

**SUPREME COURT OF CANADA**

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| **Citation:** Hinse *v.* Canada (Attorney General), 2015 SCC 35, [2015] 2 S.C.R. 621 | **Date:** 20150619**Docket:** 35613 |

Between:

Réjean Hinse

Appellant

and

Attorney General of Canada

Respondent

- and -

Association in Defence of the Wrongly Convicted,

Centre Pro Bono Québec and Pro Bono Law Ontario

Interveners

**Official English Translation**

**Coram:** McLachlin C.J. and LeBel,\* Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner and Gascon JJ.

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| **Joint Reasons for Judgment:**(paras. 1 to 181) | Wagner and Gascon JJ. (McLachlin C.J. and Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ. concurring) |

\* LeBel J. took no part in the judgment.

Hinse *v.* Canada (Attorney General), 2015 SCC 35, [2015] 2 S.C.R. 621

Réjean Hinse Appellant

v.

Attorney General of Canada Respondent

and

Association in Defence of the Wrongly Convicted,

Centre Pro Bono Québec and Pro Bono Law Ontario Interveners

**Indexed as: Hinse *v.* Canada (Attorney General)**

2015 SCC 35

File No.: 35613.

2014: November 10; 2015: June 19.

Present: McLachlin C.J. and LeBel,[[1]](#footnote-1) Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner and Gascon JJ.

on appeal from the court of appeal for quebec

 *Crown law — Crown liability — Prerogatives — Public law immunity — Crown’s power of mercy vested in federal Minister of Justice under Criminal Code, R.S.C. 1985, c. C-46 — Characterization of nature of Minister’s power — Circumstances in which exercise of power of mercy can expose Crown to liability — Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50, ss. 2 “liability”, 3(a)(i) — Civil Code of Québec, arts. 1376, 1457.*

 *Civil liability — Crown liability — Fault — Qualified immunity — Individual wrongly convicted of armed robbery — Federal Minister of Justice refusing to exercise Crown’s power of mercy, which is vested in him under Criminal Code — Standard of fault applicable to Minister’s conduct — Whether individual has proven on balance of probabilities that Minister acted in bad faith or with serious recklessness in reviewing applications for mercy — Civil Code of Lower Canada, art. 1053 — Civil Code of Québec, art. 1457.*

 *Damages — Punitive damages — Extrajudicial fees — Pro bono representation — Whether individual entitled to compensatory or punitive damages — Whether, in case of abuse of process and where there is pro bono agreement, damages can be awarded in Quebec in respect of extrajudicial fees in order to compensate party who has suffered damage resulting from fault of other party — Civil Code of Québec, art. 1608.*

 In 1964, H was unjustly sentenced to 15 years’ imprisonment for armed robbery. He was granted parole after serving a third of his sentence. In 1966, he had persuaded three of the five perpetrators of the robbery to sign affidavits to clear his name. Between 1967 and 1981, H submitted three applications for mercy to the federal Minister of Justice (“Minister”) under the *Criminal Code* and an application for a pardon to the Governor General in Council. They were all denied. In 1988, he applied to the Commission de police du Québec, which, following an investigation, said that it hoped the Attorney General of Quebec (“AGQ”) would intervene with the Solicitor General of Canada so that justice would be done. In 1990, H submitted a fourth application for mercy, but the Minister replied that he should seek relief in the Quebec Court of Appeal, which he did. The Court of Appeal allowed the appeal, but instead of entering an acquittal or ordering a new trial, it directed a stay of proceedings. On January 21, 1997, the Supreme Court of Canada unanimously acquitted H in a judgment delivered from the bench, as it was of the view that the evidence could not allow a reasonable and properly instructed jury to find H guilty beyond a reasonable doubt. H then instituted an action in civil liability for an order for solidary payment against the AGQ, the Attorney General of Canada (“AGC”) and the town of Mont-Laurier. Under out-of-court settlements, the town and the AGQ paid him a total of $5,550,000 in compensation. After these settlements, H continued to claim $1,079,871 for his pecuniary losses and $1,900,000 for his non-pecuniary losses, as well as $10,000,000 in punitive damages, from the AGC.

 The Superior Court allowed the action and ordered the AGC to pay H a total of almost $5.8 million. It found, pursuant to the *Crown Liability and Proceedings Act*, that the Minister was subject to Quebec’s rules of civil liability, that he was not protected by any immunity, that he had committed a fault of “institutional inertia” or “institutional indifference”, and that a sustained, concerted and extensive review would have uncovered the errors. It ordered the AGC to pay H more than $850,000 for pecuniary damage and $1,900,000 for non-pecuniary damage, as well as $2,500,000 in punitive damages. It also found that the AGC’s conduct at trial had amounted to an abuse of process and ordered him to pay $100,000 for fees H had paid to the first law firm that had represented him, as well as $440,000 for the value of the services rendered by the second even though that firm had never billed him for fees, as they had entered into a *pro bono* agreement.

 The Court of Appeal reversed the judgment. It found that the exercise of the Minister’s power of mercy is protected by a qualified immunity and that the Crown can be held liable only if the decision was made in bad faith, and with malice. In this case, the court found that it had not been proven that the Minister had committed a fault and that, even if it were assumed that a fault had been committed, there was nothing to suggest that the miscarriage of justice would have been ascertained quickly if the Minister had acted promptly.

 *Held*: The appeal should be dismissed.

 The power of mercy codified in the *Criminal Code* derives from the royal prerogative of mercy. At the material time, the applicable provisions of the *Criminal Code* left it up to the Minister to determine in what circumstances he or she should intervene. In making this discretionary decision, the Minister had to assess and weigh public policy considerations on the basis of social, political and economic factors. This power came into play after all judicial remedies had been exhausted, and the Minister, in exercising it, had to be careful to avoid usurping the role of the courts and short-circuiting the usual judicial process. The history and the nature of the power of mercy show that the exercise of that power was a true core policy act. The exercise of such a power could not therefore expose the Crown to liability unless the Minister acted irrationally or in bad faith.

 To assess the Minister’s conduct in the exercise of his power of mercy, it would be inappropriate to apply a standard of fault that limits bad faith to malice. In Quebec civil law, bad faith is broader than just intentional fault or a demonstrated intent to harm another. Bad faith can be established by proving that the Minister acted deliberately with the specific intent to harm another person, or by proof of serious recklessness that reveals a breakdown of the orderly exercise of authority so fundamental that absence of good faith can be deduced and bad faith presumed. In light of the applicable provisions of the *Criminal Code* and of the fact that there was, at the relevant time, no established procedure to guide the exercise of the power of mercy, the Minister was required to conduct a meaningful review of any application that was neither frivolous nor vexatious. However, this review was not equivalent to the one that would be expected from a police investigation or a commission of inquiry. The duty to conduct a meaningful review entails a duty to make a decision in good faith on the basis of the evidence uncovered by that review.

 The trial judge erred in approaching the issue of the federal Crown’s civil liability from the perspective of a fault of institutional inertia or indifference. The analysis should instead have focused on the individual conduct of each Minister acting in his or her capacity as a servant of the federal Crown. The trial judge also erred in considering the powers of a commissioner under the *Inquiries Act* as a basis for determining whether the review conducted by the Minister was a meaningful one, given that those powers were not conferred on the Minister until 2002, when Parliament reformed the procedure in respect of applications for mercy. Moreover, there is no legislation establishing an obligation for the federal government or the provinces to compensate victims of miscarriages of justice, nor is there any legislation establishing a right to such compensation. Nor did the *Guidelines: Compensation for Wrongfully Convicted and Imprisoned Persons* require the federal government to compensate H, as they do not constitute binding legislation.

 In this case, H has failed to prove, on a balance of probabilities, that the Minister acted in bad faith or with serious recklessness in reviewing his applications for mercy. The documentary evidence negates the trial judge’s inference that there was no review whatsoever of H’s initial application for mercy. Although there are only a few documents in the record, they attest to the fact that a certain review was conducted and that certain actions were taken in this regard. By way of admissions, the parties acknowledged that certain government employees would have confirmed that, as they had understood the facts, an extensive and careful review of the case was under way at the time in question. A delay in reviewing the initial application was raised, but despite this, an analysis of the circumstances does not support the conclusion that the Minister acted in bad faith or with serious recklessness. As for H’s three subsequent applications, it cannot reasonably be argued that no meaningful review was conducted in respect of them. The relevant correspondence shows the opposite to be true. Regarding the second application, which was very brief and contained no new evidence or legal arguments, it was open to the Minister to find it frivolous and to reject it on that basis. As for the third application, given that it did not go into much detail, the allegations based on vague irregularities could have struck the Minister as being of little consequence. In the case of the fourth application, it was reasonable for the Minister to justify her decision by noting that the Court of Appeal could consider the case on its own without her having to intervene, particularly given that the Minister did not reject the application outright.

 Some additional comments on causation and damages are in order. Even if it were assumed that the Minister failed to conduct a meaningful review of the first application, the evidence does not establish that he would probably have discovered at that time the key evidence uncovered by the investigator of the Commission de police 20 years later. To conclude otherwise would be to rely on mere conjecture or remote hypotheticals. H has failed to establish a causal connection between the Minister’s fault and the alleged damage.

 On the issue of damages, the trial judge failed to take into account the requirement that the liability be apportioned solidarily, and to establish the amounts being awarded on the basis of the actual liability of each of the solidary debtors. To the extent that more than one solidary debtor could be liable for heads of claim, the releases granted by H to the AGQ and the town of Mont-Laurier made it necessary to examine the causal faults and apportion liability. H should have borne the shares of the solidary debtors he had released (arts. 1526 and 1690 *C.C.Q.*). In addition to this overriding error, the grounds for each of the heads of damages were also flawed. Where the question of pecuniary damage is concerned, there is no direct connection between the Minister’s conduct and H’s decision to retire at age 60, the fees and costs incurred in respect of the proceedings brought in the Court of Appeal and the Supreme Court between 1990 and 1997 did not result from the alleged faults, and wasted time and efforts expended to obtain justice are inconveniences that are inherent in the efforts of anyone who is involved in legal proceedings. As for non-pecuniary damage, an order that the AGC pay $1,900,000 after the AGQ had paid $1,100,000 under the same head of damages would seem to be disproportionate, and the amounts granted in other cases of miscarriages of justice were mostly made further to the recommendations of advisory bodies and were based on considerations that are different from those on which damages are based in principle. Moreover, those cases were different in that they involved the much more serious crime of murder and in that the period of incarceration was longer in almost all of them. On the issue of punitive damages, even though the reference in the *Crown Liability and Proceedings Act* to the Quebec rules of extracontractual civil liability encompasses the remedy of punitive damages provided for in the *Charter of human rights and freedoms*, it was not appropriate to award such damages in this case. Given that the Minister’s conduct cannot be equated with bad faith or serious recklessness, it cannot be concluded that there was intentional interference with a right protected by the *Charter*. The evidence does not support a finding that the Minister’s state of mind was such that he intended to harm H or had knowledge of the adverse consequences his conduct would have for H.

 In Quebec law, it is only in exceptional cases that a party can be required to pay the fees of lawyers retained by the opposing party, and such compensation must be consistent with the general rules of civil liability. Only an abuse of process can justify awarding extrajudicial fees as damages. However, by virtue of art. 1608 *C.C.Q.*, the obligation to pay damages to the other party is neither reduced nor altered by the fact that the latter received a gratuitous benefit from his or her counsel. In this case, the AGC’s conduct did not amount to an abuse of process. The law on the federal Crown’s liability for a fault committed by the Minister in exercising his or her power of mercy was far from clear at the time of the dispute, and it was reasonable and appropriate for the AGC to contest H’s action and raise the defence that he did. The trial judge committed a palpable and overriding error in finding that there had been an abuse of process in the context of this case. H was not entitled to the extrajudicial fees that were awarded.

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*Act respecting the implementation of the reform of the Civil Code*, ss. 2, 3, 9.

*Charter of human rights and freedoms*, CQLR, c. C-12, s. 49.

*Civil Code of Lower Canada*, arts. 1053, 1054.

*Civil Code of Québec*, preliminary provision, arts. 1376, 1440, 1457, 1463, 1474, 1478, 1526, 1607, 1608, 1621, 1690, 2803, 2846, 2849.

*Code of Civil Procedure*, CQLR, c. C-25, arts. 54.1 to 54.6, 54.4.

*Criminal Code*, R.S.C. 1970, c. C-34, s. 617.

*Criminal Code*, R.S.C. 1985, c. C-46, ss. 690, Part XXI.1, 696.2, 696.3, 696.4, 696.5, 748.

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 APPEAL from a judgment of the Quebec Court of Appeal (Pelletier, Bich and Bouchard JJ.A.), 2013 QCCA 1513, [2013] R.J.Q. 1451, [2013] AZ-51000894, [2013] Q.J. No. 7562 (QL), 2013 CarswellQue 13456 (WL Can.), setting aside a decision of Poulin J., 2011 QCCS 1780, [2011] R.J.Q. 794, [2011] AZ-50742270, [2013] J.Q. no 3760 (QL), 2011 CarswellQue 3905 (WL Can.). Appeal dismissed.

 *Guy J. Pratte*, *Alexander De Zordo* and *Marc-André Grou*, for the appellant.

 *Bernard Letarte* and *Vincent Veilleux*, for the respondent.

 *Brian H. Greenspan* and *Naomi M. Lutes*, for the intervener the Association in Defence of the Wrongly Convicted.

 *Bernard Larocque* and *Jonathan Lacoste-Jobin*, for the intervener Centre Pro Bono Québec.

 *Ranjan K. Agarwal* and *Nathan J. Shaheen*, for the intervener Pro Bono Law Ontario.

English version of the judgment of the Court delivered by

 Wagner and Gascon JJ. —

1. Introduction
2. Although it receives praise from around the world, the Canadian criminal justice system is not free from the risk of miscarriages of justice. Where such situations arise — although fortunately very rare, they have serious consequences — certain remedies are available to the victims. One such remedy is the discretionary power of mercy provided for in the *Criminal Code*, R.S.C. 1985, c. C-46 (“*Cr. C.*”), which enables the federal Minister of Justice (“Minister” or “Ministers”) to help rectify miscarriages of justice in certain cases. In this appeal, the Court is being asked for the first time to rule on the standard of conduct that applies to the exercise of this power and on the circumstances in which the federal Crown might be exposed to liability.
3. The appellant, Réjean Hinse, was wrongly convicted of armed robbery. Under out-of-court settlements, the town of Mont-Laurier (“Mont-Laurier”) and the Attorney General of Quebec (“AGQ”) paid him a total of $5,550,000 in compensation for this miscarriage of justice. According to Mr. Hinse, this compensation was incomplete, however, since the Ministers who had decided on his applications for mercy over the years had also committed a fault against him by failing to diligently exercise their power in his favour.
4. The Quebec Superior Court found that a simple fault was sufficient for the Crown to be liable in respect of the Minister’s conduct. The trial judge concluded that a fault of [translation] “institutional inertia” or “institutional indifference” on the federal government’s part had caused Mr. Hinse damage equivalent to nearly $5.8 million. The Court of Appeal reversed that judgment, expressing the opinion that the person who exercises this power of mercy is protected by an immunity analogous to the one that applies to a Crown prosecutor in a case of malicious prosecution. Given that there was no intentional or gross fault, or even a simple fault, on the Minister’s part, it dismissed Mr. Hinse’s action against the Attorney General of Canada (“AGC”).
5. We are of the opinion that, at the material time, the exercise of the Minister’s power of mercy was a true policy decision. The Minister was therefore protected by a qualified (or “relative”) immunity. On being presented with an application for mercy that was neither frivolous nor vexatious, the Minister had a duty to conduct a meaningful review of the application, and a breach of that duty amounting to bad faith, which encompasses serious recklessness, could expose the Crown to liability.
6. We agree with the Court of Appeal that, on a balance of probabilities, the evidence does not support the trial judge’s inference that the Ministers violated the rules of civil liability in this case. We also agree with the judges of that court that, in any event, Mr. Hinse failed to discharge his burden of proving the requisite causal connection between the Ministers’ actions and the alleged damage. Finally, we agree with the Court of Appeal that the damages awarded to the appellant in excess of the $5,550,000 he had already received were inappropriate. The appeal should therefore be dismissed.
7. Background and Judicial History
8. In September 1964, Mr. Hinse was found guilty of an armed robbery that he claimed not to have committed. He was sentenced to 15 years’ imprisonment. Because a request he made for legal aid was denied, he did not appeal his conviction. However, he began to take steps to have his conviction recognized as a miscarriage of justice.
9. In 1966, he persuaded three of the five perpetrators of the robbery to sign affidavits to clear his name. On April 24, 1967, he wrote to the Minister, seeking recognition of the miscarriage of justice of which he claimed to be a victim. This was the beginning of a correspondence that would span more than three decades. Although he was in prison at the time of the initial exchanges, Mr. Hinse was granted parole in 1969 after serving a third of his sentence.
10. Mr. Hinse submitted three applications for mercy between 1967 and 1981. He also applied to the Governor General in Council for a pardon in 1971. All these applications were denied. In 1988, he applied to the Commission de police du Québec (“Commission de police”). Following an investigation into Mr. Hinse’s allegations, the Commission de police found that his complaint was [translation] “sufficiently troubling” and the facts gathered were “sufficiently probative” to warrant submitting a report, which it forwarded to the AGQ and the Quebec Minister of Public Security: A.R., vol. XI, at p. 36. In its report, the Commission de police said that it hoped the AGQ would intervene with the Solicitor General of Canada so that “justice will be done” to Mr. Hinse: *ibid.*, at p. 68. The Quebec Minister of Public Security sent the report to the Solicitor General of Canada on November 20, 1990. It was at this point that Mr. Hinse submitted a fourth application for mercy. The Minister replied that he should seek relief in the Quebec Court of Appeal, which he did.
11. On June 8, 1994, after granting Mr. Hinse leave to file a notice of appeal and introduce fresh evidence, the Court of Appeal allowed his appeal: (1994), 64 Q.A.C. 53. But instead of entering an acquittal or ordering a new trial, the court exercised its inherent jurisdiction and directed a stay of proceedings for abuse of process, although that was not the result Mr. Hinse had requested.
12. Mr. Hinse then appealed the case to this Court, challenging the legality and the constitutionality of the stay of proceedings. The Court denied him leave to appeal to it: [1995] 1 S.C.R. viii. Mr. Hinse refused to give up, filing an application for reconsideration. On November 30, 1995, the Court allowed his application and granted him leave to appeal: [1995] 4 S.C.R. 597. On January 21, 1997, it unanimously acquitted him in a judgment delivered from the bench, “being of the view that the evidence could not allow a reasonable jury properly instructed to find the appellant guilty beyond a reasonable doubt”: [1997] 1 S.C.R. 3, at para. 2.
13. On February 4, 1997, Mr. Hinse sent the AGC a formal notice. On June 5, 1997, he instituted an action for an order for solidary payment against three defendants: the AGQ, the AGC and Mont-Laurier. On November 15, 2002, Mont-Laurier signed a transaction with him for a total of $250,000. On December 2, 2010, the AGQ, too, entered into a transaction, this one for a total of $5,300,000 in principal, interest and costs. This out-of-court settlement came more than four weeks into the hearing on the merits of the action, after the parties had presented their evidence but before they had made their oral arguments.
14. The hearing on the merits thus ended with the AGC as the sole defendant. In respect of the AGC, Mr. Hinse alleged that the federal government had helped to perpetuate and exacerbate the damage he had suffered by failing to act diligently to acknowledge and rectify the miscarriage of justice of which he had been the victim. He submitted that the conduct of the federal government [translation] “was indicative of reprehensible carelessness, recklessness and total denial, which must be denounced and condemned [by the award of] exemplary damages”: A.R., vol. IV, at p. 31. After the settlement with the AGQ was reached, he continued to claim $1,079,871 for his pecuniary losses and $1,900,000 for his non-pecuniary losses, as well as $10,000,000 in punitive damages, from the AGC.
	1. Quebec Superior Court, 2011 QCCS 1780, [2011] R.J.Q. 794
15. The Superior Court allowed Mr. Hinse’s action and ordered the AGC to pay him a total of almost $5.8 million.
16. Poulin J. began by determining that the out-of-court settlements Mr. Hinse had reached with Mont-Laurier and with the AGQ constituted an express release from the debt. Mr. Hinse therefore did not have to prove any fault on their parts. However, the federal Crown could be held liable only for the share of the damage caused by its servants: paras. 17-22; art. 1690 of the *Civil Code of Québec* (“*C.C.Q.*”).
17. Poulin J. then found that the Minister was subject to Quebec’s rules of civil liability and was not protected by any immunity: paras. 62-63. She concluded that he had committed a fault of [translation] “institutional inertia” or “institutional indifference”: paras. 33, 55 and 75-76. The Minister had had a duty to conduct a meaningful review of Mr. Hinse’s applications, but had failed to do so: paras. 71 and 73.
18. Poulin J. was of the opinion that Mr. Hinse had proved causation by means of presumptions of fact, given that [translation] “[a] sustained, concerted, extensive, competent and timely review of his initial efforts would surely have brought the errors to the AGC’s attention”: paras. 75 and 98. In her view, Mr. Hinse had proved the damage he had suffered. She ordered the AGC to pay him more than $850,000 for pecuniary damage and $1,900,000 for non-pecuniary damage. She also found that the AGC was guilty of unlawful and intentional interference with Mr. Hinse’s right to dignity and awarded Mr. Hinse $2,500,000 in exemplary damages. Finally, she found that the AGC’s conduct at trial had amounted to an abuse of process. She ordered him to pay Mr. Hinse $100,000 for fees he had paid to the first law firm that had represented him, as well as $440,000 for the value of the services rendered by the second even though it had never billed him for fees, as they had entered into a *pro bono* agreement.
	1. Quebec Court of Appeal, 2013 QCCA 1513
19. The Court of Appeal reversed Poulin J.’s judgment. It expressed disagreement with her finding on the issue of immunity. In its view, the exercise of the Minister’s power of mercy is protected by a qualified immunity: para. 141. As a result, the Crown can be held liable only if the Minister’s decision was made in bad faith, and with malice: paras. 144 and 150.
20. The Court of Appeal found that it had not been proven that the Minister had committed a fault: para. 157. The court acknowledged that it was difficult [translation] “to accurately gauge what kind of study was conducted, because of the summary nature of the evidence adduced”, but inferred nothing negative from the brevity of the Minister’s decision: para. 170 (CanLII). At the time in question, the Minister was under no obligation to give reasons for his or her decisions, and good faith on his or her part had to be presumed. The Court of Appeal also rejected the view that the time it had taken the Minister to reach a decision had caused the damage: even if it were assumed that a fault had been committed, there was nothing to suggest that the miscarriage of justice would have been ascertained quickly if the Minister had acted promptly (paras. 171-72).
21. The Court of Appeal went on to say that even if it were assumed that there had been some fault on the AGC’s part, Poulin J. had failed to apportion liability among the AGC, the AGQ and Mont-Laurier for the purpose of calculating the damages: paras. 193 et seq. On the issue of punitive damages, the court found that even if a fault had been proven, there had been no unlawful and intentional interference with Mr. Hinse’s fundamental rights: paras. 228-32. Finally, it rejected Poulin J.’s findings with respect to abuse of process: para. 242.
22. Issues
23. The appeal raises several issues, which can be summarized as follows:
24. What rules of civil liability apply to the Minister’s power of mercy?
25. Has the appellant shown that the Minister’s conduct constituted a fault in this case?
26. If so, has the appellant proven a causal connection between the Minister’s fault and the alleged damage?
27. If so, is the appellant entitled to compensatory or punitive damages and to compensation for his counsel’s extrajudicial fees?
28. Analysis
	1. Rules of Civil Liability That Apply to the Minister’s Power of Mercy
		1. Extracontractual Liability of the Crown
29. The original legislation respecting civil liability of the federal Crown was the *Crown Liability Act*, S.C. 1952-53, c. 30, which later became the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50 (“*C.L.P.A.*”). The *C.L.P.A.* provides that whether the federal Crown is liable for damages is governed by the law of the jurisdiction where the acts in question were committed. In Quebec, the combined effect of the *C.L.P.A.* and the *C.C.Q.* is that the federal Crown is generally subject to the rules of civil liability set out in art. 1457 *C.C.Q.*: *Canadian Food Inspection Agency v. Professional Institute of the Public Service of Canada*, 2010 SCC 66, [2010] 3 S.C.R. 657,at paras. 25-26. In the instant case, the Crown is alleged to be liable in respect of the fault of its servants: ss. 2 “liability” and 3(*a*)(i) *C.L.P.A.*
30. However, art. 1376 *C.C.Q.* provides that the rules respecting liability set out in the *C.C.Q.* apply “to the State and its bodies, and to all other legal persons established in the public interest, subject to any other rules of law which may be applicable to them”. This Court has found, for example, that general principles or rules of public law may either prevent the general rules of civil liability from applying or substantially alter how they are applied: *Finney v. Barreau du Québec*, 2004 SCC 36, [2004] 2 S.C.R. 17, at para. 27; *Prud’homme v. Prud’homme*, 2002 SCC 85, [2002] 4 S.C.R. 663, at para. 31; *Canadian Food Inspection Agency*, at para. 26.
31. The principles in question include those relating to Crown immunity, which the Court considered in *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45;see also *Canadian Food Inspection Agency*, at para. 27; s. 8 *C.L.P.A.* In *Imperial Tobacco*, the Court noted that the prevailing view in Canada is that only “true” policy decisions are protected by Crown immunity. The Court explained that it is not helpful to posit a stark dichotomy between policy decisions and operational decisions, or to define policy decisions negatively as decisions that are not “operational” decisions: paras. 84-86. Although it refrained from establishing a black-and-white test, the Court concluded that 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.
32. In *Imperial Tobacco*,the Court did not lay down a strict rule that only “true” core policy decisions can be protected by a qualified immunity. On the contrary, it stated that “[a] black and white test that will provide a ready and irrefutable answer for every decision in the infinite variety of decisions that government actors may produce is likely chimerical”: para. 90. Although that case concerned the federal Crown’s liability for negligence at common law, its conclusions on the issue of immunity for acts of the Crown pertained to public law, which means that they are applicable to Quebec’s rules relating to Crown liability.
33. With these principles in mind, we must begin by characterizing the nature of the ministerial power at issue so as to determine whether it is a true core policy act to which a qualified immunity applies. Having done this, we must identify the standard of fault that applies to this power and then, after defining the nature of the duties owed by the Minister during the material period, apply this standard to the facts.
	* 1. Nature of the Ministerial Power at Issue
34. In the case at bar, Poulin J. found that the Minister is subject to the rules of civil liability and is not protected by any immunity when he or she exercises the power of mercy. But the Court of Appeal held that the Minister is in fact protected by a qualified immunity, given that the power in question stems from a royal prerogative and is exercised in a policy rather than an operational capacity. In this Court, the appellant submits that the Minister acts in the context of a statutory process, not of a royal prerogative, and that the standard is the existence of a simple fault. He argues that there is a distinction between the processing of applications for mercy and the Minister’s final decision. In his view, the processing of applications falls within the operational sphere and should not be protected by any immunity. As for the respondent, he supports the Court of Appeal’s analysis and its conclusion.
35. Applications for mercy are governed by the *Cr. C.* Four successive provisions applied during the material period. They are reproduced in the Appendix. It can be seen from these provisions that the discretionary nature of the Minister’s power (“[t]he Minister of Justice may”) and the requirement that the Minister conduct an inquiry (“if after inquiry he is satisfied that in the circumstances”) were constants throughout this period.
36. We agree with the Court of Appeal that the power of mercy codified in the *Cr. C.* derives from the royal prerogative of mercy. Most academic commentators are also in agreement with this. Historically, the royal prerogative of mercy has had two strands and two objectives: to show compassion by relieving an individual of the full weight of his or her sentence, and to correct miscarriages of justice such as wrongful convictions (G. T. Trotter, “Justice, Politics and the Royal Prerogative of Mercy: Examining the Self-Defence Review” (2001), 26 *Queen’s L.J.* 339, at p. 344, citing A. T. H. Smith, “The Prerogative of Mercy, the Power of Pardon and Criminal Justice”, [1983] *P.L.* 398). The prerogative was incorporated into Canadian law and conferred on the Governor General by letters patent: *Attorney General for Canada v. Attorney General of the Province of Ontario* (1894), 23 S.C.R. 458, at pp. 468-69; *Letters Patent Constituting the Office of Governor General of Canada* (1947), *Canada Gazette*, Part I, vol. 81, p. 3014 (reproduced in R.S.C. 1985, App. II, No. 31).
37. Until 2002, the second strand of the royal prerogative of mercy, that of the rectification of miscarriages of justice, was codified primarily in s. 690 *Cr. C.* Originally, in 1892, the forerunner of this provision read as follows:

**748.** If upon any application for the mercy of the Crown on behalf of any person convicted of an indictable offence, the Minister of Justice entertains a doubt whether such person ought to have been convicted, he may, instead of advising Her Majesty to remit or commute the sentence, after such inquiry as he thinks proper, by an order in writing direct a new trial at such time and before such court as he may think proper.

(*Criminal Code, 1892*, S.C. 1892, c. 29)

1. The provision has evolved over time, but the link between the referral procedure and the concept of mercy has always remained, as can be seen from the words “upon an application for the mercy of the Crown” (*Criminal Code*, S.C. 1953-54, c. 51, s. 596). In *Therrien (Re)*, 2001 SCC 35, [2001] 2 S.C.R. 3, at para. 113, Gonthier J. considered the effect of a pardon, which he defined as “an expression of the sovereignty of the monarch, the result of the unilateral and discretionary exercise of the Royal prerogative of mercy or clemency”. He explained that in Canada, statutory provisions merely set out various ways to exercise this prerogative but do not limit its scope. The types of pardons include “the pardon granted after a referral for hearing or referral to a court of appeal in accordance with s. 690 of the *Code* . . . which results in a new trial or a new hearing”: *Therrien*, at para. 114.
2. The fact that the Minister’s power derives from the royal prerogative of mercy attests to the broad discretion that is conferred on him or her. Although the fact that a decision is discretionary is not on its own sufficient to justify finding that a public law immunity applies, it is nonetheless a helpful criterion.
3. Moreover, the various relevant provisions of the *Cr. C.* over the years were all drafted in broad and general language. They offered little guidance for the exercise of this discretion and accordingly gave the Minister a great deal of latitude. They gave the Minister the power to, *inter alia*,direct a new trial or refer the matter to the court of appeal, and left it up to the Minister to determine in what circumstances he or she should intervene:

**596.** The Minister of Justice may . . .

(*a*) direct . . . a new trial before any court that he thinks proper, if after inquiry he is satisfied that in the circumstances a new trial should be directed;

(*Criminal Code*, S.C. 1953-54)

1. In making this discretionary decision, the Minister necessarily had to assess and weigh public policy considerations on the basis of social, political and economic factors. This power, which derived from the royal prerogative, fell outside the traditional sphere of criminal law in that it came into play after all judicial remedies had been exhausted. In exercising it, the Minister had to be careful to avoid usurping the role of the courts and short-circuiting the usual judicial process. It clearly did not constitute a new level of appeal. As the Court of Appeal noted in the case at bar, the Minister’s duties required

[translation] . . . diverse (and often diverging) legal and social interests, ranging from the specific interest of the particular individual and a concern for justice to the preservation of the independence and integrity of the judicial system and of the stability of judgments — each of them being no less important than the others — to be weighed [in relation to] facts that are seldom clear. [para. 141]

1. Furthermore, Part XXI.1 of the *Cr. C.*, which was introduced in 2002 by the *Criminal Law Amendment Act, 2001*, S.C. 2002, c. 13, s. 71, has as its purposes to provide greater guidance for the exercise of this power and to enhance the transparency of the process: Library of Parliament, “Bill C-15A: An Act to amend the Criminal Code and to amend other Acts”, Legislative Summary LS-410E, October 12, 2001 (“Legislative Summary”). Under the current s. 696.3(3)(*a*) *Cr. C.*, the Minister may now direct a new trial or refer the matter to the court of appeal “if the Minister is satisfied that there is a reasonable basis to conclude that a miscarriage of justice likely occurred”. Unlike when Mr. Hinse made his applications, s. 696.4 *Cr. C.* now sets out specific criteria on which the Minister’s decision must be based. Public policy considerations, such as certainty of judgments and judicial independence, were taken into account when the new provisions were enacted, and their importance in the Minister’s decision-making process has been reduced.
2. Finally, because the decision maker’s role may also be a relevant factor in characterizing the power in question, it should be borne in mind that the Minister, in making such policy decisions, does not act as a mere public servant working in an administrative or operational capacity. In this regard, the appellant’s argument that a distinction should be drawn between the processing of applications for mercy by government employees and the Minister’s decision is wrong. Such a distinction is both difficult to justify and difficult to make in practice. This power is a single power — to review a conviction — that cannot be split into two unconnected steps. Although the ministerial review process does of course require administrative support, this fact alone does not, in the case before us, justify dividing the process into distinct compartments of policy decisions and operational decisions. The decision to consider a case further or to deny an application is an integral part of the evaluation process.
3. The history and the nature of the Minister’s power of mercy lead us to find that the exercise of that power was a true core policy act at the relevant time. In light of the principles from *Imperial Tobacco*, the exercise of such a power could not therefore expose the Crown to liability unless the Minister acted irrationally or in bad faith. In the instant case, it is not necessary to consider in detail what might constitute an irrational decision by the Minister. That is not the issue Mr. Hinse raises here. He merely complains of the failure to conduct adequate reviews of his applications. What is really at issue in this case is whether the Minister conducted a meaningful review. This means that it is important to define what constitutes bad faith in Quebec civil law in the context of the case at bar.
	* 1. Characterization of the Fault
4. Mr. Hinse maintains that the Minister’s conduct when exercising his power of mercy must be assessed against a standard of simple fault. In the alternative, he argues that the fault threshold required to lift the Crown’s qualified immunity includes carelessness or serious recklessness. The AGC counters that the Crown cannot be held liable in respect of the Minister’s conduct absent “bad faith or other similar conduct”: R.F., at paras. 43 and 51. At the hearing in this Court, the AGC conceded that bad faith can be proven indirectly by showing conduct so blameworthy and inexplicable that it cannot be concluded that the person in question acted in good faith, since the only possible explanation is that he or she did so in bad faith. In the AGC’s opinion, this is a very high threshold. A total failure by the Minister to review an application for mercy would be one example of such conduct: transcript, at pp. 77-78.
5. The Superior Court, having found that the Minister was not protected by any immunity, decided on and applied a standard of simple fault. The Court of Appeal, being of the opinion that the Minister’s actions were protected by an immunity, preferred to apply the malice standard developed in the context of the liability of Crown prosecutors for malicious prosecution. It pointed to the similarities between the Minister’s duties and those of prosecutors. It did not rule definitively on the issue, however, as in its view, the appellant had not proven that a fault of any kind had been committed: paras. 150-57.
	* + 1. Applicable Standard of Fault Is Not Malice
6. In our opinion, it would be inappropriate to import the malice standard applicable to the liability of Crown prosecutors for malicious prosecution into a case concerning an application for mercy. Although there is a certain similarity between the duties discharged by the Minister in exercising his or her power of mercy and those discharged by Crown prosecutors in exercising their discretion in criminal prosecutions, there are significant differences between the two roles.
7. First, although it is possible, in rare cases, to hold Crown prosecutors liable for malicious prosecution, there are policy reasons that justify an extremely high threshold for success in such an action: *Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339, at para. 43; *Proulx v. Quebec (Attorney General)*, 2001 SCC 66, [2001] 3 S.C.R. 9, at para. 4; *Nelles v. Ontario*, [1989] 2 S.C.R. 170. As a result, an action for malicious prosecution must be based on malice or on an improper purpose: *Miazga*, at paras. 56 and 81. The decision to initiate or continue criminal proceedings lies at the core of the Crown prosecutor’s powers, and the principle of independence of the prosecutor’s office shields prosecutors from the influence of improper political factors: *Miazga*, at para. 45; see also *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372. Prosecutors must be able to act independently of any political pressure from the government and must be beyond the reach of judicial review, except in cases of abuse of process. This independence is so fundamental to the integrity and efficiency of the criminal justice system that it is constitutionally entrenched: *Miazga*, at para. 46; *Krieger*, at paras. 30-32.
8. The imposition of a high fault threshold thus flows from an intentional choice made to preserve a balance “between the right of individual citizens to be free from groundless criminal prosecutions and the public interest in the effective and uninhibited prosecution of criminal wrongdoing”: *Miazga*, at para. 52.
9. These policy reasons do not apply to the Minister’s power of mercy, however. Although this power is a highly discretionary one, the Minister’s latitude in deciding whether to exercise it is not fundamental to the integrity and efficiency of the criminal justice system *per se.* Indeed, the mercy process [translation] “begins where the law ends”: *Bilodeau v. Canada (Ministre de la Justice)*, 2009 QCCA 746, [2009] R.J.Q. 1003, at para. 14; see also *Thatcher v. Canada (Attorney General)*, [1997] 1 F.C. 289 (T.D.), at para. 9. Furthermore, although prosecutorial authority must be shielded from political influence, the Minister must weigh social, political and economic factors in making his or her decision. As well, the Minister’s independence in the context of this decision-making process is not entrenched in the Constitution.
10. Second, it must be borne in mind that the exercise of the royal prerogative, like the exercise of any other statutory power, can be reviewed by the courts. Ministerial decisions on applications for mercy are therefore subject to judicial review: *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441; P. W. Hogg, P. J. Monahan and W. K. Wright, *Liability of the Crown* (4th ed. 2011), at p. 26; see also *Bilodeau v. Canada (Minister of Justice)*, 2011 FC 886, 394 F.T.R. 235; *Daoulov v. Canada (Attorney General)*, 2009 FCA 12, 388 N.R. 54; *Bilodeau* (QCCA); *Timm v. Canada (Attorney General)*, 2012 FC 505, 409 F.T.R. 8, aff’d 2012 FCA 282, 451 N.R. 250; *Thatcher*. This is generally not the case for Crown prosecutors’ decisions on whether to prosecute.
11. A comparison between the prosecutorial prerogative of Crown prosecutors and the evolution of the Minister’s power of mercy under the *Cr. C.* reveals significant differences between the contents of the two prerogatives. This means that these prerogatives must be analyzed from different perspectives.
12. Third, what is at issue in the instant case is whether the general Quebec rules of extracontractual civil liability apply to the federal Crown, as provided for in the *C.L.P.A.* Intent is not usually a prerequisite for establishing such liability. Even where gross fault is alleged, intent is not required, unlike in the case of the tort of malicious prosecution, for which intent must be proven.
13. Finally, we note that the AGC did not insist on this very high standard at the hearing in this Court.
14. It is therefore our opinion that to assess the Minister’s conduct in the exercise of his power of mercy, it would be inappropriate to apply a standard of fault that limits bad faith to malice. The bad faith referred to in *Imperial Tobacco* to circumscribe the qualified immunity of the Crown for acts of political authority does not require such a result.
	* + 1. Applicable Standard of Fault in This Case
15. In Quebec civil law, the concept of bad faith is flexible, and its content varies from one area of the law to another: *Entreprises Sibeca Inc. v. Frelighsburg (Municipality)*, 2004 SCC 61, [2004] 3 S.C.R. 304, at para. 25. In *Finney*, this Court defined the scope of a statutory immunity according to which the Barreau du Québec could not be prosecuted for acts carried out in good faith. The Court held that bad faith is broader than just intentional fault or a demonstrated intent to harm another: para. 37. It also encompasses serious recklessness. LeBel J. wrote the following:

. . . recklessness implies a fundamental breakdown of the orderly exercise of authority, to the point that absence of good faith can be deduced and bad faith presumed. The act, in terms of how it is performed, is then inexplicable and incomprehensible, to the point that it can be regarded as an actual abuse of power, having regard to the purposes for which it is meant to be exercised. [Emphasis added; para. 39.]

1. In *Sibeca*, this Court applied the definition of bad faith from *Finney* in the context of the qualified immunity that protects a municipality when exercising its regulatory discretion. Deschamps J.’s comments on the nature of that discretion can be transposed to the instant case:

Municipalities perform functions that require them to take multiple and sometimes conflicting interests into consideration. To ensure that political disputes are resolved democratically to the extent possible, elected public bodies must have considerable latitude. Where no constitutional issues are in play, it would be inconceivable for the courts to interfere in this process and set themselves up as arbitrators to dictate that any particular interest be taken into consideration. They may intervene only if there is evidence of bad faith. The onerous and complex nature of the functions that are inherent in the exercise of a regulatory power justifies incorporating a form of protection both in civil law and at common law. [para. 24]

1. In Deschamps J.’s view, the interpretation of bad faith proposed in *Finney* is applicable both to cases in which acts were committed deliberately with intent to harm and to those in which circumstantial evidence of bad faith must be relied on: *Sibeca*, at para. 26.
2. In our opinion, a standard of bad faith that encompasses serious recklessness as defined in *Finney* and applied in *Sibeca* is consistent with the logic of Quebec’s principles of civil liability. Moreover, this standard is akin to the concept of gross fault, which includes gross recklessness: see art. 1474 *C.C.Q.*; J.-L. Baudouin, P. Deslauriers and B. Moore, *La responsabilité civile* (8th ed. 2014), at No. 1-190.
3. This standard is of course higher than the standard of simple fault that the trial judge incorrectly applied in the case at bar. A simple fault such as a mistake or a careless act does not correspond to the concept of bad faith that defines the limits of the Crown’s qualified immunity. Moreover, it would be paradoxical if the exercise of the Minister’s power of mercy were subject to a reasonableness standard on judicial review while being considered from the standpoint of a simple fault in extracontractual liability.
4. In sum, decisions of the Minister that are made in bad faith, including those demonstrating serious recklessness — as defined in *Finney* and *Sibeca* — on the Minister’s part, fall outside the Crown’s qualified immunity. Bad faith can be established by proving that the Minister acted deliberately with the specific intent to harm another person. It can also be established by proof of serious recklessness that reveals a breakdown of the orderly exercise of authority so fundamental that absence of good faith can be deduced and bad faith presumed. It is with this in mind that the duty owed by the Minister when exercising his or her power of mercy must be analyzed.
	* 1. Minister’s Duty
5. The trial judge held that the Crown’s extracontractual liability under art. 1457 *C.C.Q.* is based on [translation] “the breach of a duty flowing from the conduct required of a reasonable person in society”: para. 32. She found that when the Minister exercises the power of mercy, he or she has a duty to react as quickly as possible when evidence of a miscarriage of justice arises: para. 68. At a minimum, this duty requires the Minister to conduct a meaningful review of applications for mercy, since he or she has the powers of a commissioner under Part I of the *Inquiries Act*,R.S.C. 1985, c. I-11: para. 71. The trial judge described the meaningful review as a “thorough” investigation (para. 95) or a “sustained, concerted [and] extensive . . . review” (para. 75).
6. The Court of Appeal concluded that the trial judge had erred in law in defining the scope of the Minister’s duty at the time of Mr. Hinse’s initial application for mercy on the basis of current standards and practices: para. 165. It instead found that the scope of that duty had been correctly defined in *Thatcher*: paras. 166-68. When presented with an application for mercy that was neither frivolous nor vexatious, the Minister was required to conduct a meaningful review of it, although not a review equivalent to the one that would be expected from a police investigation or a commission of inquiry.
7. In our opinion, the Court of Appeal was right, in defining the scope of the Minister’s duty at the relevant time, to endorse the conclusions reached by the Federal Court in *Thatcher*, to mention that the Minister was under no obligation to give reasons for his or her decisions, and to point out that good faith on the Minister’s part had to be presumed: para. 170.
8. Mr. Hinse’s applications for mercy were made to the Minister between 1967 and 1990, and the response to his final application was sent to him in April 1991, that is, before the *C.C.Q.* came into force in 1994. It will therefore be necessary to refer to the standard that was provided for in art. 1053 of the *Civil Code of Lower Canada* (“*C.C.L.C.*”) (now art. 1457 *C.C.Q.*), which was in force at the time of the facts alleged against the AGC:

Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill.

1. Under the *C.L.P.A.*, the federal Crown can be held liable not on its own account, but solely for the fault of its servants (in this case, the Minister): s. 3(*a*)(i). In Quebec civil law, it was art. 1054 *C.C.L.C.* — now art. 1463 *C.C.Q.* — that provided for this type of liability. However, this liability scheme was based on the same concept of fault as the one described in the general provisions on extracontractual liability, or, in this case, art. 1053 *C.C.L.C.*
2. To define the duty owed by the Minister when exercising his or her power of mercy, we must take the *Cr. C.* and the procedure that applied at the material time into account. These factors will make it possible to establish a general definition of the scope of that duty.
3. In finding that the Minister is protected by a qualified immunity, we noted that the *Cr. C.*’s successive provisions on mercy that applied during the relevant period (from 1967 to 1990) granted the Minister a broad discretion. Regardless of the amendments Parliament made over the years to the section of the *Cr. C.* that conferred this power on the Minister, the wording remained essentially the same: “The Minister of Justice may, upon an application for the mercy of the Crown . . . .” These various sections did not include the verb “shall” in relation to the Minister’s powers, and nowhere in them was any specific duty imposed on the Minister.
4. We also mentioned that Parliament left it up to the Minister to decide on the circumstances in which it would be appropriate to direct a new trial or refer the matter to the court of appeal. Ideally, Parliament could have defined the types of circumstances that were relevant and given better guidance on the procedure the Minister was to follow. But it did not do so. This reflects Parliament’s choice to give the Minister considerable latitude and must be taken into account when defining the scope of the Minister’s duty.
5. As we mentioned above, Parliament modified the power of mercy significantly in 2002, choosing to provide greater guidance for the exercise of the power. Since then, the Minister has been required to review applications for mercy in accordance with the *Regulations Respecting Applications for Ministerial Review — Miscarriages of Justice*, SOR/2002-416: s. 696.2 *Cr. C.* The Minister is also required to submit an annual report to Parliament in relation to such applications: s. 696.5 *Cr. C.* This change underlines the fact that there was no applicable procedural framework when Mr. Hinse made his applications for mercy. Moreover, the following appears in the Legislative Summary:

Prior to 1994, the Department of Justice took a more or less *ad hoc* approach to section 690 applications. There was no set procedure or designated personnel to deal with them. . . .

. . .

In 1994, the Department of Justice instituted a number of measures to address complaints about the section 690 application process. [Emphasis added; pp. 17-18.]

1. While the procedure to be followed is now more detailed, it does not actually require the Minister to conduct an investigation in every case. Section 3 of the *Regulations* provides that the Minister must conduct a preliminary assessment of the application. After that, the Minister is in principle required to conduct an investigation only “if [he or she] determines that there may be a reasonable basis to conclude that a miscarriage of justice likely occurred”: s. 4 of the *Regulations*. Finally, unlike with the powers the Minister had at the material time in this case, he or she now has and may exercise the powers of a commissioner under Part I of the Inquiries Act and the powers that may be conferred on a commissioner under s. 11 of that Act: s. 696.2(2) *Cr. C.*
2. In light of the applicable provisions of the *Cr. C.* and of the fact that there was, at the relevant time, no established procedure to guide the Minister in exercising his or her power of mercy, we, like the Court of Appeal, agree with the conclusions of Rothstein J. (then a judge of the Federal Court — Trial Division) in *Thatcher* regarding the scope of the Minister’s duty. *Thatcher* concerned an application for judicial review of a decision to deny an application for mercy made under s. 690 *Cr. C.* and, therefore, the scope of the duty of fairness the Minister owed when exercising the power. Although that is not the issue in the instant case, Rothstein J.’s analysis of the Minister’s power was nonetheless correct, and his conclusions will be helpful in determining the scope of the Minister’s duty in the context of the Crown’s civil liability.
3. Rothstein J. began by indicating that the mercy procedure is not the subject of legal rights, as it is initiated only after a convicted person has exhausted his or her rights: *Thatcher*, at para. 9. He then made the following observation:

That the function of the Minister of Justice under section 690 is an “exemplar of a purely discretionary act” is reflected in the wide allowance given to the Minister to exercise his discretion. There are no statutory provisions directing the Minister as to the manner in which he should exercise his discretion. There are no requirements as to the type of investigation the Minister must carry out under section 690. [para. 10]

1. Rothstein J. pointed out that no procedure had been established and that the Minister’s decision was not subject to appeal: *Thatcher*, at para. 11. He concluded that “the Minister must act in good faith and conduct a meaningful review, provided that the application is not frivolous or vexatious”: para. 13. An application usually had to introduce some new matter “indicating it is likely that there has been a miscarriage of justice”: para. 14. Rothstein J. stated that the applicant had no general right to disclosure of what the Minister or his officials had considered in their review: para. 13. However, the applicant was entitled to disclosure of any new information uncovered by the Minister’s investigation: para. 14.
2. Finally, Rothstein J. wrote:

Exceptionally, as a result of new information that is substantial and would provide a reasonable basis for a finding of miscarriage of justice, the Minister may find it necessary to consider material in police or prosecution files. In such a case, the material, or at least the gist of the material the Minister or his officials review, if not already known by the applicant, would have to be disclosed to him. But there is no general obligation on the Minister to review police and prosecution files or to disclose those files merely because of a request by a convicted person. [Emphasis added.]

(*Thatcher*, at para. 15)

1. It is our opinion that, for the purpose of establishing liability under the Quebec rules of extracontractual liability, the Minister’s duty can be defined in terms of a meaningful review of an application for mercy. What a meaningful review entails must be understood in light of Rothstein J.’s comments. It is not the extensive and thorough review referred to by Poulin J. As well, this review is clearly not intended to be equivalent to a new level of appeal. And it is inappropriate to compare the Minister’s review to a police investigation or to the work of a commission of inquiry. On the other hand, a slapdash investigation could hardly be described as a meaningful one either. It goes without saying that, as the AGC agreed at the hearing, a total failure to conduct a meaningful review of an application that is neither frivolous nor vexatious would constitute a breach of the Minister’s duty. In addition, as we concluded above that it is inappropriate to draw a distinction between the processing of an application for mercy and the Minister’s decision with respect to that application, these two aspects of the power of mercy are intrinsically linked. The duty to conduct a meaningful review therefore entails a duty to make a decision in good faith on the basis of the evidence uncovered by that review. Finally, we would add that at the time, the Minister did not have to document his or her investigation or give any reasons whatsoever for his or her discretionary decision. This fact will be important for our assessment of the evidence that has been submitted.
2. Since we have concluded that the Minister is protected by a qualified immunity when exercising his or her power of mercy, only a breach of the Minister’s duty that amounts to bad faith or serious recklessness could expose the Crown to liability. In short, the evidence had to show that the Minister had acted in bad faith or with serious recklessness in conducting the required review of Mr. Hinse’s applications for mercy.
	1. Evidence of Fault in This Case
3. Although the basis for the Crown’s extracontractual liability in respect of the Minister’s conduct is governed by the *C.C.L.C.*, it is the *C.C.Q.* that governs the rules of evidence and procedure in this case: ss. 2 and 3 of the *Act respecting the implementation of the reform of the Civil Code* (see also the second para. of s. 9). Article 2803 *C.C.Q.* provides that “[a] person seeking to assert a right shall prove the facts on which his claim is based.” The onus was therefore on Mr. Hinse to prove fault on the AGC’s part, damage he himself had suffered, and a causal connection between the two: see J.-C. Royer and S. Lavallée, *La preuve civile* (4th ed. 2008),at No. 158.
4. In this case, there is no direct evidence regarding the quality of the Minister’s review. The appellant’s argument was based on proof by presumption of fact, and the trial judge relied on this argument to conclude that the Minister had not conducted a meaningful review. Article 2846 *C.C.Q.* provides that “[a] presumption is an inference drawn by the law or the court from a known fact to an unknown fact.” Regarding presumptions of fact, art. 2849 *C.C.Q.* provides that courts may, at their discretion, take such presumptions into account, but only if they are “serious, precise and concordant”. These modifiers can be defined as follows:

[translation] Presumptions are serious when the connection between the known fact and the unknown fact is such that the existence of one establishes the existence of the other in a clear and obvious manner. . . .

Presumptions are precise when the conclusions that flow from the known fact tend to establish the contested unknown fact in a direct and specific manner. If it were also possible to draw different and even contrary results, to infer the existence of various and contradictory facts, the presumptions would not be precise in nature and would give rise only to doubt and uncertainty.

Finally, they are concordant, whether or not they each spring from a common or different source, when they tend[, as a whole and in how they accord with one another,] to establish the fact to be proven. . . . If, on the contrary, they contradict each other . . . and cancel each other out, they are no longer concordant, and create only doubt in the magistrate’s mind. [Emphasis added.]

(M. L. Larombière, *Théorie et pratique des obligations* (new ed.1885), vol. 7, at p. 216, reproduced in *Barrette v. Union canadienne, compagnie d’assurances*, 2013 QCCA 1687, [2013] R.J.Q. 1577, at para. 33; *France Animation s.a. v. Robinson*, 2011 QCCA 1361, at para. 120 (CanLII), quoting *Longpré v. Thériault*, [1979] C.A. 258, at p. 262.)

1. Thus, [translation] “[a] presumption of fact cannot be deduced from a pure hypothesis, from speculation, from vague suspicions or from mere conjecture”: Royer and Lavallée, at No. 842, citing *Crispino v. General Accident Insurance Company*, 2007 QCCA 1293, [2007] R.R.A. 847. An unknown fact will not be proven if the known facts cause another fact that is inconsistent with the fact the plaintiff wants to prove to be more or less likely, or if they do not reasonably rule out another possible cause of the damage he or she suffered: see, e.g., *Crispino.* However, it is not necessary to rule out every other possibility: Royer and Lavallée, at No. 842; see also *St-Yves v. Laurentienne générale, compagnie d’assurance inc.*, 1997 CanLII 10732 (Que. C.A.).
2. After reviewing the steps taken by Mr. Hinse and the authorities’ responses, Poulin J. concluded that [translation] “the federal government’s conduct was marked by institutional indifference”: para. 55. She made the following points, *inter alia*, in this regard:

- despite the multiple and urgent distress calls Mr. Hinse sent out, no one really listened to him, no one helped him, no one looked into his allegations, no one tried to validate them;

- even though he was acquitted by this Court in 1997, and despite the Quebec government’s proposal, the federal government refused to compensate him in accordance with the *Guidelines: Compensation for Wrongfully Convicted and Imprisoned Persons* (1988) (“*Guidelines*”);and

- the AGC contested Mr. Hinse’s action firmly and vigorously for more than 13 years, thereby perpetuating the miscarriage of justice (paras. 57 and 59-60).

1. Poulin J. then expressed the opinion that [translation] “the federal government is liable for the faults committed by its servants and agents, manifested primarily in their indifference toward him”: para. 61. In this regard, she notably criticized the federal government for a number of actions:

- it let more than a year and a half go by and did not respond to the appellant’s first application for review until it had received the third letter from the appellant or his spouse;

- it created confusion in the instructions it gave them;

- it misled the appellant by referring him to the provincial authorities on several occasions;

- it deliberately caused the appellant to lose precious time;

- it repeatedly asked the appellant to tell his story; and

- it forwarded documents the appellant had sent to it to third parties who were not involved in his case (para. 63).

1. Moreover, Poulin J. expressed the opinion that the AGC had had a duty to react as quickly as possible to Mr. Hinse’s application for mercy, as a wrongful conviction is a flagrant example of a miscarriage of justice: para. 68. In her view, the Minister [translation] “had at the very least a duty to conduct a meaningful review of Hinse’s review applications simply because he ‘has and may exercise the powers of a commissioner under Part I of the Inquiries Act’”: para. 71, quoting s. 696.2(2) *Cr. C.* She added that the Minister should, in exercising his power, have taken into account certain concerns raised in an article published in 1992, in which Philip Rosen describes the procedure followed when an application for mercy is sent to the Minister: para. 72, citing Library of Parliament, “Wrongful Convictions in the Criminal Justice System”, Background Paper BP-285E, January 1992, at pp. 10-11. Poulin J. observed that this exercise had “clearly” not been undertaken in this case, which amounts to a fault of omission: para. 73.
2. She concluded her remarks regarding fault as follows:

[translation] The evidence that Hinse adduced by presumption of fact satisfies the Court that the AGC’s wrongful inaction compounded his suffering. . . . Institutional inertia exacerbated and extended it by perpetuating the impact of the criminal past that the whole of society had attached to Hinse for a robbery he had not committed, whereas the AGC was the only one in a position to remedy the injustice.

That, it should be repeated, is where his fault lies. [paras. 75-76]

1. The Court of Appeal found that the Minister had had a duty to conduct a meaningful review of Mr. Hinse’s case, because the affidavits submitted by Mr. Hinse had indicated that a miscarriage of justice may have occurred. The court acknowledged that it was difficult [translation] “to accurately gauge what kind of study was conducted, because of the summary nature of the evidence adduced”, but nevertheless inferred nothing negative from that: para. 170. At the time in question, the Minister had not been under an obligation to give reasons for his or her decisions, and good faith on his or her part was presumed. In the court’s view, the evidence in the record did not justify the trial judge’s inferring from the refusals Mr. Hinse had met with that the Ministers had not conducted a meaningful review or had acted maliciously: para. 177. The Court of Appeal pointed out that when Mr. Hinse had made his applications, he had not yet exhausted his legal remedies, and that at his trial, Judge Côté had made some very harsh comments regarding his credibility: paras. 168-69. Finally, the court stated that, even if it considered the handling of all Mr. Hinse’s applications globally, it could not identify any wrongful conduct: para. 183.
2. The appellant submits that the trial judge did not err in law in defining the meaningful review standard. In his view, it can be seen from *Thatcher* and from *Wilson v. Minister of Justice*, [1983] 2 F.C. 379 (T.D.), aff’d [1985] 1 F.C. 586 (C.A.), that in those cases, Department of Justice officials had conducted exhaustive investigations and reviews, and [translation] “[t]he contrast between the work carried out in those cases and the total absence of any documentation and/or any information showing any enquiry whatsoever carried out by the AGC in this case is striking”: A.F., at para. 58 (emphasis deleted). The respondent contends that the trial judge erred in law by reviewing the Minister’s conduct on the basis of the provisions of the *Cr. C.* that came into force in 2002 and the practices followed in the 1990s. She should have conducted this review on the basis of the standards that applied at the time of the acts in question. The respondent relies on the conclusions reached in *Thatcher* to himself conclude that the Minister’s conduct in the case at bar was not wrongful.
3. We are of the opinion that the trial judge not only erred in finding that no immunity whatsoever applied to the Minister’s exercise of his power, but also made several errors regarding the scope of the Minister’s duty, and that those errors led her to conclude, incorrectly, that the Minister had committed a fault. We will discuss the errors in question first, before turning to the determinative issue of the allegation that the Minister failed to conduct a meaningful review.
	* 1. Anachronism in the Scope of the Minister’s Duty
4. The Court of Appeal was right to find that Poulin J. had erred in considering the powers of a commissioner under the *Inquiries Act* as a basis for determining whether the review conducted by the Minister was a meaningful one. Those powers were not conferred on the Minister until 2002, when Parliament reformed the procedure in respect of applications for mercy. As the Court of Appeal pointed out, this anachronism had distorted Poulin J.’s analysis of the nature of the meaningful review the Minister was required to conduct, as she had found that the Minister had [translation] “extremely broad” latitude in this regard and could seek assistance from the RCMP, from local police forces and from forensic scientists or other experts: para. 71, citing Rosen, at p. 11. As was established in *Thatcher*, however, the Minister would be required to consult the files of the prosecutor or of the police only in exceptional circumstances. In our opinion, requiring the Minister to assume the role of a police investigator or to enlist the aid of such investigators or any other experts would have been even less appropriate.
5. Similarly, as the Court of Appeal observed, the 1992 study by Philip Rosen could be helpful, but not determinative, in the analysis of the Minister’s conduct: para. 165. Although Rosen briefly reviewed the history of the Minister’s power, his study was really limited to s. 690 *Cr. C.*, the Department of Justice’s “present practice” (i.e. the one followed since 1985), problems with that practice, and proposals for change. But s. 690 *Cr. C.* did not come into force until 1988, whereas Mr. Hinse made the first three of his applications before that date. As for the fourth application, which he made in 1990, it is enough at this point to note that Mr. Hinse did not meet with a firm refusal from the Minister then in office; rather, the Minister asked Mr. Hinse to seek relief directly from the Quebec Court of Appeal, and to contact her again if he was unsuccessful: A.R., vol. XI, at p. 75.
6. In his study, Rosen discussed problems with the Department of Justice’s “present practice” that the lawyers of certain applicants had denounced. Those problems confirm some of the criticisms of the Minister made by Mr. Hinse and the trial judge, which included the following (pp. 13-14):

- a lack of established rules of procedure;

- issues with respect to the types of evidence and documents collected by the Department and the nature of the report submitted to the Minister;

- concerns about the fact that applicants or their counsel were not advised of adverse findings and allowed to make further legal or evidentiary responses before the investigation report was submitted to the Minister; and

- the Minister’s response to an application for mercy, which might not provide the reasons for rejecting the application in sufficient detail.

* + 1. Confusion of the Minister’s Conduct With That of the AGC
1. Furthermore, Poulin J. sometimes confused the Minister’s actions with those of the AGC. Thus, she faulted the AGC for vigorously contesting Mr. Hinse’s action and for asserting in his oral argument that there was no evidence showing beyond a reasonable doubt that Mr. Hinse had not committed the crime: paras. 60, 64 and 66. Although the AGC is the Minister’s representative for the purposes of this proceeding, it is important to distinguish the conduct of the former from that of the latter. It is the Minister’s conduct that must be reviewed to determine whether the federal Crown is civilly liable. In the part of her judgment dealing with fault, the judge should have confined her analysis to the Minister’s conduct. If the criticisms levelled against the AGC regarding the conduct of the litigation are at all relevant, it is only for the purpose of determining whether there was an abuse of process, which is an issue that must be considered separately.
	* 1. Federal Crown’s Obligation to Compensate
2. Canada has recognized that it is desirable to compensate victims of miscarriages of justice. In particular, it acceded to the *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171 (“*ICCPR*”), which provides, in art. 14(6):

When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

(Entry into force, March 23, 1976; accession by Canada, May 19, 1976.)

1. However, Canada has not enacted legislation to incorporate the *ICCPR* into Canadian domestic law. There is no legislation establishing an obligation for the federal government or the provinces to compensate victims of miscarriages of justice, nor is there any legislation establishing a right to such compensation. The federal and provincial governments did adopt the *Guidelines* in 1988. The *Guidelines* establish a set of criteria that a wrongfully convicted person must meet to be entitled to compensation. In addition to fixing the maximum amount of such compensation, they require, *inter alia*, that the person first receive a statement to the effect that he or she is innocent: a free pardon or the quashing of a guilty verdict is not, on its own, sufficient. The *Guidelines* are not binding legislation, however, and have never been regarded as such: see, e.g.,S. L. Robins, *In the Matter of Steven Truscott: Advisory Opinion on the Issue of Compensation*, March 28, 2008 (online), at pp. 18-23.
2. As a result, the *Guidelines* did not require the federal government to compensate Mr. Hinse,particularly given that his “factual innocence” had not been proven. Moreover, Quebec had decided not to compensate the appellant for this very reason: examination on discovery of D. Grégoire, May 28, 2009, R.R., vol. II, at pp. 89-90, 94-96 and 99. The trial judge therefore could not hold this against the AGC when assessing the alleged fault.
	* 1. Refusal Based on the Earlier Applications
3. The trial judge faulted the federal authorities for denying subsequent applications on the basis of the original refusal:

 [translation] Even though they had fresh evidence establishing that he was the victim of a miscarriage of justice, the federal authorities based their subsequent refusals on the rejection of the initial application. [Footnotes omitted; para. 74.]

1. In support of this conclusion, she relied on the following excerpts from the examination of Kerry Scullion, Director and General Counsel for the Criminal Conviction Review Board of the Department of Justice, who represented the AGC:

- Do you know what the federal government did after that?

- If he’s repeating the same claims that he made in the previous applications, probably not much. There would be no further reviews if the same material is being put forward in support of subsequent applications as what was put forward in past applications that were denied. It probably wouldn’t go any further than somebody having reviewed what was done in the past and a letter written back saying . . . . I mean you have to look at it to see if there is something new as to what was maintained in the previous ones, but other than that, that would be the extent of it. It looks like something was written back to him possibly.

. . .

- So basically, Mr. Hinse’s request is once again turned down?

- Yes. There would have been nothing new from the last request. [Emphasis added.]

(A.R., vol. VII, at pp. 164-65)

1. In our opinion, the comments the trial judge attributed to the AGC’s representative must be qualified. It is true that the AGC’s representative stated that if Mr. Hinse had submitted new applications to the Minister without raising any new facts or evidence, then the subsequent refusals would very likely have been due to the first refusal.
2. With respect, however, these statements do not establish that, in the instant case, the Ministers failed to consider what was described as fresh evidence. It should be borne in mind that the Minister’s duty is owed in respect only of serious applications and that such an application will usually arise from some new matter indicating that it is likely there has been a miscarriage of justice: *Thatcher*, at para. 14. Absent exceptional circumstances, the Minister may deny a new application for mercy on the basis of previous refusals if the new application does not introduce any new facts or issues.
	* 1. Fault of Institutional Inertia or Indifference
3. At trial, Mr. Hinse linked the fault allegedly committed by the federal authorities to what his counsel described as [translation] “institutional indifference”: paras. 33, 40 and 52. Poulin J. summarized Mr. Hinse’s position in this regard as follows:

 [translation] More specifically, he submits that the government acted wrongfully toward him for over 40 years by failing to act as a competent, prudent and diligent authority would have done, given that it knew or ought to have known about the miscarriage of justice of which he was the unfortunate victim and that it could not therefore have been unaware that its failure to act was exacerbating the damage Hinse was sustaining. [para. 33]

Although Poulin J. referred to specific, time-limited wrongful actions, she ultimately characterized the AGC’s fault as one of “institutional inertia” (para. 75; see also para. 209) or “institutional indifference” (paras. 55, 89, 149 and 203), as if there were one continuous fault that subsumed the individual actions of the successive Ministers. In her view, this “institutional inertia” had exacerbated and extended the duration of the miscarriage of justice of which Mr. Hinse was the victim, and that was the essence of the AGC’s fault: paras. 75-76.

1. To thus characterize the fault as one of “institutional inertia” or “institutional indifference” amounted to accusing the federal Crown itself of a fault. But under the *C.L.P.A.*, the federal Crown cannot be held liable for its own actions, but is only liable in respect of the fault of its servants (in this case, the Minister): s. 3(*a*)(i). The trial judge erred in approaching the issue of the federal Crown’s civil liability from the perspective of a fault of institutional inertia or indifference. She should instead have analyzed the individual conduct of each of the successive Ministers acting in his or her capacity as a servant of the federal Crown.
	* 1. Alleged Failure to Conduct a Meaningful Review
2. Regarding the alleged failure to conduct meaningful reviews of Mr. Hinse’s applications for mercy, we will begin by pointing out that Poulin J. erred in law first in finding that a simple fault on the Minister’s part had exposed the Crown to liability. She then erred in law a second time when she determined that the Minister’s duty at the relevant time was to conduct a [translation] “sustained, concerted [and] extensive . . . review” or a “thorough investigation”: paras. 75 and 95. Her finding of fault on the Minister’s part must be attributed to these two errors. The analysis of Mr. Hinse’s applications must be reconsidered in light of both the duty the Ministers owed at the relevant time and the applicable standard of civil fault.
3. Before doing so, we must make two preliminary remarks. First, given the scope of the meaningful review the Minister was required to conduct, the appellant is wrong to compare the reviews conducted in his case to the ones conducted in *Thatcher* and *Wilson*. Mr. Hinse submits that [translation] “[t]he contrast between the work carried out in those cases and the total absence of any documentation and/or any information showing any enquiry whatsoever carried out by the AGC in this case is striking”: A.F., at para. 58 (emphasis deleted). He points out that in *Thatcher*, counsel for the Department prepared a draft investigative summary that included the trial evidence, the appellate proceedings, the material provided by the applicant, and other information gathered during the investigation. Counsel sent this summary to the applicant’s lawyer, who had a chance to make further submissions, and the Minister rendered a detailed 73-page decision.
4. In the case at bar, Mr. Hinse had the opportunity to introduce any new facts or evidence he wished to present in order to flesh out his applications for mercy. The federal authorities asked him several times to provide specific facts to support his application. Mr. Hinse had a “reasonable opportunity to state his case”: *Thatcher*, at para. 13. This being said, it should be borne in mind that under the law as it then stood, the Minister was under no obligation to provide Mr. Hinse with an investigative summary or to give reasons for his or her decision.
5. In *Wilson*, there had been newspaper reports suggesting that members of the jury had been involved in improprieties. The provincial attorney general had therefore ordered a police investigation, which led him to conclude that no offences had been committed. Mr. Wilson submitted an application for mercy, and federal officials asked him several times for additional information that was needed. The Minister ultimately refused to exercise his power of mercy in Mr. Wilson’s favour. In his refusal letter, he stated that he had reviewed Mr. Wilson’s submissions, information obtained in the provincial attorney general’s investigation, and other information gathered in the course of inquiries made at his own request.
6. At that time, however, absent exceptional circumstances, the Minister was under no obligation to consult the files of the prosecutor or the police, let alone to contact other sources or to organize any investigation whatsoever. The fact that the Minister decided to do so in Mr. Wilson’s case does not mean that he should have done the same in Mr. Hinse’s case. It is important to note that the Minister had a broad discretion in exercising his or her power of mercy. It was open to the Minister to take special or additional measures if he or she deemed it appropriate to do so. But that could not create a legitimate expectation that he or she was to do so in every case.
7. The second remark concerns the appellant’s argument that there is no documentary or testimonial evidence attesting to any review whatsoever having been conducted in his case. In his oral argument in this Court, counsel for the appellant noted that his client had demanded that the AGC turn over any documents confirming that a meaningful review had been conducted in his case, and that he was told that he had been provided with all the documentation there was. His client had therefore done all that he could, because only the Minister could really prove what sort of review he had conducted: transcript, at pp. 19-20. In the absence of such evidence, counsel argued, the trial judge was right to find that there had been no review.
8. It should be pointed out, however, that in this situation, the burden of proof was on Mr. Hinse. It was therefore up to him to establish the Minister’s fault, that is, a breach equivalent to bad faith or serious recklessness in the review of the applications for mercy. He could of course present evidence by presumption of fact that would lead the court to infer that a meaningful review had not been conducted, or that one had been conducted in bad faith or with serious recklessness. Nevertheless, that burden was on him, and it was up to him to discharge it. This is particularly significant as regards Mr. Hinse’s first application. At the hearing, counsel for the appellant and counsel for the respondent agreed that the key period for determining whether the Crown is liable in respect of the Minister’s conduct is the period of that first application.
	* + 1. The 1967 Application
9. We will limit our review to a summary of the initial correspondence between Mr. Hinse and the federal authorities. Mr. Hinse sent his first application for mercy to the Minister on July 19, 1967. He proclaimed his innocence and stated that he had identified the five people who actually committed the crime. Three of them had agreed to sign affidavits, which he had photocopied and enclosed with his application. The affidavits of Yvon Savard and Laurent Beausoleil were identical, so we will reproduce only that of Mr. Savard:

[translation] I, Yvon Savard, hereby admit that I was one of the perpetrators of the armed robbery committed on December 14, 1961 at the residence of Mr. and Mrs. Henriot Grenier, of Mont-Laurier.

Consequently, I solicit the attention of the appropriate person so that I may be called to testify in the case of Réjean Hinse and exonerate him of that crime, of which I know, beyond a doubt, he is innocent.

(A.R., vol. VI, at p. 152)

1. The affidavit of Claude Levasseur was different:

[translation] I, Claude Levasseur, hereby admit that I know the facts of what happened during the robbery committed on December 14, 1961 at the residence of Mr. and Mrs. Henriot Grenier, of Mont-Laurier.

Consequently, I solicit the attention of the appropriate person so that I may be called to testify in the case of Réjean Hinse and exonerate him of that crime, of which I know, beyond a doubt, he is innocent. [Emphasis added.]

(A.R., vol. VI, at p. 155)

1. Mr. Hinse had also identified the other two perpetrators of the robbery: Georges Beaulieu and Léopold Véronneau. But he explained that they had refused categorically to sign any statement whatsoever and would refuse to testify even if they were offered court protection.
2. J. A. Bélisle acknowledged receipt of the application on behalf of the Director of the Criminal Law Section on July 28, 1967. That same day, Mr. Bélisle wrote to Quebec’s Deputy Minister of Justice, asking the latter to send him the police reports. Mr. Hinse’s file then remained inactive for more than a year after being sent to the Canadian Penitentiary Service, which did not return it to the federal Department of Justice. It was Mr. Hinse’s spouse who, by writing to the Minister in September 1968, caused the loss of the file to be discovered, and the file itself to be reactivated.
3. A series of letters were then exchanged, between the office of the Deputy Solicitor General of Canada and the Criminal Law Section of the Department of Justice in particular. In addition, the Quebec government sent [translation] “certain documentation” to the Minister in April 1969: A.R., vol. X, at p. 78. Mr. Bélisle asked his Quebec counterpart about the possibility that they [translation] “compare [their] files at a future date”: *ibid.*, at p. 75.
4. On March 12, 1971, Mr. Hinse applied to the Governor General in Council for a free pardon under s. 655 *Cr. C.* (now s. 748 *Cr. C.*), continuing to proclaim his innocence. On March 30 of that same year, J. L. Cross of the Privy Council Office wrote to the Solicitor General of Canada. He enclosed the conclusions of the Special Committee of the Privy Council that had reviewed Mr. Hinse’s application for a pardon. The following is an excerpt from those conclusions:

It is our opinion that subject did not provide us with sufficient fresh facts that were not available at the time of the trial and that could have been a basis to prove his innocence under the royal prerogative of mercy.

However, it is suggested that the case be referred to your department for further study in this matter based on our above inquiry, and for the Minister’s approval as to whether Mr. Hinse should be given a new trial.

(A.R., vol. X, at p. 83)

1. In October 1971, Mr. Hinse obtained two additional affidavits, one from Jean-Claude Pressé and the other from Laurent Beausoleil. They are almost identical:

[translation] I hereby declare that on or about September 10, 1961, I was one of the passengers in the vehicle of Laurent Beausoleil (a 1957 Buick) when said vehicle was searched and its passengers were checked by officer Arthur Scott of the municipality of Mont-Laurier.

I declare that, besides me, there were: Laurent Beausoleil, Hugues Duval and Léopold Véronneau.

I wish to attest to the fact that neither Réjean Hinse nor André Lavoie was in the vehicle or was with us on that day.

(A.R., vol. X, at p. 85)

1. Mr. Hinse sent these affidavits to the National Parole Board, which forwarded them to the federal Minister of Justice in November. On December 22, 1971, S. F. Sommerfeld, Director of the Criminal Law Section, informed the National Parole Board of the Minister’s refusal in the following words:

[translation] We have carefully reviewed the file of Réjean Hinse and have come to the conclusion that a new trial should not be granted in this matter.

(A.R., vol. X, at p. 102)

1. The National Parole Board forwarded this response to Mr. Hinse on February 10, 1972. This response was not unrelated to the result of Mr. Hinse’s parallel application for a free pardon. The Special Committee of the Privy Council was of the opinion that there was not enough fresh evidence to conclude that Mr. Hinse was innocent, but nevertheless suggested that his case be submitted to the Minister.
2. In our opinion, this documentary evidence negates the trial judge’s inference that there had been no review whatsoever of Mr. Hinse’s initial application for mercy. Although there are only a few documents in the record, they nevertheless attest to the fact that a certain review was conducted and that certain actions were taken in this regard. As the Court of Appeal stated, given that the Minister was under no obligation to give reasons for his decision at that time, it is inappropriate to draw a negative inference from the summary nature of the Minister’s file in this matter.
3. Moreover, the record contains minutes of hearing that record an admission by the parties regarding the production of determinative documents:

[translation] The parties admitted the following with regard to all the documents in respect of which they make admissions for the purposes of production:

* they are certified copies of the originals;
* if the person who signed a document were to testify, he or she would confirm having written the document in question and having sent it to its recipient, who received it, if such is the case; and
* finally, he or she would confirm that the document is proof of the truth of its content.

(Minutes from the hearing of November 9, 2010, A.R., vol. IV, at p. 57)

1. One of the documents to which this admission applied was a letter sent to Mrs. Hinse in January 1969 by Mr. Bélisle on behalf of the Director of the Criminal Law Section in which Mr. Bélisle wrote:

[translation] Rest assured that we will contact you [regarding your husband’s application] in the near future, as we are currently conducting an extensive review of this case. [Emphasis added.]

(A.R., vol. X, at p. 62)

1. Another document to which the admission applied was a letter in which Mr. Sommerfeld, the Director of the Criminal Law Section, forwarded the Minister’s refusal to the National Parole Board. In it, Mr. Sommerfeld said the following: [translation] “We have carefully reviewed the file of Réjean Hinse . . .” (A.R., vol. X, at p. 102). By their admission, therefore, the parties had acknowledged that if Mr. Bélisle and Mr. Sommerfeld were to testify, they would have confirmed that these letters were proof of the truth of their content — in short, that as Mr. Bélisle and Mr. Sommerfeld had understood the facts, an extensive and careful review of Mr. Hinse’s case was under way at the time in question. The trial judge did not mention this admission. It is true that the obligation to give reasons for judgments does not imply that a judge must address every little detail of a case. However, given the state of the documentary evidence in the record, the trial judge should have considered this admission before inferring that no review had been conducted. Taken together with the other relevant evidence that we have just discussed, it did not support her inference that a review had not been undertaken.
2. The probative value of this admission is enhanced by the fact that the appellant, for reasons known only to him, asked merely to examine a single representative of the AGC and did not specifically summon the decision makers who had played a role in the review of his applications for mercy: R.R., vol. I, at p. 16. Moreover, when the appellant began his action, he concentrated his efforts on the suit against the AGQ and Mont-Laurier, no doubt because it was they who were primarily responsible for the damage he had suffered.
3. If we disregard the inferences drawn from the presumptions of fact on which Mr. Hinse relies, we must find that, on a balance of probabilities, the evidence does not support his assertion that the Minister failed to conduct a meaningful review of his initial application. The appellant has also failed to prove, on a balance of probabilities, that the Minister acted in bad faith or with serious recklessness in reviewing his application. Although he points to the fact that the Minister misplaced his file for a period of time, this fact cannot be equated with bad faith or serious recklessness. The review of the application stretched over several years from the time it was received until the time the Minister gave his final answer. Despite the delay at issue, an analysis of the circumstances does not support the conclusion that the Minister acted in bad faith or with serious recklessness. Here again, the burden of proof was on Mr. Hinse. We cannot find that he discharged it.
	* + 1. The Other Applications
4. The appellant submitted a second application for mercy on July 23, 1980. This application was only three paragraphs long. On December 30 of that same year, a special adviser to the Minister informed Mr. Hinse that his application had been denied because it contained only [translation] “vague allegations of mistaken identification that occurred during [his] trial”, and because after reading Judge Omer Côté’s judgment, the Department had “found nothing to support [his] affirmation”: A.R., vol. X, at p. 108.
5. A week later, on January 6, 1981, Mr. Hinse submitted a third application to the Minister. On January 22, the special adviser to the Minister asked him to set out in writing, and in detail, the grounds that he intended to raise in support of his application for mercy, as well as all the contacts he had had with other judicial and political authorities. The adviser stated that [translation] “it is essential that you disclose the new facts that lead you to request an interview with the Minister”: A.R., vol. X, at p. 111. Mr. Hinse sent the Minister a more detailed letter on March 9, 1981.
6. As the Court of Appeal observed, most of the facts Mr. Hinse alleged in that letter were the same as the ones that had been set out in his 1967 application, the exception being allegations with respect to an identification error made by officer Scott and to the conduct of counsel and of the judge at his trial. First, Mr. Hinse claimed that Mr. Véronneau — with whom he had been jointly tried — had retained a criminal lawyer [translation] “who had close ties to Judge Omer Côté” and who had previously defended Mr. Beaulieu, Mr. Levasseur and Mr. Savard in another case: A.R., vol. XI, at p. 10. This lawyer allegedly recommended to these three individuals that they not testify for the defence, and this enabled him to have Mr. Véronneau acquitted. Next, Mr. Hinse explained that officer Scott had had an excellent lead from the outset. Upon arriving at the scene of the crime, he had made a connection with a search he had undertaken two months earlier when he had stopped four suspicious individuals in a car with its lights turned off at about 10:00 p.m. in front of the victims’ house. Those four individuals were Mr. Beausoleil, Mr. Véronneau, Mr. Duval and Mr. Pressé. According to Mr. Hinse, Mr. Beausoleil and Mr. Duval had confided to him that officer Scott had also taken down the name of André Lavoie, since the vehicle was registered in his name. Mr. Hinse said that at the trial, officer Scott had referred to his notes from that initial arrest and that he had been “shocked” to hear the officer testify that he had been the fifth occupant of the car even though his name did not appear in the officer’s notebook: *ibid.*, at p. 11.
7. On September 23, 1981, the special adviser responded to Mr. Hinse as follows:

 [translation] I regret to inform you that, despite the additional explanations you gave to the Minister, your case is not one that justifies his intervention. Indeed, the Minister of Justice exercises his power of intervention in exceptional circumstances only, and no such circumstances were revealed in the thorough examination of your file.

(A.R., vol. XI, at p. 16)

1. Finally, several years later, the appellant retained a lawyer who, in November 1990, sent a fourth application for mercy to the Minister of the day. The lawyer explained that the Commission de police had conducted an investigation and prepared a report, which he enclosed with his letter. In reply, the Minister acknowledged that the report [translation] “describes fresh evidence highly deserving of consideration”: A.R., vol. XI, at p. 75. However, she expressed the opinion that the issues raised by the Commission de police could also be heard by the Quebec Court of Appeal without this task having to be imposed on it under s. 690 *Cr. C.* The Minister invited Mr. Hinse’s lawyer to contact her again should the Court of Appeal refuse to consider his case.
2. As in the case of the first application for mercy, we find that none of the Ministers who considered the three subsequent applications acted in bad faith or with serious recklessness. Mr. Hinse cannot reasonably argue that the Minister failed to conduct a meaningful review in respect of any of those applications. The relevant correspondence shows the opposite to be true. Nor has the requisite element of bad faith or serious recklessness been proven. Regarding Mr. Hinse’s second application (1980), which was very brief and contained no new evidence or legal arguments, it was open to the Minister to find it frivolous and to reject it on that basis. As for the third application, as the Court of Appeal wrote, [translation] “[g]iven that Mr. Hinse did not go into much detail, the new allegations, based on vague irregularities committed by the police officers, attorneys and trial judge, could have struck the Minister as being of little consequence”: para. 181. In the case of the fourth application (1990), the Minister justified her decision by noting that the Court of Appeal could agree on its own to consider the case without her having to intervene. This was a reasonable attitude to adopt, particularly since the Minister did not reject Mr. Hinse’s application outright, but asked him to contact her again should the Court of Appeal refuse to consider his case. It should be noted that an application for mercy is an exceptional remedy that is available only after the applicant’s legal rights have been exhausted: *Thatcher*, at para. 9.
3. In short, after a proper analysis of the Ministers’ conduct based on the duty they owed and the applicable standard of fault, we cannot conclude that Mr. Hinse has discharged his burden, namely that of proving that the Ministers acted in bad faith or with serious recklessness in dealing with his applications for mercy. Our analysis could end with this finding, but like the Court of Appeal, we believe that some comments on causation and damages are in order.
	1. Causation
4. The trial judge concluded that Mr. Hinse had proven causation, once again by means of presumptions of fact. In her view, [translation] “[a] sustained, concerted, extensive, competent and timely review of his initial efforts would surely have brought the errors to the AGC’s attention”: para. 75. Her finding on causation was based primarily on the 1990 report of the Commission de police: because the Commission de police had concluded that a miscarriage of justice had occurred, a meaningful review by the Minister should logically have led to the same result. In light of the nine years that had elapsed between the time when Mr. Hinse contacted the Commission de police (1988) and the date of his acquittal by this Court (1997), the trial judge found that Mr. Hinse could have been acquitted in the mid-1970s were it not for the AGC’s fault: paras. 77 and 97.
5. We agree with the Court of Appeal that, even if it were assumed that the Minister failed to conduct a meaningful review between 1967 and 1972, it was not possible to conclude that such a review would inevitably have led to the discovery of the irregularities brought to light in 1990 by the report of the Commission de police. A comparison of the information in that report with the information that was available when Mr. Hinse made his initial application to the Minister reveals two crucial pieces of evidence that could not, in all likelihood, have been discovered at that time.
6. According to the evidence in the record, it was not until November 1988, when Mr. Hinse wrote to the Commission de police, that he provided [translation] “for the first time certain crucial details that would guide the work of Commissioner Fourcaudot”: C.A. decision, at para. 65. The report of the Commission de police shows that the most significant facts that emerged from the investigation were officer Scott’s recantation of his testimony and, to a lesser degree, the willingness of the true perpetrators of the crime to co-operate with the investigator in 1989 and 1990.
7. Where the perpetrators of the crime are concerned, it should be noted that after they had signed their affidavits in 1966, Mr. Beausoleil, Mr. Savard and Mr. Levasseur refused to co-operate further with the police. In the second set of affidavits signed in 1971, Mr. Pressé and Mr. Beausoleil merely attested to their having been in the car that was searched by officer Scott in Mont-Laurier on September 10, 1961, and to the fact that Mr. Lavoie and Mr. Hinse had not been in it. They made no declarations about the robbery committed in December of that same year of which Mr. Hinse had been found guilty. At the time of the investigation carried out by Mr. Fourcaudot in 1989, Mr. Beausoleil added [translation] “many details” about the events, and Mr. Véronneau, although he had refused to sign an affidavit, ended up stating that Mr. Hinse [translation] “wasn’t even there”: A.R., vol. XI, at pp. 54 and 53.
8. Even more importantly, the investigator received a call from Mr. Duval, who was then living in the Dominican Republic, in 1990. Mr. Duval revealed for the first time several details regarding the conspiracy and the robbery, stating that Mr. Hinse was in no way involved. He subsequently sent the investigator a letter confirming this information. However, the police report of September 12, 1966, prepared by an officer named Bourgeois (officer in charge of the Sûreté du Québec detachment at Mont-Laurier), indicated that Mr. Duval had provided the police with information about the robbery and that he was supposed to be questioned further. Mr. Duval was never questioned after that.
9. This “oversight” can perhaps be explained by a comment made by Mr. Duval in his conversation with the investigator in 1990 that he knew officer Bourgeois quite well at the time, as the latter had taken part in some chain letter schemes he was operating. This is why Mr. Duval [translation] “was never bothered by the police, even though he believed that they knew he was behind the robbery”: A.R., vol. XI, at p. 56. Officer Bourgeois had played an important role in the initial investigation, particularly in the identification of Mr. Hinse by the victims of the robbery.
10. Nevertheless, the evidence does not support an assertion that Mr. Duval would have been prepared to incriminate himself in this way or to co-operate with the police (or the Minister) at the time of the initial police investigation, or at the time of Mr. Hinse’s first application for mercy. This information was in fact highly incriminating. As the AGC points out, these statements were ultimately made from the Dominican Republic, a country with which Canada does not have an extradition treaty.
11. Moreover, the particular focus of the report of the Commission de police is on officer Scott’s recantation of his testimony. This is clear from both the language used and the number of pages dedicated to this subject. Out of the report’s 35 pages, the role of officer Scott takes up approximately 9, whereas the analysis of each of the other exculpatory factors rarely exceeds 2 pages. The officer’s testimony had [translation] “made a strong impression” on the trial judge, because he had declared under oath, without any hesitation, that he had seen Mr. Hinse among the individuals in the car he had stopped on September 10, 1961: A.R., vol. XI, at p. 56. This declaration contradicted Mr. Hinse’s version of the facts. The officer testified that he had known Mr. Hinse for a long time and swore categorically that Mr. Hinse had been in Mont-Laurier that day. It was not until his third meeting with the investigator of the Commission de police, on July 31, 1990, that officer Scott admitted he might have been mistaken.
12. It should be mentioned that officer Scott had difficulty identifying the exact year in which he had started having doubts about his testimony. He said it may have been around 1974 or 1975, after a friend of Mr. Duval’s (Yves Chalifoux) and Mr. Duval himself both told him he was wrong. It was these conversations that in all likelihood sowed a doubt in his mind, and that doubt finally surfaced during the investigation of the Commission de police. On this point, too, it cannot be assumed that officer Scott would have recanted his testimony earlier.
13. As a result, even if the Minister had decided to conduct a more extensive investigation at the time of Mr. Hinse’s first application, there is no evidence that officer Scott would have recanted his testimony then, as he did later, or that the individuals involved in the robbery would have been inclined to answer the Minister’s questions. It is highly likely that, 20 years after the events, these individuals agreed to co-operate with the authorities because they had less to fear, or because they no longer had anything to lose.
14. Also, Poulin J.’s assertion that the Minister’s investigation should [translation] “surely” have led to the same result as the report of the Commission de police is based on assumptions and inferences that are not supported by any analysis. It is well established that, even where a fault has been committed, the person who committed it cannot be held liable for damage that was not related to the fault. Rather, the damage must have been a logical, direct and immediate consequence of the fault (art. 1053 *C.C.L.C.*; *Parrot v. Thompson*, [1984] 1 S.C.R. 57, at p. 71; *Dallaire v. Paul-Émile Martel Inc.*, [1989] 2 S.C.R. 419; Baudouin, Deslauriers and Moore, at No. 1-683).
15. Furthermore, as the Commission de police explained in a letter to Mr. Hinse, it [translation] “may, at the written request of a citizen, investigate the conduct of municipal police or Sûreté du Québec officers if the citizen provides sufficient grounds for his or her request”: A.R., vol. XI, at p. 23. In the case at bar, the Commission de police instructed an investigator to conduct an investigation in accordance with the *Act respecting police organization*, R.S.Q., c. O-8.1, ss. 64 to 88 (later replaced by the *Police Act*, CQLR, c. P-13.1 (S.Q. 2000, c. 12, s. 353)). Under that Act, the investigator had the power to enter any police station and examine any documents or other effects relating to the complaint. He could also require of any person any information or document he considered necessary. Moreover, all persons were prohibited from hindering his work in any manner whatever, deceiving him through concealment or by making a false declaration, refusing to furnish him with information or a document relating to the complaint, refusing to allow him to make a copy of such a document, or concealing or destroying such a document: ss. 71, 84 and 85 of the *Act respecting police organization*.
16. In this case, the report of the Commission de police indicates that the investigator

 [translation] [f]or several months . . . focused his efforts on building up a huge file: he met with numerous individuals and collected their stories; he searched through the records of several courthouses and examined all the documents he could lay his hands on; and, finally, he reported his findings to the Commission.

(A.R., vol. XI, at p. 35)

1. However, it is clear that the Minister did not have those same powers at the material times. It was not until 2002 that the Minister was given the powers of a commissioner under the *Inquiries Act*, including the power to summon witnesses and to compel them to testify and to produce documents: s. 696.2(2) *Cr. C.*; ss. 4 and 5 of the *Inquiries Act*. These new powers were deemed necessary because of the inefficiency of the existing review process: *House of Commons Debates*, vol. 137, No. 054, 1st Sess., 37th Parl., May 3, 2001, at p. 3583; *Debates of the Senate*, vol. 139, No. 66, 1st Sess., 37th Parl., November 1, 2001, at p. 1612.
2. A distinction must therefore be made between the investigation conducted by the Commission de police from 1988 to 1990 and the meaningful review of an application for mercy that the Minister was required to conduct in the late 1960s. At that time, the Minister had neither the power nor the duty to compel witnesses to testify, to require the production of documents, or to review police or prosecution files, which would have enabled him or her to build up a file as extensive and exhaustive as the one amassed by the Commission de police. On this point, we cannot accept Mr. Hinse’s argument that officer Scott might have retracted his testimony sooner had the Minister confronted him with certain evidence that discredited it. The Minister was not required to take such action; he was simply required to consider Mr. Hinse’s application in good faith and to determine on the basis of the file submitted to him whether additional information was needed or intervention was appropriate. The evidence does not establish that at the time of the first application, the Minister would probably have discovered the key evidence uncovered by the investigator of the Commission de police 20 years later. The burden of proving that the Minister would probably have done so was on Mr. Hinse, and it was up to him to discharge this burden.
3. In this regard, Poulin J. did not really explain her reasoning on the issue of causation, but merely stated that the facts set out in her reasons, which Mr. Hinse had proven by means of presumptions of fact, established a causal connection: para. 98. However, it is clear from her reasons that her finding that the miscarriage of justice would have been ascertained quickly if the AGC had acted promptly and competently (para. 97) is based on the erroneous premise that the Minister, like the investigator of the Commission de police, had a duty to conduct a thorough investigation. Because Poulin J., in so doing, drew inferences and made findings of fact that were not supported by the evidence, the Court of Appeal was justified in intervening: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 22; *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401, at para. 4. It has therefore not been proven that the alleged failure, namely the failure to conduct a meaningful review or to conduct one more expeditiously, was the probable cause of the failure to discover the miscarriage of justice in Mr. Hinse’s case. To conclude otherwise would be to rely on mere conjecture or remote hypotheticals. A court’s conclusion with respect to civil liability cannot be based on speculation such as this.
	1. Damages
4. In our opinion, the Court of Appeal was also right to intervene on the issue of damages. There was an overriding error in the trial judge’s analysis. She failed to take into account the requirement that the liability be apportioned solidarily, and to establish the amounts being awarded on the basis of the actual liability of each of the solidary debtors. As the Court of Appeal noted, [translation] “to every extent that more than one solidary debtor could be liable for the heads of claim, Mr. Hinse’s releases made it necessary to examine the causal faults and apportion liability”: para. 189. Mr. Hinse should have borne the shares of the solidary debtors he had released: arts. 1526 and 1690 *C.C.Q.*
5. The trial judge addressed the issue of damages as if the Minister were the only party to commit a fault and as if the damage sustained by Mr. Hinse was due solely to the Minister’s [translation] “institutional inertia”: paras. 75-77. Indeed, rather than fixing the damages amounts that could be specifically attributed to the AGC, she simply relied on Mr. Hinse’s claims:

[translation] Furthermore, since, following the transaction entered into between the AGQ and Hinse, the latter amended his proceeding so as to claim from the AGC only the portion he had attributed to [the AGC] on the basis of the various heads of damage he raised, the Court will examine, for the purpose of this proceeding and in compliance with the provisions quoted above, only the applications that are in line with this new reality and that concern solely the AGC. [para. 22]

1. Thus, except in the case of the punitive damages, the trial judge awarded the amounts being claimed on the assumption that Mr. Hinse had correctly limited them to the amounts that solely concerned the AGC. However, the apportionment of the liability of Mr. Hinse’s various co-debtors had to be determined on the basis of the seriousness of each one’s fault: art. 1478 *C.C.Q.* The trial judge could not simply rely on the apportionment suggested by Mr. Hinse; her role as the arbiter of damages required that she herself fix each debtor’s share of the liability.
2. In addition to this overriding error, which skews the amounts awarded under all the heads of damages, the grounds for each of those amounts were also flawed.
	* 1. Pecuniary Damage
3. Poulin J. ordered the AGC to pay a total of $855,229.61 in respect of pecuniary damage. This amount seems excessive, given that the AGQ had already paid $1,100,000 under this head pursuant to the transaction entered into with Mr. Hinse. At the very least, the onus was on Mr. Hinse to show that the payments concerned distinct heads of compensation. He did not do so. Moreover, when the amounts awarded are broken down, it is clear that there was no justification for the amounts being claimed.
4. The amount of $127,214 awarded for a loss of income by Mr. Hinse that resulted from his retiring at age 60 instead of at 65 is unjustified. In Quebec law, only an injury which is an immediate and direct consequence of a wrongful act gives rise to an entitlement to damages: art. 1607 *C.C.Q.* This was a personal decision on Mr. Hinse’s part. There is no direct connection between the Ministers’ conduct and his decision. Poulin J. erred in awarding damages under this head of claim.
5. Poulin J. ordered the AGC to pay Mr. Hinse $193,660.88 under the head of claim for fees and costs incurred in respect of the proceedings he brought in the Court of Appeal and the Supreme Court between 1990 and 1997. She was wrong to do so. Even if the Minister had granted one of Mr. Hinse’s applications, he would have either ordered a new trial or referred the matter to the Court of Appeal. In short, Mr. Hinse would have had to pay these fees anyway. This is not damage that resulted from the alleged faults.
6. Poulin J. awarded $500,000 for investigation costs, wasted time and effort, photocopies, transcripts, travel, postage, etc. The Court of Appeal correctly found that wasted time and efforts expended to obtain justice are inconveniences that are inherent in the efforts of anyone who is involved in legal proceedings: para. 215. Unless there has been an abuse of process, these are not heads of damage under which Mr. Hinse can seek compensation. Moreover, they fall under non-pecuniary damage, given that there is no evidence of lost income. Since Poulin J. awarded a separate amount in respect of non-pecuniary damage, this resulted in double recovery.
	* 1. Non-pecuniary Damage
7. In the *Andrews* trilogy, this Court set an upper limit of $100,000 for non-pecuniary losses resulting from a serious bodily injury: *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229; *Thornton v. School District No. 57 (Prince George)*, [1978] 2 S.C.R. 267; *Arnold v. Teno*, [1978] 2 S.C.R. 287. This limit applies in the common law provinces and Quebec alike. Relying on its own decision in *France Animation*, the Court of Appeal applied the limit in the instant case. But when it rendered its decision, the Court of Appeal did not have the benefit of this Court’s judgment in *Cinar*, which confirmed that the limit is inapplicable to damages for non-pecuniary loss that do not stem from bodily injury: *Cinar Corporation v. Robinson*, 2013 SCC 73, [2013] 3 S.C.R. 1168, at para. 97. This being said, even if the Court of Appeal erred on this point, the trial judge had nonetheless erred in awarding an amount under this head of damages.
8. Poulin J., after comparing the amount — $1,900,000 — claimed by Mr. Hinse for non-pecuniary damage with the amounts granted in the Marshall, Proulx, Sophonow, MilgaardandTruscottcases,ordered the AGC to pay him the exact amount he sought, expressing the opinion that it was [translation] “not excessive”: para. 198. In *Cinar*, this Court reiterated that to properly assess the amounts to be awarded, a court should compare the case at hand with other analogous cases in which amounts were awarded for non-pecuniary damage: paras. 105-6. In the case at bar, the comparisons made were shaky and did not justify a quantum of that magnitude.
9. In the case of Donald Marshall Jr., a royal commission was struck to review the case in 1989. In his report submitted in 1990, Justice Evans valued the amount to compensate for non-pecuniary losses at $225,000, to which were added $158,000 in interest, for a total of $383,000 in compensation. Mr. Marshall, who had been convicted of murder in 1971, had spent 11 years in prison (between the ages of 17 and 28) and had been acquitted in 1983:G. T. Evans, Commission of Inquiry Concerning the Adequacy of Compensation Paid to Donald Marshall, Jr., *Report of the Commissioner* (1990); *In the Matter of Steven Truscott*, at p. 48; C.A. decision, at paras. 221-22; Sup. Ct. decision, at para. 184.
10. In the Proulxcase, Mr. Proulx had been convicted of murder on November 10, 1991, and was acquitted on August 20, 1992: *Proulx v. Québec (Procureur général)*, [1997] R.J.Q. 2509 (Sup. Ct.). He sued the AGQ for $1,443,000 in damages. In 1997, Letarte J. awarded him $250,000 in compensation for non-pecuniary damage: [1997] R.J.Q. 2516 (Sup. Ct.), at p. 2524.
11. In the inquiry regarding Thomas Sophonow, the Honourable Peter Cory recommended in 2001 the payment in compensation of approximately $2,600,000, including interest, of which $1,750,000 would be for non-pecuniary damage. Mr. Sophonow had undergone three trials and spent nearly four years in prison after being unjustly charged with murder. The liability for payment of the compensation was to be apportioned among the city (Winnipeg), the province (Manitoba) and the federal government: P. deC. Cory, *The Inquiry Regarding Thomas Sophonow: The Investigation, Prosecution and Consideration of Entitlement to Compensation* (2001); C.A. decision, at para. 222; Sup. Ct. decision, at para. 184.
12. In the Milgaard case, a total of $10,000,000 was paid to Mr. Milgaard in 2008 following the settlement of two civil liability suits. The exact apportionment of liability among the levels of government is unknown. Mr. Milgaard had been charged with murder in 1970 and had spent 23 years in prison. He had been shot during one of two escape attempts and had suffered abuse while incarcerated: *In the Matter of Steven Truscott*,at p. 49.
13. Finally, in the Truscottcase, Justice Robins recommended in 2008 that a payment of $6,500,000 be made to Mr. Truscott, who had been convicted of murder at the age of 14 and sentenced to death by hanging. Mr. Truscott, who was the subject of an unprecedented reference to this Court, had spent 10 years in prison and had finally been on parole for almost 40 years, living under an assumed name. Justice Robins felt that, in the circumstances, Mr. Truscott should be paid $250,000 per year of incarceration and $100,000 per year on parole. Given that both levels of government had been involved in the case virtually from the beginning, Justice Robins was of the opinion that they should share the costs of the compensation equally: *In the Matter of Steven Truscott*, at p. 56.
14. As the Court of Appeal pointed out, the amounts granted in the Marshall, Sophonow and Truscott cases were made further to the recommendations of advisory bodies. They did not result from judicial awards and were based on considerations that are very different from those on which damages are based: C.A. decision, at para. 222. Only the compensation assessed in *Proulx* was the result of a judicial process. What is more, all these cases can be distinguished from the case at bar in that they involved the much more serious crime of murder and in that the period of incarceration was longer in almost all of them.
15. Moreover, we note that under the transaction between the AGQ and Mr. Hinse, the latter was paid only $1,100,000 under this head of damages, whereas he had been claiming $3,000,000 in this regard from the AGQ and the AGC, for which they were to be solidarily liable. We realize that care must be taken in comparing amounts agreed to in transactions with amounts resulting from judicial awards. Nevertheless, in this case, Mr. Hinse and the AGQ fixed the amount under this head of damages in their agreement after each side had made its case. In the circumstances of this case, we have difficulty seeing why the federal government should be ordered to pay more in respect of non-pecuniary damage than the amount paid by the province. Even if the Minister had committed a fault, we find it hard to justify finding that such a fault would be as serious as, or even more serious than, the ones committed by Mont-Laurier and the AGQ with regard to the arrest, the police investigation and the criminal prosecution that led to Mr. Hinse’s wrongful conviction and imprisonment. At the very most, such a fault would have prolonged the damage already caused by the town and the AGQ.
16. In our opinion, therefore, an order that the AGC pay $1,900,000 after the AGQ had paid $1,100,000 under the same head of damages would be disproportionate. In a civil liability case, the court’s primary objective is to compensate the plaintiff for damage he or she has suffered, not to punish the debtor.
	* 1. Punitive Damages
			1. Reference in the C.L.P.A. to Provincial Law
17. Poulin J. ordered the AGC to pay Mr. Hinse $2,500,000 in punitive damages under s. 49 of the *Charter of human rights and freedoms*, CQLR, c. C-12 (“*Charter*”). Section 3 *C.L.P.A.* provides that the federal Crown is liable for damages for which, if it were a person, it would be liable for the purpose of assessing damage caused by the fault of a servant of the Crown. According to s. 2 *C.L.P.A.*, “liability” means “extracontractual civil liability” in the Quebec context. It must therefore be determined whether this reference in the *C.L.P.A.* encompasses the remedy of punitive damages provided for in the *Charter*. This question does not appear to have been answered by the courts. We are of the opinion that it must be answered in the affirmative.
18. First, when Parliament enacted the *Crown Liability Act*, the predecessor to the *C.L.P.A.*, in 1953, the intention was “to make the federal crown liable to the full extent to which a person in a private capacity would be liable under the provincial law”: *House of Commons Debates*, vol. IV, 7th Sess., 21st Parl., March 26, 1953, at p. 3330; see also s. 3(1) of the *Crown Liability Act*. Under the *C.L.P.A.*, the Crown continues to be liable for damages for which, if it were a person, it would be liable in respect of damage caused by the fault of a servant of the Crown, the word “person” meaning a natural person of full age and capacity: ss. 3 and 2.1.
19. Second, as can be seen from the language used in the *C.L.P.A.* and from its bijural nature, Parliament has referred to the applicable provincial law in very general terms: extracontractual civil liability in Quebec and liability in tort in any other province. Even before 1953, this Court [translation] “had already held that the suppletive law in delict and in tort is the law of the place where the right of action arose”: P. Garant, with the collaboration of P. Garant and J. Garant, *Droit administratif* (6th ed. 2010), at p. 913. The applicable provincial law to which the *C.L.P.A.* refers includes not only the relevant articles of the *C.C.Q.*,but also all the provincial statutes that modify the liability law of the province where the cause of action arose, including the *Charter*: see s. 8.1 of the *Interpretation Act*,R.S.C. 1985, c. I-21; Hogg, Monahan and Wright, at p. 436.
20. Third, although it is true that there is a “purist” view according to which the concept of punitive damages does not exist in the traditional civil law (see, e.g., *Chaput v. Romain*, [1955] S.C.R. 834, at p. 841; Baudouin, Deslauriers and Moore, at No. 1-373), the awarding of such damages has been permitted in Quebec civil law in certain circumstances for many years: see, e.g., the *Tree Protection Act*, CQLR, c. P-37. In addition, at the time of the reform of the *C.C.Q.*, the draft *Civil Code of Québec* provided that punitive damages could be widely awarded in cases involving gross or intentional fault: Baudouin, Deslauriers and Moore, at No. 1-373. Although the legislature ultimately abandoned this idea, punitive damages are now referred to in art. 1621 *C.C.Q.*, but they remain an exceptional remedy given that they can be awarded only where they are expressly provided for by law: *de Montigny v. Brossard (Succession)*, 2010 SCC 51, [2010] 3 S.C.R. 64, at para. 48; *Béliveau St-Jacques v. Fédération des employées et employés de services publics inc.*, [1996] 2 S.C.R. 345, at para. 20.
21. In our opinion, the scheme established by the *Charter* in this regard can be seen as complementing the rules of extracontractual liability. The *Charter* [translation] “has the effect of complementing the protection afforded by the Civil Code by creating a new remedy that enables victims to claim punitive damages that are not available under the [Civil] Code”: L. Perret, “De l’impact de la Charte des droits et libertés de la personne sur le droit civil des contrats et de la responsabilité au Québec” (1981), 12 *R.G.D.* 121, at p. 170.
22. Thus, the scheme of punitive damages provided for in s. 49 of the *Charter* is not distinct from and inconsistent with the rules of extracontractual civil liability. Rather, they contribute to this area of the law without being totally subsumed by it. The two sets of rules intersect at several levels, but the remedy under s. 49 is not entirely subordinate to the conditions for civil liability. It can constitute an autonomous scheme that creates remedies that are not based in civil liability: *de Montigny*, at para. 44; *Cinar*, at para. 124; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*, 2004 SCC 30, [2004] 1 S.C.R. 789, at para. 26.
23. Before the *Charter* came into force in 1976, fundamental rights were protected by the civil liability provisions of the *C.C.L.C.* And [translation] “the civil law concept of fault is an extremely flexible one that affords protection to individuals in all spheres”: Perret, at p. 124; L. LeBel, “La protection des droits fondamentaux et la responsabilité civile” (2004), 49 *McGill L.J.* 231, at p. 235. In the instant case, the alleged wrongful conduct essentially occurred before the *C.C.Q.* came into force. The preliminary provision of the *C.C.Q.* now expressly provides that the *C.C.Q.*,“in harmony with the Charter . . . and the general principles of law, governs persons, relations between persons, and property”. The *C.C.L.C.* lacked equivalents for both the preliminary provision and art. 1621 of the *C.C.Q.*,but we are nevertheless of the opinion that this does not affect our analysis. Although these provisions attest to the relationship between the *Charter* and the *C.C.Q.*, they do not create that relationship and are therefore not essential to our conclusion.
24. For these reasons, we conclude that the reference in the *C.L.P.A.* to provincial law encompasses the remedy of punitive damages provided for in the *Charter*. We would add that since punitive damages are also available in the law of the common law provinces, this conclusion favours a more uniform application of the law of Crown liability across the country. Having resolved this preliminary issue, we will now consider whether it was appropriate to award such damages in this case.
	* + 1. Award of Punitive Damages
25. Section 49 of the *Charter* provides that, “[i]n case of unlawful and intentional interference, the tribunal may, in addition, condemn the person guilty of it to punitive damages.” This Court explained what “unlawful and intentional interference” means in *Quebec (Public Curator) v. Syndicat national des employés de l’hôpital St-Ferdinand*, [1996] 3 S.C.R. 211:

Consequently, there will be unlawful and intentional interference within the meaning of the second paragraph of s. 49 of the *Charter* when the person who commits the unlawful interference has a state of mind that implies a desire or intent to cause the consequences of his or her wrongful conduct, or when that person acts with full knowledge of the immediate and natural or at least extremely probable consequences that his or her conduct will cause. This test is not as strict as specific intent, but it does go beyond simple negligence. Thus, an individual’s recklessness, however wild and foolhardy, as to the consequences of his or her wrongful acts will not in itself satisfy this test. [Emphasis added; para. 121.]

1. In the instant case, given that the Ministers’ conduct cannot be equated with bad faith or serious recklessness, we cannot conclude that there was intentional interference. The evidence does not support a finding that the Ministers’ state of mind was such that they intended to harm Mr. Hinse or had knowledge of the adverse consequences their conduct would have for him. This stringent test was not met, and punitive damages should not have been awarded.
	* 1. Extrajudicial Fees
2. Finally, the trial judge concluded that the AGC’s conduct had amounted to an abuse of process, and she ordered the AGC to pay Mr. Hinse $100,000 for the fees paid to the first law firm he had retained: para. 230. She also awarded $440,000 for services rendered by the firm that had replaced the first and with which Mr. Hinse had entered into a *pro bono* agreement: para. 240. To justify her decision to award this amount even though Mr. Hinse had not had to pay his lawyers, the trial judge relied on an Ontario judgment: para. 236, quoting *1465778 Ontario Inc. v. 1122077 Ontario Ltd.* (2006), 82 O.R. (3d) 757 (C.A.). She was of the opinion that it would be [translation] “unfair for a person at fault to have the benefit of an agreement [concluded] for the purpose of helping out a victim”: para. 239. However, she stated that in order to avoid unjust enrichment, such an award could be made only if there was an agreement under which the party was to remit the amount to his or her counsel: paras. 237-39. It should be pointed out that the total amount of the transaction with the AGQ — $5.3 million — had included $800,000 for Mr. Hinse’s lawyers.
3. The Court of Appeal reversed the trial judge’s conclusion, finding that the AGC was entitled to answer the case against him given the amounts being claimed and the legal principles at issue. It found that the AGC had not shown bad faith in defending himself and that he had not taken multiple procedural steps or unnecessarily and improperly continued the proceedings. The Court of Appeal also cautioned against [translation] “[indiscriminately] importing common law precedents” and stated that “[t]he judge wrongly referred to a case from Ontario case law to grant the claim, extrajudicial fees being different from costs”: paras. 243-44.
4. In *Viel v. Entreprises Immobilières du Terroir ltée*, [2002] R.J.Q. 1262, the Court of Appeal had confirmed that in Quebec law, it is only in exceptional cases that a party can be required to pay the fees of lawyers retained by the opposing party. Such compensation must be consistent with the general rules of civil liability: paras. 72-73. There must be a fault committed by the other party, damage, and a causal connection between the fault and the damage. In *Viel*, the Court of Appeal mentioned the distinction between an abuse on the merits and an abuse of process, and noted that only an abuse of process can justify awarding extrajudicial fees as damages:

 [translation] In theory, and save exceptional circumstances, the fees paid by one party to its attorney cannot, in my opinion, be considered direct damages that sanction abuse on the merits. There is no adequate causation between the fault (abuse on the merits) and the damage. Adequate causation corresponds to the event or events having a logical, direct and immediate relation with the origin of the injury suffered. . . .

. . .

Conversely, regardless of whether there is abuse on the merits, a party [whose conduct amounts to an abuse of process] causes injury to the opposing party, which, to combat the abuse, needlessly pays judicial fees to its attorney. In that event, there is an actual causation between the fault and the damage. [Emphasis added; emphasis in original deleted.]

(*Viel*, at paras. 77-79)

1. Since *Viel*, the Quebec legislature has added provisions to the *Code of Civil Procedure*, CQLR, c. C-25 (“*C.C.P.*”), that confirm the power of the courts to impose sanctions for improper use of procedure: see arts. 54.1 to 54.6. Article 54.4 *C.C.P.* provides that a court may, *inter alia*, “condemn a party to pay, in addition to costs, damages in reparation for the prejudice suffered by another party, including the fees and extrajudicial costs incurred by that party”.
2. Thus, in Quebec, damages can be awarded in respect of extrajudicial fees in cases of abuse of process in order to compensate a party who has suffered damage resulting from the fault of the other party. In the common law provinces, costs are traditionally awarded to indemnify the successful party for expenses incurred either in defending an unfounded claim (if the successful party is the defendant) or in pursuing a valid legal right (if the plaintiff prevails): see, e.g., *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371, at para. 21; *Young v. Young*, [1993] 4 S.C.R. 3, at p. 135. This Court has pointed out that at common law, the modern rules with respect to costs have objectives that are not limited to compensation. For example, an order as to costs could penalize a party who has refused a reasonable settlement offer. It could also be used to sanction conduct that increased the duration or the expense of litigation, or that was otherwise unreasonable or vexatious: *Okanagan Indian Band*, at para. 25. In the common law provinces, therefore, the purpose of costs is not limited to compensation, but also includes repression. In this sense, costs differ from an order to pay extrajudicial fees as damages in Quebec law. These differences must be taken into account when considering judgments on these issues from the other provinces.
3. The trial judge did not refer to any Quebec cases in which extrajudicial fees had been awarded in respect of *pro bono* representation. Rather, she turned to the case law of the Ontario Court of Appeal, which has stated on various occasions that a *pro bono* representation agreement is no bar to an award of costs: see, *inter alia*, *1465778 Ontario Inc.*; *Human Rights Commission (Ont.) v. Brillinger* (2004), 185 O.A.C. 366; *Reynolds v. Kingston (Police Services Board)*, 2007 ONCA 375, 86 O.R. (3d) 43. Since costs at common law are different in nature from extrajudicial fees in Quebec law, the comparison was inappropriate.
4. In this Court, the appellant relies on art. 1608 *C.C.Q.* in support of the awarding of extrajudicial fees in an abuse of process case despite the existence of a *pro bono* agreement. This is the first time art. 1608 has been raised in this context. It reads as follows:

 **1608.** The obligation of the debtor to pay damages to the creditor is neither reduced nor altered by the fact that the creditor receives a benefit from a third person, as a result of the injury he has suffered, except so far as the third person is subrogated to the rights of the creditor.

1. The interveners Centre Pro Bono Québec and Pro Bono Law Ontario submit that this is exactly what happened in the situation now before us: counsel, acting on a *pro bono* basis, indemnified the victim of an abuse of process for the injury he sustained, and this intervention by a third person did not release the debtor from his obligation to make reparation for the injury. The AGC disputes this assertion, arguing that the damage that is normally compensable by an order to pay extrajudicial fees in a case of abuse of process is non-existent when representation is without cost. A party that is the victim of such an abuse cannot be a “creditor” within the meaning of art. 1608 *C.C.Q.*
2. On its face, the AGC’s argument is appealing. The Court of Appeal held in *Viel* that the damage sustained by a party as a result of an abuse of process is the obligation to pay unnecessary legal fees: para. 79. If there is a *pro bono* agreement, the victim of the abuse of process pays no fees to his or her counsel (subject to the particulars of the agreement in each case). On the basis of this reasoning, given that the victim of the abuse of process has suffered no damage, he or she cannot be a creditor of the party whose conduct constituted such an abuse.
3. However, if this were true in the case of an abuse of process, it would also have to be true in the other situations to which art. 1608 *C.C.Q.* applies. A person who suffers an injury caused by the fault of another person but receives an indemnity or a benefit from a third person under a contract of insurance or a contract of employment has not really suffered an injury either. But it is clear from the commentary of the Minister of Justice from the time of enactment of the *C.C.Q.* that it is to that type of situation in particular that art. 1608 *C.C.Q.* applies:

 [translation] [This article] is intended to resolve the question of whether the obligation on a debtor to compensate can be reduced or altered by payments made to the creditor by a third party, whether those payments are gratuitous or for consideration. This would be the case if, for example, without being required to do so, the creditor’s employer continued to pay him his salary while he was unable to work; it would also be the case if the creditor’s insurer paid him, in his capacity as an insured, the proceeds of an insurance policy he had taken out.

 Giving a negative answer to this question may sometimes result in giving the creditor double compensation — what he receives from the third party and what he is paid by the debtor — and so conferring an enrichment on him; such an answer may also seem contrary to the principle of compensation for injury, since in some cases the injury may no longer exist as the third party may have already given compensation for it.

 On the other hand, an affirmative answer seems contrary to the preventive function of the obligation to compensate, and may also lead to the somewhat disturbing result of relieving the debtor of any obligation to compensate solely as the result of the good will of a third party or the creditor’s foresight in protecting himself at his own expense against the possibility of the injury.

 The article comes down in favour of a negative answer to this question of whether the debtor’s obligation to compensate may be reduced or altered by payments the creditor receives from a third party; but so as to avoid the principal cases in which double compensation would result, it expressly excludes situations where the third party is legally or by agreement subrogated to the creditor’s rights.

 This is the solution which seems fairest in the circumstances, especially as most of the payments made by third parties — social security indemnities, insurance payments or payments resulting from collective labour agreements — are not really in the nature of an indemnity and in any case are not meant to compensate for the injury sustained by the creditor. [Emphasis added.]

(Ministère de la Justice, *Commentaires du ministre de la Justice*, vol. I, *Le Code civil du Québec — Un mouvement de société* (1993), at p. 994)

1. We are aware that the drafting of art. 1608 *C.C.Q.* may have left something to be desired: “. . . that the creditor receives a benefit from a third person, as a result of the injury he has suffered . . . .” However, the legislature’s intent is unambiguous, and we must give effect to it. Moreover, this interpretation is consistent with art. 1440 *C.C.Q.*:

 **1440.** A contract has effect only between the contracting parties; it does not affect third persons, except where provided by law.

1. Litigants are required to refrain from conduct that would amount to an abuse of process. A litigant who defaults on this obligation commits a fault and may be ordered to pay damages. By virtue of art. 1608 *C.C.Q.*, the litigant’s obligation to pay damages to the other party is neither reduced nor altered by the fact that the latter received a gratuitous benefit from his or her counsel. The rationale for art. 1608 *C.C.Q.*, which is explained in the Minister of Justice’s commentary, applies with equal force in a case of abuse of process: damages must be allowed to fully perform their preventive function, and a person who causes an “injury” must not be exempted from liability.
2. Article 1608 *C.C.Q.* also attests to the legislature’s intention not to relieve debtors of their obligation to compensate even if this may result in double recovery for the victim. The legislature chose to exclude cases involving subrogation, as they are the ones that most often give rise to double recovery. The courts must defer to that choice. This means that, contrary to what the trial judge said, it is not necessary for the *pro bono* agreement to stipulate that any extrajudicial fees that might be awarded are to be paid to counsel. It is up to the parties and their counsel to negotiate the particulars of such agreements.
3. Having made these clarifications, we will now consider the trial judge’s finding that the AGC’s conduct in this case amounted to an abuse of process. In particular, she stressed the fact that the AGC had

- insisted that Mr. Hinse prove every little detail;

- refused to give him certain documents;

- faulted Mr. Hinse for failing to call the decision makers who had played a role in his case to testify before the court;

- repeatedly stated that it was up to Mr. Hinse to discharge his burden of proof;

- blindly endorsed the theory of his own experts;

- waited until November 2, 2010, the first day of the trial, to acknowledge that Mr. Hinse was the victim of a miscarriage of justice;

- refused to allow the report of the Commission de police to be filed in the record; and

- contended that the witnesses who provided the “new evidence” adduced in the Court of Appeal that led to the stay of proceedings in June 1994 should be heard (para. 226).

1. Like the Court of Appeal, however, we can see no abuse of process in the AGC’s conduct. It is true that the position taken by Dr. Chamberland, a psychiatric expert, that the effects of Mr. Hinse’s incarceration had been “beneficial” was unfortunate; the AGC should have disassociated himself from it. But this on its own does not amount to an abuse of process. The AGC did not multiply proceedings in an unreasonable manner or call unnecessary witnesses. He did not use procedural mechanisms excessively or unreasonably, nor did he act in bad faith or recklessly. The law on the federal Crown’s liability for a fault committed by the Minister in exercising his or her power of mercy was far from clear at the time of the dispute. It was reasonable and appropriate for the AGC to contest the appellant’s action and raise the defence that he did. The trial judge committed a palpable and overriding error in finding that there had been an abuse of process in the context of this case. The appellant was not entitled to the extrajudicial fees that were awarded.
2. Disposition
3. There is no denying that the miscarriage of justice of which Mr. Hinse was a victim is most regrettable. However, in the absence of bad faith or serious recklessness on the Minister’s part, and of a causal connection between his actions and the alleged damage, Mr. Hinse’s action against the AGC must fail. We would dismiss the appeal without costs, as the Court of Appeal did.

**APPENDIX**

*Criminal Code*, S.C. 1953-54, c. 51 (first application)

**596.** [Powers of Minister of Justice] The Minister of Justice may, upon an application for the mercy of the Crown by or on behalf of a person who has been convicted in proceedings by indictment,

(*a*) direct, by order in writing, a new trial before any court that he thinks proper, if after inquiry he is satisfied that in the circumstances a new trial should be directed;

(*b*) refer the matter at any time to the court of appeal for hearing and determination by that court as if it were an appeal by the convicted person; or

(*c*) refer to the court of appeal at any time, for its opinion, any question upon which he desires the assistance of that court, and the court shall furnish its opinion accordingly.

*Criminal Law Amendment Act, 1968-69*, S.C. 1968-69, c. 38

**62.** Section 596 of the said Act is repealed and the following substituted therefor:

**596.** [Powers of Minister of Justice] The Minister of Justice may, upon an application for the mercy of the Crown by or on behalf of a person who has been convicted in proceedings by indictment or who has been sentenced to preventive detention under Part XXI,

(*a*) direct, by order in writing, a new trial or, in the case of a person under sentence of preventive detention, a new hearing, before any court that he thinks proper, if after inquiry he is satisfied that in the circumstances a new trial or hearing, as the case may be, should be directed;

(*b*) refer the matter at any time to the court of appeal for hearing and determination by that court as if it were an appeal by the convicted person or the person under sentence of preventive detention, as the case may be; or

(*c*) refer to the court of appeal at any time, for its opinion, any question upon which he desires the assistance of that court, and the court shall furnish its opinion accordingly.

*Criminal Code*, R.S.C. 1970, c. C-34 (second and third applications)

**617.** [Powers of Minister of Justice] The Minister of Justice may, upon an application for the mercy of the Crown by or on behalf of a person who has been convicted in proceedings by indictment or who has been sentenced to preventive detention under Part XXI,

(*a*) direct, by order in writing, a new trial or, in the case of a person under sentence of preventive detention, a new hearing, before any court that he thinks proper, if after inquiry he is satisfied that in the circumstances a new trial or hearing, as the case may be, should be directed;

(*b*) refer the matter at any time to the court of appeal for hearing and determination by that court as if it were an appeal by the convicted person or the person under sentence of preventive detention, as the case may be; or

(*c*) refer to the court of appeal at any time, for its opinion, any question upon which he desires the assistance of that court, and the court shall furnish its opinion accordingly.

*Criminal Code*, R.S.C. 1985, c. C-46 (fourth application)

**690.** [Powers of Minister of Justice] The Minister of Justice may, on an application for the mercy of the Crown by or on behalf of a person who has been convicted in proceedings by indictment or who has been sentenced to preventive detention under Part XXIV,

(*a*) direct, by order in writing, a new trial or, in the case of a person under sentence of preventive detention, a new hearing, before any court that he thinks proper, if after inquiry he is satisfied that in the circumstances a new trial or hearing, as the case may be, should be directed;

(*b*) refer the matter at any time to the court of appeal for hearing and determination by that court as if it were an appeal by the convicted person or the person under sentence of preventive detention, as the case may be; or

(*c*) refer to the court of appeal at any time, for its opinion, any question on which he desires the assistance of that court, and the court shall furnish its opinion accordingly. [rep. 2002, c. 13, s. 70]

 *Appeal dismissed.*

 Solicitors for the appellant: Borden Ladner Gervais, Montréal.

 Solicitor for the respondent: Attorney General of Canada, Ottawa.

 Solicitors for the intervener the Association in Defence of the Wrongly Convicted: Greenspan Humphrey Lavine, Toronto.

 Solicitors for the intervener Centre Pro Bono Québec: Lavery, de Billy, Montréal.

 Solicitors for the intervener Pro Bono Law Ontario: Bennett Jones, Toronto.

1. LeBel J. took no part in the judgment. [↑](#footnote-ref-1)