

S E R V I N G C A N A D I A N S



APPLICATIONS FOR
MINISTERIAL REVIEW –
MISCARRIAGES OF JUSTICE

ANNUAL REPORT 2010
MINISTER OF JUSTICE



Department of Justice
Canada

Ministère de la Justice
Canada

Canada

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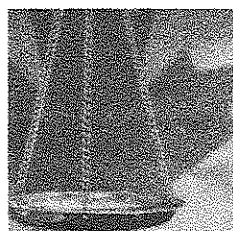


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Introduction

When an innocent person is found guilty of a criminal offence, there has clearly been a miscarriage of justice.

A miscarriage of justice may be suspected where new information surfaces which casts serious doubt on whether a convicted person received a fair trial – for example, where important information has not been disclosed to the defence.

Since 1892, the Minister of Justice has had the power, in one form or another, to review a criminal conviction under federal law to determine whether there may have been a miscarriage of justice.

Currently, 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 – either referring the case to a court of appeal to be heard as a new appeal, or directing that a new trial be held.

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 may be 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 eighth annual report, and it covers the period April 1, 2009, to March 31, 2010. Under the regulations, the 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.



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

In 2002, following public consultations, section 690 of the *Criminal Code* was repealed and replaced by sections 696.1 to 696.6. These provisions, together with the regulations, 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 for 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 who investigate applications on behalf of the Minister the authority to compel the production of documents as well as the appearance and testimony of witnesses;
- creating the independent position of Special Advisor to the Minister; 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.

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 rest of 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.



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. Typically, this is done where there is a potential conflict of interest, such as where the prosecution had been conducted on behalf of the Attorney General of Canada by the Public Prosecution Service of Canada, formerly the Federal Prosecution Service (e.g. drug prosecutions, or criminal prosecutions in the Yukon, Northwest Territories and Nunavut). In such circumstances, the outside agent, rather than the CCRG, will provide advice to the Minister.

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 on 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.

However, 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 a court of appeal 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 an 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 would allow 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.

Stages of the Review

There are four stages in the review process:

- 1) preliminary assessment; 2) investigation; 3) preparation of an investigation report; and 4) the decision by the Minister. They are described in detail in the application booklet and in previous annual reports.

As a practical matter, the Minister is not personally involved in the preliminary assessment, investigation and the preparation of the investigation report stages. 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 prosecuting agency (usually the provincial attorney general), 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 such as the admissibility of fresh evidence.

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, which are still applicable today. Some have in fact been incorporated into the current *Criminal Code* provisions.

1. The remedy contemplated by section 696.1 is extraordinary. It is intended to ensure that no miscarriage of justice occurs when all conventional avenues of appeal have been exhausted.
2. Section 696.1 does not exist simply to permit the Minister to substitute a ministerial opinion for a trial verdict or a result on appeal. Merely because the Minister might take a different view of the same evidence that was before the court does not empower the Minister to grant a remedy under section 696.1.
3. Similarly, the procedure created by section 696.1 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 696.1 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 696.1 should ordinarily be based on new matters of significance that either were 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 whether there is "...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 696.1, 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 above analysis, that there is a basis to conclude that a miscarriage of justice likely occurred.



The Special Advisor to the Minister

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 the 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.

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.



Remedies Granted by the Minister

During this reporting period, the Minister granted one remedy, pursuant to paragraph 696.3 (3) (a) of the *Criminal Code*.

D.S.

In 1995, D.S. was convicted of three sexual abuse offences and was sentenced to eight years in prison. The victim testified at trial that the sexual abuse by D.S. had occurred over a number of years. Although the expert medical evidence from the prosecution was consistent with sexual abuse, the defence put forward other expert medical evidence that questioned whether any sexual abuse had actually taken place. However, the main evidence against D.S. was the unsworn testimony of the 10-year-old victim, which the trial judge accepted as truthful.

In 2000, the victim recanted the evidence given at trial in a Statutory Declaration.

On January 10, 2010, the Minister asked the Alberta Court of Appeal to decide whether the complainant's recantation was admissible as fresh evidence on appeal and if so, to hear the case as a new appeal.

Update on Previous Remedies Granted

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

Since 2003, as Table A shows, the Minister of Justice has referred 13 cases (from five provinces) back to the courts – five for new trials and eight for review by courts of appeal.

In one case where the Minister had ordered a new trial, the applicant was retried and convicted of the lesser offence of manslaughter. In 11 cases, the Crown stayed or withdrew the charges or the courts entered an acquittal. One case is still before the courts.

The following are key developments that have taken place in these cases during the past year¹:

Kyle Wayne Unger

In October 2009, Manitoba announced that the Crown would not be calling any evidence against Kyle Wayne Unger and he was subsequently acquitted by a judge.

Mr. Unger was originally convicted of the first degree murder of 16-year-old Brigitte Grenier at an outdoor rock concert near Roseisle, Manitoba, in June 1990. His appeal to the Manitoba Court of Appeal was rejected and he was denied leave to appeal to the Supreme Court of Canada.

In September 2004, the Forensic Evidence Review Committee, an advisory committee established by the Manitoba government, called into question the hair comparison evidence used at Mr. Unger's trial.

Mr. Unger's counsel subsequently filed an application to the Minister of Justice for a review of the murder conviction. In November 2005, a judge of the Manitoba Court of Queen's Bench granted Mr. Unger bail pending the Minister's decision.

In March 2009, the Minister quashed the conviction and ordered a new trial for Mr. Unger, stating: "I am satisfied there is a reasonable basis to conclude that a miscarriage of justice likely occurred in Mr. Unger's 1992 conviction."

A Manitoba Crown official told the Court of Queen's Bench that a group of experienced Crown attorneys reviewed the file and concluded it would not be appropriate to retry Mr. Unger on the available evidence.

¹ For greater transparency, some of the developments reported in this section may have taken place after the end of the reporting period.

Romeo Phillion

In April 2010, the Ontario Crown withdrew a murder charge against Romeo Phillion.

Mr. Phillion was convicted of non-capital murder in Ottawa on November 7, 1972, in the killing of off-duty firefighter Leopold Roy in August 1967. He was sentenced to life imprisonment without eligibility for parole for 10 years. His 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 at the time of the killing, which he claimed had not been disclosed by the Crown, and on new expert reports on the reliability of his confession to the police.

In August 2006, the Minister referred two questions about Mr. Phillion's case to the Ontario Court of Appeal.

In a 2-1 ruling, the Court of Appeal quashed the conviction and ordered a new trial. It ruled that the fresh evidence was admissible on appeal and that it could reasonably have been expected to have changed the result at trial.

Mr. Justice Michael Moldaver, writing for the majority, said that had the jury had the benefit of the information, it might, "considered with the entirety of the evidence heard at trial ... have left the jury in a state of reasonable doubt as to whether the appellant was the person who killed Mr. Roy."

"However, the compelling nature of his confessions – particularly the level of detail and accuracy found in them – prevents me from concluding that the admission of the fresh evidence would make it 'clearly more probable than not' that the appellant would be acquitted at a new trial."

When the Crown decided to withdraw the charge rather than proceed with a trial, Mr. Phillion filed an application in Ontario Superior Court seeking to require the Crown to arraign him and have the court enter an acquittal, rather than simply withdrawing the charge.

In her March 2010 ruling dismissing the application, Justice Lynn Ratushny referred to the case as a "miscarriage of justice" but said she could not force the Crown to arraign Mr. Phillion because that would "amount to judicial supervision of a decision that is solidly within a core area of prosecutorial discretion."

André Tremblay

In May 2010, the Quebec Court of Appeal quashed the murder conviction of André Tremblay and ordered a new trial on a charge of manslaughter.

Mr. Tremblay was convicted of first degree murder in February 1984 in the death of Serge Fournier in a Montreal apartment. Subsequent appeals to the Quebec Court of Appeal and Supreme Court of Canada were rejected.

After Mr. Tremblay applied to the Minister for a review of his conviction, the Minister referred the case to the Quebec Court of Appeal in July 2005. The main issue on the application was the alleged recantations by a jailhouse informant who had testified against Mr. Tremblay.

Mr. Tremblay was released on conditional release in March 2004.

Before the Court of Appeal, Quebec argued that because of the passage of time and the fact that Mr. Tremblay had spent 16 years in prison before his release in 2004, it would be unjust to subject him to another trial.

In light of new evidence, the appeal court overturned Mr. Tremblay's murder conviction, but said a manslaughter finding was still a possible verdict and ordered a new trial on that charge. The Court also refused Mr. Tremblay's request to enter a stay of proceedings on the basis of the passage of time, stating:

It is true that the prosecution has already announced that in the event of an order for a new trial it would have no evidence to call, resulting in an acquittal. None the less, it is wiser, in light of all of the circumstances of this case, to leave that decision to the prosecution.

In July 2010, the Crown called no evidence and Mr. Tremblay was acquitted of the manslaughter charge.

**TABLE A**

Applicant and Charge	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; charges stayed by Crown
Driskell, James (Manitoba) First Degree Murder	March 5, 2005	New trial ordered	Proceedings stayed in the Court of 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	Court of Appeal overturned conviction on May 31, 2010 and ordered a new trial on manslaughter. The Crown called no evidence and he was acquitted July 8, 2010
Phillion, Romeo (Ontario) Non-Capital Murder	August 23, 2006	Reference to Ontario Court of Appeal	Court of Appeal ordered a new trial; charge withdrawn by Crown on April 29, 2010
Mullins-Johnson, William (Ontario) First Degree Murder	July 17, 2007	Reference to Ontario Court of Appeal	Acquittal entered by the Court of Appeal on October 15, 2007
L.G.P. (Alberta) Sexual Assault	September 21, 2007	Reference to Alberta Court of Appeal	Court of Appeal ordered a new trial; charge stayed by the Crown
Walsh, Erin (New Brunswick) Non-Capital Murder	February 28, 2008	Reference to New Brunswick Court of Appeal	Acquittal entered by the Court of Appeal on March 14, 2008
Unger, Kyle Wayne (Manitoba) First Degree Murder	March 11, 2009	New trial ordered	Crown called no evidence; Court entered an acquittal on October 23, 2009
D.S. (Alberta) Sexual Assault	January 12, 2010	Reference to the Alberta Court of Appeal	



Statistical Information

Reporting Period

The period covered by this annual report is from April 1, 2009, to March 31, 2010.

Inquiries

This year, the report includes a new category: inquiries. This new category includes people who contact the CCRG for general information about the conviction review process or other information but do not formally request the booklet *Application for a Conviction Review*.

During the reporting period, the CCRG received 11 such inquiries.

Applications Made to the Minister

Table 1 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 time while the applicant gathers and submits the necessary documents and information.

Of the 22 applications made to the Minister during the reporting period, six 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. Nine applications were screened out during this reporting period.

**TABLE 1: APPLICATIONS
MADE TO THE MINISTER**

FROM APRIL 1, 2009, TO MARCH 31, 2010

Applications completed	7
Applications partially completed	6
Applications screened out	9
TOTAL	22

Progress of Applications through the Conviction Review Process

Table 2 summarizes the work completed in the first three stages of the conviction review process. Ten preliminary assessments were completed during the period covered by this report. No investigations were completed during the reporting period, and none were abandoned by applicants.

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

TABLE 2: PROGRESS OF APPLICATIONS THROUGH THE CONVICTION REVIEW PROCESS

FROM APRIL 1, 2009, TO MARCH 31, 2010

Preliminary assessments completed	10
Investigations completed	0
Applications abandoned	0
TOTAL	10

Preliminary Assessments

Tables 3 and 4 provide further information about the work done at the preliminary assessment stage of the conviction review process. Table 3 summarizes the 22 applications that were at the preliminary assessment stage during the reporting period. There were nine applications awaiting preliminary assessment, three preliminary assessments were under way, and ten were completed. No preliminary assessments were abandoned. An application is considered to be "under way" if it commenced during the reporting period, or if it commenced beforehand but continued during the reporting period.

Table 4 shows that two of the ten applications where preliminary assessments were completed proceeded to the investigation stage. In the other eight cases, the new matters submitted by the applicant were not sufficient to suggest that there might be a reasonable basis to conclude that a miscarriage of justice likely occurred.

TABLE 3: SUMMARY OF APPLICATIONS AT THE PRELIMINARY ASSESSMENT STAGE

FROM APRIL 1, 2009, TO MARCH 31, 2010

Applications awaiting preliminary assessment	9
Preliminary assessments completed	10
Preliminary assessments abandoned by the applicant	0
Preliminary assessments under way but not yet completed	3
TOTAL	22

TABLE 4: DISPOSITION OF APPLICATIONS FOLLOWING PRELIMINARY ASSESSMENT STAGE

FROM APRIL 1, 2009, TO MARCH 31, 2010

Applications that did not proceed to the investigation stage following a preliminary assessment	8
Applications that proceeded to the investigation stage following a preliminary assessment	2
TOTAL	10

Investigations

Table 5 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 forwarded to the Minister for review and decision.

No investigations were completed during the reporting period. Two investigations that had been carried over from the previous reporting period are still under review.

TABLE 5: SUMMARY OF APPLICATIONS AT THE INVESTIGATION STAGE

FROM APRIL 1, 2009, TO MARCH 31, 2010

Investigations completed	0
Investigations under way but not yet completed	2
TOTAL	2

Applications Abandoned or Held in Abeyance

During the reporting period, no applications were abandoned at the preliminary assessment stage or at the decision stage. No applications were held in abeyance at the request of the applicants, but one was held in abeyance by the CCRG pending a review by provincial authorities.

Decisions

Table 6 summarizes the decisions made by the Minister during the reporting period. The Minister made two decisions during this period, granting one application by referring the case to the court of appeal and dismissing the other.

TABLE 6: DECISIONS MADE BY THE MINISTER

FROM APRIL 1, 2009, TO MARCH 31, 2010

Applications dismissed	1
Applications granted	1
TOTAL	2

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

Mail

Minister of Justice
Criminal Conviction Review Group
284 Wellington Street
Ottawa, Ontario
K1A 0H8

E-mail

Initial inquiries: ccrg-grcc@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>