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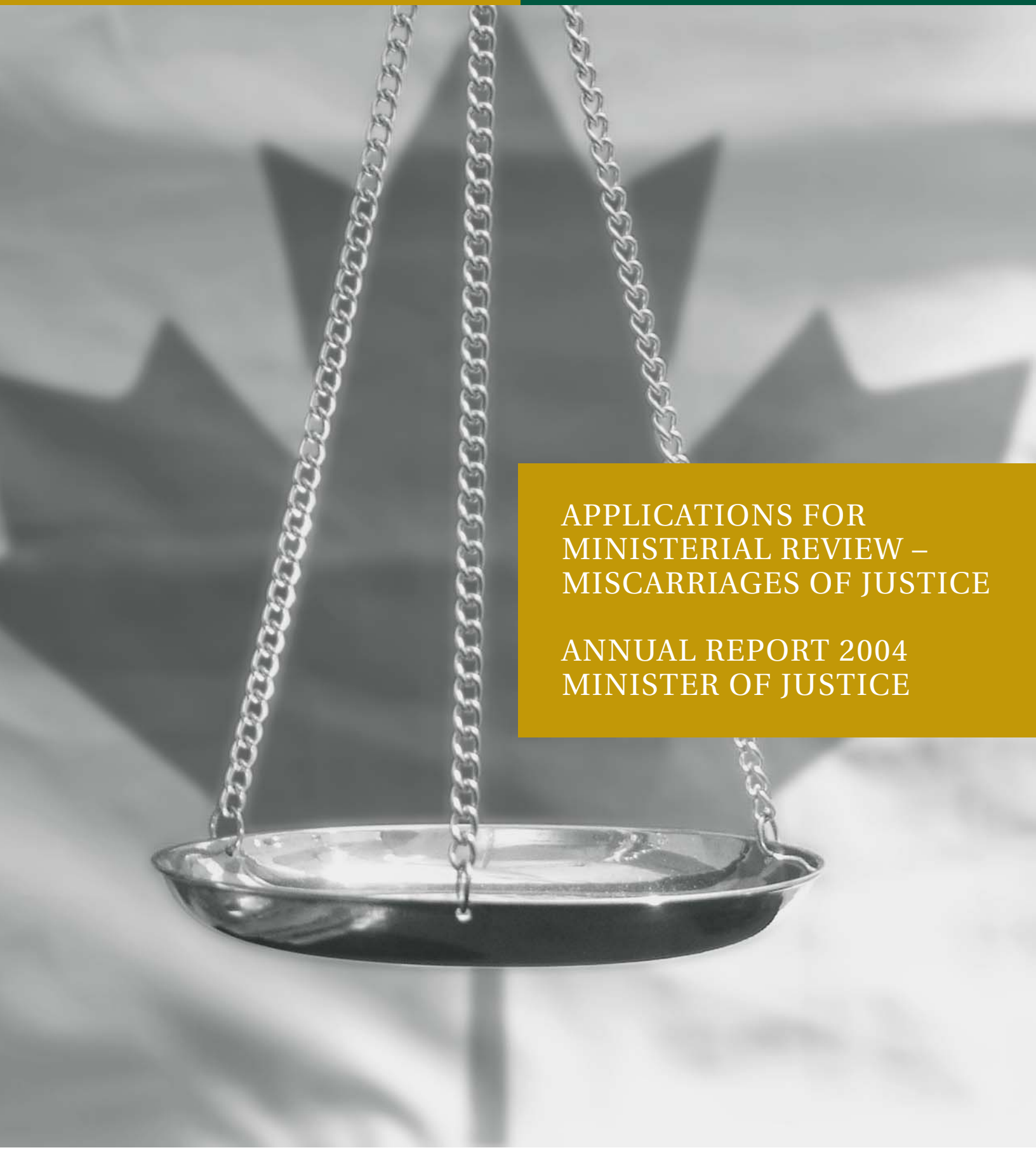

APPLICATIONS FOR MINISTERIAL REVIEW – MISCARRIAGES OF JUSTICE

ANNUAL REPORT 2004 MINISTER OF JUSTICE

Department of Justice Canada
Ministère de la Justice Canada

Canada

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National Library of Canada cataloguing in publication data

Canada. Department of Justice

Annual report, applications for ministerial review, miscarriages of justice

Annual.
2004-
Text in English and French on inverted pages.
Title on added t.p.: Rapport annuel, demande de révision auprès du ministre, erreurs judiciaires.
Issued also on the Internet.
Variant title: Applications for ministerial review, miscarriages of justice.
ISBN 0-662-68382-X
Cat. no. J1-3/2003

1. Judicial error – Canada – Périodicals.
2. Appellate procedure – Canada – Périodicals.
3. Criminal justice, Administration of – Canada – Periodicals.
I. Title.

KE9375.C32 2003 345.71'05 C2003-980279-5E

Published by authority of the Minister of Justice and
Attorney General of Canada

by the

Communications Branch
Department of Justice
Ottawa, Canada

Printed in Canada

Also available in French under the title:
Rapport annuel, demandes de révision auprès du ministre, erreurs judiciaires

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Message from the Minister

It is my pleasure to submit to Parliament the second annual report of the Minister of Justice regarding applications for ministerial review (miscarriages of justice) under Part XXI.1 of the *Criminal Code*.

Canadians can be rightfully proud and confident that they have one of the best criminal justice systems in the world. Our system includes many safeguards to ensure that an accused person receives a fair trial, from the *Canadian Charter of Rights and Freedoms* to a comprehensive and effective system of appellate review of criminal convictions. Nevertheless, as the Supreme Court of Canada recently noted in *United States of America* v. *Burns*, continuing disclosures of miscarriages of justice in Canada and elsewhere "provide tragic testimony to the fallibility of the legal system, despite its elaborate safeguards for the protection of the innocent."

Miscarriages of justice undermine public confidence in the criminal justice system if they are not effectively remedied. In 2002 Canada responded to concerns about its system for reviewing possible miscarriages of justice with changes to the law and subsequent non-legislative changes to improve the system. A person who seeks a review of his or her conviction on the grounds of a miscarriage of justice can be assured that the review will be conducted in a thorough, objective and independent manner.

The Government of Canada is committed to ensuring that miscarriages of justice are rectified and public confidence in our criminal justice system is maintained at the highest level.

Irwin Cotler
Minister of Justice

Introduction

Under Canadian law, the federal Minister of Justice has the legal authority to review a criminal conviction on the basis that 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 is initiated 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. 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 – a referral of the case to the court of appeal to be heard as a new appeal or a direction for a new trial.

Pursuant to 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.

The first such report was submitted in September 2003. This is the second annual report of the Minister of Justice, and it covers the period April 1, 2003, to March 31, 2004. 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 summarizes the history of the Minister's power to review criminal convictions, describes the role of the federal Department of Justice in such reviews, outlines how the criminal conviction review process works, provides the statistical information required by the regulations, considers a variety of emerging issues, and describes developments expected in the coming year.

The appendices provide further useful information including the governing legislation, the regulations, an organizational chart, a conviction review process chart, and information about how to contact the Criminal Conviction Review Group.

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." When Canada's *Criminal Code* was enacted in 1892, it recognized the potential for miscarriages of justice and provided a legislative remedy by codifying one aspect of the Prerogative. The original section 748 allowed the Minister of Justice to direct a new trial where the Minister entertained a doubt as to whether a person ought to have been convicted.

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, until it was revised and replaced in 2002. Prior to the 2002 amendments to the *Criminal Code*, section 690 read as follows:

> 690. 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 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.

Reforming the Conviction Review Process

During the last two decades, there have been several high-profile cases involving miscarriages of justice in Canada. A number of these cases were the subject of public inquiries. Although many of the miscarriages of justice in question were often discovered and dealt with before a conviction review application was ever submitted to the Minister of Justice, the conviction review process under section 690 of the *Criminal Code* came under scrutiny and was subject to criticism.

The Government of Canada decided to examine the process further and consider whether reforms were required. In October 1998, the Minister of Justice released a consultation paper, entitled *Addressing Miscarriages of Justice: Reform Possibilities for Section 690 of the Criminal Code*, which examined the conviction review process and discussed possible options for reform. The consultation paper was widely circulated.

From the submissions received, as well as other contributions from legal experts and interest groups, it was possible to identify several reform options for more detailed consideration. These options ranged from the creation of a separate agency to review criminal convictions, similar to the Criminal Cases Review Commission in the United Kingdom (a change long advocated by some critics of the old review process), to the elimination of section 690 altogether with a proposed broadening of the scope of appellate review.

After this broad consultation, a decision was arrived at whereby the federal Minister of Justice would retain the power to review criminal convictions, but legislative changes would be made to improve the process. These changes, known as the "reform model", represented a compromise position between a separate review agency similar to the United Kingdom model and the *status quo* under section 690 of the *Criminal Code*. The reform model had the full support of the provincial and territorial Attorneys General and Ministers of Justice. The Government of Canada then proceeded with legislative and non-legislative changes to implement the reform model.

Changes to the *Criminal Code*

In June 2002, Parliament amended the criminal conviction review provisions in the *Criminal Code*. Section 690 of the *Criminal Code* was repealed and replaced by a number of new provisions, the current sections 696.1 to 696.6 (Appendix 1). These new provisions, along with complementary regulations (Appendix 2), came into force on November 25, 2002. Under the changes to the law, a conviction review application became formally known as an "application for ministerial review (miscarriages of justice)."

The changes to the law improved the 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 an application;
- 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 on conviction reviews.

Criminal Conviction Review Group

The Criminal Conviction Review Group (CCRG) is a separate unit of the federal Department of Justice. Lawyers employed by the CCRG review applications for ministerial review and provide advice to the Minister on how the applications should be decided.

Prior to 1993, conviction review applications were being evaluated on an *ad hoc* basis by lawyers who worked in the prosecution service of the Department of Justice. This approach was subject to the criticism that the conviction reviews took too long and that the lawyers conducting the reviews lacked expertise and impartiality.

As a result of this study, a decision was made to form the CCRG, a separate unit of lawyers dedicated to conducting conviction reviews on a full-time basis. In addition, responsibility for conviction reviews was moved from the prosecution service to the criminal law policy branch of the Department. Under the new arrangement, CCRG lawyers reported through the Assistant Deputy Minister responsible for criminal law policy, rather than through the Assistant Deputy Attorney General in charge of federal prosecutions. In this manner, all responsibility for conviction reviews was removed from the Attorney General function within the Department of Justice.

Following the legislative changes in 2002, various structural changes were made to enhance the arm's length relationship between the CCRG and the Department. First, the CCRG was physically moved from its office space within the Department of Justice Headquarters to a separate location within the City of Ottawa. Second, the path by which the legal advice and other material prepared by CCRG lawyers passes to the Minister was simplified and made more direct. Rather than formally passing through another branch of the Department, advice passes from the CCRG to the Minister through the Deputy Minister's office. Third, the CCRG was removed from the criminal law policy branch, and arrangements were made to provide administration and support services to the CCRG through the Department's corporate services branch. Fourth, the position of Special Advisor was created to oversee the conviction review process and give the Minister advice on applications for ministerial review that would be independent of that given by the CCRG. The role of the Special Advisor is discussed in greater detail below.

Staff, Administration and Facilities

The CCRG presently consists of five criminal lawyers and two support staff, all of whom are permanent employees of the Department. The senior counsel is responsible for the overall management and administration of the CCRG. The Group's lawyers have five main responsibilities:

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

At the beginning of the reporting period, three full-time lawyers were employed at the CCRG. By the end of the reporting period, the full-time legal staff expanded to five with the addition of a fourth lawyer in July 2003 and a fifth in February 2004.

During the year covered by this report, CCRG lawyers have attended continuing legal education and other professional development pertaining to criminal law and other matters including the Federation of Law Societies National Criminal Law Program as well as relevant Departmental programs. Support staff attended relevant training and professional development programs as well.

In August 2003 the CCRG moved out of its offices in the Department of Justice Headquarters into temporary office space elsewhere in Ottawa, and from there into its permanent offices in November 2003. The new location is an office building in downtown Ottawa which has a mixture of government and private sector tenants. No other Department of Justice operations are located in this building. The facility has office space for the Special Advisor, up to nine lawyers or other professional staff, and two support staff.

The CCRG has its own reference library on site, but it also has access to the large holdings of the departmental library a short distance away. Information technology (IT) support is provided to the CCRG by the Department.

Effective April 1, 2004, new administrative and support arrangements were put in place for the CCRG. Funding, as well as administration and support services, are now provided to the CCRG through the Department's corporate services branch rather than through the criminal law policy branch.

The Special Advisor to the Minister

In November 2003 Bernard Grenier, a retired judge of the Court of Quebec with more than two decades of distinguished experience on the bench, was appointed as the first Special Advisor to the Minister on applications for ministerial review.

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 from outside of the Department of Justice and public service by means of an order-in-council of the Government of Canada.

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 oversee all stages of the conviction review process, including the preliminary assessment stage where applications may be screened out. The Special Advisor's involvement ensures that all stages of the review are complete, fair, and transparent.

For example, the Special Advisor may request that additional information be collected or existing information be clarified before an application is screened out at the preliminary assessment stage. The Special Advisor may insist that a particular application not be screened out but be permitted to proceed to the investigation stage.

At the investigation stage, the Special Advisor's role may include providing advice and guidance to a CCRG lawyer or seeking clarification of issues. Nevertheless, CCRG lawyers, or the appointed agents, remain responsible for conducting the investigation and are expected to provide candid and independent advice to the Minister along with the investigation report. The Special Advisor reviews the investigation report and any appended material, as well as the legal advice and recommendations of the investigating lawyer.

Given the independence of the position, the Special Advisor may or may not agree with the advice and recommendations of the CCRG. He may therefore choose to provide his own advice and recommendations to the Minister that differs from that of the CCRG.

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. The independence of the process is essential to its credibility.

Delegation of Investigative Powers

Under the section 690 conviction review process, there was no legal procedure to require witnesses to provide information or produce relevant documents. The investigation process was dependant upon the voluntary cooperation of witnesses. This circumstance was seen as a weakness in the conviction review process, since information and documents in the possession of a reluctant or uncooperative witness could not be obtained.

This weakness in the section 690 conviction review process was corrected by the amendments to the *Criminal Code*. Pursuant to section 696.2 of the *Criminal Code*, the Minister now has the powers of a commissioner under the *Inquiries Act* to investigate an application for ministerial review.[1] In practical terms, the Minister has the 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.

As a practical matter, the Minister is not involved in the investigation of applications for ministerial review. Such investigations are carried out on his behalf by CCRG lawyers or outside agents of the Department where appropriate (e.g., where there may be conflicts of interest). Subsection 696.2 (3) of the *Criminal Code* allows the Minister to delegate his powers of investigation to a lawyer, retired judge or other qualified individual.

Since the amendments to the *Criminal Code* came into force on November 25, 2002, the Minister has delegated his powers of investigation on three occasions where circumstances dictated that the thorough investigation of an application for ministerial review would require the use of those powers. In those three cases, subpoena powers were used to require witnesses to attend and give evidence. Two of those delegations were made during the period covered by this report.

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

Communications and Outreach

The CCRG's communications strategy focuses on:

- facilitating easy communication with CCRG;
- promoting awareness and understanding of the conviction review process;
- providing timely and accurate information on the conviction review process to applicants and interested parties; and
- developing an appropriate working relationship with stakeholders.

Applicants, interested parties and stakeholders are encouraged to communicate with CCRG in writing. Correspondence and inquiries in writing may be forwarded to the Minister of Justice, Criminal Conviction Review Group, 284 Wellington Street, (222 Queen, 11th Floor), Ottawa, Ontario, K1A 0H8. Initial contact with the CCRG may also be made by e-mail to "ccrg.inquiries@justice.gc.ca". Once initial contact is made by mail or e-mail, arrangements can be made for communication by telephone or other electronic means. Replies to inquiries forwarded to the Minister regarding the application process or about specific conviction review applications are prepared by the CCRG.

In an effort to provide accurate information about the conviction review process to applicants and interested parties, the CCRG produced an updated information booklet entitled *Applying For A Conviction Review*. The information booklet is a step-by-step guide to preparing and submitting an application for ministerial review. The booklet contains all the forms required for an application. The CCRG will provide a copy of *Applying For A Conviction Review* to a potential applicant or interested party who requests one. The booklet is also available on the CCRG web site (http://canada.justice.gc.ca/en/ps/ccr/index.html).

The CCRG web site can be accessed via the Department of Justice Canada web site (http://canada.justice.gc.ca/en/index.html), under "Programs and Services." The CCRG web site provides access to the information booklet, annual reports, relevant news releases, legislation and other information.

To promote awareness and understanding of the conviction review process, the CCRG provides presentations or lectures subject to availability, resources and operational requirements.

The CCRG has also taken steps to develop appropriate working relationships with various stakeholders including the courts, provincial attorneys general and other organizations such as the Association in Defence of the Wrongly Convicted (AIDWYC).

Emerging Issues

In the year covered by this report, a number of issues have emerged in the courts that are relevant to applications for ministerial review. These issues include:

- the granting of bail to an applicant pending the Minister's decision; and
- the effect of the Crown's failure to disclose information during a criminal case.

On July 21, 2003, Romeo Phillion became the first applicant for a ministerial review to be granted bail pending the Minister's decision. In *R.* v. *Phillion*,[2] Justice Watt of the Ontario Superior Court of Justice ruled that on both constitutional and common law grounds the court had jurisdiction to order the release of an applicant pending the decision of the Minister regarding an application for ministerial review. Justice Watt accepted that the conditions precedent for release are the following:

- the application for ministerial review is not frivolous;
- the applicant will surrender himself into custody according to the terms of the order; and
- the applicant's detention is not necessary in the public interest.

James Driskell became the second person in Canadian legal history to be released on bail pending the Minister's decision in late 2003. Nevertheless, in *R.* v. *Driskell*[3] Justice Scurfield of the Manitoba Court of Queen's Bench ruled that the standard for release pending the Minister's decision is high:

> In conclusion, it is always difficult and often unwise to define a standard in absolute terms. Suffice it to say that at a preliminary stage in the process of a section 696.1 application, an applicant clearly meets the standard to be considered for interim release when he establishes on a balance of probabilities that there is new, reliable evidence that is sufficiently material to raise very serious concerns as to the reliability of the original conviction. Once that standard has been met, before ordering interim release, the court should still consider whether it is probable that the particular applicant will surrender himself into custody if required to do so, or whether he generally presents a danger to public safety.

In the *Phillion* and *Driskell* cases, the federal Department of Justice did not respond to or take a position regarding the application for bail pending the Minister's decision. In each case, the provincial attorney general took responsibility for responding to the application for bail. Neither decision was appealed.

In *Taillefer* v. *The Queen*[4] a unanimous Supreme Court of Canada held that, prior to the adoption of the *Canadian Charter of Rights and Freedoms*, the Crown already had a common law duty to disclose all relevant evidence to the defence, whether favourable to the accused or not. This duty had been recognized as a component of the accused's right to a fair trial and to make full answer and defence.

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[2] [2003] O.J. No. 3422 (S.C.J.)
[3] [2004] M.J. No. 7 (Q.B.).
[4] (2003), 179 C.C.C. (3d) 353 (S.C.C.).

The Court went on to give guidance regarding the potential impact of the Crown's failure to disclose. To establish that a failure to disclose amounts to an infringement of the right to make full answer and defence, the accused must show that there was a reasonable possibility that it affected the outcome at trial or the overall fairness of the trial process (the *Dixon* test). This is a less stringent standard than the traditional test for the admission of fresh evidence that requires the new evidence to be such that it could reasonably be expected to have affected the result of the trial (the *Palmer* test). In other words, the traditional test for the admission of fresh evidence requires the accused to show that the undisclosed fresh evidence *probably affected* the result of the trial, whereas the *Dixon* test requires the accused to show only a *reasonable possibility* that it affected the outcome of the trial or the overall fairness of the trial process.

As miscarriages of justice sometimes involve a failure to disclose, the Supreme Court of Canada's analysis in *Taillefer* will be of relevance to applications for ministerial review involving the Crown's failure to disclose.

The Year Ahead

The CCRG continues to work hard to process applications for ministerial review in a thorough a timely manner. A number of applications are expected to make their way to the Minister in 2004-2005 for a decision. For example, in 2004 the Minister rendered a decision and granted the remedy of a new trial in the application of Rodney Cain.

How the Conviction Review Process Works

The *Criminal Code* gives the Minister of Justice the power to review a conviction under a federal law to determine whether there may have been a miscarriage of justice, or what is often called a "wrongful conviction." If the Minister is satisfied that there is a reasonable basis to conclude that a miscarriage of justice likely occurred, the Minister has the authority to order a new trial or refer the matter to the court of appeal for the province or the territory in question.

When an innocent person is found guilty of a criminal offence, there has clearly been a miscarriage of justice. However, a miscarriage of justice can also occur as a result of errors or irregularities in the criminal proceedings that deprive a person of 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 issue of guilt is determined by the courts according to law.

Applying for a Conviction Review

The conviction review process requires an applicant to submit a formal application form and a number of supporting documents. Under the previous section 690 process, a conviction review could be initiated by a simple request in writing. Time and effort was often needlessly wasted in obtaining the particulars of an application and supporting documents before a conviction review could proceed.

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 updated information booklet, *Applying For A Conviction Review*. A copy of the booklet is forwarded to each applicant and to any person who inquires about submitting an application for ministerial review. A copy of the booklet is also available on-line at the CCRG Web site (http://canada.justice.gc.ca/en/ps/ccr/index.html) and, in many circumstances, from corrections authorities.

Anyone convicted of an offence under a federal law or regulation may apply for a conviction review. For example, a person who has been convicted under the *Criminal Code* or the *Controlled Drugs and Substances Act* is eligible to apply for a conviction review. 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 apply for a conviction review. However, an application for ministerial review 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. This point needs to be emphasized, since it is sometimes misunderstood. A conviction review application 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 to second-guess a decision rendered by those courts or to substitute his or her own judgment.

An application for ministerial review must be supported by "new matters of significance" – generally new information, evidence or arguments that were not presented to the courts or considered by the Minister on a prior application. Only new matters of significance will put the Minister 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 are encouraged to seek the assistance of a lawyer or organizations specializing in wrongful conviction issues such as the Association in Defence of the Wrongfully Convicted (AIDWYC) or the Innocence Project. Experience has shown that applicants who obtain legal advice are generally better able to identify legal issues and important information in support of their applications. A well-presented and properly supported application for ministerial review will have the greatest prospect of success.

Guiding Principles

A number of basic principles guide the CCRG in its review of applications for ministerial review. The conviction review process is animated by an approach that is:

- **Independent:** The independence of the conviction review process is supported by the arm's length relationship between the CCRG and the Department of Justice, the involvement of the Special Advisor and the ethical obligation of all CCRG lawyers to provide candid, objective and independent advice to their client – the Minister of Justice.
- **Impartial:** Where the CCRG has a conflict of interest, an application for ministerial review will be referred to a lawyer outside of the Department of Justice (i.e., an agent) for review. That outside lawyer will provide advice to the Minister rather than a CCRG lawyer. For example, cases that were prosecuted by Department of Justice lawyers (e.g., drug cases or criminal cases in the Yukon, Northwest Territories and Nunavut) are referred to outside lawyers. In most criminal cases, the prosecutions are conducted by provincial attorneys general. No conflict of interest exists in such cases. The CCRG will remain fair and impartial in its approach to an application as between the applicant and the provincial attorney general.

- **Thorough:** Each application for ministerial review will receive thorough and meaningful consideration. Those that are supported by new matters of significance will proceed to the investigation stage of the conviction review process. Those that are not so supported will be screened out, and the applicants will be given reasons in writing for that decision. The CCRG conducts a thorough investigation of all application and will, where warranted, use the substantial powers of investigation that are available (e.g., subpoena) to require the production of information or documents. At the decision stage of the process, the applicant will be provided with reasons in writing for the Minister's decision.
- **Non-adversarial:** The CCRG gathers information during its investigations in a neutral and non-adversarial fashion. The emphasis is on determining whether the information in support of an application can be verified.
- **Objective:** CCRG lawyers provide objective advice and recommendations to the Minister based on the facts, the law and any other relevant considerations.
- **Transparent:** The CCRG is dedicated to an open and transparent conviction review process, subject to legitimate privacy interests.
- **Accountable:** The CCRG is accountable for the performance of its responsibilities to the Minister, through the Deputy Minister's office.

All reasonable efforts are made to process and review each application as quickly as possible. However, priority is generally given to those matters where the applicant is in custody serving a sentence of imprisonment.

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.

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 provided. Once the application is complete, a CCRG lawyer conducts a preliminary assessment to determine whether it merits further investigation – notably, whether the application presents new matters of significance that were not available at trial or on appeal and that could have affected the outcome or fairness of the trial.

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 the preliminary assessment stage. The Special Advisor may disagree with the decision to screen out the application and require the matter to proceed to the investigation stage.

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

Investigation

The investigation is conducted by a CCRG lawyer and is a process of attempting to verify the information in support of the application. Depending on the type of information provided by the applicant, the investigation could involve any of the following:

- interviewing or examining witnesses to clarify or verify the information in the application;
- carrying out scientific tests (e.g. DNA testing);
- 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 file).

The time required for the investigation depends on the complexity of the application and the availability of evidence.

Investigation Report

The results and findings of the investigation are compiled in an investigation report. The investigation report will summarize the facts derived from the judicial record and will address if, or the extent to which, the new information in support of the application has been verified. The investigation report is sent to the applicant with a request for comments.

When the applicant's comments, 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 investigating lawyer then prepares written advice and recommendations for the Minister.

The Special Advisor reviews the investigation report, final comments of the applicant and advice prepared by the investigating lawyer. The Special Advisor prepares his own advice and recommendations to the Minister. The application then proceeds to the final stage of the conviction review process – the decision of the Minister.

Decision by the Minister

In the final stage of the conviction review process, the Minister of Justice reviews the investigation report and supporting materials, the materials submitted by the applicant, the advice and recommendations of the investigating lawyer, 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 matters that the Minister considers relevant including:

- Whether the application is supported by new matters of significance that were not considered by the courts or considered by the Minister in a previous application for ministerial review;
- The relevance and reliability of information that is presented in connection with 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 for ministerial review may raise a question for which the Minister may wish the assistance of the 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, to refer a question 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 the Ministerial discretion have been established in various Ministerial decisions regarding applications for a conviction review. In 1994 the then Minister of Justice, Allan Rock, summarized the guiding principles for the exercise of ministerial discretion under section 690 of the *Criminal Code* in 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 and 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 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 "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 section 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.

Statistical Information

Section 696.5 of the *Criminal Code* specifies that the Minister of Justice must submit an annual report to Parliament regarding applications for ministerial review during the previous fiscal year.

The report must include the number of applications made to the Minister, the number of applications that have been abandoned or that are incomplete, the number of applications 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.

Time frame

The time frame covered by this annual report is the one-year period between April 1, 2003, and March 31, 2004. This is the first annual report to cover a full year. The previous report covered the period from November 25, 2002, to March 31, 2003 (i.e., the period from the coming into force of the new legislation to the end of the fiscal year).

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 the potential applicant's behalf inquires about submitting an application for ministerial review. The information booklet, *Applying For A Conviction Review*, is sent to the person making an inquiry. The booklet provides detailed information about the conviction review process, includes the required forms, and provides step-by-step instructions for submitting an application for ministerial review.

During the period covered by this report, 29 application requests were made to the Minister – an average of 2.4 application requests per month.

TABLE 1: APPLICATION REQUESTS MADE TO THE MINISTER	
DURING THE PERIOD APRIL 1, 2003, TO MARCH 31, 2004	
April 2003	0
May 2003	2
June 2003	1
July 2003	2
August 2003	2
September 2003	7
October 2003	1
November 2003	3
December 2003	2
January 2004	2
February 2004	4
March 2004	3
TOTAL	**29**

Applications Made to the Minister

Table 2 outlines 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 two completed applications during the reporting period, representing 7% of all applications made.

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 specified by the regulations. Although it is the responsibility of the applicant to provide the required documentation, CCRG staff frequently assist the applicant in doing so. 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 29 applications made to the Minister during the reporting period, 23 (79%) 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, an application would be "screened out" if it related to a provincial offence, involved a civil matter, or dealt with the same subject matter as a previously denied application and did not raise any new matters of significance.

TABLE 2: APPLICATIONS MADE TO THE MINISTER

DURING THE PERIOD APRIL 1, 2003, TO MARCH 31, 2004	
Applications completed	2
Applications partially completed	23
Applications screened out	4
TOTAL	**29**

Progress of Applications Through the Conviction Review Process

Table 3 summarizes the work completed at the first three stages of the conviction review process. Ten preliminary assessments were completed during the period covered by this report. Eleven investigations and three investigation reports were completed during the reporting period.

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. The time required to complete an investigation report varies with the complexity of the case.

TABLE 3: PROGRESS OF APPLICATIONS THROUGH THE CONVICTION REVIEW PROCESS

DURING THE PERIOD APRIL 1, 2003, TO MARCH 31, 2004	
Preliminary assessments completed	10
Investigations completed	11
Investigations reports completed	3
TOTAL	**24**

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 of the conviction review process during the reporting period. Twenty applications were at the preliminary assessment stage during the reporting period. Ten of the preliminary assessments were completed during the reporting period, and ten are still under way. A preliminary assessment is considered to be "under way" if it commenced during the reporting period, or commenced prior to the reporting period but continued during the reporting period.

Table 5 shows that of the ten applications where preliminary assessments were completed, nine did not proceed to the investigation stage. In such cases, the new matters raised by the applicant were not such that they might be a reasonable basis to conclude that a miscarriage of justice likely occurred. One application did proceed to the investigation stage. This information is summarized in Table 5.

TABLE 4: SUMMARY OF APPLICATIONS AT THE PRELIMINARY ASSESSMENT STAGE

FOR THE PERIOD APRIL 1, 2003, TO MARCH 31, 2004	
Preliminary assessments completed	10
Preliminary assessments under way but not yet completed	10
TOTAL	**20**

TABLE 5: DISPOSITION OF APPLICATIONS FOLLOWING PRELIMINARY ASSESSMENT STAGE

FOR THE PERIOD APRIL 1, 2003, TO MARCH 31, 2004	
Applications that did not proceed to the investigation stage following a preliminary assessment	9
Applications that did proceed to the investigation stage following a preliminary assessment	1
TOTAL	**10**

Investigations

Table 6 summarizes the work done on applications at the investigation stage during the reporting period. An investigation is considered to be "completed" when the investigating lawyer has conducted the investigation and is ready to proceed to the next stage of the conviction review process – the preparation of an investigation report.

Eleven investigations were completed during the reporting period, five investigations are under way, and one application is awaiting an investigation.

TABLE 6: SUMMARY OF APPLICATIONS AT THE INVESTIGATION STAGE

FOR THE PERIOD APRIL 1, 2003, TO MARCH 31, 2004	
Investigations completed	11
Investigations under way but not yet completed	5
Applications awaiting investigation	1
TOTAL	**17**

Table 7 summarizes the work done on applications at the investigation report stage during the reporting period. An investigation report is considered to have been "completed" when it is in its final form, and the application is ready to be forwarded to the Minister for a decision.

Three investigation reports were completed during the reporting period. Five other investigation reports are in the process of being prepared but are not yet complete.

TABLE 7: SUMMARY OF APPLICATIONS AT THE INVESTIGATION REPORT STAGE

FOR THE PERIOD APRIL 1, 2003, TO MARCH 31, 2004	
Investigation reports completed	3
Investigation reports under way but not yet completed	5
TOTAL	**8**

Decisions

Table 8 summarizes the decisions made by the Minister regarding applications for ministerial review during the reporting period. The Minister made six decisions during the one-year period covered by this report. All six applications for ministerial review considered by the Minister were dismissed.

TABLE 8: DECISIONS MADE BY THE MINISTER

FOR THE PERIOD APRIL 1, 2003, TO MARCH 31, 2004	
Applications dismissed	6
Applications allowed	0
TOTAL	**6**

Applications Abandoned or Held in Abeyance

During the reporting period, one application was abandoned at the preliminary assessment stage. Six applications were held in abeyance at the request of the applicant.

Status of Active Applications at the End of the Fiscal Year

Table 9 provides a snapshot of the status of all "active applications" as of March 31, 2003. An application is considered to be "active" if it is completed and awaiting preliminary assessment or is at any of the four stages of the conviction review process.

Of the 44 active applications as of March 31, 2003, 19 (43%) were completed and awaiting preliminary assessment, ten (23%) were at the preliminary assessment stage, seven (16%) were at the investigation stage, five (11%) were at the investigation report stage, and three (7%) were at the decision stage.

TABLE 9: SUMMARY OF THE STATUS OF ALL ACTIVE APPLICATIONS

AS OF MARCH 31, 2004	
Status	**Number**
Applications completed and awaiting preliminary assessment	19
Preliminary assessment stage	10
Investigation stage	7
Investigation report stage	5
Decision stage	3
TOTAL NO. OF ACTIVE APPLICATIONS	**44**

Judicial Review

There were no applications for judicial review of decisions made by the CCRG or the Minister.

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;

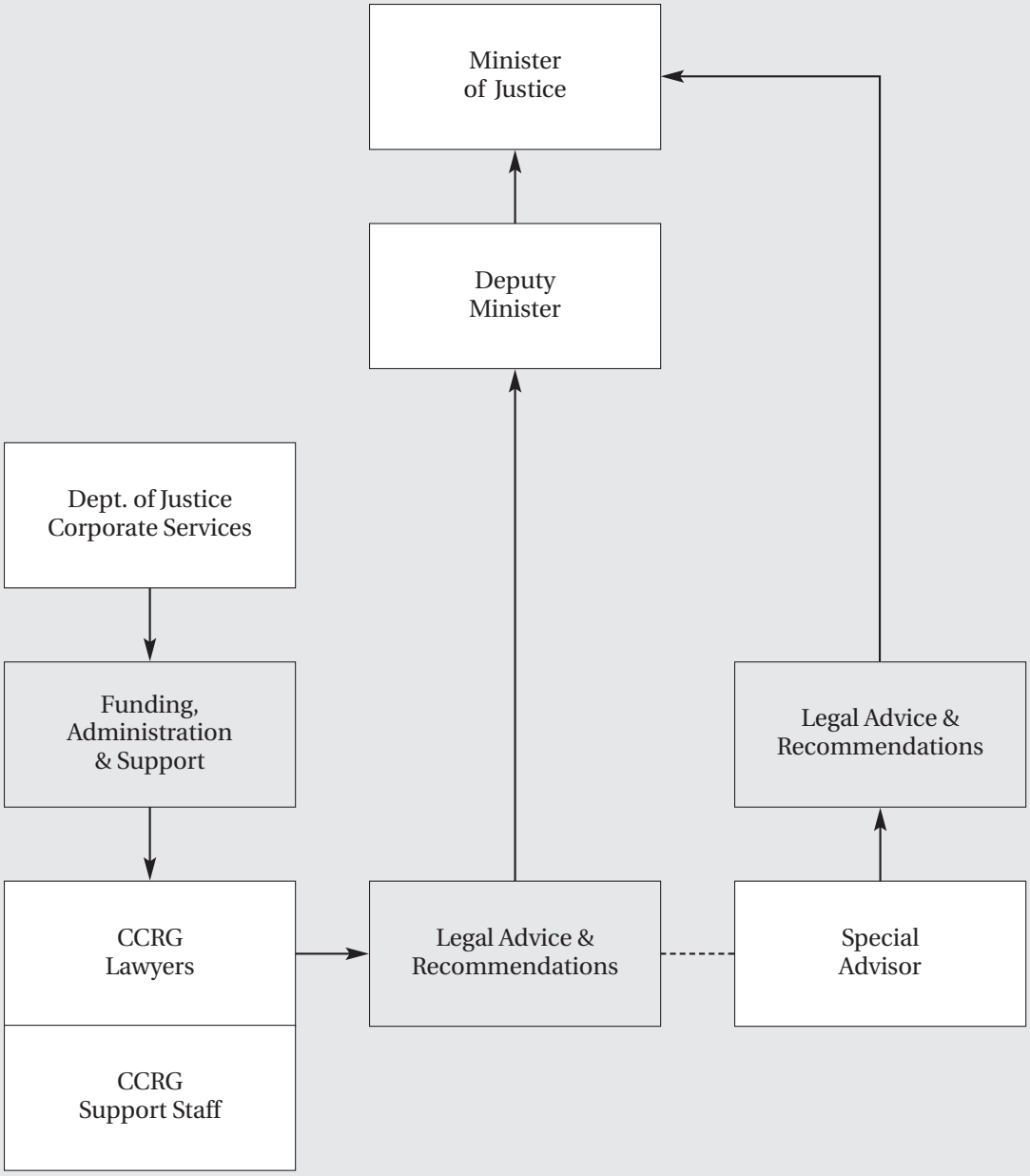
(*d*) the number of applications that are at the investigation stage;

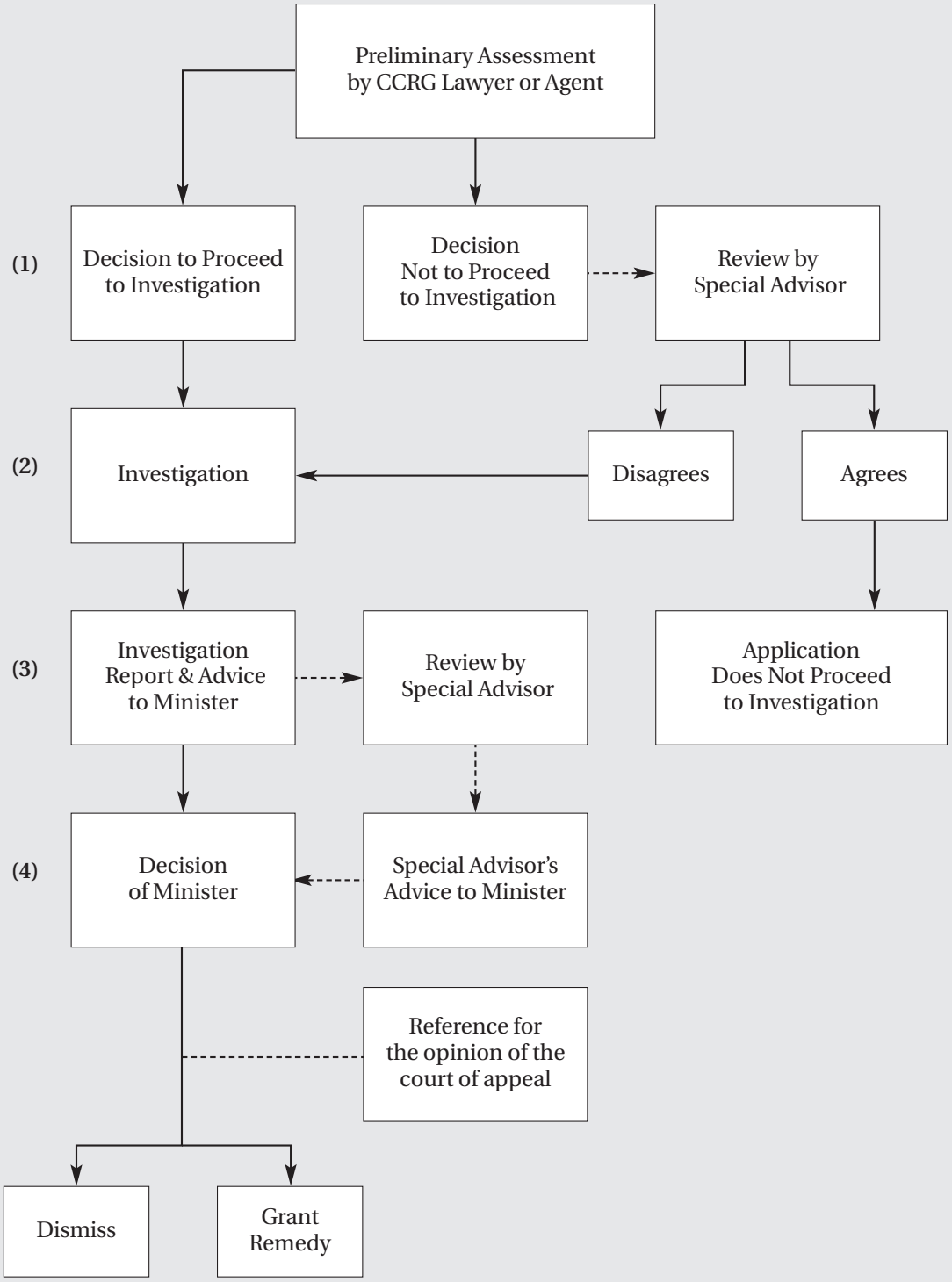
(*e*) the number of decisions that the Minister has made under subsection 696.3(3) of the Code; and

(*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 the *Criminal Law Amendment Act, 2001*, chapter 13 of the *Statutes of Canada, 2002*, comes into force.


Minister of Justice
Deputy Minister
Dept. of Justice Corporate Services
Funding, Administration & Support
Legal Advice & Recommendations
CCRG Lawyers
Legal Advice & Recommendations
Special Advisor
CCRG Support Staff


Preliminary Assessment by CCRG Lawyer or Agent
(1)
Decision to Proceed to Investigation
Decision Not to Proceed to Investigation
Review by Special Advisor
(2)
Investigation
Disagrees
Agrees
(3)
Investigation Report & Advice to Minister
Review by Special Advisor
Application Does Not Proceed to Investigation
(4)
Decision of Minister
Special Advisor's Advice to Minister
Reference for the opinion of the court of appeal
Dismiss
Grant Remedy

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/en/ps/ccr/index.html