

Unofficial English Translation of the Judgment of the Court

## COURT OF APPEAL

CANADA  
PROVINCE OF QUEBEC  
REGISTRY OF MONTREAL

No: 500-09-030217-228  
(500-06-000972-196)

DATE: October 2, 2023

Traduction  
non-officielle

---

**CORAM: THE HONOURABLE JULIE DUTIL, J.A.  
STEPHEN W. HAMILTON, J.A.  
SOPHIE LAVALLÉE, J.A.**

---

**JULIE TANNY**  
APPELLANT – Applicant  
v.

**UNITED STATES ATTORNEY GENERAL**  
RESPONDENT – Defendant  
and  
**ROYAL VICTORIA HOSPITAL**  
**McGILL UNIVERSITY**  
**ATTORNEY GENERAL OF CANADA**  
IMPLEADED PARTIES – Defendants

---

### JUDGMENT

---

[1] The appellant appeals a judgment of the Superior Court, District of Montreal (the Honourable Mr. Justice Gary D.D. Morrison), which granted an application by the respondent, the United States Attorney General, to dismiss an application to authorize a class action against it.

[2] For the reasons of Dutil, J.A., with which Hamilton and Lavallée, J.J.A. concur, **THE COURT:**

[3] **DISMISSES** the appeal, with legal costs.

---

JULIE DUTIL, J.A.

---

STEPHEN W. HAMILTON, J.A.

---

SOPHIE LAVALLÉE, J.A.

Mtre Jeffrey Orenstein  
Mtre Andrea Grass  
CONSUMER LAW GROUP INC.  
For Julie Tanny

Mtre Malcolm N. Ruby  
Mtre Adam Bazak  
Mtre Antoine Van Audenrode  
GOWLING WLG CANADA  
For the United States Attorney General

Mtre François Joyal  
Mtre Andréane Joannette-Laflamme  
Mtre Sarom Bahk  
DEPARTMENT OF JUSTICE CANADA  
For the Attorney General of Canada

Hearing date: March 30, 2023

---

## REASONS OF DUTIL, J.A.

---

[4] The trial judge granted an application by the respondent, the United States Attorney General, to dismiss an application to authorize a class action against it.<sup>1</sup> That action seeks to obtain compensation for all persons who underwent treatments as part of the “Montreal Experiments”, conducted between 1948 and 1964 by Dr. Donald Ewen Cameron. It also seeks to compensate their successors, assigns, family members, and dependants.

[5] This appeal raises the issue of state immunity, more specifically whether the exception to this immunity, found in s. 6(a) of the *State Immunity Act* (“SIA”),<sup>2</sup> applies in the case at bar or whether other common law exceptions can apply.

### BACKGROUND

[6] The trial judge described the background of this case as follows:

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

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 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 suppress nerve functionality and activation.

[5] Representative Applicant further alleges that none of the patients gave informed consent, being under the impression that they were receiving “medically

---

<sup>1</sup> *Tanny c. Royal Victoria Hospital*, 2022 QCCS 3258 [Judgment under appeal].

<sup>2</sup> *State Immunity Act*, R.S.C. 1985, c. S-18 [SIA].

sound” therapy as opposed to being exposed to brainwashing and mind-control experimentation.

[6] With a view to obtaining financial compensation, 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. 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. 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.

[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”).

[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”.<sup>3</sup>

[References omitted]

## THE TRIAL JUDGE’S DECISION

[7] The judge addressed five issues related to the application of state immunity.

[8] He began by rejecting the appellant’s submission that issues related to exceptions to state immunity, enacted in the SIA regarding death, personal or bodily injury or

---

<sup>3</sup> Judgment under appeal, paras. 3-13.

commercial activity, are matters of mixed fact and law that should be referred to the judge on the merits. Rather, the judge was of the opinion that they should be decided at a preliminary stage, since this is an issue of jurisdiction and public order.<sup>4</sup>

[9] The judge then considered whether the respondent benefitted from immunity under the SIA. The events giving rise to the class action having occurred between 1957 and 1960,<sup>5</sup> that is before the coming into force of the SIA, he concluded that the exceptions to state immunity now found in that statute did not apply. In his view, the SIA did not have retroactive effect when it came into force in 1982.<sup>6</sup> He also rejected the appellant's argument regarding the retrospective character of the SIA since this is matter of substantive law, which precludes rebutting the presumption against retrospective application of a statutory provision.<sup>7</sup>

[10] In support of his analysis, the judge relied on the fact that certain provisions of the SIA provide that they apply retroactively, for example those regarding acts of terrorism.<sup>8</sup> Indeed, the SIA was amended in 2012 to add the terrorism exception, and expressly stipulated that that exception applied on or after January 1, 1985.<sup>9</sup>

[11] With respect to the state immunity exceptions at common law, which existed prior to the coming into to force of the SIA in 1982, the judge was of the opinion that they were of limited scope since none covered death or personal or bodily injury.<sup>10</sup> As for the exception regarding commercial activity, he considered that it did not apply in the case at bar.<sup>11</sup>

[12] Finally, the judge rejected the appellant's submission that the illegal and covert character of an activity was an exception to the immunity rule.<sup>12</sup>

[13] Because the judge concluded that the respondent benefitted from immunity, he did not address the other questions relating to the right of the family members of victims of the Montreal Experiments to sue.<sup>13</sup>

---

<sup>4</sup> *Id.*, paras. 22-32.

<sup>5</sup> This is the period of the respondent's alleged involvement in the Montreal Experiments.

<sup>6</sup> Judgment under appeal, para. 45.

<sup>7</sup> *Id.*, para. 59.

<sup>8</sup> SIA, *supra*, note 2, s. 6.1 (1).

<sup>9</sup> Judgment under appeal, paras. 42-47.

<sup>10</sup> *Id.*, para. 74.

<sup>11</sup> *Id.*, para. 79.

<sup>12</sup> *Id.*, para. 98.

<sup>13</sup> *Id.*, paras. 100-102.

## ISSUES IN DISPUTE

[14] The appellant raises six issues, which can be grouped as follows:

- 1) Did the trial judge err in law by deciding the issue of state immunity at a preliminary stage?
- 2) Did the trial judge err in law by finding that the respondent benefitted from state immunity in the case at bar, notwithstanding the exceptions stemming from the SIA and common law principles?
- 3) If so, do the family members of victims of the Montreal Experiments also benefit from the exceptions to state immunity?

[15] Before our Court, the Attorney General of Canada filed no memorandum and made no submissions at the hearing.

## ANALYSIS

### 1) Did the trial judge err in law by deciding the issue of state immunity at a preliminary stage?

[16] The appellant submits that the judge's decision to dismiss her action at a preliminary stage was ill-founded. A court cannot do so unless it is dealing with a pure question of law. Rather, this case raises a mixed question of fact and law in that, to determine whether certain exceptions to state immunity apply, including that regarding commercial activity, evidence must be adduced to establish its nature. The issue should have been referred to the judge on the merits.

[17] The principles surrounding the application of article 168 *C.C.P.* are well known. Trial courts must be cautious when called upon to decide an application to dismiss, since the dismissal of an action at this stage can have serious consequences.<sup>14</sup> However, an action must not be allowed to continue if it is unfounded in law. The correctness standard of review applies in the analysis of this issue.<sup>15</sup>

---

<sup>14</sup> *Canada (Attorney General) v. Confédération des syndicats nationaux*, 2014 SCC 49, para. 17.

<sup>15</sup> *Propane Nord-Ouest v. Galarneau*, 2015 QCCA 1688, para. 17. See also: *Société de l'assurance automobile du Québec v. Ville de Montréal*, 2022 QCCA 1165, para. 19; *B.J. v. La Capitale assureur de l'administration publique inc.*, 2020 QCCA 615, para. 36; *3952851 Canada inc. v. Groupe Montoni (1995) division construction inc.*, 2017 QCCA 620, para. 32; *9213-1705 Québec inc. v. Geitzen*, 2016 QCCA 71, para. 11; *Entrepôt International Québec, s.e.c. v. Protection incendie de la Capitale inc.*, 2014 QCCA 617, para. 1.

[18] Article 168 para. 2 *C.P.C.* allows a party to ask that an application be dismissed if it is unfounded in law. Rules regarding state immunity are rules of law, as the Court noted in *Dostie v. Procureur général du Canada*:

[TRANSLATION]

[22] “Applicable law” refers, of course, to the law relevant to the merits of the case, However, and this is equally as important, it also refers to the more technical rules governing:

[...]

- the bars of action and immunities from prosecution (those of a foreign state, for example, or those provided in the *Act respecting industrial accidents and occupational diseases* or the *Automobile Insurance Act*);<sup>16</sup>

[...]

[References omitted]

[19] I am of the view that the judge did not err by deciding the issue of the respondent’s immunity at the application to dismiss stage, since this raises a question of law. In *Kazemi, LeBel, J.*, for the majority, explained that requiring a foreign defendant to mount a defence to then decide whether he or she is immune from suit would defeat the purpose of state immunity, namely to bar a court from hearing a case on its merits *in limine*.<sup>17</sup>

[20] In the case at bar, the judge correctly applied *Trudel*<sup>18</sup> and *Schreiber*,<sup>19</sup> which concluded that the issue of state immunity is a matter of public order. Barring exceptional circumstances, it must therefore be decided at the application to dismiss stage.<sup>20</sup>

[21] Moreover, I do not accept the appellant’s argument that the matter should be heard on its merits in order to establish certain facts to demonstrate the illegal or covert character of the acts committed by the respondent. She argues that it would be important to determine whether the latter benefitted from either the implied or express authorization of the Canadian government to conduct its experiments on Canadian soil. In my view, there exists in Canadian law no exception to state immunity based upon the illegal or

---

<sup>16</sup> *Dostie v. Procureur général du Canada*, 2022 QCCA 1652, para. 22, citing: *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62 [*Kazemi*], confirming *Islamic Republic of Iran v. Hashemi*, 2012 QCCA 1449; *New Jersey (Department of the Treasury of the State of), Division of Investment v. Trudel*, 2009 QCCA 86 [*Trudel*].

<sup>17</sup> *Kazemi, supra*, note 16, para. 105.

<sup>18</sup> *Trudel, supra*, note 16.

<sup>19</sup> *Schreiber v. Canada (Attorney General)*, 2002 SCC 6 [*Schreiber*].

<sup>20</sup> *Trudel, supra*, note 16, para. 22; *Schreiber v. Federal Republic of Germany*, 152 CCC (3d) 205, para. 16 (Ont. C.A.), confirmed by *Schreiber, supra*, note 19.

covert nature of the acts committed, as we shall see. Such evidence would therefore have been irrelevant to deciding the issue of immunity.

[22] The appellant also submits that, had the issue of the respondent's immunity been decided on the merits, she could have demonstrated that the cause of action had crystallized for the class members in 2017-2018. This differs from the time frame in which the events took place, namely from 1957 to 1960. This argument must fail as well. The appellant conflates the test to determine when the cause of action was discovered, which goes to the analysis of the extinctive prescription of the action, and the dates on which the facts occurred, which is determinative of the law applicable to the issue of the respondent's immunity.

[23] All of the allegations required to allow the judge to determine whether the respondent benefitted from immunity appear in the application to authorize a class action. The appellant has not established that the trial judge erred in deciding the issue of the respondent's immunity at a preliminary stage.

**2) Did the trial judge err in law by finding that the respondent benefitted from state immunity in the case at bar, notwithstanding the exceptions stemming from the SIA and common law principles?**

[24] Before dealing with the other issues in dispute, a review of the law regarding state immunity will be helpful. The principle of immunity is enacted in s. 3(1) of the SIA:

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

**3 (1)** Sauf exceptions prévues dans la présente loi, l'État étranger bénéficie de l'immunité de juridiction devant tout tribunal au Canada.

[25] A number of exceptions are provided in the SIA, notably where state actions relate to any commercial activity, where death or personal or bodily injury occurs in Canada and in cases where a state is sued for its support of terrorism on or after January 1, 1985:

**5** A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to any commercial activity of the foreign state.

**5** L'État étranger ne bénéficie pas de l'immunité de juridiction dans les actions qui portent sur ses activités commerciales.

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

**6** L'État étranger ne bénéficie pas de l'immunité de juridiction dans les actions découlant :

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

**a)** des décès ou dommages corporels survenus au Canada;



**(b)** any damage to or loss of property that occurs in Canada.

**b)** des dommages aux biens ou perte de ceux-ci survenus au Canada.

**6.1 (1)** A foreign state that is set out on the list referred to in subsection (2) is not immune from the jurisdiction of a court in proceedings against it for its support of terrorism on or after January 1, 1985.

**6.1 (1)** L'État étranger inscrit sur la liste visée au paragraphe (2) ne bénéficie pas de l'immunité de juridiction dans les actions intentées contre lui pour avoir soutenu le terrorisme le 1er janvier 1985 ou après cette date.

[26] In *Kazemi*, LeBel, J. noted that state immunity is one of the organizing principles between independent states. That principle is consistent with that of equality between states:

[35] Conceptually speaking, state immunity remains one of the organizing principles between independent states (*R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292, at para. 43). It ensures that individual nations and the international order remain faithful to the principles of sovereignty and equality (Larocque, *Civil Actions for Uncivilized Acts*, at p. 236; C. Emanuelli, *Droit international public: Contribution à l'étude du droit international selon une perspective canadienne* (3rd ed. 2010), at p. 294). Sovereignty guarantees a state's ability to exercise authority over persons and events within its territory without undue external interference. Equality, in international law, is the recognition that no one state is above another in the international order (*Schreiber*, at para. 13). The law of state immunity is a manifestation of these principles (*Hape*, at paras. 40-44; Fox and Webb, at pp. 25 and 76; *Germany v. Italy*, at para. 57).<sup>21</sup>

[Emphasis added]

[27] In that decision, LeBel, J. added that there exist many justifications for state immunity, including comity and reciprocity.<sup>22</sup> That principle plays a large role in international relations and has “emerged as a general rule of customary international law”.<sup>23</sup> The content of that immunity has evolved over the years, however. Whereas in its earliest incarnation it was absolute, a new approach emerged in the wake of the Second World War to its restriction in criminal prosecutions, but also in civil suits against states. One now speaks of restrictive immunity.<sup>24</sup>

[28] LeBel, J. noted that the SIA is a complete codification of Canadian law in that area.<sup>25</sup> In 2012, Parliament in fact added to the exceptions to immunity the exception

<sup>21</sup> *Kazemi*, *supra*, note 16, para. 35.

<sup>22</sup> *Id.*, para. 37.

<sup>23</sup> *Id.*, para. 38.

<sup>24</sup> *Id.*, paras. 39-41.

<sup>25</sup> *Id.*, para. 54.

regarding terrorist activity (s. 6.1 SIA), thus indicating that it may act to alter the scope of state immunity. LeBel, J. concluded by noting that, in Canada, it is first towards Parliament that one must turn when ascertaining the contours of state immunity. He wrote:

[44] In 2012, Parliament amended the SIA to include an additional exception to state immunity for certain foreign states that have supported terrorist activity (Arbour and Parent, at pp. 508.1-8.3). Under this new legislative regime, a foreign state may be sued in Canada if (1) the act that the state committed took place on or after January 1, 1985 and (2) the foreign state accused of supporting terrorism is included on a list created by the Governor in Council (SIA, s. 6.1; Library of Parliament, *Legislative Summary of Bill C-10* (2012), at s. 2.2.2.1). Although no argument concerning the nature or constitutionality of the terrorism exception was advanced before this Court, it is nonetheless relevant to the case at hand. If nothing else, it reveals that Parliament can and does take active steps to address, and in this case pre-empt, emergent international challenges (Ranganathan, at p. 386), thereby reinforcing the conclusion, discussed below, that the SIA is intended to be an exhaustive codification of Canadian law of state immunity in civil suits. I also note in passing, with all due caution, that when the terrorism exception bill was before Parliament, it was criticized on numerous occasions for failing to create an exception to state immunity for civil proceedings involving allegations of torture, genocide and other grave crimes (*Legislative Summary of Bill C-10*, s. 2.1.4). Indeed, Private Member Bill C-483 proposed to create such an exception but it never became law. More broadly, the amendment to the SIA brought by Parliament in 2012 demonstrates that forum states (i.e. states providing jurisdiction) have a large and continuing role to play in determining the scope and extent of state immunity.

[45] It follows that state immunity is not solely a rule of customary international law. It also reflects domestic choices made for policy reasons, particularly in matters of international relations. As Fox and Webb note, although immunity as a general rule is recognized by international law, the “precise extent and manner of [the] application” of state immunity is determined by forum states (p. 17). In Canada, therefore, it is first towards Parliament that one must turn when ascertaining the contours of state immunity.<sup>26</sup>

[Emphasis added]

[29] LeBel, J. did not accept, therefore, the view of some scholars that the SIA is not exhaustive and that the common law, as well as international law, must inform its

---

<sup>26</sup> *Id.*, paras. 44-45.

interpretation.<sup>27</sup> He was of the opinion, rather, that the list of exceptions to state immunity found in the SIA is exhaustive.<sup>28</sup>

\* \* \*

### ***Section 6 of the SIA***

[30] The appellant submits, first, that the respondent is not immune, because s. 6 of the SIA, which provides for an exception in proceedings that relate to death or personal or bodily injury, applies.

[31] She argues that the judge erred by deciding that the SIA does not apply to the present case because the facts giving rise to the claim took place before its coming into force, in 1982. In her view, a distinction must be made between the time when the fault was committed, namely between 1957 and 1960, that when the damages appeared, namely over the course of many decades, and, finally, the time when the facts to establish causal connection were discovered by the class members, around 2017-2018. Sixty years elapsed between the fault and the crystallization of the right action in civil liability. According to the appellant, the class members could not have acted prior to that time. The SIA would therefore apply, since their right of action arose following its coming into force, in 1982.

[32] This argument cannot be accepted.

[33] I am of the view that the judge did not err by considering, for the purpose of his analysis, that the relevant facts to determine whether the SIA applies, occurred prior to its enactment, in 1982.<sup>29</sup>

[34] As the respondent argues, the appellant conflates the discovery of a cause of action for purposes of prescription with the occurrence of the facts relevant to determine whether the respondent is immune. Those facts occurred in the late fifties and in the early sixties, barring the application of the SIA, unless it has a retroactive or retrospective effect, another argument submitted by the appellant.

### ***Does the statute apply retroactively or retrospectively?***

[35] The appellant does not argue that the SIA is retroactive. She alleges that the SIA has retrospective effect, since it is of a procedural nature and jurisdiction-granting. She pleads that the judge erred by failing to distinguish between a retroactive statute and one that applies retrospectively.

---

<sup>27</sup> *Id.*, para. 55.

<sup>28</sup> *Id.*, para. 56.

<sup>29</sup> Judgment under appeal, para. 41.

[36] For its part, the respondent is of the view that the judge did not err in this regard. He properly found that the statute is not retroactive with respect to the immunity exception for personal or bodily injury. When Parliament intended that an exception apply retroactively, it specifically mentioned it, as was the case for the exception carved out for terrorist activities, which was added to the SIA in 2012, but with a retroactive effect for acts committed on or after January 1, 1985 (s. 6.1 SIA). Moreover, the respondent argues that the presumption against retrospectivity is not rebutted, since the SIA is not merely procedural, but also affects substantive rights.

[37] The issue of the application of the SIA to facts that occurred before its coming into force, in 1982, has not often been addressed by the courts. This requires an analysis of the rules of statutory interpretation that concern the temporal application of statutes. There is a certain confusion as to the interpretation to be given to the different expressions related thereto, i.e., a statute's retroactive nature, its retrospective nature and, finally, the immediate effect of a purely procedural statute.<sup>30</sup>

[38] Professor Driedger considered the issue and developed a methodology echoed by Professor Sullivan in *The Construction of Statutes*. The latter explains as follows the distinction between the retroactive nature and the retrospective nature of a statute:

A retroactive statute is one that “changes the law from what it was”; it deems new law to be the law applicable to facts that occurred prior to its coming into force. A retrospective statute, by contrast, is prospective but it “attaches new consequences for the future to an event that took place before the statute was enacted”.<sup>31</sup>

[39] Three presumptions arise from these rules of interpretation: (1) laws are presumed to be non-retroactive;<sup>32</sup> (2) laws are presumed to be non-retrospective,<sup>33</sup> and, finally, (3) purely procedural laws are presumed to apply immediately.<sup>34</sup>

[40] Authors Côté and Devinat explain that the presumption against retroactivity can be rebutted [TRANSLATION] “when a new statute applies in such a way as to prescribe the legal regime of facts entirely accomplished prior to its commencement”.<sup>35</sup> They propose the following approach:

---

<sup>30</sup> *R. v. Dineley*, 2012 SCC 58, para. 9; Ruth Sullivan, *The Construction of Statutes*, 7th ed., Toronto, Lexis Nexis, 2022, p. 734.

<sup>31</sup> R. Sullivan, *supra*, note 30, p. 734, citing Elmer A. Driedger, “Statutes: *Retroactive retrospective reflections*”, (1978) 56 *Can. Bar Rev.* 264, pp. 268-269.

<sup>32</sup> *Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301, p. 317; *Angus v. Sun Alliance Insurance Co.*, [1988] 2 S.C.R. 256, para. 14; R. Sullivan, *supra*, note 30, pp. 737-738.

<sup>33</sup> *R. v. Dineley*, *supra*, note 30, para. 10; R. Sullivan, *supra*, note 30, p. 750.

<sup>34</sup> *Angus v. Sun Alliance Insurance Co.*, *supra*, note 32, para. 19; *Wildman v. R.*, [1984] 2 S.C.R. 311, p. 331; R. Sullivan, *supra*, note 30, p. 784.

<sup>35</sup> Pierre-André Côté et Mathieu Devinat, *Interprétation des lois*, 5<sup>e</sup> éd., Montréal, Thémis, 2021, n° 484.

[TRANSLATION] The first stage consists of identifying the legal facts, that is, the facts to which are attached legal consequences. This requires the reconstitution of the legal rule expressed in the text, distinguishing between the facts which will entail the application of the statute and the legal consequences that the statute attributes to the occurrence of these facts. [...] The second stage consists of situating in time the concrete facts which correspond to the legal facts described hypothetically by the statute. These are the facts which generate rights and obligations, powers or duties, with respect to the legal subject in question. [...] There is retroactive effect when the new statute defines the legal regime of a fact or group of facts that arose entirely before its commencement.<sup>36</sup>

[Emphasis added]

[41] A statute's retroactivity may also be revealed by the legislator's explicit or implicit intent.<sup>37</sup> It may thus be accomplished by clear language in the statute or shown by the statute's purpose.<sup>38</sup>

[42] The presumption against retrospectivity, for its part, can be rebutted by express language or necessary implication.<sup>39</sup> This can also be the case "if the new prejudicial consequence at issue is designed to protect the public rather than as a punishment for a prior event",<sup>40</sup> "provided that legislative intent otherwise supports doing so".<sup>41</sup> Moreover, "the design of the penalty itself [must be such that it] signals that Parliament has weighed the benefits of retrospectivity against its potential for unfairness".<sup>42</sup>

[43] Finally, the presumption of immediate application applies when a statute is purely procedural in nature:

[TRANSLATION] Thus, a statute is purely procedural if its application affects only the means of exercising a right. If the application of the statute makes exercise of a right practically impossible, it goes beyond being "purely procedural" and actually affects "substantive rights".<sup>43</sup>

[44] In the case at bar, the appellant concedes that s. 6 SIA is not retroactive. Rather, she argues that it has retrospective effect. However, it will be helpful to examine the judge's reasoning on the issue of both the presumption against retroactivity and that against retrospectivity.

---

<sup>36</sup> *Id.*, n° 485-493.

<sup>37</sup> *Id.*, n° 577.

<sup>38</sup> *Id.*, n° 579.

<sup>39</sup> *Tran v. Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50, paras. 48-49.

<sup>40</sup> *Id.*, para. 47; *Brosseau v. Alberta Securities Commission*, *supra*, note 32, p. 319.

<sup>41</sup> *Tran v. Canada (Public Safety and Emergency Preparedness)*, *supra*, note 39, para. 50.

<sup>42</sup> *Ibid.*

<sup>43</sup> P.-A. Côté et M. Devinat, *supra*, note 35, n° 709.

[45] In my view, the judge did not err in finding that the presumptions against retroactivity and against retrospectivity have not been rebutted. Indeed, nothing in the SIA indicates that that it expressly or impliedly confers any retroactive or retrospective reach to s. 6 SIA, which provides an exception to state immunity in the case of personal or bodily injury. Moreover, this interpretation has been adopted in a number of decisions by Ontario courts, including the Court of Appeal, namely *Carrato*,<sup>44</sup> *Jaffe*,<sup>45</sup> *Tritt*<sup>46</sup> and, more indirectly, *Tracy*.<sup>47</sup> It appears that these are the only decisions addressing the issue. Further, the SIA is not purely procedural in nature and therefore is not of immediate application.

[46] Moreover, s. 6.1 (1) SIA provides an example of a provision's retrospective effect. Parliament expresses this clearly:

**6.1 (1)** A foreign state that is set out on the list referred to in subsection (2) is not immune from the jurisdiction of a court in proceedings against it for its support of terrorism on or after January 1, 1985.

**6.1 (1)** L'État étranger inscrit sur la liste visée au paragraphe (2) ne bénéficie pas de l'immunité de juridiction dans les actions intentées contre lui pour avoir soutenu le terrorisme le 1er janvier 1985 ou après cette date.

[47] That provision, enacted in 2012, provides that a state is not immune in proceedings against it for its support of terrorism on or after January 1, 1985. It was added to the SIA following the government's review of the final report of the commission of inquiry into the Air India bombing that occurred on June 23, 1985.<sup>48</sup> It reflects a clear legislative intent in that case. It gave that provision a retrospective scope, which is not found in s. 6 SIA. The Legislative Summary of Bill S-7, *An Act to deter terrorism and to amend the State Immunity Act*, includes the following passage dealing with the nature of the amendment:

The time limit applicable to bringing this cause of action also appears to be quite broad. Clause 4(1) is retrospective in scope: it allows victims who have suffered loss or damage as a result of terrorist acts or omissions to bring an action against the perpetrators of such acts or omissions as long as they were committed on or after 1 January 1985 (it is more common for legislation to apply only to actions committed on or after the date when it is enacted). The JVTA is likely designed to operate retrospectively so that families of the victims of the bombing of Air India

<sup>44</sup> *Carrato v. United States* (1982), 40 O.R. (2d) 459 (Ont. Sup. Ct.) [*Carrato*].

<sup>45</sup> *Jaffe v. Miller* (1993), 13 O.R. (3d) 745 (Ont. C.A.), application for leave to appeal to the Supreme Court dismissed, No. 24971 [*Jaffe*].

<sup>46</sup> *Tritt v. United States of America (H.C.J.)* (1989), 68 O.R. (2d) 284 (Ont. Sup. Ct.) [*Tritt*].

<sup>47</sup> *Tracy v. Iran (Information and Security)*, 2017 ONCA 549, paras. 56 and 131 [*Tracy*].

<sup>48</sup> House of Commons, *House of Commons Debates*, 41st Parl., 1st Sess., Vol. 146, No. 56, November 29, 2011, p. 3748 (B. Rathgeber).

Flight 182, which occurred on 23 June 1985, can potentially benefit from this new cause of action.<sup>49</sup>

[48] In the case at bar, the judge applied the principle of *expressio unius est exclusio alterius*<sup>50</sup> in finding that s. 6 SIA did not apply retroactively. However, courts have often noted that this principle, which means “to express one thing implies the exclusion of another”,<sup>51</sup> must be applied with caution.<sup>52</sup> In the instant case, s. 6.1 SIA was enacted in the context of the fight against terrorism<sup>53</sup> and not pursuant to a reform of the law regarding the issue of state immunity, so that the principle relied upon by the judge does not carry the weight that he ascribes to it in determining whether s. 6 SIA is retroactive in scope. However, as LeBel, J. noted in *Kazemi*, addressing the 2012 amendment, this demonstrates that Parliament “can and does take active steps to address, and in this case pre-empt, emergent international challenges”.<sup>54</sup> It could have amended s. 6 SIA to extend its reach and give it retroactive or retrospective scope, but it did not do so.

[49] Turning to the presumption against retrospectivity, the judge noted:

[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.

---

<sup>49</sup> Jennifer Bird and Julia Nicol, “Bill S-7: An Act to deter terrorism and to amend the State Immunity Act”, in *Library of Parliament*, Ottawa, April 26, 2010, online: [https://publications.gc.ca/collections/collection\\_2011/bdp-lop/lp/40-3-s7-1-eng.pdf](https://publications.gc.ca/collections/collection_2011/bdp-lop/lp/40-3-s7-1-eng.pdf).

<sup>50</sup> Judgment under appeal, para. 47.

<sup>51</sup> Albert Mayrand, *Dictionnaire de maximes et locutions latines utilisées en droit*, 4th ed., Cowansville, Yvon Blais, 2007, “*expressio unius est exclusio alterius*”.

<sup>52</sup> P.-A. Côté et M. Devinat, *supra*, note 35, n° 1165; *Alimport v. Victoria Transport Ltd.*, [1977] 2 S.C.R. 858, p. 862; *Verreault (J.E.) & Fils Ltée v. Quebec (Attorney General)*, [1977] S.C.R. 41, pp. 45-46; *Jones v. A.G. of New Brunswick*, [1975] 2 S.C.R. 182, pp. 195-196.

<sup>53</sup> *Justice for Victims of Terrorism Act*, S.C. 2012, c. 1, s. 2; *Tracy*, *supra*, note 47, para. 1.

<sup>54</sup> *Kazemi*, *supra*, note 16, para. 44.

[52] As confirmed by the majority of the Supreme Court of Canada in *Kazemi*, 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”.

[53] In *Angus v. Sun Alliance Insurance Co.*, 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*, 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 [*sic*] insight into the question of whether substantive rights are affected by citing the following statement of Justice La Forest in *Angus*:

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*, 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*, 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.

[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.<sup>55</sup>

[References omitted]

[50] In my view, the judge made no error on this issue. The SIA does not have retrospective effect and the appellant’s argument that the SIA is of a purely procedural nature, and thus of immediate application, cannot be sustained. Indeed, as the judge noted, the Supreme Court, in its decision in *R. v. Dineley*, explained that “courts have long recognized that the cases in which legislation has retrospective effect must be exceptional”.<sup>56</sup> Deschamps, J., for the Court, added that not all provisions dealing with procedure will have retrospective effect. That is not the case if they affect substantive rights:

[11] Not all provisions dealing with procedure will have retrospective effect. Procedural provisions may, in their application, affect substantive rights. If they do, they are not purely procedural and do not apply immediately (P.-A. Côté, in collaboration with S. Beaulac and M. Devinat, *The Interpretation of Legislation in Canada* (4th ed. 2011), at p. 191). Thus, the key task in determining the temporal application of the Amendments at issue in the instant case lies not in labelling the provisions “procedural” or “substantive”, but in discerning whether they affect substantive rights.<sup>57</sup>

[51] Here, the SIA affects substantive rights. Indeed, it affects a defence, namely that of state immunity, since before the SIA came into effect, in 1982, such immunity for personal or bodily injury existed. The Supreme Court, in *Kuwait Airways*, mentioned that the SIA was not solely procedural in nature.<sup>58</sup>

[52] Moreover, as mentioned above, the Canadian courts that have addressed the issue have all concluded that the SIA does not apply when the impugned conduct took place prior to its coming into force, in 1982. In *Jaffe*, a decision of the Ontario Court of Appeal, it was determined that the exception provided in s. 6 SIA did not apply because, *inter alia*, the actions that caused the injuries had taken place before its coming into force. The Court explained:

---

<sup>55</sup> Judgment under appeal, paras. 48-59.

<sup>56</sup> *R. v. Dineley*, *supra*, note 30, para. 10.

<sup>57</sup> *Id.*, para. 11. See also: *Angus v. Sun Alliance Insurance Co.*, *supra*, note 34, pp. 266-267.

<sup>58</sup> *Kuwait Airways Corp. v. Irak*, 2010 SCC 40, para.12 [*Kuwait Airways*].

[53] Since it is conceded that personal injuries were not excepted from state immunity at common law, the appellants must come within the State Immunity Act to succeed. Counsel for the appellants submitted that Sutherland J. was wrong in holding that s. 6 of the Act had no application because the alleged kidnapping and personal injury to the appellant Jaffe took place prior to the Act coming into force. Her first argument was that the immunity of a foreign state took effect only when it was claimed and was subject to whatever rules that were applicable at that time. She could provide no authority for this proposition and it flies in the face of s. 3(1) and (2) of the Act set out above. It is clear from these subsections that a foreign state is immune from the jurisdiction of any court in Canada and that in any proceedings the court shall give effect to this immunity notwithstanding that the state has failed to take any step in the proceedings. The immunity attaches when the foreign state is permitted to exercise a presence in the host country and is subject to whatever terms are recognized at the time of such entry. The entry alleged in the case on appeal occurred in September of 1981 when the alleged kidnapping took place in Toronto. Accordingly, the appellants are not entitled to rely upon exceptions legislated after the date upon which this tort is said to have occurred.<sup>59</sup>

[53] In the case at bar, the alleged facts, namely the treatments administered by Dr. Cameron with the financial support of the CIA, took place well before the coming into force of the SIA, in 1982. The exception to state immunity, found at s. 6 SIA, does not apply since the statute has no retroactive or retrospective effect.

[54] The appellant further argues that, if the SIA does not apply, the respondent does not benefit from any immunity at common law for commercial activity. She cites author François Larocque to explain that European civil law jurisdictions had moved away from the principle of absolute state immunity as early as the late nineteenth century to adopt that of restrictive immunity.<sup>60</sup> She also refers to various decisions in support of the view that in Quebec also, the principle of restrictive immunity is recognized for commercial activity.<sup>61</sup> The appellant does not however dispute that the exception to immunity for personal or bodily injury and death did not exist prior to the coming into force of the SIA.

[55] The respondent replies that the appellant acknowledges in her brief that at the time of the events, namely between 1957 and 1960, absolute state immunity had been

---

<sup>59</sup> *Jaffe, supra*, note 45, para. 53.

<sup>60</sup> François Larocque, *Civil Actions for Uncivilized Acts: The Adjudicative Jurisdiction of Common Law Courts in Transnational Human Rights Proceedings*, 2010, Toronto, Irwin Law, 2010, pp. 240-241.

<sup>61</sup> *Zodiac International Products Inc. v. The Polish People's Republic*, [1977] C.A. 366, p. 663, confirmed by *Zodiak International v. Polish People's Republic*, [1983] 1 S.C.R. 529; *Venne v. Democratic Republic of the Congo*, [1969] B.R. 818, p. 146 (C.A.), reversed for other reasons by *Gouvernement de la République Démocratique du Congo v. Venne*, [1971] S.C.R. 997; *Penthouse Studios Inc. v. Government of the Sovereign Republic of Venezuela et al.* (1969), 8 D.L.R. (3d) 686 (CA).

recognized by the Supreme Court in *Dessaulle v. Republic of Poland*<sup>62</sup> and that the latter did not revisit its position before 1983, in the matter of *Zodiak International Productions Inc. v. The Polish People's Republic*, by confirming the decision of the Court of Appeal.<sup>63</sup>

[56] The first question is to determine whether the respondent's impugned activities were commercial in nature. If they were not, the inquiry can end there and it is unnecessary to determine whether, for the period in question, state immunity was absolute or restrictive in Canada.

[57] In *Re Canada Labour Code*, the Supreme Court set out the principles for determining whether an activity can be classified as commercial. That decision was rendered in 1992, that is after the SIA came into force. However, the Supreme Court noted that that statute clarifies and continues the theory of restrictive immunity. It does not alter its substance:

I view the Canadian *State Immunity Act* as a codification that is intended to clarify and continue the theory of restrictive immunity, rather than to alter its substance. The relevant provisions of the Act, ss. 2 and 5, focus on the nature and character of the activity in question, just as the common law did.<sup>64</sup>

[58] In that case, the Supreme Court distinguished between a government's public acts (*jure imperii*), to which immunity applies, and private acts (*jure gestionis*), to which it does not.<sup>65</sup> It noted that a contextual approach must prevail to determine whether or not the foreign state's action is of a commercial character. La Forest, J. wrote:

It seems to me that a contextual approach is the only reasonable basis of applying the doctrine of restrictive immunity. The alternative is to attempt the impossible -- an antiseptic distillation of a "once-and-for-all" characterization of the activity in question, entirely divorced from its purpose. It is true that purpose should not predominate, as this approach would convert virtually every act by commercial agents of the state into an act *jure imperii*. However, the converse is also true. Rigid adherence to the "nature" of an act to the exclusion of purpose would render innumerable government activities *jure gestionis*.<sup>66</sup>

---

<sup>62</sup> *Dessaulle v. Republic of Poland*, [1944] S.C.R. 275.

<sup>63</sup> *Zodiak International Productions Inc. v. The Polish People's Republic*, *supra*, note 61.

<sup>64</sup> *Re Canada Labour Code*, [1992] 2 S.C.R. 50, p. 73.

<sup>65</sup> Jean-Maurice Arbour and Geneviève Parent, *Droit international public*, 7th ed., Montréal, Yvon Blais, 2017, p. 518.

<sup>66</sup> *Re Canada Labour Code*, *supra*, note 64, p. 73; See also *Kuwait Airways*, *supra*, note 58, paras. 31-33; *Steen v. Islamic Republic of Iran*, 2013 ONCA 30, paras. 17-23; *Maroc (Gouvernement du Royaume du) v. El Ansari*, 2010 QCCA 2256, paras. 64-70; *Trudel*, *supra*, note 16, para. 39; *Bouzari v. Iran*, 71 O.R. (3d) 675, paras. 50-57 (Ont. C.A.).

[59] Both the nature and the purpose of the act must be considered to determine whether it is a commercial activity. In the instant case, what the respondent is being blamed for are its funding activities related to the Montreal Experiments.<sup>67</sup> What was at issue here were not mere grants. I agree with the judge that such funding was not commercial in nature. The experiments were conducted to address national security concerns in the wake of the Second World War. The judge stated the following:

[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* "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.<sup>68</sup>

[References omitted]

[60] The contextual inquiry leads to the conclusion that by reason of both its nature and its purpose, the activity was not of a commercial character. It is thus unnecessary to determine whether, at the time of the events, there existed an absolute or restrictive immunity in Canada for the commercial activities of states.

[61] Nor do I accept the appellant's submission that the respondent, having acted under the guise of a private party (the Human Ecology Fund) to fund Dr. Cameron's activities, cannot therefore invoke immunity. In my view, no matter what the vehicle used, the activities conducted by the respondent were not commercial in nature.

[62] Moreover, the appellant argues that, since the respondent's activities were illegal, it cannot benefit from immunity. This argument must also fail. There exists no such exception in the SIA that would bar the respondent from benefitting from immunity. The same holds true at common law or under customary international law. The trial judge wrote:

---

<sup>67</sup> Re-Amended Application to Authorize the Bringing of a Class Action & to Appoint the Applicant as Representative Plaintiff, March 25, 2022, paras. 25-28.

<sup>68</sup> Judgment under appeal, paras. 79-81.

[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 Congreso del Partido*, 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* decision, found that foreign state sovereign immunity applied to a civil claim for damages resulting from alleged torture.<sup>69</sup>

[References omitted]

[63] I agree.

**3) If so, do the family members of victims of the Montreal Experiments also benefit from the exceptions to state immunity?**

[64] I have found, as did the trial judge, that the exceptions enacted in s. 6 SIA are not applicable in this case. As a result, it is not necessary to decide this issue.

[65] Consequently, I propose that the appeal be dismissed, with legal costs.

---

JULIE DUTIL, J.A.

---

<sup>69</sup> Judgment under appeal, paras. 92-96.