

C A N A D A
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

**SUPERIOR COURT
(Class action chambers)**

N°: 500-06-000972-196

JULIE TANNY

Applicant

v.

ROYAL VICTORIA HOSPITAL

and

MCGILL UNIVERSITY HEALTH CENTRE

and

**ATTORNEY GENERAL OF CANADA,
representing the Federal Government of
Canada**

and

**UNITED STATES ATTORNEY GENERAL,
representing the United States
Department of Justice**

Defendants

**APPLICATION TO DISMISS OF DEFENDANT UNITED STATES ATTORNEY
GENERAL**

(Article 168 of the *Code of civil procedure* and section 4(3)(a) of the *State Immunity Act*)

**TO THE HONOURABLE JUSTICE GARY D.D. MORRISON OF THE SUPERIOR
COURT SITTING IN AND FOR THE JUDICIAL DISTRICT OF MONTREAL,
DEFENDANT UNITED STATES ATTORNEY GENERAL, RESPECTFULLY SUBMITS
THE FOLLOWING:**

I. INTRODUCTION

1. In this *Application to dismiss of Defendant United States Attorney General* (hereinafter "**Application to Dismiss**"), the United States of America, acting on behalf of the Defendant named as the United States Attorney General (hereinafter the "**United States**"), invokes state immunity as provided for in the *State Immunity Act*, R.S.C., 1985, c. S-18 (hereinafter "**SIA**" or "**Act**") and under customary international law. The United States respectfully requests that the *Application to authorize the bringing of a class action & to appoint the applicant as representative plaintiff* (hereinafter "**Authorization Application**") be dismissed as against the United States;

II. CONTEXT

2. In her *Authorization Application*, Applicant Tanny seeks to institute a class proceeding on behalf of a proposed class whose members underwent treatments (the “**Treatments**”) at the Allan Memorial Institute in Montréal between 1948 and 1964. She also claims compensation for proposed class members or their successors, assignees, family members, and/or dependants;
3. Applicant alleges that the Treatments were methods of brain “depatterning” or “re patterning” that involved drug induced sleep/coma, intensive electroconvulsive therapy, psychic driving, sensory deprivation, and administration of various barbiturates, chemical agents, and medications to suppress nerve functionality and activation;
4. As a result of the alleged Treatments, Applicant Tanny seeks to claim damages/compensation for the alleged direct and proximate results of defendants’ intentional and/or negligent conduct;
5. More specifically, on behalf of proposed class members who were former patients, Applicant seeks to claim damages for physical and mental/emotional injuries, past and future health and medical expenses not covered by public health care, lost income/livelihood, loss of earnings/earning capacity, and any related pecuniary losses;
6. On behalf of proposed class members who are family members and dependants of former patients, Applicant Tanny seeks to claim damages for loss of support, guidance, care, consortium, intimacy, stability, and companionship as well as physical and mental/emotional injuries, out-of-pocket expenses related to nursing, housekeeping, and other services, and loss of past and future income;
7. Applicant Tanny also seeks to claim punitive damages on behalf of all proposed class members;
8. Given the nature of the allegations, Defendant United States submits that the cause of action alleged in the *Authorization Application* apparently relates to alleged personal or bodily injuries that occurred in the Province of Quebec and not to commercial activity;

III. GROUND FOR DISMISSAL: STATE IMMUNITY

A. *Immunity under the SIA and customary international law*

9. Defendant United States respectfully submits that, as a foreign sovereign, it is immune from the jurisdiction of the Superior Court of Québec and cannot be named as a Defendant in the *Authorization Application*;
10. As stated by the Supreme Court of Canada, foreign sovereign immunity is a paramount principle in customary international law (*Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62) (“**Kazemi**”);

11. In Canada, the existing principles of sovereign immunity were codified on 15 July 1982, when the *SIA* was proclaimed into force (*Kazemi*). Prior to this date, Canadian courts looked to customary international law to determine whether jurisdiction existed over a foreign sovereign;
12. At the time of the acts alleged in the *Authorization Application*, Canada applied absolute immunity to foreign states. For this reason, the claims as against the United States must fail for want of jurisdiction;

B. *SIA does not apply retroactively*

13. As articulated in *Kazemi*, the *SIA* provides that a foreign state is immune from the jurisdiction of any court in Canada unless a specific exception applies:

“State immunity

3. (1) Except as provided by this Act, a foreign state is immune from the jurisdiction of any court in Canada.

[...]

Death and property damage

6. A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to

(a) any death or personal or bodily injury, or

(b) any damage to or loss of property

that occurs in Canada.”

14. Given the nature of the allegations in the *Authorization Application*, it appears the Applicant relies on the so-called “tort exception” to immunity contained in section 6 (a) of the *SIA*, which relates to “personal and bodily injuries” that may occur in Canada. An exception to state immunity based on personal and bodily injuries did not exist in Canada before enactment of the *SIA* in 1982;
15. The critical date to identify application of the *SIA* to a proceeding based on tort is the date the cause of action arose;
16. The *SIA*, proclaimed into force on 15 July 1982, has repeatedly been characterized by Canadian courts as substantive law that does not operate retroactively (*Carrato v. United States of America*, 1982 CanLII 2254 (ON SC); *Tritt v. United States of America (H.C.J.)*, 1989 CanLII 4254 (ON SC); *Jaffe v. Miller*, 1993 CanLII 8468 (ON CA)). If the conduct giving rise to the tort allegation occurred before proclamation of the *SIA*, a foreign state is immune from civil claims in Canada;
17. During the period in which the research funding activity attributable to the United States is alleged to have occurred (three research grants allegedly approved between 1957 and 1960), courts in Canada applied absolute immunity in claims

against a foreign sovereign (*Dessaulles v. Republic of Poland*, [1944] SCR 275 (SCC); *Saint John (City) v. Fraser-Brace Overseas Corp.*, [1958] SCR 263 (SCC)). Even if a qualified, or restrictive, theory of sovereign immunity could be found to apply immediately before enactment of the *SIA*, that exception only applied to commercial matters, and was not accepted in Canada until 1977, at least 17 years after the conduct alleged against the United States (*Zodiak International Productions Inc. v. Poland (Republic)*, [1977] C.A. 366 (Que CA));

18. These research grants allegedly provided by the United States between 1957 and 1960 occurred more than two decades before proclamation of the *SIA* on 15 July 1982 and almost six decades before the *Authorization Application* was commenced. Any cause of action based on facts that occurred before the *SIA* came into force cannot fall under any codified exception, and no exception to sovereign immunity based on personal or bodily injury existed in Canada when the alleged acts occurred. Consequently, the Applicant's claim is barred under the doctrine of absolute state immunity that applied at the time;

C. The acts alleged are not commercial activity

19. Even if the commercial activity exception to immunity under customary international law existed at the time of the conduct alleged, on the face of the document, the *Authorization Application* does not involve commercial activity. The alleged funding of research programs in support of military preparedness and national and international security, is a quintessentially sovereign activity for which the United States is presumptively immune, and which falls outside any exception to immunity, including a commercial activity exception;
20. Based upon customary international law, the *SIA* and applicable jurisprudence, the United States is immune from the jurisdiction of any court in Canada relating to the allegations in the *Authorization Application*. The United States respectfully requests that all claims be dismissed as against the United States;

D. Importance of hearing based on ground of state immunity at a preliminary stage

21. The United States submits that the *Application to Dismiss* must be determined at a preliminary stage to avoid any risk of waiver, or submission;
22. State immunity is of such importance to the relationship between sovereign states and the international legal order that Canadian courts are required to immediately decide a foreign state's immunity from jurisdiction (*New Jersey (Department of the Treasury of the State of), Division of Investment c. Trudel*, 2009 QCCA 86);
23. Therefore, the United States submits that this *Application to Dismiss* be heard and decided immediately;
24. The United States reiterates that its application before this honourable court is only for the purpose of claiming immunity from jurisdiction, as provided by section 4(3)(a) of the *SIA*, and is not a submission to, or recognition of, the court's jurisdiction;

25. The *Application to Dismiss* is well founded in fact and in law.

FOR THESE REASONS, MAY IT PLEASE THIS HONOURABLE COURT TO:

GRANT the *Application to Dismiss*;

DISMISS the *Authorization Application* as against the United States;

THE WHOLE without costs, unless the *Application to Dismiss* is contested.

Montreal, March 24, 2021



Gowling WLG (Canada) LLP

Attorneys for defendant

UNITED STATES ATTORNEY GENERAL

1, Place Ville-Marie, suite 3700

Montréal (Québec) H3B 3P4

Mtre Malcolm Ruby

Phone: 416-862-4314

Fax: 416-862-7661

malcolm.ruby@gowlingwlg.com

Mtre Guy Poitras

Phone: 514-392-9511

Fax: 514-876-9511

guy.poitras@gowlingwlg.com

Mtre Emily Bolduc

Phone: 514-392-9425

Fax: 514-878-9515

emily.bolduc@gowlingwlg.com

Mtre Adam Bazak

Phone: 416-369-7363

Fax: 416-862-7661

adam.bazak@gowlingwlg.com

NOTICE OF PRESENTATION

TO: Mtre Jeff Orenstein
Mtre Andrea Grass
Consumer Law Group Inc.
1030 rue Berri, Suite 102
Montréal (Québec) H2L 4C3
Phone: (514) 266-7863
Fax: (514) 868-9690
jorenstein@clg.org
agrass@clg.org

Attorneys for Plaintiff J. Tanny

Mtre Doug Mitchell
Mtre Danielle Marcovitz
IMK LLP
Place Alexis Nihon, Tour 2
3500, boulevard de Maisonneuve
Ouest, bureau 1400
Montréal (Québec) H3Z 2C1
dmitchell@imk.ca
dmarcovitz@imk.ca

Attorneys for McGill University
Health Centre

Mtre Gabrielle Brochu
Mtre Jean-François Gagnon
Mtre Sandra Desjardins
Langlois Avocats
1250 René-Lévesque Blvd. West
20th Floor
Montréal (Québec) H3B 4W8
notificationmtl@langlois.ca
gabrielle.brochu@langlois.ca
jean-francois.gagnon@langlois.ca
sandra.desjardins@langlois.ca

Attorneys for Defendants Royal Victoria
Hospital

Mtre Andréane Joannette-Laflamme
Mtre Sarom Bahk
Mtre François Joyal
Procureur général du Canada
200 René-Lévesque Blvd. West
9th floor, East tower;
Montréal (Québec) H2Z 1X4
[NotificationPGC-
AGC.Civil@justice.qc.ca](mailto:NotificationPGC-AGC.Civil@justice.qc.ca)
[Andreane.Joannette-
Laflamme@justice.qc.ca](mailto:Andreane.Joannette-Laflamme@justice.qc.ca)
Sarom.Bahk@justice.qc.ca
francois.joyal@justice.qc.ca

Attorneys for Defendant Attorney
General of Canada

TAKE NOTICE that the present *Application to dismiss of Defendant United States Attorney General* will be presented for adjudication before Justice Gary D.D. Morrison of the Superior Court, in and for the district of Montreal, on June 8 and 9, 2021, at a time and place to be determined.

DO GOVERN YOURSELF ACCORDINGLY.

Montreal, March 24, 2021



Gowling WLG (Canada) LLP
Attorneys for defendant
UNITED STATES ATTORNEY GENERAL

1, Place Ville-Marie, suite 3700
Montréal (Québec) H3B 3P4

Mtre Malcolm Ruby
Phone: 416-862-4314
Fax: 416-862-7661
malcolm.ruby@gowlingwlq.com

Mtre Guy Poitras
Phone: 514-392-9511
Fax: 514-876-9511
guy.poitras@gowlingwlq.com

Mtre Emily Bolduc
Phone: 514-392-9425
Fax: 514-878-1450
emily.bolduc@gowlingwlq.com

Mtre Adam Bazak
Phone: 416-369-7363
Fax: 416-862-7661
adam.bazak@gowlingwlq.com