Federal Court  Cour fédérale

Date: 20150605

Docket: T-729-13

Citation: 2015 FC 710

Ottawa, Ontario, June 5, 2015

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

THOMAS WINMILL

Applicant

and

CANADA (MINISTER OF JUSTICE)

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] In the morning of Sunday September 22, 1991, the Applicant, his son Robert Winmill, Robert's wife at the time, Tina Winmill (now Prevost), and two of Robert's acquaintances, Christopher Cvetkovic and Brian Brady, were driving to the farm property of an Applicant's friend in Port Colborne, Ontario. Mr. Brady was murdered en route and left in a ditch on a side road. In the evening, Tina and Robert called the police. As a result of the information they

provided to the police, the Applicant and Mr. Cvetkovic were arrested for Mr. Brady's murder but the charges against Mr. Cvetkovic were dropped a few hours later. The Applicant was tried.

[2] On October 28, 1992, following a 17-day jury trial, the Applicant was convicted of first degree murder and sentenced to life imprisonment with no eligibility of parole for 25 years. His conviction and sentence were confirmed by the Ontario Court of Appeal on January 28, 1999 (*R. v Winmill*, 42 O.R. (3d) 582, [1999] OJ No. 213 (QL)). There was no appeal to the Supreme Court of Canada.

[3] On November 2, 2011, the Applicant, with the assistance of the Innocence Project at Osgoode Hall Law School (the Innocence Project), applied for Ministerial review of his conviction under section 696.1 of the *Criminal Code*, RSC, 1985, c C-46 (the Conviction Review Application). He claimed that there was significant new evidence showing that his son, Robert Winmill, has now confessed to the murder for which he stands convicted.

[4] As required by subsection 3(b) of the *Regulations Respecting Applications For Ministerial Review – Miscarriages of Justice*, SOR/2002-416 (the Regulations), the Minister of Justice (the Minister), through the Criminal Conviction Review Group at the Department of Justice (CCRG), conducted a preliminary assessment of the Conviction Review Application. On May 7, 2012, CCRG found that the said Application did not raise any new and significant evidence that would provide a reasonable basis to conclude that a miscarriage of justice likely occurred in his case. Therefore, it concluded that it would not proceed to the second stage of the conviction review process – the investigation.

[5] In August 2012, the Innocence Project wrote to CCRG claiming that a preliminary assessment would be incomplete in this case without making some effort to determine, given her poor recollection of the events, what the position of Tina Prevost (Tina) is with respect to Robert Winmill's claim that he is responsible for that murder. In particular, the Innocence Project requested CCRG to compel Tina to testify under oath and allow it to cross-examine her.

[6] This request was dismissed on October 18, 2012. On November 22, 2012, the Innocence Project asked CCRG to reconsider its decision. The request for reconsideration was denied on January 16, 2013.

[7] The Applicant seeks judicial review, under section 18(1) of the *Federal Courts Act*, RSC 1985, c F-7, of the Minister's decision not to proceed to the second stage of the conviction review process. He claims that the Minister breached the duty of fairness owed to him by failing to conduct any meaningful investigation into the Conviction Review Application and in particular, by failing to properly examine Tina.

[8] For the reasons that follow, the Applicant's judicial review application is dismissed.

II. Background

[9] This summary of the facts is offered to provide context to the discussion of the issues arising on this application for judicial review. To the extent it concerns what led to the Applicant's conviction and the appeal before the Ontario Court of Appeal, this summary has been taken from the judgement of the Court of Appeal.

A. The Conviction

(1) The Crown's Case

[10] The Crown's case was summarized as follows by the Ontario Court of Appeal. For ease of reference, the Court of Appeal referred to Robert Winmill, Tina Winmill and Mr. Cvetkovic as "Robert", "Tina", and "Chris" respectively, and to the victim, Brian Brady, as the "deceased":

> 5 Early in the morning of September 22, 1991, the deceased arrived at Robert and Tina's apartment. Robert, Tina, Chris and the appellant were all present in the apartment. Shortly after his arrival, the deceased began arguing with Robert about the value Robert had obtained on the sale of property that the two of them had stolen. The noise awakened the appellant and within a short time he became involved in the argument.
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> 6 Tempers quickly cooled and Robert and the deceased left to commit more break and enters. At dawn, they returned to the apartment with the proceeds of their night's work. The appellant, Robert, Chris and the deceased stayed up drinking the alcohol that they had stolen that night. Tina slept. At about 7:30 a.m. she was woken up and told that they were all leaving to go to a farm of a friend to deliver a stolen VCR. She showered and prepared to join the group on the trip to the farm. She said that while she was in the bathroom the appellant came into the bathroom and told her he was going to "do" Brian. I will refer to Tina's evidence about her encounter with the appellant in the bathroom in more detail shortly.
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> 7 Chris testified that before they left to go to the farm the appellant also told him that the appellant was going to kill the deceased. The appellant made similar comments to Robert. No one took the appellant's comments seriously at the time. Within a short time Robert, Tina, Chris, the deceased and the appellant left the apartment in Chris' car with the VCR loaded in the trunk. Robert drove. On the way to the farm he turned off the road and travelled about a half a mile along an unimproved road where he stopped the car. It was on that isolated stretch of road that the deceased was stabbed and killed.

> 8 Robert, Tina and Chris testified that after they turned onto the back road, the appellant asked Robert to stop the car so that he could urinate. When the car stopped, the deceased got out of the car. When the deceased finished urinating at the side of the road, the appellant stabbed him twice in the abdomen with Chris' knife. He then slit the deceased's throat.
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> 9 The evidence of Robert, Tina and Chris, all of whom testified that they saw the appellant stab and kill the deceased, was central to the Crown's case. The Crown also relied on what it claimed was an inculpatory statement made by the appellant following his arrest. According to the arresting officers, upon being told that he was being arrested for the murder of Brian Brady, the appellant stated, "At 9 o'clock yesterday morning, I was drunk and I couldn't even move." The Crown alleged that this statement proved that the appellant knew the time of the deceased's death, and it therefore contradicted the appellant's claim that he was asleep in the car when the deceased was killed, and was therefore unaware of the circumstances of the deceased's death.

(2) The Applicant's Defence

[11] The Applicant' defence was that he was sleeping in the back of the car when Mr. Brady was killed and that, in any event, he was physically incapable of committing the murder due to a broken pelvis he had suffered in a car accident occurring on July 1, 1991.

[12] The Applicant testified at trial that on Saturday September 21, 1991, he was at the farm of his friends Earl and Sheila Cyopick where he had moved temporarily, while recovering from his fractured pelvis. He said that he was in bed, trying to sleep**,** when he was awakened by Robert who suggested that he sleep at his and Tina's apartment that night instead. The idea was that he would also spend Sunday at the apartment and return to the Cyopick farm on Sunday night. The Applicant accepted the invitation.

[13] Once at Robert and Tina's apartment, the Applicant testified that he consumed two or three beers within a short time and then went to sleep on the couch in a more or less sitting

position as a result of his injuries. He said that Mr. Brady arrived at Robert and Tina's apartment while he was asleep and that he was awakened when Mr. Brady and Robert got into an argument about the fact Robert had sold property that they had stolen together for too little. The Applicant said he intervened in the argument, taking Robert's side. He also said that the tension went up a notch when Tina got involved in the discussion and Mr. Brady responded to her in harsh words. The situation eventually settled down.

[14] The Ontario Court of Appeal made the following account of the Applicant's evidence on what ensued from that point in the evening of September 21, 1991 up to the Monday morning (September 23) when he was arrested by the police:

> Robert and the deceased then left briefly to go to a store. The appellant said at his request they brought him two chocolate bars. When they returned those present shared some marijuana. Robert and the deceased then asked Chris if they could use his car. They then left in Chris' car to commit some break and enters in the Crystal Beach area. It was dawn when they returned. (…).
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> 15 Among the goods stolen by Robert and the deceased was some liquor. The appellant took advantage of the new liquor supply and drank southern comfort, rye, vodka, cognac and beer. The others, apart from Tina, joined in. During this part of the morning, Robert, the deceased and Chris in various ways displayed their personal knives. Chris had to retrieve his knife from the car in order to participate in this display.
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> 16 The appellant stated that the group, other than Tina, who was sleeping, decided to go to the Cyopick farm to deliver a recently stolen VCR to Darlene Drake, who lived at the farm. (…) By the time the appellant left the apartment to go to the Cyopick farm, he said that he was "pretty wobbly" due to the alcohol he had consumed.
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> 17 When it was decided to leave the apartment and go to the Cyopick farm, Robert wakened Tina so that she could get ready for the trip. When Tina was in the bathroom having a shower, the appellant entered the bathroom to use the facilities and to finish cleansing his abdominal wounds where pins had been inserted when he was provided with a pelvic fixator following his car accident. The appellant recalled being in the bathroom using the toilet when Tina was in the shower; however, he denied telling

Tina that he was going to kill the deceased. He testified that while he and Tina were both in the bathroom there was no conversation.

18 The appellant said that he "crutched" out to the car and sat in the right front seat beside Robert, the driver. He almost immediately fell asleep. He awakened to the sound of a dog barking at the side of the car. He immediately recognized the Cyopicks' Rhodesian Ridgeback and understandably concluded he was at the Cyopick farm, which was about a 30-minute drive from the apartment. Before the appellant got out of the car, the others decided to leave. At this time, the deceased was no longer present. Unknown to the appellant, who said he slept through the entire trip from the apartment to the farm, the deceased had been killed on the way from the apartment to the Cyopick farm. The appellant recalled that the deceased was in the car when the group left the apartment. He did not notice that he was not in the car when they arrived at the Cyopick farm.

19 As they left the Cyopick farm, Robert wakened the appellant and asked him about a bootlegger. He wanted to find a bootlegger to whom he might sell some of the stolen liquor. At the appellant's direction, they stopped at the house of a local retired bootlegger. The appellant went into the house and was given a drink of rye. The others remained in the car. The appellant testified that he did not try to sell the stolen liquor to this bootlegger because he did not want his friend, the bootlegger, to be involved with stolen liquor. When the occupants of the car became impatient, the appellant returned to the car.

20 Once the appellant was back in the car, he said, he almost immediately fell asleep again. He next woke up back at the Cyopick farm where he left the car to urinate. He recalled that Darlene Drake helped him into his pyjamas and he said that he then went to sleep. He slept until about 9:00 p.m. The appellant did not recall being at the apartment or going from the apartment back to the farm.

21 The next morning the police arrived and arrested the appellant for Brady's murder. According to the appellant, in an interview shortly after his arrest he asked the arresting officer, Detective Bruno, when the murder was supposed to have taken place, and was told, "early yesterday morning." This was the appellant's explanation for having said to the police officers, "At 9 o'clock yesterday morning, I was drunk and I couldn't even move."

[15] The Applicant testified that he was unable to walk without assistance of, first a walker, and then crutches, because of his fractured pelvis. He admitted telling Mr. Brady the night before the murder that if he didn't keep quiet, "[he] 'll stick [his] crutch down his throat", but denied the evidence of Robert, Tina and Chris that he had killed him or even threatened to kill him before leaving the apartment to go to the Cyopick farm.

[16] It was also the Applicants' defence that he did not know what happened during the trip when Mr. Brady was murdered; that is during the period extending from the time he, Robert, Tina, Chris and Mr. Brady left the apartment to the time when they arrived at the Cyopick farm, a drive that would normally take 30 minutes. He further argued that except recalling getting out of the car at the bootleggers and going into the bootlegger's house, he had no recollection of events from the time the group, minus Mr. Brady, left the Cyopick farm until the group returned to the Cyopick farm later in the day.

(3) The Verdict

[17] It was accepted at trial that the three main Crown witnesses, Robert Winmill, Tina and Mr. Cvetkovic, were witnesses of unsavoury character although, on the surface, Mr. Cvetkovic appeared less untrustworthy than the other two as he had no criminal record, was steadily employed, was a relatively recent acquaintance of the Winmills, barely knew the victim and had no real motive to kill him or to help Robert or Tina.

[18] As to the Applicant's mobility at the time the crime was committed, the evidence was conflicting; the three main Crown witnesses testifying that they had seen the Applicant walk

without the assistance of crutches, while others, including the Cyopicks, saying that he was walking only with crutches.

[19] An orthopaedic surgeon who reviewed the Applicant's hospital medical records, testified that patients with a grade two pelvic fracture, as the Applicant's, should be ambulatory in 8 to 12 weeks. He said that the Applicant could have been walking without the assistance of crutches or a walker within 8 weeks following the surgery and opined that his walking limitations were not structural in the sense that he would have been capable of walking if he could withstand the attendant discomfort.

[20] The jury found the Applicant guilty of first degree murder.

B. *The Appeal to the Ontario Court of Appeal*

(1) The Grounds of Appeal

[21] The Applicant advanced three grounds of appeal. He submitted that the trial judge erred:

a) in failing to adequately caution the jury with respect to the evidence of Robert Winmill, Tina and Mr. Cvetkovic and in failing to direct the jury that the evidence of any one of these untrustworthy witnesses could not provide support for the evidence of either of the other untrustworthy witnesses;

b) in failing to properly alert the jury to the numerous inconsistencies in the version of events advanced by these three witnesses and the objectively demonstrable facts; and

c) in admitting evidence that the Applicant had previously worked as a butcher in a slaughterhouse.

[22] The Court of Appeal rejected all three grounds of appeal. It found that the trial judge had "bluntly and unequivocally told the jury that Robert, Tina and Chris were unsavoury witnesses and that the Crown's case depended on the jury accepting their evidence". It further found that the trial judge had "thoroughly, and in a balanced way, reviewed the evidence" and that his charge was both fair and sufficient. It concluded that having had the "enormous advantage of seeing and hearing all of the witnesses, particularly the three witnesses aptly characterized as unsavoury", it was opened to the jury to accept the evidence of these three witnesses to the exclusion of a reasonable doubt.

(2) The Request to Admit Fresh Evidence

[23] The Court of Appeal also dealt with a motion from the Applicant for an order admitting fresh evidence. That evidence consisted of an affidavit of Beverly Jane Bacon sworn on April 30, 1997, and of her cross-examination on the affidavit. Ms. Bacon had not testified at trial.

[24] Ms. Bacon's proposed fresh evidence concerned statements allegedly made to her by Robert Windmill in September 1991, after the Applicant was arrested and charged with Brian Brady's murder. In her affidavit, she stated that Robert telephoned her on three occasions. On the first two occasions, which occurred the same evening, she stated that Robert called to tell her that the Applicant had been arrested and charged with that murder and to ask her to contact the police to "get him out" because the Applicant "didn't do it." Robert also told her, according to the affidavit, that Mr. Brady had had an affair with Tina. Ms. Bacon stated that on the third occasion, which occurred the next day, Robert told her about the murder. Ms. Bacon's affidavit sets out this part of the telephone conversation as follows:

> He [Robert] stated that when Brian got out of the car to urinate, Chris held Brian while Tina stabbed him. Robert stated that he had to finish the job and had removed the body from the road. Robert told me that he had been wearing his father's jacket and shoes. He told me that he had hidden a knife and clothes in a dumpster.
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> Robert further stated to me that Chris had deposited the knife in a 45 gallon drum in the garage where he was employed. Robert stated to me that he, Chris and Tina had gathered the clothes and thrown them in a dumpster located one or two blocks from Robert's apartment.

[25] Ms. Bacon stated that she then asked Robert why he had not provided this information to the police and that Robert responded that Tina had already contacted the police and that he thought the police would be arriving at his apartment shortly. Ms. Bacon assumed at the time, according to her affidavit, that Robert would tell the police that Tina had stabbed Mr. Brady.

[26] As a result of these telephone calls, Ms. Bacon stated having contacted the police as well as the Applicant's sister, Jacklynn Lee, who agreed to find a lawyer for the Applicant. She further affirmed that the day following the third telephone call, she received the visit of Detectives Bruno and Matthews, who were in charge of the investigation into Mr. Brady's murder, and told them what Robert had said to her about the murder. Ms. Bacon added that from September 1991 to the beginning of the Applicant's trial in October 1992, she received regular phone calls from Robert, who, according to her, maintained that the Applicant had not committed the murder.

[27] In response to Ms. Bacon's affidavit, the Crown tendered affidavits from these two detectives. According to the evidence, both detectives denied having been told by Ms. Bacon that Robert had said that Tina had stabbed Mr. Brady, as described in Ms. Bacon's affidavit.

They further denied that she had mentioned anything about the disposal of clothing. Both police officers stated that the only reference to the disposal of anything was a reference to the knife that had been used to stab the victim. Detective Matthews, who took notes during the interview, stated in his affidavit that the majority of the 30-minute interview was spent talking about Robert's criminal activities in a particular surrounding cottage area.

[28] Applying the principles guiding the admission of fresh evidence set out in the Supreme Court of Canada decision in *R v Palmer* (1979), 50 C.C.C. (2d) 193 (SCC), the Court of Appeal concluded that when exposed to the required scrutiny, Ms. Bacon's proposed fresh evidence was not reasonably capable of belief and if admitted, would not have likely affected the verdict. In particular, it found that had Ms. Bacon told the two detectives about Robert saying that Tina had stabbed the deceased, both Mr. Bruno and Matthews would have recalled that significant part of the interview, made a note of it, and done something about it. It further found it difficult to believe that the Applicant's sister, Ms. Lee, who had retained counsel for her brother and who was called as a defence witness, would not have disclosed the crucial revelations about the murder to the Applicant's counsel at the time.

[29] The Court of Appeal noted that Robert Winmill had made a number of prior inconsistent statements about the murder. It wrote:

> 91 Moreover, as I have said, Robert made a number of prior inconsistent statements about the murder. The last of them was his admission to a defence investigator during the trial that Chris killed the deceased. His alleged statements to Ms... Bacon that Tina killed the deceased would have constituted one more entry on a long list of Robert's prior inconsistent statements, assuming that, if asked, Robert would have admitted telling Ms... Bacon that Tina stabbed the deceased

[30] The Applicant's motion to admit fresh evidence was dismissed.

C. *The Conviction Review Application*

[31] As I indicated previously, the Conviction Review Application was filed with the Minister, through CCRG, on November 2, 2011. In support of his claim that a miscarriage of justice had occurred, the Applicant submitted the following materials:

a) an affidavit from Robert Winmill, dated September 20, 2011, in which he admits to killing Mr. Brady and framing the Applicant;

b) an affidavit from a private investigator, Mr. Edward Kaj, dated September 2010, which states that Robert Winmill confessed to Mr. Brady's murder and provided a written statement to that effect;

c) the written statement, dated September 7, 2010, provided to Mr. Kaj by Robert Winmill;

d) a letter from Robert Winmill to the Applicant, dated July 27, 2010, in which Robert writes that he will finally tell the truth;

e) a DVD of a videotaped interview of Robert Winmill conducted by two RCMP officers on August 24, 2010, and the transcript of the interview;

f) an affidavit of his brother, Thomas Winmill Jr., dated October 10, 2011, in which he states having heard Robert confess to the murder of Mr. Brady;

g) an affidavit of Ms. Ginette Dugas, Robert Winmill's childhood friend, dated October 25, 2011, in which she states that Robert Winmill confessed that he killed Mr. Brady in order to get back at the Applicant; and

h) an affidavit from Ms. Bacon, above, dated September 12, 2011, in which she states that Robert Winmill confessed to her that he, Tina Winmill and Mr. Cvetkovic killed Mr. Brady.

[32] In its letter dated May 7, 2012, informing the Applicant that the Conviction Review Application would not proceed to the investigation stage of the conviction review process, CCRG stated that the issue to be determined was whether the Conviction Review Application raised "new matters of significance" that could have impacted on the verdict had they been known to the judge and the jury at the time of the Applicant's trial. In this letter, CCRG defined the term "new matters of significance" as follows:

> New matters of significance can include any new information or evidence that was not previously considered by the courts or by the Minister on a previous application. Information will be considered 'new' if it was not considered by the court during your trial or if you became aware of it only after the court proceedings were over.
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> Information will be considered 'significant' if it is relevant, reasonably capable of belief, and could have affected the verdict had t been presented at trial.

[33] CCRG also explained that in determining whether evidence is new and significant, it was guided by the principles used by the courts in assessing fresh evidence, referring in particular to the criteria set out in *Palmer*, above, as well as to the approach to the admission of recantations as fresh evidence outlined by the Ontario Court of Appeal in *Babinski v The Queen* (1999), 44 O.R. (3d) 695, 135 C.C.C. (3d) 1.

(1) Robert's affidavit, letter to the Applicant and written statement to Mr. Kaj

[34] CCRG first reviewed Robert's affidavit, his letter to the Applicant and written statement to Mr. Kaj, as well as Mr. Kaj's affidavit. According to these materials, Robert's motivation for coming forth at this point in time was because he no longer deserved the sacrifice the Applicant had made for him since he had, himself, ended up in prison. As to the alleged motive for killing

Mr. Brady, it was that he had become angry with the fact Mr. Brady had disrespected the Applicant during the argument occurring the night before the murder.

[35] CCRG concluded that this evidence of Robert Winmill's recantation was not reasonably capable of belief as:

a) He had a long history of making inconsistent statements and lying;

b) His current incarceration for unrelated convictions for which the warrant expiry is August 2021 as well as the charges for accessory after the fact in relation to two murders dating back to 2004 he was facing at the time of his recantation and which could potentially result in a lengthier incarceration, were factors that could not be ignored in determining the credibility of his recent confession;

c) The evidence from the other two Crown eyewitnesses, Tina and Mr. Cvetkovic, which implicated the Applicant, had not been recanted in one case (Mr. Cvetkovic) and was reiterated in the other (Tina); and

d) His alleged motive for the murder, which was to avenge some minor disrespect directed at the Applicant, was very difficult to reconcile with him blaming the murder on the Applicant within the hours that followed the murder and testifying falsely against him at trial.

(2) The remaining supporting materials

[36] CCRG then reviewed the remaining supporting materials to see if it could independently corroborate Robert's evidence that he had committed the murder.

[37] It first examined the August 2010 RCMP interview. It noted that this interview was held regarding Robert Winmill's involvement in the two murders for which he was charged as being

an accessory after the fact. During the interview, Robert informed the two RCMP officers conducting the interview that he was in the process of taking responsibility for a murder that happened in Ontario.

[38] CCRG found that Robert's admissions during the interview "closely mirror what was said in his affidavit and written statement to Mr. Kaj" and that, although the interview corroborated the fact he had made similar admissions, it could not be considered as independent corroboration that he had in fact committed the murder.

[39] It then reviewed the affidavit of Robert Winmill's brother, Thomas Winmill Jr. Again, CCRG found that this affidavit did corroborate that Robert had stated he committed the murder but did not independently corroborate Robert having committed the murder. This affidavit spoke of Robert's violent character and desire, since adolescence, to get revenge on the Applicant for leaving his mother. Thomas Jr. also stated in the affidavit that he had heard Robert, three days after Mr. Brady's murder, tell the police on the phone that he was the killer. However, CCRG noted that at the time of the murder's investigation and trial, Thomas Jr. never raised this version of events with the police or with the Applicant's counsel.

[40] A similar finding was made regarding the affidavit of Robert Winmill's childhood friend, Ginette Dugas. In her affidavit, Ms. Dugas recounted a conversation she had with Robert just a couple of days following Mr. Brady's murder. She said that Robert talked to her about making sure the Applicant would spend his life in prison because of his abusive behaviour towards his family by killing Mr. Brady as a mean to get back at the Applicant. She further stated that she

then contacted the police to reveal what Robert had just said to her but never heard back from them. However, CCRG noted that Ms. Dugas did nothing further after receiving no response from the police despite the ongoing prosecution against the Applicant and it found it difficult to believe that she would have remained silent if she had reasons to believe that it was Robert, and not the Applicant, who had killed Mr. Brady. CCRG further found that the version of events described in Ms. Dugas' affidavit as to what had happened at the crime scene was inconsistent with the evidence at trial and that her description of Robert's motive for killing Mr. Brady was completely different from the motive put forward by Robert in his own affidavit, which is that he killed Mr. Brady to avenge the Applicant for the disrespect Mr. Brady had shown to him the night before the murder.

[41] As for Ms. Bacon's affidavit, CCRG ruled that besides some discrepancies on peripheral matters, it closely mirrored her earlier affidavit of April 30, 1997 that the Applicant had unsuccessfully attempted to file fresh evidence before the Ontario Court of Appeal. As a result, it gave no consideration to this affidavit as it could not be considered to be "new" evidence for the purposes of the Conviction Review Application. CCRG further concluded that this most recent affidavit from Ms. Bacon was, again, only corroboration of Robert Winmill's confession, not a corroboration of him having committed the murder.

[42] Lastly, CCRG noted that of the other persons present at the scene of the crime – that is the Applicant, Tina and Mr. Cvetkovic - none ever provided evidence corroborating Robert's admissions: both Tina and Mr. Cvetkovic, who is now deceased, testified against the Applicant at trial and have not recanted their testimony. As for the Applicant himself, he does not offer any

corroboration of Robert's latest version of events as he testified at trial that he was asleep in the car during the trip from the apartment to the Cyopick farm so that he could not recall what he was doing when the car was pulled over and Mr. Brady was killed.

(3) Tina's interview with the Innocence Project

[43] CCRG dealt specifically with the Innocence Project's concern about Tina's recollection of events following a meeting the Project had with her in June 2011. Although Tina then confirmed her testimony at trial that the Applicant had stabbed and killed Mr. Brady, the Innocence Project found that her recollection of events was poor and not consistent with her testimony at trial. It also learned that Tina had been diagnosed with post-traumatic stress disorder (PTSD) as a result of these events and of her continuing fear of Robert.

[44] As a result, attempts were made to have Tina see a clinical psychologist with experience working with the police in using hypnosis to aid in memory recollection. A first session was held but had to be postponed as Tina became ill. A second session was scheduled for the week of October 31, 2011, but had to be cancelled as Tina was arrested the week before - and detained - on outstanding warrants.

[45] The Innocence Project suggested to CCRG that the most effective way to access the truth of Robert's claim that he is the one who murdered Mr. Brady was to continue working with Tina to assist her with the recovery of her fragmented recollection of the events surrounding the murder. CCRG dismissed that suggestion given the presumptive inadmissibility of evidence adduced through hypnosis.

(4) The May 7, 2012 preliminary assessment's overall conclusion

[46] Overall, CCRG found that the Applicant's Conviction Review Application did not raise any new and significant evidence that would provide a reasonable basis to conclude that a miscarriage of justice likely occurred in the Applicant's case as this evidence was neither new, nor significant, was clouded with inconsistencies and was not reasonably capable of belief.

[47] In particular, CCRG noted that the possibility that Robert had perpetrated the crime was presented to the jury at the time of the trial, since the defence took the position that Robert owed Mr. Brady money, and therefore had a motive to kill him. It also noted in its conclusion that evidence that Robert had told a police officer in the next few days following the murder that he was responsible for the murder, was presented to the jury.

[48] CCRG concluded as follows:

> Without stronger corroborative evidence, Robert's admission is not reasonably capable of belief. He has communicated inconsistent accounts of the murder over time to various people, including the police, the court, private investigator Kaj, Ms. Lee, Ms. Dugas and Ms.. Bacon, and there is nothing to substantiate his current account. He is serving a lengthy penitentiary sentence and is facing a considerable consecutive sentence for his outstanding charges should he be convicted. This may be a motive as to why he is now prepared to accept responsibility for the act that the Applicant was convicted of.

D. ***The Follow-up Correspondence to CCRG's Preliminary Assessment regarding Tina's recollection of events***

[49] In August 2012, the Innocence Project wrote to the CCRG claiming that any preliminary assessment of the Conviction Review Application would be incomplete without making some effort to determine what the position of Tina Winmill was with respect to Robert's claim that he is responsible for the murder of Mr. Brady. In particular, the Innocence Project requested the Minister to compel Tina to testify under oath and to permit it to cross-examine her on her relevant recollections.

[50] In letters dated September 4 and October 18, 2012, CCRG dismissed that request on the ground that the position of Tina was quite clear, based on the materials submitted with the Conviction Review Application, that the Applicant was the murderer. It added that in a telephone conversation she had with the Head of CCRG, Mr. Kerry Scullion, on August 28, 2012, Tina was categorical that her trial evidence was accurate and truthful and that there was never any intention on her part to change her evidence either because she was mistaken, untruthful or unclear as to what happened at the scene of the crime.

[51] On November 22, 2012, the Innocence Project, stressing the inadequacy of the "informal phone-call investigation" conducted by Mr. Scullion, sought CCRG to reconsider its decision "to forgo any formal and effective investigation of the evidence provided by Ms. Prevost [Tina]".

[52] On January 16, 2013, CCRG dismissed the Innocence Project's request for reconsideration on the basis that it was unclear how Tina's recollection problems related to her

PTSD could assist the Applicant's Conviction Review Application. In this respect, it reiterated that :

a) It could well be that Tina is now having recollection problems concerning an event that took place a long time ago;

b) There was no evidence, however, that she was having recollection problems as to who committed the murder when she testified shortly after the event;

c) The information submitted in support of the Applicant's Conviction Review Application substantially confirmed her evidence at trial that it was the Applicant who killed Mr. Brady; and

d) Tina maintained that the Applicant committed the murder in her August 28, 2012 telephone conversation with Mr. Scullion and confirmed that her evidence at trial was truthful.

[53] CCRG concluded that there appeared to be little, if any, reason to contact Tina further and reiterated that it was open to the Applicant to submit additional information for review within the time frame provided in the preliminary assessment letter of May 7, 2012.

[54] It is worth mentioning at this stage that on May 31, 2012, a staff physician for the Peterborough and Lindsay sites of the Ontario Addiction Treatment Centres, Dr. Alan Konyer, who had been treating Tina since 2006 for substance dependence and chronic bilateral sacroileitis with chronic pain syndrome, informed the Innocence Project that Tina had felt unduly pressured and stressed by the plans for another interview under hypnosis. Dr. Konyer advised that Tina had "experienced significant prolonged decompensation after a previous similar examination" and that in his professional opinion, she "would put herself at high risk of serious prolonged relapse in her mental health and substance use recovery by submitting to this planned

procedure". He informed the Innocence Project that he had advised Tina not to agree to this examination for health reasons.

III. Issues

[55] The Applicant claims that the only issue in the present application for judicial review is whether CCRG breached the duty of fairness by failing to conduct any meaningful investigation into the Conviction Review Application. He contends in that regard that CCRG denied him procedural fairness by failing to exercise its statutory powers to properly investigate the fresh evidence submitted in support of the said Application.

[56] Although he accepts that the substance of CCRG's preliminary assessment is subject to judicial review on a reasonableness standard, the Applicant submits that when it comes to the procedures that CCRG follows in arriving at a decision, the standard of correctness applies as this is a pure question of law.

[57] The Minister contends that the issue, as framed by the Applicant, is too broad as the only decision under review in the present proceedings is the January 16, 2013 decision dismissing the Innocence Project's request for reconsideration of CCRG's refusal to examine Tina under oath and permit that she be cross-examined by the Innocence Project. It says that procedural fairness was met in this regard as the process established under the Code and the Regulations for reviewing applications for ministerial review is not akin to a criminal trial, does not require CCRG to examine witnesses under oath and does not provide an applicant with the right to cross-examine witnesses.

IV. Analysis

A. *The Ministerial Conviction Review Process*

[58] The Minister's authority to review criminal convictions on grounds of miscarriage of justice is codified in Part XXI.I of the *Criminal Code* (the Code). Where the Minister is satisfied, pursuant to such review, that there is "a reasonable basis to conclude that a miscarriage of justice likely occurred", he may either order a new trial before any court that the Minister thinks proper or refer the matter to the court of appeal for hearing and determination by that court as if it were an appeal by the convicted person (subsection 693.3(3)(a)). Otherwise, the Minister dismisses the application (subsection 693.3(3)(b)).

[59] According to subsection 696.4 of the Code, the Minister, in making such a decision, "shall take into account all matters that the Minister considers relevant" but these must include :

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 a ministerial review application in relation to the same conviction;

b) Whether the information presented in connection with the application is relevant and reliable; and

c) The fact that such a conviction review application is not intended to serve as a further appeal and that any remedy available on such an application is an extraordinary remedy.

[60] The form, content and accompanying materials of conviction review applications are prescribed by the Regulations, so is the applications' review process (subsections 691.1(2) and 692.2(1)).

[61] According to the Regulations, the Minister must first conduct a preliminary assessment of the conviction review application. Following the preliminary assessment, if the Minister determines that there may be a reasonable basis to conclude that a miscarriage of justice likely occurred, then the Minister shall conduct an investigation in respect of the application (subsection 4(1)(a)). When he conducts such investigation, subsection 693.2(2) of the Code confers on the Minister some of the powers of a commissioner under Part I of the *Inquiries Act*, 1985, c I-11.

[62] If, on the other hand, the Minister determines that there is no basis for concluding that a miscarriage of justice likely occurred, the Minister must notify the applicant that no investigation will be conducted (subsection 4(2)). The applicant then has one year in which to provide further information in support of his application (subsection 4(3)). If further information is so provided, then the preliminary assessment is continued in light of the new information. If further information is provided by the applicant, but after that period of one year, then the Minister must conduct a new preliminary assessment (subsection 4(4)).

[63] In instances where the Minister conducts an investigation, the Minister shall prepare an investigation report and provide a copy to the applicant. Here again, the applicant is entitled to provide further information in support of his application within one year of the date the report is sent (subsection 5(1)). Where the applicant fails to provide further information within that period of one year or indicates in writing that no further information will be provided, the Minister may then proceed to make a decision under subsection 693.3(3) of the Code.

[64] The power vested in the Minister under Part XXI.1 of the Code has been described so far by this Court as "one of exception and prerogative" (*Timm v Canada (Attorney General)*, 2014 FC 587, at para 9; *Bilodeau v Canada (Minister of Justice)*, 2011 CF 886, 394 FTR 235, at para 69 [*Bilodeau (FC)*]; *Ross v Canada (Minister of Justice and Attorney General)*, 2014 FC 338, at para 32 [*Ross*]; *Thatcher v Canada (Attorney General)*, 120 FTR 116, [1997] 1 FC 289, at para 8). A conviction review application is not an appeal as of right on the merits of the alleged wrongful conviction but rather a request for an extraordinary and highly discretionary remedy that derives from the Royal Prerogative of Mercy (*Ross*, above at para 32).

[65] In *Bilodeau v Canada (Ministre de la Justice)*, 2009 QCCA 746, [2009] JQ no 3472 (QL)(Leave to appeal to the Supreme Court of Canada dismissed on October 8, 2009 - no 33216 [*Bilodeau (QCCA)]*), the Quebec Court of Appeal made a thorough analysis of the Minister's power under section 696.1 of the Code. In that case, Mr. Bilodeau had challenged before the Quebec Superior Court the Minister's decision dismissing his conviction review application. The issue before the Court of Appeal was whether the Quebec Superior Court had jurisdiction to entertain Mr. Bilodeau's proceedings, given the Federal Court's exclusive authority to review decisions of "federal boards", as defined in the *Federal Courts Act*. Mr. Bilodeau's main argument was that the provincial superior courts were empowered to judicially review the Minister's decisions under section 696.1 because those decisions raised criminal law issues over which those courts had jurisdiction.

[66] The Quebec Court of Appeal dismissed that argument. It held that the scope of the Minister's authority to review convictions on grounds of miscarriage of justice fell "outside the

traditional sphere of criminal law" as "it begins after legal remedies are exhausted". It further held that the 2002 amendments which brought into force the provisions of Part XXI.1 of the Code had not altered, in its essence, the nature of that authority which remains today, as it has been since it was codified in 1892, a discretionary power historically considered as one of the forms of exercise of the Royal Prerogative of Mercy (*Bilodeau (QCCA)*, at para 25).

[67] In *Ross*, above, Justice Richard G. Mosley held that subsection 696.4 of the Code, by directing that the decision on a conviction review application shall be made taking into account "all matters that the Minister considers relevant", had preserved the Minister's discretion in a broad sense. Although he found that by specifying certain factors that must be considered relevant, subsection 696.4 had circumscribed the Minister's discretion, he noted that those factors mirrored the guidelines adopted in 1994 to guide the Minister in the exercise of his discretion under what was then section 690 of the Code. He noted that these guidelines "reflected the 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", and that they "clearly influenced" the amendments that led, in 2002, to the enactment of Part XXI.1 (*Ross*, at para 33 to 36).

B. *Which Decision is Before the Court?*

[68] As indicated previously, the Minister's view is that the only decision under review in these proceedings is CCRG's decision of January 16, 2013, dismissing the Innocence Project's request for reconsideration of the refusal to compel Tina to be examined and cross-examined under oath. The Minister claims that CCRG's decision, dated May 7, 2012, not to conduct an

investigation after completion of the preliminary assessment of the Applicant's Conviction Review Application is not reviewable as it was not challenged by the Applicant and as the motion for leave to commence the present proceedings sought leave to challenge the January 16, 2013 decision, not the May 7, 2012, and was granted accordingly by the Court.

[69] The Minister raises a valid concern. The Applicant's Notice of motion, which is dated March 14, 2013, was for an order "allowing the Applicant to commence an application for judicial review of the decision of the Minister of Justice dated January 16, 2013, and extending the time to file a Notice of Application". It is also clear from the grounds of the motion that the focus was on the January 16, 2013 decision.

[70] In his written submissions, the Minister explains that the Applicant's motion was not opposed based on the explanation given for the delay coupled with the fact the 30-day limitation period to challenge the January 16, 2013 decision had expired merely a month before the motion was brought. The Applicant's motion was granted by Justice Roger T. Hughes on March 27, 2013. Justice Hughes' order made it clear that the leave order sought concerned the January 16, 2013 decision.

[71] The Minister claims that he would have opposed the Applicant's motion had the Applicant made it clear that he intended to challenge both the January 16, 2013 decision confirming that Tina would not be compelled to testify under oath and be cross-examined and the May 7, 2012 decision not to conduct an investigation following CCRG's preliminary assessment.

[72] In light of the above, I am satisfied that the Applicant sought – and was granted - leave to judicially review the January 16, 2013 decision, and no other, and that, as a result, this decision is the only decision under review in these proceedings.

C. ***No duty to Compel Tina to Testify under Oath and to be Cross-Examined***

[73] The Applicant claims that the statutory reforms of 2002 introduced into the conviction review process a formalized process supported by full investigative powers which, on a proper assessment of the factors set out in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at para 21 (*Baker*)), calls for a high duty of fairness.

[74] This means, according to the Applicant, that the Minister is under a duty to conduct a "neutral and thorough investigation" before deciding a conviction review application and that, as a general rule, this duty will be breached where, quoting from *Slattery v Canada (Canada (Human Rights Commission)*, [1994] 2 FC 574, 73 FTR 161, a case decided under the Canadian Human Rights legislation, "unreasonable omissions are made, for example where an investigator failed to investigate obviously crucial evidence".

[75] In the context of the present case, the Applicant argues that the duty to conduct a neutral and thorough investigation required CCRG to obtain evidence from Tina and that in failing to do so, CCRG failed to investigate "obviously crucial evidence" and breached, therefore, the duty of procedural fairness it owed to him.

[76] The Applicant's position is premised on the view that the conviction review process is firmly rooted in the criminal process and the Code and that the assessment of whether a miscarriage of justice has occurred is, as a result, a decision more closely associated with the judicial functions of trial and appellate courts than with administrative decision-making processes. It assumes in this respect that by conferring on the Minister some of the powers of a commissioner under the *Inquiries Act*, by circumscribing his discretion through subsection 696.4 and by granting participatory rights to applicants, the 2002 reform has altered the nature of the power exercised by the Minister.

[77] However, as we have seen, the case law suggests otherwise. Despite this reform, and although the conviction review process remains the only mechanism by which an applicant who has exhausted all appeals can challenge a wrongful conviction, the power vested in the Minister under Part XXI.1 of the Code is still "one of exception and prerogative" and still falls outside the traditional sphere of criminal law. A conviction review application remains a request for an extraordinary and highly discretionary remedy that derives from the Royal Prerogative of Mercy (*Timm*, above at para 9; *Bilodeau (FC)*, above at para 69 and 125; *Ross*, above at para 32). In other words, the essence of the Minister's authority under Part XXI.1 of the Code has not been altered by the 2002 amendments (*Bilodeau (QCCA)*, above, at para 25).

[78] I believe CCRG properly characterized the conviction review process in its letters of October 18, 2012 and January 16, 2013 to the Innocence Project, when it wrote that:

a) An application for ministerial review under section 696.1 of the Code is a post-conviction non adversarial process and is not conducted as if a new trial was to take place;

b) Practices and procedures, including pre-trial disclosure, which are more commonly associated with a criminal trial itself are not applied in the conviction review process;

c) This process is not a trial where the presumption of innocence applies and where witnesses are cross-examined by counsel representing an applicant and it is not a process where an applicant need only raise a reasonable doubt as to the correctness of his or her conviction;

d) The role of the Minister under that process is not to substitute his opinion or views for that of the trier of fact, including on matters of credibility, or lack thereof, of a witness at trial, unless new matters of significance, which are to be reviewed in conjunction with all the evidence adduced at trial, dictate otherwise.

[79] Therefore, I cannot agree with the Applicant that the power vested in the Minister is "closely associated with the judicial functions of trial or appellate courts" and that, as a result, the content of the duty of fairness owed by the Minister in exercising that power is at "the high end of the spectrum".

[80] In *Bilodeau (FC)*, above, Justice Johanne Gauthier, as she was then, reminded that the right provided for under Part XXI.1 of the Code has yet to be recognized as a fundamental right engaging the protection of the *Canadian Charter of Rights and Freedoms*. She also indicated, and I agree with her, that the same kind of procedural advantages as those before criminal or civil courts could not be imposed on the exercise of the royal prerogative (*Bilodeau (FC)*, at para 74 to 79).

[81] After having conducted an analysis of the factors set out in *Baker*, above, Justice Gauthier held that the duty of fairness owed by the Minister to Mr. Bilodeau included ensuring that a neutral and thorough investigation be conducted. However, in that case, the Minister had

already conducted a preliminary assessment and had proceeded to the investigation stage of the conviction review process after having determined, in accordance with section 4(1)(a) of the Regulations, "that there may be a reasonable basis to conclude that a miscarriage of justice likely occurred".

[82] In my view, at the preliminary assessment stage of the wrongful conviction review process, the duty of fairness owed by the Minister is closer to that established in *Thatcher*, above, where Justice Marshall Rothstein, as he was then, held that the Minister was required to act in good faith and conduct a meaningful review (*Thatcher* at para 13).

[83] In light of these principles, I find that CCRG was under no duty to compel Tina to testify under oath and allow the Innocence Project to cross-examine her on her alleged poor recollection of events. Furthermore**,** there is no evidence on record that representations were ever made to the Applicant that such a course of action would be carried out, either before or after the submission of the Conviction Review Application, so as to engage the legitimate expectation factor set out in *Baker*.

[84] Although the Minister now does have some of the powers of a commissioner under the *Inquiries Act*, the wording of section 696.2 of the Code suggests that these powers are only available to the Minister when he conducts an "investigation in relation to an application under this Part". The word "investigation" is not defined in Part XXI.1 of the Code. However, it is well recognized that regulations can assist in interpreting a legislative provision especially where the statute and regulations are "closely meshed" (*Monsanto Canada Inc. v Ontario*

(Superintendent of Financial Services), 2004 SCC 54, [2004] 3 SCR 152, at para 35; *R. v Campbell*, [1999] 1 SCR 565, at para. 26; *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 282). Here, according to section 696.2(1) of the Code, the Minister shall review a conviction review application "in accordance with the regulations". When section 696.2 is read in conjunction with the Regulations, the word "investigation" clearly refers to the second stage of the review process where, as I have just indicated, the Minister has already formed the view that there may be a reasonable basis to conclude that a miscarriage of justice likely occurred.

[85] But even then, Justice Gauthier held in *Bilodeau (FC)*, above, that these powers were conferred on the Minister so as to provide him with tools to conduct a proper investigation, not to oblige him to use them in every case (*Bilodeau (FC)*, at para 83). She further held, in dismissing Mr. Bilodeau's contention, that the Minister's agent in charge of the investigation ought to have compelled some of the trial's witnesses to testify under oath, that it was up to the Minister or his agent to decide whether or not they need to use all of the powers conferred upon them by the Code (*Bilodeau (FC)*, at para 97).

[86] Therefore, even if the Minister was entitled to use his powers under the *Inquiries Act* at the preliminary stage of the conviction review process, he would still have a significant measure of discretion in deciding whether or not to use these powers to compel a witness to testify under oath.

[87] Here, as the Minister points out, the Applicant submitted no evidence that Tina was having any recollection problems as to who committed the murder when she testified shortly after the events or that she had given false evidence at trial. Furthermore, the information the Applicant submitted in support of his Conviction Review Application substantially confirmed Tina's evidence at trial that he had committed the murder. As I indicated previously, the Innocence Project did examine Tina in June 2011 and she did confirm her testimony at trial that the Applicant had stabbed and killed Mr. Brady.

[88] In such context, I agree with the Minister that there was no necessity for CCRG to speak to Tina, much less to examine her under oath in order to determine whether she was standing by her trial testimony as the materials in support of the Conviction Review Application was clearly indicative that she was.

[89] The Innocence Project has been urging CCRG to examine Tina under oath because although she maintained that the Applicant was responsible for the murder of Mr. Brady, her account of events was inconsistent with her testimony at trail. However, no particulars with respect to these alleged inconsistencies were provided in the Conviction Review Application materials, nor did the Applicant explain how these inconsistencies may have been significant in the overall context of her testimony at trial.

[90] The onus was on the Applicant to show that he met the necessary conditions for the exercise of the Minister's discretion under section 696.1 of the Code. The Minister says that what the Applicant seeks in reality is to have CCRG go on a "fishing expedition where he would

rent the boat and allow the Applicant to do the fishing". The language is colourful but as Justice Gauthier pointed out in *Bilodeau (FC)*, the Minister has no duty to provide a conviction review applicant with the means to meet the requirements set out in the Code and even in the context of an investigation, he is not required to "turn over every possible stone" (*Bilodeau (FC)*, at paras 90 and 119).

[91] For now, the materials in support of the Conviction Review Application show that Tina's version of events as to who committed Mr. Brady's murder remains consistent with her testimony at trial and the alleged inconsistencies in her account of events of June 2011 have not been substantiated by the Applicant. Thus, Tina's version of events remains consistent with the trial testimony of Mr. Cvetkovic's who, as we have seen, was found by the Ontario Court of Appeal to be less untrustworthy than Tina and Robert because of his clean criminal record, steady employment, and lack of motive to kill Mr. Brady or to help Robert or Tina, whom he barely knew.

[92] The record shows that Mr. Scullion interviewed Tina over the phone on August 28, 2012, in the mist of the exchange of correspondence with the Innocence Project that followed CCRG's preliminary assessment. According to CCRG, Tina was categorical that her trial evidence was accurate and truthful and that there was never any intention on her part to change her evidence either because she was mistaken, untruthful or unclear as to what happened at the crime scene. The notes summarizing that conversation read as follows:

> Spoke to Ms. Prevost at the phone number provided by the Innocence Project on this date at approximately 1:40-1:55.

> Explained to her who I was, what we did as a group. Explained that we had received an application from Thomas Winmill and explained the process.
>
> I explained to her that her name and coordinates had been provided to us by the Innocence Project and that we were following up.
>
> I asked her directly was her trial evidence truthful? She responded "yes." I then asked her what Thomas Winmill did on the day in question. She replied that he had stabbed the victim and with the help of his son also cut the victim's throat.
>
> There was no doubt in her mind that Thomas Winmill had stabbed and killed the victim that morning. She remembers it clearly. It was in the morning hours.
>
> She added that she is not prepared to change or recant her evidence that she gave at trial as she was truthful at trial when she testified.
>
> I asked her if she had any idea as to why there was some suggestion by the Innocence Project that she had not told the truth or that she was mistaken when she testified. She replied that it was the Innocence Project who suggested that she might be mistaken and that medication she had taken might be preventing her from remembering the events clearly and that hypnosis would not be a good idea.
>
> I am satisfied based on my conversation with her that there is no need to interview her further, under oath or otherwise, given all the facts of this application and the conclusions that were reached before my conversation with her this date. There is nothing in her comments that would necessitate changing the conclusion already reached.

[93] The Innocence Project claims that this "phone call investigation" was inadequate. But again, an application for ministerial review under section 696.1 of the Code is a post-conviction non adversarial process. Practices and procedures which are more commonly associated with a criminal trial are not applied in such process. Therefore, it was open to CCRG, in my view, to make that verification the way it did. As I have already indicated, it certainly had no obligation

to compel Tina to provide this information under oath and to allow the Applicant's representatives to cross-examine her on the content of the said information.

[94] The Applicant further claims that the notes of the telephone conversation between Mr. Scullion and Tina contain a "shocking confession", that of Robert's participation in helping the Applicant cut Mr. Brady's throat. He contends that this required further investigation. However, this is not new evidence that the Applicant is not responsible of Mr. Brady's murder. It shows that Robert might have been involved to some degree in the murder but it does not exonerate the Applicant. What remains clear from those notes is that Mr. Scullion was told by Tina that there was no doubt in her mind that the Applicant "had stabbed and killed the victim that morning" and that "she is not prepared to change or recant her evidence that she gave at trial".

[95] I am therefore satisfied that the Minister was correct in dismissing the Applicant's request to compel Tina to testify under oath and to allow the Innocence Project to cross-examine her on her recollection of the events that lead to Mr. Brady's murder. The rules of procedural fairness did not require the Minister to do so.

[96] The Applicant remains entitled to provide to the Minister further information raising new matters of significance, in which case a new preliminary assessment of the Conviction Review Application would have to be conducted by the Minister as contemplated by section 4(5) of the Regulations.

[97] In sum, as the Conviction Review Application stands now, I am not convinced that in order to conduct a meaningful review of the said Application, CCRG had to compel Tina to testify under oath. Even considering the issue of procedural fairness from the Applicant's perspective, I am not satisfied either that CCRG "failed to investigate obviously crucial evidence" by not compelling Tina to testify under oath. For the reasons outlined above, at this point, there was no reason for CCRG to believe that Tina's evidence at trial was mistaken, untruthful or unclear as to who killed Mr. Brady in the early morning of September 22, 1991.

[98] This is dispositive of the present judicial review application.

[99] The Respondent claims that even assuming the Applicant's challenge to the May 7, 2012 preliminary assessment was properly before me, it could not succeed either. I agree.

[100] The Applicant claims in this respect that the May 7, 2012 preliminary assessment is unreasonable as (i) there was no reasonable basis to find Robert's recantation not credible, (ii) the impeachment value of the fresh evidence was not considered, and (iii) the fresh evidence was not considered in context.

[101] As the Minister points out, this is an attack on the merits of the May 7, 2012 preliminary assessment, not an attack grounded on procedural fairness principles. The applicable standard of review here is reasonableness (*Walchuck v Canada (Minister of Justice)*, 2013 FC 958, 439 FTR 166 at para 21; *Ross*, above at para 28). It is well established that reasonableness is a differential standard. It is concerned mostly "with the existence of justification, transparency and

intelligibility within the decision-making process" and with whether the decision "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at para 47). As Justice Luc Martineau stated in *Timm*, above, the Court "must takes pain not to substitute itself for the Minister" (*Timm*, at para 9).

[102] Here, CCRG conducted a complete and thorough assessment of the Applicant's Conviction Review Application. As we have seen previously, it assessed the fresh evidence in the context of the trial's evidence. Each and every piece of fresh evidence was examined. CCRG found that Robert's confession was not reasonably capable of belief and, therefore, was not credible. It concluded, as a result, that it was not a matter of significance within the meaning of section 696.4 of the Code. It based that conclusion on the following considerations:

a) Robert's long track record of giving inconsistent and false statements as to who had committed the murder, alternately implicating himself, the Applicant, Tina and Mr. Cvetkovic;

b) Being incarcerated on a warrant expiring in August 2021 and facing outstanding charges which could potentially result in a lengthier incarceration, he had, at the time of his recantation, a motive to lie;

c) The motive he now provides for killing Mr. Brady, which was to avenge some minor disrespect directed at the Applicant, is very difficult to reconcile with him blaming the murder on the Applicant within the hours that followed the murder and testifying falsely against him at trial;

d) His confession is inconsistent with the trial evidence of Tina and Mr. Cvetkovic which was believed by the jury and which has not been recanted in one case (Mr. Cvetkovic) and was reiterated in the other (Tina); and

e) The possibility that Robert had perpetrated the crime was presented to the jury through the position taken by the defence that Robert owed Mr. Brady money and therefore had a motive to kill him, and through evidence from a police officer that Robert had claimed responsibility for Mr. Brady's murder in the next few days following the crime.

[103] Further, the Court notes that in his affidavit, Robert affirms that at the time Mr. Brady was killed, the Applicant "was stumbling around the outside of the car". This version of events contradicts the Applicant's testimony at trial that he had not left the car on his way to the Cyopick's farm as he was asleep due to his intoxication from the drinking at Robert's apartment.

[104] In *Palmer*, above, the Supreme Court of Canada cautioned, as an overriding consideration of the court of appeal's broad discretionary power to admit fresh evidence, that it would not serve the interests of justice "to permit any witness by simply repudiating or changing his trial evidence to reopen trials at will to the general detriment of the administration of justice".

[105] The Minister's conviction review power is a "safeguard against mistake in the criminal system" but such mistake will only occur "when new evidence would inevitably lead to a wrongful conviction" (*Walchuck*, above at para 31).

[106] Robert is essentially asking the Minister to determine whether he was lying then, at trial, or now, post-conviction. Either way, one can see that this was an appropriate ground for CCRG to make an adverse credibility finding. This finding, in my view, was open to CCRG as a possible acceptable outcome defensible in respect of the facts and the law.

[107] I also fail to see the impeachment value of Robert's recantation and in particular, how it could inevitably lead to the conclusion that the Applicant was wrongfully convicted for Mr. Brady's murder. Robert was found to be an unsavoury, untrustworthy witness at trial, which required the jury to be alerted to the danger of relying on his evidence; he has a long history of giving inconsistent statements; and his recantation now is in direct conflict with the trial evidence given by Tina and Mr. Cvetkovic, evidence that was believed by the jury and that has never been recanted since. In other words, his credibility is already significantly compromised. Although CCRG made no explicit finding in this respect, I am of the view that this transpires from the entire May 7, 2012 decision, when read as a whole.

[108] I am therefore satisfied that the May 7, 2012 preliminary assessment, assuming it is reviewable through the present proceedings, is reasonable. Again, the role of the Court is not to substitute itself for the Minister but to determine whether this decision falls within the range of possible and acceptable outcomes. I find that it does.

[109] The judicial review application is dismissed. Both parties are seeking their costs in these proceedings. I see no reason to depart from the general rule that costs should be awarded to the successful party.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed, with costs.

"René LeBlanc"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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