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

S U P E R I O R C O U R T
(Class Actions)

No: 500-06-000972-196

JULIE TANNY

Petitioner

v

ROYAL VICTORIA HOSPITAL

and

MCGILL UNIVERSITY

and

ATTORNEY GENERAL OF CANADA

and

UNITED STATES ATTORNEY GENERAL

Defendants

RESPONSE OF THE DEFENDANT ATTORNEY GENERAL OF CANADA TO THE APPLICATION TO DISMISS OF DEFENDANT UNITED STATES ATTORNEY GENERAL

---

1. The Attorney General of Canada (AGC) submits the following in response to the Application to dismiss of the Defendant United States Attorney General (USAG).

2. The AGC does not take a position on the ultimate disposition of the Defendant USAG's Application to dismiss. However, the AGC has an interest in the proper development of the law on state immunity and wishes to make submissions on the general principles applicable to the interpretation and application of the relevant provisions of the *State Immunity Act*, RSC 1985, c S-18 ("SIA").

3. The SIA establishes that "[e]xcept as provided by this Act, a foreign state is immune from the jurisdiction of any court in Canada" (s. 3(1)).

4. The SIA recognizes an exception to the application of this jurisdictional immunity in the case of a proceeding relating to "any death or personal or bodily injury" "that occurs in Canada" (s. 6(a)).

5. In support of the Application to dismiss, the Defendant USAG pleads, among others, that the SIA cannot apply "retroactively", pointing out that the acts complained of by the Applicants as they relate to the USAG predate the enactment of the SIA (see paras. 13-18).

6. In response to this point, the AGC submits that, from a conceptual point of view, this position rests on an erroneous approach to the question of the temporal application of the SIA. The Application to dismiss raises an issue, not of potential retroactivity, but rather of potential retrospectivity of the SIA.

7. A decision by the Court applying the exception in s. 6(a) in the context of a proceeding relating to a "death or personal or bodily injury" that has occurred *before* the entry into force of the SIA would not involve a retroactive application of the SIA.

8. In *Benner v Canada (Secretary of State)*, [1997] 1 SCR 358 ("*Benner*"), the Supreme Court held that a retroactive statute "*operates backwards*" (emphasis in original) and "changes the law from what it was" (para. 39), while a retrospective statute "*operates forwards*, but it looks backwards in that it attaches new consequences *for the future* to an event that took place before the statute was enacted" (para. 39, emphasis in original).

9. The application of the exception in s. 6(a) in the circumstances described in paragraph 7 above would not lead the SIA to operate backwards and change the *past* legal consequences of events that have occurred before its entry into force.

10. Indeed, it would not affect any immunity that the foreign state may have had *in the past*, prior to the entry into force of the SIA. It would only lead to the result that, going forward, the foreign state would no longer have the jurisdictional immunity it may have had in the past.

11. Thus, the question that should be asked in this case is whether the application of the exception in s. 6(a) in the circumstances described in paragraph 7 above would involve –

not a retroactive – but a *retrospective* application of the SIA, and if so, whether such retrospective application would be permissible.

12. In *Angus v Sun Alliance Insurance*, [1988] 2 SCR 256 ("*Angus*"), the Supreme Court held that, while "[t]here is a presumption that statutes do not operate with retrospective effect", "'[p]rocedural' provisions are not subject to the presumption. To the contrary, they are presumed to operate retrospectively" (page 262).

13. The Court added that "[a] provision is substantive or procedural for the purposes of retrospective application […] according to whether or not it affects substantive rights" (page 265) [See also *R v Dineley*, [2012] 3 SCR 272, 2012 SCC 58, para. 11 ("*Dineley*")].

14. For the purpose of this inquiry, a statute is "procedural" in nature if it affects only the manner in which a right is asserted, as opposed to the existence or contents of such right (*Angus*, page 265; *Application under s. 83.28 of the Criminal Code (Re)*, [2004] 2 SCR 248, 2004 SCC 42, para. 57; *Dineley*, para. 10).

15. The jurisprudence in Canada has mostly been to the effect that foreign States' immunity from jurisdiction is substantive in nature and that the SIA's exceptions do not apply to conduct that has occurred before its entry into force [*Carrato v United States of America*, 1982 CanLII 2254 (ONSC); *Tritt v United States of America*, 1989 CanLII 4254 (ON SC); and *Jaffe v Miller*, 1993 CanLII 8468 (ONCA); *contra*: *The Ship 'Atra' v Lorac Transport*, [1987] 1 FC 108, 1986 CanLII 3996, paras. 25-27 (obiter) (FCA)].

16. However, in the decision of the Supreme Court in *Kazemi Estate v. Islamic Republic of Iran*, [2014] 3 SCR 176, 2014 SCC 62 ("*Kazemi*") – on which the Defendant USAG has relied –, Lebel J., for the majority, characterized the concept of state immunity as a "procedural bar", adding that such immunity operates "to prohibit national courts from weighing the merits of a claim against a foreign state or its agents" (para. 34).

17. That said, the Court did not have to rule in *Kazemi* on the issue raised here by the Application to dismiss, because the conduct at issue in *Kazemi* occurred after the entry into force of the SIA.

18. The AGC does not take a position on any of the other arguments raised by the Defendant USAG in support of the Application to dismiss (paras 2-12 and 19-25).

Montreal, April 16, 2021

Attorney General of Canada

ATTORNEY GENERAL OF CANADA
(Code d'impliqué: BC 0565)
Department of Justice Canada
Quebec Regional Office (Montreal)
200 René-Lévesque Blvd. East Tower, 9th Floor
Montréal (Quebec) H2Z 1X4
Fax: 514-496-7876

Per: **M^e François Joyal**
M^e Andréane Joanette-Laflamme
M^e Sarom Bahk
Tel.: 514-283-5880 (FJ) 514-283-5841 (AJL)
514-283-8618 (SB)
francois.joyal@justice.gc.ca
andreane.joanette-laflamme@justice.gc.ca
sarom.bahk@justice.gc.ca
notificationPGC-AGC.civil@justice.gc.ca

Counsel for the Defendant, *Attorney General of Canada*

Our file: 10396083

No 500-06-000972-196

SUPERIOR COURT
DISTRICT OF MONTREAL
(Class Actions)

JULIE TANNY

Petitioner

v

ROYAL VICTORIA HOSPITAL

and

MCGILL UNIVERSITY HEALTH CENTRE

and

ATTORNEY GENERAL OF CANADA

and

UNITED STATES ATTORNEY GENERAL

Defendants

RESPONSE OF THE DEFENDANT ATTORNEY GENERAL OF CANADA TO THE APPLICATION TO DISMISS OF DEFENDANT UNITED STATES ATTORNEY GENERAL

ORIGINAL

ATTORNEY GENERAL OF CANADA
M^e François Joyal, M^e Andréane Joanette-Laflamme and M^e Sarom Bahk
DEPARTMENT OF JUSTICE - CANADA
Guy-Favreau Complex
200 René-Lévesque Blvd. West, East Tower, 9th Floor
Montréal (Québec) H2Z 1X4
Tel: 514-283-5880 / 514-283-5841 / 514-283-8618
Fax: 514-496-7876
francois.joyal@justice.gc.ca
andreane.joanette-laflamme@justice.gc.ca
sarom.bahk@justice.gc.ca

OP 0828
BC 0565

Our File: 10396083