SUPERIOR COURT

(Class Action Chamber)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No.: 500-06-000972-196

DATE: August 23, 2022

PRESIDING: THE HONOURABLE GARY D.D. MORRISON, J.S.C.

JULIE TANNY
Representative Applicant
v.
ROYAL VICTORIA HOSPITAL
and
MCGILL UNIVERSITY HEALTH CENTRE
and
ATTORNEY GENERAL OF CANADA, representing the Federal Government of Canada
Respondents
and
UNITED STATES ATTORNEY GENERAL, representing the United States Department of Justice
Respondent Applicant

JUDGMENT
(on an Application to Dismiss)

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1. OVERVIEW

[1] The United States Attorney General ("United States") invokes state immunity in support of its Application to Dismiss Julie Tanny's application to authorize a class action.

[2] The context of the present juridical debate is as follows.

[3] Madam Tanny (the "Representative Applicant") is seeking to institute a class action on behalf of the following class[1]:

> All persons who underwent depatterning treatment at the Allan Memorial Institute in Montreal, Quebec, between 1948 and 1964 using Donald Ewen Cameron's methods (the "Montreal Experiments") and their successors, assigns, family members, and dependants or any other group to be determined by the Court;

[4] The alleged "Montreal Experiments" are said to have consisted of extreme mind-control brainwashing experimentation on "unwitting" patients[2] by methods of depatterning and repatterning the brain, which included drug-induced sleep/coma, intensive electroconvulsive therapy, "psychic driving", sensory deprivation and the administration of barbiturates, chemical agents and medications to supress nerve functionality and activation[3].

[5] Representative Applicant further alleges that none of the patients gave informed consent, being under the impression that they were receiving "medically sound" therapy as opposed to being exposed to brainwashing and mind-control experimentation[4].

[6] With a view to obtaining financial compensation[5], Representative Applicant has named as proposed defendants the United States, Royal Victoria Hospital, McGill University and the Attorney General of Canada.

[7] The Royal Victoria Hospital ("RVH") is named on the grounds that the Montreal Experiments were said to have been conducted at the Allan Memorial Institute (the "Institute"), which was allegedly RVH's psychiatry department[6]. It has not adopted a position on the state immunity issue and did not attend the hearing.

[8] McGill University is named having allegedly hired Dr Cameron, supplied its medical faculty to work at RVH and co-administered the Institute[7]. It too has not adopted a position on state immunity, nor did it attend the hearing.

[9] The Attorney General of Canada ("AG Canada") and the United States are named in relation to the funding of the Montreal Experiments between 1950 and 1964, and this for a total amount of $221,673.95[8].

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1 Re-Amended Application to Authorize the Bringing of a Class Action & to Appoint the Applicant as Representative Plaintiff (the "Application"), para. 1.
2 *Idem*, para. 10.
3 *Idem*, para. 2.
4 *Idem*, para. 298.
5 *Idem*, paras. 282, 286 and 287.
6 *Idem*, paras. 14, 16 and 64.
7 *Idem*, paras 15, 16, and 83.
8 *Idem*, paras. 18 to 27 and 84.

[10] AG Canada has not directly supported or contested the United States state-immunity claim but did attend the hearing and shared its views as to Canada's *State Immunity Act* ("SIA" or the "Act").

[11] As for the United States funding activity, it is alleged to have been conducted by the Central Intelligence Agency ("CIA")[9].

[12] The Court will refer to additional allegations pertaining to the CIA's involvement and funding in the analysis section of the present judgment.

[13] In addition to funding, Applicant alleges that both Canada and the United States not only funded the experiments but also "supervised, monitored, oversaw, authorized, recommended, supported, directed, and otherwise exercised control over the Montreal Experiments"[10].

2. PARTIES' RESPECTIVE POSITIONS

[14] According to the United States, the sole issue for the Court to decide is whether it is immune from the Court's jurisdiction based on the allegations of the Application. In this regard, it describes its activity through the CIA, at all relevant times, to have been directly related to its, post-WWII, Cold War security interests.

[15] The United States pleads that the SIA is a "complete" codification of Canadian law on state immunity, subject to the exceptions stipulated therein.

[16] It also argues that at the time of the relevant acts and conduct alleged in the Application, Canada applied absolute immunity, without any exception as to personal and bodily injuries. Accordingly, if the acts and conduct that give rise to allegations of fault occurred prior to the SIA being proclaimed in July 1982, a foreign state is immune from civil claims in relation to any resulting personal and bodily injury because the Act does not apply retroactively.

[17] Moreover, the United States claims that even if prior to the SIA there existed a "restrictive" theory of state immunity, as argued by Representative Applicant, such a restrictive view applied only to commercial activities, which is not relevant to the case at hand.

[18] It should be noted that for the purposes of its petition in state immunity, the United States correctly recognizes that allegations of fact contained in the Application are considered to be true.

[19] According to the Representative Applicant, the United States is not entitled to claim state immunity in the present matter for the following reasons:

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9 *Idem*, para. 25.
10 *Idem*, para. 28.

1. The SIA codified the then existing legal norms of restrictive immunity, not absolute immunity;

2. The SIA applies retrospectively and must be assessed as at the time the claim of immunity is asserted;

3. Its activities were commercial in nature, which is specifically excluded by section 5, SIA;

4. Its activities resulted in personal and bodily injury, which is specifically excluded from state immunity by section 6, SIA;

5. Torture is prohibited by the norm of *jus cogens* which applies to all states, and the SIA was amended in 2009 to exclude immunity for same;

6. The United States was acting in Canada secretly, conducting an illegal activity through a non-governmental private commercial third-party organization, and for the purposes of research in a manner contrary to the *Official Secrets Act*, whereby these countries had agreed not to fund defence research on the other's soil without disclosure, all of which renders invalid any claim to foreign state immunity;

7. In the context of class action proceedings at the authorization phase, unless the facts demonstrate immunity in a clear and precise manner, the issue should be referred to the judge on the merits being, for the most part, a matter of mixed fact and law.

3. QUESTIONS BEFORE THE COURT

[20] As can been seen from the various arguments raised by the parties, the issue of state immunity in this matter brings forward a number of interesting questions.

[21] The Court is to address the following:

- Should the Court refer the decision on immunity to a judge on the merits?

- Does the SIA provide the United States foreign state immunity in the present proceedings?

- If not, does the United Sates have a valid claim to foreign state immunity under the common law?

- Is immunity rendered inapplicable by reason of commercial, covert and/or illegal activity?

- Absent immunity, are derivative actions barred?

4. SHOULD THE COURT REFER THE DECISION ON IMMUNITY TO A JUDGE ON THE MERITS?

[22] Representative Applicant contends that, in the event of uncertainty, issues pertaining to the exclusions stipulated in the SIA, as regards the existence of death, personal or bodily injury and commercial activity, are by their nature of mixed fact and law and, as such, tend to be referred to a judge on the merits who will be best suited to decide the matter having heard the entirety of the proof.

[23] By way of example, she refers to cases involving relative immunity in favour of states at common law, which are often referred to the merits given the need to clarify the relevant facts for the purpose of determining the applicability of the immunity[11].

[24] Without commenting on the test applied in *Carrier*, the Court does not consider such a referral to be a viable option in the present case.

[25] The Supreme Court of Canada in *Schreiber* v. *Canada (Attorney General)*[12], upheld a decision of the Ontario Court of Appeal[13] which concluded that a court faced with a foreign state immunity claim pursuant to the SIA "cannot withhold its decision until the end of the trial".

[26] The Court agrees with the United States that it must decide an immunity on its merits before proceeding further, otherwise it places the foreign state in the "untenable" position of either losing its immunity claim by participating further in the proceedings or risking an unfavourable decision by not participating further[14].

[27] This is in keeping with the general principle that jurisdictional issues should always be dealt with at the outset[15].

[28] The fact that it is a class-action proceeding at the authorization phase changes little, since in most cases, the foreign state immunity debate is often held in the absence of a complete, or even substantially-complete record. Those who institute proceedings against a foreign state should take into consideration the potential of an immunity claim when drafting, or thereafter amending the proceeding.

[29] The need to decide SIA foreign state immunity claims at an initial phase is due to the nature of the immunity. It is a statutory immunity attached to the Court's jurisdiction. Either a court has jurisdiction or it does not. If it does not have jurisdiction, extraneous

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11 For example : *Carrier* c. *Québec (Procureur général)*, 2011 QCCA 1231, paras. 31 ss.
12 2002 SCC 62.
13 *Schreiber* v. *Federal Republic of Germany*, 2001 CanLII 23999 (ON CA), paras. 16-18.
14 *Idem*, para. 18.
15 *Barer* v. *Knight Brothers LLC*, 2019 SCC 13, para. 80; see also: *CC/Devas (Mauritius) Ltd.* v. *Republic of India*, 2022 QCCS 7.

factors such as equity, fairness and sympathy should not be considered by the court so as to give rise to a jurisdiction that otherwise does not exist at law.

[30] In keeping with the same principle as stated in *Schreiber*[16], the Quebec Court of Appeal in *New Jersey (Department of the Treasury of the State of), Division of Investment* v. *Trudel*[17] states that foreign state immunity from jurisdiction is a matter of public order and must, accordingly, be decided immediately.

[31] In the Court's view, there are no exceptional circumstances present that would warrant the Court not deciding the issue immediately and waiting to a later stage in the proceedings.

[32] Accordingly, the statutory immunity stipulated in favour of foreign states in the SIA, being an issue of jurisdiction, and public order is to be decided as a threshold issue before the parties proceed further towards a decision on authorization.

5. DOES THE SIA PROVIDE THE UNITED STATES FOREIGN STATE IMMUNITY IN THE PRESENT PROCEEDINGS?

[33] The Court is of the view that the SIA does not apply in the present matter and, as a result, it cannot serve as a basis for a claim in foreign state immunity or for a statutory exclusion thereto.

[34] Foreign state immunity in civil matters is the "cornerstone"[18] rule in Canada pursuant to section 3(1) SIA, which reads as follows:

Except as provided by this Act, a foreign state is immune from the jurisdiction of any court in Canada.	Sauf exceptions prévues dans la présente loi, l'État étranger bénéfice de l'immunité de juridiction devant tout tribunal au Canada.

[35] The courts are to give effect to such immunity even when the state takes no steps to have it enforced, so long as it has not waived immunity[19].

[36] The SIA identifies the exceptions to state immunity as being waiver[20] and proceedings that relate to commercial activity[21], death or personal or bodily injury that occurs in Canada[22], damage to or loss of property that occurs there[23], support of terrorism on or after January 1, 1985[24], certain actions *in rem* and *in personam* against or in

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16 *Schreiber*, *supra*, note 12.
17 2009 QCCA 86, paras. 22-27.
18 *Kazemi Estate* v. *Islamic Republic of Iran*, 2014 SCC 62, para. 42.
19 Sections 3(2) and 4, SIA.
20 Section 4, SIA.
21 Sections 5 and 2, SIA.
22 Section 6(a), SIA.
23 Section 6(b), SIA.
24 Section 6.1(1), SIA.

connection with a ship owned or operated by a state[25] or against or in connection with cargo owned by the state and, as well, an interest or right of the state in property arising from a succession, gift or *bona vacantia*.

[37] The United States argues that the SIA does not operate retroactively and accordingly, that it does not apply to events that occurred prior to its coming into force in 1982, as in the present matter.

[38] Its position is that the critical date for analysis as to the applicability of the SIA is the date when, according to the facts, the cause of action arose. If that date precedes the coming into force of the SIA, the latter does not apply and recourse should then only be had to foreign state immunity as it existed prior thereto.

[39] In that regard, the United States cites the decision of the Ontario Court of Appeal decision in *Jaffe* v. *Miller*[26].

[40] In the 1993 *Jaffe* decision, the Ontario Court of Appeal was concerned with the status of various defendants, including the Attorney General of the State of Florida, as regards a claim in egregiously actionable torts. Defendants sought the dismissal of the action on the basis of sovereign immunity whereas plaintiff argued the personal injury exception pursuant to the SIA.

[41] As regards the application of the personal injury or damage to property exception provided for at s. 6 SIA, that court concluded that the alleged personal injury "must occur in Canada after passage of the Act", otherwise the prior common law principles are to be considered[27]. The facts giving rise to the cause of action having occurred prior to the SIA coming into force, the court concluded that the Act did not apply.

[42] The decision of the Ontario Court of Appeal in 1993, as with other various Ontario decisions cited by the parties, were rendered prior to the amendment of the SIA in relation to a support-for-terrorism exclusion as stipulated at s. 6.1 SIA, which only came into force on March 13, 2012.

[43] As mentioned above, the 2012 exception to immunity is specifically stated to relate to terrorism on or after January 1, 1985. In other words, where the Legislator intended a certain retroactive effect, it was clearly stated.

[44] The Ontario Court of Appeal in its 2017 decision in *Tracy* v. *Iran (Information and Security)*[28] considered that retroactive reference to 1985 to be a carve-out exception to

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25 Section 7(1)(a)(b), SIA.

26 *Jaffe v. Miller*, 1993 CanLII 8468 (ON CA); see also: *Tritt v. United States*, 1989 CarswellOnt 350 (ONSC), para. 6.

27 *Idem, Jaffe*, paras. 53 to 57.

28 2017 ONCA 549, paras. 55-58.

the general rule against retroactivity in the SIA, confirming at the same time the presumption against retroactivity.

[45] In this regard, the SIA contains no general retroactive language intended to make it fully operate backwards as of a prior date. A contextual reading of its provisions in their entirety provides no indication of any intent by the Legislator to give it a generalized retroactive effect.

[46] Actually, the wording of a number of sections demonstrates the contrary. In addition to the terrorism amendment mentioned above, one should also consider the s. 7(1) and (2) exceptions relating to *in rem* and *in personam* actions against ships and cargo, which specifically stipulate that non-application of immunity is triggered by the following: “if at the time the claim arose” or the proceedings were commenced, they constituted part of a commercial activity.

[47] By so expressing for very precise purposes a retroactive reference to the time the claim arose or to a specified date, and in keeping with the long-established principle of *expressio unius est exlusio alterius*, being to express one thing implies the exclusion of another, the Court considers that the Legislator intended the general rule of immunity and its exceptions not to be of retroactive effect.

[48] Both Representative Applicant and the AGC argue that regardless of retroactivity, the SIA is retrospective, intended to apply presently and in the future, by imposing new consequences for the future to both past and future events, such as those at the heart of the proposed class action.

[49] In other words, going forward from the coming into force of the SIA, a foreign state would no longer have the same jurisdictional immunity it may have had in the past.

[50] The Representative Applicant therefore asserts that the critical date for analysis is the time that the action is filed, not when the events took place which gave rise to the cause of action.

[51] In this regard, the SIA states clearly that what a foreign state is immune from in Canada is “the jurisdiction” of any domestic court.

[52] As confirmed by the majority of the Supreme Court of Canada in *Kazemi*[29], state immunity is “a ‘procedural bar’ which stops domestic courts from exercising jurisdiction over foreign states” and “operates to prohibit national courts from weighing the merits of a claim against a foreign state or its agents”.

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[29] *Kazemi Estate*, *supra*, note 18, para. 34.

[53] In *Angus* v. *Sun Alliance Insurance Co.*[30], the Supreme Court of Canada states that although there exists a presumption to the effect that statutes do not operate with retrospective effect, “procedural provisions” are not subject to that presumption. In other words, argues Representative Applicant, procedural provisions are more likely to be retrospective.

[54] However, years later, in its 2012 decision in *R.* v. *Dineley*[31], the Supreme Court confirms that the retrospective application of statutory provisions is exceptional and that not all procedural provisions apply retrospectively, stating that the analysis should be based not on whether provisions are procedural or substantive in nature but rather “in discerning whether they affect substantive rights”.

[55] The Court then offered same insight into the question of whether substantive rights are affected by citing the following statement of Justice La Forest in *Angus*[32]:

> Normally, rules of procedure do not affect the content or existence of an action or defence (or right, obligation, or whatever else is the subject of the legislation), but only the manner of its enforcement or use. […] Alteration of a "mode" of procedure in the conduct of a defence is a very different thing from the removal of the defence entirely.

[56] In this regard, Justice LeBel of the Supreme Court of Canada, in *Kuwait Airways Corp.* v. *Iraq*[33], observed that the SIA “is not solely procedural in nature”.

[57] Clearly, the application of state immunity or an exclusion thereto is not simply a “mode” of procedure. Although foreign state immunity is a “procedural bar” in the sense that the court is not to weigh the merits of a claim, the plaintiff’s substantive rights can be completely neutralized, as if they no longer existed. So too the rights of the foreign state if it were to entirely lose its claim to immunity as a result of any stipulated exceptions. It is the existence of the action at law that is directly affected.

[58] The Quebec Court of Appeal, in the matter of *Carrier*[34], qualified local state immunity at common law as a means of defence. Albeit that that case can clearly be distinguished in various ways, particularly in that it did not involve jurisdictional foreign state immunity and accordingly has a different test as to the how and when of its application, the Court nevertheless refers to it because it demonstrates the substantive importance of immunity by distinguishing it from a simple “mode” of procedure issue.

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30 [1988] 2 S.C.R. 256, p. 262; see also regarding presumption against retrospectivity: SULLIVAN, Ruth, *Sullivan on the Construction of Statutes,* 2014, 6th ed., LexisNexis Canada, p.754.

31 [2012] 3 S.C.R. 272, paras. 10-11.

32 *Angus*, *supra*, note 30, pp. 265-266.

33 [2010] 2 S.C.R. 571, para. 12.

34 *Carrier*, *supra*, note 11, paras. 34 ss.

[59] Under the circumstances, the Court concludes that foreign state immunity under the SIA affects substantive rights, that accordingly the presumption against retrospective application applies and that it has not been rebutted in the present case.

[60] As a result, the SIA does not apply in the present case given that the facts generating the right of action occurred before its coming into force in 1982.

[61] As regards Representative Applicant's argument that the damages resulting from the Montreal Experiments have continued beyond 1982 and are still being incurred, a review of the damage allegations in the Application[35] does not indicate that damages were caused after 1982 or are currently being caused. One can understand that certain damages previously caused may continue to exist, whether they be physical, psychological, psychiatric or behavioural in nature, but in the Court's view, that may be more relevant to other judicial debates than it is to the application of the SIA.

[62] What is relevant for the present purposes is whether the cause of action that gave rise to an alleged damage or injury arose prior to the coming into force of the SIA and not whether such damage or injury can be said to continue.

[63] This issue seems to be tied in part to the derivative claims by family members, who are included in the definition of the class as set forth in the Application and in its section dealing with damages.

[64] The United States argues that the "personal or bodily injury" exception stipulated at a. 6 SIA relates only to physical injury inflicted by the foreign state, and this in keeping with the Supreme Court decision in *Kazemi*[36], and that accordingly there can be no valid derivative claims.

[65] However, having concluded that the SIA does not apply to the present matter, the Court need not decide the issue as framed by the parties.

6. DOES THE UNITED STATES HAVE A VALID CLAIM TO FOREIGN STATE IMMUNITY UNDER THE COMMON LAW?

[66] In the Court's view, there is no basis for saying that the Legislator intended to exclude common law foreign state immunity for matters that arose prior to the SIA coming into force in 1982.

[67] As time passes, there are progressively fewer incidents that are likely to come before the courts raising this issue.

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35 Primarily at paragraphs 282 to 287.

36 *Kazemi Estate*, *supra,* note 18, paras. 74-77.

[68] In cases such as the present one, where the events giving rise to a cause of action precede the SIA, the Court is of the view that the common law immunity for foreign states as it then was continues to provide immunity to foreign states.

[69] The United States argues that such an immunity is absolute, as was affirmed by the Supreme Court of Canada in its 1944 decision in the matter of *Dessaulles* v. *Republic of Poland*[37].

[70] In this regard, in the Post-War era, the principle of absolute immunity began to be challenged by courts, particularly as regards commercial activity in which states were becoming increasingly more involved. The doctrine of restrictive immunity was being adopted abroad in a number of states. This development is described in the 1977 decision of the Quebec Court of Appeal in the matter of *Zodiak International Products Inc.* v. *Polish People's Republic*[38].

[71] Justice Kaufman, on behalf of the Court of Appeal in *Zodiak*, made it clear that "the time has come for change"[39], and the Court proceeded to allow the appeal and the claim to continue against the foreign state because it was a "purely commercial transaction"[40].

[72] By the time the Supreme Court of Canada had rendered its judgment in the case, the SIA had come into law.

[73] In 1992, Justice La Forest of the Supreme Court of Canada, writing on behalf of the majority in the matter of *Re Canada Labour Code*[41], expressed the view that the SIA is "a codification that is intended to clarify and continue the theory of restrictive immunity, rather than to alter its substance". He added that the s. 5 exception regarding "commercial activity" along with its definition at s. 2, focus on the nature and character of the activity just as the common law did.

[74] It is nonetheless important to recognize the limited focus of this restricted doctrine. It applied to commercial activity. There was no such restriction, or exception, to absolute immunity in relation to death, personal or bodily injury. That was newly created at s. 6 SIA. This observation was made by the Ontario Court of Appeal in *Jaffe*[42].

[75] Under the common law foreign-state doctrine of immunity in Canada, prior to the SIA, an absolute immunity existed in relation to civil claims for death, personal or bodily injury. The United States benefits therefrom in the present matter.

[76] As regards commercial activity, Representative Applicant argues that there is no immunity in that regard in the present matter because the United States chose to conduct

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37 [1944] S.C.R. 275, p. 277.
38 1977 CanLII 1851 (QC CA).
39 *Idem*, p. 663.
40 *Idem*, p. 662.
41 [1992] 2 S.C.R. 50, pp. 72-74.
42 *Jaffe*, *supra*, note 26, para. 22.

its funding of the Montreal Experiments by means of secret funding to a private third-party medical research foundation, the Society for the Investigation of Human Ecology, which in turn awarded grants to Dr Cameron.

[77] Firstly, the Society was not, according to Respondent Applicant's own proof, a third-party independent private research foundation. According to the decision of the US District Court for the District of Columbia in *Orlikow* v. *United States*[43], whose decision is filed by her as an exhibit, it was the CIA that set up the Society in 1955 as a secret front organization to fund the research.

[78] In this regard, Representative Applicant also refers to the Society in her Application as a known CIA front[44], whose executive director was a CIA agent[45] through which the funds flowed from the CIA to McGill[46].

[79] In the Court's view, the nature of such funding is not commercial in nature. This is not akin, for example, to hiring employees to cook food or manage non-military duties on an air-force base. The class action proposed by Representative Applicant only incidentally relates to money being paid for a service.

[80] The true nature and essence of the claim is the alleged extreme mind-control brainwashing experimentation of "unwitting" patients, and that this research was allegedly done to address Cold War national security concerns.

[81] To adopt the commercial activity notion advanced by the Representative Applicant would, in the words of Justice La Forest in *Re Canada Labour Code*[47] "broaden the 'commercial activity' exception to the point of depriving sovereign immunity of any meaning". In this regard, and as mentioned above, the focus of commercial activity as adopted by the SIA was the same as it had been under the common law.

[82] One more issue should be addressed regarding Representative Applicant's argument concerning the use of the Society for funding as a form of commercial activity.

[83] Representative Applicant argues that s. 1 of the 1997 *Order Restricting Certain Immunity In Relation To The United States*, which reads as follows, stipulates that immunity to third-party entities is only granted in cases where the United States is the majority owner of the entity:

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43 Exhibit R-47: 682 F. Supp. 77 (D. D. C. 1988), p. 3 of 15.
44 Application, *supra*, note 1, paras. 25 and 121.
45 *Idem*, para. 117.
46 *Idem*, para. 182(b).
47 *Re Canada Labour Code*, *supra*, note 41, p. 80.

1. The immunity accorded under the *State Immunity Act*, in relation to the United States, shall not extend to a legal entity, whether or not it is a corporate entity, wherever registered, that is acting on behalf of, on instructions from or at the request of the United States, unless a majority of the shares or other ownership interest of the legal entity is owned by the United States or a political subdivision of the United States.	1. L'immunité accordée en vertu de la *Loi sur l'immunité des États*, relativement aux États-Unis, ne s'applique pas à une entité juridique, constituée en personne morale ou autrement, où qu'elle soit enregistrée, qui agit au nom, suivant les instructions ou à la demande des États-Unis, à moins que les États-Unis ou une subdivision politique des États-Unis n'en ait majoritairement la propriété sous forme d'actions ou autrement.

[84] Regardless of whether the majority of shares or other ownership interests of the entity in question, the Society, were or were not owned by the United States, and regardless of whether it could be said to apply retroactively or retrospectively, the *Order* addresses the immunity of the legal entity, as opposed to that of the state. The Society has not been sued in the present case, having allegedly been abandoned around 1965.

[85] Accordingly, the question as to whether or not it would be entitled to claim foreign state immunity, which is the subject matter addressed at s. 1 of the *Order*, is entirely moot and need not be analyzed further in the present case.

[86] For these reasons, the Court concludes that even in the context of a restricted foreign state immunity relating to commercial activity, a restriction or exclusion based thereon would not apply herein.

[87] Accordingly, a claim to foreign state immunity would still be available to the United States.

7. IS IMMUNITY RENDERED INAPPLICABLE BY REASON OF COVERT AND/OR ILLEGAL ACTIVITY?

[88] As mentioned, Representative Applicant argues that the United States was involved in covert and illegal activity, which should be considered a bar to claiming immunity.

[89] She cites the 1812 decision of the Supreme Court of the United States in *The Schooner Exchange* v. *McFaddon & Others*[48] in which that Court concluded that when a foreign state enters the territory of another with the latter's "knowledge and license", it is understood that its citizens are exempt from arrest and detention.

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[48] 11 (7 Cranch) U.S. 116 (1812), p. 272.

[90] With respect, the Court considers that Representative Applicant's application of that principle to the present case does not lead it to conclude that there is no claim available for immunity.

[91] Not only is the issue of arrest and detention of a foreign citizen not relevant to the case at hand, but it cannot be argued that the United States had no authorization to have a presence in Canada during the class period. It certainly was present with the "license" of the Canadian government. For the present purposes, the Court takes judicial notice of the fact that the United States has had an official presence in Canada since at least Confederation.

[92] Albeit that the Canadian government was allegedly not aware of the specific activity in question, the principle if applied as suggested by Representative Applicant would always constitute a bar to foreign state immunity in relation to any and all undeclared illegal activities.

[93] However, more recent case law is not consistent with that position, nor is the decision of the Legislator to specifically exclude torture under the SIA but not other acts that could qualify as illegal or criminal.

[94] In the 1983 House of Lords decision in *I Congress del Partido*[49], Lord Wilberforce writes that "the whole purpose of the doctrine of state immunity is to prevent such issues (acts contrary to international law, or to good faith, or were discriminatory, or penal) being canvassed in the courts of one state as to the acts of another".

[95] Although he was in the minority as to the application of restricted immunity to the commercial activity before it, Lord Wilberforce's overall views as to foreign state immunity were shared by the majority.

[96] In Canada, the Supreme Court, in its 2014 *Kazemi*[50] decision, found that foreign state sovereign immunity applied to a civil claim for damages resulting from alleged torture.

[97] In *Jaffe*[51], the Ontario Court of Appeal recognized foreign state immunity even though the civil-damages claimant had been abducted in and kidnapped from Canada after a number of unsuccessful attempts at extradition, and then, returned forcibly to Florida to face criminal charges that had been falsely laid. In that case, as with the present matter, there is no express and substantiated allegation that the agents of the United States were acting purely in some personal capacity as opposed to in their official capacity.

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49 [1983] 1 A.C. 244 (H.L.).
50 *Kazemi Estate*, *supra*, note 18.
51 *Jaffe*, *supra*, note 26.

[98] In the Court's view, Representative Applicant's position in this regard is inconstant with the applicable caselaw in Canada. Where the federal government adopted a different view, such as regards torture, it modified the SIA to reflect that change, but in so doing, it did not exclude foreign state immunity in all cases of illegal and covert activity.

[99] The United States argues that as regards the *Official Secrets Act*[52] referred to by Representative Applicant, and contrary to the latter's suggestion, the Legislator has not otherwise excluded immunity for any alleged contraventions by a foreign state of any provisions of that *Act*. In the Court's view, any alleged contravention of the said *Act*, which the Court need not presently decide, is not therein stipulated as giving rise to a restriction or exclusion of foreign state immunity, let alone one that would be applicable to the present case.

8. THE ISSUE OF DERIVATIVE ACTIONS

[100] The United States argues that there exists a bar to family members of those who underwent the Montreal Experiments from claiming their personal damages given an absence of physical injury or any other breach of personal integrity allegedly committed by it against them.

[101] It cites the decisions in *Schreiber*[53], *Kazemi*[54] and *Jaffe*[55] in support of its position.

[102] However, the Court having determined that the United States is to benefit from foreign state immunity in the present matter, it will not decide as to the issue of derivative claims or, in fact, regarding any other issues raised by the parties that have not convinced the Court to restrict or exclude such immunity in this matter.

9. JUDICIAL COSTS

[103] Legal costs, as stipulated at Art. 340 *Code Civil Procedure*, "are owed" to the successful party, unless the court decides otherwise.

[104] In the Court's view, given the nature of the allegations, the complexity of the issues, the fact that the underlying proceedings are at a class action pre-authorization stage and, further, that the Court is not deciding an issue on the merits but rather one of foreign state immunity, it would be appropriate and in the interest of the putative class members not to award judicial costs in relation to the present application.

FOR THESE REASONS, THE COURT:

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52 Presently referred to as the *Security Information Act*, R.S.C. 1985, c. O-5.
53 *Schreiber*, *supra*, note 12.
54 *Kazemi Estate*, *supra*, note 18.
55 *Jaffe*, *supra*, note 26.

[105] **GRANTS** the Application to Dismiss of respondent United States Attorney General;

[106] **DISMISSES** the Re-Amended Application to Authorize the Bringing of a Class Action as against the United States Attorney General;

[107] **THE WHOLE** without judicial costs.

Gary D. D. Morrison

Signature numérique de Gary D. D. Morrison
Date : 2022.08.23 11:18:14 -04'00'

Gary D.D. Morrison, J.S.C.

Mtre. Jeffrey Orenstein
Mtre. Andrea Grass
CONSUMER LAW GROUP INC.
For the Representative Applicant

Mtre. François Joyal
Mtre. Sarom Bahk
Mtre. Andréane Joanette-Laflamme
JUSTICE CANADA
For the Attorney General of Canada

Mtre. Malcom Ruby
Mtre. Gabriel D'Addona
Mtre. Adam Bazak
Mtre. Guy Poitras
GOWLING WLG (CANADA) S.E.N.C.R.L., S.R.L.
Attorney Whitney Hayes
UNITED STATES DEPARTMENT OF JUSTICE
For the United States Attorney General

Dates of Hearing: April 27 and 28, 2022