Federal Court  Cour fédérale

Date: 20140407

Docket: T-1790-10

Citation: 2014 FC 338

Ottawa, Ontario, April 7, 2014

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

DEVERYN DONALD ALEXANDER ROSS

Applicant

and

THE MINISTER OF JUSTICE
AND
THE ATTORNEY GENERAL OF CANADA

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] In a decision rendered on September 29, 2010, the Minister of Justice refused to grant the applicant a remedy under section 696.1 of the *Criminal Code*, RSC 1985, c C-42 [the Code] regarding two convictions for fraud imposed in 1995 and upheld on appeal in 1996. The applicant seeks judicial review of the Minister's decision under s 18(1) of the *Federal Courts Act*, RSC 1985, c F-7. These are my reasons for granting the application and returning the matter to the Minister for reconsideration.

I. **BACKGROUND:**

[2] The facts of the events leading to the applicant's fraud convictions are complex and still disputed. It is not necessary to review them in detail for the purpose of this decision. The brief summary below is offered solely to provide context to the discussion of the issues that arise on this application. Nothing in these reasons should be taken as a comment on Mr. Ross's guilt or innocence as determined at his trial before the Manitoba Court of Queen's Bench and reviewed on appeal before the Manitoba Court of Appeal.

[3] In 1990, the applicant was a lawyer practising in Brandon, Manitoba. He joined two of his clients, Mr. William Knight and Mr. Sheldon Gray, mutual fund salesmen, to launch a Perkins Family Restaurant franchise project. They agreed to sell "units", at a cost of $25,000 each, in a "Perkins Limited Partnership" (PLP). Most of the investors who bought into the project were elderly and unsophisticated. They were told that their investments were guaranteed and that they would receive a nine per cent return. Messrs. Knight and Gray supplied Mr. Ross with signed forms for each investor purporting to show that the investors had the experience to evaluate their investment and had been encouraged to seek independent legal advice. These proved to be false statements.

[4] Thirty-four units were sold during the spring and summer of 1990, raising $850,000. Messrs. Ross, Knight, and Gray assigned twelve units in the project to themselves, four each, at no cost, paid for out of the investors' capital. Each of them resold two units to investors in 1990. Mr. Ross resold two more units in spring 1991. He accepted $25,000 for each of these units.

One had been in his wife's name and the other had been in Mr. Gray's wife's name. At his trial, the court found that Mr. Ross had told Mr. Gray that he sold this second unit at a discount, for $15,000 and had kept the remaining $10,000 of the actual sale price. The purchasing investor, a Mr. Simpson, testified that he had believed he was buying the units from another investor, not from the project organizers.

[5] In late July 1990, it became apparent that the budget to build and equip the restaurant was short by at least $300,000. Mr. Ross set up a second limited partnership in a numbered company, 2613981 (261), which obtained a bank loan from CIBC for another $400,000 in return for a pledge of all of PLP's assets. Mr. Ross transferred PLP's assets into 261. He did not advise the investors of this. His counsel argued at trial that Mr. Ross had relied on Messrs. Knight and Gray to keep the investors informed throughout but the court did not accept this argument.

[6] The project began to fall apart in November 1991. The popularity of the restaurant was less than expected and its revenues declined. A rental payment for the building was missed and the loan was recalled by CIBC. The 261 partnership was petitioned into bankruptcy by the bank in June 1992. The remaining assets were sold by the receiver for $185,000 and distribution of the proceeds was contested between the bank and the investors.

[7] The Manitoba Securities Commission (MSC) launched an inquiry. Civil proceedings were initiated against Messrs. Knight and Gray. In September 1994 they entered guilty pleas to charges under the Manitoba *Securities Act*. Following a criminal investigation, Mr. Ross was

charged with nine counts of fraud. His trial took place in April-May 1995 before a judge with no jury. The prosecution called 39 witnesses during the six week trial; the defence called none. The Crown alleged: that Mr. Ross had stripped the partnership's assets by allowing the sale of the unfunded assigned units (six counts of fraud); that he had sold two units to Mr. Simpson under false pretences; that he had not disclosed the second partnership, the bank loan, and the transfer of PLP's assets into 261 to Mr. Simpson (the seventh count); that he had failed to disclose the budget shortfall, the new bank loan, and the transfer of PLP's assets to the investors in PLP (the eighth count); and that he had defrauded the Brandon CIBC (the ninth count).

[8] Mr. Ross was acquitted on the first six charges. The trial judge held that he might have been negligent, selfish, and cynical to arrange to pocket such a large share of the proceeds from the venture, but this did not constitute fraud. He was convicted on the seventh and eighth charges for concealing information from the investors. He was acquitted on the final charge, as a letter from Mr. Ross to CIBC, which a bank manager conceded he may have received, contained an acknowledgment of the relationship between PLP and 261.

[9] Mr. Ross's appeal was argued in December 1995 and dismissed on January 9, 1996. The Manitoba Court of Appeal found that there was no doubt that Mr. Ross had been the main person involved in the planning of the entire scheme. He was sentenced to eighteen months in custody and was disbarred from the Law Society of Manitoba on April 15, 1996. He did not apply for leave to appeal to the Supreme Court of Canada.

[10] Following his release, Mr. Ross set out to collect evidence to challenge his convictions with the assistance of a private investigator who re-interviewed some of the trial witnesses. A newspaper reporter also took an interest in the case and made inquiries.

[11] On May 26, 2004, Mr. Ross filed an application under s 696.1 of the Code for ministerial review of the two convictions. He put forward as grounds for that application the non-disclosure of significant evidence at trial, including evidence that had been available to the Crown in 1995, and new evidence allegedly discrediting certain witness testimony. Two key items of undisclosed evidence were detailed admissions of guilt by Messrs. Knight and Gray to the Manitoba Securities Commission (the Settlement Agreement) and a pre-trial agreement struck between Messrs. Knight and Gray and the investors in relation to an action against Mr. Ross for professional malpractice (the Assignment Agreement). Messrs. Knight and Gray agreed to assign any proceeds received from the Professional Liability Claims Fund of the Law Society of Manitoba to the investors to offset their losses. As well, one investor had been repaid by Mr. Knight before the trial. In addition, Mr. Simpson had, during telephone interviews in the years following the trial with the journalist, Mr. Dan Lett, and the private investigator, Mr. Brian Savage, made statements which allegedly contradicted evidence he gave at the trial concerning the ownership of the additional units he purchased from the applicant.

[12] Mr. Ross and his counsel at the time of the trial, Mr. Timothy Killeen, gave evidence in support of the application that they would have conducted the defence strategy very differently had this information been known to them. Mr. Ross would have testified in his own defence and counsel would have attacked the credibility of the witnesses more aggressively. Instead, Mr

Killeen stated, he had deliberately avoided challenging the evidence of the elderly investors for fear of being seen to be too harsh on the victims. Moreover, had the information been in his possession, he would probably have chosen to contest the version of events put forward by Messrs. Knight, Gray and Simpson by calling Mr. Ross.

[13] By the time the review application was submitted, the Manitoba prosecutor at the 1995 trial, Mr. Paul Jensen, had become a senior counsel in the Federal Prosecution Service. The Federal Prosecution Service (FPS) was the predecessor to the Public Prosecution Service of Canada (PPSC) which was created on December 12, 2006. In 2004, the FPS was part of the Department of Justice, as was the Criminal Conviction Review Group (CCRG) which supports the Minister in the exercise of his review jurisdiction. While the FPS reported through departmental channels to the Attorney General of Canada, that office is also held by the Minister of Justice. Because of concerns over a possible conflict of interest as a result of this, a senior member of the Alberta criminal defence bar, Mr. Alex Pringle, Q.C., was delegated to conduct the investigation and to provide advice to the Minister.

[14] Mr. Pringle examined the files of the Manitoba Securities Commission, Manitoba Justice, the Brandon Police Service and the RCMP, conducted interviews under oath with witnesses and assembled an extensive documentary record of what had been a fairly complex fraud investigation and prosecution.

[15] On May 15, 2008, Mr. Pringle provided a document entitled "Investigative Report" (the First Investigative Report) to counsel for the applicant and to the Manitoba Department of

Justice. Extensive written representations were submitted to Mr. Pringle by the applicant and by Manitoba Justice in response to the First Investigative Report. Mr. Jensen drafted the response to the First Investigative Report on behalf of Manitoba Justice, although he was by then no longer an employee of that Department.

[16] Mr. Pringle provided his final findings and recommendations to the Minister on June 22, 2009 in a document entitled "Final Investigative Report". In that report Pringle concluded that there was "a reasonable basis upon which the conclusion could be reached that there was a 'reasonable possibility' that [Mr.] Ross would have testified if the Settlement Agreements had been made available to Mr. Killeen". Further Mr. Pringle concluded that "there is a 'reasonable possibility' that Mr. Killeen would have changed his approach in cross-examining the investors" if the defence had received disclosure of the Assignment Agreement. In drawing those conclusions, Mr. Pringle conveyed his understanding of the relevant jurisprudence pertaining to fair trial rights.

[17] The Final Investigative Report was not disclosed to the applicant prior to these proceedings despite requests for it from the applicant's counsel. On September 29, 2010, the Minister denied the request for relief from the convictions.

[18] Mr. Ross filed for judicial review of the ministerial decision on October 28, 2010. He put forward three grounds for review. The first was that the Minister was incorrect in law in concluding that although the non-disclosures and witness credibility issues were significant, the determining factor was the speculated outcome of the trial in the event that disclosure had been

properly made. The second was that there was an unacceptable perception of bias stemming from the participation in the review process by Mr. Jensen, the Crown prosecutor at Mr. Ross's trial. The third was that there was procedural unfairness due to the Minister's non-disclosure of the final version of the investigation report prior to making his decision.

II. **DECISION UNDER REVIEW:**

[19] In his decision, the Minister stated that he was not satisfied that there was a reasonable basis to conclude that a miscarriage of justice had likely occurred. He reviewed the application, the investigation reports, all of the information submitted on behalf of the applicant, the trial judge's reasons for decision, and the appeal decision. The Minister then examined the basis for the convictions. He concluded that despite the doubt cast upon some of the witness testimony, this did not necessarily invalidate the factual findings at trial and was not so critical to the convictions that a miscarriage of justice likely occurred. The remaining evidence sufficed to sustain the convictions, in the Minister's view.

[20] As for the non-disclosures, the Minister applied the two-part *Dixon/Taillefer* jurisprudential test (*R v Dixon*, [1998] 1 SCR 244 [*Dixon*]; *R v Taillefer*, 2003 SCC 70 [*Taillefer*]) by which the decision maker must: (1) determine whether the information had any impact on the verdict, and (2) determine whether there was an impact on the conduct of the defence and whether the accused was allowed to make full answer and defence. The Minister disagreed with Mr. Pringle's ultimate finding that there was a reasonable possibility that Mr. Ross would have conducted his defence differently, preferring to take the view that there was no impact from the non-disclosures on the conduct of the defence. This was the position argued by

Mr. Jensen. The Minister also adopted the Manitoba Court of Appeal's view that Mr. Ross was the controlling mind in the investment scheme and that a different defence would not have resulted in a different trial outcome.

III. **ISSUES:**

[21] The relevant sections of the Code and the Regulations, *Ministerial Review – Miscarriages of Justice,* SOR/2002-416, are set out in an Annex to these reasons.

[22] At the outset of these proceedings, the applicant sought production of the Final Investigative Report under Rule 317 of the *Federal Courts Rules*. The respondent objected on the ground that it contained solicitor-client privileged information. When the application came on for hearing before this Court the applicant brought a motion for directions under Rule 318 with respect to the Minister's objection. I directed that the respondent file the Final Investigative Report in a sealed form with written representations in support of the asserted claim of privilege. Following the hearing, the Minister elected to release the Final Investigative Report subject to the redaction of paragraphs 556, 567 and 606-613. Having considered further representations from the parties on the privilege issue, I upheld the Minister's decision to redact those paragraphs: *Ross v Canada (Justice),* 2013 FC 757.

[23] The redacted paragraphs contain Mr. Pringle's recommendations to the Minister. While I have read them, they have not been relied upon by the respondent and have formed no part of my decision.

[24] The parties were given the opportunity to make additional submissions upon the release of the redacted version of the Final Investigative Report. In doing so, the applicant acknowledged that the key factual findings in that report did not differ in any significant respect from the findings in the First Investigative Report. He conceded that there was, as a result, no natural justice requirement for the respondent to advise him of any new factual allegations. In light of this, I consider that the issue of procedural fairness arising from the non-production of the Final Investigative Report is now moot and do not propose to deal with it further.

[25] In their written representations and during the course of the hearing, counsel for the applicant referred to documentary evidence in the record and made submissions in support of their position that Mr. Ross is factually innocent of the two counts of fraud of which he was convicted. It is not the role of this court to make that determination and I do not intend to address that evidence or those submissions. I note, however, that the evidence may be admissible and relevant if the matter were to be referred to the Manitoba Court of Appeal for further consideration or a new trial ordered; two options open to the Minister of Justice in the exercise of his discretion.

[26] The remaining issues in this matter are as follows:

1. What are the applicable standards of review?
2. Did the Minister err in law in his application of the test for ministerial review?
3. Did the involvement of Mr. Jensen in the review process give rise to a reasonable apprehension of bias?

IV. **ANALYSIS:**

A. *Standard of Review:*

[27] The Supreme Court of Canada established in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*] at para 57, that "existing jurisprudence may be helpful in identifying some of the questions that generally fall to be determined according to the correctness standard".

[28] The standard of review for a Minister's decision in an application for review of a conviction has been determined to be reasonableness (*Daoulov v Canada (Attorney General)*, 2008 FC 544 aff'd 2009 FCA 12; *Jolivet v Canada (Attorney General)*, 2011 FC 806; *Bilodeau v Canada (Attorney General)*, 2011 FC 886; *Timm v Canada (Attorney General)*, 2012 FC 505).

[29] The applicant argued at the outset of the proceedings that the standard of review for the application of the legal test in a ministerial review should be correctness, given that the question of what constitutes a "miscarriage of justice" is a question of law which is of central importance to the legal system as a whole, transcending this particular case. That argument was not accepted by Justice Manson in *Walchuk v Canada (Minister of Justice)*, 2013 FC 958, [2013] FCJ no 1030 at paras 20-21 relying upon *Agraira v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] SCJ no 36 at paras 48-50. I adopt Justice Manson's reasoning and conclude that I am unable to depart from the jurisprudence establishing reasonableness as the standard.

[30] Applying the reasonableness standard, the Court must be concerned with the existence of justification, transparency and intelligibility within the decision-making process. It is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law: *Dunsmuir*, above, at paras 47, 51, and 53. It is not for the Court to substitute its own assessment of the evidence or the material provided for that of the Minister. For the reviewing court, the issue is whether the decision, viewed as a whole in the context of the record, is reasonable: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 at para 3.

[31] The standard of review for questions of procedural fairness, and specifically when a reasonable apprehension of bias is proposed, has been found to be correctness in previous jurisprudence: *Wheeldon v Canada (Attorney General)*, 2013 FC 144 at para 20; *Tremblay v Canada (Attorney General)*, 2012 FC 1546 at para 16; *Singh v Canada (MCI)*, 2013 FC 201 at para 36; *Canadian Union of Postal Workers v Canada Post Corp***,** 2012 FC 975 at paras 20-21. Deference to the decision-maker is not at issue: *Ontario (Commissioner Provincial Police) v MacDonald*, 2009 ONCA 805, 3 Admin LR (5^{th}) 278 at para 37. The task for the Court is to determine whether the process followed by the decision-maker satisfied the level of fairness required in all of the circumstances: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 43. In this instance, the question is whether Mr. Jensen's involvement rendered the process unfair.

B. *Did the Minister err in law in his application of the test for ministerial review?*

[32] The underlying application to the Minister was not an appeal as of right on the merits, but a request for an extraordinary remedy. The powers given to the Minister under Part XXI.I of the Code derive from the Royal Prerogative of Mercy and are highly discretionary: *Bilodeau c Canada (Ministre de la Justice)*, 2009 QCCA 746 at para 25; *McArthur v Ontario (Attorney General)*, 2012 ONSC 5773 at para 54. In exercising that discretion the Minister must act in good faith and conduct a meaningful review: *Thatcher v Canada (Attorney General)*, [1996] FCJ No 1261 (QL), [1997] 1 FC 289 at para 13.

[33] Section 696.4 of the Code directs that the decision shall be made taking into account "all matters that the Minister considers relevant". This preserves the Minister's discretion in a broad sense. However, the section also specifies certain factors that must be considered relevant and which thereby circumscribe the Minister's discretion. These are:

(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;	*a*) la question de savoir si la demande repose sur de nouvelles questions importantes qui n'ont pas été étudiées par les tribunaux ou prises en considération par le ministre dans une demande précédente concernant la même condamnation ou la déclaration en vertu de la partie XXIV;
(*b*) the relevance and reliability of information that is presented in connection with the application; and	*b*) la pertinence et la fiabilité des renseignements présentés relativement à la demande;

(*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.	*c*) le fait que la demande présentée sous le régime de la présente partie ne doit pas tenir lieu d'appel ultérieur et les mesures de redressement prévues sont des recours extraordinaires.

[34] These factors are not exhaustive and the Minister is free to take other factors into consideration so long as they are relevant to the purpose of the Act: *Yu v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 819 [*Yu*] at para 15. The purpose of s 696.1 and its related provisions is to determine whether a miscarriage of justice likely occurred as provided in s 696.3(3)(a).

[35] The reference to "new matters of significance that were not considered by the courts" at s 696.4(a) reflects the language of guidelines adopted in 1994 to guide the Minister in the exercise of his discretion under what was then section 690 of the Code. Among other things not pertinent to this application, those guidelines stated:

> 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 arise 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, that there is a basis to conclude that a miscarriage of justice likely occurred.
>
> Patricia Braiden & Joan Brockman, "Remedying Wrongful Convictions Through Applications to the Minister of Justice under Section 690 of the *Criminal Code*" (1999) 17 Windsor YB Access Just 3 at 9.

[36] These guidelines reflected principles that had been developed by the appellate courts in dealing with claims of miscarriages of justice and which had been incorporated within the conviction review process. While not binding, the guidelines framed the exercise of the Minister's discretion and clearly influenced the legislation subsequently adopted by Parliament: *An Act to amend the Criminal Code and to amend other Acts*, SC 2002, c 13, s 71, amending the review provisions of the Code.

[37] In this case, the question before the Minister was whether, on the basis of the "new matters" put forward in the investigation, there was a reasonable basis to conclude that a miscarriage of justice likely occurred. In considering that question, the Minister acknowledged that he was guided by the above referenced appellate court principles including those developed subsequent to the formulation of the 1994 guidelines.

[38] The "new matters" in this case included both fresh evidence that was not available at the applicant's trial and evidence that was available but was not disclosed to the applicant and his counsel by the Crown.

(1) The "fresh evidence"

[39] The test for the consideration of fresh evidence in the appellate context was set out in *Palmer v The Queen*, [1979] SCJ No 126 (QL), [1980] 1 SCR 759 [*Palmer*]. The question to be asked is whether the evidence, if found to be credible, is of such strength or probative force that it might, taken with the other evidence adduced, have affected the result? This is essentially the principle set out in guideline 5 above.

[40] The fresh evidence here was of statements made by the witness Mr. Simpson in post-conviction telephone calls with Mr. Savage and Mr. Lett. That evidence, if available at trial, may have supported an inference that Mr. Simpson was mistaken in his recollection with regard to what he had been told by Mr. Ross regarding the origins of the two units he purchased for $50,000. Mr. Pringle's considered view, having interviewed both Messrs. Ross and Simpson and having examined the evidence adduced at trial, was that the new evidence would not have made a difference in the outcome had it been available at the trial.

[41] In his decision, the Minister responded to several questions posed by Mr. Pringle regarding the likely effect of this new evidence. He concluded that the new evidence did not invalidate the findings of the trial court upheld by the Court of Appeal, that it did not provide a reasonable basis to conclude that a miscarriage of justice likely occurred and that there was sufficient remaining evidence to sustain the conviction regardless of whether Simpson was mistaken about the representations made by Mr. Ross as to the origins of the units being purchased.

[42] These findings by the Minister are not seriously challenged by the applicant in these proceedings. I am satisfied that they are reasonable as they are justified, transparent and intelligible and defensible in respect of the facts and the law.

(2) The "undisclosed evidence"

[43] Other information submitted in support of the application falls within the category of evidence under the control of the Crown during the trial and not disclosed to the defence. In appellate proceedings this category has been found to call for the application of a very different test than that in *Palmer*, bearing not on what the trial court would have made of the evidence but on whether the defence's approach to the case would have been affected had it been disclosed.

[44] In *Dixon*, above, at para 36 the Supreme Court set out a two-step analysis for determining whether the right to make full answer and defence had been impaired by the non-disclosure of relevant information. The first step was to consider whether the undisclosed information affected the reliability of the conviction. If so, a new trial should be ordered. But even if the undisclosed information did not in itself affect the reliability of the result at trial it was necessary to consider its effect on the overall fairness of the trial process. This would include the lines of inquiry with witnesses and opportunities to collect additional evidence that may have been available to the defence if the relevant information had been disclosed.

[45] The Supreme Court revisited this topic in *Taillefer*, above, at paras 77-79, 99. The Court pointed out that the analysis called for in *Dixon* was substantially different from that required by *Palmer* which focused on the impact of fresh evidence on the results of the trial. Moreover, the

burden on the party seeking to have fresh evidence admitted under *Palmer* is more stringent – a probable affect on the outcome – whereas the test where non-disclosure was in issue under *Dixon* was that of a reasonable possibility that the outcome or the fairness of the trial process were affected. To measure the impact on the overall fairness of the trial, the appellate court must consider what realistic opportunities to explore possible uses of the undisclosed evidence were lost.

[46] This was discussed in *Taillefer* at para 99:

> **99** As noted earlier, the method of analysis prescribed by *Dixon* consists of two separate steps. The first involves assessing the impact of the fresh evidence on the result of the trial. The second requires that the appellate court assess the impact of the fresh evidence on the overall fairness of the trial. Thus the infringement of the accused's right to make full answer and defence may arise from a reasonable possibility that the failure to disclose had an impact on the overall fairness of the trial even if it cannot be concluded that the verdict might have been different. To measure the impact of the non-disclosure on the overall fairness of the trial, it must be asked what "*realistic* opportunities to explore possible uses of the undisclosed information for purposes of investigation and gathering evidence were lost" (*Dixon*, at paragraph 36 (emphasis in original)). It does not seem, from the reasons of Beauregard J.A., that the impact of the fresh evidence on the overall fairness of the trial was even examined. By reviewing the items of fresh evidence one by one, and comparing them to the evidence presented at trial, Beauregard J.A. assessed the potential impact of each piece of evidence on the jury's verdict, without inquiring into the possible unrealistic uses of that evidence by the defence. In my opinion, had he done that, his conclusions would have been very different. Several parts of the fresh evidence could have been used by the defence at trial, whether to impeach the credibility of certain witnesses and the credibility of the Crown's theory or to gather new evidence.

[47] In his decision, the Minister noted that while applications for ministerial review under s 696.1 were not at issue in these cases he found the principles set out in *Dixon* and *Taillefer* to

be useful in exercising his discretion in this matter. In my view, the Minister was bound not only to rely on the Supreme Court jurisprudence as a guide to the exercise of his discretion but to apply the principles set out therein within the framework of the authority granted him by Parliament under s 696.1. Having agreed that the applicable principles to determine the application are those that have been set out by the courts in dealing with the effects of non-disclosure at trial, it was not open to the Minister to apply them erroneously.

[48] Mr. Pringle had determined that a number of documents and other information had not been disclosed to the applicant prior to his trial. These included the Manitoba Securities Commission Settlement Agreements and the Assignment Deal. He found that there was a reasonable basis to conclude that the Crown did not meet its disclosure obligations under *R v Stinchcombe* [1991] 3 SCR 326 with respect to documentation that had been collected in the parallel investigation conducted by the Manitoba Securities Commission. Commission counsel knew about the Assignment Deal before Ross's criminal trial was scheduled to commence and the Settlement Agreements were executed on the opening day of the trial. While it does not appear that Mr. Jensen had possession of this information during the trial and that the nondisclosure was likely inadvertent, Mr. Pringle was satisfied that due to the extensive cooperation that occurred between the Commission investigation and the criminal investigation conducted by the RCMP and Brandon Police Service, there was a reasonable basis to conclude that the information should have been disclosed to the applicant before his trial.

[49] Mr. Pringle's view was that this evidence, and other information of lesser significance which he discusses in detail, would not have changed the outcome if it had been available at trial.

In particular, he concluded that the Assignment Deal did not rebut or put into question any of the factual underpinnings that were found to have been proven in order to return convictions on counts seven and eight. Despite the fact that Mr. Simpson was to recover at least part of his losses from the proceeds of the deal he testified truthfully at the trial that he had recovered nothing as of that date and was not asked whether he had any expectations of recovery. Moreover, he and the other investors were credible when they testified that they knew nothing about the transfer of assets worth $700,000 from PLP to 261 or that a bank loan secured by the assets had been taken out for $400,000.

[50] Mr. Ross and his defence counsel had become aware of the Settlement Agreements before his conviction appeal was argued before the Manitoba Court of Appeal. Mr. Ross did not seek to have the evidence of the Settlement Agreements introduced as fresh evidence on the appeal because, as he acknowledged in his submissions to Mr. Pringle, the evidence was not capable on its own of satisfying the fourth stage of the test in *Palmer*.

[51] Mr. Pringle similarly concluded, applying the lesser onus of proof approved by the Supreme Court in *Dixon*, that there was no reasonable possibility that the introduction of the Settlement Agreements, or other evidence not disclosed to the applicant and his counsel, would have affected the verdict. Counsel for the applicant conceded in his response to the First Investigative Report that the non-disclosures would not support a finding that the convictions were unreliable at the first stage of the *Dixon-Taillefer* test. On this application, the applicant took the position that the case comes down to the effect of the non-disclosures on the fairness of the trial.

(3) Affect of the non-disclosures on the fairness of the trial

[52] In his final report, Mr. Pringle considered what impact the non-disclosed evidence had on the overall fairness of Mr. Ross's trial in the sense of whether the non-disclosure infringed his right to make full answer and defence. It is clear from Mr. Pringle's analysis that he was not convinced that disclosure of the evidence would have made a difference in the outcome. However, based on his understanding of the *Dixon-Taillefer* test, he was obliged to consider not what would have happened but what might have happened if the required disclosure had been made. This is consistent with the explanation of the test by the Supreme Court in *R v Illes*, 2008 SCC 57 at paras 25 and 27:

> **25** With respect to the first prong of the *Dixon* test, it is important to note that the issue here is not whether the undisclosed evidence *would* have made a difference to the trial outcome, but rather whether it *could* have made a difference. More precisely, the issue the appellate court must determine is whether there is a reasonable possibility that the additional evidence could have created a reasonable doubt in the jury's mind. See *R. v. Taillefer*, [2003] 3 S.C.R. 307, 2003 SCC 70, at para. 82.
>
> . . .
>
> **27** With respect to the second prong of the *Dixon* test, an appellant need only establish a reasonable possibility that the overall fairness of the trial process was impaired. This burden can be discharged by showing, for example, that the undisclosed evidence could have been used to impeach the credibility of a prosecution witness (see *Taillefer*, at para. 84), or could have assisted the defence in its pre-trial investigations and preparations, or in its tactical decisions at trial (see *R. v. Skinner*, [1998] 1 S.C.R. 298, at para. 12 (Cory J., for the Court)).

[53] Similarly in *R v Skinner*, [1998] 1 SCR 298 at paras 8 -12, the Supreme Court concluded that the appellant would be entitled to a new trial if he could show that the non-disclosure of a

witness statement affected the overall fairness of the trial process. In that matter, there was a reasonable possibility that had the undisclosed statement been produced by the Crown, it could have affected the defence's decision not to call evidence. The Court noted that on appeal, it is impossible to reconstruct the trial process and determine exactly how the defence might have used the undisclosed evidence.

[54] The issue for Mr. Pringle was whether the non-disclosures deprived the accused of certain evidence, information or investigative resources that could have made a difference to Mr. Ross's trial. In considering this issue, Mr. Pringle took into account, in particular, the evidence of the defence counsel, Mr. Killeen, that he would have significantly altered his approach at trial if he had had disclosure of the Settlement Agreements. Mr. Pringle agreed with Mr. Killeen that there were significant differences between the evidence given by Messrs. Knight and Gray at the preliminary inquiry and their admissions in the Settlement Agreements that could have been put to them in cross-examination at the trial.

[55] Having analysed the evidence that he had collected against the second part of the *Dixon-Taillefer* test, Mr. Pringle found that there was a "reasonsable possibility" that Mr. Ross would have testified in his own defence and that his counsel may have changed his approach in cross examining the investors if the Settlement Agreements and the Assignment Deal had been disclosed at trial. The Minister disagreed with these conclusions.

[56] Mr. Pringle was the Minister's delegate to conduct the investigation under s 696.2(3) of the Code. It was open to the Minister not to accept Mr. Pringle's advice and views in making the

ultimate decision. However, in light of his departure from Mr. Pringle's advice, to meet the standard of reasonableness the Minister was under a heightened duty to explain the reasons for his disagreement: *Yu*, above, at para 25, citing *Singh v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 115 at paras 12-13; *Grant v Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 958, [2010] FCJ no 386; and *Vatani v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 114 at paras 8-9.

[57] The Minister did not interview the witnesses or read the volumes of documents assembled in the investigation. Within the broad range of acceptable outcomes open to him in the exercise of his discretion, it was not open to the Minister to err in his assessment of important material facts.

[58] As the applicant submits, Mr. Killeen, Mr. Ross's trial counsel, gave uncontradicted evidence that the undisclosed Settlement Agreements would have fundamentally altered the dynamics of the trial. Those agreements together with inconsistent preliminary inquiry testimony from Messrs. Knight and Gray would have been sufficient not only to discredit the two men, but to demonstrate that they had deceived Mr. Ross as well as the investors. The undisclosed Assignment Deal would have provided a basis to question the credibility of the investors in general and that of Mr. Simpson in particular. These witnesses, Messrs. Knight and Gray and the investors, were at the heart of the Crown's case on counts 7 and 8 on which Mr. Ross was convicted. The undisclosed documents also go directly to the pivotal issue of whether Mr. Ross would have testified if he had known of them.

[59] The Minister references a passage in Mr. Killeen's affidavit to support his conclusion that Mr. Ross would not have testified because of the risks associated with cross-examination. He states:

> As suggested by Mr. Killeen in his affidavit filed in support of Mr. Ross's application, there were many risks associated with him testifying. Mr. Killeen correctly points out that Mr. Ross would have had to testify on a large number of points on a nine count indictment and his evidence would have contradicted that of many of the crown witnesses, including Mr. Simpson, on a multitude of issues. He would face considerable and undoubtedly difficult cross examination such that, on the recommendation of his trial counsel, he chose not to testify as was his right.

[60] However, this passage refers to the situation as Mr. Killeen perceived it to be at the trial in 1995, before he learned of the non-disclosed evidence, not what he thought later when he was aware of its significance. Mr. Killeen's evidence as a whole in his affidavit and *viva voce* testimony under oath is that there was "every possibility" that he would have advised Mr. Ross to testify had the Settlement Agreements been disclosed.

[61] To Mr. Killeen, disclosure of the agreements would have "fundamentally altered the dynamics of the trial". It is clear, as Mr. Pringle found from his interviews, that Mr. Ross was willing to testify and had, in fact, provided his counsel with a detailed account of what his evidence would consist of even before the preliminary inquiry.

[62] In rejecting these findings, the Minister chose to substitute his own analysis of the evidence for that of Mr. Pringle, who had the opportunity to directly observe and evaluate the evidence of both Messrs. Ross and Killeen in the interviews he conducted with them. In doing

so, the Minister seriously misinterpreted the full force of Mr. Killeen's evidence. Moreover, he failed to take account of Mr. Pringle's assessment of Mr. Ross's own evidence on this point:

> Certainly in my view Mr. Ross would have been willing to testify in his own defence if Mr. Killeen felt that he should. Although it was several years later when I examined Mr. Ross on two occasions in Winnipeg, I did not get the sense that he was afraid or reluctant to provide his account under oath as to what occurred in this matter - rather my impression was quite the contrary.

[63] I agree with the applicant that the Minister erred in his consideration of the second aspect of the *Dixon-Taillefer* test. The question to be decided was whether the applicant received a fair trial as a result of the non-disclosure, not whether the outcome would have been affected.

[64] The Minister accepted Mr. Pringle's view that the disclosure of the information could have led to a different defence approach. But he then erred in merging the *Palmer* and *Dixon/Taillefer* tests in concluding that the result would not have changed and in deciding from this that no miscarriage of justice was likely to have occurred. In doing so, the Minister engaged in a largely speculative discussion of what effect different approaches by the defence to the questioning of key witnesses would have had on the outcome had the applicant been in a position to consider how to make use of the undisclosed evidence.

[65] The Minister's disposition of the application is consistent with the 1994 guidelines, in the sense that he focused his attention on whether the undisclosed evidence "could reasonably have affected the verdict". However, it is not consistent with the evolution of the appellate jurisprudence since then. While a request for a remedy under s 696 is not an appellate proceeding, the Minister had accepted to be guided by that jurisprudence but then erred in its

application. The interpretation of the legislative framework under which the Minister exercises his discretion must not be static but evolve with the development of the jurisprudence.

(4) Did the involvement of Mr Jensen give rise to a reasonable apprehension of bias?

[66] A reasonable apprehension of bias may be raised where an informed person, viewing the matter realistically and practically and having thought the matter through, would think it more likely than not that the decision maker would unconsciously or consciously decide the issue unfairly: *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 SCR 369 at p 394.

[67] As noted above, Mr. Jensen transferred from Manitoba Justice in 2003 to become the senior federal prosecutor in Manitoba in the employ, at that time, of the FPS which was then within the Department of Justice. Since 2006 criminal litigation on behalf of the Attorney General of Canada is conducted by the PPSC. Under the *Director of Public Prosecutions Act*, SC 2006, c 9, the Director of the PPSC exercises the authority of the Attorney General in federal prosecutions. The Office of the Director is a separate department and no longer part of the Department of Justice. It remains open to the Attorney General to issue instructions to the Director and to assume the conduct of any prosecution but such instructions must be published in the Canada Gazette.

[68] Concerns about Mr. Jensen's involvement in this matter as an employee of the FPS were drawn to the attention of the Department of Justice when the s 696 application was first filed. As a result, the CCRG agreed that the matter should be referred to outside counsel and Mr. Pringle

was appointed as the Minister's delegate under s 696.2(3) of the Code to conduct the investigation.

[69] Mr. Jensen was interviewed under oath as a witness by Mr. Pringle twice in April and May 2006. The interviews touched on matters of fact and on Mr. Jensen's views about core issues in the case, including disclosure. His responses were relied upon by Mr. Pringle and incorporated in the First Investigative Report.

[70] Mr. Jensen drafted and signed "on behalf of Manitoba Justice" the 114-page response to Mr. Pringle's First Investigative Report. The decision to involve Mr. Jensen in the preparation of Manitoba's response was apparently made by the provincial department on the grounds of economy. Mr. Ross' counsel wrote to that department to express concern at Mr. Jensen's involvement on November 7, 2008. The Manitoba Assistant Deputy Attorney General replied on December 3, 2008 that "Manitoba Justice makes no apologies for this decision […] We will not burden the taxpayers of Manitoba with the expense of hiring outside counsel who would just have to talk to Mr. Jensen in any even to learn the file."

[71] Counsel for the applicant also wrote to Mr. Pringle to express their concern and to register their objection to Mr. Jensen's involvement in the review process. In his final report, Mr. Pringle noted the objection to Mr. Jensen's participation. He agreed that it would have been preferable for Manitoba Justice to have used other counsel to prepare the written submissions but did not consider that it had any impact on his independence in reviewing the application. The written submission provided on behalf of Manitoba was simply argument and it was immaterial,

in Mr. Pringle's view, who prepared that argument as he was interested in the substance not the author. He gave it no greater weight by reason that it had been prepared by Mr. Jensen.

[72] The applicant submits that he was entitled to a fair and impartial assessment of the issues raised in his application in the response prepared by Manitoba Justice. Mr. Jensen was a witness in the review process. His dual role, as witness and advocate, violated the rules of professional conduct. The problem, in the applicant's view, is not that his conduct would cause Mr. Pringle to be biased but rather that the Minister had to sit in judgment on questions of non-disclosure by his employee and the submissions that he had provided and evidence given under oath. The personal and professional interests of Mr. Jensen were implicated in the application to the Minister. There is no indication in the Minister's decision that he addressed his mind to this concern.

[73] It is not for this Court to determine whether Mr. Jensen's involvement as both witness and advocate violates Manitoba's rules of professional conduct. I note, however, that while at Manitoba Justice, Mr. Jensen had complained to his superior about harassment allegedly targeted against him personally by Mr. Ross from 1995 to 2001. Moreover, the potential conflict of interest arising from his employment with the FPS was sufficiently apparent at the outset of the ministerial review that the CCRG thought it necessary to retain Mr. Pringle's services as delegate rather than to conduct the investigation in-house. It is conceivable, as the applicant argues, that another counsel, looking at the matter objectively on behalf of Manitoba Justice without any of the history that Mr. Jensen brought to the file would have come to different conclusions with respect to the issues raised on the application.

[74] In the circumstances, I think it is clear that Mr. Jensen should not have been involved in preparing Manitoba's response to the First Investigation Report despite his deep knowledge of the file.

[75] To establish a reasonable apprehension of bias on the part of the decision-maker stemming from a lack of impartiality on the part of one or more participants in the process, it is generally considered necessary to demonstrate that this had an influence on the decision maker. See for example *Lim v Association of Professional Engineers (Ontario)*, (2011) 274 OAC 292 (Div Ct) at para 108 and *Van Rassel v Canada (R.C.M.P.)*, [1987] 1 FC 47. In this instance, the relevant decision-maker is the Minister, not Mr. Pringle.

[76] It is arguable, as the applicant contends, that the Minister's conclusion that Mr. Ross would never have testified even if he had received the disclosures prior to trial, rested on Mr. Jensen's forceful argument to that effect rather than on Mr. Pringle's more thoughtful and careful analysis. However, there is no explicit reference to the Manitoba response in the Minister's decision or other clear indication that he had relied on Mr. Jensen's intervention.

[77] The threshold for establishing bias or a reasonable apprehension of bias is high. The grounds for the finding must be serious and substantial: *Wewaykum Indian Band v Canada*, [2003] 2 SCR 259 at para 76. The presumption is that a decision maker will act impartially: *Zundel v Citron*, [2000] 4 FC 225 (FCA), leave to appeal to SCC refused, [2000] SCCA no 332.

[78] In the absence of any clear demonstration that the Minister relied on Mr. Jensen's argument to the exclusion of the evidence and representations in the record as a whole, I am unable to find that the decision was tainted by bias or a reasonable apprehension of bias.

V. **CONCLUSION:**

[79] The exercise of the Minister's discretion under the framework established by Parliament in the Code for the review of criminal convictions must evolve with the principles established by the jurisprudence of the Supreme Court of Canada for dealing with criminal convictions in appellate proceedings. I find that the Minister's decision in this matter did not conform to those principles as they had developed by 2010 in relation to the effect of the undisclosed evidence on the fairness of the applicant's trial.

[80] Applying the standard of reasonableness I find that the decision lacks justification, transparency and intelligibility and does not fall within the range of possible, acceptable outcomes which are defensible in respect of the facts and law. Accordingly, the application will be granted with costs in favour of the applicant, and the matter remitted to the Minister for reconsideration.

[81] I do not think it appropriate for the Court to direct the Minister to grant a specific remedy under s 696.3 of the Code, as requested by the applicant. Nor do I consider it appropriate to specify a period of time within which the Minister is to render a decision. That responsibility rests with the Minister and not with the Court.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is granted and the matter remitted to the Minister for reconsideration in accordance with the reasons provided; and

2. The applicant is awarded costs on the normal scale.

.

"Richard G. Mosley"
Judge

ANNEX

APPLICABLE LEGISLATION:

Criminal Code **R.S.C., 1985, c. C-46**	**Code criminel** **L.R.C. (1985), ch. C-46**
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.	**696.1** (1) Une demande de révision auprès du ministre au motif qu'une erreur judiciaire aurait été commise peut être présentée au ministre de la Justice par ou pour une personne qui a été condamnée pour une infraction à une loi fédérale ou à ses règlements ou qui a été déclarée délinquant dangereux ou délinquant à contrôler en application de la partie XXIV, si toutes les voies de recours relativement à la condamnation ou à la déclaration ont été épuisées.
(2) The application must be in the form, contain the information and be accompanied by any documents prescribed by the regulations.	(2) La demande est présentée en la forme réglementaire, comporte les renseignements réglementaires et est accompagnée des documents prévus par règlement.
696.2 (1) On receipt of an application under this Part, the Minister of Justice shall review it in accordance with the regulations.	**696.2** (1) Sur réception d'une demande présentée sous le régime de la présente partie, le ministre de la Justice l'examine conformément aux règlements.
(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	(2) Dans le cadre d'une enquête relative à une demande présentée sous le régime de la présente partie, le ministre de la Justice possède tous les pouvoirs accordés à un commissaire en vertu de la partie I de la *Loi sur les*

on a commissioner under section 11 of that Act.

enquêtes et ceux qui peuvent lui être accordés en vertu de l'article 11 de cette loi.

(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).

(3) Malgré le paragraphe 11(3) de la *Loi sur les enquêtes*, le ministre de la Justice peut déléguer par écrit à tout membre en règle du barreau d'une province, juge à la retraite, ou tout autre individu qui, de l'avis du ministre, possède une formation ou une expérience similaires ses pouvoirs en ce qui touche le recueil de témoignages, la délivrance des assignations, la contrainte à comparution et à déposition et, de façon générale, la conduite de l'enquête visée au paragraphe (2).

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.

696.3 (1) Dans le présent article, « cour d'appel » s'entend de la cour d'appel, au sens de l'article 2, de la province où a été instruite l'affaire pour laquelle une demande est présentée sous le régime de la présente partie.

(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.

(2) Le ministre de la Justice peut, à tout moment, renvoyer devant la cour d'appel, pour connaître son opinion, toute question à l'égard d'une demande présentée sous le régime de la présente partie sur laquelle il désire son assistance, et la cour d'appel donne son opinion en conséquence.

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

(3) Le ministre de la Justice peut, à l'égard d'une demande présentée sous le régime de la

présente partie :

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

a) s'il est convaincu qu'il y a des motifs raisonnables de conclure qu'une erreur judiciaire s'est probablement produite :

(ii) 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

(i) prescrire, au moyen d'une ordonnance écrite, un nouveau procès devant tout tribunal qu'il juge approprié ou, dans le cas d'une personne déclarée délinquant dangereux ou délinquant à contrôler en vertu de la partie XXIV, une nouvelle audition en vertu de cette partie,

(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

(ii) à tout moment, renvoyer la cause devant la cour d'appel pour audition et décision comme s'il s'agissait d'un appel interjeté par la personne déclarée coupable ou par la personne déclarée délinquant dangereux ou délinquant à contrôler en vertu de la partie XXIV, selon le cas;

(b) dismiss the application.

b) rejeter la demande.

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

(4) La décision du ministre de la Justice prise en vertu du paragraphe (3) est sans appel.

696.4 In making a decision

696.4 Lorsqu'il rend sa

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.

Regulations Respecting Applications for Ministerial Review — Miscarriages of Justice
SOR/2002-416

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

décision en vertu du paragraphe 696.3(3), le ministre de la Justice prend en compte tous les éléments qu'il estime se rapporter à la demande, notamment :

a) la question de savoir si la demande repose sur de nouvelles questions importantes qui n'ont pas été étudiées par les tribunaux ou prises en considération par le ministre dans une demande précédente concernant la même condamnation ou la déclaration en vertu de la partie XXIV;

b) la pertinence et la fiabilité des renseignements présentés relativement à la demande;

c) le fait que la demande présentée sous le régime de la présente partie ne doit pas tenir lieu d'appel ultérieur et les mesures de redressement prévues sont des recours extraordinaires.

Règlement sur les demandes de révision auprès du ministre (erreurs judiciaires)
DORS/2002-416

5. (1) Une fois l'enquête visée à l'alinéa 4(1)*a*) terminée, le ministre rédige un rapport d'enquête, dont il transmet copie au demandeur et, le cas échéant, à la personne qui présente la demande en son nom. Le ministre doit informer

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.

par écrit le demandeur que des renseignements additionnels peuvent lui être fournis à l'appui de la demande dans un délai d'un an à compter de la date d'envoi du rapport d'enquête.

(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.

(2) Si le demandeur ne transmet pas les renseignements additionnels dans le délai prévu au paragraphe (1), ou s'il informe le ministre par écrit qu'aucun autre renseignement ne sera fourni, le ministre peut rendre une décision en vertu du paragraphe 696.3(3) du 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.

6. Le ministre transmet au demandeur et, le cas échéant, à la personne qui présente la demande en son nom, une copie de la décision rendue en vertu du paragraphe 696.3(3) du Code.

Federal Courts Act
R.S.C., 1985, c. F-7

Loi sur les Cours fédérales
L.R.C. (1985), ch. F-7

18. (1) Subject to section 28, the Federal Court has exclusive original jurisdiction

18. (1) Sous réserve de l'article 28, la Cour fédérale a compétence exclusive, en première instance, pour :

[. . .]

[. . .]

(*b*) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (*a*), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

b) connaître de toute demande de réparation de la nature visée par l'alinéa *a*), et notamment de toute procédure engagée contre le procureur général du Canada afin d'obtenir réparation de la part d'un office fédéral.

Federal Courts Rules
SOR/98-106

317. (1) A party may request material relevant to an application that is in the possession of a tribunal whose order is the subject of the application and not in the possession of the party by serving on the tribunal and filing a written request, identifying the material requested.

(2) An applicant may include a request under subsection (1) in its notice of application.

(3) If an applicant does not include a request under subsection (1) in its notice of application, the applicant shall serve the request on the other parties.

318. (1) Within 20 days after service of a request under rule 317, the tribunal shall transmit

(*a*) a certified copy of the requested material to the Registry and to the party making the request; or

(*b*) where the material cannot be reproduced, the original material to the Registry.

Règles des Cours fédérales
DORS/98-106

317. (1) Toute partie peut demander la transmission des documents ou des éléments matériels pertinents quant à la demande, qu'elle n'a pas mais qui sont en la possession de l'office fédéral dont l'ordonnance fait l'objet de la demande, en signifiant à l'office une requête à cet effet puis en la déposant. La requête précise les documents ou les éléments matériels demandés.

(2) Un demandeur peut inclure sa demande de transmission de documents dans son avis de demande.

(3) Si le demandeur n'inclut pas sa demande de transmission de documents dans son avis de demande, il est tenu de signifier cette demande aux autres parties.

318. (1) Dans les 20 jours suivant la signification de la demande de transmission visée à la règle 317, l'office fédéral transmet :

a) au greffe et à la partie qui en a fait la demande une copie certifiée conforme des documents en cause;

b) au greffe les documents qui ne se prêtent pas à la reproduction et les éléments matériels en cause.

(2) Where a tribunal or party objects to a request under rule 317, the tribunal or the party shall inform all parties and the Administrator, in writing, of the reasons for the objection.

(2) Si l'office fédéral ou une partie s'opposent à la demande de transmission, ils informent par écrit toutes les parties et l'administrateur des motifs de leur opposition.

(3) The Court may give directions to the parties and to a tribunal as to the procedure for making submissions with respect to an objection under subsection (2).

(3) La Cour peut donner aux parties et à l'office fédéral des directives sur la façon de procéder pour présenter des observations au sujet d'une opposition à la demande de transmission.

(4) The Court may, after hearing submissions with respect to an objection under subsection (2), order that a certified copy, or the original, of all or part of the material requested be forwarded to the Registry.

(4) La Cour peut, après avoir entendu les observations sur l'opposition, ordonner qu'une copie certifiée conforme ou l'original des documents ou que les éléments matériels soient transmis, en totalité ou en partie, au greffe.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1790-10
STYLE OF CAUSE:	DEVERYN DONALD ALEXANDER ROSS v THE MINISTER OF JUSTICE AND THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	NOVEMBER 4, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	MOSLEY J.
DATED:	APRIL 7, 2014

APPEARANCES:

James Lockyer Phillip Campbell	FOR THE APPLICANT
Sean Gaudet	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Lockyer, Campbell, Posner Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENTS