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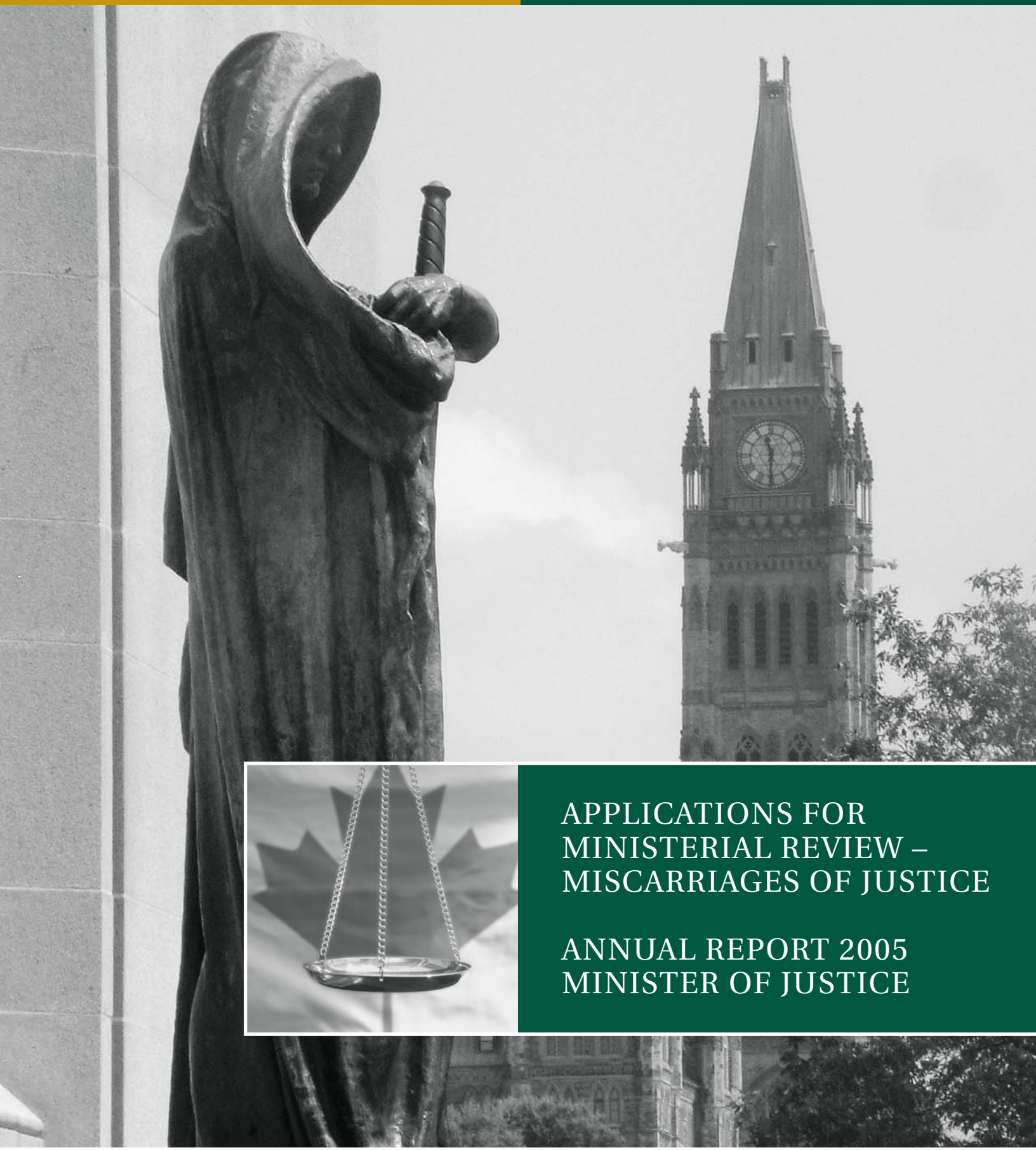

APPLICATIONS FOR MINISTERIAL REVIEW – MISCARRIAGES OF JUSTICE

ANNUAL REPORT 2005 MINISTER OF JUSTICE

Department of Justice Canada
Ministère de la Justice Canada

Canada

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ANNUAL REPORT 2005
Minister of Justice
National Library of Canada cataloguing in publication data

Canada. Department of Justice

Annual report, applications for ministerial review, miscarriages of justice

Annual.
2005-
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 0-662-41702-X
Cat. no. J1-3/2005E-PDF

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

I am pleased to submit to Parliament the third annual report of the Minister of Justice regarding applications for ministerial review (miscarriages of justice) under Part XXI.1 of the *Criminal Code*.

We are beyond the point of thinking that miscarriages of justice rarely, if ever, occur in the criminal justice system. Events of recent years – and my own involvement as Minister of Justice – have made it painfully clear that miscarriages of justice do occur.

Miscarriages of justice come in many forms. Some are notorious; others are not. But, whether a particular case has a high profile or not, miscarriages of justice matter – to the individuals affected, to their families, to the criminal justice system and to society as a whole. Remedying miscarriages of justice is important work and one of the most important responsibilities that I have. Without an effective means of addressing potential miscarriages of justice, public confidence in our criminal justice system would be eroded. Injustice hurts the individual and it also hurts the justice system.

As Minister of Justice, I am guided by one overarching principle – the pursuit of justice. The correction of miscarriages of justice falls squarely within the principles and priorities I have identified in advancing a Justice agenda. An effective process for remedying miscarriages of justice is an important part of our system of justice and reflects a commitment to Canadian values of fairness, equality, respect and accountability.

Canada's conviction review process is a safety valve in our criminal justice system. During the year-long period covered by this report, I have decided six applications for ministerial review. I dismissed one of those applications and allowed the five others. In three cases, I quashed the convictions and ordered new trials. I referred the remaining two cases to the court of appeal to be heard as new appeals. These developments may be seen as a signal of the health of our criminal justice system. Miscarriages of justice are being addressed and remedied through our conviction review process.

The five remedies I granted during the reporting period were the most in any one-year period in the last 113 years. Some critics have called for the creation of a separate commission, such as exists in the United Kingdom, to investigate potential miscarriages of justice. However, I believe the current conviction review process is an example of a unique, made-in-Canada approach that is successfully addressing the problem of miscarriages in our criminal justice system.

The Government of Canada is dedicated to fostering even greater public confidence in our criminal justice system by means of a fair, effective and efficient conviction review process. The events of the last year indicate that our conviction review process is working well. That process, coupled with our continuing efforts to prevent miscarriages of justice before they ever occur, will strengthen Canada's criminal justice system.

Irwin Cotler
Minister of Justice

Message from the Special Advisor to the Minister of Justice

In 2003 I was appointed as the first Special Advisor to the Minister of Justice regarding applications for ministerial review submitted pursuant to sections 696.1-696.6 of the *Criminal Code*. Having served in this position for over a year and a half, I wish to offer my perspective on our criminal conviction review process.

My main role as Special Advisor is to make recommendations to the Minister once the investigation of an application for ministerial review is complete. My independent recommendation is sent directly to the Minister, without going through any intermediary.

It is also important that I, as Special Advisor, provide independent advice at all stages of the conviction review process, including the preliminary assessment stage where applications may be screened out. My involvement ensures that all stages of the review are complete, fair and transparent:

- **Preliminary Assessment Stage:** If the information presented in support of an application for ministerial review does not provide a reasonable basis to conclude that a miscarriage of justice may have occurred, the Criminal Conviction Review Group may decide on behalf of the Minister not to proceed to the investigation stage. This decision effectively terminates the application for ministerial review, unless further information is provided by the applicant. Before a decision is made to terminate the application, I may request that additional information be collected or existing information be clarified. If I disagree with the Criminal Conviction Review Group's view that the application should be terminated at this stage, I can recommend to the Minister that the review process be continued.

- **Investigation Stage:** At this stage, I may provide advice and guidance to the Criminal Conviction Review Group or I may seek clarification of issues arising from the application.

- **Investigation Report Stage:** When the Criminal Conviction Review Group has completed its investigation, I review the investigation report and any appended material as well as the legal advice and recommendations of the Group.

- **Decision Stage:** In my capacity as Special Advisor, I provide my own independent advice and recommendations to the Minister with respect to how an application should be decided. I am, of course, not bound by the advice and recommendations made by the Criminal Conviction Review Group. Therefore, I may choose to provide advice and recommendations to the Minister that differs from that of the Criminal Conviction Review Group.

As Special Advisor, I have a unique status and position. I am a retired judge of the Quebec Court, where I presided over thousands of criminal cases. I am a member of the Bar of Quebec, and now work in private practice in a firm specializing in criminal law. I am committed to ensuring that the criminal justice system is strengthened by ensuring that miscarriages of justice are effectively remedied. Although I work closely with the Criminal Conviction Review Group, I am not part of it. The employees of the CCRG are public servants employed by the Government of Canada. I am not. My status is akin to that of an outsider and allows me to review alleged miscarriages of justice with a fresh and independent outlook.

To facilitate my work, I am provided with an office in the same location as the office of the Criminal Conviction Review Group. This arrangement allows me to follow the evolution of the investigations and to conduct discussions with the lawyers at the Group.

As a final matter, I wish to stress the exceptional quality and professionalism of the work done by the members of the Criminal Conviction Review Group. They are fair, open minded and thorough in the work they do. This observation also applies to agents mandated to assess applications for ministerial review. These lawyers give thorough, meaningful and open-minded consideration to all applications for ministerial review.

The existence of the ministerial review process, designed to remedy miscarriages of justice, is a guarantee of the quality of the criminal justice system in Canada. It exemplifies the efforts by everyone involved in the criminal justice system to ensure that accused persons are treated in a just and fair manner.

Bernard Grenier
Special Advisor

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 started 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. This is the third annual report of the Minister of Justice, and it covers the period April 1, 2004, to March 31, 2005. 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, reviews the cases in which remedies have been granted, 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," a body of extraordinary powers held by the Crown that allow 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, 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.

Background to the Current 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 some of the miscarriages of justice in question were 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* nonetheless 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 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, the Government decided that the 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 Government of Canada then proceeded with legislative and non-legislative changes to implement the reform model in 2002. Parliament passed the necessary legislative changes and amended the *Criminal Code*.

The Current Conviction Review Process

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

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

- including clear guidelines as to when a person is eligible for a conviction review;
- providing a straightforward application form and clear direction on the information and documents needed to support 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 now a separate unit of the federal Department of Justice. The CCRG assesses applications for ministerial review and provides advice to the Minister on how the applications should be decided.

Prior to 1993, conviction review applications were evaluated on an *ad hoc* basis by lawyers who worked in the prosecution service of the Department of Justice.

In 1993, the CCRG was set up as 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 Federal Prosecution Service to the Department's Criminal Law Policy Branch. 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 way, all responsibility for conviction reviews was removed from the Attorney General function within the Department of Justice.

Following the legislative changes in 2002, 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. Second, the path by which the legal advice and other material prepared by the CCRG 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 provide independent advice on 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 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 candid, objective and independent legal advice to the Minister on the disposition of applications for ministerial review.

Throughout the reporting period, five full-time lawyers were employed at the CCRG. They have broad experience in criminal law including defence work, prosecutions and criminal law policy development. During the reporting period, CCRG lawyers have attended continuing legal education and other professional development programs related 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.

Administration and support services have been provided to the CCRG by the Department's Corporate Services Branch during this reporting period.

The CCRG office is located outside of the Department of Justice Headquarters in a downtown Ottawa office building which has a mixture of government and private sector tenants. No other Department of Justice operations are located in this building. The Special Advisor has an office on site.

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.

The Special Advisor to the Minister

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

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

While the Special Advisor's main role is to make recommendations to the Minister once an investigation is complete, it is equally important that he provide independent advice during 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 conclude that a particular application should not be screened out and recommend to the Minister that the review process continue.

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

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.

Conviction Reviews By Outside Agents

As a practical matter, the Minister is not personally involved in the preliminary assessment, investigation and investigation stages of the conviction review process. These stages of the conviction review process are usually carried out on his behalf by the CCRG. The Minister does personally decide applications for ministerial review when they reach the decision stage.

In some circumstances, it may not be appropriate for the CCRG to conduct a conviction review. In such a case, the Department retains an outside "agent" to conduct the conviction review. The outside agent, rather than the CCRG, will provide advice to the Minister.

Typically, a conviction review is conducted by an outside agent where a potential conflict of interest arises, such as where the prosecution was conducted by the Attorney General of Canada (e.g., drug prosecutions, or criminal prosecutions in the Yukon, Northwest Territories and Nunavut). Other reasons may also justify referring an application for ministerial review to an outside agent. During this reporting period, two applications for ministerial review were referred to outside agents because of potential conflicts of interest.

Authorizations for the Use of the Minister's Investigative Powers

Under the previous section 690 conviction review process, there was no legal procedure to require witnesses to provide information or produce documents that might be relevant to matters raised in an application for ministerial review. The review of an application was therefore dependent upon the voluntary cooperation of witnesses. This was seen as a weakness in the review process, since information and documents in the possession of a reluctant or uncooperative witness could not be obtained.

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

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

Those involved in the first three stages of the conviction review process may need to use these investigative powers to evaluate an application for ministerial review. Therefore, a lawyer, retired judge or other qualified individual may be authorized in writing by the Minister to exercise the investigative powers described above. Typically, a CCRG lawyer or outside agent is given this authority. Hence, where it is necessary to do so, the CCRG lawyer or outside agent can, for example, issue a subpoena to a witness and require the witness to answer questions under oath.

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

The CCRG does not hesitate to seek the Minister's authority to use the broad investigative powers available under section 696.2 of the *Criminal Code* where warranted. During this reporting period, the Minister gave two written authorizations for the use of his investigative powers.

Communications and Outreach

The CCRG's communications objectives focus 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 interested parties.

Applicants and interested parties 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". 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. During the reporting period, presentations on the conviction review process were made to the Canadian Association for Civilian Oversight of Law Enforcement and the Defence Counsel Association of Ottawa.

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

Emerging Issues and Developments

Preventing Miscarriages of Justice

On January 25, 2005, the federal, provincial and territorial (FPT) ministers responsible for justice publicly released a major report on the prevention of miscarriages of justice.[2] The 155 page report was prepared by a working group of the FPT Heads of Prosecutions Committee, composed of senior prosecutors and police from across the country. It was the result of over two years of work.

"A wrongful conviction is a failure of justice in the most fundamental sense," the report states. "If there is one theme that emerges from all of the recommendations in this report, it is vigilance – everyone involved in the criminal justice system must be constantly on guard against the factors that can contribute to miscarriages of justice."

The report includes a chapter on each of the issues that have been identified, both in Canada and elsewhere, as the key factors that contribute to wrongful convictions:

- tunnel vision;
- mistaken eyewitness identification and testimony;
- false confessions;
- in-custody informers; and
- forensic evidence and expert testimony.

The report contains 40 recommendations for individual police officers and prosecutors, police and prosecution services, as well as the Heads of Prosecutions Committee as an organization.

It concludes that everyone involved in the criminal justice system – including the police, prosecutors and defence counsel – must be constantly on guard against the factors that can contribute to miscarriages of justice. The Working Group believes that individual police officers and prosecutors, individual police forces and prosecution services, and indeed the entire police and prosecution communities, must make the prevention of wrongful convictions a constant priority.

The recommendations stress the need for continuing education for prosecutors and police and urge each prosecution service to develop a comprehensive written plan for educating its Crown attorneys on the causes and prevention of wrongful convictions. The report recommends the creation of a virtual resource center for police and prosecutors on the prevention of wrongful convictions and the establishment of a permanent Heads of Prosecutions committee on the prevention of wrongful convictions.

The Working Group's recommendations are aimed primarily at the most serious of offences, particularly homicides. These are the cases where the risk of long-term incarceration, and hence the consequences of a wrongful conviction, are the greatest. However, some of the recommendations are applicable to other offences, when feasible.

[2] The report (*FPT Heads of Prosecutions Committee Report of the Working Group on the Prevention of Miscarriages of Justice*) is available on-line at http://canada.justice.gc.ca/en/dept/pub/hop/index.html.

The Heads of Prosecutions Committee has set up a permanent committee of prosecutors and police to follow up this report. As well, individual prosecution services have begun to review their policies and practices in light of the recommendations.

The Group benefited from extensive participation in its work by representatives of the Canadian Association of Chiefs of Police (CACP).

Forum on Preventing Miscarriages of Justice

The Government of Manitoba, in conjunction with the Law Society of Manitoba and the Faculty of Law at the University of Manitoba, took up the challenge of organizing and staging a major forum on the prevention of miscarriages of justice. This international conference ("Unlocking Innocence: Avoiding Wrongful Conviction") will be held in Winnipeg, Manitoba, from October 20 to 22, 2005. The three-day conference will feature a keynote address by Janet Reno, former Attorney General of the United States, and presentations by numerous experts in the field of wrongful convictions. More information is available at www.wrongfulconviction.ca.

The Department is contributing financially to the conference and will be represented by the Minister's Special Advisor on Miscarriages of Justice, the senior counsel of the CCRG, the Special Advisor on Wrongful Convictions and other officials from across the Department.

Understanding Wrongful Convictions Conference

The Attorney General of New Brunswick, in partnership with the Saint John Police Force and the New Brunswick Ministry of Public Safety, are sponsoring a two-day conference entitled "Understanding Wrongful Convictions." The conference will take place on November 1 and 2, 2005, in Saint John, New Brunswick. The program features a presentation by CCRG's Senior Counsel on applications for ministerial review and a number of other speakers who will address various topics on wrongful convictions. The keynote address will be presented by Justice Marc Richard of the New Brunswick Court of Appeal.

Manitoba Justice Initiatives

In April 2003, the Deputy Attorney General of Manitoba, Bruce A. MacFarlane, Q.C., established a forensic evidence review committee to examine cases where homicide convictions were secured during the past 15 years and where the Crown tendered and relied upon microscopic hair comparison evidence in order to assess whether any miscarriages of justice occurred.

The committee submitted its report on August 19, 2004, and identified two cases warranting further scrutiny.[3] Late in 2004, the mandate of the review committee was expanded to consider sexual assault and robbery cases. In January 2005, Manitoba Justice also invited the province's defence lawyers to bring forward their concerns about cases that might constitute miscarriages of justice. No other province or territory has to date adopted the same course of action as Manitoba.

[3] The report is available at the Manitoba Justice web site (http://www.gov.mb.ca/justice/publications/forensic/index.html).

Appointment of Departmental Special Advisor

In June 2005 Stephen Bindman, a former journalist, was appointed Special Advisor on Wrongful Convictions within the office of the Senior Assistant Deputy Minister, Policy Sector. In this new position, Mr. Bindman will coordinate all Departmental policy activities related to the prevention of wrongful convictions, including the Department's response to the FPT report on the prevention of miscarriages of justice described above.

Mr. Bindman's position within the public service should be distinguished from that of the Minister's Special Advisor on Miscarriages of Justice, Bernard Grenier, who is an order-in-council appointment from outside of the public service and provides independent advice to the Minister regarding the disposition of applications for ministerial review.

Disclosure Reform

A failure to disclose relevant information is a common theme in miscarriages of justice. On November 16, 2004, the Minister released a consultation paper proposing reforms to the disclosure process in criminal cases.[4] The consultation paper addresses proposals with respect to:

- facilitating electronic disclosure;
- providing disclosure through access to disclosure materials;
- specialized court proceedings on disclosure;
- detailed disclosure-management procedures; and
- addressing improper use of disclosure materials.

The consultation paper seeks submissions on additional ideas for disclosure reform. Responses to the consultation have been provided by justice system partners and stakeholders and these are now being analyzed by the Department.

Public Inquiries

Miscarriages of justice continue to be an important criminal justice issue. Provincial public inquiries are currently underway or being planned in Newfoundland, Saskatchewan and Manitoba.

On March 23, 2003, the Government of Newfoundland and Labrador announced that there would be a commission of inquiry regarding criminal proceedings against Gregory Parsons, Randy Druken and Ronald Dalton.[5] The Right Honourable Antonio Lamer, former Chief Justice of Canada, was appointed commissioner. The commission's proceedings and hearings have continued throughout the reporting period. A final report from the commission is expected by December 31, 2005.

[4] The consultation paper is available at the Department of Justice Canada web site (http://canada.justice.gc.ca/en/cons/disc-ref/index.html).

[5] The web site of the commission of inquiry regarding Gregory Parsons, Randy Druken and Ronald Dalton is at http://www.nlcoi.gov.nl.ca/nlcoi/default.htm.

The Government of Saskatchewan announced the appointment on February 20, 2004, of the Honourable Mr. Justice Edward P. MacCallum of the Alberta Court of Queen's Bench as commissioner to conduct an inquiry into the wrongful conviction of David Milgaard.[6] The commission's proceedings began during the reporting period and will continue into the next reporting period. The Department has standing at the commission and is represented by counsel.

On March 3, 2005, the Minister announced his decision regarding the application for ministerial review of James Driskell. After deciding there was a reasonable basis to conclude that a miscarriage of justice likely occurred in the case, the Minister quashed Driskell's murder conviction and ordered a new trial. The same day, Manitoba's prosecution service stayed the murder charge against Driskell, and the Government of Manitoba announced that there would be a public inquiry into his case. Terms of reference have not yet been released nor has a commissioner been appointed. However, it can be anticipated that the commission's proceedings will commence during the next reporting period.

The Decision in *R. v. Balafrej*

The Quebec Court of Appeal released its decision in the case of *R. v. Balafrej*[7] on January 19, 2005. The accused was convicted at trial of uttering threats. The Quebec Court of Appeal dismissed his appeal, and the Supreme Court of Canada denied his application for leave to appeal. Subsequently, it was discovered that the victim had forged the document in which the accused had allegedly threatened her.

The accused brought an application to the Quebec Court of Appeal pursuant to the *Civil Code* for a retraction of its judgment dismissing his appeal. The accused also applied to the Court of Appeal for leave to appeal its decision to the Supreme Court of Canada in accordance with section 37 of the *Supreme Court Act*.[8] The Crown conceded that a miscarriage of justice had occurred.

The Court of Appeal concluded that it did not have jurisdiction pursuant to the *Civil Code* to grant a retraction of its judgment dismissing the accused's appeal because there were other legal recourses open to the accused including an application for ministerial review and an application for leave to appeal to the Supreme Court of Canada. The Court granted the accused's application for leave to appeal his conviction to the Supreme Court of Canada. With the Crown's consent, the Supreme Court of Canada subsequently reversed the Court of Appeal's decision pursuant to section 70 of the *Supreme Court Act*, quashed the accused's conviction and substituted an acquittal.

The case illustrates another legal mechanism for correcting a miscarriage of justice where an accused's case is no longer in the legal system. Particularly where the Crown concedes that a miscarriage of justice has occurred, it may be open to the accused to seek leave from the Court of Appeal to appeal a conviction to the Supreme Court of Canada.

[6] The web site of the commission of inquiry into the wrongful conviction of David Milgaard is at http://www.milgaardinquiry.ca/.
[7] [2005] J.Q. no. 154, 197 C.C.C. (3d) 88 (C.A.).
[8] R.S.C. 1985, c. S-26.

Transparency

The Department of Justice is dedicated to an open and transparent conviction review process. However, this guiding principle must be balanced against other legitimate interests and concerns. At the third stage of the conviction review process, an applicant is provided with a copy of the investigation report, as required by section 5 of the regulations. The investigation report summarizes the CCRG's findings. It may, in some cases, contain new information that was previously unknown to the applicant.

The investigation report is usually accompanied by appendices that contain documents relevant to the investigation. In most, if not all cases, substantial numbers of these documents are provided by third parties such as provincial attorneys general, provincial correctional service ministries, Correctional Service Canada, police, etc. Sometimes, important witnesses are examined under oath as part of an investigation. Transcripts of these examinations, which may contain highly personal information, are frequently also included in the appendices. Other highly-private information, such as criminal record searches of witnesses, may also from part of the appendices.

The applicant and counsel are asked to keep the investigation report and appendices confidential. By means of an agreement or undertaking, the applicant and counsel are obliged not to release the material to the public or any other third party, including the media, without the consent of the Department. However, information and documents that are already in the public domain are not covered by this confidentiality obligation. This approach has led to criticism that CCRG is conducting conviction reviews "in secret."[9]

The task of striking an appropriate balance between transparency and other legitimate concerns is a challenging one. Openness and transparency are among the principles that guide the conduct of conviction reviews. The applicant, the person at the heart of the process, has complete access to all the relevant information in the investigation report and the appendices. This approach ensures that the applicant is fully informed of the facts, findings, issues and considerations on which the Minister proposes to make a decision. The applicant has the right to provide further information, comments and submissions in support of the application. Thus, the maximum amount of transparency and access to information is afforded to the applicant whose interests are at stake. The applicant may, of course, release personal information about himself or herself to the public.

Transparency, of course, operates at another level – public access to information, principally through the media. Transparency of this type raises other issues which must be considered. First, the Department and the CCRG must respect the provisions of Canada's *Privacy Act*. An investigation report and documents in the appendices almost always contain personal information about third parties, other than the applicant. The *Privacy Act* requires that the privacy of these individuals be respected and that personal information about them not be released to the public except in accordance with the law. For example, an investigation report and appendices may contain information about the criminal record of a person other than the applicant that is not in the public domain. Protecting the privacy of this personal information in accordance with the law is a legitimate concern.

[9] Kirk Makin, "Secret conviction reviews now common, lawyer says," *Globe & Mail,* 18 June 2005, p. A5.

Second, the Department and the CCRG are mindful of the fact that many documents are provided voluntarily by third parties such as provincial attorneys general, government ministries, police and private individuals. In some circumstances, documents provided are privileged or highly confidential. The CCRG prefers to obtain this material through a cooperative process of voluntary disclosure, although it will not hesitate to subpoena the documents if necessary. The public disclosure of such documents, without the consent of the third parties, might undermine their willingness to voluntarily provide such material.

Third, the current approach of the CCRG with respect to the confidentiality of information and documents is consistent with the approach taken to disclosure in criminal cases. The disclosure documents given to the defence in a criminal case are not provided to the public. Nor are disclosure materials provided to third parties by the defence except for the purpose of making full answer and defence. Indeed, the vast majority of disclosure documents (e.g., police reports, police notes, etc.) are never made public or received in evidence in a criminal trial. In a recent case, the Ontario Court of Appeal suggested that disclosure materials in a criminal case may be subject to an implied undertaking that they can only be used for the purpose of defending a charge.[10] Any other use of that material would require the authorization of the court. Similarly, an applicant is provided with the investigation report and appendices for the purpose of addressing the ultimate issue, that is, whether there is a reasonable basis to conclude that a miscarriage of justice likely occurred in the applicant's case.

Finally, the Department and the CCRG must respect and preserve the integrity of court proceedings. Serious consideration must be given to the issue of whether the public release of information or documents might adversely affect the integrity or fairness of a new trial or appeal ordered by the Minister.

The public release of a report prepared for the Minister was recently addressed by the Ontario Court of Appeal in *Re Truscott*.[11] In October 2004, the Minister referred Truscott's case to the Ontario Court of Appeal to be heard as a new appeal. Various media organizations brought a motion for access to a report prepared for the Minister by retired Justice Fred Kaufman. The Court held on June 24, 2005, that the report was subject to solicitor-client privilege and that the Minister had not waived that privilege. In its decision dismissing the media's motion for access to the report, the Ontario Court of Appeal was mindful of privacy issues:

> Counsel for the [federal] Minister [of Justice] made it clear in his submissions that subject to concerns about the integrity of the process on the Reference, the Minister considers it to be in the public interest to release the Report, subject to limited editing to protect privacy interests. In that regard, as counsel for the Minister pointed out, the examination conducted by Mr. Kaufman was not constrained by the ordinary rules of admissibility governing court proceedings and the Report could therefore contain information that is rank hearsay, sometimes speculative, and occasionally hurtful to the reputations of individuals. In short, he maintained that legitimate privacy interests may well require editing to protect the reputation of individuals and other legitimate privacy interests.

[10] *D.P. v. Wagg* (2004), 184 C.C.C. (3d) 321.
[11] [2005] O.J. No. 2667.

> In earlier correspondence with the Minister, the court advised him that it saw sufficient merit in the Provincial Crown's contention that the release of the Report could compromise the integrity of the Reference to recommend that the full Report not be released at that time. The Minister followed that advice. With the benefit of full submissions from the parties to the Reference and the moving parties on the motion, we are now satisfied that the question of the release of the Report must be addressed in two stages.
>
> First, the Minister must determine whether to waive solicitor and client privilege. If he chooses to do so, he will presumably edit the Report to protect the privacy concerns described earlier. Second, if the Minister chooses to waive privilege and release an edited version of the Report, he will presumably advise the parties of his intentions. Should either party oppose the release of the edited Report, that party may bring an appropriate motion on notice to the parties involved in this motion. It would be incumbent on any party resisting disclosure to justify on proper legal principles and evidence the continued non-disclosure of all or part of the Report.

Following the judgment in *Re Truscott*, the Minister announced his decision on August 12, 2005, to waive solicitor-client privilege and make public a copy of Justice Kaufman's report, edited for privacy purposes. The Department followed the procedure set out by the Ontario Court of Appeal, giving both Truscott and the Attorney General of Ontario 30 days to determine if either wished to oppose the public release of the edited report.

It may be that documents or information provided to an applicant as part of the conviction review process are relevant to proceedings such as an application for bail pending the Minister's decision. The *Driskell* matter is a case in point.[12] Driskell, who had submitted an application for ministerial review through counsel, was provided with a copy of a Winnipeg Police report reviewing its investigation of the murder for which he was convicted. Both Driskell and his counsel signed undertakings to keep the report confidential and not disclose it to the public.

However, the report was relevant to Driskell's application for bail pending the Minister's decision and was tendered as evidence. Driskell's counsel sought a sealing order from the court with respect to the report. Associate Chief Justice Oliphant rejected the application for a sealing order resulting in the public disclosure of the document:

> Fundamental freedoms, such as the freedom of expression and freedom of the press, as guaranteed by the Charter, cannot be sacrificed to avoid embarrassment to various individuals. To me, the innocence and the liberty of Mr. Driskell is at stake here. Nothing can trump that in terms of what is important as far as the public disclosure of the Winnipeg Police Service is concerned. I cannot think of one valid reason why the secrecy surrounding this report and the other documents in question ought to be maintained. In fact, I cannot think of a bad reason why they ought not to be publicly disclosed. The application for the sealing order is therefore dismissed.[13]

Openness and transparency fosters public confidence in the administration of justice. The CCRG continues to grapple with these important issues. The CCRG will review its procedures and policies on a continuing basis to maximize transparency, yet at the same time respect the law and accommodate other interests and concerns. As always, the challenge is to find the right balance.

[12] *R. v. Driskell*, [2003] M.J. No. 484 (Q.B.).
[13] *Ibid.*, para. 15.

Remedies Granted by the Minister

During the reporting period, the Minister granted five remedies pursuant to section 696.3 (3) (a) of the *Criminal Code*. A number of factors help explain the significant increase in remedies granted in 2004-2005. These include improvements to the conviction review process brought about by the changes to the law in 2002, the allocation of additional resources to the CCRG to handle the anticipated increase in applications, and the creation of a priority system in which applications are immediately screened and assigned priority according to their apparent merits and whether the applicant is still in custody. Moreover, since 2001 it has not been necessary for the Minister to *personally* decide every application for ministerial review as had been the prior practice. The decision of the Federal Court in *Bonamy v. The Queen*[14] established that the CCRG or agent acting on behalf of the Minister could decide at the preliminary assessment stage whether or not an application should proceed to an investigation. In other words, where an application is not supported by new matters of significance suggesting that a miscarriage of justice likely occurred, it will be screened out at the preliminary assessment stage and will not proceed any further in the conviction review process. All applications that proceed to the investigation stage are decided personally by the Minister.

Rodney Cain

Rodney Cain was convicted of second degree murder on February 14, 1985, after a trial at Toronto, Ontario. He was sentenced to life imprisonment without eligibility for parole for 12 years. His appeal against conviction was dismissed by the Ontario Court of Appeal on November 3, 1987, although the Court reduced the period of imprisonment that Cain would have to serve before being eligible for parole from 12 to 10 years. Cain's application for leave to appeal to the Supreme Court of Canada was dismissed on March 9, 1989.

In May 1996, Cain submitted an application for ministerial review. The Minister appointed an outside agent to investigate the application. Regrettably, the agent died in March 2002 before completing his work. The Minister appointed a second agent to complete the investigation. The investigation found new information that cast doubt on the reliability of the conviction and could support Cain's contention that he acted in self-defence. The new information included evidence from new witnesses, recantations or admissions of perjury by witnesses, and evidence regarding the victim's propensity for violence.

The Minister found that this new information provided a reasonable basis to conclude that a miscarriage of justice likely occurred in Cain's case. On May 19, 2004, the Minister granted the application, quashed Cain's murder conviction and ordered a new trial.

[14] (2001), 156 C.C.C. (3d) 110.

Steven Truscott

After a jury trial, Steven Truscott, at age 14, was convicted of murder at Goderich, Ontario, on September 30, 1959. He was sentenced to death, as was then required by the law. The Ontario Court of Appeal dismissed his appeal on January 20, 1960. The next day, his sentence was commuted to life imprisonment. The Supreme Court of Canada dismissed his application for leave to appeal on February 24, 1960.

Subsequently, concern arose that Truscott's conviction might be a miscarriage of justice. On April 26, 1966, the Government of Canada referred his case to the Supreme Court of Canada pursuant to section 55 of the *Supreme Court Act*. The Supreme Court was asked to determine how it would have decided an appeal by Truscott, on the basis of the existing judicial record and any other evidence it received. The Supreme Court answered that question on May 4, 1967, and ruled that it would have dismissed Truscott's appeal.

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

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

The Minister announced on August 12, 2005, that he is waiving his privilege with respect to Justice Kaufman's report and that a copy of the report will be released publicly once it has been edited to protect privacy interests.

Darcy Borge

Darcy Borge was tried at Wetaskiwin, Alberta, on the following charges: (1) that he was unlawfully in possession of a car having a value of more than $1,000, knowing that it had been obtained by the commission of a theft; and (2) that he unlawfully defrauded a victim of a sport utility vehicle having a value of over $1,000. Borge was convicted of both charges on March 24, 1994. He was sentenced to three years in prison on the first charge and a concurrent three-year prison sentence on the second charge.

Borge submitted an application for ministerial review of both convictions on June 8, 2000. The application was supported by statements from three new witnesses with evidence relevant to the charges. The evidence supported the contention that the car Borge was in possession of was not stolen, but rather was the subject of an insurance fraud.

In his decision of February 10, 2005, the Minister determined that there was a reasonable basis to conclude that a miscarriage of justice likely occurred in relation to Borge's conviction for possession of stolen property. He ordered a new trial on this charge before the Alberta Court of Queen's Bench. The Minister dismissed that part of the application relating to Borge's conviction for fraud.

Danny Wood

After a trial in Calgary, Alberta, Danny Wood was convicted of murder on June 7, 1990, and sentenced to life imprisonment with no eligibility for parole for 25 years. The Alberta Court of Appeal dismissed his appeal against conviction on January 30, 1992. Eight months later, the Supreme Court of Canada dismissed Wood's application for leave to appeal.

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

James Driskell

On June 14, 1991, James Driskell was convicted of first degree murder at Winnipeg, Manitoba. He was sentenced to life imprisonment without eligibility for parole for 25 years. His appeal to the Manitoba Court of Appeal was dismissed on December 7, 1992.

Driskell completed his application for ministerial review in October 2003. In November 2003, he applied for bail and became only the second person in Canadian legal history to be released pending a decision regarding an application for ministerial review.[15] The Attorney General of Manitoba supported the granting of a remedy to Driskell and a return of his case to the court system.

On March 3, 2005, the Minister released his decision regarding Driskell's application for ministerial review. The Minister granted Driskell's application, quashed his murder conviction and ordered a new trial. The same day, the murder charge against Driskell was stayed, and the Government of Manitoba announced that there would be a public inquiry into his case.

The Minister said there were a number of significant factors which accounted for the exercise by him of this rarely-used remedy, including:

- DNA hair analysis in 2002 effectively refuted expert evidence presented by the Crown at Driskell's trial that three hairs found in a vehicle owned by him belonged to the victim. The DNA analysis clearly established that the hairs did not belong to the victim, so that a significant piece of evidence, upon which the jury relied, was unfounded.
- The Crown failed to disclose that its two key witnesses – Reath Zanidean and John Gumieny – who had testified that Driskell planned the murder, had received substantial financial consideration. This denied Driskell's right to full disclosure and right to challenge the credibility of key witnesses.

[15] *R. v. Driskell,* [2004] M.J. No. 7 (Q.B.).

- For 11 years after Driskell's trial, the Crown failed to disclose information that Zanidean likely committed perjury at the trial.
- For ten years, Winnipeg Police failed to disclose an investigative report regarding the murder which included important and relevant information that would have been helpful to Driskell's defence.
- The Crown's two key witnesses (Zanidean and Gumieny) have, since Driskell's trial, either recanted or threatened to recant their trial testimony regarding Driskell's involvement in the murder. The failure to disclose this information to the defence was not only a serious breach of the constitutional duty to disclose, but the information also significantly undermined the credibility of these key witnesses.

The Year Ahead

The CCRG continues to work hard to process the applications for ministerial review in a thorough and timely manner. A number of applications are expected to make their way to the Minister in 2005-2006 for a decision. On July 12, 2005, for example, the Minister released his decision in the application for ministerial review of Andre Tremblay who contended that his 1984 conviction for first degree murder was a miscarriage of justice. The Minister determined that there was a reasonable basis to conclude that a miscarriage of justice had likely occurred and referred the matter to the Quebec Court of Appeal.

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. A miscarriage of justice can also occur where new information surfaces which casts doubt on whether the applicant received a fair trial. Thus, the Minister's decision that there is a reasonable basis to conclude that a miscarriage of justice likely occurred in a case does not amount to a declaration that the convicted person is innocent. Rather, such a decision leads to a case being returned to the judicial system where the relevant legal issues are determined by the courts according to law. The issue of guilt, therefore, is determined by the courts, not the Minister.

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 were often needlessly wasted in obtaining the details of an application and supporting documents before a conviction review could proceed. The current procedure eliminates these difficulties.

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 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 for a conviction review. Convictions for indictable and summary conviction offences are now 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 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. An application for ministerial review is not meant to be another level of appeal or a mechanism that allows the Minister of Justice to take the same evidence and arguments presented to the courts and 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 that was 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 may 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.

Guiding Principles

A number of basic principles guide the CCRG in its review of applications for ministerial review:

- **Independence:** 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 the CCRG to provide candid, objective and independent advice to its client – the Minister of Justice.
- **Impartiality:** Where the CCRG has a conflict of interest, an application for ministerial review will be referred to an agent outside of the Department of Justice for review. That outside agent will provide advice to the Minister rather than the CCRG. 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 agents. In most criminal cases, the prosecutions are conducted by provincial attorneys general. No conflict of interest exists in most of these cases. The CCRG will remain fair and impartial in its approach to an application as between the applicant and the provincial attorney general.
- **Thoroughness:** 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 applications 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.
- **Objectivity:** The CCRG provides objective advice and recommendations to the Minister based on the facts, the law and any other relevant considerations.
- **Transparency:** The CCRG is dedicated to an open and transparent conviction review process, subject to legitimate privacy interests and other concerns.

- **Accountability:** 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, the CCRG 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.

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 recommend to the Minister that the review process continue.

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 conducted by the CCRG attempts 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 gathered 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 may also identify relevant issues and legal authorities. As required by law, the investigation report is sent to the applicant with a request for comments. The attorney general for the province where the prosecution occurred is also given a copy of the investigation report and asked for submissions.

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

The Special Advisor reviews the investigation report and any additional submissions, and 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 personally reviews the investigation report and supporting materials, the materials submitted by the applicant, the advice and recommendations of the CCRG, 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 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 on 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 his decision regarding the application of Colin Thatcher:

> In creating the role of the Minister of Justice under section 690 of the Code, Parliament used very broad language, and the discretion of the Minister has been cast in the widest terms. Indeed, the section does not contain a statutory test, other than the general reference in clause (a) to the Minister being "satisfied that in the circumstances a new trial or hearing … should be directed".
>
> In interpreting and applying section 690, I do not intend to limit or restrict the wide discretion given to the Minister. It is impossible to predict the nature of the cases in which such applications might be brought in the future, and it is in the public interest, in my view, to leave the Minister's discretion in the broadest possible terms.
>
> Nevertheless, that discretion is to be exercised in accordance with certain governing principles, and I believe that it would be useful to identify those principles here.
>
> > 1. The remedy contemplated by section 690 is extraordinary. It is intended to ensure that no miscarriage of justice occurs when all conventional avenues of appeal have been exhausted.
> >
> > 2. The section does not exist simply to permit the Minister to substitute a ministerial opinion for a jury's verdict or a result on appeal. Merely because I might take a different view of the same evidence that was before the court does not empower me, under section 690, to grant a remedy.
> >
> > 3. Similarly, the procedure created by section 690 is not intended to create a fourth level of appeal. Something more will ordinarily be required than simply a repetition of the same evidence and arguments that were put before the trial and appellate courts. Applicants under section 690 who rely solely on alleged weaknesses in the evidence, or on arguments of the law that were put before 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.

Timeframe

The timeframe covered by this annual report is the one-year period between April 1, 2004, and March 31, 2005.

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, 35 application requests were made to the Minister – an average of 2.9 application requests per month.

TABLE 1: APPLICATION REQUESTS MADE TO THE MINISTER	
DURING THE PERIOD APRIL 1, 2004 TO MARCH 31, 2005	
April 2004	3
May 2004	3
June 2004	7
July 2004	1
August 2004	1
September 2004	4
October 2004	4
November 2004	1
December 2004	1
January 2005	0
February 2005	7
March 2005	3
TOTAL	**35**

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 seven completed applications during the reporting period, representing 20% of the 35 application requests 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 35 applications requests made to the Minister during the reporting period, 26 (74%) 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. Two applications (5.7%) were screened out during the reporting period.

TABLE 2: APPLICATIONS MADE TO THE MINISTER	
DURING THE PERIOD APRIL 1, 2004, TO MARCH 31, 2005	
Applications completed	7
Applications partially completed	26
Applications screened out	2
TOTAL	**35**

Progress of Applications Through the Conviction Review Process

Table 3 summarizes the work completed at the first three stages of the conviction review process. Thirteen preliminary assessments were completed during the period covered by this report. Six investigations and two 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, 2004, TO MARCH 31, 2005	
Preliminary assessments completed	13
Investigations completed	6
Investigations reports completed	2
TOTAL	**21**

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. Thirty-three applications were at the preliminary assessment stage during the reporting period. Thirteen of the preliminary assessments were completed during the reporting period, and twenty 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 thirteen applications where preliminary assessments were completed, twelve 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, 2004, TO MARCH 31, 2005	
Preliminary assessments completed	13
Preliminary assessments under way but not yet completed	20
TOTAL	**33**

TABLE 5: DISPOSITION OF APPLICATIONS FOLLOWING PRELIMINARY ASSESSMENT STAGE

FOR THE PERIOD APRIL 1, 2004, TO MARCH 31, 2005	
Applications that did not proceed to the investigation stage following a preliminary assessment	12
Applications that did proceed to the investigation stage following a preliminary assessment	1
TOTAL	**13**

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.

Six investigations were completed during the reporting period and eighteen investigations are under way. No applications are presently awaiting an investigation.

TABLE 6: SUMMARY OF APPLICATIONS AT THE INVESTIGATION STAGE

FOR THE PERIOD APRIL 1, 2004, TO MARCH 31, 2005	
Investigations completed	6
Investigations under way but not yet completed	18
Applications awaiting investigation	0
TOTAL	**24**

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.

Six investigation reports were completed during the reporting period. Twelve 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, 2004, TO MARCH 31, 2005	
Investigation reports completed	6
Investigation reports under way but not yet completed	12
TOTAL	**18**

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. Five applications for ministerial review considered by the Minister were allowed, and one was dismissed. These cases are discussed earlier at pages 18 to 21. As of March 31, 2005, one application was under consideration by the Minister and awaiting a decision.

TABLE 8: DECISIONS MADE BY THE MINISTER

FOR THE PERIOD APRIL 1, 2004, TO MARCH 31, 2005	
Applications dismissed	1
Applications allowed	5
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, 2005. 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 33 active applications as of March 31, 2005, 13 (39%) were completed and awaiting preliminary assessment, seven (21%) were at the preliminary assessment stage, nine (27%) were at the investigation stage, three (9%) were at the investigation report stage, and one (3%) was at the decision stage.

TABLE 9: SUMMARY OF THE STATUS OF ALL ACTIVE APPLICATIONS	
AS OF MARCH 31, 2005	
Status	**Number**
Applications completed and awaiting preliminary assessment	13
Preliminary assessment stage	7
Investigation stage	9
Investigation report stage	3
Decision stage	1
TOTAL NO. OF ACTIVE APPLICATIONS	**33**

Judicial Review

There were no applications for judicial review of decisions made by the CCRG, outside agents 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;

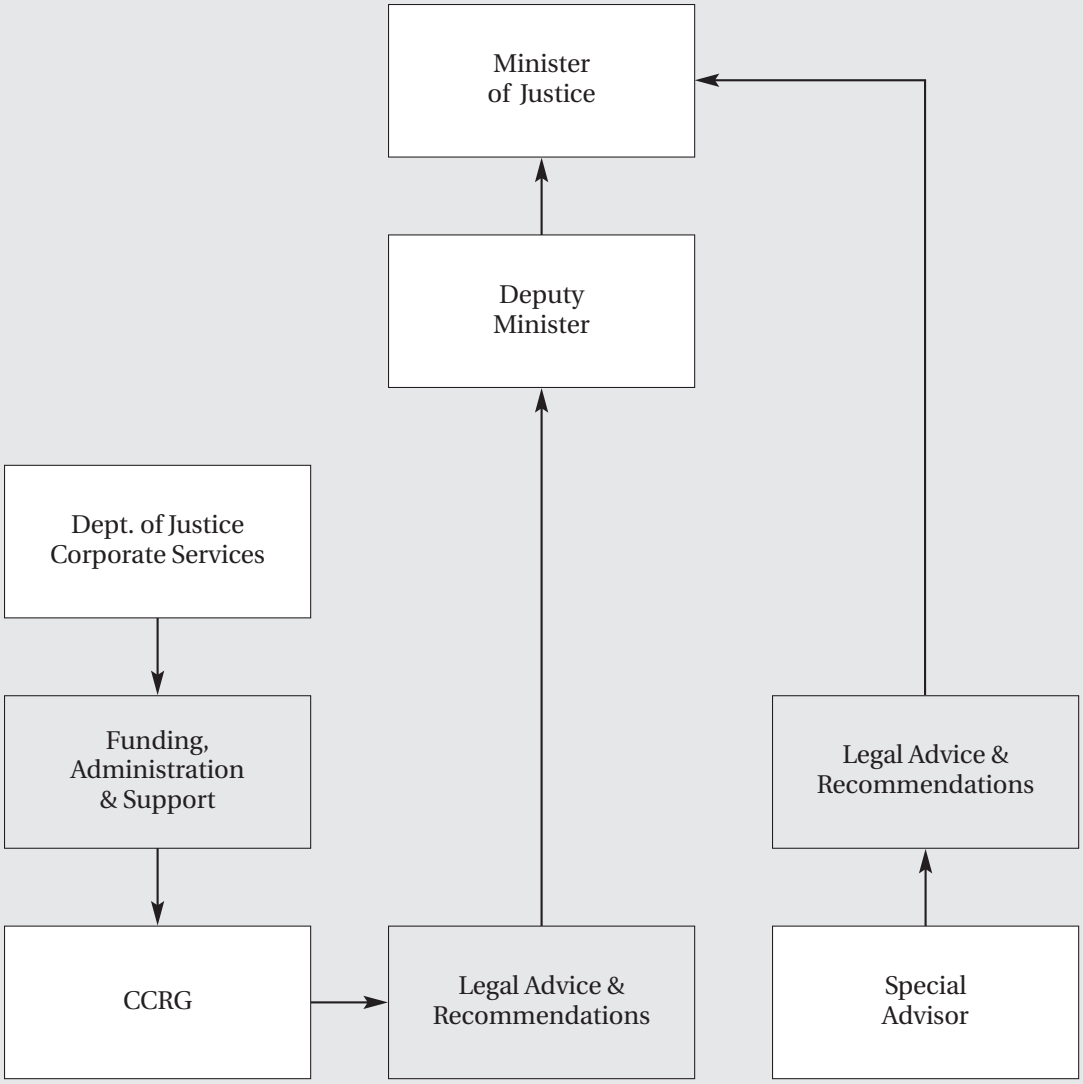
(*e*) the number of decisions that the Minister has made under subsection 696.3(3) of the Code; and

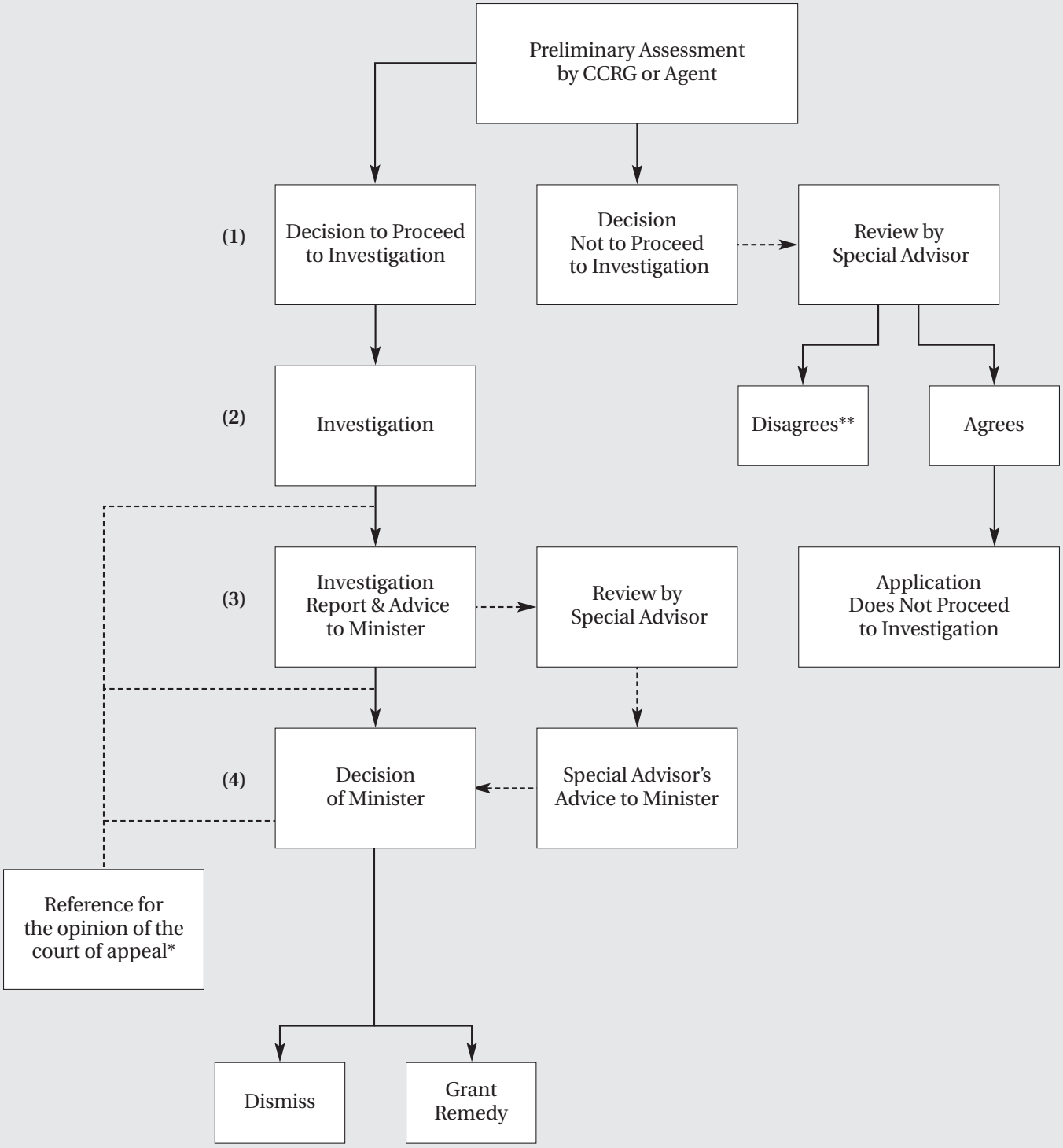
(*f*) any other information that the Minister considers appropriate.

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.

ORGANIZATIONAL CHART





* Such an opinion can be requested at any stage of the process but would most likely occur as indicated above.

** Recommends review process continue.

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