CITATION: Piljak Estate v. Abraham, 2014 ONSC 2893
COURT FILE NO.: CV-11-433289
DATE HEARD: May 8, 2014
ENDORSEMENT RELEASED: June 4, 2014

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: THE ESTATE OF SNEZANA PILJAK by its Estate Trustee SIMO PILJAK, SIMO PILJAK, PETER PILJAK, SONJA PILJAK, RANKA CULUM and RADMILO CULUM v. DR. THARAIKATTU EASO ABRAHAM, DR. ALI HASSAN QUIZILBASH, RUDD CLINIC and DR. BRANIMIR BRCIC

BEFORE: Master R. Dash

COUNSEL: Miles Obradovich, for the plaintiffs

Timothy Chapman-Smith, for the defendants Drs. Abraham and Brcic

REASONS FOR DECISION

[1] The defendants Drs. Abraham and Brcic move under rule 32.01 for the genetic testing of liver tissue taken from Snezana Piljak (since deceased), although they have asked for it in a rather roundabout manner. It raises the question whether excised human tissue is personal property within the meaning of Rule 32.

BACKGROUND

[2] In May 2008 the defendant Dr. Abraham performed a colonoscopy on Ms. Piljak during which he identified and excised a 5 mm. polyp in the ascending colon. Pathological examination diagnosed the polyp as a benign tumour.

[3] In August 2009 Ms. Piljak underwent a CT scan at Sunnybrook Hospital for unrelated reasons which revealed lesions in both Ms. Piljak's liver and in the ascending colon and a colonoscopy was performed. Pathological examination of a tissue sample revealed colorectal cancer, which resulted in Ms. Piljak's death on August 14, 2011.

[4] On August 19, 2011 this action was commenced by Ms. Piljak's estate and by her family members against Dr. Abraham (amongst other medical professionals) for negligence in his conduct of the May 2008 colonoscopy. One of the allegations against Dr. Abraham is that he should have detected the cancerous lesion. Dr. Abraham pleads that he met the standard of care. He also pleads that unrelated medical conditions pre or post-dating his involvement caused the plaintiff's death.

[5] The tissue block of liver, as well as portions mounted on slides for pathological examination, has been preserved and is in the possession of Sunnybrook Hospital.

THE EVIDENCE ON THE MOTION

[6] The moving defendants ask that genetic testing be done on the tissue. The defendants have provided an expert report by Dr. Mark Vincent, a medical oncologist who treats gastrointestinal cancer. He suggests that such testing could establish or refute a possible diagnosis of hereditary non-polyposis colorectal cancer ("HNPCC") by revealing a particular type of DNA with microsatellite instability. Cancers with this condition may develop rapidly and can easily be missed despite well performed colonoscopies due to involvement of a flat type of polyp. The question arises because Ms. Piljak has a family history of colon cancer and hence the possibility that the cancer was the hereditary HNCPP. Dr. Vincent opines that "since the visibility of these lesions may vary depending on the exact genetic basis for the polyp and cancer formation, it may be helpful to subject the available pathologic material (especially the resected liver metastasis) to molecular testing."

[7] The defendants argue that if genetic testing of the liver tissue established that Ms. Piljak's cancer was of the HNCPP type with flat and fast developing polyps, that testing might reasonably go to the issue of Dr. Abraham's standard of care.

[8] It is requested that the genetic testing be done by a geneticist at Mt. Sinai Hospital, Dr. Aaron Pollett. There is no evidence from Dr. Pollett by way of affidavit or expert report or even letter. There is no evidence that he is prepared to genetically test the tissue, the methodology he would use, whether the testing would be destructive of the tissue sample, whether he could reasonably ascertain if the tissue demonstrates HNCPP, whether he has examined the tissue and if so the quantity available and whether there would be sufficient left over for examination by the plaintiffs' experts. The only information about Dr. Pollett and his procedure comes from letters written by Erica Baron and Timothy Chapman-Smith, lawyers for Dr. Abraham, to Mr. Obradovich, the lawyer for the plaintiffs, which letters are attached as exhibits to the affidavit of a law clerk at the offices of the defendants' lawyers without commentary.

[9] The letters suggest that to the extent Dr. Pollett is willing to perform the test, Dr. Pollett will not take instructions for genetic testing from the lawyers but rather Dr. Pollett requires a request from Ms. Piljak's former treating surgical oncologist, Dr. Natalie Coburn. In turn this would require that Ms. Piljak's personal representatives (her estate trustee, a plaintiff herein) make that request of Dr. Coburn.

[10] In fact the relief set out in the notice of motion is for "an order requiring the Plaintiffs to direct Ms. Snezana Piljak's former clinician to request genetic testing of the block of Ms. Piljak's liver tissue, and any tissue slides, to be conducted by Dr. Aaron Pollett."

[11] It is suggested in the letters that Dr. Pollett would provide his conclusions to Dr. Coburn with a "clear indication" that she would in turn communicate the results to all counsel. There is no evidence from Dr. Coburn that she is prepared to make that request or share any results with all counsel.

[12] The letters suggest that Dr. Pollett, who would be performing the genetic testing, would not be retained as the defendants' expert, but the results of his testing would (through Dr. Coburn) be available to all parties, and presumably their experts. (The defendants have not confirmed whether Dr. Vincent would be their expert on standard of care following release of the results of the genetic testing, although he is their expert for purposes of this motion.)

[13] Although Mr. Chapman-Smith sets out in his letter some aspects of the test to be conducted by Dr. Pollett it is not an extensive description of the protocol, and not having come from Dr. Pollett, even as information and belief from Mr. Chapman-Smith, there is no evidence at all of the protocol to be used for the testing.

[14] In his letter, Mr. Chapman-Smith confirms that the genetic testing will result in the destruction of multiple cut slides, however "we expect that much of the tissue block would remain for further testing if necessary." Even if that were in evidentiary form (which it is not) there is no indication of the basis for that conclusion. There is no indication that Dr. Pollett has seen the tissue block and no indication of its quantity and of the proportion to be destroyed by testing. Dr. Vincent, in his letter states, "the existing tissue block would provide adequate tissue, with lots remaining." There is no evidence that Dr. Vincent has ever seen the tissue block (and it seems clear he has not) or that his statement is any more than an educated guess.

[15] There is no evidence to explain why Dr. Pollett would require a request from Dr. Coburn and why he would be required to deliver his test results to her. With Ms. Piljak no longer alive there could be no diagnostic or treatment rationale for the genetic testing. The rationale for Dr. Coburn requesting genetic testing must relate to other family members. In one of Mr. Chapman-Smith's letters he states that the micro-satellite instability can be related to hereditary issues and "this may have implications for the other members of Ms. Piljak's family." Further, Dr. Vincent says that because these microsatellite instable cancers often run in families, establishing whether Ms. Piljak has the condition firstly would be to properly plan life-time surveillance "and secondly to know whether to screen other family members who might be at risk."

[16] The normal purpose for such testing is as a treatment aid to the patient and to provide screening information for other members of the family so that they can take such action as they deem appropriate. The testing of course is no longer a treatment aid for Ms. Piljak, and her family members who would receive screening information object to the testing. Presumably they do not want to know the information for their own undisclosed reasons, but putting Dr. Coburn in the position where she may ethically be bound to tell them will result in their being told. Knowledge that they may have a hereditary life threatening condition could have implications for the family members far beyond testing and treatment decisions; however the plaintiffs do not raise that as a factor in my decision.

RULE 32.01 AND THE PROCEDURAL REQUIREMENTS

[17] Rule 32.01 provides as follows:

> 32.01 (1) The court may make an order for the inspection of real or personal property where it appears to be necessary for the proper determination of an issue in a proceeding.
>
> (2) For the purpose of the inspection, the court may,
>
> (a) authorize entry on or into and the taking of temporary possession of any property in the possession of a party or of a person not a party;
>
> (b) permit the measuring, surveying or photographing of the property in question, or of any particular object or operation on the property; and
>
> (c) permit the taking of samples, the making of observations or the conducting of tests or experiments.
>
> (3) The order shall specify the time, place and manner of the inspection and may impose such other terms, including the payment of compensation, as are just.
>
> (4) No order for inspection shall be made without notice to the person in possession of the property unless,

(a) service of notice, or the delay necessary to serve notice, might entail serious consequences to the moving party; or

(b) the court dispenses with service of notice for any other sufficient reason.

[18] Therefore, rule 32.01 permits the inspection of personal property where it appears to be necessary for the proper determination of an issue in the action and to permit the taking of and conducting tests on samples. The issues are whether a human tissue sample is personal property and whether I am satisfied that the tests are necessary to the determination of the issue of standard of care.

[19] Even if those hurdles are cleared there are difficult procedural issues for the moving defendants to overcome related to the requirements to specify the manner of inspection as required by rule 32.01(3) and the failure to put Sunnybrook Hospital, the person in possession of the tissue, on notice pursuant to rule 32.01(4). Finally there is the problem that the relief requested is not to order the inspection by Dr. Pollett but rather to order the plaintiffs to request Dr. Coburn to request Dr. Pollett to conduct the tests.

[20] Neither Dr. Pollett nor Dr. Coburn have been served with this motion, although clearly they are persons who would be affected by the order requested: rule 37.07(1).

IS EXCISED HUMAN TISSUE PERSONAL PROPERTY?

[21] Rule 32.01 permits only "the inspection of real or personal property". Is a tissue sample taken from a human being for the purpose of diagnostic testing "personal property"?[1]

[22] In my view, this is not a simple question. Neither party has provided me with any jurisprudence determining that issue and neither party has presented a principled approach to determining the question.

[23] All definitions of "property" involve ownership or other legal rights with respect to a thing or object. "Property" has been defined as a "thing belonging to someone".[2] It is described as "that which belongs exclusively to a person; in a legal sense, the aggregate of rights that are subject to ownership. The term may denote the thing or object to which the rights or interest apply or to the legal relationship that exists with respect to those rights."[3] It is an "external thing over which the rights of possession, use and enjoyment are exercised" or alternatively the "right of ownership" or "the right to possess, use and enjoy" a "determinate thing".[4]

[24] "Personal property" or "personalty" is that class of property dealing with rights in a "chattel"[5] or any "movable or intangible thing that is subject to ownership and not classified as real property."[6]

[25] The moving defendants have provided me with an article from the Canadian Medical Association Journal dealing with rights to access excised human tissue and in so doing make conclusions about who "owns" the tissue.[7] It notes that human tissue is excised either for diagnostic purposes/medical care or for research purposes. Diagnostic tissue, such as in the case before me, is tissue obtained in a procedure for patient care and that in accordance with regulations under the *Public Hospitals Act*[8] must be sent to a laboratory or pathology department for examination and diagnosis. The sampled and processed tissue is retained as archived diagnostic tissue for a minimum of 20 years in the clinical archives of the pathology department (although excised tissue not specifically sampled is typically discarded within weeks).[9]

[26] The authors state that it "is unquestionably true that patients own their tissue before it is excised", and while it has never been squarely dealt with by a Canadian court, they conclude that diagnostic tissue, once excised becomes a "component of the medical record" (as required by regulation under the *Public Hospitals Act*)[10]. As such, "both possession and ownership are transferred to the institution" and "by virtue of it being part of the medical record, diagnostic tissue is therefore owned by the institution or hospital." At best a patient is entitled to "reasonable access." The authors note that their conclusion has been supported by American jurisprudence. While this is not binding on me I find the reasoning compellable and I adopt its conclusions.

[27] Ms. Piljak's excised tissue is therefore owned by Sunnybrook Hospital, whose pathology department performed the diagnostic tests and in whose archives the tissue is kept. As the excised tissue is subject to rights of ownership, and since the tissue is clearly a moveable, I conclude that it is personal property to which inspection and testing under rule 32.01 may apply.

[28] The one case provided to me dealing with excised human tissue[11] was not under rule 32.01 but was rather a motion for an injunction in a medical malpractice action in which the plaintiff sought to have released to her tissue slides and blocks taken from her during a caesarean section "for the purpose of inspection and examination". The responding hospital did not deny the right of inspection provided it had equal rights of inspection and examination. The court noted that there were "no decided cases in Canada as to who is entitled to the tissue slides and blocks" and concluded "the tissue slides and blocks are in their present state independent physical evidence which are available to the parties in this kind of litigation for inspection, examination and analysis. It is evidence which is part of the search for the truth", with the applicant's tissue to be inspected, examined and analyzed "by professionals of her choice."[12] Although the injunction was denied, the court ordered the plaintiff had the right to inspect, examine and analyze all tissue slides and blocks at a place and by a person of her choice, the hospital was to send the tissue slides and blocks to the facility where the expert would be conducting the examination after which they would be returned to the hospital. The hospital then had the right to its own examination and analysis.

[29] While this case was not under Rule 32, and thus did not deal with whether the tissue slides were personal property to which Rule 32 might apply, the motion and order were to the same effect. In my view it supports my conclusion that Rule 32 may be used to permit either party to inspect and test human tissue initially excised for diagnostic purposes.

MUST THE DEFENDANTS' EXPERT REPORT BE PROVIDED TO THE PLAINTIFFS?

[30] The plaintiffs' argument opposing this motion is not a principled approach to whether excised human tissue is personal property to which Rule 32 can apply. Rather the plaintiffs' concern is to require the defendants' expert who will be examining the results of the genetic testing done by Dr. Pollett, whether it is Dr. Vincent or some other expert, to provide to the plaintiffs a copy of his or her expert report. Pursuant to rule 31.06(3) a person retaining an expert must at examination for discovery reveal the name of its expert and their findings unless the party undertakes not to call the expert as a witness at trial. The expert's report however need not be provided until 90 days before the pre-trial conference, and then only if the party intends to call the expert as a trial witness: rule 53.03(1).

[31] On the other hand, the name of the expert conducting the testing must normally be revealed so that the court can determine if the person has the appropriate expertise to conduct the test such that it is appropriate to make an order for inspection under rule 32.01.[13]

[32] The plaintiffs argue that the relief sought must rather be under section 105 of the *Courts of Justice Act*[14] and Rule 33. The plaintiffs want the order to be made under Rule 33 because rule

33.06 requires that after conducting the examination "the examining health practitioner shall prepare a written report…and shall forthwith provide the report to the party who obtained the order", who shall in turn "serve the report on every other party." Rule 33 applies only to orders made undersection 105 which states that "where the physical or mental condition of a party to a proceeding is in question, the court…may order the party to undergo a physical or mental examination by one or more health practitioners." Although the physical condition of Ms. Piljak is in issue in the action, the court would not be ordering the physical examination of Ms. Piljak. She is deceased. The court would be ordering an examination of diagnostic tissue removed from her prior to her death. Rule 33 has no application to the relief sought.

[33] In any event the question of the release of the expert report is not in issue. The moving defendants seek genetic testing of the tissue by Dr. Pollett. Dr. Pollett is the expert who will be providing an opinion as to the existence of a particular type of DNA with microsatellite instability leading to a diagnosis of hereditary non-polyposis colorectal cancer. As the motion is framed, both the plaintiffs and the defendants will be receiving the report of Dr. Pollett. What the plaintiffs want is the report of Dr. Vincent or some other expert who will not be conducting any testing of the tissue sample, but may rather be providing an opinion, based on a review of Dr. Pollett's report, on the growth rate and possible shape of that type of cancer and how that would affect Dr. Abraham's standard of care. The plaintiff of course, with equal access to Dr. Pollett's report, can retain their own expert. What Dr. Vincent has done on this motion is provide an opinion as to the usefulness of testing by Dr. Pollett.

IS THE TESTING NECESSARY TO DETERMINE AN ISSUE IN THE ACTION?

[34] The next question is whether the inspection and testing "appears to be necessary for the proper determination of an issue in the proceeding" within the enabling wording of rule 32.01(1). The plaintiffs' concern is that Dr. Vincent has only raised the "question" whether Ms. Piljak's cancer was a hereditary form of the disease (based on family history) and if so, "one possibility" is that it is HNPCC. Dr. Vincent stated that some early cancers may be missed "probably" due to the involvement of a flat type of polyp, such as is associated with HNPCC, although that is but one form of hereditary cancer. He concludes that the visibility of these lesions "may" vary depending on the exact genetic basis for polyp and cancer formations and it "may be useful" to subject the tissue samples to molecular testing. The plaintiffs therefore argue that with all of these uncertainties. no convincing case has been made out for the necessity of the genetic testing.

[35] For the proposed testing to meet the requirement of appearing to be "necessary for a proper determination of an issue in the proceeding", the moving party need only show a "reasonable possibility" that the proposed test will reveal something useful for the trier of facts:

> (a) The proposed test must be one which, in the words of rule 32.01(1), "appears to be necessary for the proper determination of an issue in a proceeding."
>
> (b) "Necessary" has been held to mean "useful" or "probative of an issue"…Therefore, in my view, to establish "necessity" the moving party must show that there is a reasonable possibility the proposed test will reveal something useful for the trier of fact (that is, something which will assist the trier of fact in determining an issue in the proceeding).
>
> (c) Even if "necessity" is established, the court is not bound to authorize the test, since the opening words of rule 32.01(1) bespeak a discretion in this regard.
>
> (d) Rather than be concerned with whether the proposed test will "destroy" the property, I think the better question is: Will the proposed test impair the integrity of the property such that the party in possession of the property will be prejudiced at trial?

(e) If the party in possession will be so prejudiced, this fact must be balanced with the benefit to be derived from the test by the trier of fact.[15]

[36] In that case the court concluded that it was "satisfied there is a reasonable possibility" that allowing the expert to have certain negatives "will assist him in arriving at his opinion and, in turn, will aid the trier of fact in deciding the issues of causation and negligence."[16]

[37] In my view, based on the report of Dr. Vincent, I am satisfied that while the results of the genetic testing by Dr. Pollett will not necessarily be helpful in determining the issue of standard of care of Dr. Abraham, I am satisfied that there is a reasonable possibility that the testing by Dr. Pollett may reveal information useful to an expert oncologist in preparing a report on standard of care, which in turn may reasonably be of assistance to the court in determining whether Dr. Abraham met the appropriate standard of care.

[38] I am satisfied that genetic testing of the liver tissue may establish that Ms. Piljak's cancer was of the HNCPP type with flat and fast developing polyps and if so, that testing might reasonably go to the issue of Dr. Abraham's standard of care. I am therefore satisfied that genetic testing by Dr. Pollett "appears to be necessary for the proper determination of an issue in a proceeding" within the meaning of rule 32.01.

REASONS WHY THE MOTION MUST FAIL

[39] Notwithstanding that the tissue samples are property, the inspection and testing of which appear to be necessary for determining issues of standard of care, this motion must fail for any one or more of eight reasons.

[40] Firstly, rule 32.01 permits the court to order an inspection of property and permit the conducting of tests thereon. I am not being asked to order the inspection or testing of the tissue block and slides either by Dr. Pollett or at all. I am instead being asked to require the plaintiffs to request Dr. Coburn to ask Dr. Pollett to conduct tests. That is not a form of relief under rule 32.01.

[41] Second, in my view the rule presupposes that the person inspecting the property and conducting tests thereon is either a party or an expert retained by a party, or at least a person willing and able to perform the tests at the request of a party. Dr. Pollett has not been retained by the moving party. In fact there is no evidence from Dr. Pollett or from anyone who has spoken to Dr. Pollett that he is prepared to conduct the tests. Dr. Vincent, who has been retained by the moving parties, is not the expert who will be doing the genetic testing.

[42] In this case the only evidence is that of a law clerk at the defendants' law firm attaching, without comment, a number of letters written by either Ms. Baron or Mr. Chapman-Smith, both lawyers at the firm, to Mr. Obradovich. In a letter of February 21, 2013 Ms. Baron says that it is her "understanding" that the hospital "can" perform the testing if requested by a clinician and she "understands" that Dr. Pollett is willing to perform the genetic testing. Ms. Baron's letter is not evidence.

[43] Third, there is no evidence that Dr. Pollett has the expertise to conduct the genetic testing.

[44] Fourth, there is no evidence from Dr. Pollett that he will be able to test for the hereditary genetic cancer form known as HNPCC.

[45] Fifth, rule 32.01(3) requires me to "specify the time, place and manner of the inspection" and permits me to "impose such other terms, including the payment of compensation, as are just". I

have no evidence from Dr. Pollett as to when, where or in what manner he will inspect the property and what manner of tests will be performed. I have no evidence as to what terms Dr. Pollett may require or what if any compensation must be paid to Dr. Pollett or to the hospital for the testing.

[46] Mr. Chapman-Smith states in a letter dated February 27, 2014, attached as an exhibit to the law clerk's affidavit, that Dr. Pollett indicated that the "standard clinical test" is to test two loci, but for legal purposes to test at the biological level he will test five loci. Mr. Chapman-Smith also indicates that he "believes" OHIP "may" pay for the testing, but with no basis stated for the source of that belief, but if not the defendants will pay. That letter is not evidence. Even if the law clerk had indicated that she was advised by Mr. Chapman-Smith of this information and that the lawyer in turn obtained it from Dr. Pollett it would be inadmissible double hearsay. The law clerk however does no more than attach the letter without comment. The letter also fails to set out with more precision the manner of testing (not just the number of loci tested) or the time and place and other terms.

[47] The last four points suggest that an affidavit from Dr. Pollett would have been a necessary precondition to granting the relief. While an affidavit or a report from Dr. Pollett would have been the best evidence or a letter from Dr. Pollett attached as an exhibit an acceptable alternative, the evidence could also have been provided on information and belief by whoever spoke to Dr. Pollett, although that type of evidence may go to weight.[17] No-one who may have spoken to Dr. Pollett has provided an affidavit. As noted, the only evidence is that of a law clerk at the defendants' law firm attaching, without comment, letters written by two lawyers at the firm to Mr. Obradovich. The letters are not only not best evidence, they have no evidentiary value whatsoever. Furthermore, to the extent that the information came from Ms. Baron and Mr. Chapman-Smith who in turn received it from Dr. Pollett, that would be inadmissible double hearsay if given in evidence by the law clerk.

[48] Sixth, the issue of prejudice to the plaintiffs has not been addressed adequately in the evidence. The plaintiffs are concerned whether, after testing by Dr. Pollett, there will be sufficient tissue left in the block and on the slides for testing by their own expert, or as stated in the case law: "Will the proposed test impair the integrity of the property such that the party in possession of the property will be prejudiced at trial?"[18]

[49] Dr. Hsieh, a pathologist at Sunnybrook, wrote to Mr. Obradovich on July 8, 2013 to indicate that the tissue blocks "from specimen C" are retained in storage in that department and "unstained tissue slides or tissue curls" can be provided. There is no indication of the quantity. Mr. Chapman-Smith in his letter of February 27, 2014 indicated that the genetic testing will result in the destruction of cut slides and Dr. Pollett required multiple cut slides. Mr. Chapman-Smith adds "we expect much of the tissue block would remain for further testing if necessary." As indicated, that letter is not evidence of those facts and in any event Mr. Chapman-Smith's expectations, without a source of that information, has no value. There is no indication that Dr. Pollett has ever seen the tissue block and slides or opined as to the quantity available before and after testing. Dr. Vincent, says in his concluding sentence, "The existing tissue block would provide adequate tissue, with lots remaining." There is no indication that Dr. Vincent has ever examined the existing tissue block or how he concludes there would be "lots remaining."

[50] While the plaintiffs provide no evidence that there would not be sufficient tissue left for their separate testing, the onus is on the moving defendants to satisfy the court of that fact, since it is an important factor in the exercise of the court's discretion.

[51] Seventh, rule 32.01(4) requires that "no order for inspection shall be made without notice to the person in possession of the property". There are exceptions if service or the delay caused by service might entail serious consequences to the moving party or the court dispenses with service

for "other sufficient reason." The evidence is that the tissue is in the possession of the pathology department of Sunnybrook Hospital. Sunnybrook Hospital has not been served with notice of this motion. There is no evidence that there would be serious consequences if necessary to serve or that there are other compelling reasons not to serve.

[52] Eighth, rule 37.07(1) requires service of the motion not only on the parties to the action, but on any "other person who will be affected by the order sought". Dr. Pollett would be affected by the order since it is proposed he do the testing, yet the motion was not served on him. Dr. Coburn will be affected not only because she is being asked to make a request to Dr. Pollett and thereafter receive the results or report from Dr. Pollett, but also because she will be charged with the responsibility of conveying any discovery of a hereditary form of cancer to family members. This is particularly salient because the test is not being done to aid in the treatment of Ms. Piljak, who is deceased, nor is it for the purpose of providing screening information to family members, but for the non-medical, non-diagnostic purpose of this litigation. Dr. Coburn was not served with the motion.

CONCLUSIONS

[53] For all of these reasons, the motion by the moving defendants to require the plaintiffs to direct Dr. Coburn to request genetic testing of the block of Ms. Piljak's liver tissue and any tissue slides, to be conducted by Dr. Pollett is dismissed. The dismissal is without prejudice to moving again with a proper evidentiary foundation and for relief permitted by rule 32.01.

[54] If a fresh motion were brought, the defendants could improve their position if (a) they had evidence from Sunnybrook Hospital as to the nature and quantity of tissue available, (b) they retained Dr. Pollett or some other geneticist as their expert to conduct genetic testing of the tissue, (c) the geneticist provided evidence as to his expertise, the nature, methodology, timing and place of the testing, what the testing may reveal, that he is prepared to conduct the testing and, based on evidence from Sunnybrook or having examined the tissue sample himself, that he was able to opine as to the sufficiency of the remaining tissue available for the plaintiffs to conduct their own genetic testing, (d) the order sought from the court under rule 32.01 is to order inspection and testing by the expert and (e) the motion was on notice Sunnybrook Hospital who is in possession of the tissue sample.

COSTS

[55] If the parties are unable to agree on costs, the plaintiffs may provide brief costs submissions together with a Costs Outline and redacted dockets within 10 days of release of these reasons. Responding submissions may be made within seven days after receiving plaintiffs' submissions.

ORDER

[56] I hereby order as follows:

The motion by the defendants Abraham and Brcic pursuant to rule 32.01 requiring the plaintiffs to direct Ms. Snezana Piljak's former clinician to request genetic testing of the block of Ms. Piljak's liver tissue and any tissue slides, to be conducted by Dr. Aaron Pollett is dismissed.

Master R. Dash

DATE: June 4, 2014

[1] It is clearly not real property.
[2] *The Concise Oxford Dictionary*, Tenth Edition, Oxford University Press at p. 1146;
[3] *Canadian Law Dictionary*, Fourth Edition, John A. Yogis, Barron's Press, at p. 212
[4] *Black's Law Dictionary*, Seventh Edition, Bryan A. Garner, West Group Press.
[5] *Canadian Law Dictionary*, supra at p. 202
[6] *Black's Law Dictionary*, supra
[7] *Defining Diagnostic Tissue in the Area of Personalized Medicine*, Carol C. Cheung MD, PhD, Bella R. Martin MHA LLB and Sylvia L Asa MD PhD, *Canadian Medical Association Journal*, February 5, 2013, 185(2) pp. 135-139
[8] *Public Hospitals Act*, RRO 1990, Regulation 965
[9] This differs from research tissue which is stored in a research biobank and not in clinical archives of a pathology department.
[10] See footnote 8
[11] *Marchand v. Public General Hospital of Chatham*, [1993] O.J. No. 561 (O.C.G.D.)
[12] *Marchand v. Public General Hospital of Chatham*, supra, at paragraphs 6, 11-13
[13] *Northern Sawmills Inc. v. Northwest Installations Inc.*, [2009] O.J. No. 6229 (S.C.J. – Master) at paragraphs 4-5
[14] *Courts of Justice Act*, R.S.O. 1990, Chap. C.43 as amended
[15] *Peel School District No. 19 v. 553518 Ontario Ltd. (c.o.b. Munden Park Electric)*, [2000] O.J. No. 3581 (S.C.J.) at para. 16.
[16] *Peel School District No. 19*, supra, at para. 22
[17] *Hough v. Amer Sports Canada Inc.*, 2012 ONSC 4281 (CanLII), 2012 ONSC 4281, [2012] O.J. No. 3543 (S.C.J.) at paras. 10-12.
[18] [18] *Peel School District No. 19*, supra, at para. 16.