
CANADA / JUDGMENT

L.T. v. D.T. Estate

2020 BCCA 328

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 328 L.T. v. D.T. Estate

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

L.T. v. D.T. Estate,

2020 BCCA 328

Date: 20201124

Docket: CA46587

Between:

L.T.

Appellant

(Petitioner)

And

The Estate of D.T.

Respondent

(Respondent)

And

The Attorney General of British Columbia

Intervenor

And

The Attorney General of Canada

Intervenor

SEALED FILE

Before:

The Honourable Mr. Justice Harris

The Honourable Mr. Justice Goepel

The Honourable Mr. Justice Abrioux

On appeal from: An order of the Supreme Court of British Columbia, dated
December 9, 2019 (L.T. v. D.T. Estate (Re), 2019 BCSC 2130,
Vancouver Docket S1810682).

Counsel for the Appellant:

J. Wahid

No one appearing on behalf of the Respondent

Counsel for the Intervenor, the Attorney General of British Columbia:

A. Dutton

Counsel for Intervenor, the Attorney General of Canada:

C.D.E. Mitchell

G. MacIsaac

Place and Date of Hearing:

Vancouver, British Columbia

November 6, 2020

Place and Date of Judgment:

Vancouver, British Columbia

November 24, 2020

Written Reasons by:

The Honourable Mr. Justice Harris

Concurred in by:

The Honourable Mr. Justice Goepel

The Honourable Mr. Justice Abrioux

Summary:

Appeal of an order dismissing an application to permit the use of a deceased donor's reproductive material to produce an embryo even though the donor's consent to that use had not been provided in conformity with the governing legislation. Held: Appeal dismissed. Parliament has enacted a criminal prohibition on the posthumous use of a donor's reproductive material unless the donor had given prior, informed, written consent to its removal and use for that purpose. The donor had not given his consent in the required form. The Court must give effect to Parliament's clearly expressed intent.

Reasons for Judgment of the Honourable Mr. Justice Harris:

Introduction

- [1] This appeal is about whether human reproductive material removed from a deceased donor who had not given prior written consent to its removal or use can nevertheless be used to create embryos to allow his partner to have a child fathered by him.
- [2] The impediment to the proposed use of the donor's reproductive material is the federal scheme governing the use of human reproductive material. The Assisted Human Reproduction Act, S.C. 2004, c. 2 [AHRA] and its regulations, the Consent for Use of Human Reproductive Material and In Vitro Embryos Regulations, SOR/2007-137 [Regulation], prohibit the removal of human reproductive material from a donor without the donor's prior, informed, written consent.
- [3] The issue before us is whether properly interpreted the AHRA and the Regulation in fact prohibit the intended use of the donor's reproductive material in the circumstances of this case. The appellant, Ms. T, contends that the prohibition does not bar her proposed use of her deceased husband's stored reproductive material to allow her to create embryos and a full biological sibling(s) for their existing child.
- [4] At the outset, it is helpful to recall that the Supreme Court of Canada has upheld the constitutionality of the section of the AHRA prohibiting the removal of human reproductive material without a donor's prior consent. The Court concluded that Parliament enacted the prohibition in the exercise of its criminal law powers. In that context, the issue before us is limited to the proper interpretation of the relevant section and Regulation.

Background

- [5] In order to set the issue in context it is necessary to describe the sad circumstances in light of which this Court must interpret the AHRA and Regulation.
- [6] Mr. T died suddenly and unexpectedly. He died intestate.
- [7] Not long before his death, Mr. and Ms. T had a child. Ms. T and Mr. T had been in a long-term relationship. They had been married for three years before his death.

- [8] Ms. T and Mr. T planned to have more children together. Both of them wanted more children, wanted to have siblings for their child, and took great joy in being parents.
- [9] Neither Mr. T nor Ms. T considered what would happen if one or other of them died. They did not turn their minds to the possible posthumous use of their reproductive material. The judge concluded that, like most other young couples, they had not put their minds to that circumstance. He also reasoned that the comments attributed to Mr. T about his desire for a larger family and siblings for his child assumed he would be an active participant in their lives. Having said that, I think it right that we accept, for the purpose of our analysis, that Mr. T would have consented to the posthumous use of his reproductive material if he had considered the issue. Mr. T did not consent, however, to its posthumous removal or use in fact or, most importantly, in accordance with the plain statutory language of the AHRA and Regulation.
- [10] When Mr. T died, Ms. T brought an urgent after-hours application seeking orders that:
- a) The human reproductive material of Mr. T shall be removed from his body after his death;
 - b) The human reproductive material removed from Mr. T shall be stored at an IVF Clinic chosen by the petitioner, Ms. T; and
 - c) Mr. T's human reproductive material shall be used to create embryo(s) for the reproductive use by the petitioner, Ms. T, and for no other or improper purpose.
- [11] The judge explained what he did:
- [6] Recognizing that this was a last minute urgent application and that a denial would be terminal, I determined that an order maintaining the status quo was required to allow for the applicant to provide full submissions on the operation of the AHRA and regulations in a full hearing. I authorized the removal of Mr. T's reproductive material by a qualified physician; ordered that the material be stored at the identified fertility centre; and ordered that such material could not be released, distributed, or used until further order of the Court. I ordered a further hearing to address the key question of the effect of the AHRA and the Regulations on the application.
- [7] I also requested counsel to contact the Federal Department of Justice and the provincial Ministry of the Attorney General on behalf of the Court inviting them to provide submissions at the future hearing.
- [8] Pursuant to these orders, a hearing of the issue of whether Mr. T's reproductive material may be used by Ms. T to create an embryo took place on October 7, 2019.
- [9] The Department of Justice declined the invitation but was present during the hearing as an observer. The Attorney General of British Columbia appeared and provided submissions for which I am appreciative as am I of those from petitioner's counsel.

- [12] The judge identified the issue before him as the interpretation of the statute and its regulations. He concluded that Parliament intended to permit the posthumous use of a donor's reproductive material only if the donor had provided consent in compliance with the Regulation: namely, prior informed written consent. He considered the arguments advanced by Ms. T seeking to interpret the scheme in a manner that did not foreclose her using her husband's reproductive material for her proposed purpose. He did not accept those arguments. He concluded that there was no "legislative gap" in the scheme that applied to the facts. The current circumstances fell within the application of the legislation. Removal and use of Mr. T's reproductive material was prohibited. In his view, Ms. T's argument invited him to amend the legislation contrary to its clear meaning. The judge decided that, in the face of the clear statutory language, he did not need to consider Ms. T's argument based on *parens patriae*. Similarly, the statutory definition of consent displaced common-law notions of consent or property rights. Reluctantly, and recognizing the tragic circumstances before him, he dismissed the petition and terminated his interim order. He stayed his order to permit Ms. T to appeal it. A stay of his order remains in place.
- [13] I agree with the reasoning of the judge. For the reasons that follow, and with regret, I would dismiss the appeal.

Analysis

- [14] Before I set out the legislative scheme, I repeat that the only issue before us is one of statutory interpretation. Parliament has enacted the provisions we must interpret further to its constitutional power over the criminal law. The provisions in issue are part of the criminal law and the prohibition of the removal of a donor's reproductive material without consent is criminal in nature. This fact influences statutory interpretation because in enacting a criminal prohibition one would expect Parliament to attempt to achieve clarity and certainty.
- [15] The prohibition on the use of reproductive material without consent is set out in s. 8 of the AHRA. Section 8(1) deals with removal and use of reproductive material without consent by living donors. Section 8(2) deals with posthumous use without consent. The sections underscore the importance of consent by the donor to any removal or use of reproductive material and in each case defines what will count as consent. Section 8(2) of the AHRA provides:

Posthumous use without consent

- (2) No person shall remove human reproductive material from a donor's body after the donor's death for the purpose of creating an embryo unless the donor of the material has given written consent, in accordance with the regulations, to its removal for that purpose.

- [16] It is uncontroversial that we must interpret this statutory prohibition in accordance with the modern approach. We are to read the words of a statute 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. Furthermore, if the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process: see *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1 at para. 21.
- [17] I will comment more generally on the object of the AHRA shortly. For the moment, I observe that s. 8(2) is a clear and unequivocal prohibition on removal of reproductive material to create an embryo unless the donor (here Mr. T) has given written consent for that use in accordance with the regulations (which he had not). The section does not admit of any exceptions. It applies to all persons. It does not carve out an exception for spouses or common-law partners. It does not provide any exception to the requirement of prior written consent. It does not deal with a situation in which a donor's death is anticipated differently from one in which it is unexpected. There is no provision in the section for the court to order otherwise or to relieve from the prohibition. And, there is no indication of any criteria a court might consider to avoid the universal and uniform application of the prohibition.
- [18] I observe, further, that a contravention of s. 8 is an offence punishable by a penalty: see s. 61.
- [19] The conditions for providing the required form of consent for the posthumous use of reproductive material are set out in ss. 6, 7 and 8 of Part 2 of the Regulation:

Consent Given Under Subsection 8(2) of the Act

6 This Part applies in respect of a consent given under subsection 8(2) of the Act to remove human reproductive material from a donor's body after the donor's death for the purpose of creating an embryo.

7 Before a person removes human reproductive material from a donor's body after the donor's death for the purpose of creating an embryo, the person shall have a document signed by the donor stating that, before consenting to the removal, the donor was informed in writing that

- (a) the human reproductive material will be removed in accordance with the donor's consent to create an embryo for one or more of the following purposes, namely,
 - (i) the reproductive use of the person who is, at the time of the donor's death, the donor's spouse or common-law partner,
 - (ii) improving assisted reproduction procedures, or
 - (iii) providing instruction in assisted reproduction procedures;
- (b) if the donor wishes to withdraw their consent, the withdrawal must be in writing;

- (c) the withdrawal is effective only if the person who intends to remove the human reproductive material is notified in writing of the withdrawal before the removal of the material; and
- (d) human reproductive material removed from the donor cannot be used for a purpose mentioned in paragraph (a) unless the person who intends to make use of the material has the donor's written consent under Part 1 respecting the use of the material.

8 Before a person removes human reproductive material from a donor's body after the donor's death for the purpose of creating an embryo, the person shall have the donor's written consent respecting the removal of the material and the donor's written consent under Part 1 respecting the use of the material.

[20] Again, it is uncontroversial that a court must interpret a regulation in accordance with the modern principle and read it concurrently with, and in the context of, the enabling legislation, in order to implement the statutory scheme and give effect to the intention of Parliament: see, for example, *S.H. v. D.H.*, 2019 ONCA 454 at para. 31.

[21] Part 2 stipulates that before a person posthumously removes human reproductive material from a donor's body for the purpose of creating an embryo the person shall have a document signed by the donor stating that, before the donor had consented in writing to such removal, the donor was informed (in writing) of four matters; namely that:

- (a) his or her material would be removed posthumously in accordance with his or her consent to create an embryo for the reproductive use of the person who is, at the time of the donor's death, the donor's spouse or common law spouse and/or for research or instructional purposes;
- (b) any withdrawal of consent would have to be in writing;
- (c) any withdrawal of consent would only be effective if the person who intends to remove the material is notified in writing of the withdrawal before removal; and that
- (d) his or her removed material cannot be used for (a) unless the person who intends to use the material has the donor's written consent under Part 1 respecting the use of the material.

[22] This Regulation is clear and unambiguous. It applies to all persons who could remove genetic material and requires informed, written consent by the donor before death. It provides for no exceptions. It does not confer any jurisdiction on a court to avoid the universality of its application or to exempt a person from its operation where the necessary conditions for consent have not been complied with. It is consistent with, complements, and fulfills the purpose of s. 8(2).

[23] The effect of the AHRA and the Regulation read together is unequivocal and clear. In the exercise of its power over the criminal law, Parliament has declared definitively what will count as consent for permissibly removing reproductive material posthumously from a donor. No other forms of "consent" can have any application in rendering the posthumous removal of reproductive material lawful. Implied, hypothetical, imputed, or substituted

consent are simply not consent for the purpose of avoiding the prohibition set out in s. 8 and the Regulation. Parliament has provided for legal certainty in what is, without doubt, a morally challenging and humanly complex area.

- [24] Respectfully, this is not, as was suggested in argument, an interpretation of the statute lacking in nuance. It is not a narrow reading. It is a recognition that Parliament has made a policy choice. Parliament has defined the only circumstances in which it is lawful to remove and use reproductive material from a donor. That choice reflects the value Parliament has placed on a donor's individual autonomy and an individual's control over his or her body. It has made that choice in the face of numerous deep moral and ethical dilemmas posed by new reproductive technologies.
- [25] Recognizing the complexity of the challenges posed by new reproductive technologies government established, in 1989, the Royal Commission on New Reproductive Technologies (the "Baird Commission"). The Baird Commission reported in 1993: see *Proceed with Care: Final Report of the Royal Commission on New Reproductive Technologies* (Ottawa: Minister of Government Services Canada, 1993) (the "Baird Report"). The Baird Report recommended the need for clear and well-defined regulation of reproductive technologies. The Baird Report is the foundation of the AHRA, even though Parliament did not adopt all of the Baird Report recommendations.
- [26] It is worth pausing to comment on several features of the Baird Report. First, one important principle, among others, is the recognition of the importance of donor individual autonomy and the right to control one's own body. Second, the Report encourages Parliament to rely on its criminal law powers to establish clear boundaries around new reproductive technologies and practices (p. 108). Third, the Report rejects relying on property law concepts to regulate the use of human reproductive material (p. 597). Fourth, the Report recommends that decisions about the disposition of zygotes should be made by women or couples before any gametes are retrieved or zygotes created. Fifth, it recommends that clear principles should be established to ensure that zygotes do not become the object of disputes in order to avoid the need for courts to resolve disputes. Sixth, the Report recommends that zygotes should not continue to be stored after the death of one of the gamete donors.
- [27] Initially, the government appeared ready to follow the recommendation of the Baird Report with respect to a complete prohibition on the posthumous use of reproductive material. In 1996, Bill C-47, *An Act Respecting Human Reproductive Technologies and Commercial Transactions Relating to Human Reproduction*, 2nd Sess., 35th Parl. 1996, contained an absolute prohibition against a person knowingly retrieving sperm from a cadaver with the intention to use it to fertilize an ovum. The bill, however, died on the order paper.

[28] Subsequently, in 2001, the Minister of Health tabled draft legislation that was studied by the House of Commons Standing Committee on Health. The Standing Committee published a report that emphasized the importance of consent: *Assisted Human Reproduction: Building Families* (Ottawa: Public Works and Government Services Canada, December 2001) (Chair: Bonnie Brown). At p. 6 the report stated:

[I]nformed choice can lead to either informed refusal or informed consent. We want individuals participating in assisted human reproduction to be able to choose freely on the basis of full information of risks as well as benefits pertaining to medical, legal, ethical, social, or psychological implications. For the resulting children, they must be able to rely on the involved adults. For participating adults, this can mean having full understanding of short-term as well as long-term ramifications including the consequences for others who may be involved. We want to ensure that consent is given freely for all aspects of assisted human reproduction such as treatment, donation, and research. We also want continual assessment of the consent that is given and an acknowledgement that, for most activities, consent may be withdrawn at any time.

[29] In short, the Standing Committee endorsed the view that primacy be given to informed donor consent. It urged that consent be based on the full understanding of the implications of providing one's personal reproductive material for use by others. To achieve this end, the Committee supported prohibitions on the use of reproductive materials without prior, written, informed donor consent.

[30] Parliament ultimately followed the Standing Committee approach rather than the Baird Report's recommendation that zygotes not be stored after death of a donor. Parliament opened the door to the posthumous use of reproductive materials to create zygotes and hence embryos, but only if prior written, informed consent has been given by the deceased donor.

[31] I am grateful to the judgment of Justice Fairburn (as she then was) in *S.H. v. D.H.*, in which she considered some of the issues that concern us. I agree with what she has said:

[36] Free and informed consent lies at the heart of the entire AHRA, "central to the scheme established by the Act" and "intimately tied to moral concerns": *Reference re AHRA* [2010 SCC 61], at para. 142. The statement of principles in s. 2(d) of the AHRA underscores the statutory emphasis on consent:

[T]he principle of free and informed consent must be promoted and applied as a fundamental condition of the use of human reproductive technologies[.] [Emphasis added.]

[37] Parliament's deliberate decision to criminalize the use of reproductive material and in vitro embryos in the absence of written donor consent reflects deep moral concerns about human reproduction and its intersection with human autonomy. Those moral concerns were front and centre when considering whether it was acceptable for the criminal law to govern donor consent under s. 8 of the AHRA. As McLachlin C.J. said in *Reference re AHRA*, at para. 90:

At the heart of s. 8 lies the fundamental importance that we ascribe to human autonomy. The combination of the embryo's moral status and the individual's interest in his or her own genetic material justify the incursion of the criminal law into the field of consent. There is a consensus in society that the consensual use of reproductive material implicates fundamental notions of morality. This confirms that s. 8 is valid criminal law.

- [32] I emphasize, as does Justice Fairburn, the statutory emphasis on consent found in s. 2(d) of the AHRA: namely that the principle of free and informed consent must be promoted and applied as a fundamental condition of the use of human reproductive technologies. I see nothing in the AHRA or in the declarations in s. 2 that undermines the importance of protecting donor consent as defined in the statute. Regulation by means of or reliance on the common law is clearly ousted. In my view, the meaning of the text is clear and the meaning as I have described it is consistent with the purpose and objects of Parliament's intention.
- [33] Respectfully, Ms. T's position is untenable. Granting permission to use Mr. T's reproductive material would be contrary to the explicit language of s. 8(2) and the overarching legal and moral objective of the AHRA -- to protect the donor's interest in their reproductive material by only permitting its use with their express and informed written consent.
- [34] It follows from this that the court has no alternative but to give effect to the prohibition found in s. 8(2) on the facts of this case.
- [35] I regret that I am unable to accede to her arguments that attempt to avoid this conclusion. There is no legislative gap entailing that the prohibition does not apply to her circumstances. I cannot agree that the prohibition is only intended to apply in the case of a foreseeable death and not an unanticipated one where a couple are planning to have children together. To read the statute in that way would be to amend it by judicial decree. We have no right to do so.
- [36] I can find nothing in the legislation that would allow Ms. T to assert a property or possessory right to her husband's reproductive material. The statute reflects the Baird Report's rejection of treating reproductive material as a form of property. To the extent that reproductive material has on occasion been treated by courts as having some attributes of property, such principles are displaced by and inconsistent with the prohibition found in s. 8(2). Indeed, in the face of clear statutory language any common law principles inconsistent with the proper interpretation of the statute are of no continuing effect. This principle explains the result in *S.H. v. D.H.* In that case, a couple had created a number of in vitro embryos with the aid of anonymous donors. The couple divorced and the ex-husband notified the IVF clinic in writing that he withdrew his consent to the use of the embryos. His written demand complied with the provisions in the Regulation governing withdrawing consent. His former wife attempted to argue that one reason why her former husband could not withdraw his consent was that he would be doing so in breach of contract. The court concluded in effect that the regulatory scheme ousted the applicability of the common law. The Regulation

governed the right to withdraw consent regardless of any common-law restriction that might otherwise apply. The same principle is engaged here in a different circumstance.

- [37] The same approach answers Ms. T's reliance on the *parens patrie* jurisdiction of the court. That jurisdiction derives from the royal prerogative. It permits a court to protect and benefit those who are vulnerable and cannot protect themselves. It applies where there is a legislative gap, and not in the face of a statute that governs the situation. As Justice Groberman explained in *J.E.S.D. v. Y.E.P.*, 2018 BCCA 286 at para. 58:
- [58] Two other limitations on the *parens patriae* jurisdiction are important. First, as it is a prerogative power, it must yield to statutory provisions. Thus, in *L.M. v. British Columbia (Director of Child, Family and Community Services)*, 2016 BCCA 367 at para. 33, Saunders J.A., speaking for a unanimous Court, said:
- [33] Where there is a legislative scheme, this protective jurisdiction of the court applies only when there is a gap in that legislation: *Beson v. Director of Child Welfare (NFLD)*, [1982] 2 S.C.R. 716, 142 D.L.R. (3d) 20. Use of *parens patriae* jurisdiction is, accordingly, not meant to be an avenue for statutory amendment or broad interference with existing laws, and does not create substantive rights: *Tsaoussis v. Baetz* (1998), 112 O.A.C. 78, 41 O.R. (3d) 257 (C.A.); *P.(E.) v. B.C. (Supt. of Fam. & Child Service)* (1988), 23 B.C.L.R. (2d) 329, 28 D.L.R. (4th) 469 (C.A.).
- [38] I read Ms. T's argument as an invitation to amend the statute and an attempt to create substantive rights that do not otherwise exist and are inconsistent with the AHRA.
- [39] The cases referred to by Ms. T do not assist in grounding an interpretation of s. 8(2) that would render the removal and use of Mr. T's reproductive material lawful. In *Jocelyn Edwards: Re the estate of the late Mark Edwards*, [2011] NSWSC 478, no legislation addressed or prohibited the posthumous removal or use of reproductive material. *Lam v. University of British Columbia*, 2015 BCCA 2, dealt with a class action brought by men who had freely provided reproductive material that was damaged while being stored by the defendant. The majority was circumspect in limiting its conclusion to the proposition that each donor had ownership of his sperm within the definition of goods under the Warehouse Receipt Act. The case engaged no issues about the absence of written donor consent to posthumous removal or use of the donor's reproductive material.
- [40] At first blush, *K.L.W. v. Genesis Fertility Clinic*, 2016 BCSC 1621, does offer some support to Ms. T both in recognizing reproductive material as property and in permitting use of reproductive material after donor death even though the donor had not fully complied with the formalities of the statutory scheme. In that case, the donor consented to the removal of his reproductive material during his lifetime. He suffered from a life threatening medical condition. The couple had agreed that his reproductive material should be used, even if he died. He died, intestate, without completing the written consent as required by s. 8(1) of the AHRA to permit the use of his reproductive material posthumously.

- [41] The proceeding was uncontested, although the judge considered the effect of the AHRA. The judge concluded the reproductive material was property that passed to the petitioner for her use. The judge ultimately determined that the consent that the deceased donor had given to the use of his reproductive material after death was sufficient to satisfy the fundamental objective of the AHRA that the donor's consent must be both free and informed. He ordered that the reproductive material be released for the purpose of creating an embryo.
- [42] I do not propose to comment directly on the judge's reasoning about the status of reproductive material as property. Whether that conclusion withstands scrutiny should be decided after considered argument in a properly adversarial hearing. Given that the judge did not have the benefit of full argument, even though I am sure counsel did their best to provide the court with helpful and relevant authority, I am not persuaded that the case can be treated as authoritative.
- [43] I also do not need to dwell at length on the factual distinctions between that case and this one. At a minimum, the donor had complied with the consent requirements for removal and use in his lifetime, but had not been advised of the formal consent conditions for use after his death, even though he expressly contemplated such use. Hence, the reproductive material existed separate from the donor's body with his consent. In this case, Mr. T had not consented to the posthumous removal of his reproductive material. It existed separately from his body only because of the interim order. Moreover, Mr. T had never given his express consent to posthumous use of his reproductive material in any way similar to the deceased donor in K.L.W.
- [44] The reason why K.L.W. does not assist Ms. T is because the judge did not give effect to the clear and unambiguous wording of a criminal prohibition. Although a tragic case, as is this one, the judge, in my view, erred in approving use of reproductive material contrary to the prohibition. In substance, he ignored the requirements of the statute on the basis that doing so was consistent with the statute's objectives. I do not think that is a correct approach to applying criminal prohibitions. The case should be treated as having been overruled insofar as it contemplates the possible use of reproductive material where the statutory conditions have not been complied with.
- [45] I turn to consider Ms. T's remaining arguments. Ms. T argues, in effect, that the judge's interim order permitting the removal of Mr. T's reproductive material has created property that she is entitled to possess. With respect, this suggestion misunderstands the nature of the judge's interim order. That order does not create any substantive rights. It simply was a means by which Ms. T was given an opportunity to argue that she had the right to remove and use her husband's reproductive material to create an embryo. In the circumstances, her potential claim to have such a right would have been lost without the order. The order that determined whether in fact she had the right to remove and use the material is the order dismissing her claim to have those rights that she now appeals.

[46] Ms. T also relies on s. 51 of the AHRA to argue that it contemplates that Ms. T might have an entitlement to possession of reproductive material, even if s. 8(2) has been breached.

Section 51 provides:

51 (1) A person from whom material or information is seized may, within 60 days after the date of the seizure, apply to a provincial court judge within whose jurisdiction the seizure was made for an order of restoration, if the person sends to the Minister notice of their intention to do so.

(2) The provincial court judge may order that seized material or information be restored immediately to the applicant if, on hearing the application, the judge is satisfied that

(a) the applicant is entitled to possession of it; and

(b) it will not be required as evidence in any proceedings under this Act.

[47] Section 51 is found among a series of sections that permit inspectors to seize reproductive material in order to verify compliance or prevent non-compliance with ss. 8, 10 and 12 of the AHRA. By its terms, it does not apply to the current circumstances. No inspector has seized material. Standing to challenge a seizure is conferred on the person from whom the material was seized. The section was not part of the statute at the material time. Critically, s. 51 does not create any substantive rights. It simply provides an ancillary procedure to allow someone from whom material has been seized to apply to establish an entitlement to possession. The section is purely procedural. It does not create an entitlement to possession. Establishing an entitlement to possession requires, here, a demonstration that a person who is in "possession" of the material has a right to remove and use it. That is the question answered by whether the conditions of s. 8(2) have been complied with. Section 51 adds nothing to the analysis.

[48] Ms. T argued that the legislative history disclosed an awareness of the potential tragic circumstances that might arise from a definitive blanket interpretation of s. 8 because many individuals would not know what they had to do to comply with the consent requirements. She says that the government contemplated a programme to educate citizens about these requirements, but has not provided one. I understood that argument to be that therefore the section should be interpreted not to apply to individuals who were mistaken about the consent requirements or as indicating a gap in the scheme.

[49] I cannot give effect to this argument. Whether government has effectively explained statutory requirements cannot affect the interpretation of those requirements. Indeed the argument begs the question. Implicit in the argument is that the statute does establish the conditions of consent, but the government has done an inadequate job of explaining them. The argument does not demonstrate the existence of a legislative gap.

- [50] Finally, Ms. T suggests that this Court could authorize the export of Mr. T's reproductive material because there is no explicit prohibition on export. That argument cannot succeed in the face of the clear prohibition on removing Mr. T's reproductive material unless the requirements of s. 8(2) are satisfied.
- [51] It is useful to add one final word about the interim order. In the circumstances that confronted the judge, making an order to permit the removal of Mr. T's reproductive material pending a determination of whether that material could be removed and used was clearly the right thing to do. What it permitted, however, was the removal of Mr. T's removal of reproductive material contrary to the prohibition in s. 8(2). In that sense, it permitted the commission of a criminal offence. This was not a case in which there was doubt about whether Mr. T had actually complied with s. 8(2). It was accepted from the beginning that he had not. The issue was whether the statute could be interpreted so that the failure to comply with those requirements was not fatal to the right to remove and use the reproductive material. This Court has now provided a definitive answer to that question. In the legal sense, the interim order ought not to have been pronounced. It will, accordingly, be unnecessary to make a similar order in similar circumstances in the future.

Disposition

- [52] I would dismiss the appeal. I do so with regret, aware of the painful and tragic circumstances confronting Ms. T's family. Given the circumstances, I would stay the order of this Court for 60 days to permit the parties to consider their position on an appeal to the Supreme Court of Canada. I would order that each party bear their own costs.

- [53] We thank all counsel for their helpful submissions.

"The Honourable Mr. Justice Harris"

I agree:

"The Honourable Mr. Justice Goepel"

I agree:

"The Honourable Mr. Justice Abrioux"

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