Cour fédérale Federal Court

Date: 20220831

Docket: T-541-10

Citation: 2022 FC 1243

Ottawa, Ontario, August 31, 2022

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

RÉGENT BOILY

Plaintiff

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Defendant

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JUDGMENT AND REASONS

I. Overview

[1] Torture is a universally condemned practice. It is a radical way of annihilating human dignity. It inflicts acute suffering on its victims and often results in long-term psychological damage.

[2] Torture is prohibited both internationally and domestically. Canada, along with over 170 other countries, has ratified the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Can TS 1987, No 36 [the Convention]. States that have ratified the Convention must criminalize torture. The Convention also prohibits the extradition or deportation of a person to a country where they would face a substantial risk of torture. Canadian law contains similar rules. Notably, section 269.1 of the *Criminal Code* prohibits torture. Further, as the Supreme Court stated in *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3 [*Suresh*], and *R v Bissonnette*, 2022 SCC 23 [*Bissonnette*], torture is contrary to sections 7 and 12 of the *Canadian Charter of Rights and Freedoms* [the Charter].

[3] In this action for damages, the plaintiff, Régent Boily, claims that the defendant, Her Majesty the Queen [the federal government], extradited him to Mexico despite having received new information indicating that he would face a substantial risk of torture.

[4] The factual background of the case can be summarized as follows. Mr. Boily was found guilty of drug trafficking in Mexico. He escaped from the Cieneguillas prison in the State of

Zacatecas, where he was incarcerated. During the escape, a prison guard was killed. Mr. Boily then returned to Canada. Mexico subsequently requested his extradition, so that he could serve the remainder of his sentence and face charges of escaping from lawful custody and manslaughter. The Minister of Justice agreed to this request, under the condition that Mexico provide diplomatic assurances regarding Mr. Boily's safety. After Mexico gave such assurances, the Quebec Court of Appeal rejected Mr. Boily's application for judicial review of the extradition order. Given the diplomatic assurances, the Court was of the opinion that Mr. Boily would not face a substantial risk of torture. However, on the eve of the extradition, federal officials learned that the Mexican authorities intended to detain Mr. Boily at the Cieneguillas prison, from which he had previously escaped and where the guard who was killed had been working at the time of the escape. Despite being aware of the substantial risk revealed by this new information, the federal government nevertheless handed Mr. Boily over to the Mexican authorities the next day. Mr. Boily alleges that guards at the Cieneguillas prison tortured him three times in the days following his extradition. The torture techniques used included submerging Mr. Boily's head in a barrel of filthy water, suffocating him with a plastic bag, and injecting hot sauce into his nose.

[5] I am allowing Mr. Boily's action because the federal government breached his right to security of the person under section 7 of the Charter. The internal memoranda filed in evidence clearly show that federal officials knew that returning Mr. Boily to the prison from which he had escaped exposed him to a serious risk of reprisal. Save in exceptional circumstances, which are not present here, extraditing or deporting a person to a country where they will be exposed to a substantial risk of torture breaches section 7. If the federal government had not extradited Mr.

Boily after becoming aware of this substantial risk, or if it had taken steps to counter it, Mr. Boily would not have been tortured by the guards at the Cieneguillas prison. Thus, the federal government's conduct caused the harm Mr. Boily suffered.

[6] I also reject the defences put forward by the federal government. The decision to extradite Mr. Boily despite the new information obtained on the eve of the extradition is not immune from suit. This information and the resulting risk had not been assessed by the Minister of Justice or by the Quebec Court of Appeal. Hence, Mr. Boily's action does not amount to a collateral attack against those decisions. Moreover, Mr. Boily's testimony was credible, and the federal government cannot blame him for the lack of evidence corroborating his allegations of torture. In light of all the evidence, I find that Mr. Boily has proven on a balance of probabilities that he was tortured in the days following his extradition.

[7] I therefore award Mr. Boily damages in the amount of $500,000, in order to compensate him and ensure the vindication of his rights.

[8] It may come as a surprise that such a large amount of money would be awarded to someone who has been convicted of serious crimes. Can one be both an offender and a victim? No one questions the validity of the convictions against Mr. Boily nor the sentences imposed on him. Mr. Boily breached several fundamental norms of Mexican society. His escape from prison cost an innocent guard his life. Nothing can compensate the loss suffered by the latter's family. Because of those crimes, Mr. Boily was incarcerated for nearly fourteen years, eleven of which were spent in Mexican prisons. The legitimate punishment he deserved, however, did not include

torture. The prohibition of torture flows from the obligation to respect the human dignity of all persons "irrespective of their actions": *Bissonnette*, at paragraph 59. The federal government did not seek the dismissal of Mr. Boily's claim on the sole basis that he committed serious crimes. Therefore, regardless of his criminal record, Mr. Boily must be compensated for the harm resulting from being exposed to a substantial risk of torture.

II. Factual Background

[9] First, it is necessary to establish the factual setting that gave rise to Mr. Boily's action for damages. I will outline the main undisputed facts pertaining to his arrest, escape, extradition and early detention in Mexico. I will then describe the alleged acts of torture, the credibility of which will be assessed later. I will also summarize the procedural background of this action and discuss the decision rendered by the United Nations Committee against Torture with respect to Mr. Boily's case.

A. *Mr. Boily's Arrest in Mexico, his Escape and his Return to Canada*

[10] Mr. Boily was born in 1944. Following the accidental death of his wife, he left Canada and settled in Mexico in 1993. He remarried a Mexican citizen.

[11] On March 9, 1998, Mexican police officers near the town of Fresnillo, in the state of Zacatecas, arrested Mr. Boily after they discovered over 500 kg of marijuana in his recreational vehicle. Mr. Boily alleges that the officers threatened to kill him if he did not name his accomplices. When he refused to talk, the officers allegedly tortured him, notably by suffocating

him with a plastic bag and injecting chili sauce and carbonated water into his nostrils. He was allegedly forced to sign a statement written in Spanish, which he could not understand. The officers then threatened to kill him if he revealed the abuse he had suffered.

[12] On November 10, 1998, Mr. Boily was sentenced to 14 years in prison. He was incarcerated at the Cieneguillas prison, in the state of Zacatecas.

[13] On March 9, 1999, Mr. Boily escaped from prison. After claiming he had lost his glasses, he was taken under escort to an eye clinic. On the way back, armed men intercepted the vehicle he was in and seized him. During this event, one of the two guards accompanying Mr. Boily was shot and killed. Mr. Boily maintains that he never heard the shot and infers that he had already left the scene when the guard was killed.

[14] Over the next few weeks, Mr. Boily travelled to various locations in Mexico. With the help of his in-laws, he covertly crossed the Rio Grande and then took domestic flights within the United States to reach Burlington, Vermont. He then crossed the Canadian border on foot. For the next several years, he lived in the Outaouais region under his true identity.

B. *The Process Leading to Mr. Boily's Extradition to Mexico*

[15] In 2003, Mexico requested that Mr. Boily be extradited so that he could serve the remainder of his sentence and face charges of manslaughter and escaping from legal custody. He was arrested on March 1, 2005. On May 27, 2005, the Minister of Justice issued an Authority to Proceed pursuant to section 15 of the *Extradition Act*, SC 1999, c. 18. Mr. Boily was detained

pending his extradition. On November 25, 2005, the Superior Court ruled that there was sufficient evidence to justify his extradition.

[16] Under section 40 of the *Extradition Act*, it was then up to the Minister of Justice to decide whether to issue an extradition order. In opposing the issuing of such an order, Mr. Boily argued that he would face a substantial risk of torture in Mexico. He invoked three grounds for his fear: (1) he had been tortured at the time of his initial arrest; (2) he was now accused of murdering a prison guard; and (3) reports about the human rights situation in Mexico noted the frequent use of torture. On May 24, 2006, after considering Mr. Boily's submissions, the Minister of Justice ordered his extradition. The Minister acknowledged that reports on the human rights situation in Mexico indicated that the Mexican police and armed forces were involved in various human rights violations. However, the Minister was of the opinion that Canada could meet its obligation not to return Mr. Boily to a country where he would face a substantial risk of torture by obtaining assurances from Mexico that (1) reasonable precautions would be taken to ensure Mr. Boily's safety; (2) his counsel or Canadian consular services would be able to visit him at all times; (3) he would be able to communicate with them at all times; and (4) his trial would be held within a reasonable time.

[17] On November 16, 2006, Mexico provided the requested assurances. On January 22, 2007, the Minister of Justice wrote to Mr. Boily's counsel, informing them that he was satisfied with the assurances received from Mexico.

[18] Mr. Boily sought judicial review of the Minister of Justice's decision authorizing his extradition. On February 22, 2007, the Quebec Court of Appeal dismissed the application: *Boily c Canada (Ministre de la Justice)*, 2007 QCCA 250. The Court found that the Minister's decision was reasonable in light of all the evidence. It noted that Mr. Boily's fears arising from the accusation of homicide of a prison guard and reports of frequent torture in Mexico were general in nature. In the Court's view, the Minister had taken those fears into account and reasonably considered that they were mitigated by the assurances provided by Mexico.

[19] Mr. Boily applied for leave to appeal the Court of Appeal's decision. The Supreme Court of Canada dismissed that application on July 5, 2007.

[20] On July 4, 2007, Mr. Boily filed a communication with the United Nations Committee against Torture, requesting urgent measures to stay his extradition. On July 6, 2007, the Committee requested that Canada stay Mr. Boily's extradition pending a more complete review of the case. On July 26, 2007, the Canadian government requested that the Committee withdraw its request for a stay of extradition, because Mr. Boily's concerns were general in nature, not supported by human rights reports in Mexico and had been considered by Canadian courts. On August 13, 2007, the Committee withdrew its request for a stay of his extradition.

C. *Mr. Boily's Extradition and the Alleged Torture*

[21] Mr. Boily's extradition to Mexico was set for Friday August 17, 2007. On August 15, two days earlier, officials from the Department of Foreign Affairs learned of Mr. Boily's imminent extradition in the newspapers.

[22] Sally Dowe Marchand, a case officer at the Consular Affairs Division in Ottawa, then sought to obtain the text of the diplomatic assurances. Upon reading this document, on August 16, 2007, she concluded that Mr. Boily would be incarcerated at the same prison from which he had escaped and where the guard murdered during his escape had worked. For her part, Isabelle Desjardins, a consular officer at the Canadian Embassy in Mexico, expressed serious concerns that Mr. Boily could face reprisals if he returned to that prison. Ms. Desjardins and Robin Dubeau, Consul General of Canada in Mexico, immediately took steps with the Mexican authorities to have Mr. Boily transferred to another prison.

[23] However, that same afternoon, officials of the Department of Foreign Affairs in Ottawa held discussions on the matter. They decided not to intervene with the Mexican authorities. Mr. Dubeau and his colleagues at the embassy immediately ceased their efforts.

[24] Mr. Boily was extradited the next day, August 17, 2007. Upon boarding the plane to Mexico, he was told by the Mexican officers escorting him that he would be held at the Cieneguillas prison (May 2, 2022, transcript, pp 99–100). Upon his arrival at the Mexico City airport, Mexican media were present to film the event (Ms. Desjardins' report, Exhibit 47). Mr. Boily then met with Ms. Desjardins and expressed his concern about being sent back to the same prison. Given this concern, Ms. Desjardins decided to monitor the situation more closely than she normally would. Mr. Boily then flew to Zacatecas and arrived at the Cieneguillas prison that evening.

[25] Mr. Boily alleges that he was tortured during the first days of his detention at the Cieneguillas prison. Upon his arrival on August 17, 2007, two guards roughed him up and threatened to kill him to avenge their colleague who had died during his escape in 1999. That evening, these same two guards, accompanied by the prison's head of security, took Mr. Boily to a deserted area of the prison and tortured him. Mr. Boily was allegedly beaten several times, before having his head submerged about ten times in a barrel of filthy water. He then collapsed face down. One of the guards sat on his back and repeatedly tried to put a plastic bag over his head. As Mr. Boily struggled, the three guards worked together to put the plastic bag over his head, suffocating him until he became unconscious. When he woke up, they tried to hold his head under a water faucet. They then injected hot sauce into his nostrils. They told him that they wanted to avenge the death of their colleague and threatened to kill him if he reported what had happened.

[26] Another inmate saw Mr. Boily as he was being taken back to his cell and offered to help him. Mr. Boily asked him to contact his family and his Canadian counsel, Mr. Deslauriers. Indeed, at that time, the prison authorities did not allow Mr. Boily to make telephone calls (transcripts of May 2, 2022, pp 136–37, and May 3, 2022, p 3).

[27] On Sunday, August 19, 2007, Mr. Boily was taken to the prison warden's office, where he was asked to answer a Mexican television reporter's questions. That evening, the same three guards tortured him just like they had done on August 17.

[28] On Monday, August 20, 2007, Mr. Boily received a phone call from his daughter, who had been contacted by the fellow prisoner. He provided her with a summary of what had happened to him and asked her to contact his counsel and his sister.

[29] That same day, Canadian embassy staff in Mexico took steps to ensure that the assurances provided to Canada, with respect to Mr. Boily, were complied with. A consular officer, Valérie Malingreau, attempted to reach the prison warden. In the middle of the afternoon, she managed to speak to the prison's legal affairs officer, who was already aware of Mr. Boily's case and who reassured her that Mr. Boily could make telephone calls (Exhibit 56). For her part, Ms. Desjardins sent an official letter to the prison warden (Exhibit 57), stating that [TRANSLATION] "we are concerned for the safety of the inmate considering the nature of the charges against him."

[30] Finally, given the distance between the state of Zacatecas and Mexico City, the embassy contacted the Zacatecas State Human Rights Commission, a non-governmental organization whose mission includes the monitoring of prison conditions and which was able to quickly dispatch a representative to the prison. Upon learning of the circumstances of the case, a Commission representative decided to go immediately to the Cieneguillas prison to meet with Mr. Boily. However, Mr. Boily did not know if he could trust this person and did not disclose to him the torture he had suffered.

[31] In the late afternoon, Ms. Desjardins managed to speak to Mr. Boily. He told her that he was not allowed to call the embassy and that he had not had access to the medication he needed

because a guard had torn up his prescription. He did not disclose the torture to her at that time. Instead, he told her that he was surrounded by guards and that he did not feel comfortable talking, [TRANSLATION] "for fear of making his situation worse" (see Ms. Desjardins's note, Exhibit 59; May 3, 2022, transcript, pp 5–6).

[32] On the morning of August 21, 2007, Mr. Boily's sister telephoned Ms. Dowe Marchand to tell her that her brother had been [TRANSLATION] "mistreated, insulted, scorned". In the early afternoon, Mr. Deslauriers sent a letter to Ms. Desjardins indicating that he had learned that Mr. Boily had been tortured during the evening of August 19 and that he did not have access to a telephone. Embassy staff then arranged to visit Mr. Boily as soon as possible. (Witnesses at the hearing were not very specific about when the decision to hasten the visit was made.) A letter (Exhibit 75) was sent to the prison warden informing him that the visit would take place the following day.

[33] On Tuesday evening, August 21, 2007, the same three guards allegedly tortured Mr. Boily using similar methods to the past two times.

[34] On Wednesday, August 22, 2007, Mr. Dubeau and Ms. Malingreau visited Mr. Boily at the Cieneguillas prison. Mr. Boily disclosed to them the acts of torture he had been subjected to. However, he requested that they keep the information confidential, as he was concerned for his safety. During the conversation, Mr. Boily expressed his wish to be transferred to another prison, where the guards would not know him. The embassy representatives then spoke with the prison warden. They reminded him of the importance of ensuring Mr. Boily's safety, particularly

because of the animosity that some guards might have towards him. It was agreed upon that Mr. Boily would call the embassy twice a week and that he would receive the medication that his condition required. Mr. Dubeau and Ms. Malingreau also spoke with the prison doctor, primarily about Mr. Boily's health and medication.

[35] That same day, the acting head of mission of the Canadian Embassy, Grant Manuge, telephoned the deputy director general for North America of the Mexican Ministry of Foreign Affairs (Exhibit 83; May 9, 2022, transcript, pp 74–76). He told him that Mr. Boily had complained about his mistreatment, but avoided using the word "torture." He reminded him of the diplomatic assurances Mexico gave and emphasized Canada's consular interest in Mr. Boily's case. The following day, on August 23, his interlocutor called him back and informed him that he had requested that the Zacatecas authorities conduct an investigation into the matter and that they respect Mr. Boily's human rights. A few weeks later, the Mexican authorities sent a diplomatic note containing the prison warden's response dated August 23 in which he stated that Mr. Boily had always had access to a telephone and denying the allegations of torture. He added that Mr. Boily had been examined by a doctor in the presence of Mr. Dubeau and that no injuries had been observed (Exhibit 123A).

[36] During the August 22 visit, Mr. Dubeau reassured Mr. Boily that he could speak in confidence to the Human Rights Commission's representatives (May 3, 2022, transcript, p 118). Mr. Boily told Mr. Dubeau that he wished to be transferred to another prison, where the guards would not know his history. On September 4, 2007, he gave a written statement to the Human Rights Commission in which he claimed that he was tortured at the Cieneguillas prison on

August 17, 19 and 21, 2007. By September 4, however, Mr. Boily was more hesitant about a transfer because of information he had received about the federal prison in Puente Grande, where discipline was stricter. He also stated that the attitude of the prison staff had completely changed after Mr. Dubeau and Ms. Malingreau's August 22 visit. He said, "Now I feel calm. I'm not afraid anymore." He stated that he did not want to make a complaint. He ultimately decided to abandon the transfer request (May 3, 2022, transcript, pp 21–22, 127–31). He remained incarcerated at the Cieneguillas prison until 2010.

[37] Before going any further, it may be useful to note that Mr. Boily was convicted of escaping from legal custody and manslaughter in connection with the events of March 1999 and was sentenced to serve 30 years in prison, which was subsequently reduced to 16 years. In June 2017, he was repatriated to Canada under the *International Transfer of Offenders Act*, SC 2004, c 21. He has been on parole since December 2017.

D. *The Present Action for Damages*

[38] Mr. Boily commenced this action for damages in 2010. The federal government responded with a motion to strike, claiming that this action was an abuse of process, as it called into question the Minister of Justice's decision to extradite Mr. Boily, which had already been upheld by the Quebec Court of Appeal.

[39] Prothonotary Morneau allowed this motion in part: *Boily v Canada (Attorney General)*, 2010 FC 1228. He determined that the portions of the statement of claim impugning the decision to extradite Mr. Boily and the decision to accept assurances from Mexico amounted to an abuse

of process. However, he declined to strike the portions of the statement that dealt with the lack of adequate monitoring of the Mexican authorities once the decision to extradite Mr. Boily had been made. According to the Prothonotary, that was a separate cause of action.

[40] The decision of Prothonotary Morneau was not appealed. It is therefore *res judicata*. It circumscribes the issues in this case.

[41] It took 12 years for the action to be perfected. The parties raised numerous procedural issues that had to be decided by this Court, and on two occasions by the Federal Court of Appeal. There is no need to enumerate them.

[42] It should also be noted that although the case raises issues of constitutional law and even international law, the parties agree that the applicable suppletive law is Quebec law, presumably pursuant to article 3126 of the *Civil Code of Québec*, since Mr. Boily resided in Quebec at the time of his extradition and continues to do so today. In terms of the rules of evidence, the *Canada Evidence Act*, RSC 1985, c C-5, must of course be applied, supplemented with Quebec law if necessary.

E. *The Committee Against Torture's Decision*

[43] Concurrently with the present action, Mr. Boily pursued his efforts to obtain a decision regarding the complaint he submitted to the United Nations Committee against Torture. On November 14, 2011, the Committee upheld this complaint: UN Doc CAT/C/47/D/327/2007. After setting out the parties' submissions and finding the complaint admissible, the Committee

stated that the issue at hand was "whether, at the time the extradition took place, [Mr. Boily] ran a foreseeable, real and personal risk of torture." The Committee's findings are set out in paragraph 14.5 of its decision:

> In this case, the Committee is of the view that the State party did not take into account, before deciding on extradition, all of the circumstances indicating that the complainant ran a foreseeable, real and personal risk of torture. First, the State party gave no consideration to the fact that the complainant would be sent to the same prison in which a guard had died during the complainant's escape years before, and that the guard's death too was a subject of the extradition request. Second, the agreed system of diplomatic assurances was not carefully enough designed to effectively prevent torture. The diplomatic and consular authorities of the State party were not given due notice of the complainant's extradition and not informed of the need to stay in close and continuous contact with him from the moment he was handed over. In this case the diplomatic assurances and the foreseen consular visits failed to anticipate the likelihood that the complainant had the highest risk of being tortured during the initial days of his detention. This risk proved to be true, as the complainant arrived in Mexico on 17 August 2007 and stated that he was subsequently tortured from 17 to 20 August 2007. However, the State party did not take steps to check on his safety until 22 August 2007. The Committee concludes therefore that the extradition of the complainant to Mexico in those circumstances constituted a violation by the State party of article 3 of the Convention.

[44] Notwithstanding the Committee's decision, I will undertake an independent review of Mr. Boily's claim, for two main reasons.

[45] First, this Court is a Canadian court that applies first and foremost Canadian law. In contrast, the Committee makes decisions according to international law. The application of international law by Canadian courts raises complex, sensitive and sometimes controversial issues, as evidenced by the recent cases of *Nevsun Resources Ltd v Araya*, 2020 SCC 5, and *Quebec (Attorney General) v 9147-0732 Quebec Inc*, 2020 SCC 32. In some cases, Canadian law

may provide a complete solution to a dispute. As will be seen below, that is the case here. In such cases, it is not necessary to address issues of international law.

[46] Second, the evidence before this Court is much more extensive than that which was before the Committee. The Committee reaches its decision based on the record and does not hear witnesses. In contrast, the proceedings before this Court involve the communication of documentary evidence in the possession of the parties and a trial in which witnesses are heard orally and cross-examined. The cross-examination of witnesses at trial remains a privileged tool in the search for truth, particularly when their credibility is a central issue. This Court's fact-finding advantage has been summarized by the Supreme Court of Canada as follows: "[t]he trial judge is better situated to make factual findings owing to his or her extensive exposure to the evidence, the advantage of hearing testimony viva voce, and the judge's familiarity with the case as a whole": *Housen v Nikolaisen*, 2002 SCC 33 at paragraph 18, [2002] 2 SCR 235.

III. Did the Alleged Events Occur?

[47] Before addressing the legal issues raised by Mr. Boily's action, it is necessary to establish the facts. This is a necessary and delicate exercise, since the federal government argues that Mr. Boily is not a credible witness and that he has not met the burden of proving the facts on which his action is based, namely that he was tortured when he arrived at the Cieneguillas prison in August 2007.

[48] In short, the federal government claims that Mr. Boily's criminal record seriously affects his credibility. Mr. Boily's testimony is allegedly inconsistent and contradicted by other evidence

presented at trial. Most importantly, Mr. Boily's story would be implausible, particularly with respect to his criminal involvement and the circumstances of his return to Canada after his escape. Finally, Mr. Boily's version of events is not corroborated; on the contrary, it would be contradicted by the denial of the Mexican authorities and by the testimony of one of the prison guards he accused of torturing him.

[49] For the reasons that follow, I find that Mr. Boily is credible and has proven the facts that he alleges on a balance of probabilities.

A. *Basic Principles*

[50] To analyze these claims, one must begin with a reminder of certain basic principles concerning the standard of proof in civil cases and the assessment of the credibility of witnesses.

(1) Standard of Proof

[51] The search for truth is often presented as the ultimate goal of a trial. However, judges do not have direct access to the truth. They must rely on the evidence presented to them in order to make findings of fact. In a trial, the evidence is often equivocal. Judges seek the truth, but rarely find absolute certainty. A decision must often be made in the face of residual uncertainty as to the facts.

[52] The degree of uncertainty that can be tolerated in determining the facts is reflected in what is known as the standard of proof. In a criminal trial, the margin of uncertainty is narrow:

guilt must be proven beyond a reasonable doubt. The reason for adopting such a high standard of proof is to avoid at all costs convicting an innocent person. In other words, we prefer that the Crown bear the burden of any residual uncertainty with respect to the facts.

[53] On the other hand, in civil matters, a greater degree of uncertainty is tolerated, because society does not seek to protect the defendant at the expense of the plaintiff. The standard of proof does not favour one party; it does not seek to place the burden of uncertainty on one party over the other: Sidney N Lederman, Alan W Bryant and Michelle K Fuerst, *The Law of Evidence in Canada*, 6th ed (Markham: LexisNexis, 2022) at paragraph 5.65 [*Sopinka on Evidence*]; *FH v McDougall*, 2008 SCC 53 at paragraph 42, [2008] 3 SCR 41 [*McDougall*].

[54] This standard of proof is the balance of probabilities. It is described in article 2804 of the *Civil Code of Québec*:

2804. Evidence is sufficient if it renders the existence of a fact more probable than its non-existence, unless the law requires more convincing proof.	**2804.** La preuve qui rend l'existence d'un fait plus probable que son inexistence est suffisante, à moins que la loi n'exige une preuve plus convaincante.

[55] The factual issue that is central to this case is whether Mr. Boily was indeed tortured in the days following his extradition to Mexico. The standard of proof on a balance of probabilities means that I must consider whether it is more likely than not that this claim is true. If it is, I must find that Mr. Boily was tortured, even if there remains some doubt or a possibility that it is not true.

[56] Neither the seriousness of Mr. Boily's allegations, nor the fact that they may otherwise constitute a criminal offence, justify the imposition of a higher standard: *McDougall*, at paragraphs 40 and 49.

[57] The fact that the standard of proof is lower in civil cases than in criminal cases does not mean that fact-finding is a task that can be taken lightly. When a judge makes a finding of fact despite lingering uncertainty, the judge is simply applying the standard of proof on a balance of probabilities. Of course, this uncertainty makes fact-finding more difficult, but "[a]s difficult as the task may be, the judge must make a decision": *McDougall*, at paragraph 46.

(2) Assessing Credibility

[58] In this case, Mr. Boily's credibility is a crucial factor in assessing the evidence on a balance of probabilities. Indeed, the evidence of the August 2007 acts of torture rests almost entirely on Mr. Boily's testimony. It follows that Mr. Boily's credibility is a decisive factor, since the truth of his testimony necessarily results in the rejection of the federal government's factual arguments; see, by analogy, *McDougall*, at paragraph 86.

[59] Credibility is simply a measure of the reliability of a person's testimony. Courts attach great importance to assessing the credibility of witnesses in order to avoid basing their decisions on evidence that is deceitful or merely erroneous.

[60] Assessing credibility is not a scientific or mathematical exercise. Rather, it is a matter of common sense. Like any person who must consider whether they believe what another person

tells them, judges weigh all of the available information in order to make a judgment about the credibility of witnesses. The rules of evidence circumscribe the type of information that may be considered, in part to prevent the assessment of credibility from overshadowing the substantive issues or from becoming a trial of the witness' character.

[61] The rules of evidence, however, do not dictate the outcome of the exercise or the weight to be given to each relevant piece of evidence. Nevertheless, case law has developed a number of principles to guide this process. These principles have been developed primarily in the criminal context. In many respects, they are related to the presumption of innocence and the respective roles of the judge and the jury. Regardless, the wisdom they embody is equally useful in civil matters, to help the judge avoid the pitfalls of falsehood and failing memory.

[62] The nature of the federal government's submissions leads me to consider the role of a witness's criminal record and of corroborating evidence in assessing credibility. In criminal cases, the judge must caution the jury against convicting an accused on the basis of testimony of doubtful credibility unless it is corroborated: *Vetrovec v The Queen*, [1982] 1 SCR 811 [*Vetrovec*]; *R v Khela*, 2009 SCC 4, [2009] 1 SCR 104. A witness's criminal record is a factor that can adversely affect the witness's credibility and triggers the application of this rule. The reason is simple: a person who violates the basic social norms embodied by the criminal law is also likely to disregard the social norm of telling the truth. To this end, under section 12 of the *Canada Evidence Act*, RSC 1985, c C-5, witnesses may be asked whether they have ever been convicted of any criminal offence, and proof of the convictions may be adduced if need be.

[63] However, a criminal record is not a bar to admissibility or a presumption that the testimony is not credible: *R v Corbett*, [1988] 1 SCR 670 at 687. In that case, the Supreme Court suggested a more nuanced approach (at p 685):

> There can surely be little argument that a prior criminal record is a fact which, to some extent at least, bears upon the credibility of a witness. Of course, the mere fact that a witness was previously convicted of an offence does not mean that he or she necessarily should not be believed, . . .

[64] Nor does the rule in *Vetrovec* translate into a strict requirement of corroboration. In criminal cases, an accused may be convicted on the basis of the testimonial evidence of an unsavoury witness, provided the jury is satisfied that that evidence is true: *Khela*, at paragraph 37. Nor is there a strict requirement of corroboration in civil cases. Of course, corroborative evidence increases the likelihood that an alleged fact is true. Nevertheless, uncorroborated testimony may, depending on the circumstances, establish a fact on a balance of probabilities. Indeed, article 2844 of the *Civil Code of Québec* specifically states that testimonial evidence may be given by a single witness. Similarly, in *McDougall*, at paragraph 80, the Supreme Court held that, after carefully weighing all the relevant facts, a trial judge could believe a witness who had reason to lie even in the absence of corroboration. See also *Superior Energy Management Gas, lp c 9102-8001 Québec inc*, 2013 QCCA 682, at paragraph 7.

[65] Another important principle in assessing credibility is the consistency that one would expect from a witness. A person who has observed certain facts should be able to provide a similar description of those facts on different occasions as well as provide an account that is internally coherent. In this regard, contradiction can reveal gaps in memory or expose falsehoods. Cross-examination is probably one of the most incisive tools for detecting

inconsistencies in testimony. A witness may also be contradicted by the witness's previous statements or by the testimony of others.

[66] Lastly, credibility is assessed on the basis of plausibility, that is, by asking whether the reported facts are consistent with common sense or common experience. The concept of plausibility was described as the testimony's "harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" in a classic decision of the British Columbia Court of Appeal: *Faryna v Chorny*, [1952] 2 DLR 354 at 357. In assessing the plausibility of testimony, two pitfalls must be avoided.

[67] First, improbability should not be confused with implausibility: *Al Dya v Canada (Citizenship and Immigration)*, 2020 FC 901 at paragraphs 35–36 [*Al Dya*]. A fact is not implausible merely because it has less than a 50% probability of occurring. Improbable things can happen. Therefore, findings of implausibility should be made only in the clearest cases.

[68] Second, to determine whether facts occurring in a foreign country are plausible, care must be taken not to give undue weight to common experience tied to the Canadian context: *Al Dya*, at paragraphs 27–28. Indeed, what would be implausible in Canada may occur frequently in another country. This is particularly important in this case. It is risky to make findings of implausibility about facts relating to crime or the prison setting in Mexico in the absence of reliable information on the subject.

[69] The particular context of the allegations of torture must be kept in mind when applying the foregoing principles. In the vast majority of cases, it is the police or prison authorities who practice torture. It should not be surprising that many victims of torture are accused of a crime or have a criminal record. Since torture is officially prohibited in much of the world, it is usually carried out in secret and victims will find it difficult to provide corroborative evidence. Unrealistic evidentiary requirements should therefore be avoided, as they would effectively provide torturers impunity, which would have deleterious effects.

[70] With these principles established, I now turn to the various grounds raised by the federal government to challenge Mr. Boily's credibility. I will first consider the impact of his criminal record. I will then consider the consistency of his testimony, and assess whether other evidence contradicts or corroborates it. Finally, I will address the issue of plausibility and the role of expert testimony in assessing credibility.

B. *Criminal Record and Propensity to Lie*

[71] In 1998 and 1999, Mr. Boily committed and was convicted of drug trafficking, escaping from legal custody and manslaughter. These are undoubtedly serious crimes, for which Mr. Boily has received lengthy sentences. These convictions certainly show that Mr. Boily was willing, at that time, to breach society's basic norms.

[72] Not all offences have the same effect on credibility. A conviction for a "crime of dishonesty" has a greater impact on a witness's credibility since it tends to indicate a greater propensity to lie. Similarly, a recent conviction will carry more weight than an older one,

especially if the latter is followed by a long period of compliance with the law: *Corbett*, at 740–2.

[73] In my opinion, the escape from the Cieneguillas prison is a crime entailing a significant element of dishonesty, as it involves a complex plan to deceive the prison authorities. The escape also demonstrates a profound lack of respect for judicial and correctional institutions. Given the seriousness of the escape, it is not necessary for me to comment on the other crimes of which Mr. Boily has been convicted.

[74] When cross-examined, Mr. Boily also admitted that he had attempted to saw through one of the bars on the window of his cell in the Hull jail, where he was being held pending extradition. However, no evidence was filed of any criminal conviction or even a disciplinary offence in connection with this matter. Without more information, it is difficult for me to assess the seriousness of this attempt. In any event, the 1999 escape is a far more serious offence.

[75] It is clear that Mr. Boily's criminal record is an important factor to consider in assessing his credibility. As the Supreme Court noted in *Corbett*, however, the passage of time must also be taken into account. Mr. Boily's only convictions relate to offences that took place in 1998 or 1999, over twenty years ago. The event at the Hull jail took place at least fifteen years ago. All the evidence suggests that Mr. Boily has been a law-abiding citizen since his extradition in 2007 and for the first fifty years of his life. Thus, his involvement in criminal activities is limited to a specific time of his life.

[76] Mr. Boily's criminal record therefore requires me to take a critical look at his testimony and to carefully weigh all of the elements affecting his credibility. However, considering it has been fifteen or twenty years since he committed those offences, it is not an absolute bar to his action or a compelling reason to dismiss his testimony outright.

C. *The Alleged Contradictions*

[77] At trial, Mr. Boily's testimony was consistent. Even taking into account the passage of time, his testimony about his first days in the Cieneguillas prison and the torture he was subjected to is specific and detailed. The description of the techniques that his torturers used and the sensations that he experienced is credible at first glance. When cross-examined, he maintained his version of the facts and did not contradict himself.

[78] I now turn to some of the inconsistencies raised by the federal government. At the outset, I note that the first two inconsistencies do not relate to the instances of torture in August 2007, but rather to collateral facts.

(1) One or Two Trips?

[79] In his testimony in chief at trial, Mr. Boily stated that he had carried a first shipment of drugs in January 1998. The shipment in March 1998, when he was arrested, was therefore the second trip he made. Yet, in his 2015 written examination, when asked, [TRANSLATION] "was your arrest in connection with marijuana trafficking in 1998 the first time you were involved in drug trafficking?", he responded, [TRANSLATION] "yes, it was the first time".

[80] When confronted with this contradiction at trial, he simply stated that, in his view, the January and March 1998 trips were a single occasion or involvement (May 3, 2022, transcript, pp 146–7). This explanation may be puzzling at first. However, Mr. Boily had already disclosed the existence of the January 1998 trip in his testimony before the Superior Court in 2005. Therefore, when responding to the written examination in 2015, Mr. Boily was not seeking to hide an aspect of his past that he had previously managed to conceal. Rather, I believe that he was attempting to describe the events in a more favourable light by playing on words. This may have some negative effect on his credibility.

(2) Lies and Omissions in his Statements to Mexican Police

[81] When Mr. Boily was arrested in 1998, he initially claimed that he was unaware that drugs were hidden in his vehicle. According to the federal government, this lie undermines his credibility. Furthermore, when questioned by the Mexican police, he did not denounce the people he was working for. In respect of both issues, he explained at trial that his actions were motivated by fear of retaliation against himself or his in-laws (May 2, 2022 transcript, p 76; May 3, 2022, p 74).

[82] While one might wish that criminals make full confessions as soon as they are caught, I believe that Mr. Boily's fears of retaliation are sufficiently serious that the statements he made to the Mexican police at the time of his arrest or shortly thereafter should not be held against him and should not affect his credibility today.

(3) Cessation of Fear

[83] At trial, Mr. Boily testified about the extreme fear he felt for several weeks after the events. This fear prevented him from sleeping at night, as he was anticipating and visualizing a new torture session, and caused him headaches, dizziness and nausea. He made similar statements to Professor Brunet, the psychologist who examined him and testified at trial. However, on September 4, 2007, he told the Zacatecas State Human Rights Commission that he was no longer afraid. He also ceased his efforts to transfer to another correctional institution. The federal government sees this as a contradiction and believes that if Mr. Boily had truly been tortured, he would have sought to be separated from his torturers at all costs.

[84] Nevertheless, Mr. Boily offered credible explanations for the change in his position. In written statements to the Commission, he declared that the attitude of the prison staff had changed dramatically after Mr. Dubeau's visit on August 22. In addition, he explained that he did not want to be transferred to Puente Grande Federal Prison because he had learned that discipline was stricter there (May 3, 2022, transcript, pp 21–22, 127–31).

[85] In my opinion, there is no real inconsistency between these statements. The statements to the Commission and the abandonment of his request for a transfer are the result of a rational thought process regarding which strategy to adopt to reduce the risk of torture and ill-treatment and to enjoy suitable conditions during his detention. Noting the change in attitude of the prison staff since Mr. Dubeau's visit and the implementation of close consular monitoring, Mr. Boily may have, rightly or wrongly, believed that he had everything to lose by being transferred to

another institution. As the saying goes, “if it ain’t broke, don’t fix it.” His statement that he was no longer afraid should be read in this context. It should also be remembered that Mr. Boily never wished to file a formal complaint with the Commission. Moreover, it is a myth that victims unfailingly seek to avoid their assailant: *R v JC*, 2021 ONCA 131, at paragraph 66.

[86] In contrast, the statements made to Professor Brunet refer to a situation of hypervigilance and inability to sleep at night. In other words, Mr. Boily is describing his instinctive reactions and not the outcome of a rational thought process (May 3, 2022, transcript, pp 19–20).

D. *Conflicting and Corroborating Evidence*

[87] The federal government insists heavily on the lack of corroborating evidence of Mr. Boily’s alleged torture. However, the question of corroboration must be approached with a certain amount of common sense taking into account the nature of the events to be proven. Needless to say, torture is universally condemned. Countries that have ratified the Convention, such as Mexico, have the duty to criminalize torture. In these circumstances, it is likely that those who practice torture will avoid leaving evidence of it. Requiring systematic corroboration of allegations of torture may well render remedies for violations of the Convention ineffective; by way of analogy, see *Canada (Citizenship and Immigration) v USA*, 2014 FC 416 at paragraph 24. In *McDougall*, at paragraph 80, Justice Rothstein noted that one must be careful not to make corroboration a strict requirement in sexual assault cases, since these “normally occur in private”. The same reasoning applies to torture—corroboration cannot be required if no one else was in the room where it happened.

[88] This being said, I now turn to three aspects of the evidence that, according to the federal government, would contradict Mr. Boily's testimony.

(1) Testimony of the Prison Guard

[89] At trial, the federal government presented, via videoconference, the testimony of one of the three prison guards who allegedly tortured Mr. Boily. This guard categorically denied having tortured or abused Mr. Boily in any way.

[90] The assessment of this testimony raises delicate questions.

[91] To state the obvious, it is highly unlikely that a prison guard would admit to torture. Such a confession would result in major criminal consequences for the person concerned and possibly for others. This is especially true since Mr. Boily's allegations have not been seriously investigated in Mexico. The guard is therefore not under any pressure to confess to the crime. Put simply, if the guard committed a serious crime by torturing Mr. Boily, it is in his interest to lie.

[92] Therefore, the testimony I heard could just as easily be that of an honest man who has nothing to hide or that of a torturer. This testimony is therefore of little use in establishing whether Mr. Boily was tortured. I would add that, in view of the guard's complete denial during the examination in chief, Mr. Boily's counsel did not have to cross-examine him directly on the alleged instances of torture.

[93] Still, it is useful to focus on some of the details of this testimony. The guard acknowledged that he was working at the Cieneguillas prison in August 2007. He remembered that Mr. Boily was there and that he was placed in a section of the prison called "*los separos*". Although he does not remember if he was at work on the evenings of August 17, 19, and 21, 2007, these facts are consistent with Mr. Boily's account. He alluded to the fact that he worked 24-hour shifts, followed by a full day of rest (May 11, 2022 transcript, pp 75, 95), which might explain why Mr. Boily was tortured at 48-hour intervals. Furthermore, he acknowledged that he knew the guard who lost his life during Mr. Boily's escape, even though he was not a close friend. This is consistent with Mr. Boily's account that his torturers were motivated by a desire to avenge the dead guard. He also confirmed that one of the guards Mr. Boily identified by first and last name had been the prison's head of security. Although he testified in chief that guards could not go to the "*separos*" section at night, he acknowledged on cross-examination that it was always possible to access it in the event of an emergency.

[94] There is more. In his testimony in chief, the guard stated that he did not know David, one of the guards who participated in the torture and whom Mr. Boily only knew by first name. On cross-examination, the guard was asked when he had last seen David. He spontaneously answered that he had not seen him for a long time, adding [TRANSLATION] "if that is the David you are talking about". He added that he did not know David's last name, only the nickname that everyone at the prison knew him by (May 11, 2022 transcript, pp 76, 90–91).

[95] All this gives the impression that the guard knows more than he is willing to reveal. Moreover, his statements corroborate certain details of Mr. Boily's testimony, even though the guard denies having tortured him.

[96] Before leaving this topic, I wish to make it clear that these reasons should not be read as a finding with respect to the guard's potential criminal liability. Suffice it to say that the standard of proof in criminal matters is fundamentally different from that in civil matters. This judgment concerns the civil liability of the Canadian federal government, not the criminal liability of any individual.

(2) Lack of Visible Signs of Torture During Mr. Dubeau's Visit

[97] The federal government submits that Mr. Boily should not be believed because he bore no visible marks of torture when he met with Mr. Dubeau on August 22, 2007.

[98] This argument faces an obvious obstacle: it is well known that torture techniques are often designed to leave no visible marks. Torturers are usually aware of the illegality of their conduct and seek to conceal their crime. The Supreme Court of Canada recognized this grim reality in *Badesha*, at paragraphs 64 and 65, and in *Schreiber v Canada (Attorney General)*, 2002 SCC 62 at paragraph 63, [2002] 3 SCR 269; see also *Cetinkaya v Canada (Citizenship and Immigration)*, 2012 FC 8 at paragraph 53.

[99] In any event, Mr. Boily did not claim that the torture had left any such marks (May 3, 2022, transcript, p 12). However, he was unaware of the condition of his back, which he was

unable to see for himself. He added that he was crying when he told Mr. Dubeau about his ordeal.

[100] The federal government nonetheless argued that, given the degree of violence to which Mr. Boily testified, it is inconceivable that he would not have had broken bones or, at the very least, bruises. However, it is difficult to measure the physical force used by Mr. Boily's torturers and to deduce that visible marks would necessarily have been present. Such an exercise involves a large measure of speculation. One can just as easily say that Mr. Boily's torturers necessarily took the desired precautions so as not to inflict visible physical injuries.

[101] In any event, Mr. Dubeau's testimony in this regard is not very reliable. As noted previously, Mr. Dubeau provided three accounts of his meeting with Mr. Boily: in a report he wrote on the same day, during his examination for discovery in 2012 and at trial. These three versions of his story are not always compatible. On cross-examination, Mr. Dubeau had to admit that some of his answers were inaccurate (with respect to the clothes Mr. Boily was wearing, for example), that he had failed to write down some of Mr. Boily's statements (the first name of one of the torturers and the fact that a fellow inmate had witnessed him returning to his cell), and that his memory sometimes played tricks on him (May 10, 2022, transcript, pp 141–7, 183–5). At trial, he testified that he had a conversation with the Mexican Ministry of Foreign Affairs on August 16, 2007, although he was not entirely sure who he had spoken to, despite the fact that he denied having had such a conversation in the 2012 examination for discovery (May 10, 2022, transcript, pp 35–36, 117–21, 123–5).

[102] In fact, at trial, Mr. Dubeau attempted to portray Mr. Boily's condition as normal, since he was walking normally and did not reveal any aches or signs of psychological distress. These statements, however, must be considered with some skepticism, since these facts are not mentioned in the report written on the day of that meeting (Exhibit 84). Instead, the report says that Mr. Boily was emotional when he recounted the instances of torture, and relieved at the end of the meeting. The federal government chose not to call Ms. Malingreau to the witness stand, even though she was present at the meeting. For these reasons, I believe that the account written on the day of the meeting is a more accurate description of what took place. On the whole, this account corroborates Mr. Boily's allegations more than it contradicts them.

[103] In any event, Mr. Dubeau did not take certain basic steps that could have shed additional light on Mr. Boily's allegations. He did not ask Mr. Boily to remove his shirt. He did not ask the prison doctor to examine him; in fact, the meeting with the doctor focused on Mr. Boily's blood pressure problems. He did not actively seek details from Mr. Boily that would advance any potential investigation. When Mr. Boily volunteered certain details, Mr. Dubeau did not take note of them. The failure to take such steps reduces the probative value of Mr. Dubeau's testimony. Moreover, the federal government can hardly blame Mr. Boily for the lack of corroborative evidence that could have been obtained if Mr. Dubeau had performed such basic inquiries.

(3) The Mexican Authorities' Denial

[104] The federal government also relies on a diplomatic note sent by Mexico on September 10, 2007, which reproduces a report sent by the warden of the Cieneguillas prison on

August 23, 2007, the day after Mr. Dubeau's visit. The warden denied that Mr. Boily was tortured, essentially, because he was examined by the prison doctor in the presence of Canadian embassy personnel and no injuries were observed.

[105] Although Mr. Boily did not object to the admission of this document into evidence, it contains several layers of hearsay. Neither the author of the diplomatic note, nor the warden nor the doctor testified at trial or were cross-examined. It also was not explained to me why this would not have been possible.

[106] In any event, no value can be placed on this denial. As I have noted above, the absence of physical injury is not determinative. Moreover, the warden's statements are contradicted by Mr. Dubeau's report and testimony. Contrary to the warden's statement, Mr. Dubeau was not present when the prison doctor examined Mr. Boily. This examination took place during the initial interview between Mr. Dubeau and the warden. There is no indication that the doctor was aware of the allegations of torture or that his examination was intended to detect signs of torture. The subsequent meeting between Mr. Dubeau, Mr. Boily, the doctor and the warden focused on Mr. Boily's blood pressure and the medication that had been prescribed for it (see Mr. Dubeau's report, Exhibit 84; Mr. Boily's May 3, 2022, testimony, pp 15–16; Mr. Dubeau's May 10, 2022, testimony, pp 102–4).

[107] The warden's denial is not based on anything other than the doctor's findings. Yet in the presence of an allegation of torture, one would have expected the warden to carry out more thorough inquiries, in particular by questioning the guards present at the time of the alleged

events. This is especially true as the matter was attracting the scrutiny of foreign officials. The warden's brief response is clearly not that of someone seeking the truth.

[108] The evidence presented at trial contradict other statements made by the warden. In particular, it is established that Mr. Boily did not have access to a telephone for the first three or four days of his detention. Yet the warden denies that there were any restrictions on Mr. Boily's access to a telephone. It is therefore difficult to give credence to the warden's denials.

[109] The federal government's witnesses all agreed that the September 10, 2007, diplomatic note was not the result of an adequate investigation (May 6, 2022, transcript, pp 125–6; May 9, 2022, pp 150–2; May 10, 2022, pp 232–4). It is difficult to see how the federal government could use it to undermine Mr. Boily's credibility.

E. *Plausibility*

[110] I will now examine Mr. Boily's account in terms of plausibility. I will begin by demonstrating the plausibility of Mr. Boily's allegations of torture and then look at some specific aspects of his account.

(1) Frequent Use of Torture in Mexico

[111] In its closing submissions, the federal government acknowledged the plausibility of the basic elements of Mr. Boily's story, namely, that he was tortured by guards who wanted to

avenge the death of one of their colleagues. Despite this concession, it may be useful to clarify what makes these facts plausible.

[112] The endemic nature of torture in Mexico has been extensively documented in reports by non-governmental organizations and United Nations treaty monitoring bodies. In matters of immigration and extradition, such reports are frequently used to assess the risks a person would face upon removal: see, for example, *Badesha*, at paragraph 44; *Koffi v Canada (Immigration, Refugees and Citizenship)*, 2019 FC 970 at paragraph 58. At trial, Mr. Robertson, who was director of the consular case management division at the time, acknowledged that such reports were frequently used by the Department of Foreign Affairs (May 6, 2022, transcript, pp 78–79). In the context of a civil trial, such reports are not evidence of the facts in dispute (or "adjudicative facts"), but they can be used to distinguish what is plausible from what is not in a given country.

[113] For example, the United States State Department report on the human rights situation in Mexico in 2005 (Exhibit 215) states that torture remains a serious problem, that confessions obtained under torture are often admitted into evidence despite this being prohibited by law, and that torturers are rarely punished. In 2014, Amnesty International published a report (Exhibit 223) synthesizing the findings regarding torture in Mexico from previous years. The report noted the very frequent use of torture by law enforcement officials and the impunity these officials enjoy. In 2019, the World Justice Project published a report entitled *Failed Justice: Prevalence of Torture in Mexico's Criminal Justice System* (Exhibit 227), based on data collected between 2006 and 2016. The report notes that torture is mainly used to extract confessions, but that it is

also practiced in prisons (pages 34 and 35 of the report). Finally, in 2004, in its fourth periodic report submitted to the Committee against Torture, the Mexican government itself acknowledged that "torture continues to be practised in Mexico despite all the international instruments signed by Mexico and the legislative and administrative measures taken to eradicate it" (UN Doc CAT/C/55/Add.12; Exhibit 231, paragraph 299). These reports are not evidence of the facts at issue in this case, but they do demonstrate that Mr. Boily's account is consistent with "the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions", to use the words of the British Columbia Court of Appeal in the previously cited decision.

(2) Mr. Boily's Degree of Criminal Involvement

[114] In reality, the allegations of implausibility made by the federal government do not relate so much to Mr. Boily's alleged torture, but rather to his description of the criminal activities he was involved in and the circumstances of his escape.

[115] Briefly put, the federal government claims that it is implausible that for his first or second criminal outing, Mr. Boily was entrusted with a shipment with a retail value of several million dollars. It also submits that it is implausible that Mr. Boily was able to make it to Canada after his escape without the assistance of the criminal organizations for whom he had carried drugs.

[116] Even assuming that the value of the shipment was significant, it is quite possible that the prospect of retaliation against his in-laws was a powerful incentive for Mr. Boily to deliver the shipment to the agreed upon destination. It is therefore not implausible that a criminal

organization entrusted him with a very valuable shipment. Moreover, if Mr. Boily had been involved in organized crime at a high level, we could assume that he would not have carried the shipment himself.

[117] As to the circumstances of his escape and return to Canada, I agree that Mr. Boily's testimony was vague in some respects. Nevertheless, I understand that he did not want to name the persons who helped him, possibly because this would expose them to criminal prosecution in Mexico. On cross-examination, he denied receiving any assistance from organized crime, and there was no evidence to the contrary. One might also be surprised that, while wanted by the Mexican authorities for serious offences, Mr. Boily was able to board a plane in the United States using a driver's license showing his true identity. However, it was only in 2003 that Mexican authorities asked Canadian police to search for Mr. Boily, spelling his last name incorrectly. This mistake caused considerable delay (transcript of the 2005 Superior Court Hearing, Exhibit 1, pp 53, 83, 86–8). It is therefore possible that American authorities were not sent a wanted notice in 1999 or that Mr. Boily's name was spelled incorrectly, which would have allowed him to fly undetected.

[118] All in all, I do not find this to be one of the those clearest of cases that would justify a finding of implausibility and the rejection of Mr. Boily's evidence in its entirety. Moreover, the alleged implausibilities do not relate to the facts grounding the cause of action, but rather relate to collateral facts.

(3) August 21 Incident

[119] One final aspect of Mr. Boily's account may also give rise to questions. On August 21, 2007, Ms. Desjardins faxed a letter to the prison warden announcing Mr. Dubeau's visit the following day. The federal government argues that it is implausible that Mr. Boily was tortured on the evening of August 21, when the Canadian consular staff visit was imminent.

[120] Although it is legitimate to ask this question, answering it is a matter of speculation. The evidence does not reveal when the August 21 letter was transmitted, nor when the prison warden became aware of it. It is also unclear whether, at that precise moment, the warden was aware of Mr. Boily's allegations or the identity of the guards who allegedly tortured him. It is therefore possible that the prison warden simply did not have the opportunity to act to prevent a new episode of torture. In any event, this Court's jurisprudence reminds us that it is risky to speculate regarding what a "reasonable agent of persecution" would do: *Senadheerage v Canada (Citizenship and Immigration)*, 2020 FC 968 at paragraph 19, [2020] 4 FCR 617; *Hernandez Cortez v Canada (Citizenship and Immigration)*, 2021 FC 1392 at paragraph 36; *Aboutaleb v Canada (Citizenship and Immigration)*, 2022 FC 810 at paragraph 17. This is not, therefore, one of those clearest of cases in which it would be appropriate to draw a finding of implausibility.

F. *Psychiatric Evidence Regarding Malingering*

[121] The federal government called psychiatrist Gilles Chamberland to testify, mainly with respect to the degree of the functional impairment Mr. Boily had allegedly suffered. Dr.

Chamberland also testified that Mr. Boily met many of the criteria for malingering. I will disregard Dr. Chamberland's opinion for the following reasons.

[122] It is well established that expert evidence intended solely to enhance or undermine the credibility of testimony is inadmissible: *R v Béland*, [1987] 2 SCR 398 at 415–416 [*Béland*]; *R v Marquard*, [1993] 4 SCR 223 at 247–249 [*Marquard*]; *Sopinka on Evidence*, at paragraph 12.160; Catherine Piché, *La preuve civile*, 6th ed, Montréal, Yvon Blais, 2020 at 385–386. This is because expert evidence can only relate to facts or opinions that are beyond the experience or knowledge of the trier of fact. Indeed, "[i]t is a basic tenet of our legal system that judges and juries are capable of assessing credibility and reliability of evidence": *Béland*, at 416. Expert evidence regarding credibility is only admissible where it concerns conduct or impediments to testifying that the trier of fact cannot appreciate: *Marquard*, at 249.

[123] To support his statement that malingering was likely, Dr. Chamberland relied on the American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, Fifth Edition. Arlington, VA, American Psychiatric Association [the DSM-5], at 727:

> Malingering should be strongly suspected if any combination of the following is noted:
>
> 1. Medicolegal context of presentation (e.g., the individual is referred by an attorney to the clinician for examination, or the individual self-refers while litigation or criminal charges are pending).
>
> 2. Marked discrepancy between the individual's claimed stress or disability and the objective findings and observations.
>
> 3. Lack of cooperation during the diagnostic evaluation and in complying with the prescribed treatment regimen.
>
> 4. The presence of antisocial personality disorder.

[124] In the context of a trial, the first criterion is obviously tautological in nature and adds nothing to the analysis. To a large extent, the other three criteria overlap with the factors that courts use to assess credibility. A psychologist's or psychiatrist's opinion based on these criteria is nothing more than an attempt to disguise as an expert opinion what is ultimately a judgment based on common sense that is the exclusive purview of the judge. Testimony based on such criteria is inadmissible, since it is contrary to the principles flowing from *Béland* and *Marquard*.

[125] In any event, as I explain later in these reasons, Dr. Chamberland is not a credible witness. Moreover, regarding the criteria for malingering, there is no discrepancy between what Mr. Boily reports and the results of the tests administered by Dr. Chamberland, since Mr. Boily does not claim to have a functional impairment and Dr. Chamberland does not assess suffering. In his testimony, Dr. Chamberland acknowledged that Mr. Boily cooperated in the interview (May 13, 2022, transcript, p 57). Furthermore, Mr. Boily gave perfectly valid reasons for preferring psychotherapy to medication. Lastly, Dr. Chamberland admitted that he was not in a position to diagnose Mr. Boily with an antisocial personality disorder (May 13, 2022, transcript, pp 72–73).

[126] For the same reasons, I also cannot consider the testimony of Professor Brunet when assessing credibility. He testified about the validity scales contained in the psychological tests he administered to Mr. Boily as well as his own clinical ability to assess the truthfulness of his patients' accounts. For the reasons outlined above, this evidence is inadmissible for the purposes of assessing a witness's credibility.

G. *Summary of Credibility Assessment*

[127] To summarize, in 1998 and 1999, Mr. Boily committed serious crimes. The escape from Cieneguillas prison involved a certain degree of deception that may indicate a propensity to lie. These facts call for a critical look at Mr. Boily's credibility.

[128] Nonetheless, Mr. Boily's testimony was consistent and free of significant contradictions with his earlier statements.

[129] In truth, the federal government's challenge to Mr. Boily's credibility is essentially based on the idea that Mr. Boily is far more involved in organized crime than he is willing to admit. It seeks to portray Mr. Boily as a hardened criminal who would not hesitate to fabricate a story for financial gain. While such a scenario is not impossible, it has its own problems. In particular, by making false allegations of torture, Mr. Boily could very well have exposed himself to retaliation, possibly including torture. Moreover, nothing in the evidence supports such a scenario. On cross-examination, Mr. Boily maintained his testimony that the crimes committed in 1998 and 1999 constitute a circumscribed period of his life. Some aspects of his account of his criminal activity and his escape from prison may raise doubts or appear surprising, but they do not make his entire testimony implausible.

[130] In this regard, it is understandable that a claim for compensation from a man who has committed serious crimes attracts skepticism. There is no denying that Mr. Boily's criminal record gives rise to legitimate moral indignation. However, the punishment that he deserved for

those crimes did not include torture. The question of whether he was tortured is entirely independent of the crimes he committed or the links he may have had with criminal organizations. His criminal record is relevant only to assess his credibility. It should not be given undue weight because of an instinctive desire to further punish a person who has committed serious crimes.

[131] We are thus left with the testimony of the prison guard. As I explained earlier, it is difficult to give significant weight to such a denial, since in the circumstances of this case, a person who committed torture would have no reason to confess. Moreover, some aspects of the guard's testimony corroborate Mr. Boily's testimony.

[132] In sum, while there may be some residual concerns, I find that Mr. Boily is, on the whole, credible and has proven, on a balance of probabilities, that he was tortured at the Cieneguillas prison on August 17, 19 and 21, 2007.

[133] Although this is not seriously disputed, I would point out that the treatment suffered by Mr. Boily constitutes torture within the meaning of Article 1 of the Convention. Indeed, "public officials" intentionally inflicted "severe pain or suffering, whether physical or mental" on Mr. Boily in order to punish him for the death of the guard killed during the 1999 prison escape and to force him to confess to voluntary homicide.

IV. Damages for Breach of Section 7 of the Charter

[134] Having established that Mr. Boily was tortured in the days following his extradition to Mexico, it is now necessary to determine whether these facts give rise to a claim for damages against the federal government. To do so, I will apply the analytical framework established by the Supreme Court in *Vancouver (City) v Ward*, 2010 SCC 27, [2010] 2 SCR 28 [*Ward*]. Indeed, the misconduct alleged by Mr. Boily is a breach of section 7 of the Charter. Although Mr. Boily alternatively based his action on extra-contractual liability and the *Crown Liability and Proceedings Act*, RSC 1985, c C-50, I prefer to rely on the *Ward* framework, because the same substantive issues would have to be addressed, namely the breach of section 7, causation, the factors that might give rise to immunity, and the assessment of the quantum of damages. As in *Francis v Ontario*, 2021 ONCA 197 at paragraph 29 [*Francis*], it is preferable to approach the case from the perspective of the Charter rather than from the perspective of extra-contractual liability.

[135] In *Ward*, at paragraph 4, the Supreme Court summarized its proposed analytical framework as follows:

> The first step in the inquiry is to establish that a Charter right has been breached. The second step is to show why damages are a just and appropriate remedy, having regard to whether they would fulfill one or more of the related functions of compensation, vindication of the right, and/or deterrence of future breaches. At the third step, the state has the opportunity to demonstrate, if it can, that countervailing factors defeat the functional considerations that support a damage award and render damages inappropriate or unjust. The final step is to assess the quantum of the damages.

[136] The following analysis will therefore be divided according to the four steps of this framework.

A. *Breach of Section 7*

[137] I find that the federal government breached section 7 of the Charter by extraditing Mr. Boily in spite of the fact officials had just learned that he would face a substantial risk of torture. Neither the Minister of Justice nor the Quebec Court of Appeal had assessed this risk, since no one had considered that, contrary to the most basic common sense, Mr. Boily would be incarcerated at the same prison from which he had escaped and where the guard who was killed during his escape had been working. In the face of this new risk, the decision of the Minister of Justice and the decision of the Court of Appeal were no longer sufficient guarantees of Mr. Boily's section 7 rights.

[138] To demonstrate this, it is first necessary to explain how section 7 applies in the context of extradition or deportation to a foreign country. I will then apply these principles to the circumstances that flowed from the realization, on August 16, 2007, of the risk arising from the intention of the Mexican authorities to incarcerate Mr. Boily at the Cieneguillas prison. It will become apparent that this risk had not been taken into consideration in previous decisions, and it constituted a substantial risk of torture. The federal government did nothing to mitigate this risk, thereby rendering Mr. Boily's extradition contrary to section 7. The federal government failed to put forward any exceptional circumstances that would have justified Mr. Boily's extradition in spite of the substantial risk of torture.

(1) The Scope of Section 7 in Relation to Deportation or Extradition

[139] Section 7 of the Charter reads as follows:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.	**7.** Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

[140] The impact of section 7 on the extradition or removal process has been discussed by the Supreme Court of Canada in a number of decisions, including *United States v Burns*, 2001 SCC 7, [2001] 1 SCR 283 [*Burns*]; *Suresh*; and *India v Badesha*, 2017 SCC 44, [2017] 2 SCR 127 [*Badesha*].

[141] *Burns* dealt with the extradition to the United States of persons accused of murder. The Minister had authorized their extradition without requiring assurances that the death penalty would not be administered. In that case, the Supreme Court established the first principle that is useful in analyzing Mr. Boily's situation: when deciding whether a person's extradition is consistent with section 7, one must consider the consequences that person could potentially face in the country they are being extradited to. Therefore, even though the death penalty would not be administered by Canada, the risk that Mr. Burns would be executed if extradited meant that his extradition without assurances breached section 7.

[142] At issue in *Suresh* was the removal to Sri Lanka of a person suspected of belonging to a terrorist organization. Mr. Suresh claimed that his removal would expose him to a risk of torture,

resulting in a breach of section 7. A second relevant principle stems from the Supreme Court's decision: returning a person to a country where they would be at risk of torture breaches section 7, save in exceptional circumstances. Specifically, the Court noted that the principles of fundamental justice require balancing the factors in favour of extradition and those against it. However, considering that Canadians strongly reject the use of torture and that this rejection flows from international law, the Court found that this balancing act would in the vast majority of cases lead to the conclusion that extradition in the face of a substantial risk of torture breaches section 7.

[143] Lastly, in *Badesha*, two persons accused of murder were to be extradited to India. One of the accused claimed that she would be at risk of torture. In response to this argument, the Supreme Court established a third principle relevant to our case: extradition may be consistent with section 7 if the risk of torture is reduced to an acceptable level by obtaining diplomatic assurances. The Court also stated that it was necessary to take the entire context into account when assessing the reliability of the assurances and provided a list of relevant factors to consider. In that case, the Court found the Minister's decision to accept India's assurances to be reasonable, in part because the individuals had not shown that they would be exposed to a higher risk of torture than the general prison population in that country.

[144] The federal government argues that once the Minister of Justice has made a decision that is consistent with these principles, and, if the decision was contested, the Court of Appeal has validated that decision, the remedies under section 7 have somehow been exhausted. This is not entirely accurate. It is true that the Minister's decision (or the decision of the Court of Appeal on

judicial review of the Minister's decision) is the final determination of the issues before it. However, if new facts give rise to a substantial risk of torture, the Minister's decision is no longer sufficient to ensure compliance with section 7. The situation must be reassessed. The same is true where new evidence fundamentally affects the risk assessment underlying the Minister's decision.

[145] The Federal Court of Appeal's jurisprudence on stays of removal provides a clear rationale as to why section 7, in the present circumstances, requires that the risk be reassessed. This jurisprudence arises from the following context. The *Immigration and Refugee Protection Act*, SC 2001, c 27, provides for a robust process to prevent the removal of a person in circumstances that would breach section 7, in particular when there is a substantial risk of torture. This process includes the review of a claim for refugee protection by the Immigration and Refugee Board and a pre-removal risk assessment by the Minister of Citizenship and Immigration. When a decision is made at the end of this process, it can usually be assumed that the person's removal is consistent with section 7. However, if a new risk arises or new evidence of risk is uncovered, this Court may grant a stay of removal to allow for the proper assessment of that risk.

[146] For example, in *Atawnah v Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 144, [2017] 1 FCR 153, the Federal Court of Appeal reviewed the case law which asserts that where there is a new risk or new evidence of risk, an enforcement officer or this Court may stay the removal. This helps to ensure compliance with the guarantees of section 7.

[147] The Federal Court of Appeal reiterated this principle in *Savunthararasa v Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 51 at paragraph 7, [2017] 1 FCR 318:

> . . . when evidence of some new risk is put forward, an enforcement officer may defer removal when the failure to defer will expose the person seeking deferral to a risk of serious personal harm. More specifically, an enforcement officer may defer removal where an applicant establishes a risk of death, extreme sanction or inhumane treatment that has arisen since the last assessment of risk . . .

[148] The Court explicitly linked section 7 to this "safety valve" that seeks to ensure a continuous assessment of risk in *Revell v Canada (Citizenship and Immigration)*, 2019 FCA 262 at paragraph 51, [2020] 2 FCR 355:

> Upon judicial review of a decision by an enforcement officer not to defer removal, the Federal Court is empowered to (and in my view must) assess any risk of harm that has been overlooked by the enforcement officer in order to determine whether the rights protected by section 7 of the Charter are engaged . . .

[149] In short, while the law provides for mechanisms to ensure that a person's removal to a foreign country is consistent with section 7, the federal government is still obliged to reassess the situation when it becomes aware of a new risk or new evidence of a risk. Developed in the context of removals, this principle applies equally to extradition, as the scope of section 7 is substantially the same in both cases.

(2) New Risk

[150] Therefore, in order to show a breach of section 7 in the present case, there must be a new risk that had not been assessed. The first step in this demonstration is to identify the risks that

were assessed by the Minister of Justice when the extradition order was made and then by the Court of Appeal on judicial review of that order. The Minister first concluded that, without diplomatic assurances, Mr. Boily's extradition would be contrary to section 7. After noting that reports on the human rights situation in Mexico showed continuing abuses by law enforcement officials, the Minister stated:

> In my view, Canada can meet both its international obligation to surrender Mr. Boily and its international obligations not to send him to face torture in Mexico by attaching assurances and conditions to the surrender order. . .
>
> The imposition of conditions is therefore dependent upon my preliminary determination either that extradition without conditions would be unconstitutional or that there are other compelling reasons to exercise my general discretion in this respect.

[151] Furthermore, the Minister does not mention any exceptional circumstances that, according to *Suresh*, would make Mr. Boily's extradition constitutional in spite of a substantial risk of torture. In the absence of such circumstances, it must be concluded that any substantial risk of torture renders extradition contrary to section 7.

[152] However, there is every reason to believe that no one in the federal government imagined that Mr. Boily would be returned to the Cieneguillas prison. The extradition order was therefore based on the premise that Mr. Boily would be incarcerated at another prison. It follows that Mr. Boily's incarceration at the same prison from which he escaped and where the guard who was killed during the escape had been working constituted a new risk that the Minister of Justice and the Court of Appeal had not assessed.

[153] In order to understand why the risks arising from Mr. Boily's incarceration in Cieneguillas had not been assessed by the Minister, it is useful to review the subsequent steps in the extradition process. The diplomatic assurances given by Mexico are contained in an eight-page document, dated November 16, 2006. The only passage relating to Mr. Boily's place of incarceration is the following:

> [TRANSLATION]
>
> With respect to the drug-related crime for which he was already sentenced, this will fall under the aegis of the Secretariat of the Interior for the State of Zacatecas, as there is no Federal Social Readjustment Centre in that state. Nevertheless, the Federal Government has signed agreements with the state authorities so that federal prisoners may serve their sentences in these Centres.

[154] Nothing in this paragraph explicitly states that Mr. Boily will be held at the same prison he had escaped from and where the guard who was killed during the escape had been working. The use of the plural in the second sentence suggests that there are several prisons (or "social readjustment centres") where Mr. Boily could be incarcerated. The confusion that has arisen in the current proceedings regarding this issue may have stemmed from the frequent use of the term "Zacatecas prison" to refer to the place where Mr. Boily was incarcerated. Yet, this expression is ambiguous, as it refers to a state and not a specific institution. The same is true of the acronym "CERESO", which means "social readjustment centre" and does not refer to a specific institution.

[155] On January 22, 2007, the Minister of Justice informed Mr. Boily that he accepted Mexico's assurances. Nothing in the Minister's letter suggests that the Minister was aware that Mr. Boily would be returned to the Cieneguillas prison.

[156] The federal government made much of the phrase [TRANSLATION] “Zacatecas, the exact place where they want to return the appellant” in Mr. Boily’s factum before the Quebec Court of Appeal. This phrase is found in a paragraph highlighting that the Attorney General of that state had acknowledged that torture was regularly practiced there. Nothing in this factum revealed that Mr. Boily was aware of the fact that he would be incarcerated at the Cieneguillas prison. In two other passages, he pointed out that he was at greater risk of torture because he was accused of the homicide of a prison guard, but he did not add that he would be held at the same prison. This factum, moreover, predated the receipt of Mexico’s diplomatic assurances. It does not contradict Mr. Boily’s statement that he did not learn of his exact destination until the day of his extradition.

[157] In any event, there is no indication that the issue of Mr. Boily’s place of incarceration was brought to the attention of the Court of Appeal. Although Mr. Boily stated that [TRANSLATION] “[b]ecause he is charged with participating in the murder of a prison guard, there is reason to fear the resentment of the other prison guards” (paragraph 24 of the judgment), the statement is general and he does not mention that he expected to return to the same prison. At the hearing, the Court of Appeal was provided with the text of the diplomatic assurances. The Court of Appeal quoted large portions of it, but not the passage reproduced above. I conclude that the Court of Appeal was not aware that Mr. Boily would be returned to the prison from which he had escaped and where the guard who was killed had been working, because there was nothing in the record to support such a conclusion.

[158] In his July 2007 request to the Committee against Torture for interim measures, Mr. Boily did not mention that Mexico intended to incarcerate him at the Cieneguillas prison. Presumably, if he had been aware of this fact, he would have given it considerable weight. Canada's response to the Committee also made no mention of his place of incarceration.

[159] In short, the near total silence regarding where Mr. Boily was to be incarcerated after his extradition strongly suggests that no one had considered that he would be returned to the prison from which he had escaped and where the guard who was killed had been working.

[160] In fact, it was the consular officers stationed in Mexico or those with a thorough knowledge of the situation in Mexico, in particular Ms. Desjardins and Ms. Dowe Marchand, who were able to infer that Mr. Boily would be incarcerated at the Cieneguillas prison. According to the evidence presented at trial, to make such an inference, one must either be familiar with the various prisons in the state of Zacatecas and understand that only the Cieneguillas prison is capable of holding inmates who have committed serious crimes or know that this prison is the only one in the state of Zacatecas that is subject to an agreement with the Mexican federal government to hold inmates serving federal sentences. Without this information, it is difficult to infer anything. For example, on cross-examination, Mr. Robertson acknowledged that he did not know the name of the prison where Mr. Boily was being held or the number of prisons in the state of Zacatecas, and that it was difficult to infer anything with certainty from the text of the diplomatic assurances (May 6, 2022 transcript, pp 105–7). Mr. Dubeau, on the other hand, claims to have learned these details during his conversation with his Mexican counterpart on August 16, 2007 (May 10, 2022 transcript, p 36). There is every reason to believe that neither

the Minister of Justice, nor the Quebec Court of Appeal, nor Mr. Boily's counsel had this information.

[161] Consequently, neither the Minister of Justice nor the Quebec Court of Appeal could have assessed the risk that Mr. Boily would be incarcerated at the prison from which he had escaped and where the guard who was killed had been working, since neither of them was aware of it. Invoking this risk in the present case is therefore not a collateral attack on their decisions. On the contrary, it was a new risk, the existence of which was only revealed once the judicial process had been exhausted. Mr. Boily could not be extradited if that risk was substantial. I now turn to this issue.

(3) Substantial Risk of Torture

[162] Under the circumstances, it is clear that Mr. Boily was exposed to a substantial risk of torture upon his arrival at the Cieneguillas prison. Any reasonable observer would agree that it was not prudent to send a person accused of escaping lawful custody and homicide of a prison guard back to the institution where those events had taken place. That person would be in contact with co-workers of the guard who was killed, and thus would be exposed to reprisals. The Canadian consular staff very quickly arrived at this same conclusion. For example, in a memo filed on August 16, 2007 (Exhibit 31; see also May 9, 2022 transcript, p 26, and May 10, 2022 transcript, pp 33–4), Ms. Desjardins wrote:

> [TRANSLATION]
>
> I learned today that following Mr. Boily's extradition to Mexico tomorrow, he will be incarcerated at the Zacatecas prison to serve his sentence. This transfer to Zacatecas will take place immediately after his arrival at the Mexico City airport.

> From a consular perspective, I am concerned that the place where Mr. Boily will serve his sentence is the prison from which he escaped; especially since a guard was killed during his escape. In Mexico, as in Canada, attacking a guard is very poorly received by prison authorities and retaliation is possible. I understand that in Canada, they would try to avoid putting an inmate in such a situation.
>
> Despite the guarantees offered by the Mexican authorities, I remain concerned about Mr. Boily's personal safety and his physical and psychological health in his daily life at the Zacatecas prison.
>
> Would it be possible to make representations to the Mexican authorities to have Mr. Boily transferred to a prison other than the one in Zacatecas in order to minimize the risks to his safety and health?

[163] At about the same time, Ms. Dowe Marchand expressed her agreement with the concerns raised by Ms. Desjardins. Again in the chain of emails in Exhibit 31, she states:

> I appreciate that the transfer cannot be delayed for legal reasons at this point. However, I do agree with the mission that we have concerns regarding Mr. Boily's transfer to Zacatecas subsequent to his arrival in Mexico. . . my feeling is that the mission should proceed with a diplomatic note expressing our concerns regarding his onward transfer to Zacatecas.

[164] The nature of the risk Mr. Boily faced was specifically described in a note written by Ms. Malingreau on August 20, 2007: [TRANSLATION] "we were concerned for his safety due to possible retaliation by the prison staff" (Exhibit 56).

[165] Moreover, the degree of urgency with which Mr. Dubeau and his colleague Daniel Caron took steps on August 16, 2007 to ensure that Mr. Boily would not be incarcerated at Cieneguillas clearly shows that the situation raised serious concerns (May 10, 2022 transcript, pp 34–5). In

cross-examination, Mr. Dubeau acknowledged that the discussions that took place on August 16 did not remove these concerns (May 10, 2022 transcript, pp 158–9):

> [TRANSLATION]
>
> Mr. SWANSTON: So everybody has the same concerns, Mr. Boily, the people who represent Canada on the ground, everybody is concerned because he is going back to the exact same prison, right?
>
> Mr. DUBEAU: There are concerns, yes.
>
> Mr. SWANSTON: How do you... can you explain to us that reading the diplomatic assurances makes those concerns go away.
>
> Mr. DUBEAU: That the reading...can you repeat that, please?
>
> Mr. SWANSTON: But it was after reading the decision, the ministerial decision, that we realized that Mr. Boily had to go back to the same place, and then the concerns went away?
>
> Mr. DUBEAU: No, some concerns remained.

[166] Other sources corroborate the serious nature of the risk of torture to which Mr. Boily was exposed. Upon getting off the plane, after learning that he was returning to Cieneguillas, Mr. Boily expressed concern for his safety and asked Ms. Desjardins if he could be transferred to another prison (May 2, 2022 transcript, pp 101–2; see also Exhibit 47). When the Zacatecas State Human Rights Commission was informed of Mr. Boily's situation on August 20, 2007, it immediately sent one of its representatives to the Cieneguillas prison to meet with Mr. Boily. Lastly, in its decision, the Committee against Torture concluded that Mr. Boily "ran a foreseeable, real and personal risk of torture" in particular because he "would be sent to the same prison in which a guard had died during the complainant's escape years before, and that the guard's death too was a subject of the extradition request." This conclusion was based on common sense and experience, not on any peculiarity of international law.

[167] Lastly, it should be noted that this substantial risk was an individualized risk, as it arose from the combination of the offences with which Mr. Boily was charged and the place where he was to be incarcerated. This distinguishes the present case from the situation in *Badesha*, where no individualized risk was involved and no significant change had occurred since the Minister's decision.

(4) Extradition in the Face of a Substantial Risk of Torture Breaches Section 7

[168] In light of these findings, Mr. Boily's extradition gave rise to a substantial risk of torture that had not been assessed by the Minister. According to *Suresh,* his extradition was therefore contrary to section 7 of the Charter unless there were countervailing exceptional circumstances, an issue I address later in these reasons.

[169] According to *Badesha*, it was still possible to put in place measures to reduce this risk to a tolerable level. In this regard, the federal government argued that the diplomatic assurances given by Mexico were specifically aimed at minimizing the risk of torture. However, in light of the information that came to the attention of the federal government on August 16, 2007, it was no longer possible to rely on these assurances. The Mexican authorities were about to directly expose Mr. Boily to reprisals from the co-workers of the guard who was killed during his escape. This intention was clearly a breach of the assurances.

[170] Nevertheless certain avenues remained open to the federal government to bring Mr. Boily's extradition into compliance with section 7. However, it failed or neglected to pursue any one of those avenues.

[171] The first avenue would have been to insist that Mexican authorities incarcerate Mr. Boily at another institution. This was the most obvious solution and was immediately identified by Canadian consular staff. However, on August 16, 2007, the federal government decided not to make such a request. That decision was made following email exchanges involving officials from the Department of Foreign Affairs as well as legal counsel from that department and the Department of Justice. The federal government did not disclose the content of those discussions on the grounds that they are covered by solicitor-client privilege. Ms. Dowe Marchand sent an email at approximately 2:00 p.m. on August 16 informing the consular staff in Mexico of this decision:

> [TRANSLATION]
>
> Following internal consultations, we suggest that given the guarantees provided by the Mexican authorities and accepted by the Canadian government, we do not intervene at this time.
>
> We will of course follow our consular mandate to ensure Mr. Boily's well-being and remind the local authorities of their duty to protect him at all times.

[172] It is true that the steps Mr. Dubeau took led to a conversation with an official from the Mexican Ministry of Foreign Affairs during the afternoon of August 16, 2007. However, that conversation took place only after Mr. Dubeau had been instructed not to take any steps (May 11, 2022 transcript, p 55). In these circumstances, the conversation was more in the nature of a request for information and Mr. Dubeau was not in a position to demand anything from the Mexican authorities. There is no evidence that the Mexican authorities would have refused to incarcerate Mr. Boily at another facility if the federal government had insisted on making it a *sine qua non* of his extradition.

[173] A second possibility would have been to take immediate and firm measures to reduce the risk of torture before Mr. Boily arrived at the Cieneguillas prison. Given the exceptional nature of the situation, exceptional measures would have been required. I cannot say exactly what measures could have been implemented, in particular because the thought process leading to the August 16, 2007 decision was not disclosed to me. Nevertheless, in light of all the evidence, it is reasonable to believe that the federal government could have: (1) clearly expressed its dissatisfaction with the intention of the Mexican authorities to return Mr. Boily to Cieneguillas, through a diplomatic note or equivalent means; (2) informed the Cieneguillas prison authorities of the diplomatic assurances given by Mexico and of Canada's intention to closely monitor compliance with them; (3) accompanied Mr. Boily upon his arrival to Cieneguillas; and (4) indicated Canada's intention to maintain frequent contact with Mr. Boily.

[174] The federal government chose not to implement any of these measures. Ms. Dowe Marchand's note, reproduced above, did not ask consular staff to implement any exceptional measures. On the contrary, there is every reason to believe that the reference in the note pertains to regular consular monitoring.

[175] It is true that Mr. Dubeau and Ms. Desjardins did, in fact, take measures that went beyond regular consular monitoring. They met Mr. Boily when he got off the plane on August 17. They called the prison on Monday, August 20. They asked a representative of the Human Rights Commission to visit Mr. Boily. Lastly, they planned an in-person visit within two weeks of his arrival (May 9, 2022 transcript, p 37, and May 10, 2022 transcript, p 46). However, those measures were not sufficient to address the substantial risk of torture. They did not send a strong

message that Canada was monitoring the situation closely, which could have been communicated by ensuring a physical presence at the prison at the time of Mr. Boily's arrival or even beforehand. Three days passed before consular staff contacted prison authorities. Yet it was during the first few days of detention that the risk of torture was at its highest. In fact, it was not until allegations of torture were received on August 21 that the federal government decided to take stronger action, but by then it was too late.

[176] Mr. Boily also argued that section 7 creates an obligation on the federal government to put in place monitoring measures that are tailored to the nature and degree of the risk that the diplomatic assurances are intended to address. Given the foregoing analysis, I need not decide this issue. It is possible that such monitoring measures would have made it possible to discover more quickly the intention of the Mexican authorities to incarcerate Mr. Boily at Cieneguillas and to take appropriate action. However, the lack of monitoring measures adds nothing to the analysis, since the substantial risk was, in fact, uncovered and the federal government extradited Mr. Boily despite the presence of that risk. For the same reasons, it is not necessary that I decide whether the Minister of Justice, in his decision to extradite Mr. Boily, undertook to put in place monitoring measures that went beyond the scope of normal consular monitoring.

(5) Lack of Justification

[177] According to the *Suresh* framework, I am also required to assess whether there were factors that favoured Mr. Boily's extradition in spite of a substantial risk of torture. In this regard, I note that the Minister of Justice did not mention any such grounds in support of his extradition order. In fact, the Minister acknowledged that he could not have ordered Mr. Boily's

extradition in the face of a substantial risk of torture, which is why he sought diplomatic assurances from Mexico.

[178] One obstacle to this assessment is the fact that the federal government has not disclosed the reasons for its August 16, 2007 decision not to demand that Mr. Boily be incarcerated at another prison. The federal government invoked solicitor-client privilege to oppose disclosure of the contents of the emails that might have shed light on what may have motivated that decision. Nevertheless, it sought to prove the fact that counsel from the Departments of Justice and Foreign Affairs participated in those discussions. Mr. Boily objected to this evidence. I reject this objection. The federal government may waive immunity to the extent that it chooses. However, the fact that the August 16, 2007 decision was made after a discussion involving several individuals, including legal counsel, does not demonstrate any compelling reason to extradite Mr. Boily in spite of a substantial risk of torture.

[179] At trial, the federal government witnesses nevertheless alluded to some potential justifications for the August 16, 2007 decision. Mr. Robertson referred to the principle of non-interference in Mexico's internal affairs (May 6, 2022 transcript, p 114). Ms. Desjardins stated that Mexico was a [TRANSLATION] "trusted partner" (May 9, 2022 transcript, pp 116–27). Mr. Dubeau suggested that he had been instructed to rely on Mexico's assurances (May 10, 2022 transcript, pp 158–9). The submissions to the Committee against Torture in July 2007 also point out that the *Extradition Act* provides that extradition must take place within 45 days of the exhaustion of remedies, in this case by August 20, 2007. Finally, the record contains some

references to the summit of the heads of state and government of Canada, the United States and Mexico scheduled for August 20, 2007, three days after Mr. Boily's extradition.

[180] Even assuming that these were the reasons for the decision not to intervene, I can see nothing that would make Mr. Boily's extradition consistent with the principles of fundamental justice. These considerations, which were essentially matters of administrative convenience or a desire not to offend the Mexican authorities, did not justify exposing Mr. Boily to a substantial risk of torture. I would add that requiring assurances is in itself a form of interference in the internal affairs of the country requesting extradition and implies that the latter is not fully trusted.

[181] Moreover, the notion that Mexico's assurances could or should be relied upon was significantly undermined by the realization that Mr. Boily would be returned to the Cieneguillas prison. As I explained above, it is difficult to reconcile the assurances about Mr. Boily's safety with the fact that the Mexican authorities were about to expose him to retaliation from the co-workers of the guard who was killed. Extradition could no longer take place on the basis of those assurances alone, which were revealed to be of little value.

[182] I therefore conclude that Mr. Boily's extradition breached section 7 of the Charter. On August 16, 2007, the federal government was aware that Mr. Boily would be incarcerated at the same prison from which he had escaped and where the guard who was killed had been working, but it did not implement any measures to address the resulting substantial risk of torture.

(6) Other Issues

[183] The federal government made various other arguments to show that there is no section 7 breach that could give rise to an award of damages in this case. For the reasons that follow, I reject those submissions.

a) *The Scope of Prothonotary Morneau's Decision*

[184] As noted above, Prothonotary Morneau struck out the parts of the initial statement of claim that attacked the Minister of Justice's decision to extradite Mr. Boily and to accept Mexico's diplomatic assurances. In his view, these parts of the initial statement of claim were a collateral attack on the Minister's decision and the Quebec Court of Appeal's decision. He did, however, allow the parts of the statement of claim relating to the fault of the Minister of Foreign Affairs in the "monitoring of extradition".

[185] The federal government now argues that Mr. Boily's allegations of misconduct amount to a challenge of the Minister's decision and the Court of Appeal's ruling, which is prohibited by Prothonotary Morneau's decision. According to the federal government, the claim that more intensive monitoring than the usual consular services was required should have been put before the Minister and, since it was not, invoking it now constitutes a disguised collateral attack.

[186] That is not what the prothonotary said. In his decision, he left in place the portions of the statement dealing with the failure of the Minister of Foreign Affairs to monitor the situation. In paragraph 20, he states:

> However, the same cannot be said for the allegations made by the plaintiff at paragraphs 27, then 54 to 88 of the statement of claim. These paragraphs are essentially concerned with the alleged lack of a monitoring mechanism at Foreign Affairs to ensure at all times that the plaintiff, once in Mexico after his extradition, would not be tortured.

[187] Moreover, those portions of the statement included allegations that explicitly referred to the August 15 and 16, 2007 discussions between officials at the Department of Foreign Affairs. The reference to "after his extradition" relates to the time when the torture took place, not to the time of the wrongful acts or omissions of the federal government. The prothonotary therefore did not exclude the actions of the officials in the days leading up to the extradition from the scope of the action.

[188] The federal government made much of Mr. Boily's submission to the Committee Against Torture on April 14, 2011, in which he stated that, based on the prothonotary's decision, this Court should restrict the consideration of federal liability to [TRANSLATION] "what happened following the extradition." If this phrase is taken literally, it is not entirely accurate, as I have just demonstrated. In any event, a reading of those submissions as a whole makes it clear that Mr. Boily meant that the decisions of the Minister of Justice to extradite him and to accept Mexico's assurances could not ground an action before this Court.

[189] As for the argument that any follow-up action should have been discussed at the proceeding before the Minister of Justice, it obviously cannot apply to the discovery of facts that give rise to a new risk.

b) *Action or Omission?*

[190] The federal government also argued that the alleged misconduct was one of omission and that section 7 does not impose positive obligations on the government. The distinctions between actions and omissions and between positive and negative obligations are not relevant to this case. What is ultimately at issue is Mr. Boily's extradition. *Suresh* and *Badesha* establish that extradition may, in certain circumstances, breach section 7 if sufficient measures are not taken to counter a risk of torture. The breach of section 7 lies not so much in the omission to take these measures, but in the action of extraditing in the absence of adequate measures. The federal government relies on the distinction between positive and negative obligations, often used in the analysis of the justiciability of economic and social rights, for example in *Gosselin v Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 SCR 439. Yet, no useful analogy can be drawn between this issue and the extradition process.

c) *An Extraterritorial Application of the Charter?*

[191] The federal government also argues that Mr. Boily's action is tantamount to giving extraterritorial application to the Charter, contrary to the principles set out in *R v Hape*, 2007 SCC 26 at paragraphs 107–11, [2007] 1 SCR 292. This is not the case. The breach of section 7 arises from the federal government extraditing Mr. Boily in the face of a substantial risk of torture. In the presence of such a risk and in the absence of measures to counter it, *Burns*, *Suresh* and *Badesha* have established that extradition breaches section 7 even if the torture ultimately takes place on foreign soil. This does not constitute an extraterritorial application of the Charter, since the breach results primarily from the act of extraditing Mr. Boily. The rules governing the

application of the Charter to Canadian police officers investigating on foreign soil, as was the case in *Hape*, are not a useful analogy.

[192] Even if we focus on the federal government's omissions, the most significant omission occurred on Canadian soil. It was the decision, made on August 16, 2007, when Mr. Boily was still in Canada, not to intervene to have his place of incarceration changed.

d) *A Duty to Reassess?*

[193] Finally, the federal government argues that public servants do not have a duty to constantly reassess the merits of the Minister's decision. This could mean two things. If it means that public servants can turn a blind eye to a new risk they become aware of and which had not previously been assessed by the Minister or the Court of Appeal, then I cannot accept this argument. As I explained above, in such circumstances it became necessary to ensure that the extradition remained consistent with section 7. On the other hand, this argument could also mean that officials do not have a duty to actively search for facts that might make a reassessment of risk necessary. However, this is not the issue at hand, as the officials did in fact become aware of a new risk. I therefore refrain from commenting on this issue.

B. *Functions Performed by the Award of Damages*

[194] Once a breach of a Charter right has been established, the second step in the *Ward* framework is to determine whether an award of damages would serve one of the three recognized functions of compensation, vindication and deterrence.

(1) Compensation and Causation

[195] Compensation is usually the most prominent function of damages. As the Supreme Court stated, the "breach of an individual's *Charter* rights may cause personal loss which should be remedied": *Ward*, at paragraph 25. In other words, "[w]here the objective of compensation is engaged, the concern is to restore the claimant to the position she would have been in had the breach not been committed": *Ward*, at paragraph 48.

[196] Compensation is implemented based in part on private law concepts, in particular causation. In order for a claimant to be compensated for an injury they have suffered, the injury must have been caused by the infringement of a Charter right. Causation, like the other elements of the claim, must be proven on a balance of probabilities.

[197] During oral submissions, the parties addressed the test for assessing causation. Mr. Boily focused on the "sufficient causal connection" standard put forward by the Supreme Court in *Suresh*, at paragraphs 54 and 55; *Canada (Prime Minister) v Khadr*, 2010 SCC 3 at paragraphs 19–21, [2010] 1 SCR 44 [*Khadr*]; and *Canada (Attorney General) v Bedford*, 2013 SCC 72 at paragraphs 74–8, [2013] 3 SCR 1101. In the latter case, the standard is described at paragraph 76 as follows:

> A sufficient causal connection standard does not require that the impugned government action or law be the only or the dominant cause of the prejudice suffered by the claimant, and is satisfied by a reasonable inference, drawn on a balance of probabilities ([*Khadr*], at para. 21). A sufficient causal connection is sensitive to the context of the particular case and insists on a real, as opposed to a speculative, link.

[198] The federal government, on the other hand, relies on the Supreme Court's remarks in *Henry v British Columbia (Attorney General)*, 2015 SCC 24 at paragraphs 95 and 97, [2015] 2 SCR 214:

> Liability attaches to the Crown only upon a finding of "but for" causation. . .
>
> Regardless of the nature of the harm suffered, a claimant would have to prove, on a balance of probabilities, that "but for" the wrongful non-disclosure he or she would not have suffered that harm. This guarantees that liability is restricted to cases where the intentional failure to disclose was actually the cause of the harm to the accused.

[199] Without additional insight, reconciling these propositions is a perilous exercise. Moreover, the "but for" test is derived from the common law, whereas the parties agree that in this case, the suppletive law is Quebec civil law, which usually applies the adequate causation test: *Imperial Tobacco Canada Ltd. c Conseil québécois sur le tabac et la santé*, 2019 QCCA 358 at paragraphs 661 to 666. According to this test, an adequate cause is one that objectively makes the harm possible or significantly increases its possibility. One way to reconcile these statements would be to apply different tests at the stage of the breach of section 7 and when deciding whether damages is an adequate remedy. However, this might lead to an incongruous situation in which the connection between the federal government's conduct and the injury would be sufficient to find a breach of section 7, but insufficient to justify an award of damages. However, it is not necessary to decide this issue, since I am of the view that, whatever test is chosen, causation is established.

[200] In the present case, I found that the federal government breached section 7 by extraditing Mr. Boily without taking measures to address a substantial risk of torture. In other words,

Mr. Boily's extradition had to be accompanied by measures that would reduce that risk to a level that could not be characterized as substantial. By definition, if there is no substantial risk of torture, then on a balance of probabilities Mr. Boily will not be tortured. Thus, because of the way in which the scope of section 7 is defined in extradition or removal cases, a breach of section 7 will necessarily have a causal link to the torture that results from it. By way of analogy, this is similar to the principle set out in *Morin v Blais*, [1977] 1 SCR 570: where a standard is intended to prevent a particular type of harm and that such harm appears immediately after a breach of that standard, it is reasonable to presume that one caused the other.

[201] This can be illustrated by the first type of measure that would have brought Mr. Boily's extradition into compliance with section 7, namely requiring that he be incarcerated at a place other than Cieneguillas prison. If Mr. Boily had been transferred to another prison, he probably would not have been tortured. In all likelihood, he would not have been in the presence of guards who worked with the guard who was killed during his escape and who were likely to be motivated by a desire for revenge. In fact, when Minister of Justice made the extradition order, the scenario he had in mind did not include the heightened risk resulting from Mr. Boily's return to the Cieneguillas prison. The Minister concluded that this scenario did not involve a substantial risk of torture. In other words, Mr. Boily would most likely not have been tortured at another prison. Therefore, there is a causal link between the failure to make such a demand and the instances of torture suffered by Mr. Boily, no matter what test one uses. Under the "but for" test, Mr. Boily would not have been tortured but for the failure to require his transfer to another prison. Under the sufficient causation test, the failure to require the transfer significantly

increased the likelihood that Mr. Boily would be tortured. In any event, this is a sufficient connection pursuant to *Bedford*.

[202] I have also alluded to the possibility that the federal government could have fulfilled its obligation under section 7 by putting in place immediate and close monitoring mechanisms to counter the high risk of torture arising from Mr. Boily's incarceration at the Cieneguillas prison. It is not for me to say precisely what steps the federal government should have taken. However, if such steps succeed in bringing the extradition into compliance with section 7, this would be because Mr. Boily would no longer be exposed to a substantial risk of torture. Therefore, applying the "but for" test, it must be concluded that Mr. Boily would not have been tortured but for the failure to take such measures. From the perspective of sufficient causation, this failure significantly increased the likelihood that Mr. Boily would be tortured.

[203] The federal government argues that there can be no causal link between its omission and the torture that Mr. Boily suffered, since it was carried out by prison guards acting in secret, contrary to Mexican law and without the knowledge of their superiors. However, it goes without saying that the risk of torture against which section 7 protects includes torture inflicted in secret, unlawfully and without explicit superior orders. Moreover, this argument is speculative. In reality, we know very little about the internal workings of the Cieneguillas prison and the relationship between the prison administration and the torturers. We do know that one of the guards who tortured Mr. Boily was the prison's head of security. This makes it likely that there was some degree of collusion between the guards and the prison's administration. In any event, we know that the torture stopped as soon as Mr. Dubeau visited the prison on August 22. This

fact, which is not speculative, is the best available evidence of the prison authorities' control over the guards.

[204] In any event, in *Suresh*, the Supreme Court noted that the federal government could commit a breach of section 7 even if it did not itself engage in torture. This is compatible with the way in which the issue of causation is analyzed in civil law. An injury may have been caused by more than one fault. The fact that one of these faults appears particularly serious or constitutes a criminal offence does not negate the others. For example, in *Salomon v Matte-Thompson*, 2019 SCC 14, [2019] 1 SCR 729 [*Salomon*], the Supreme Court held a lawyer liable for the financial loss his client suffered after she was defrauded by the financial adviser his lawyer had recommended to her. The fact that the lawyer did not commit fraud did not negate the existence of a causal link between his fault and the loss suffered by his client: *Salomon*, at paragraphs 82–92.

(2) Vindication

[205] Having found that an award of damages is necessary to compensate Mr. Boily, I must now assess whether such an award would also serve the second purpose identified in *Ward*, namely vindication. Unlike compensation, which is intended to repair the harm suffered by the victim, vindication is concerned with the harm that the infringement of a right causes to society as a whole. Indeed, tolerating an infringement undermines society's confidence in the constitutional guarantee of fundamental rights: *Ward* at paragraph 28.

[206] In *Ward*, the Supreme Court did not develop a detailed analytical framework for determining whether the vindication objective is engaged in a particular case. However, it did suggest that the seriousness and wilfulness of the infringement of a guaranteed right were relevant factors: *Ward*, at paragraphs 65 and 72. I consider these two factors here, as well as Mr. Boily's argument regarding the federal government's response to his allegations of torture.

a) *The Seriousness of the Infringement*

[207] There is no doubt that the infringement of Mr. Boily's rights was serious. Protection from torture is one of the most fundamental rights and goes to the heart of human dignity: *Suresh*, at paragraph 51; *Bissonnette*, at paragraph 66. An essential component of the protection against torture is the principle of *non-refoulement*, that is, the prohibition against extraditing or returning a person to a country where they would face a substantial risk of torture. This principle is recognized in international law through article 3 of the Convention and in Canadian law in *Suresh*, at paragraph 76, and *Badesha*, at paragraph 42.

[208] Therefore, Mr. Boily's extradition constituted a serious breach of his rights, since it had just been discovered that the extradition would be accompanied by a substantial risk of torture. If Canada strongly condemns torture as fundamentally contrary to human dignity, it cannot risk letting one of its citizens be subjected to it.

[209] Mr. Boily argued that the federal government's failure to put in place a monitoring program prior to his extradition was a factor favouring an award of vindication damages. As I noted above, it is possible that such a program might have mitigated the serious risk of torture to

which Mr. Boily was exposed, but that is a hypothetical question. What was a serious breach was the extradition of Mr. Boily in the face of such a risk.

b) *The Wilfulness of the Infringement*

[210] What makes the situation particularly shocking was the wilful nature of the infringement of Mr. Boily's rights, or in other words, the fact that the federal officials acted with full knowledge of the situation and the likely consequences of their conduct. See, for example, *Quebec (Public Curator) v Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 SCR 211 at paragraph 121 [*St-Ferdinand*]; *Henry*, at paragraphs 86 to 88.

[211] In this regard, I reiterate that on August 16, 2007, Ms. Desjardins and Ms. Dowe Marchand both recorded in writing their deep unease about Mr. Boily's return to the prison from which he had escaped. The likely consequences of his extradition were specifically identified, as I have noted above in paragraphs [162] and [163]. The sense of urgency with which Mr. Dubeau and Ms. Desjardins took steps to have Mr. Boily incarcerated at another prison reflects the seriousness of those consequences.

[212] However, the federal government has not brought any evidence to suggest that that initial assessment was wrong or that it had been overturned. Although Foreign Affairs officials in Ottawa ordered Mr. Dubeau and Ms. Desjardins to cease their efforts, there is no evidence that that decision was based on a different assessment of the risk to which Mr. Boily would be exposed at the Cieneguillas prison. In fact, in the days that followed, Ms. Desjardins wrote to the prison warden expressing her concerns [TRANSLATION] "for the safety of the inmate given the

nature of the charges against him" (Exhibit 57) and Ms. Malingreau wrote a note referring to [TRANSLATION] "possible reprisals by prison staff" (Exhibit 56). I cannot imagine Ms. Desjardins and Ms. Malingreau using such language if their superiors in Ottawa had concluded that their concerns were unfounded.

[213] In short, the infringement of Mr. Boily's rights was not accidental, but rather wilful. The federal government knew the risk of torture to which he would be exposed at the Cieneguillas prison and nevertheless decided to extradite him. When one considers the universal condemnation of torture and the seriousness of the consequences for Mr. Boily, such a decision is likely to shock the conscience of society and it suggests that the federal government does not value human dignity. Vindication is therefore relevant in this case.

[214] The federal government replies that Canadian consular staff in Mexico acted in good faith in providing Mr. Boily with consular services well beyond the usual standards. I have no doubt that Ms. Desjardins was sincerely concerned about Mr. Boily's safety and that she made significant efforts, with Mr. Dubeau's approval, so that he would not suffer any reprisals. However, the scope of these efforts was inevitably limited by the decision of her superiors in Ottawa not to request Mr. Boily's transfer to another prison and to extradite him despite the risk that had just been discovered. The serious infringement of Mr. Boily's rights stems primarily from that decision and not from Ms. Desjardins' actions.

c) *The Federal Government's Response to Allegations of Torture*

[215] Mr. Boily placed great emphasis on the manner in which the federal government responded to his allegations of torture. The latter would have failed to investigate those allegations or demand that Mexican authorities look into the matter. It would also have failed to disclose information in its possession to Mr. Boily's counsel. Instead, it adopted a confrontational attitude, which led it to deny that Mr. Boily had been tortured. That denial would have been based exclusively on the September 10, 2007 diplomatic note which the federal government's witnesses acknowledged was insufficient. Finally, the federal government did not impose any sanctions on Mexico, which, according to Mr. Boily, demonstrates the ineffectiveness of diplomatic assurances, since neither the state extraditing the individual nor the state requesting extradition has any interest in recognizing that a breach has taken place.

[216] In essence, these allegations amount to a charge that the federal government wrongly defended itself against Mr. Boily's allegations or, in order words, abused its right to litigate. Such a situation may be taken into account in awarding punitive damages: see, for example, *Whiten v Pilot Insurance Co*, 2002 SCC 18, [2002] 1 SCR 595 [*Whiten*]. Logically, it can also engage the vindication objective in a Charter claim. For this to be the case, however, the situation must be characterized as an abuse.

[217] In this case, certain aspects of the federal government's conduct raise questions. If the decision to defend Mr. Boily's action were based solely on the September 10, 2007 diplomatic note, this would indeed raise concerns. However, there is no evidence that this is what happened.

It is important to keep in mind that I am allowing Mr. Boily's action based on the evidence presented at trial. One cannot predict with certainty how witnesses will stand up under cross-examination. Counsel for the federal government may have legitimately believed that they would be able to undermine Mr. Boily's credibility or that their own witnesses would give more compelling testimony. In this regard, there is no evidence that the federal government's conduct was the result of abuses similar to those condemned by the Court in *Whiten*. In addition, legitimate questions have been raised about the amount claimed by Mr. Boily. In sum, the information before me does not allow me to conclude that the federal government abused its right to litigate in defending Mr. Boily's action. For the same reasons, the federal government cannot be faulted for not having imposed diplomatic sanctions on Mexico.

[218] It is also in this light that allegations of failure to conduct an adequate investigation must be assessed. While article 12 of the Convention imposes a duty on each state party to proceed to a prompt and impartial investigation into any allegation of torture, this duty rests with the state in whose territory the alleged torture occurred, that being Mexico in this case. Even if paragraph 7(3.7)(d) of the *Criminal Code* could provide a basis for the jurisdiction of Canadian courts regarding the torture Mr. Boily endured, it is difficult to imagine that Canadian authorities would be able to undertake an investigation of Mexican authorities in Mexico, when the latter deny the facts. One may deplore the fact that the efforts of the Canadian consular staff were primarily aimed at preventing the recurrence of torture rather than finding the truth about what had happened. However, it must be remembered that at that time, Mr. Boily had already filed a complaint against Canada with the United Nations Committee Against Torture. Furthermore, he

had also stated that he did not wish to file a formal complaint with the competent Mexican authorities.

[219] As to the submissions regarding a conflict of interest inherent in any situation in which extradition is accompanied by diplomatic assurances, I cannot give them effect without contradicting the Supreme Court's decision in *Badesha*, which specifically contemplates the use of such assurances.

[220] In short, given the circumstances, I do not have sufficient evidence to fault the federal government's response to Mr. Boily's allegations as a factor that would require a heightened level of vindication.

(3) Deterrence

[221] The third objective that *Ward* assigns to damages is deterrence. In my view, this is not an overriding objective in this case. Of course, the obligation to compensate Mr. Boily will reinforce the state's duty to assess the impact of its future conduct on the Charter rights of every individual. This is known as general deterrence: *Ward*, at paragraph 29. By definition, any award of compensatory damages also has a deterrent effect: see, for example, *Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46 at paragraph 29, [2001] 2 SCR 534.

[222] However, Mr. Boily has not demonstrated that the federal government's conduct in this case required a greater degree of deterrence. The facts of this case are exceptional in many respects. There is no evidence that similar situations have occurred or that the breach of

Mr. Boily's rights is the manifestation of a systemic problem. Again, to the extent that it challenges the principle of diplomatic assurances, I cannot give effect to that submission without contradicting *Badesha*.

C. *Countervailing Factors*

[223] In *Ward*, the Supreme Court stated that an award of damages may not be appropriate and just if there are countervailing factors. Those factors include the existence of alternative remedies and concerns for good governance. The burden of proving these factors is on the state: *Ward*, at paragraph 35.

(1) The Existence of Alternative Remedies

[224] Given the importance of the compensation objective in Mr. Boily's case, it cannot be seriously agued that alternative remedies, such as a declaratory judgment, would be more appropriate.

[225] Similarly, the availability of an action for damages based on extra-contractual liability does not preclude a Charter remedy, provided that it does not result in double compensation. According to the Supreme Court, "[t]he existence of a potential claim in tort does not therefore bar a claimant from obtaining damages under the *Charter*": *Ward*, at paragraph 36; see also *Francis*, at paragraph 29. In this case, the primary basis of Mr. Boily's action is a breach of section 7 of the Charter.

(2) Good Governance and Qualified Immunity

[226] The federal government argued that Mr. Boily's action must fail because the decisions at issue are immune from suit. Relying on *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42, [2011] 3 SCR 45 [*Imperial Tobacco*]; *Hinse v Canada (Attorney General)*, 2015 SCC 35, [2015] 2 SCR 621 [*Hinse*], and *Ressources Strateco inc c Procureure générale du Québec*, 2020 QCCA 18 [*Ressources Strateco*], the federal government argued that the decision not to take steps to ensure that Mr. Boily was not incarcerated at the Cieneguillas prison was a policy decision. Because it is based on the weighing of a wide range of factors, such a decision would be entitled to qualified immunity, in other words, it would give rise to civil liability only if the federal government had acted in bad faith or with reckless disregard.

[227] The federal government's arguments are framed in terms that are more appropriate for an action in extra-contractual liability (or tort) than for an action for damages under the Charter. The analysis must therefore be reframed in terms of the principles established by the Supreme Court in this regard. In *Ward,* at paragraph 39, the Supreme Court stated that "[i]n some situations . . . the state may establish that an award of *Charter* damages would interfere with good governance such that damages should not be awarded unless the state conduct meets a minimum threshold of gravity". In so doing, the court apparently moved away from the approach of granting immunity to broad categories of public policy decisions. Given the priority afforded to constitutional rights, it makes sense not to grant immunity simply because the state made a decision by weighing a wide range of competing interests. For example, in *Conseil scolaire francophone de la*

Colombie-Britannique v British Columbia, 2020 SCC 13 at paragraphs 170 to 179, the Court stated that mere government policies that are not established by statute are not immune.

[228] However, the approach based on categories of decisions has not been entirely discarded. In *Henry*, the Court stated that a person claiming damages for a breach of the duty to disclose evidence in the context of a criminal trial must prove that the Crown acted deliberately and with knowledge of the consequences of the breach. This approach can be described either as a form of qualified immunity or as a heightened fault requirement. In *Ernst v Alberta Energy Regulator*, 2017 SCC 1, [2017] 1 SCR 3, the Court also suggested that adjudicative decisions would be similarly immune, although no clear majority emerged from that decision.

[229] Current case law has not precisely determined the scope of these principles, as the Ontario Court of Appeal noted in *Francis*, at paragraphs 80–93. However, it is not necessary to delve into this issue, as the decision to extradite Mr. Boily despite a substantial risk of torture was not, in fact, a policy decision and did not fall within a category of decisions attracting immunity. In any event, the decision meets the heightened standard of fault applicable in cases of qualified immunity.

[230] In *Hinse*, at paragraph 23, the Supreme Court, referring to its earlier decision in *Imperial Tobacco*, summarized the relevant principles for identifying policy decisions that are entitled to qualified immunity as follows:

> . . . core policy government decisions that are protected from suit are "decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith":

> para. 90. Policy decisions form a narrow subset of discretionary decisions. Such a decision is a considered decision that represents "a 'policy' in the sense of a general rule or approach, applied to a particular situation": para. 87. To determine whether a decision is a policy decision, the role of the person who makes it may be of assistance, given that employees working at the operational level are not usually involved in making policy choices: paras. 87-90.

[231] Further, in *Ressources Strateco*, the Quebec Court of Appeal stated that in determining whether a government decision was entitled to a qualified immunity, the degree of discretion exercised by the decision maker must be considered.

[232] In this case, the decision to extradite Mr. Boily despite a substantial risk of torture does not have any of the characteristics of a policy decision attracting immunity. Unlike the decision in *Ressources Strateco*, which was made by a Minister, this decision was made by lower ranking officials. There is no evidence that the decision was made in accordance with a general policy applicable to similar cases. It was not a legislative or regulatory decision. Rather, it was an operational decision made regarding a specific case.

[233] The decision could not have been based on a range of economic, social and political considerations, to paraphrase the Supreme Court in *Imperial Tobacco*. As I explained in paragraph [142] above, only in exceptional cases will the decision to extradite a person despite a substantial risk of torture be justified by such considerations. As I stated at paragraph [177], the extradition order was not based on any such considerations, but rather on the premise that extradition could not take place if there was a substantial risk of torture. The evidence does not reveal any reason that would have suddenly allowed consideration of such factors on the eve of the extradition. The decision was therefore not made in the exercise of a broad discretion.

[234] The decision cannot be described as adjudicative. It did not follow any adversarial process. It was not made pursuant to decision-making power granted by statute. Rather, it was an action taken by officials who, in the process of enforcing the law, discovered that what they were about to do would expose a person to a substantial risk of torture. Neither was the decision akin to one made by the Crown in the course of a criminal prosecution, as discussed in *Henry*.

[235] In any event, even if one were to conclude that the decision at the heart of this case was subject to qualified immunity, I find that it meets the heightened standard of fault referred to in *Hinse* and *Henry*.

[236] In *Henry*, at paragraph 84, the Supreme Court held that damages may be awarded against the government where a Crown prosecutor deliberately withholds information knowing that it will likely impinge on the accused's right to make full answer and defence. In the present case, as I have demonstrated at paragraphs [210] to [212], federal officials knew that Mr. Boily would be exposed to a substantial risk of torture, thereby violating his right to security of the person under section 7 of the Charter, and yet they deliberately chose to extradite him.

[237] Similarly, the Court in *Hinse* stated, at paragraph 53, that policy decisions may give rise to an award of damages if there is "proof of serious recklessness that reveals a breakdown of the orderly exercise of authority so fundamental that absence of good faith can be deduced"; see also *Finney v Barreau du Québec*, 2004 SCC 36 at paragraphs 37 to 40, [2004] 2 SCR 17. I find that this formulation of the test is also satisfied in this case. I find it difficult to imagine how federal officials could have concluded that Mr. Boily's extradition would be consistent with section 7 of

the Charter, after having learned that he would be incarcerated at the prison from which he had escaped and where the guard who was killed during his escape worked. The federal government did not present any evidence nor did it argue that Ms. Desjardins's conclusions about the substantial risk of torture that Mr. Boily would face were wrong or were not shared by other officials involved in the extradition process. The federal government also failed to establish any grounds that would have justified extradition despite a substantial risk of torture. It was therefore clear that Mr. Boily's extradition was contrary to section 7 of the Charter. See, by way of analogy, *Francis*, at paragraphs 77 and 78.

[238] Beyond the recognized categories of decisions that give rise to qualified immunity or to which a heightened fault requirement applies, *Ward* also contemplates that good governance concerns may be raised on a case-by-case basis. However, the federal government has not brought any evidence of such concerns. Because Mr. Boily's situation is exceptional, I find it difficult to see how an award of damages would undermine good governance.

[239] Lastly, the federal government relied on *Khadr* to argue that several of the actions complained of in Mr. Boily's action, in particular the failure to ask the Mexican authorities to incarcerate Mr. Boily at another prison, were taken under the royal prerogative and are immune from suit. I reject this submission.

[240] This submission is based on a misreading of *Khadr*. At paragraph 36 of *Khadr*, the Supreme Court held that courts may review a decision made under the royal prerogative for a Charter breach. However, the remedy provided by the court must take into account the broad

discretion that the state enjoys in the conduct of international relations. This is what motivated the Supreme Court to substitute the injunction issued at trial in that case with a declaratory judgment. There is nothing in the Court's ruling to suggest that decisions made under the royal prerogative are immune in principle from an award of damages under the Charter.

[241] Moreover, it is incorrect to say that the decision made on August 16, 2007, was based on the royal prerogative. The royal prerogative is defined as the residue of the Crown's power that has not been superseded by law: *Khadr*, at paragraph 34. In this case, however, the decision to proceed with the extradition process despite the discovery of a substantial risk of torture was made in the context of the application of the *Extradition Act*, and therefore fell outside the realm of the royal prerogative. The fact that certain steps that might have brought the extradition into conformity with the Charter, such as sending a diplomatic note, are traditionally associated with the royal prerogative, does not change this. Similarly, while consular services may be provided under the royal prerogative, I have explained above why the breach of section 7 of the Charter does not primarily arise from the consular services provided to Mr. Boily.

D. *The Amount of Damages*

[242] Considering that an award of damages would compensate Mr. Boily and ensure the vindication of his rights, and that such an award is not precluded by considerations of good governance, it is now necessary to determine the amount of damages.

(1) Principles

[243] It is useful to summarize the basic principles governing the assessment of damages, whether they are awarded for compensation for injury or for vindication.

[244] When it comes to compensation, *Ward* states that the principles governing the assessment of damages in private law may be relevant (paragraphs 49, 50 and 54), including the principle of full restitution. In this case, the parties have agreed that it is Quebec civil law principles that apply. Nevertheless, the relevant principles are quite similar in civil law and in common law.

[245] Personal injury is generally considered to give rise to three forms of compensation: the cost of health care required as a result of the injury, replacement of the victim's lost income and non-pecuniary losses: Jean-Louis Baudouin, Patrice Deslauriers and Benoît Moore, *La responsabilité civile*, 9e éd (Montréal: Yvon Blais, 2020) at paragraphs 1–475 to 1–516 [Baudouin, *La responsabilité civile*]; Daniel Gardner, *Le préjudice corporel*, 4e éd (Montréal: Yvon Blais, 2016) at paragraphs 305 to 551 [Gardner, *Le préjudice corporel*]. Non-pecuniary losses (also known as pain and suffering) include suffering, psychological harm and loss of amenities. Moreover, in *Ward*, at paragraph 50, the Supreme Court reiterated that "[p]ain and suffering are compensable".

[246] Mr. Boily's claim does not pertain to the cost of care or lost income. Because he was incarcerated, it is readily understandable that the torture he endured did not deprive him of the opportunity to work. Thus, he is only seeking compensation for non-pecuniary injury.

[247] In assessing non-pecuniary loss, Quebec courts have relied on three methods or approaches: *St-Ferdinand*, at paragraphs 72 to 80; *Cinar Corporation v Robinson*, 2013 SCC 73 at paragraph 105, [2013] 3 SCR 1168 [*Cinar*]. The conceptual approach assigns an objective value to each component of the human person. In contrast, the personal approach seeks to assess the harm from the subjective perspective of the victim. Lastly, the functional approach is based on the cost of measures meant to make the victim's life more pleasant. It is recognized that these three approaches can complement each other. In addition, courts often rely on a comparison with awards granted for similar injuries in previous decisions: *Cinar*, at paragraph 106; Baudouin, *La responsabilité civile*, at paragraph 1-506.1.

[248] Compensation for non-pecuniary loss arising from personal injury is subject to a cap, set at $100,000 in 1978 by the Supreme Court in *Andrews v Grand Toy Alberta Ltd*, [1978] 2 SCR 229 [*Andrews*]. Its indexed value is now approximately $400,000. See also *Cinar*, at paragraphs 95–103. This cap must not be viewed as the high end of a scale of suffering, intended to be prorated according to the seriousness of the injury. Rather, it is simply a maximum compensation: *Stations de la vallée de St-Sauveur inc c MA*, 2010 QCCA 1509 at paragraph 78, [2010] RJQ 1872. At paragraph 50 of *Ward*, the Supreme Court explicitly referred to *Andrews*, suggesting that the cap applied to Charter damages.

(2) Evidence of Harm

[249] In order to properly apply these principles, it is necessary to begin by describing in more detail the harm that Mr. Boily suffered, first by looking at his own testimony and that of his daughter, and then at the expert evidence.

a) *Testimonies of Mr. Boily and his Daughter*

[250] In Mr. Boily's testimony at trial, he described in detail the sensations he experienced during the three instances of torture, the short- and medium-term consequences on his mental health and the long-term effects he still feels today.

[251] When he realized that he would be tortured, Mr. Boily felt a sense of panic. He stated that being immersed in a barrel of filthy water is the worst thing a human being can experience. In his own words (May 2, 2022, transcript, pp 122–24):

> [TRANSLATION]
>
> . . . I tried to twist to the left and then to the right, I tried to free one arm, free the other arm, free the other arms, I was caught, I had difficulty, but, ah, judge, you feel so powerless in a situation like that, you can't defend yourself, you can't tell them to stop assaulting you, you know? And it's humiliating, it's humiliating to know that they do what they want to you. . .
>
> . . . they managed to put my head in the water. David, he had done it to me... this is the worst moment a human being can experience. I was sure that I was going to drown there.
>
> . . . I was thinking about my children, my family, my in-laws, my Mexican wife, I even thought about my Canadian wife who had died, my parents who had died, I asked them: "Oh no, I don't want to die like this, I have so many things I want to do in life." You know, it's... you see their image and then you implore them, then everyone, you ask them to do a miracle, to get you out of this situation.
>
> . . . I even threw up in the barrel, then I tried to clear my throat because there was water that had… uh, not the throat, it was the trachea and then the lungs, it was water that had entered.
>
> . . . They put my head back in the… my vomit. Ah, he did that about ten times. But each time, I was sure that I was going to drown.

[252] Mr. Boily also described how he felt when the guards suffocated him with a plastic bag (May 2, 2022, transcript, p 128):

> [TRANSLATION]
>
> Then there, [the bag] filled up quickly with mist because… because of the breathing. When I breathed in, it stuck to my nose, it stuck to my mouth, I breathed out, it went away. And then, at a certain moment, I started to have a buzzing in my ears, and it got bigger. Then I saw black dots, black dots that were jumping and dancing in front of my eyes. Then I was dizzy. Dizzy. There, I felt in a void as if there was nothing. I felt like I was not even in my body. There I asked myself stupid questions: who I was, where I was, what am I doing here, what's going on?

[253] Between the sessions of torture and in the days and weeks that followed, Mr. Boily constantly feared that he would be subjected to torture again. At night, he anticipated the guards' visit, which prevented him from sleeping. Those fears were acute for two months, until he was transferred to another cell. They recurred periodically thereafter, especially when he was transferred to a different prison. He experienced physical symptoms, such as high blood pressure, ulcers, heartburn and nosebleeds.

[254] During his time in Mexican prisons, Mr. Boily became depressed. He was heavily medicated (May 3, 2022, transcript, pp 30, 43). He also attempted to take his own life (May 3, 2022, transcript, p 42).

[255] Even after he returned to Canada and was granted parole, Mr. Boily has continued to suffer from the consequences of the events of 2007. He sometimes chokes on his food, believing he has [TRANSLATION] "bugs in his throat" (May 3, 2022, transcript, p 185). He has nightmares in which he drowns. When he moved into an apartment alone, he was constantly fearful to the

point of barricading himself in at night. His daughter, with whom he lived for the first few months after his release, confirmed at trial that he regularly suffered from insomnia and was constantly suspicious when he went to the grocery store or a restaurant. In addition, Mr. Boily became extremely depressed shortly after moving in alone. He is now under regular psychiatric care.

b) *Expert Evidence*

[256] The expert evidence makes it possible to label what Mr. Boily experienced: it is post-traumatic stress disorder [PTSD]. This evidence also allows for a better understanding of the consequences of his PTSD.

[257] Mr. Boily called Professor Alain Brunet to testify. Professor Brunet, who teaches psychology at McGill University, is a renowned expert on post-traumatic stress, particularly in veterans. He specializes in psychometrics and has designed a test that is frequently used to diagnose PTSD. I found his testimony to be generally credible.

[258] Professor Brunet described PTSD as a [TRANSLATION] “wound to the soul” (May 4, 2022 transcript, p 28) resulting from an unexpected encounter with death, be it one’s own death or the death of other individuals. The DSM-5 sets out detailed diagnostic criteria that include recurrent nightmares or memories, avoidance of stimuli associated with the traumatic event, mood alterations, sleep disturbance, or hypervigilance. These symptoms must last for more than one month and must cause either “clinically significant distress” or impairment in social functioning.

[259] Professor Brunet examined Mr. Boily and made him undergo a series of tests. He concluded that Mr. Boily was experiencing PTSD as a result of the torture that he had suffered in 2007. In particular, he noted that some of the symptoms Mr. Boily described, such as the nightmares about drowning or involving insects or vermin, were specifically related to the simulated drowning that he was subjected to at that time (May 4, 2022 transcript, pp 83−84).

[260] The federal government called psychiatrist Gilles Chamberland to testify. Dr. Chamberland, who practises forensic psychiatry at the Institut Philippe-Pinel, frequently acts as an expert witness in a wide range of cases. He met with and administered psychometric tests to Mr. Boily. In his report, he concluded that Mr. Boily had no functional impairment. At the hearing, he also asserted that Mr. Boily was not suffering from PTSD.

[261] I give no weight to Dr. Chamberland's opinion for two main reasons: he was not a credible witness and his mandate did not include assessing whether Mr. Boily had PTSD.

[262] Indeed, Dr. Chamberland had to admit on cross-examination that there were significant shortcomings in his report. For example, his report contains detailed criticism of Professor Brunet's use of a particular psychometric test while in reality, Professor Brunet had used a different test (May 13, 2022 transcript, pp 67−69). When he was writing his report criticizing Professor Brunet's opinion, he had not realized that Professor Brunet had received instructions different from his own (May 12, 2022 transcript, p 86; May 13, 2022 transcript, p 90). Dr. Chamberland was also inconsistent in that he criticized Professor Brunet for not having taken certain steps even though he did not bother to follow these steps himself. For

example, when he was writing his report, he did not consult Mr. Boily's medical file, he did not attempt to speak to the psychiatrist who is currently treating him, and he did not keep the list of questions he had asked Mr. Boily (May 12, 2022 transcript, pp 176−184, 247−248).

[263] These shortcomings are a symptom of a more fundamental issue. Under section 52.2 of the *Federal Courts Rules*, all expert witnesses must agree to be bound by a code of conduct that imposes on them "an overriding duty to assist the Court impartially", as well as a duty to be "independent and objective" and to not be "an advocate for a party." However, the above-noted shortcomings suggest that Dr. Chamberland is using every tool at his disposal to defend his client's cause, at the expense of thoroughness and impartiality. Furthermore, during his testimony, he adopted an attitude that is difficult to reconcile with his duty to assist the Court impartially. He attempted to cling tooth and nail to opinions whose foundation had been undermined on cross-examination. To do so, he did not hesitate to state one thing and its opposite, then to argue semantics in order to make up for the contradiction (see, for example, the May 12, 2022 transcript, pp 193−194, and the May 13, 2022 transcript, pp 45−46 and 108−109). When he was pushed to the limit, he made assertions that were completely implausible, such as stating that Mr. Boily did not have PTSD when he had met with him but that he could nevertheless have suffered from it a few months earlier or later (May 12, 2022 transcript, pp 223−224). Briefly put, he is an extremely argumentative witness who does not easily admit that he could be wrong.

[264] The other reason I give no weight to Dr. Chamberland's testimony is that the instructions he received are unrelated to the issues that I have to decide. Counsel for the federal government

asked him to assess whether Mr. Boily had a functional impairment using the standardized methods designed for this purpose. However, Mr. Boily is not claiming damages for a loss of ability to earn his livelihood or for a loss of functionality; rather, he is claiming non-pecuniary damages for his suffering. In this regard, Dr. Chamberland stated several times that he was unable to assess suffering. Therefore, his conclusions regarding functional impairment provide no useful guidance with respect to the issues that I must decide.

[265] At the hearing, Dr. Chamberland attempted to convert his opinion that Mr. Boily had no functional impairment into an opinion that he was not experiencing PTSD. To do so, he submitted that a person cannot suffer from PTSD without also having a functional impairment. Yet the DSM-5 states the contrary: the patient may present with either "clinically significant distress" or with a functional impairment. To get around this roadblock, Dr. Chamberland claimed that in order to be clinically significant, distress must be objectively demonstrable, lead to functional limitations or require treatment (May 13, 2022 transcript, pp 20, 23−24). It is difficult to reconcile these assertions with those to the effect that suffering or distress cannot be quantified or that several criteria within the DSM-5, such as nightmares, are intrinsically subjective (May 12, 2022 transcript, p 131; May 13, 2022 transcript, pp 19, 27−28). In fact, the reasoning that Dr. Chamberland adopted to improvise a diagnosis at the hearing renders the clinically significant distress criterion meaningless. This criterion must mean something other than an impairment in functioning; otherwise, we would need to conclude that the authors of the DSM-5 used redundant wording. His reasoning is also contrary to the testimony given by Professor Brunet, who noted that over half of people suffering from PTSD do not have a functional impairment (May 4, 2022 transcript, p 29). In reality, Dr. Chamberland had to admit

on cross-examination that few human beings will not develop symptoms after being subjected to torture sessions such as those that Mr. Boily had been subjected to (May 13, 2022 transcript, p 78).

[266] I therefore have no hesitation in accepting Professor Brunet's opinion that Mr. Boily has PTSD.

(3) Pre-existing Injury and the Thin-skull Rule

[267] The federal government submits that it does not have to compensate Mr. Boily because he was already suffering from PTSD stemming mainly from the torture that had been inflicted on him when he was arrested in 1998. In particular, it relies on the report by psychologist Raymond David, who had diagnosed Mr. Boily with this disorder in 2006. More broadly, the federal government contends that Mr. Boily's PTSD could have been caused by other trauma, such as his wife's accidental death in 1991, the fact that he had been held hostage when he had escaped, or the various forms of violence of which he may have been a victim in prison.

[268] The basic principle of damages is *restitutio in integrum*. The compensation must be sufficient to restore the plaintiff to the position in which they would have been had their rights not been breached, but no more than that. When the plaintiff has a particular vulnerability that causes the losses to be more significant than they would have been for the average person, the defendant must still fully compensate the plaintiff for that damage. This is what we call the thin-skull rule. However, when the plaintiff has already suffered injury or when a pre-existing condition would have inevitably evolved to cause an injury independently of the unlawful

breach, the compensation that the defendant is required to provide is reduced by a corresponding amount. In this regard, see Gardner, *Le préjudice corporel*, at paragraphs 85 to 93; *Athey v Leonati*, [1996] 3 SCR 458 at paragraphs 34 to 36; and *Blackwater v Plint*, 2005 SCC 58 at paragraphs 78 to 81, [2005] 3 SCR 3. The burden of establishing that the injury already existed or would have developed independently of the unlawful breach is on the defendant: Gardner, *Le préjudice corporel*, at paragraph 87.

[269] However, the evidence on this point is inconclusive. The general impression conveyed by Professor Brunet's and Dr. Chamberland's testimony is that there are no tools that make it possible to clearly distinguish between the consequences of two successive traumatic events.

[270] In the light of all the evidence, I am of the opinion that only the episode of torture that occurred in 1998 need be considered as a possible cause of Mr. Boily's PTSD. Among the events that the federal government relied upon, it is the only one that gave Mr. Boily the feeling that he was about to die. We also know that over 50% of torture cases result in PTSD, whereas the likelihood of developing this disorder is lower for other types of traumatic events (May 4, 2022 transcript, pp 68, 149). As for the death of his wife in 1991, it would have led to a depression, but there is no evidence that it triggered PTSD (May 4, 2022 transcript, pp 191−192).

[271] The federal government placed great emphasis on the report by psychologist Raymond David, who examined Mr. Boily in 2006 and diagnosed him with PTSD. Dr. Chamberland stated that the symptoms that were observed at the time were just as severe, if not more severe, than

Mr. Boily's current ones, while reiterating that he is unable to assess suffering (May 12, 2022 transcript, pp 130−132).

[272] I assign little weight to Mr. David's report because he did not testify at the hearing. In addition, Professor Brunet criticized certain aspects of this report, and it is highly possible that Mr. Boily developed significant anxiety on account of his impending extradition (May 4, 2022 transcript, pp 196−201).

[273] Even assuming that Mr. Boily experienced PTSD after being tortured in 1998, I am unable to accept this as an explanation for all of the harm that he has suffered to date. Such a proposition is completely implausible. It is tantamount to stating that the three episodes of torture to which Mr. Boily was subjected in 2007 caused no injury. This proposition is also belied by the evidence: Professor Brunet explained that certain symptoms are specific to the second instance of torture (May 4, 2022 transcript, pp 83−84).

[274] The more delicate question is whether Mr. Boily would have inevitably continued to suffer the after-effects of the events of 1998 if the events of 2007 had not taken place. The experts did not look at this issue from that angle. I am inclined to find that Mr. Boily would have continued to experience some of the symptoms that Mr. David had observed, for some time. However, the evidence does not allow me to reach more precise conclusions as to their duration or seriousness. In the absence of more specific indications, I arbitrate at 10% the reduction of the compensation awarded to Mr. Boily aimed at accounting for this injury, which cannot be attributed to the events of 2007.

(4) The Appropriate Amount

[275] Having defined the nature of the injury that Mr. Boily suffered and the extent to which that injury was caused by the federal government's breach of his rights, it is now possible to determine the quantum of damages. For the reasons that follow, I award Mr. Boily damages in the amount of $360,000 for the purposes of compensation, as well as an additional sum of $140,000 for the vindication of his rights, for a total of $500,000.

[276] The amount of $360,000 awarded as compensation is equal to 90% of a base amount of $400,000. It is particularly difficult to quantify the injury that Mr. Boily sustained. One could ask the hypothetical question of what sum of money one would pay to avoid being subjected to such an ordeal, but in the end, [TRANSLATION] "the difficulty of assessing the monetary value of non-pecuniary damage is that it has no common measure with money": *Corriveau c Pelletier*, [1981] CA 347 at 354. Hence, I have determined the amount of the compensation primarily by searching for an adequate comparison.

[277] In his Charter claim, Mr. Boily is claiming a lump sum of $6 million in order to meet the objectives of compensation, vindication and deterrence in an undifferentiated manner. However, in his claim based on extra-contractual liability, he is separately claiming $1 million in compensatory damages and $5 million in punitive damages. To justify the $6 million amount, he is mainly relying on the settlements that the federal government has reached with victims of torture, including Messrs. Arar, Khadr, Almalki, El-Maati and Nurredin. Those settlements attracted considerable media attention. Each victim received approximately $11 million.

[278] I cannot agree with Mr. Boily without contradicting the Supreme Court of Canada, which, at paragraph 153 of *Hinse*, noted that it is risky to determine compensation by relying on amounts that do not result from judicial awards. We do not know the exact nature or extent of the injury for which compensation was provided in each of those cases. Unlike Mr. Boily, some of these individuals may have been illegally detained for long periods of time in addition to being tortured. They may have received compensation for the pecuniary damage that they suffered, whereas Mr. Boily is not claiming any amount in that regard. We also do not know whether part of the amounts that were awarded were punitive damages.

[279] The federal government submits that cases concerning [TRANSLATION] "criminal physical assaults resulting in PTSD" are the proper basis for comparison. It provides as examples the following cases, in which compensation ranging from $50,000 to $150,000 was awarded, in 2022 present value: *LL c Tsagatakis*, 2009 QCCS 4279; *Ferland c Langlois*, 2015 QCCS 5928; *Roy c Privé*, 2017 QCCS 986; *MH c O'Brien*, 2018 QCCS 4918, appeal allowed in part, 2020 QCCA 1157; and *A c B*, 2022 QCCS 768. Therefore, according to the federal government, $150,000 to $200,000 may be an appropriate amount to compensate Mr. Boily.

[280] In *St-Sauveur*, at paragraphs 78 and 79, the Court of Appeal of Quebec stated that it is very difficult to compare psychological injuries that have been inflicted on different individuals because psychological injuries are subjective. I have little information enabling me to compare the severity of the PTSD that the victims in those cases experienced to the severity of Mr. Boily's PTSD. The fact that the above-cited cases arose from a variety of situations—sexual

assault of a minor, spousal abuse, assault involving work colleagues—does not make this exercise any easier.

[281] Nevertheless, without minimizing the seriousness of the assaults that led to those decisions, I find that they do not involve certain aspects of the injury that Mr. Boily sustained. He testified that each time that he was immersed in the barrel of filthy water, he felt his death was certain. He was also unable to ask for anyone's protection because he was incarcerated and tortured by his guards. Moreover, Professor Brunet noted that torture is one of the most traumatic types of events (May 4, 2022 transcript, pp 68, 149). In short, torture cannot be reduced to assault, even aggravated assault.

[282] In my view, *Gauthier v Beaumont*, [1998] 2 SCR 3 [*Gauthier*] provides the most relevant comparison. In that case, two police officers tortured the victim, Mr. Gauthier, for one whole night in order to induce him to confess to a crime. This ordeal placed Mr. Gauthier in such a state of fear that he was unable to work for six months and moved to the other side of the country. He was diagnosed with "post-traumatic neurosis" that prevented him from bringing civil action against the police officers for six years. The Supreme Court awarded him $50,000 in pecuniary damages, as well as $200,000 in moral (or non-pecuniary) damages. The Court observed that this amount was justified by the recurrent flashbacks and nightmares, the mood issues, "the humiliation he suffered in the course of torture, the loss of dignity, the severe violation of his physical and psychological integrity, and his physical and psychological suffering": *Gauthier* at paragraph 103. The Court also awarded him $50,000 in punitive damages.

[283] Of course, the injury that Mr. Gauthier experienced is not exactly the same as that inflicted on Mr. Boily. For example, Mr. Gauthier sustained physical injuries that required him to be hospitalized for a few days. However, since Mr. Boily was incarcerated, he continued to be confronted by his torturers and was unable to relocate to the other end of the country. He also attempted to end his life, which was apparently not the case for Mr. Gauthier. It is difficult to compare the severity of the psychological injuries that both men suffered, but based on the information at my disposal, they may have been of the same order of magnitude.

[284] In 2022 present value, the $200,000 amount awarded to Mr. Gauthier is equal to approximately $335,000. I have assessed the injury that Mr. Boily sustained as being equivalent to a slightly higher sum, namely, $400,000. As I have explained above, I have reduced this amount by 10% to account for the fact that Mr. Boily already had a pre-existing injury. I therefore award him $360,000 as compensation.

[285] I am of the opinion that this amount is insufficient to fulfill the objective of vindication. For the following reasons, I award an additional amount of $140,000 to achieve this end, for a total of $500,000.

[286] As I have explained above, the violation of Mr. Boily's rights was serious and wilful. The federal government knew perfectly well that it was exposing him to a substantial risk of torture. In extraditing him in spite of that risk, the federal government showed an inexcusable disregard for human dignity. For reasons not disclosed to me, Mr. Boily's physical and psychological integrity was sacrificed. However, despite the crimes that he committed, torture is "so inherently

repugnant that it could never be an appropriate punishment, however egregious the offence": *Suresh* at paragraph 51. It is therefore necessary to award a significant amount of damages in order to reassure Canadians that the federal government makes no compromises with respect to torture and will not turn a person over to foreign authorities when doing so will expose them to a substantial risk of torture: *Ward*, at paragraph 28.

[287] Mr. Boily is claiming a total of $6 million, which I assume includes $5 million for the purposes of vindication and deterrence. Even though the breach of his rights was serious and wilful, it is difficult to reconcile awarding such a large sum with the message of moderation conveyed in *Ward*, particularly at paragraphs 53 and 54.

[288] I consider that a total amount of $500,000, which includes $140,000 awarded specifically for the purposes of vindication of right, is sufficient to express this Court's disapproval with respect to the seriousness of the federal government's fault. The $140,000 component is of the same order of magnitude as certain punitive damages awards in cases involving very serious faults committed by police officers or civil servants. For example, the $50,000 that was awarded for that reason in *Gauthier* is equivalent to $85,000 today. In a recent case, *Attorney General of Canada v Manoukian*, 2020 QCCA 1486, $200,000 was awarded to each of the plaintiffs because the RCMP had conducted a botched investigation.

(5) Solidarity

[289] One last issue must be addressed. Relying on article 1478 of the *Civil Code of Québec*, the federal government is asking that the obligation to compensate be apportioned between the

persons liable for the injury, including the guards who tortured Mr. Boily and the Mexican state as their employer. It considers that it is liable for only 10% of the injury.

[290] Yet the Code provides for certain situations in which the obligation to make reparation for injury caused through an extra-contractual fault is solidary. In particular, article 1526 reads as follows:

1526. The obligation to make reparation for injury caused to another through the fault of two or more persons is solidary where the obligation is extra-contractual.	**1526**. L'obligation de réparer le préjudice causé à autrui par la faute de deux personnes ou plus est solidaire, lorsque cette obligation est extracontractuelle.

[291] In *Montréal (Ville) v Lonardi*, 2018 SCC 29 at paragraph 72, [2018] 1 SCR 104 [*Lonardi*], the Supreme Court specified the following: "For this article to apply, the fault of two or more persons must have caused a single injury. This fault may be a common fault or may consist of contributory faults." Faults are said to be contributory when two individuals who are not acting together commit separate faults that combine to cause a single injury. As examples, see *Salomon*; *Genex Communications inc c Association québécoise de l'industrie du disque, du spectacle et de la vidéo*, 2009 QCCA 2201 at paragraphs 108 and 109, [2009] RJQ 2743; *Beauchamp c Ville de Montréal*, 2021 QCCS 4726 at paragraph 15; and the examples cited by Baudouin, *La responsabilité civile*, at paragraph 1-721. However, when each fault can be tied to a separate injury, article 1526 does not apply. That is what happened in *Lonardi*.

[292] In this case, the faults committed by the federal government, the prison guards who tortured Mr. Boily and various branches of the Mexican government are contributory because

they all played a part in causing a single injury. Contrary to the situation in *Lonardi*, it is not possible to attribute a distinct component of the injury that Mr. Boily sustained to the fault committed by the federal government.

[293] Article 1526 therefore applies, and the federal government's responsibility is solidary with that of the prison guards and of the various branches of the Mexican government. As a result, under article 1528, Mr. Boily could sue the federal government alone in order to obtain compensation for all of the harm that he suffered. The federal government could not require that the other parties at fault also be sued: this would be the benefit of division that article 1528 expressly precludes. Moreover, such a requirement would be contrary to the very definition of solidarity found in article 1523, according to which each debtor may "be compelled separately to perform the whole obligation". Insofar as the decision in *Garderie Loulou de Marieville inc c Lapierre*, 2016 QCCS 1498, detracts from these principles, I decline to follow it.

[294] Solidary liability cannot be imposed for punitive damages: *Cinar* at paragraphs 120 to 132. Logically, the same rule should apply to the portion of damages granted for the purpose of vindication. However, the amount that I have awarded in this regard is justified by the federal government's conduct alone. Thus, I am not imposing solidary liability for punitive damages related to the conduct of other individuals or organizations.

V. Disposition, Interest and Costs

[295] For the foregoing reasons, Mr. Boily is awarded Charter damages in the amount of $500,000, payable by the federal government.

[296] In his statement of claim, Mr. Boily seeks interest and additional indemnity pursuant to article 1619 of the *Civil Code of Québec*. At trial, however, Mr. Boily submitted that the granting of interest is governed by sections 31 and 31.1 of the *Crown Liability and Proceedings Act*, RSC 1985, c C-50. The federal government submitted instead that the applicable provisions are sections 36 and 37 of the *Federal Courts Act*, RSC 1985, c F-7. It is not necessary to decide this issue because these two sets of provisions set out similar rules. When the cause of action arose entirely within one province, the laws that govern the granting of interest within that province apply. However, when the cause of action did not arise within a single province, the Court will award interest at the rate that it considers reasonable in the circumstances.

[297] In this case, Mr. Boily's cause of action did not arise within only one province. Mr. Boily's extradition took place in Quebec. The August 16, 2007 decision was apparently made at the Department of Foreign Affairs' headquarters in Ontario. Lastly, the injury first arose in Mexico. Interest will therefore not be awarded under the provisions of the *Civil Code of Québec*, but rather will be based on what this Court finds reasonable.

[298] With respect to prejudgment interest, this Court's practice is to award it according to the Bank of Canada's borrowing rate, to which 1% is often added. With respect to post-judgment interest, this Court can set a higher rate, taking into account commercial rates or rates determined by provincial laws for post-judgment interest: *Seedlings Life Science Ventures, LLC v Pfizer Canada ULC*, 2020 FC 505 at paragraphs 33 to 40.

[299] Considering these factors as well as how interest rates have fluctuated since this action was filed in 2010, I am of the opinion that prejudgment interest at a 2% rate and post-judgment interest at a 4% rate should be awarded.

[300] At the hearing, the federal government submitted that the Court should not award interest that duplicates the indexation of the basis of comparison used to determine the amount of damages. This concern would have been particularly relevant if interest and the additional indemnity had been granted pursuant to the *Civil Code of Québec*. Indeed, the purposes of the additional indemnity include countering the effects of inflation: Gardner, *Le préjudice corporel*, at paragraph 889. It is well known that the interest and additional indemnity awarded under Quebec law far exceed what this Court awards as prejudgment interest. The latter is essentially intended to compensate for the delay in paying the amount owed, based on the interest that the amount owed could have generated; it is not intended to counter the effects of inflation. Hence, there is no double compensation.

[301] Under the above-mentioned provisions, prejudgment interest cannot be awarded on punitive damages. By analogy, one cannot grant prejudgment interest on damages that serve the purpose of vindication: *Brazeau v Canada (Attorney General)*, 2019 ONSC 3426 at paragraph 24. Therefore, I will award prejudgment interest only on the $360,000 amount. As the action was instituted on April 8, 2010, prejudgment interest amounts to $89,260.

[302] As a successful litigant, Mr. Boily is entitled to costs. He is seeking costs calculated based on the high end of Column V of the Tariff or, alternatively, a higher lump sum that would

be justified by the federal government's conduct. The federal government argues that Column IV of the Tariff should apply.

[303] I award costs calculated based on the midpoint of Column V of the Tariff. This decision is essentially rooted in the importance and complexity of the issues and the duration of the proceeding. In my opinion, however, the federal government committed no clear abuse in the course of the proceeding that would justify granting higher costs, for example through a lump sum.

JUDGMENT in T-541-10

THE COURT'S JUDGMENT is that:

1. The action is allowed.
2. The defendant is ordered to pay the plaintiff damages in the amount of $500,000, as well as $89,260 in prejudgment interest.
3. The defendant is ordered to pay the plaintiff post-judgment interest on those amounts, at a rate of 4% per year as of the date of this judgment.
4. The defendant is ordered to pay the plaintiff's costs based on the midpoint of Column V of the Tariff.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-541-10
STYLE OF CAUSE:	RÉGENT BOILY v HER MAJESTY THE QUEEN IN RIGHT OF CANADA
PLACE OF HEARING:	MONTRÉAL, QUEBEC; OTTAWA, ONTARIO; AND BY VIDEOCONFERENCE
DATE OF HEARING:	MAY 2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 25 AND 26, 2022
JUDGMENT AND REASONS:	GRAMMOND J
DATED:	AUGUST 31, 2022

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