. According to this theory, when an earlier decision is overruled the law is not changed: its true nature is disclosed... This theoretical position is… a fairy tale in which no one any longer believes... The whole of the common law is judge-made and only by judicial change in the law is the common law kept relevant in a changing world. But whilst the underlying myth has been rejected, its progeny - the retrospective effect of a change made by judicial decision - remains: *Kleinwort Benson Ltd. v. Lincoln City Council (1998)*, [1999] 2 A.C. 349 at 358, *per* Lord Browne-Wilkinson.
>
> [Emphasis added.]

[49] In my view, the cases to which the judge referred that conclude that human sperm is property, support its inclusion in the definition of property in the *WRA*.

[50] In *J.C.M.,* Madam Justice Russell referred to *Yearworth* and stated at para. 58:

> … 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.

To like effect were her comments, at para. 63, where she described the need for the common law to keep up with medical science as compelling.

[51] In *Yearworth,* at para. 45(a), the Court stated:

> In this jurisdiction developments in medical science now require a re-analysis 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.

I consider this to be a correct approach to the development of the common law.

[52] It is obvious that, as of the date the class members deposited their sperm, medical science had advanced to the point where sperm could be considered to be property. In my view, the judge concluded correctly that the plain meaning of goods in the *WRA* includes human sperm.

[53] After reaching his conclusion on the plain meaning of the words in the definition of goods in the

WRA, the judge stated expressly that he was obliged to be careful "not to adopt a strictly literal approach" and that he "must consider the possibility of coming to a contrary conclusion by applying a purposive or contextual analysis": para. 51. He also quoted the guidance for the analysis set out in *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 S.C.R. 84. His analysis followed. I have quoted much of it and agree with the judge.

b. The definition of "goods" is not modified by reading the Warehouse Statutes together.

[54] The appellant contends that the judge erred in refusing to treat the *WRA* and the *WLA* as a package. It asserts that the lien rights of a warehouser under the latter *Act* do not extend fully to the storage of human sperm because the *Assisted Human Reproduction Act* prohibits the purchase of human sperm.

[55] The *Assisted Human Reproduction Act* was enacted by the Federal Parliament in 2004. Sperm deposited with the appellant prior to that date, including the respondent's sperm, could have been sold and purchased. The appellant's position requires the court to conclude that the definition of property in the Provincial *WRA* was altered by Federal legislation because it affected the rights of warehousers in the *WLA*. In my view, the definition of property in the *WRA* cannot depend on the vagaries of Federal legislation that may affect rights under another Provincial statute.

[56] The appellant asserts that warehouse legislation historically was mercantile legislation and that this should determine the definition of property in the *WRA*. It argues that goods include only things that are capable of being sold in the market-place.

[57] The appellant does not suggest that the cases to which the judge referred, that determined human sperm is property, were decided wrongly. It contends that those cases should not be applied in the context of the *WRA* because it is commercial legislation which historically applied only to goods in commerce: goods capable of being traded in the market place.

[58] The judge recognized the historical context of the legislation. He stated at para. 58:

> The *WRA* also brought into law the mercantile practices relating to negotiable receipts and codified the common law regarding bailment for reward.

[59] In the present case, the appellant concedes it was a bailee for reward. The transaction between it and the members of the class was commercial. The appellant argues that its approach does not create confusion or open the floodgates because all goods, other than those which cannot be sold legally including human sperm, are included in the definition of property. In addition to rejecting the submission that the definition of property in the *WRA* should be shaped by unrelated legislation, I see nothing in the *WRA* that would make the definition of property depend on the type of goods bailed for hire. I am not convinced that historically it was otherwise.

[60] I similarly do not accept the appellant's contention that the trial judge erred in equating the presence of a statutory definition for "goods" with the absence of ambiguity. Nothing in the *WRA* suggests the need to reframe the legislation's definition of "goods" with a mercantile connotation.

c. The trial judge did not err in his consideration of other case law.

[61] The appellant asserts that the trial judge failed to distinguish previous cases concluding that sperm was "property" on the basis of different legislative contexts.

[62] In support of this contention, the appellant relies on *Saulnier v. Royal Bank of Canada*, 2008 SCC 58, [2008] 3 S.C.R. 166 [*Saulnier*], which it submits established a binding analytical framework for determining the content of legislative definitions of "property".

[63] In *Saulnier,* the Supreme Court considered whether a fishing licence was property for the purposes of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). The Court stated at para. 16:

> The questions before the Court essentially raise a dispute about statutory interpretation. We are not concerned with the concept of "property" in the abstract. The notion of "property" is, in any event, a term of some elasticity that takes its meaning from the context. The task is to interpret the definitions in the *BIA* and *PPSA* [*Personal Property Security Act*] in a purposeful way having regard to "their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 1). Because a fishing licence may not qualify as "property" for the general purposes of the common law does not mean that it is also excluded from the reach of the statutes. For particular purposes Parliament can and does create its own lexicon.

[64] The definition of property in s. 2 of the *BIA* included:

> … every description of estate, interest and profit, present or future, vested or contingent, in, arising out of or incident to property.

[65] In its factum, the appellant quotes part of para. 33 of the judgment (at para. 78):

> … If the question were whether a fishing licence *is* a *profit à prendre*, the answer would almost certainly be no. But that is not the question. The question before us is whether the fishing licences thus conceived can satisfy the statutory definition of the *BIA* and *PPSA*, purposefully interpreted.
>
> [Emphasis added by the appellant.]

It goes on to state:

> 76. [The appellant] submits that paragraph 41 of the trial judge's reasons for judgment reflects an analytical approach expressly contrary to the *ratio decidendi* in *Saulnier*. Accordingly, the trial judge erred in law in omitting to follow *Saulnier*, a recent authority from Canada's highest court that was binding upon him.

[66] In my view, *Saulnier* is of no assistance to the appellant. It is clear that Parliament can expand or

limit the scope of common law concepts, to facilitate legislative purposes. In *Saulnier,* the Court determined that the definition of property in the *BIA* was more extensive than at common law. The Court observed at para. 44:

> … The terms of the definition are very wide. Parliament unambiguously signalled an intention to sweep up a variety of assets of the bankrupt not normally considered "property" at common law. This intention should be respected if the purposes of the BIA are to be achieved.

[67] In reaching this conclusion, the Court looked to the rights granted to the holder of a fishing licence to determine whether it fell within the statutory definition. It is instructive to refer to para. 34 of the decision:

> My point is simply that the subject matter of the licence (i.e. the right to participate in a fishery that is exclusive to licence holders) coupled with a proprietary interest in the fish caught pursuant to its terms, bears a reasonable analogy to rights traditionally considered at common law to be proprietary in nature. It is thus reasonably within the contemplation of the definition of "property" in s. 2 of the *BIA*, where reference is made to a "profit, present or future, vested or contingent, in, arising out of or incident to property". In this connection the property in question is the fish harvest.
>
> [Emphasis in original.]

[68] The Court looked to the rights granted to the holder of a fishing licence to determine whether it fell within the statutory definition. There is nothing in the definition of goods in the *WRA* to suggest that property for the purposes of the legislation is not property at common law. The Legislature has limited the concept only with three specified exceptions.

d. The trial judge did not err in distinguishing Harvard College.

[69] The appellant also places considerable emphasis on *Harvard College v. Canada (Commissioner of Patents)*, 2002 SCC 76. According to the appellant, *Harvard College* established that where legislation engages ethical and social concerns which would not have been apparent when the legislation was enacted – such as the ownership of human sperm or the patenting of higher life forms – courts should be hesitant to find legislative applicability because these are the types of issues which the Legislature would wish to address directly.

[70] The case concerned an "oncomouse": a mouse bred to be more susceptible to cancer. As noted previously, the judge dealt extensively with the case. In its factum the appellant states:

> 71. … The definition of the word "invention" in that case was conceivably broad enough to include a genetically modified, living, breathing "oncomouse". … [T]he majority of the Court, per Bastarache J., held that to so construe the statute would extend its scope of application beyond that which the Legislature intended:
>
>> [120] … Even accepting that the words of the definition can support a broad interpretation, they must be interpreted in light of the scheme of the Act and the relevant context. The Act in its current form fails to address many of the unique concerns that are raised by the patenting of higher life forms, a factor which indicates that Parliament

> never intended the definition of "invention" to extend to this type of subject matter. Given the unique concerns associated with the grant of a monopoly right over higher life forms, it is my view that Parliament would not likely choose the Patent Act as it currently exists as the appropriate vehicle to protect the rights of inventors of this type of subject matter.
>
> - *Harvard College*.

> 72. In light of Supreme Court of Canada authority for restricting the scope of literally broad and general statutory definitions when fulfilment of the legislative purpose requires, which authority was cited to him, the trial judge fell into reversible error in concluding that the meaning of "goods" in the *WRA* is not capable of ambiguity from the fact that it is statutorily defined. This error, coupled with the errors set out above, led the trial judge to incorrectly reject the mercantile connotation of "goods" on account of the broad, general language appearing in the statutory definition of "goods" in the *WRA*.

In my view, the quoted portion of para. 120 must be considered in the context of the case overall.

[71] The appellant further addressed *Harvard College* as follows:

> 92. … [The appellant] argued that *Harvard College* is directly on point. The majority of the Court in *Harvard College* concluded that the broad definition of "invention" in the *Patent Act* did not include higher life forms because of the special concerns that would arise, and which Parliament would presumably desire to address, but with which the *Patent Act*, originally enacted in 1887, did not grapple:
>
>> [155] … As I discuss below, I do not believe that a higher life form such as the oncomouse is easily understood as either a "manufacture" or a "composition of matter". For this reason, I am not satisfied that the definition of "invention" in the Patent Act is sufficiently broad to include higher life forms. <u>This conclusion is supported by the fact that the patenting of higher life forms raises unique concerns which do not arise in respect of non-living inventions and which are not addressed by the scheme of the Act. Even if a higher life form could, scientifically, be regarded as a "composition of matter", the scheme of the Act indicates that the patentability of higher life forms was not contemplated by Parliament. Owing to the fact that the patenting of higher life forms is a highly contentious and complex matter that raises serious practical, ethical and environmental concerns that the Act does not contemplate, I conclude that the Commissioner was correct to reject the patent application</u>. This is a policy issue that raises questions of great significance and importance and that would appear to require a dramatic expansion of the traditional patent regime. [Emphasis added by the appellant.]
>>
>> - *Harvard College*.
>
> [93] The trial judge distinguished *Harvard College*, writing:
>
>> [66] … 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.
>
> [The appellant] submits the trial judge erred in so doing. This error resulted from the trial judge's mischaracterization of the basis for both the *ratio decidendi* in *Harvard College* and [the appellant]'s propounded analogy to the instant case. The majority in *Harvard College* rejected the patentability of higher life forms not only because of the nature of the rights granted with a patent, but also because of the nature of the innovation sought to be patented. This is borne out in the following excerpt from the majority's reasons:
>
>> [167] … 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. [Emphasis added by the appellant.]
>
> - *Harvard College*; cited in RFJ at para. 65.
>
> 94. The trial judge ought to have concluded that, like application of the *Patent Act* to the patenting of higher life forms, application of the *WRA* to the storage of sperm raises special ethical and social concerns with which the Legislature would desire to deal, but which were not addressed because the Legislature could not have contemplated them at the time the *WRA* was enacted.
>
> 95. This determination ought to have bolstered the conclusion supported by the balance of the contextual statutory interpretation analysis that it would be contrary to legislative intent for the *WRA* to apply to the storage of sperm by an andrology lab. The trial judge's mistake in distinguishing *Harvard College* led him to incorrectly conclude that a dissimilar result should ensue in the instant case.

[72] In my view, the judge did not err in his consideration of *Harvard College*. In addition, I do not agree with the appellant's treatment of the case.

[73] While he was mindful of the broad policy issues concerning patenting life forms, Mr. Justice Bastarache undertook a detailed analysis of the language of the legislation. He stated at para. 53:

> In my view, none of these proposed dividing lines arise out of the present text of the *Patent Act*. All of them are policy driven and, if they are to be introduced at all, should be introduced by Parliament.

[74] At para. 155, Bastarache J. wrote:

> Having considered the relevant factors, I conclude that Parliament did not intend to include higher life forms within the definition of "invention" found in the *Patent Act*. In their grammatical and ordinary sense alone, the words "manufacture" and "composition of matter" are somewhat imprecise and ambiguous. However, it is my view that the best reading of the words of the Act supports the conclusion that higher life forms are not patentable. As I discuss below, I do not believe that a higher life form such as the oncomouse is easily understood as either a "manufacture" or a "composition of matter". For this reason, I am not satisfied that the definition of "invention" in the *Patent Act* is sufficiently broad to include higher life forms.
>
> [Emphasis added.]

He continued:

> This conclusion is supported by the fact that the patenting of higher life forms raises unique concerns which do not arise in respect of non-living inventions and which are not addressed by the scheme of the Act. Even if a higher life form could, scientifically, be regarded as a "composition of matter", the scheme of the Act indicates that the patentability of higher life forms was not contemplated by Parliament. Owing to the fact that the patenting of higher life forms is a highly contentious and complex matter that raises serious practical, ethical and environmental concerns that the Act does not contemplate, I conclude that the Commissioner was correct to reject the patent application. This is a policy issue that raises questions of great

> significance and importance and that would appear to require a dramatic expansion of the traditional patent regime. Absent explicit legislative direction, the Court should not order the Commissioner to grant a patent on a higher life form.

[75] Mr. Justice Bastarache dealt with the definition of "invention" at para. 158:

> I agree that the definition of invention in the *Patent Act* is broad. Because the Act was designed in part to promote innovation, it is only reasonable to expect the definition of "invention" to be broad enough to encompass unforeseen and unanticipated technology. I cannot however agree with the suggestion that the definition is unlimited in the sense that it includes "anything under the sun that is made by man". In drafting the *Patent Act*, Parliament chose to adopt an exhaustive definition that limits invention to any "art, process, machine, manufacture or composition of matter". <u>Parliament did not define "invention" as "anything new and useful made by man". By choosing to define invention in this way, Parliament signalled a clear intention to include certain subject matter</u> as patentable and to exclude other subject matter as being outside the confines of the Act. This should be kept in mind when determining whether the words "manufacture" and "composition of matter" include higher life forms.
>
> [Emphasis added.]

[76] He addressed "manufacturing" at para. 159 stating that "the word would commonly be understood to denote a non-living mechanistic product or process".

[77] After reviewing definitions and the technology for producing an oncomouse, Bastarache J. was not satisfied "that the phrase 'composition of matter' includes a higher form whose genetic code has been altered in this manner": para. 162.

[78] At para. 163, he turned to the word "matter" again beginning with definitions. He concluded:

> … The fact that animal life forms have numerous unique qualities that transcend the particular matter of which they are composed makes it difficult to conceptualize higher life forms as mere "composition[s] of matter". It is a phrase that seems inadequate as a description of a higher life form.

[79] Mr. Justice Bastarache summarized his analysis at para. 166:

> Patenting higher life forms would involve a radical departure from the traditional patent regime. Moreover, the patentability of such life forms is a highly contentious matter that raises a number of extremely complex issues. If higher life forms are to be patentable, it must be under the clear and unequivocal direction of Parliament. For the reasons discussed above, I conclude that the current Act does not clearly indicate that higher life forms are patentable. Far from it. Rather, I believe that the best reading of the words of the Act supports the opposite conclusion – that higher life forms such as the oncomouse are not currently patentable in Canada.

[80] I do not think that *Harvard College* supports reading into the definition of goods in the *WRA* a limitation that goods are only property that can be traded in the market place. The Supreme Court of Canada based its decision on a careful analysis of the words of the legislation and determined that they did not embrace an oncomouse. If Parliament wanted to expand the relevant definitions to include life forms it could do so, but the Court should not. In the present case, the language of the definition does

embrace human sperm. If the Legislature wanted to limit the definition it could do so, but this Court should not.

Conclusion

[81] In my view, the judge made no error in principle and reached a correct conclusion.

[82] I would dismiss this appeal.

"The Honourable Mr. Justice Chiasson"

Reasons for Judgment of the Honourable Madam Justice Bennett:

[83] I have had the opportunity to read the draft reasons for judgment of Mr. Justice Chiasson. I agree that this appeal should be dismissed. In my respectful opinion, the semen specimen is "property" and therefore the *Warehouse Receipt Act* ("*WRA*") applies. I wish to amplify the basis for this conclusion.

[84] Mr. Justice Chiasson has carefully set out the facts and the legislation. I agree that the case turns on whether human sperm is "property" and therefore included as "goods" as defined in the *WRA*. I will focus my reasons on this discrete question.

[85] The action was commenced in 2003. This is the second time the case has been to this Court. The claim is in negligence and breach of contract. Three negligence issues and two contract issues have been certified.

[86] When Mr. Lam and the other class members stored their semen in the University of British Columbia ("UBC") freezer for procreation at a future time, they signed a Sperm Bank Facility Agreement. The Agreement contains an exclusion clause which UBC relies on to defend the claims.

[87] The two contract issues were split from the litigation with the intention of addressing them first:

> 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?

[88] Difficulties arose in moving the litigation forward, and the parties decided to have the following sub-issue tried:

> 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?

[89] The Agreement is set out in full in *Lam v. University of British Columbia*, 2013 BCSC 2094, at

para. 5. The Agreement allowed for the testing, storing and freezing of the donor's sperm, at the request of the donor. Continuance of storage beyond a year could only be at the donor's request. The specimen could only be delivered to the donor's physician upon the physician's written request. The sperm "is to be used only for the purpose of the artificial insemination of your legal or common-law spouse by a duly authorized physician", however UBC would "have no responsibility or liability", once the sperm was in the custody of the physician. A deposit fee, an annual storage fee and a withdrawal fee were required to be paid by the donors. The donor consented to the sperm being tested by UBC for the number and motility of the spermatozoa for any purpose it chose, including research and statistical purposes.

[90] Either party could terminate the Agreement with notice. The Agreement terminated automatically upon UBC receiving notice of the donor's death or if the donor failed to pay the required fee. Upon termination, UBC had the absolute discretion to dispose of the semen in any manner it considered "proper", except that it could not be used to cause a pregnancy by way of artificial insemination without the donor's consent.

[91] UBC argues that from a historical and contextual analysis, "property" in the *WRA* must refer to commercially-traded property. It argues that when the *WRA* was enacted, human sperm could not have been considered "property" as cryogenic freezing and artificial insemination were matters for science fiction writers.

[92] UBC points out that now, under the *Assisted Human Reproduction Act*, S.C. 2004, c. 2 ("*AHRA*"), human sperm cannot be commercially traded in Canada (see ss. 7 and 12). The *AHRA*, enacted in 2004, prohibits payment for sperm donation. Prior to this, sperm donors were paid for their donation. Mr. Lam's sperm was deposited in 1997 and the freezer failed in 2002, at a time when human sperm could be purchased. This argument does not, in my respectful view, assist UBC. Indeed, there are other examples of "goods" that someone came into possession of legally, but due to changes in legislation, can no longer be lawfully sold commercially. Those goods, such as products of endangered species or certain artefacts, would still be considered "property" under the *WRA*. My conclusion, however, that the human sperm is "property" does not turn on this issue, and therefore I do not need to decide this point, and in any event, I do not disagree with the analysis of Chiasson J.A.

[93] A number of decisions have tackled the question of storing human reproductive material including human sperm, and although referenced in the reasons of Chiasson J.A., I propose to discuss some of them in more detail. The reason for this is that there are many situations in which the definition of property as it relates to human sperm arises. It is therefore important to ensure that defining human sperm as property on the facts of this case does not lead to the application of the same definition in very different circumstances. Defining human sperm as property may bring with it a host of other legal rights and issues. Uncertainty exists with respect to the contexts in which human sperm could be considered property, and it is necessary to carefully circumscribe the limitations of the definition in this case. Indeed,

defining human sperm as "property" under the *WRA* in this case may widen the available remedies to Mr. Lam and the class members.

[94] For example, Mr. Lam arranged to freeze his sperm as he was about to receive cancer treatment that could leave him infertile. He froze his sperm as a contingency plan for having children of his genetic make-up should he no longer be able to produce viable sperm. If someone broke into the lab and stole the sperm, could he or she be charged with theft? Theft is a crime against property. Could Mr. Lam have donated his sperm to a sperm bank if he chose not to have his own children? What would happen if Mr. Lam had died? Would he be able to leave his sperm to his family or someone else in a will? Could he leave it to a sperm bank in his will? These are all questions that may arise if human sperm is generally classified as property.

[95] Historically, there was no property interest in the human body, dead or alive. Save for the despicable period of history when slavery and ownership of humans was legally recognized, ownership of the human body has been eschewed.

[96] In *Yearworth v. North Bristol NHS Trust*, [2009] EWCA Civ 37, [2009] 2 All E.R. 986, the England and Wales Court of Appeal in strikingly similar circumstances to this case, traced the history of the law in relation to the ownership or lack thereof, of the human body. I will be discussing *Yearworth* in some detail, as the Court concluded that in the context of that case, human sperm was property.

[97] Through the 17th, 18th and 19th centuries, the law did not change – neither a living body nor a human corpse could be "owned". (See for example, *Williams v. Williams*, [1882] 20 Ch D 659, where a person could not will his body to someone).

[98] An exception to this rule was carved out by the Australian High Court in *Doodeward v. Spence*, (1908) 6 C.L.R. 406 (Aust HC). The Court recognized ownership in a stillborn two-headed fetus that had been preserved 40 years earlier. The mother's physician had preserved the fetus, and when he died it was sold to C. who was showing it as a curiosity. Chief Justice Griffith for the majority held:

> [W]hen a person has by the lawful exercise of work or skill so dealt with a human body or part of a human body in his lawful possession that it has acquired some attributes differentiating it from a mere corpse awaiting burial, he acquires a right to retain possession of it …

[99] This principle was applied in *R. v. Kelly; R. v. Lindsay*, [1999] QB 621, to uphold convictions for theft of human body parts from the Royal College of Surgeons, where they had been used to train surgeons. Lord Justice Rose concluded that the human body parts were capable of being property within the *Theft Act* if they "have acquired different attributes by virtue of the application of skill, such as dissection or preservation techniques, for exhibition or teaching purposes", applying *Doodeward*.

[100] In *Yearworth*, five men who had been diagnosed with cancer supplied sperm specimens prior to

undergoing chemotherapy to be held by the defendant should their treatment render them infertile. The storage of the sperm was provided gratuitously. After the samples were stored, the amount of liquid nitrogen in the storage tanks fell below the requisite level and the men's semen thawed, becoming useless for fertilization of their partners' eggs.

[101] The Court considered a number of decisions, including *Hecht v. The Superior Court of Los Angeles County*, 16 Cal. App. (4th) 836 (1993); *Hecht v. The Superior Court of Los Angeles County*, 50 Cal. App. 4th 1289 (1996)[1]. In *Hecht*, the deceased, prior to his suicide, ejaculated sperm and stored it with the apparent intention that his girlfriend could give birth to his child. He bequeathed the sperm to her in his will. The Court concluded that at the time of his death, the deceased had sufficient "decision-making authority" in relation to the use of his sperm for it to amount to property for the purpose of the State's Probate Code. The Court in *Yearworth* saw the *Hecht* decision as taking the law a step further than was being asked on the facts of *Yearworth*.

[102] The Court in *Yearworth* referred to the limitations facing the donors found in the *Human Fertilisation and Embryology Act 1990* ("*HFEA*") at para. 42:

> (a) they could not themselves have used their sperm to bring about the creation of an embryo outside the human body: s. 3(1);
>
> (b) they could not themselves have "stored" their sperm, i.e. in effect by freezing it themselves: s. 4(1)(a); and
>
> (c) they could not themselves have tested, prepared, packaged, transported or delivered their sperm insofar as it was intended for human application: s. 4(1A).
>
> Conditions of licences specified in the Act would have had the following, further effect:
>
> …
>
> (e) once it had stored the sperm, the unit would not have been able to supply it to an unlicensed person otherwise than in the course of treatment and thus could not have acceded to a demand by the men that it be delivered back to them: s. 14(1)(b); and
>
> (f) the unit would not have been able to store their sperm for longer than the statutory storage period and it would then have had to allow it to perish: s. 14(1)(c).

[103] However, the Court also noted, at para. 44, relying on *Evans v. Amicus Healthcare Ltd.*, [2005] Fam 1, that the *HFEA* also provided:

> (a) the [fertility] unit would have been unable to store the men's sperm without their consent: para. 8(1);
>
> (b) it would have been unable to store it for a longer period than that specified by the terms of their consent: para. 2(2);
>
> (c) it would have been unable to use it for the purpose of any treatment of persons other than the men themselves (with their wives or partners) without their consent to such use: para. 5;
>
> (d) it would have been unable either to store or for any purpose to use any embryo created *in vitro* with the use of the men's sperm without the consent of the men (and indeed of the women who provided the egg) to its storage or use for such purpose: paras 8(2) and 6(3);

> (e) the men's consent for the above purposes would have to have been given in writing and signed: para. 1; and
>
> (f) by notice to the unit, the men could have withdrawn their consent to the storage or use of their sperm at any stage prior to its use in the creation of an embryo; and could have withdrawn their consent to the storage or use of any embryo thereby created *in vitro* at any stage prior to its use in the provision of treatment or in other specified ways: para. 4.

[104] In determining whether human sperm was property, or capable of being owned, the Court in *Yearworth* said the following at para. 28:

> A decision whether something is capable of being owned cannot be reached in a vacuum. It must be reached in context; and in this section of our judgment the context is whether an action in tort may be brought for loss of sperm consequent upon breach of the Trust's duty to take reasonable care of it. The concept of ownership is no more than a convenient global description of different collections of rights held by persons over physical and other things. In his classic essay on "Ownership" (Oxford Essays in Jurisprudence, OUP, 1961 Chapter V) Professor Honoré identified 11 standard incidents of ownership but stressed that not all of them had to be present for ownership to arise. He suggested that the second incident was "the right to use" and he added, at p. 116, that:
>
>> The right (liberty) to use at one's discretion has rightly been recognised as a cardinal feature of ownership and the fact that …certain limitations on use also fall within the standard incidents of ownership does not detract from its importance…
>
> We have no doubt that, in deciding whether sperm is capable of being owned for the purpose which we have identified, part of our enquiry must be into the existence or otherwise of a nexus between the incident of ownership most strongly demonstrated by the facts of the case (surely here, the right, albeit limited, of men to use the sperm) and the nature of the damage consequent upon the breach of the duty of care (here, their inability to use it notwithstanding that this was the specific purpose for which it was generated).

[105] The Court concluded that it could find that the sperm was property under the *Doodeward* exception, in that storing the sperm in liquid nitrogen at minus 196 degrees centigrade was an application of work and skill to the sperm (at para. 45). In my view, however, the Court failed to recognize that under the *Doodeward* analysis, this would give the defendant the ownership in the sperm, not the donors.

[106] The Court continued, and decided the case on a "broader basis". It concluded that for the tort of negligence, the sperm was property. Its conclusions are as follows at para. 45:

> …
>
> (i) By their bodies, they alone generated and ejaculated the sperm.
>
> (ii) The sole object of their ejaculation of the sperm was that, in certain events, it might later be used for their benefit. Their rights to its use have been eroded to a limited extent by the [*HFEA*] but, even in the absence of the [*HFEA*], the men would be likely to have needed medical assistance in using the sperm: so the interposition of medical judgment between any purported direction on their part that the sperm be used in a certain way and such use would be likely to have arisen in any event. It is true that, by confining all storage of sperm and all use of stored sperm to licence-holders, the [*HFEA*] has effected a compulsory interposition of professional judgment between the wishes of the men and the use of the sperm. So Mr. Stallworthy [counsel for the defendant] can validly argue that the men cannot "direct" the use of their sperm. For two

> reasons, however, the absence of their ability to "direct" its use does not in our view derogate from their ownership. First, there are numerous statutes which limit a person's ability to use his property - for example a land-owner's ability to build on his land or to evict his tenant at the end of tenancy or a pharmacist's ability to sell his medicines - without eliminating his ownership of it. Second, by its provisions for consent, the [*HFEA*] assiduously preserves the ability of the men to direct that the sperm be *not* used in a certain way: their negative control over its use remains absolute.
>
> (iii) Ancillary to the object of later possible use of the sperm is the need for its storage in the interim. In that the [*HFEA*] confines storage to licence-holders, Mr. Stallworthy stresses its erosion of the ability of the men to arrange for it to be stored by unlicensed persons or even to store it themselves; he also stresses their inability to direct its storage by licence-holders for longer than the maximum period provided by the [*HFEA*]. But the significance of these inroads into the normal consequences of ownership, driven by public policy, is, again, much diminished by the negative control of the men, reflected in the provisions that the sperm cannot be stored or continued to be stored without their subsisting consent. Thus the [*HFEA*] recognises in the men a fundamental feature of ownership, namely that at any time they can require the destruction of the sperm.
>
> (iv) The analysis of rights relating to use and storage in (ii) and (iii) above must be considered in context, namely that, while the licence-holder has *duties* which may conflict with the wishes of the men, for example in relation to the destruction of the sperm upon expiry of the maximum storage period, no person, whether human or corporate, other than each man has any *rights* in relation to the sperm which he has produced.
>
> (v) In reaching our conclusion that the men had ownership of the sperm for the purposes of their present claims, we are fortified by the precise correlation between the primary, if circumscribed, rights of the men in relation to the sperm, namely in relation to its future use, and the consequence of the Trust's breach of duty, namely preclusion of its future use.

[107] I have quoted extensively from these conclusions, as many of the limitations found in the *HFEA* in *Yearworth* are found in the Agreement signed by the donors in this case.

[108] The decision in *Yearworth* has been the subject of many academic articles. Many of the criticisms are based on suggestions that the decision was not soundly based in property rights, that the analysis was "unconvincing and incomplete", that the analysis did not "go far enough", that the Court was attempting to reach a pragmatic and just result.[2] The question of whether a person has ownership in his or her body or body parts has been a "hot" topic of debate for a considerable period of time amongst the academic medical and legal ethicists, and many were disappointed when the court failed to answer many of the broad questions this issue raises.

[109] In my respectful view, some of the criticisms are misplaced as they fail to consider the genesis of the common law. The common law develops slowly and incrementally, adjusting as it must to societal changes, in terms of technological changes, cultural, social changes and advances in science. Sometimes the common law will address the changes ahead of a legislature, particularly when human rights are engaged (the case of *Vriend v. Alberta*, [1998] 1 S.C.R. 493, comes to mind).

[110] In *Yearworth*, the Court was determining whether human sperm was property in a very narrow

context. It was not determining if all biological or reproductive material is henceforth to be considered as property with rights of ownership. It was not even determining whether sperm in other contexts, such as probate or matrimonial law, could be considered property. It was determining whether damage to frozen human sperm could be considered damage to property in order to base a cause of action against the defendant for negligence. More specifically, to bring a claim in negligence for losses caused by damage to property, the claimants in *Yearworth* had to have had either legal ownership of or possessory title to the property at the time the damage occurred (at para. 25). Therefore the Court considered whether sperm in that case was owned by the claimants.

[111] Ownership has some basic fundamental components. The Court in *Yearworth* cited Professor Honoré's 11 leading incidents of ownership, which have been modified over time by courts and other authors (A.M. Honoré, "Ownership" in A.G. Guest, ed., *Oxford Essays in Jurisprudence* (Oxford: Oxford University Press, 1961)). The Court acknowledged that the concept of ownership is one type of interest in a thing, "no more than a convenient global description of different collections of rights held by persons over physical and other things" (at para. 28). Honoré further defines ownership as the "greatest possible interest in a thing which a mature system of law recognizes" (Honoré at 108).

[112] There may be property interests less than ownership that a person can have in sperm. The Court in *Yearworth* acknowledged that if they had found that the claimants did not have ownership of the sperm for the purposes of a negligence claim, "it would clearly have been important … to proceed to enquire whether nevertheless [the claimants] had such lesser rights in relation to [the sperm] as would render them capable of having been bailors of it" for a bailment claim (at para. 47).

[113] The nature and scope of property interests that a person can have in human sperm need not be decided on the facts of this case. This case, unlike for example, *J.C.M. v. A.N.A.*, 2012 BCSC 584, does not deal with competing property interests in human sperm. This case considers whether Mr. Lam, a cancer patient, has ownership of the sperm he produced, such that he can contract for its storage to enable his personal use of the sperm at a later date. If so, the sperm is property, as something must be property if it is capable of being owned. There may also exist things that are property that cannot be owned, but that is not something that needs to be decided in the context of this case.

[114] Not all of Professor Honoré's 11 incidents of ownership need to be present for ownership to arise (*Yearworth* at para. 28). Ownership of body parts must be contextual, and often limited by legislation because of public policy reasons. No one would argue that if a cancer patient cut her hair and stored it for the purpose of later making a wig after treatment that she did not "own" her hair in that context. On the other hand, legislation prevents the selling of sperm and organs such as kidneys, but does not prevent their donation. The prohibition on sale does not necessarily mean the legislation is inconsistent with ownership. It has provided limits to ownership in some contexts.

[115] The Court in *Yearworth* provided a framework to determine whether the human sperm in that case was property. The Court set out the rights of the donors over their sperm and the limitations of those rights imposed by legislation. It weighed the factors and concluded that there was a sufficient basis to define the human sperm as property. I propose to use the same framework and analysis.

[116] In this case, the donors:

i. ejaculated the sperm;

ii. contracted to store the sperm for their future personal use;

iii. paid a fee for storage;

iv. could consent to the sperm being tested;

v. could terminate the storage agreement;

vi. could consent to the sperm being released to their physician, to be used by their legal or common-law spouse;

vii. could exclude all others from using the sperm – that is to say UBC agreed that no sperm would be used for the purpose of causing pregnancy in any person without the donor's consent; and

viii. pursuant to the termination clause, could consent to their sperm being used to cause a third party's pregnancy, in other words donate the sperm if he no longer wished to preserve it for his own use, if UBC chose to dispose of it in that manner. However, the donors could not require the sperm to be donated.

[117] The donor could not either because of legislation or the storage agreement:

i. dispose of the sperm by testamentary document, in other words leave it to someone in his will;

ii. remove it from the storage himself; and

iii. sell the sperm.

[118] In my respectful opinion, each of the donors had ample rights in relation to his own sperm specimen that invested him with ownership of that specimen sufficient to be defined as "property" and thus be "goods" under the *WRA*.

[119] I would dismiss the appeal.

"The Honourable Madam Justice Bennett"

I agree:

"The Honourable Mr. Justice Frankel"

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[1] This case has been deleted from the reports (see: 1997 Cal. LEXIS 131); thus, I have relied on the summary found in *J.C.M. v. A.N.A.*, 2012 BCSC 584.

[2] For example, see: Cynthia Hawes, "Property Interests in Body Parts: *Yearworth v. North Bristol NHS Trust"* (2010) 73:1 Mod. L. Rev. 130; Muireann Quigley, "Property: The Future of Human Tissue?" (2009) 17 Med. L. Rev. 457; Luke David Rostill, "The ownership that wasn't meant to be: *Yearworth* and property rights in human tissue" (2014) 40:1 J. Med. Ethics 14.