Federal Court  Cour fédérale

Date: 20110119

Docket: T-424-10

Citation: 2011 FC 61

[ENGLISH TRANSLATION]

BETWEEN:

DANIEL JOLIVET

Applicant

and

THE MINISTER OF JUSTICE
CANADA

and

THE CRIMINAL
CONVICTION
REVIEW GROUP

Respondents

REASONS FOR ORDER:

PROTHONOTARY MORNEAU

[1] At issue in this case is deciding, under subsections 318(3) and (4) of the *Federal Courts Rules* (the Rules), and in accordance with the direction of this Court on July 22, 2010, on the merits of the objection raised by the respondents under subsection 318(2) of the Rules.

[2] This objection was made pursuant to a request for transmission of material by the applicant under subsections 317(1) and (2) of the Rules within the framework of his application for judicial review filed on March 22, 2010 (the application for review).

[3] This request for transmission of material is, as shall be demonstrated, rather long and covers almost five (5) pages in the application for review.

Background

[4] The backdrop to this request for transmission of material is somewhat complex and covers a period of several years. In fact, through these years, the applicant was able to accumulate over 9,000 pages of documentation, which have been attached in support of his application for judicial review.

[5] However, the backdrop or context can broadly be outlined as follows:

[6] On April 1, 1994, at the conclusion of a judge and jury trial, the applicant was found guilty of the first degree murder of Denis Lemieux and Francois Leblanc, as well as the second degree murder of Nathalie Beauregard and Catherine Morin. All these people were killed on the night of November 9 to 10, 1992, during the same event.

[7] At the trial, the prosecution's evidence relied essentially on the testimony of the informant, Claude Riendeau, who claimed to have obtained a confession to the murders by the applicant in a given restaurant.

[8] On April 14, 1990, the Quebec Court of Appeal allowed the appeal by the applicant; Honourable Justices Fish and Vallerand ordered a new trial, while Honourable Justice Robert disagreed. The three judges unanimously agreed that there had been an error at trial, but had differing opinions regarding the application of the remedial provision.

[9] The Crown brought the case to the Supreme Court of Canada. In its ruling on May 18, 2000, the Supreme Court struck down the decision of the Quebec Court of Appeal and reinstated the applicant's guilty verdict.

[10] On August 22, 2005, the applicant filed an application for judicial review of his criminal conviction (application for review) with the Minister of Justice Canada (Minister of Justice), under Part XXKI.1 of the *Criminal Code* , R.S.C. 1985, c. C-46.

[11] The following are the statutory and regulatory provisions relating to judicial reviews:

PART XXI.1 APPLICATIONS FOR MINISTERIAL REVIEW — MISCARRIAGES OF JUSTICE	PARTIE XXI.1 DEMANDES DE RÉVISION AUPRÈS DU MINISTRE — ERREURS JUDICIAIRES
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	**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

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.

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 on a commissioner under section 11 of that Act.

(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 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,

(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

compel them to give evidence and otherwise conduct an investigation under subsection (2).

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 :

(i) direct, by order in writing, a new trial before any court that the Minister thinks proper or, in the case of a person found to be a dangerous offender or a long-term offender under Part XXIV, a new hearing under

(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

that Part, or

(ii) refer the matter at any time to the court of appeal for hearing and determination by that court as if it were an appeal by the convicted person or the person found to be a dangerous offender or a long-term offender under Part XXIV, as the case may be; or

(*b*) dismiss the application.

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

696.4 In making a decision under subsection 696.3(3), the Minister of Justice shall take into account all matters that the Minister considers relevant, including

(*a*) whether the application is supported by new matters of significance that were not considered by the courts or previously considered by the Minister in an application in relation to the same conviction or finding under Part XXIV;

(*b*) the relevance and reliability of information that is presented in connection with

nouvelle audition en vertu de cette partie,

(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) rejeter la demande.

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

696.4 Lorsqu'il rend sa 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

the application; and	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.
…	[…]
Regulations Respecting Applications for Ministerial Review – Miscarriages of Justice	*Règlement sur les demandes de révision auprès du ministre (erreurs judiciaires)*
(The Regulations)	(Le Règlement)
…	[…]
REVIEW OF THE APPLICATION	EXAMEN DE LA DEMANDE
3. On receipt of an application completed in accordance with section 2, the Minister shall	**3.** Sur réception d'une demande de révision présentée conformément à l'article 2, le ministre :
(*a*) send an acknowledgment letter to the applicant and the person acting on the applicant's behalf, if any; and	*a*) transmet un accusé de réception au demandeur et, le cas échéant, à la personne qui a présenté la demande en son nom;
(*b*) conduct a preliminary assessment of the application.	*b*) procède a une évaluation préliminaire de la demande.
4. (1) After the preliminary assessment has been completed, the Minister	**4.** (1) Une fois l'évaluation préliminaire terminée, le ministre :
(*a*) shall conduct an investigation in respect of the	*a*) enquête sur la demande s'il constate qu'il pourrait y avoir

application if the Minister determines that there may be a reasonable basis to conclude that a miscarriage of justice likely occurred; or

(*b*) shall not conduct an investigation if the Minister

(i) is satisfied that there is a reasonable basis to conclude that a miscarriage of justice likely occurred and that there is an urgent need for a decision to be made under paragraph 696.3(3)(*a*) of the Code for humanitarian reasons or to avoid a blatant continued prejudice to the applicant, or

(ii) is satisfied that there is no reasonable basis to conclude that a miscarriage of justice likely occurred.

(2) The Minister shall send a notice to the applicant and to the person acting on the applicant's behalf, if any, indicating whether or not an investigation will be conducted under subsection (1).

(3) If the Minister does not conduct an investigation for the reason described in subparagraph (1)(*b*)(ii), the notice under subsection (2) shall indicate that the applicant may provide further information in support of the application within one year after the date on which the notice was sent.

des motifs raisonnables de conclure qu'une erreur judiciaire s'est probablement produite;

b) ne mène pas d'enquête dans les cas où :

(i) il est convaincu qu'il y a des motifs raisonnables de conclure qu'une erreur judiciaire s'est probablement produite et que, pour éviter un déni de justice ou pour des raisons humanitaires, une décision doit être rendue promptement en vertu de l'alinéa 696.3(3)*a*) du Code,

(ii) il est convaincu qu'il n'y a pas de motifs raisonnables de conclure qu'une erreur judiciaire s'est probablement produite.

(2) Le ministre transmet au demandeur et, le cas échéant, à la personne qui présente la demande en son nom, un avis indiquant si une enquête sera ou non menée en application du paragraphe (1).

(3) Si le ministre ne mène pas d'enquête pour le motif visé au sous-alinéa (1)*b*)(ii), l'avis prévu au paragraphe (2) doit mentionner que le demandeur peut transmettre au ministre des renseignements additionnels à l'appui de la demande dans un délai d'un an à compter de la date d'envoi de l'avis.

(4) If the applicant fails, within the period prescribed in subsection (3), to provide further information, the Minister shall inform the applicant in writing that no investigation will be conducted.

(4) Si le demandeur ne transmet pas les renseignements additionnels dans le délai prévu au paragraphe (3), le ministre l'avise par écrit qu'il ne mènera pas d'enquête.

(5) If further information in support of the application is provided after the period prescribed in subsection (3) has expired, the Minister shall conduct a new preliminary assessment of the application under section 3.

(5) Si des renseignements additionnels sont transmis après l'expiration du délai prévu au paragraphe (3), le ministre procède à une nouvelle évaluation préliminaire de la demande en application de l'article 3.

5. (1) After completing an investigation under paragraph 4(1)(*a*), the Minister shall prepare an investigation report and provide a copy of it to the applicant and to the person acting on the applicant's behalf, if any. The Minister shall indicate in writing that the applicant may provide further information in support of the application within one year after the date on which the investigation report is sent.

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 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.

[12] For the purposes hereof, the Court is satisfied with the following understanding upheld by the respondents in their written submissions regarding the spirit of the aforementioned criminal conviction review process:

> 14. 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;
>
> Section 696.1 of the *Criminal Code*
>
> [TRANSLATION]
>
> 15. This application may only be made after the person's rights of judicial review or appeal with respect to the conviction or finding has been exhausted;
>
> Section 696.1 of the *Criminal Code*
>
> 16. On receipt of an application, the Minister of Justice of Canada conducts a preliminary assessment of the application based on the factual components submitted by the applicant;
>
> Paragraph 3(b), *Regulations Respecting Applications for Ministerial Review – Miscarriages of Justice* SOR/2002-416
>
> 17. If this preliminary assessment determines that there is a reasonable basis to conclude that a miscarriage of justice likely occurred, the minister shall conduct an investigation based on the facts presented in support of the application for review;
>
> Paragraph 4(1)(a), *Regulations Respecting Applications for Ministerial Review – Miscarriages of Justice* SOR/2002-416

18. However, the Minister shall not conduct an investigation if the Minister:

    a) Based on the preliminary assessment, is satisfied that there is a reasonable basis to conclude that a miscarriage of justice likely occurred and that there is an urgent need for a decision to be made under paragraph 696.3(3)(a) of the *Criminal Code* or;

        Subparagraph 4(1)(b)(i), *Regulations Respecting Applications for Ministerial Review – Miscarriages of Justice* SOR/2002-416

    b) The preliminary assessment satisfied the minister that there is no reasonable basis to conclude that a miscarriage of justice likely occurred;

        Subparagraph 4(1)(b)(ii), *Regulations Respecting Applications for Ministerial Review – Miscarriages of Justice* SOR/2002-416

19. If the Minister is satisfied that there is a reasonable basis to find that there was no miscarriage of justice, the Minister shall advise the applicant, who shall then have one year to provide further information;

        Subsections 4(2) and (3), *Regulations Respecting Applications for Ministerial Review – Miscarriages of Justice* SOR/2002-416

20. In making a decision, the Minister of Justice shall take into account all matters it considers to be relevant, based on the following criteria:

    a) Whether the application is supported by new facts that were not previously considered by the courts or the Minister;

    b) The relevance and reliability of this new information;

    c) The application is not an appeal;

        Section 696.4 of *Criminal Code*

21. Based on the legislative and regulatory provisions above, the remedy provided in Section 696.1 of the C.C.:

a) is an extraordinary remedy intended to ensure that no miscarriage of justice occurs when all conventional avenues of appeal have been exhausted;

b) does not exist simply to permit the Minister to substitute a ministerial opinion for a trial verdict or a result on appeal. Merely because the Minister might take a different view of the same evidence that was before the court does not empower the Minister to grant a remedy under section 696.1. of the C.C.

c) does not create a fourth level of appeal through which the Minister reassesses gaps in the evidence and/or issues of law reviewed in court;

d) is intended for the consideration of new matters of significance that either were not considered by the courts or that occurred or arose after the conventional avenues of appeal had been exhausted. Among other things, this review considers the reliability of new information provided with respect to the circumstances surrounding the applicant's conviction.

e) it aims to allow the applicant to demonstrate that there are grounds for believing that a miscarriage of justice likely occurred.

[13] Apparently, like any other similar application, the applicant's application for review was assessed by the Criminal Conviction Review Group (the CCRG).

[14] Following the receipt of the application for review, and as is evident from the applicant's record in response to the respondents' objection under consideration, the CCRG, represented by Martin Lamontagne and Kerry Scullion, immediately started compiling the following items, *inter alia*: the applicant's conviction file, the file of the Ministère de la Sécurité publique du Québec (the Crown's file), the file of Sûreté du Québec and the prosecution files used by the Crown during the applicant's trial.

[15] Therefore, apart from the documents and information the applicant provided to the CCRG, through its research activities, it was able to assemble a large collection of documents, even though according to the applicant, the CCRG would by itself never have been able to get the complete file of Sûreté du Québec. As for the Crown's file, it was apparently lost even before the application for review.

[16] On September 24, 2007, the CCRG made its decision in the matter of the applicant's application for review.

[17] Through this decision, the CCRG informs the applicant that his application for review will not proceed beyond the preliminary assessment stage, and will therefore not reach the investigation stage.

[18] In its letter of September 24, 2007, which was accompanied by the actual preliminary assessment, the CCRG clearly indicates to the applicant that it has considered all documents directed to it.

[19] In fact, the letter reads as follows:

> [TRANSLATION]
>
> To reach this conclusion, the CCRG has carefully reviewed the extensive relevant documentation, as well as the correspondence you submitted to it through Dominique Larochelle. Furthermore, the CCRG equally took into consideration all statements put forth in your favour by your attorney within the framework of your application for review.

> In addition to this letter, you will therefore receive a preliminary assessment of your application for the review of your conviction for four homicides. This assessment presents the reasons for which your application for review has been rejected. […] […]

[20] The preliminary assessment also specifies the following:

> [TRANSLATION]
>
> **ANALYSIS AND DOCUMENTATION**
>
> To provide prescriptive guidance on the preliminary assessment in this case, the CCRG carefully analyzed all documents submitted to it by the applicant and by law enforcement authorities. This evidence was transmitted to the CCRG by CD-ROM[15].
>
> [15] Note that the undersigned forwarded a copy of the CD-ROM to Dominique Larochelle, the applicant's attorney.

[21] Note, as emphasized in the last excerpt quoted, that all the evidence reviewed by the CCRG was communicated to the applicant.

[22] Following that, the applicant then spent the rest of the year 2007 making several access to information requests, and obtaining some answers from the relevant authorities. In 2008 and 2009, the parties exchanged correspondence on the CCRG's findings, and if the Court understands well, without however convincing the CCRG to conduct a new preliminary assessment and, of course, an investigation under the Regulations.

Analysis

[23] Rules 317 and 318 stipulate as follows:

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.	**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) An applicant may include a request under subsection (1) in its notice of application.	(2) Un demandeur peut inclure sa demande de transmission de documents dans son avis de demande.
(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.	(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) Within 20 days after service of a request under rule 317, the tribunal shall transmit	**318.** (1) Dans les 20 jours suivant la signification de la demande de transmission visée à la règle 317, l'office fédéral transmet :
(*a*) a certified copy of the requested material to the Registry and to the party making the request; or	*a*) au greffe et à la partie qui en a fait la demande une copie certifiée conforme des documents en cause;

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

[24] Although at the time of the application for review, the applicant had submitted extensive documentation generated since the crime occurred on November 10, 1992, and more precisely, the series of documents consulted by the CCRG in making its decision of September 24, 2007, considering the transmitted CD-ROM among other things, his request for transmission of material, as mentioned in paragraph [3] above, extends over almost five (5) pages as follows:

[TRANSLATION]

1. complete and non-redacted copies of every single document constituting part of the correspondence (handwritten/typed letters, emails, etc.):

    a. between the CCRG and Ginette Collin, the officer in charge of access to information and documents at Correctional Service Canada, and intended as an official request with the aim of obtaining the detention file and/or any other document concerning the detainee:

        i. Daniel Jolivet

        ii. Claude Riendeau

        iii. Michel Simon, né Mike Blass

    b. between the CCRG and Ginette Collin, the officer in charge of access to information and documents at Correctional Service Canada, and intended as an official request with the aim of obtaining all recorded statements by staff members having interacted closely or from afar with the detainee, Daniel Jolivet, as well as the hand-scripted notes of corrections officers or others, who played a direct or indirect role, and/or continue to play a role, in the latter's detention;

    c. between the CCRG and Nancy Lafond, former parole officer of the Applicant at Correctional Service Canada, and intended as an official request with the aim of obtaining all recorded statements by staff members having interacted closely or from afar with the detainee, Daniel Jolivet, as well as the hand-scripted notes of corrections officers or others, who played a direct or indirect role, and/or continue to play a role, in the latter's detention;

    d. received by the CCRG from anyone at Correctional Service Canada and in relation to each of the official requests mentioned in the paragraphs cited above at points a), b), c);

    e. between the CCRG and André Marois, the officer in charge of access to information and documents at the Ministère de la Sécurité Publique du Québec, and

intended as an official request for documents and/or information;

f. received by the CCRG from André Marois, the official in charge of access to information and documents at the Ministère de la Sécurité Publique du Québec and in relation to the official requests for documents and/or information mentioned above in paragraph e);

g. between the CCRG and Normand Proulx, Director General of the Sûreté du Québec, and intended as an official request for documents and/or any record of investigations by the Sûreté du Québec police officers within the framework of the Applicant's case;

h. received by the CCRG from Normand Proulx, Director General of the Sûreté du Québec, and related to the official requests for documents and/or information mentioned above in paragraph g);

i. between the CCRG and Serge Chartrand, captain and officer in charge of auditing and evaluation in the Sûreté du Québec's access to information and documents department, and intended as an official request for documents and/or any record of investigations by the Sûreté du Québec officers within the framework of the Applicant's case;

j. received by the CCRG from Serge Chartrand, captain and officer in charge of auditing and evaluation in the Sûreté du Québec's access to information and documents department, and and related to the official requests for documents and/or information mentioned above in paragraph i);

k. between the CCRG and Stéphane Lamarche, Quebec Attorney General's prosecutor at the Longueuil Court, intended as an official request for the complete prosecution file used by the Crown in the Daniel Jolivet case;

l. received by the CCRG from Stéphane Lamarche, Quebec Attorney General's prosecutor at the Longueuil Court, and related to any official requests, for the complete prosecution file used by the Crown in the Daniel Jolivet case and mentioned above in paragraph k);

m. between the CCRG and Sabin Ouellet, Quebec Attorney General's prosecutor and director of the Direction des Poursuites Criminelles et Pénales (DPCP), and intended as an official request for the complete prosecution file used by the Crown in the Daniel Jolivet case;

n. received by the CCRG from Sabin Ouellet, Quebec Attorney General's prosecutor and director of the Direction des Poursuites Criminelles et Pénales (DPCP), and related to any official request, for the complete prosecution file used by the Crown in the Daniel Jolivet case and mentioned above in paragraph m);

o. received by the CCRG from Juli [sic] Drolet, officer in charge of access to information and documents at the Direction des Poursuites Criminelles et Pénales (DPCP), and related to any prosecution files used by the Crown against Paul-André St-Pierre and/or Daniel Jolivet;

All the above-mentioned documents were prepared with the aim of reviewing and/or conducting a preliminary assessment of the Applicant's application for review of the criminal conviction;

2. complete and non-redacted copies of every single document constituting part of the correspondence (handwritten/typed letters, emails, etc.):

a. between the CCRG and Bernard Grenier, independent Special Adviser on criminal conviction reviews, and directly related to the review or preliminary assessment file of the Applicant's application for review of the criminal conviction;

b. received by the CCRG and constituting written opinions and/or recommendations by Bernard Grenier, independent Special Adviser on criminal conviction reviews, as stipulated in the Regulations and with respect to its own decision to agree to set aside or uphold the report and initial decision of September 24, 2007, indicating a dismissal of the Applicant's application for judicial review at the preliminary assessment stage;

c. received by the CCRG and constituting written legal opinions and recommendations by Bernard Grenier, independent Special Adviser on criminal conviction reviews, as stipulated in the Regulations and with respect

to its own decision to agree to set aside or uphold the initial decision revised by the GRCC;

d. received by the CCRG and constituting written legal opinions and recommendations by Bernard Grenier, independent Special Adviser on criminal conviction reviews, as stipulated in the Regulations and with respect to its own decision to agree to set aside or uphold the initial decision revised anew by the CCRG, regarding the dismissal of the Applicant's application for a review of his conviction;

e. received by the CCRG from Bernard Grenier, independent Special Adviser on criminal conviction reviews, with respect to letters with several attached documents intended as a written objection, by the Applicant himself, to the decision to dismiss his application for judicial review of his conviction.

3. Timetable and/or schedule established during the initial meeting to prepare the preliminary assessment, held between the lead counsel (Kerry Scullion) and the lawyer responsible for reviewing the file (Martin Lamontagne);

4. All summaries of the file prepared by Martin Lamontagne;

5. All summaries of the file prepared by Martin Lamontagne for Kerry Scullion;

6. Notes and/or reports of the second interview between Martin Lamontagne and Kerry Scullion;

7. Timetable prepared following the second meeting between Kerry Scullion and Martin Lamontagne for the ensuing stages;

8. Notes or report of the third meeting between Kerry Scullion and Martin Lamontagne to discuss the decision regarding the next possible stages;

9. Copies of all documents sent to Bernard Grenier, independent Special Adviser on applications for review of criminal convictions, to approve the dismissal of the application and his answers;

10. All written opinions by Bernard Grenier, independent Special Adviser on applications for review of criminal convictions, on the present file;

11. The two sketches accompanying the application for review:

    a. a map measuring approximately 3 feet by 8 feet, time, name and hour;

    b. a topographical map measuring approximately 3 feet by 5 feet showing the Montréal, Laval and South Shore regions with zones covered by cell phone towers;

12. Letter of June 30, 2008, from the CCRG to the Sûreté du Québec;

13. The Sûreté du Québec's response of September 8, 2008 to the CCRG;

14. All documents received by the CCRG from the Sûreté du Québec in connection with numbers 32 and 33;

15. The CD-ROM forwarded to the CCRG on February 20, 2006 pursuant to the request of October 27, 2005. This CD-ROM ought to have been accompanied by a report which has never been revealed to the Applicant.

16. All correspondence between the CCRG and the Sûreté du Québec or the Sûreté du Québec and the CCRG;

17. Correspondence between the CCRG and Bernard Grenier, special adviser, and vice versa;

18. Pierre Chapelaine's declaration;

19. Nathalie Houde's declaration;

20. Linda Madore's declaration;

21. Dino Nitollo's declaration;

22. Mike Televi's declaration;

23. Lise Veillette's declaration;

24. Maryse Villeneuve's declaration;

25. Identification parade for Solange Demers;

26. Identification parade for Martine Goulet;

27. Storage form;

28. Brossard police reports;

29. Exhibit P-31, as submitted to the Court and as found in the Sûreté du Québec's file.

[Emphasis by applicant.]

[25] I consider that there are several obstacles to this request for transmission of material.

[26] First, as per the applicant himself, the CCRG made its decision or decisions without the prosecution's file on hand, and with only part of the Sûreté du Québec's file. Indeed, many of the rulings or remedies sought by the applicant through his application for review are intended to allow the respondents to obtain the complete Sûreté du Québec prosecution's files by force. In fact, pages 3 and 4 of the applicant's notice of application state the following:

[TRANSLATION]

THE PURPOSE OF THE APPLICATION IS:

[…]

- **COMPEL** the respondent to obtain the complete files of the Sûreté du Québec and of the prosecution, take these files into consideration in its assessment and provide a copy to the Applicant;

- **COMPEL** the respondent to provide a copy of undisclosed documents consulted with regard to the supplementary decision of November 10 and 13, 2008, to the Applicant;

- **NOTE** that the prosecution's file is absent;

[…]

[27] Therefore, since these documents were definitely not before the CCRG at the time it made its decision and since the same documents form the primary basis for the application for judicial review, it seems to me that they are not relevant to the objective and purpose of Rule 317.

[28] As mentioned by the Federal Court of Appeal at paragraph 4 of *Ominayak v Lubicon Lake Indian Nation*, [2000] F.C.A No. 2056, 267 N.R. 96:

> [4] We are of the respectful view that the motions judge erred in ordering the Appellant to obtain and deliver the membership list to the Respondents. The Appellant in this case is the tribunal whose decision is to be judicially reviewed. Under Rule 317, a party may request material relevant to the judicial review that is in the possession of the tribunal. The membership list was not in the possession of the Appellant, and this is acknowledged by the motions judge. The list not being in the possession of the Appellant we are of the opinion that the motions judge erred in ordering the Appellant to obtain it and deliver it to the Respondents.
>
> [Emphasis added.]

[29] The foregoing observations thus relate to points 1(e) to (o) of the request for transmission of material at the very least.

[30] Conversely, regarding the other documents, and assuming that they exist, it seems to me that the approach taken by the applicant in this case is simply a "fishing expedition". Based on their involvement for several years now in the applicant's file, the applicant or his attorneys seem to be looking to dig into all corners of the respondents' files in a way that could allow them discover one or more documents the respondents likely obtained from a previous caseworker, a document which could possibly allow them to propel their case forward. This type of venture matches the definition of a fishing expedition.

[31] In this sense, apart from not truly complying with the requirements under subsection 317(1) of the Rules with respect to precision in the material requested, I think that this approach by the applicant has to be qualified by the following comments made by Blais J. of this Court, as he then was, in his decision in *Bradley-Sharpe v Royal Bank of Canada*, 2001 FCT 1130:

> The applicant's purpose, [...] is to scour for any information within the file or files of the Commission because she is dissatisfied or displeased with the decision of the Commission.

(See also *Beno v Canada (Commissioner and Chairperson, Commission of Inquiry into the Deployment of Canadian Forces to Somalia*), [1997] F.C.J. 535 (F.C.T.D.) (QL), paragraphs 23 and 24.)

[32] At best, this request for transmission of material is the type of document and information search found at the interlocutory stage of a case and not during an application for judicial review.

[33] In *Access Information Agency Inc. v. Canada (Attorney General)*, 2007 FCA 224, the Federal Court of Appeal declared its disagreement with the request for transmission of material under Rules 317 and 318, which clearly emerges from the processes in the cases. At paragraphs [20] and [21], the Court of Appeal indicates that:

> [20] In closing, the Court would like to express its disapproval for document disclosure requests drafted in terms as vague as the one at issue. A judicial review does not proceed on the same basis as a court action; it is a procedure that is meant to be summary. There are therefore a series of limits imposed on the parties as a result of this distinction. Evidence is brought by affidavit and not by oral testimony. There is less leeway for preliminary procedures such as discovery of evidence in the hands of the parties and examination on

> discovery. If such proceedings do prove to be necessary, the Rules provide that a judicial review may be transformed into an action.
>
> [21] It is in this context that we find section 317 of the Rules, which deals with requests for material disclosures. The purpose of the rule is to limit discovery to documents which were in the hands of the decision maker when the decision was made and which were not in possession of the person making the request and to require that requested documents be described in a precise manner. When dealing with a judicial review, it is not a matter of requesting the disclosure of any document which could be relevant in the hopes of later establishing relevance. Such a procedure is entire inconsistent with the summary nature of a judicial review. If the circumstances are such that it is necessary to broaden the scope of discovery, the party requesting more complete disclosure has the burden of advancing the evidence justifying the request. It is this final element that is completely lacking in this case. [Emphasis added.]

[34] Lastly, in *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, the Supreme Court of Canada also recalled the quick and summary nature.

[35] The applicant also refers to the decision by this Court in *Gagliano v Canada (Commission of Inquiry into the Sponsorship Program and Advertising Activities-Gomery Commission)*, 2006 FC 720, to assert that a request for transmission of material under Rule 317 could target other documents from those that served as the basis for the impugned decision. In this regard, at paragraph 80 of his written submissions filed on September 20, 2010, the applicant asserts the following:

> [TRANSLATION]
>
> 80. Second, it is not only the documents that the Minister or the CCRG chose to use in their decision that have to be transmitted to this honourable Court, but effectively all that were in their possession. In *Gagliano v Canada (Commission of Inquiry into the Sponsorship Program and Advertising Activities)*, 2006 FC 720, **tab 4**, Teitelbaum J. declared as follows at paragraph 78:

> "The issue when considering relevance under Rule 317 is not whether the materials were given any weight or considered by the Commissioner, but rather whether they were before him."
>
> [Partial citation of paragraph 78]

[36] Although that decision concerned issues of procedural fairness, it must not be construed as providing an open door to a search for all documents not taken into account in the decision. In *Gagliano*, based on contradictory evidence, the Court found that the decision-maker possibly had a certain number of emails before them, which they likely used. Here, there is no such evidence.

[37] Lastly, as previously mentioned, and as paragraph 84 of the applicant's written submissions of September 20, 2010, apparently indicates, the procedural fairness breaches raised by the applicant are based on the fact that the application for review was decided in the absence of Sûreté du Québec and prosecution documents.

> [TRANSLATION]
>
> 84. The Applicant alleges serious breaches of procedural fairness, especially in the processing of the application while the CCRG was not in possession of the complete Sûreté du Québec file, despite the Applicant's numerous indications to that effect. Furthermore, the Applicant alleges that the CCRG did not obtain the prosecution's file, which was necessary for the review of the application, notwithstanding that the CCRG itself had admitted that obtaining the file was consequential. Through its attitude, the CCRG recognized the importance of obtaining this file. The CCRG's attitude towards the Applicant, especially through its responses regarding the request for the prosecution file, as well as its change of position regarding the relevance of this file, raises serious doubts about procedural fairness;

(See also paragraph 34 of the same submissions.)

[38] However, as demonstrated by the series of written and detailed submissions by the appellant on September 20, 2010, the alleged breaches of procedural fairness are self-sustaining, even without the presence of any documents presumed lacking. In other words, it seems to me that the applicant's argument does not depend on the production of any additional document. Generally speaking, the reasons advanced by the applicant at paragraphs 73 and 75 of the written submissions of September 20, 2010, are supported by the reasoning developed throughout, in the 72 preceding paragraphs of said submissions.

[39] Therefore, for these reasons, the Court upholds the respondents' objection to the transmission of material to the applicant, without costs, since the respondents do not claim any.

"Richard Morneau"
Prothonotary

Montréal, Quebec
January 19, 2011

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-424-10
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PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	January 12, 2011
REASONS FOR ORDER :	PROTHONOTARY MORNEAU
DATED:	January 19, 2011

APPEARANCES:

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