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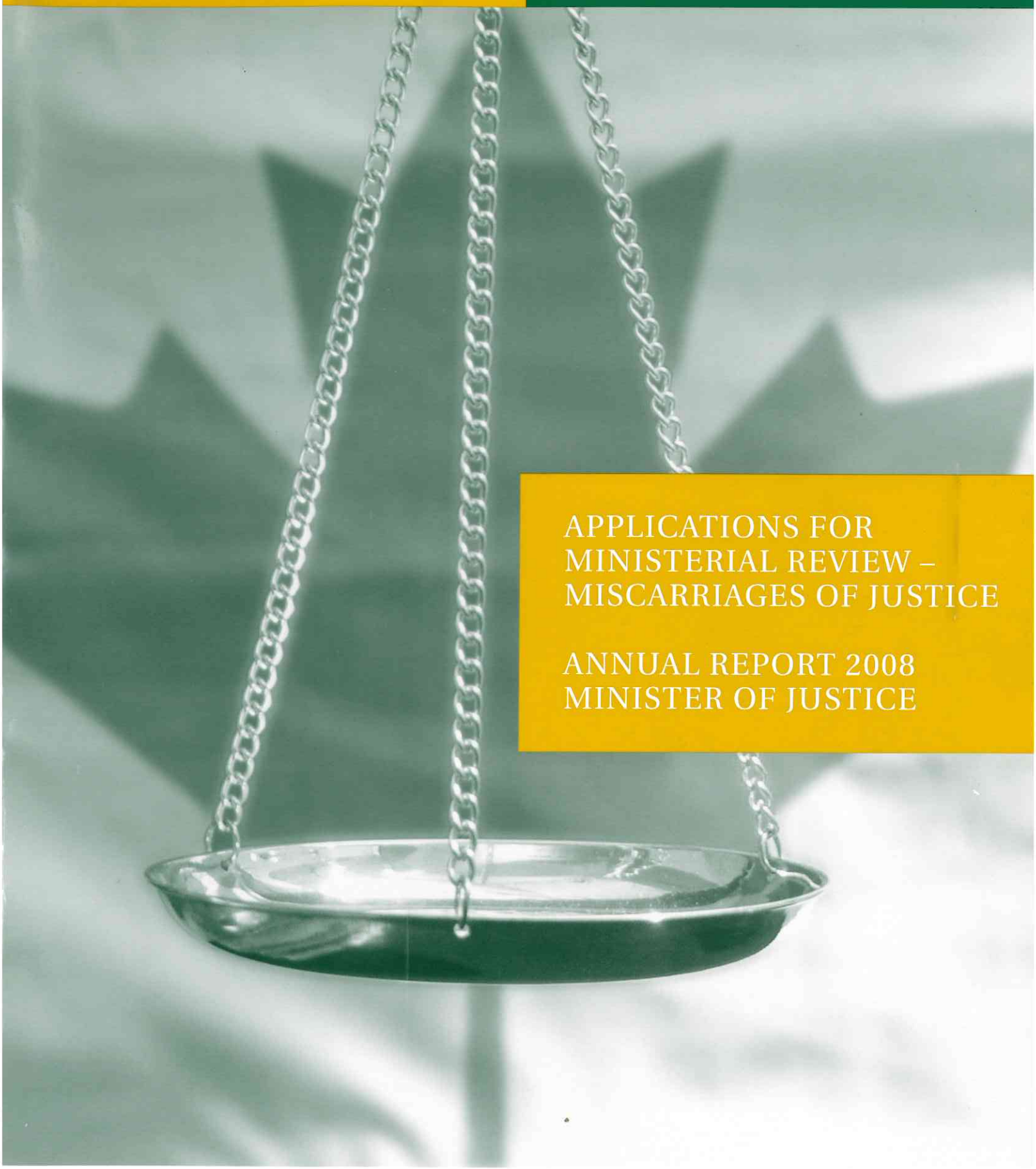

APPLICATIONS FOR MINISTERIAL REVIEW – MISCARRIAGES OF JUSTICE

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Introduction

The Minister of Justice has the legal authority to review a criminal conviction under federal law to determine whether there may have been a miscarriage of justice. The Minister has had that power in one form or another since 1892. The conviction review process begins when a person submits an application for ministerial review (miscarriages of justice), also known as a "conviction review application."

The application for ministerial review must be supported by "new matters of significance" – usually important new information or evidence that was not previously considered by the courts. If the Minister is satisfied that those matters provide a reasonable basis to conclude that a miscarriage of justice likely occurred, the Minister may grant the convicted person a remedy and return the case to the courts – a referral of the case to a court of appeal to be heard as a new appeal or a direction for a new trial.

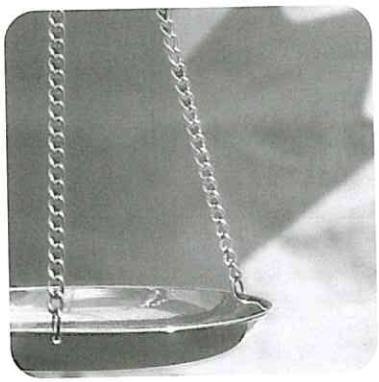
When an innocent person is found guilty of a criminal offence, there has clearly been a miscarriage of justice. A miscarriage of justice may also be suspected where new information surfaces which casts serious doubt on whether the applicant received a fair trial. Thus, the Minister's decision that there is a reasonable basis to conclude that a miscarriage of justice likely occurred in a case does not amount to a declaration that the convicted person is innocent. Rather, such a decision leads to a case being returned to the judicial system, where the relevant legal issues are determined by the courts according to law.

Under section 696.5 of the *Criminal Code*, the Minister of Justice is required to submit an annual report to Parliament regarding applications for ministerial review (miscarriages of justice) within six months of the end of the fiscal year. This is the sixth annual report, and it covers the period April 1, 2007, to March 31, 2008. Under the regulations, the Minister's annual report must address the following matters:

- the number of applications for ministerial review made to the Minister;
- the number of applications that have been abandoned or that are incomplete;
- the number of applications that are at the preliminary assessment stage;
- the number of decisions that the Minister has made; and
- any other information that the Minister considers appropriate.

This report describes the role of the Department of Justice's Criminal Conviction Review Group (CCRG) in reviewing criminal convictions, outlines how the review process works, provides the statistical information required by the regulations, considers a variety of emerging issues, reviews the cases in which remedies have been granted and updates previous ones, and describes developments expected in the coming year.

The appendices provide further information, including the governing legislation, the regulations and information about how to contact the CCRG.



Addressing Possible Miscarriages of Justice

History of the Power to Review Criminal Convictions

Historically, at common law the only power to revisit a criminal conviction was found in the "Royal Prerogative of Mercy," a body of extraordinary powers held by the Crown that allowed it to pardon offenders, reduce the severity of criminal punishments and correct miscarriages of justice.

Over the years, the Minister's power underwent various legislative changes, culminating in 1968 in the former section 690 of the *Criminal Code*. This section remained in effect for more than thirty years.

The Current Conviction Review Process

The current conviction review process has been in place since 2002, when section 690 of the *Criminal Code* was repealed and replaced by sections 696.1 to 696.6 (Appendix 1) after a public consultation. These provisions, along with regulations (Appendix 2), set out the law and procedures governing applications for ministerial review (miscarriages of justice).

The current conviction review process improved transparency and addressed deficiencies in the previous process by:

- including clear guidelines as to when a person is eligible for a conviction review;
- providing a straightforward application form and clear direction on the information and documents needed to support it;
- describing the various stages in the conviction review process;
- specifying the criteria the Minister must consider in deciding whether a remedy should be granted;
- expanding the category of offences for which a conviction review is available to include not only indictable offences but also summary-conviction offences;
- giving those investigating applications on behalf of the Minister the authority to compel the production of documents as well as the appearance and testimony of witnesses; and
- requiring the Minister to submit an annual report to Parliament.

Criminal Conviction Review Group

The Criminal Conviction Review Group (CCRG) is a separate unit of the Department of Justice. It has five main responsibilities:

- liaising with applicants, their lawyers, agents of the provincial attorneys general, the police and various other interested parties;
- reviewing applications for ministerial review and conducting preliminary assessments;
- conducting investigations where warranted;
- compiling the findings of investigations into an investigation report; and
- providing objective and independent legal advice to the Minister on the disposition of applications for ministerial review.

During the reporting period, five full-time lawyers were employed at the CCRG. In addition, the CCRG has supervised law students from the University of Ottawa under the Department of Justice's Clinical Internship Program.

Following the legislative changes in 2002, a number of structural changes were made to enhance the arm's-length relationship between the CCRG and the Department of Justice.

The CCRG office is located outside of the Department of Justice Headquarters in a downtown Ottawa office building which has both government and private sector tenants.

Rather than formally passing through another branch of the Department, advice passes from the CCRG to the Minister through the Associate Deputy Minister's office. Administration and support services are provided to the CCRG by this same office.

To promote awareness and understanding of the conviction review process, the CCRG provides presentations or lectures, subject to availability, resources and operational requirements. During the reporting period, presentations were made to several local university classes.

The CCRG has also taken steps to develop appropriate working relationships with various interested parties including the courts, provincial attorneys general and organizations such as the Association in Defence of the Wrongly Convicted (AIDWYC) and the Federal-Provincial-Territorial Heads of Prosecutions Committee.

Conviction Reviews By Outside Agents

In some circumstances, the Minister retains an agent from outside the Department of Justice to conduct the review of an application. The outside agent, rather than the CCRG, will provide advice to the Minister.

Typically, a conviction review is conducted by an outside agent where a potential conflict of interest arises, such as where the prosecution had been conducted on behalf of the Attorney General of Canada by the former Federal Prosecution Service or the now Public Prosecution Service of Canada (e.g. drug prosecutions, or criminal prosecutions in the Yukon, Northwest Territories and Nunavut). During this reporting period, two new applications for ministerial review were referred to outside agents.

How the Conviction Review Process Works

Applying for a Conviction Review

The conviction review process requires an applicant to submit a formal application form and a number of supporting documents.

The requirements for a completed application, as well as a description of the various steps in the application process, are set out in detail in the booklet, *Applying for a Conviction Review*. The booklet is available from the CCRG's Web site.

Anyone convicted of an offence under a federal law or regulation may submit an application for ministerial review. For example, a person who has been convicted under the *Criminal Code* or the *Controlled Drugs and Substances Act* is eligible to apply. Convictions for indictable and summary-conviction offences are both eligible for review. A person found to be a dangerous offender or a long-term offender under the *Criminal Code* may also submit an application for ministerial review.

An application will not be accepted until the applicant has exhausted all available rights of appeal. Judicial review and appeals to higher courts are the usual ways to correct legal errors and miscarriages of justice. Indeed, the *Criminal Code* specifically allows an appeal court to overturn a conviction on the ground that there has been a miscarriage of justice. Convicted persons are therefore expected to appeal their convictions where there are suitable grounds to do so.

A conviction review by the Minister of Justice is not a substitute for, or alternative to, a judicial review or an appeal of a conviction. An application for ministerial review is not meant to be another level of appeal or a mechanism that allows the Minister of Justice to take the same evidence and arguments presented to the courts and substitute his or her own judgment.

An application for ministerial review must be supported by "new matters of significance" – generally new information that has surfaced since the trial and appeal and therefore has not been presented to the courts, and has not been considered by the Minister on a prior application. Only after a thorough review of the new matters of significance will the Minister be in a position to determine whether there is a reasonable basis to conclude that a miscarriage of justice likely occurred.

Although it is not required, applicants may seek the assistance of a lawyer or organizations specializing in wrongful conviction issues, such as the Association in Defence of the Wrongly Convicted (AIDWYC) or the Innocence Project.

The Special Advisor to the Minister

Mr. Bernard Grenier, a retired judge of the Court of Quebec with more than two decades of distinguished experience on the bench, has served as the Special Advisor to the Minister on applications for ministerial review since 2003.

The Special Advisor's position is an independent one. He is neither a member of the Public Service of Canada nor an employee of the Department of Justice. The Special Advisor is appointed by Order-in-Council from outside the Department and public service.

While the Special Advisor's main role is to make recommendations to the Minister once an investigation is complete, it is equally important that he provide independent advice at other stages of the review process where applications may be screened out. The Special Advisor's involvement ensures that the review of all applications is complete, fair, and transparent.

The involvement of the Special Advisor, in concert with the arm's-length relationship between the CCRG and the Department of Justice, ensures that the conviction review process is independent.

Stages of the Review

There are four stages in the review process: preliminary assessment; investigation; preparation of an investigation report; and the decision by the Minister.

All reasonable efforts are made to process and review each application as quickly as possible. However, priority is generally given to those applications where the applicant is in custody.

Preliminary Assessment

When an application for ministerial review is received, the first task is to ensure that the required application form has been properly completed and the necessary supporting documents have been submitted. Once the application is complete, the CCRG conducts a preliminary assessment to determine whether it merits further investigation – normally whether the application presents "new matters of significance" that were not available at trial or on appeal.

The time required for a preliminary assessment will depend upon the amount of material to review and whether any of the new matters of significance require preliminary decisions, such as on the credibility of new evidence raised in the application.

If the application does not present new matters of significance, it will be screened out. The Special Advisor reviews the decision to screen out an application at this stage. He may request that additional information be collected or existing information be clarified before an application is screened out. The Special Advisor may also disagree with the decision to screen out the application, and recommend to the Minister that the review process continue.

Where an application is screened out at this stage, the applicant is informed in writing that the matter will not proceed to the investigation stage and is given the reasons for that decision. The applicant has one year to provide further information.

Investigation
The investigation conducted by the CCRG or agent attempts to verify the information in support of the application. Depending on the type of information provided by the applicant, the investigation could involve:

- interviewing or examining witnesses to clarify or verify the information in the application;
- carrying out scientific tests (e.g. DNA testing paid for by CCRG);
- obtaining other assessments from forensic and social science specialists (e.g. polygraph examinations);
- consulting police agencies, prosecutors and defence lawyers who were involved in the original prosecution and/or appeals; or
- obtaining other relevant personal information and documentation (e.g. Correctional Service of Canada files).

The time required for the investigation depends on the complexity of the application and the availability of information. It should be noted that any of these activities could take place at the preliminary assessment phase as well. Each case is unique, and the contents and nature of the application determine the process.

Investigation Report
The results and findings of the investigation are compiled in an investigation report. This report will summarize the facts gathered from the judicial record and address whether the new information in support of the application has been verified, and if so to what extent. The investigation report may also identify relevant issues and legal authorities. As required by law, the report is sent to the applicant with a request for submissions. The Attorney General for the province where the prosecution occurred is also given a copy of the report and asked for submissions.

When the submissions, if any, have been received – and any further investigation they might merit has been completed – the final version of the investigation report is prepared. The CCRG or agent then prepares written advice and recommendations for the Minister.

The Special Advisor's role may include providing advice and guidance to the CCRG or seeking clarification of issues. Nevertheless, the CCRG or the appointed agents remain responsible for conducting the investigation, and are expected to provide independent advice to the Minister along with the investigation report. The Special Advisor reviews the investigation report and any appended material and provides his own advice and recommendations to the Minister, which may or may not differ from the advice provided by the CCRG or agent.

The application then proceeds to the final stage of the conviction review process – the Minister's decision.

Decision by the Minister

As a practical matter, the Minister is not personally involved in the preliminary assessment, investigation and investigation stages of the conviction review process. These stages are usually carried out on his or her behalf by the CCRG. The Minister does, however, personally decide on all applications for ministerial review that proceed to the investigation stage.

In this final stage, the Minister of Justice personally reviews the investigation report and supporting materials, the submissions from the applicant and the province, the advice and recommendations of the CCRG or agent, and the advice and recommendations of the Special Advisor.

The Minister then decides to dismiss or allow the application. In arriving at a decision, the Minister must take into account all relevant matters, including:

- whether the application is supported by new matters of significance that were not considered by the courts or by the Minister in a previous application for ministerial review;
- the relevance and reliability of information that is presented in the application; and
- the fact that an application for ministerial review is not intended to serve as a further appeal and any remedy available on such an application is an extraordinary remedy.

In some circumstances, an application may raise a question on which the Minister may wish the assistance of a court of appeal. The court's opinion on the question may help the Minister make his or her decision. Hence, the Minister has the legal authority, at any time and prior to any decision, to refer a question or questions about an application to the court of appeal for its opinion. Typically, the court of appeal's opinion would be sought with regard to a legal issue central to the application.

If the Minister is satisfied that there is a reasonable basis to conclude that a miscarriage of justice likely occurred, pursuant to subsection 696.3 (3) of the *Criminal Code* the Minister may order a new trial, or a hearing in the case of a person found to be a dangerous or long-term offender, or refer the matter to the court of appeal as if it were an appeal by the convicted person or person found to be a dangerous or long-term offender.

Over the years, guidelines and general principles concerning the exercise of ministerial discretion have been established in various ministerial decisions on applications for a conviction review. In 1994, the Minister summarized the guiding principles for the exercise of ministerial discretion under the then section 690 of the *Criminal Code* in his decision regarding the application of Colin Thatcher:

> *In creating the role of the Minister of Justice under section 690 of the Code, Parliament used very broad language, and the discretion of the Minister has been cast in the widest terms. Indeed, the section does not contain a statutory test, other than the general reference in clause (a) to the Minister being "satisfied that in the circumstances a new trial or hearing ... should be directed."*

In interpreting and applying section 690, I do not intend to limit or restrict the wide discretion given to the Minister. It is impossible to predict the nature of the cases in which such applications might be brought in the future, and it is in the public interest, in my view, to leave the Minister's discretion in the broadest possible terms.

Nevertheless, that discretion is to be exercised in accordance with certain governing principles, and I believe that it would be useful to identify those principles here.

1. *The remedy contemplated by section 690 is extraordinary. It is intended to ensure that no miscarriage of justice occurs when all conventional avenues of appeal have been exhausted.*

2. *The section does not exist simply to permit the Minister to substitute a ministerial opinion for a jury's verdict or a result on appeal. Merely because I might take a different view of the same evidence that was before the court does not empower me, under section 690, to grant a remedy.*

3. *Similarly, the procedure created by section 690 is not intended to create a fourth level of appeal. Something more will ordinarily be required than simply a repetition of the same evidence and arguments that were put before the trial and appellate courts. Applicants under section 690 who rely solely on alleged weaknesses in the evidence, or on arguments of the law that were put before a court and considered, can expect to find that their applications will be refused.*

4. *Applications under section 690 should ordinarily be based on new matters of significance that either was not considered by the courts or that occurred or arose after the conventional avenues of appeal had been exhausted.*

5. *Where the applicant is able to identify such "new matters," the Minister will assess them to determine their reliability. For example, where fresh evidence is proffered, it will be examined to see whether it is reasonably capable of belief, having regard to all of the circumstances. Such "new matters" will also be examined to determine whether they are relevant to the issue of guilt. The Minister will also have to determine the overall effect of the "new matters" when they are taken together with the evidence adduced at trial. In this regard, one of the important questions will be "is there new evidence relevant to the issue of guilt which is reasonably capable of belief and which, taken together with the evidence adduced at trial, could reasonably have affected the verdict?"*

6. *Finally, an applicant under section 690, in order to succeed, need not convince the Minister of innocence or prove conclusively that a miscarriage of justice has actually occurred. Rather, the applicant will be expected to demonstrate, based on the analysis set forth above, that there is a basis to conclude that a miscarriage of justice likely occurred.*

Many of these principles have now been codified in sections 696.1 to 696.6 of the *Criminal Code*. While these principles continue to evolve as a result of experience as well as changes and advancement in the law, they remain a useful guide to assessing applications for ministerial review.

Authorizations for the Use of the Minister's Investigative Powers

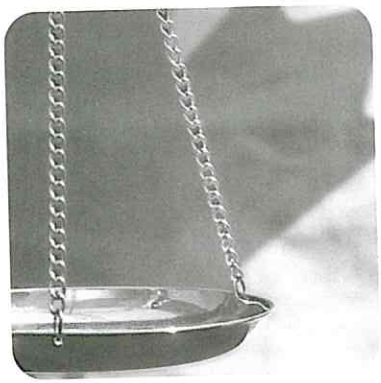
Until the 2002 amendments, there was no legal procedure to require witnesses to provide information or produce documents that might be relevant to an application. The review of an application was therefore dependent upon the voluntary cooperation of witnesses. This was seen as a weakness in the review process, since information and documents in the possession of a reluctant or uncooperative witness could not be obtained.

This weakness was corrected by the current section 696.2 of the *Criminal Code* which gives the Minister the powers of a commissioner under the *Inquiries Act*.[1] Specifically, the Minister has the investigative power to:

- subpoena a witness;
- require a witness to answer questions and give evidence, orally or in writing, under oath or solemn affirmation; and
- require a witness to produce documents or other things that may be relevant to an investigation.

Those involved in the first three stages of the conviction review process may need to use these investigative powers to evaluate an application. Therefore, a lawyer, retired judge, or other qualified individual may be authorized in writing by the Minister to exercise these investigative powers. Hence, where it is necessary to do so, the CCRG or outside agent can, for example, issue a subpoena to a witness and require the witness to answer questions under oath. During this reporting period, the CCRG did not seek such authority.

[1] See the *Inquiries Act*, R.S.C 1985, ss. 4-5.



Emerging Issues and Developments

Judicial Decisions

During this reporting period, there were two judicial reviews of cases dealt with by the CCRG.

In *Bilodeau v. Minister of Justice*, Mr. Justice Jerry Zigman of the Quebec Superior Court rejected an application by Michel Bilodeau to challenge the decision to deny his application for a ministerial review.

Mr. Bilodeau was convicted of murder in 1971 in Montreal and sentenced to life imprisonment. In 2001, his lawyer filed an application for ministerial review. In November 2007, the Minister rejected the application, concluding there were not reasonable grounds to believe that a miscarriage of justice likely occurred.

Justice Zigman ruled in March 2008 that the application to challenge the Minister's decision should have been brought in Federal Court, which has exclusive jurisdiction to review federal decisions.

The ruling has been appealed.

In *Daoulov v. Attorney General of Canada*, a Federal Court judge rejected an application by Anthony Daoulov.

Mr. Daoulov was convicted in 2000 of possession of heroin, and sentenced to 10 years in prison. The Quebec Court of Appeal upheld the conviction but reduced his sentence to eight years. In 2004, he filed an application for ministerial review. In 2005, the CCRG concluded there were no reasonable grounds to believe a miscarriage of justice likely occurred; as a result there would not be a formal investigation.

Mr. Justice Orville Frenette concluded in April 2008 that the CCRG's decision was not unreasonable and that many of the points raised by Mr. Daoulov in his application for ministerial review had been previously rejected by the courts.

Inquiry into Pediatric Forensic Pathology in Ontario

In April 2008, the Inquiry into Pediatric Forensic Pathology in Ontario completed public hearings. It heard 47 witnesses, conducted 16 roundtable meetings and reviewed 36,000 documents.

The CCRG's Director and General Counsel participated in a roundtable entitled Pediatric Forensic Pathology and Potential Wrongful Convictions. Other panelists included Alastair MacGregor, Q.C. from the Criminal Cases Review Commission in England, Dr. Michael Pollanen, Chief Forensic Pathologist for Ontario, Bruce MacFarlane from the University of Manitoba, and Mary Nethery from the Ontario Ministry of the Attorney General.

The Inquiry, headed by the Honourable Mr. Justice Stephen Goudge, of the Ontario Court of Appeal, is looking into the oversight of Ontario's pediatric forensic pathology system.

Its mandate is to conduct a systemic review and an assessment of the policies, procedures, practices, accountability and oversight mechanisms, quality-control measures and institutional arrangements of pediatric forensic pathology in Ontario from 1981 to 2001 as they relate to its practice and use in investigations and criminal proceedings. The Commissioner is to make recommendations to address systemic failings and restore and enhance public confidence in pediatric forensic pathology in Ontario.

The Inquiry was appointed in April 2007 after the Office of the Chief Coroner of Ontario released the results of a review into 45 cases of suspicious child deaths between 1991 and 2002 where forensic pathologist Dr. Charles Smith either performed the autopsy or provided an opinion as a consultant.

In 20 cases, the panel of internationally respected experts in forensic pathology did not agree with the opinions given by Dr. Smith in a written report or court testimony or both. In a number of these cases, the experts felt that Dr. Smith "had provided an opinion regarding the cause of death that was not reasonably supported by the materials available for review." Twelve of those cases had resulted in criminal convictions, and one in a finding of "not criminally responsible." One of the cases was the subject of an application for ministerial review.

The Commissioner is to deliver his final report and recommendations no later than September 30, 2008.

In the spring of 2007, the Public Prosecution Service of Canada (PPSC) announced it would undertake a review of homicide prosecution files from the North which could have involved Dr. Smith. (The PPSC is responsible for *Criminal Code* prosecutions in the three Territories.)

That review concluded that none of the autopsy-related files over 27 years had resulted in charges or convictions involving Dr. Smith. The review was conducted with the assistance of the territorial Coroners' offices.

Steven Truscott

In July 2008, the Ontario Government announced that it would pay Steven Truscott $6.5 million and his wife $100,000.

The compensation – $250,000 for every year Mr. Truscott spent in jail and $100,000 for each year he spent on parole – was based on a report by the Honourable Sydney Robins, retired justice of the Ontario Court of Appeal.

"The total amount paid to Mr. Truscott should be enough to ensure that he can live the remainder of his life with financial security, and in comfort and dignity, able to assist his family as he sees fit. It should also be enough to send a clear signal to the public that the government recognizes the enormity of the suffering that this miscarriage of justice has caused," Mr. Robins wrote in his report to the Ontario Government.

Mr. Truscott, then 14, was convicted of the murder of classmate Lynn Harper at Goderich, Ontario, on September 30, 1959. He was sentenced to death, as was then required by the law. The Ontario Court of Appeal dismissed his appeal on January 20, 1960. The next day, the federal Cabinet commuted his sentence to life imprisonment. The Supreme Court of Canada dismissed his application for leave to appeal on February 24, 1960.

On November 29, 2001 – some 42 years after his conviction – Mr. Truscott submitted an application for ministerial review. On January 24, 2002, the Minister of Justice appointed the Honourable Fred Kaufman, a former judge of the Quebec Court of Appeal, as an agent to investigate Mr. Truscott's application.

Mr. Kaufman conducted an exhaustive investigation of Mr. Truscott's application and provided a 700-page report to the Minister in the spring of 2004. The report presented new information about the case. On the basis of this new information, the Minister decided that there was a reasonable basis to conclude that a miscarriage of justice likely had occurred. Accordingly, on October 28, 2004, the Minister referred Mr. Truscott's case to the Ontario Court of Appeal to be heard as a new appeal.

In August 2007, the Court unanimously overturned Mr. Truscott's conviction as a miscarriage of justice and entered a verdict of acquittal.

Remedies Granted by the Minister

During the reporting period, the Minister granted three remedies pursuant to paragraph 696.3 (3) (a) of the *Criminal Code*. Two of the cases were made public by the applicant but the third was not; that applicant therefore cannot be named under the provisions of the *Privacy Act*.

William Mullins-Johnson

William Mullins-Johnson was convicted in 1994 of first-degree murder in the death of his four-year-old niece Valin Johnson. An appeal to the Ontario Court of Appeal was rejected.

In September 2005, Mr. Mullins-Johnson's counsel completed an application for ministerial review. A judge of the Ontario Superior Court of Justice granted Mr. Mullins-Johnson bail, pending the Minister's decision.

University of Ottawa law professor David Paciocco was appointed to investigate the case and he issued a preliminary report on October 19, 2005. However, the Ontario Attorney General asked Professor Paciocco before completing his investigation to await the results of a further review of the pathology evidence in the Mullins-Johnson case being conducted by an independent panel reviewing a number of cases involving Dr. Charles Smith, who had played a role in the Mullins-Johnson case. Mr. Mullins-Johnson agreed to this request.

After receiving Professor Paciocco's final report, the Minister concluded in July 2007 that "there is now significant new evidence that was not available at the time of Mr. Mullins-Johnson's trial that casts serious doubt on the correctness of his conviction for murder." He referred the case to the Ontario Court of Appeal.

On October 15, 2007, the Court of Appeal quashed the conviction and acquitted Mullins-Johnson, ruling "it is now clear that there is no evidence that Valin Johnson was assaulted or murdered and no evidence that Mr. Mullins-Johnson was guilty of any crime in relation to her death."

"It is profoundly regrettable that as a result of what has been shown to be flawed pathological evidence Mr. Mullins-Johnson was wrongly convicted and has spent such a very long time in jail," the Court said.

The judges concluded that the "compelling" fresh evidence showed the conviction was the result "of a rush to judgment based on flawed scientific evidence." However, the Court said it did not have the jurisdiction to make a formal legal declaration of factual innocence as requested by Mr. Mullins-Johnson "since it would not fall within the ambit or purpose of criminal law."

Following the ruling, a lawyer for the Ontario Attorney General conveyed her "sincere, profound and deepest apology to Mr. Mullins-Johnson and to his family for the miscarriage of justice that occurred."

Erin Michael Walsh

Erin Michael Walsh was convicted in 1975 in St. John, N.B. of the non-capital murder of Melvin Eugene Peters and sentenced to life imprisonment. Appeals to the New Brunswick Court of Appeal were dismissed in July 1982 and November 1982.

In December 2006, Mr. Walsh's counsel applied to the Minister of Justice for a review of the murder conviction after new evidence surfaced which he alleged had not been disclosed to him at the time of Mr. Walsh's trial.

In February 2008, the Minister referred the murder conviction to the New Brunswick Court of Appeal to be heard as a new appeal. He stated: "Mr. Walsh has submitted relevant new evidence that might have affected the verdict at his trial. He is therefore entitled to a remedy."

In March 2008, the Court of Appeal overturned the conviction and entered an acquittal, with reasons to follow.

Alberta case

In December 1994, the applicant was convicted of sexually assaulting his ex-wife and sentenced to 20 months imprisonment. His appeal to the Alberta Court of Appeal was dismissed in 1995. On July 26, 1999, the complainant signed a statutory declaration in which she recanted her testimony at trial that she had been sexually assaulted by the applicant. Based on this statutory declaration, the applicant submitted his application to the Minister which was completed in January 2002.

In September 2007, the Minister asked the Alberta Court of Appeal to determine if the complainant's recantations would be admissible as fresh evidence. If the Court is of the opinion the information would be admissible on appeal, it is to hear the case as an appeal.

The matter is scheduled to be heard in December 2008.

Update on Remedies Granted

This section provides an update on previous cases which the Minister has referred back to the courts.

Since 2003, as Table 1 illustrates, the Minister of Justice has referred 11 cases back to the courts from five provinces – four for new trials and seven to courts of appeal. Three cases are still before the courts. In another case, the applicant was retried and convicted of the lesser offence of manslaughter. In the remaining seven, the Crown stayed the charges or the appeals court entered an acquittal.

TABLE 1

Applicant	Date of Minister's Decision	Disposition by Minister	Final Result
Kaminski, Steven Richard (Alberta) Sexual Assault	January 27, 2003	New trial ordered	Proceedings stayed by the Crown at retrial
Cain, Rodney (Ontario) Second-Degree Murder	May 19, 2004	New trial ordered	Convicted of manslaughter at retrial in 2007
Truscott, Steven (Ontario) Capital Murder	October 28, 2004	Reference to Ontario Court of Appeal	Court of Appeal entered an acquittal on August 28, 2007
Bjorge, Darcy (Alberta) Stolen Property	February 10, 2005	New trial ordered	Charge stayed in the Alberta Provincial Court
Wood, Daniel (Alberta) First-Degree Murder	February 10, 2005	Reference to Alberta Court of Appeal	Court of Appeal ordered a new trial on November 27, 2006: charge stayed by Crown
Driskell, James (Manitoba) First-Degree Murder	March 5, 2005	New trial ordered	Proceedings stayed in the Manitoba Queen's Bench on the same day as the Minister's order
Tremblay, André (Quebec) First-Degree Murder	July 12, 2005	Reference to Quebec Court of Appeal	Still before the Court
Phillion, Romeo (Ontario) Non-Capital Murder	August 23, 2006	Reference to Ontario Court of Appeal	Proceedings ongoing in the Court of Appeal
Mullins-Johnson, William (Ontario) First-Degree Murder	July, 2007	Reference to the Ontario Court of Appeal	Acquittal entered by the Court of Appeal on October 15, 2007
Walsh, Erin (New Brunswick) Non-Capital Murder	February 28, 2008	Reference to the New Brunswick Court of Appeal	Acquittal entered by the Court of Appeal on March 14, 2008
(Alberta) Sexual Assault	September 21, 2007	Reference to the Alberta Court of Appeal	Still before the Court

Of the eleven cases, six dealt with disclosure issues (Truscott, Wood, Driskell, Walsh, Tremblay, Phillion); three involved faulty or poor science, (Truscott, Driskell, Mullins-Johnson); and the remaining cases (Cain, Bjorge, Kaminski and the Alberta case) dealt with other evidentiary issues including recantations, new evidence concerning possible witness tampering, and new evidence concerning witness credibility.

Daniel Wood

In September 2007, the Alberta Attorney General stayed a first-degree murder charge against Daniel Wood.

After a second trial in Calgary, Alberta, Mr. Wood had been convicted on June 7, 1990, of the first-degree murder of Merla Laycock, and sentenced to life imprisonment with no eligibility for parole for 25 years. The Alberta Court of Appeal dismissed his appeal against conviction on January 30, 1992.

Approximately three and a half years after his conviction, Mr. Wood submitted an application for ministerial review. The Minister announced his decision on Mr. Wood's application on February 15, 2005. The investigation found that the Crown had failed to disclose significant information to Mr. Wood, which could have had an impact on the fairness of the trial and the reliability of his conviction. The Minister therefore found that there was a reasonable basis to conclude that a miscarriage of justice had likely occurred. The case was referred to the Alberta Court of Appeal to be heard as a new appeal.

At the Court of Appeal, the Crown conceded that the failure to disclose to Mr. Wood relevant information possessed by the police might have affected the fairness of his trial and he was therefore entitled to a new trial. In November 2006, the appeal court rejected Mr. Wood's request for an acquittal or stay of the charge and ruled that a new trial was the appropriate remedy for the lack of disclosure.

Romeo Phillion

In January and March 2008, the Ontario Court of Appeal heard witnesses in the reference related to Romeo Phillion.

Mr. Phillion was convicted of non-capital murder in Ottawa on November 7, 1972, in the killing of Leopold Roy in August 1967. He was sentenced to life imprisonment without eligibility for parole for 10 years. Appeals to the Ontario Court of Appeal and the Supreme Court of Canada were unsuccessful.

In May 2003, Mr. Phillion's counsel completed an application for ministerial review. In July 2003, a judge of the Ontario Superior Court of Justice granted Mr. Phillion bail, pending the Minister's decision.

Mr. Phillion's application for ministerial review was based on an alleged alibi he had at the time of the killing, information which he claimed was not disclosed by the Crown, and new expert reports related to the reliability of the confession he made to police.

In August 2006, the Minister concluded: "There are certain issues that in my view merit a review by the Ontario Court of Appeal, and I believe it is necessary to seek the Court's opinion before I make my decision."

Accordingly, pursuant to subparagraph 696.3(3)(a)(ii) of the *Criminal Code*, the Minister referred two questions about Mr. Phillion's case to the Ontario Court of Appeal:

- Would the new information concerning the non-disclosure of certain material be admissible on appeal to the Court of Appeal?
- Are the recent expert reports on the reliability of Mr. Phillion's confession admissible on appeal to the Court of Appeal?

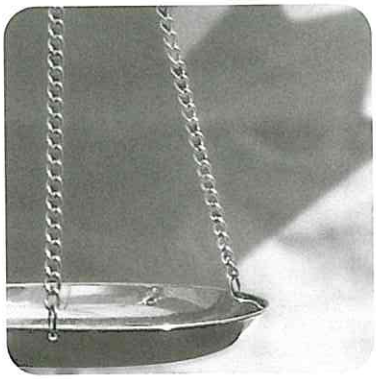
If the Court of Appeal answers either question in the affirmative, the Minister will ask the Court to hear the case as an appeal by Mr. Phillion against his conviction.

If the Court of Appeal answers both questions in the negative, the Minister will consider that opinion in making his final decision on Mr. Phillion's application.

Final arguments before the Court of Appeal are scheduled for November 2008.

The Year Ahead

The CCRG continues to work hard to process applications for ministerial review in a thorough and timely manner. A number of applications are expected to make their way to the Minister in 2008-09 for a decision.



Statistical Information

The Minister of Justice's annual report to Parliament must include the number of applications made to the Minister, the number that have been abandoned or that are incomplete, the number at the preliminary assessment stage and at the investigative stage, the number of decisions the Minister has made under subsection 696.3 (3), and any other information the Minister considers appropriate.

Reporting Period

The period covered by this annual report is from April 1, 2007, to March 31, 2008.

Application Requests

Table 1 summarizes the number of application requests made to the Minister during the reporting period. An application request is considered to have been made if a potential applicant or a person acting on his or her behalf inquires about submitting an application for ministerial review. The booklet *Applying for a Conviction Review* is sent to the person making the inquiry. This booklet provides detailed information about the conviction review process, includes the required forms, and provides step-by-step instructions for submitting an application.

During the period covered by this report, 32 application requests were made to the Minister.

TABLE 1: APPLICATION REQUESTS MADE TO THE MINISTER

DURING THE PERIOD APRIL 1, 2007, TO MARCH 31, 2008

TOTAL	**32**

Applications Made to the Minister

Table 2 indicates the number of applications that the Minister actually received during this reporting period. An application is considered to be "completed" when a person has submitted the forms, information and supporting documents required by the regulations. The Minister received seven completed applications during this reporting period.

An application is considered to be "partially completed" where a person has submitted some but not all of the forms, information and supporting documents required by the regulations. For example, a person may have submitted the required application form but not the supporting documents required. Although it is the applicant's responsibility to provide the required documentation, CCRG staff frequently assist applicants. It is not unusual for an application to remain in the "partially completed" category for a period of time while the applicant gathers and submits the necessary documents and information.

Of the 32 application requests made to the Minister during the reporting period, 23 fall into the "partially completed" category.

An application is "screened out" if the person is not eligible to make an application for ministerial review. This category covers a variety of circumstances – for example, if it relates to a provincial offence, involves a civil matter, or deals with the same subject matter as a previously denied application and does not raise any new matters of significance. Two applications were screened out during this reporting period.

TABLE 2: APPLICATIONS MADE TO THE MINISTER

FROM APRIL 1, 2007, TO MARCH 31, 2008

Applications completed	7
Applications partially completed	23
Applications screened out	2
TOTAL	**32**

Progress of Applications Through the Conviction Review Process

Table 3 summarizes the work completed at the first three stages of the conviction review process. Seventeen preliminary assessments were completed during the period covered by this report. Five investigations were completed during the reporting period, but one was abandoned by the applicant.

The length of time to conduct a preliminary assessment typically ranges from a few weeks to months. An investigation usually takes a number of months to complete, although the time required varies with the complexity of the case.

TABLE 3: PROGRESS OF APPLICATIONS THROUGH THE CONVICTION REVIEW PROCESS

FROM APRIL 1, 2007, TO MARCH 31, 2008

Preliminary assessments completed	17
Investigations completed	4
Applications abandoned	1
TOTAL	**22**

Preliminary Assessments

Tables 4 and 5 provide further information about the work completed at the preliminary assessment stage of the conviction review process. Table 4 summarizes the applications that were at the preliminary assessment stage during the reporting period, a total of 23. There were no applications awaiting preliminary assessment, 25 preliminary assessments were under way, and 17 were completed. Two preliminary assessments were abandoned and three are in abeyance. A preliminary assessment is considered to be "under way" if it commenced during the reporting period, or if it commenced prior to the reporting period but continued during the reporting period.

Table 5 shows that, of the 17 applications where preliminary assessments were completed, 16 did not proceed to the investigation stage and one proceeded to the investigation stage. In the cases which did not proceed to the investigation stage, the new matters raised by the applicant were not such that there might be a reasonable basis to conclude that a miscarriage of justice likely occurred.

TABLE 4: SUMMARY OF APPLICATIONS AT THE PRELIMINARY ASSESSMENT STAGE

FROM APRIL 1, 2007, TO MARCH 31, 2008

Applications awaiting preliminary assessment	0
Preliminary assessments completed	17
Preliminary assessments abandoned by the applicant	2
Preliminary assessments under way but not yet completed	3
Preliminary assessments in abeyance	3
TOTAL	**25**

TABLE 5: DISPOSITION OF APPLICATIONS FOLLOWING PRELIMINARY ASSESSMENT STAGE

FOR THE PERIOD APRIL 1, 2007, TO MARCH 31, 2008

Applications that did not proceed to the investigation stage following a preliminary assessment	16
Applications that did proceed to the investigation stage following a preliminary assessment	1
TOTAL	**17**

Investigations

Table 6 summarizes the work done on applications at the investigation stage during the reporting period. An investigation is considered to be "complete" when an investigation report is completed and forwarded to the Minister for review and decision.

Four investigations were completed during the reporting period and four were still under way.

TABLE 6: SUMMARY OF APPLICATIONS AT THE INVESTIGATION STAGE

FOR THE PERIOD APRIL 1, 2007, TO MARCH 31, 2008

Investigations completed	4
Investigations under way but not yet completed	4
TOTAL	**8**

Decisions

Table 7 summarizes the decisions made by the Minister during the reporting period. The Minister made four decisions during the one-year period. Three applications were granted and referred to the Court of Appeal, and one application was dismissed. As of March 31, 2008, there were no applications under consideration by the Minister.

TABLE 7: DECISIONS MADE BY THE MINISTER

FROM APRIL 1, 2007, TO MARCH 31, 2008

Applications dismissed	1
Applications granted	3
TOTAL	**4**

Applications Abandoned or Held in Abeyance

During the reporting period, two applications were abandoned at the preliminary assessment stage. One application was abandoned at the decision stage. Three applications were held in abeyance (ie. temporarily suspended) at the request of the applicants.

Status of Applications at the End of the Fiscal Year

Table 8 provides a snapshot of the status of all applications as of March 31, 2008.

Of the 32 applications, seven were completed and none were awaiting preliminary assessment; three were being held in abeyance at the request of the applicant; three were at the preliminary assessment stage; four were at the investigation stage; none were awaiting a decision by the Minister; and four had been decided by the Minister.

TABLE 8: SUMMARY OF THE STATUS OF ALL APPLICATIONS

AS OF MARCH 31, 2008	
Completed and awaiting preliminary assessment	0
In abeyance at request of the applicant	3
At preliminary assessment stage	3
At investigation stage	4
Awaiting Ministerial decision	0
Decided	4

Application

696.1 (1) An application for ministerial review on the grounds of miscarriage of justice may be made to the Minister of Justice by or on behalf of a person who has been convicted of an offence under an Act of Parliament or a regulation made under an Act of Parliament or has been found to be a dangerous offender or a long-term offender under Part XXIV and whose rights of judicial review or appeal with respect to the conviction or finding have been exhausted.

Form of application

(2) The application must be in the form, contain the information and be accompanied by any documents prescribed by the regulations.

Review of applications

696.2 (1) On receipt of an application under this Part, the Minister of Justice shall review it in accordance with the regulations.

Powers of investigation

(2) For the purpose of any investigation in relation to an application under this Part, the Minister of Justice 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 section 11 of that Act.

Delegation

(3) Despite subsection 11(3) of the *Inquiries Act*, the Minister of Justice may delegate in writing to any member in good standing of the bar of a province, retired judge or any other individual who, in the opinion of the Minister, has similar background or experience the powers of the Minister to take evidence, issue subpoenas, enforce the attendance of witnesses, compel them to give evidence and otherwise conduct an investigation under subsection (2).

Definition of "court of appeal"

696.3 (1) In this section, "the court of appeal" means the court of appeal, as defined by the definition "court of appeal" in section 2, for the province in which the person to whom an application under this Part relates was tried.

Power to refer

(2) The Minister of Justice may, at any time, refer to the court of appeal, for its opinion, any question in relation to an application under this Part on which the Minister desires the assistance of that court, and the court shall furnish its opinion accordingly.

Powers of Minister of Justice

(3) On an application under this Part, the Minister of Justice may

(*a*) if the Minister is satisfied that there is a reasonable basis to conclude that a miscarriage of justice likely occurred,

(i) direct, by order in writing, a new trial before any court that the Minister thinks proper or, in the case of a person found to be a dangerous offender or a long-term offender under Part XXIV, a new hearing under that Part, or

(ii) 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 found to be a dangerous offender or a long-term offender under Part XXIV, as the case may be; or

(*b*) dismiss the application.

No appeal

(4) A decision of the Minister of Justice made under subsection (3) is final and is not subject to appeal.

Considerations

696.4 In making a decision under subsection 696.3(3), the Minister of Justice shall take into account all matters that the Minister considers relevant, including

(*a*) whether the application is supported by new matters of significance that were not considered by the courts or previously considered by the Minister in an application in relation to the same conviction or finding under Part XXIV;

(*b*) the relevance and reliability of information that is presented in connection with the application; and

(*c*) the fact that an application under this Part is not intended to serve as a further appeal and any remedy available on such an application is an extraordinary remedy.

Annual report

696.5 The Minister of Justice shall within six months after the end of each financial year submit an annual report to Parliament in relation to applications under this Part.

Regulations

696.6 The Governor in Council may make regulations

(*a*) prescribing the form of, the information required to be contained in and any documents that must accompany an application under this Part;

(*b*) prescribing the process of review in relation to applications under this Part, which may include the following stages, namely, preliminary assessment, investigation, reporting on investigation and decision; and

(*c*) respecting the form and content of the annual report under section 696.5.

Interpretation

1. The following definitions apply in these Regulations.

"Code" means the *Criminal Code*. (*Code*)

"Minister" means the Minister of Justice. (*ministre*)

Application

2. (1) For the purposes of subsection 696.1(2) of the Code, an application for ministerial review under Part XXI.1 of the Code shall be in the form set out in the schedule and contain the following information:

(a) with respect to the applicant,
- (i) the applicant's name, including any alias or former name,
- (ii) the applicant's address, date of birth and, if any, the number assigned to the applicant under the Royal Canadian Mounted Police Automated Fingerprint Identification System,
- (iii) the name, address and telephone number of the person making the application on the applicant's behalf, if any,
- (iv) whether the alleged miscarriage of justice relates to a conviction on an offence punishable on summary conviction or on an indictable offence, or, in the case of a finding of dangerous offender or long-term offender under Part XXIV of the Code, particulars of the finding, and
- (v) whether the applicant is in custody;

(b) with respect to any pre-trial hearings,
- (i) the date of the preliminary inquiry, if any,
- (ii) the court and its address, and
- (iii) the number, type and date of any pre-trial motions, as well as the court decision on those motions;

(c) with respect to the trial,
- (i) the date on which it started,
- (ii) the court and its address, the plea entered at trial, the mode of trial and the date of the conviction and that of sentencing,
- (iii) the names and addresses of all counsel involved in the trial, and
- (iv) the number, type and date of any motions made, as well as the date of the court decision on those motions;

(d) particulars regarding any subsequent appeals to the court of appeal or the Supreme Court of Canada;

(e) the grounds for the application; and

(f) a description of the new matters of significance that support the application.

(2) The application must be accompanied by the following documents:

(a) the applicant's signed consent authorizing the Minister
- (i) to have access to the applicant's personal information that is required for reviewing the application, and
- (ii) to disclose to any person or body the applicant's personal information obtained in the course of reviewing the application in order for the Minister to obtain from that person or body any information that is required for reviewing the application;

(b) a true copy of the information or indictment;

(c) a true copy of the trial transcript, including any preliminary hearings;

(d) a true copy of all material filed by the defence counsel and Crown counsel in support of any pre-trial and trial motions;

(e) a true copy of all factums filed on appeal;

(f) a true copy of all court decisions; and

(g) any other documents necessary for the review of the application.

Review of the Application

3. On receipt of an application completed in accordance with section 2, the Minister shall

(a) send an acknowledgment letter to the applicant and the person acting on the applicant's behalf, if any; and

(b) conduct a preliminary assessment of the application.

4. (1) After the preliminary assessment has been completed, the Minister

(a) shall conduct an investigation in respect of the application if the Minister determines that there may be a reasonable basis to conclude that a miscarriage of justice likely occurred; or

(b) shall not conduct an investigation if the Minister
- (i) is satisfied that there is a reasonable basis to conclude that a miscarriage of justice likely occurred and that there is an urgent need for a decision to be made under paragraph 696.3(3)(a) of the Code for humanitarian reasons or to avoid a blatant continued prejudice to the applicant, or
- (ii) is satisfied that there is no reasonable basis to conclude that a miscarriage of justice likely occurred.

(2) The Minister shall send a notice to the applicant and to the person acting on the applicant's behalf, if any, indicating whether or not an investigation will be conducted under subsection (1).

(3) If the Minister does not conduct an investigation for the reason described in subparagraph (1)(*b*)(ii), the notice under subsection (2) shall indicate that the applicant may provide further information in support of the application within one year after the date on which the notice was sent.

(4) If the applicant fails, within the period prescribed in subsection (3), to provide further information, the Minister shall inform the applicant in writing that no investigation will be conducted.

(5) If further information in support of the application is provided after the period prescribed in subsection (3) has expired, the Minister shall conduct a new preliminary assessment of the application under section 3.

5. (1) After completing an investigation under paragraph 4(1)(*a*), the Minister shall prepare an investigation report and provide a copy of it to the applicant and to the person acting on the applicant's behalf, if any. The Minister shall indicate in writing that the applicant may provide further information in support of the application within one year after the date on which the investigation report is sent.

(2) If the applicant fails, within the period prescribed in subsection (1), to provide any further information, or if the applicant indicates in writing that no further information will be provided in support of the application, the Minister may proceed to make a decision under subsection 696.3(3) of the Code.

6. The Minister shall provide a copy of the Minister's decision made under subsection 696.3(3) of the Code to the applicant and to the person acting on the applicant's behalf, if any.

Annual Report

7. An annual report submitted under section 696.5 of the Code shall contain the following information in respect of the financial year under review in the report:

(a) the number of applications made to the Minister;

(b) the number of applications that have been abandoned or that are incomplete;

(c) the number of applications that are at the preliminary assessment stage;

(d) the number of applications that are at the investigation stage;

(e) the number of decisions that the Minister has made under subsection 696.3(3) of the Code; and

(f) any other information that the Minister considers appropriate.

Coming into Force

8. These Regulations come into force on the day on which section 71 of lthe *Criminal Law Amendment Act*, 2001, chapter 13 of the *Statutes of Canada, 2002*, comes into force.

Applicants and interested parties are encouraged to communicate with CCRG in writing. Initial contact with the CCRG may also be made by e-mail.

Mail

Minister of Justice
Criminal Conviction Review Group
(222 Queen, 11th Floor)
284 Wellington Street
Ottawa, Ontario
K1A 0H8

E-mail

Initial inquiries: **ccrg.inquiries@justice.gc.ca**

Telephone

Information for contact by telephone will be provided following the initial contact by mail or e-mail.

CCRG Web Site

http://canada.justice.gc.ca/eng/pi/ccr-rc/index.html