Federal Court  Cour fédérale

Date: 20110714

Docket: T-417-10

Citation: 2011 FC 886

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, July 14, 2011

PRESENT: The Honourable Madam Justice Johanne Gauthier

BETWEEN:

MICHEL BILODEAU

Applicant

and

THE MINISTER OF JUSTICE OF CANADA

and

THE CRIMINAL CONVICTION REVIEW GROUP

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Bilodeau is asking the Court to review the legality of the decision of the Minister of Justice denying his application for a review of his criminal conviction under the former section 690 of the *Criminal Code*, RSC 1985, c C-46 (now sections 696.1 to 696.6), because he was not

convinced that there was a reasonable basis to conclude that a miscarriage of justice likely had occurred.

[2] The applicant raised a number of arguments to the effect that the Minister had breached his duty to apply the "principles of fundamental justice", including his duty of procedural fairness in this matter. The parties agree that this is the first time a matter that has progressed beyond the second level of the ministerial review process, namely, a decision after investigation, has been the subject of an application for judicial review and that the Court has had to examine the scope of the Minister's duty in this context.

Factual background[1]

[3] Michel Bilodeau (or, more precisely, Alphonse Michel Bilodeau) was convicted, on December 23, 1971, of the non-capital murder of William Elieff.

[4] This murder occurred during an attempted armed robbery during the night of March 10 to March 11, 1971, at the Brasserie Normandie on Peel Street in Montréal. At the trial in 1971[2] the Crown's theory was that Mr. Bilodeau and Yvon Beaulieu were in the billiard hall of the establishment at the time the murder was committed while two persons who were with them, namely, Denis Cloutier and Ms. M,[3] waited for them outside the billiard hall in the second floor staircase leading from the street to the said room.

---

[1] The Court reviewed all of the evidence in the record, which is quite voluminous. We are obviously not going to discuss each and every fact raised in the matter here, even though the Court may feel it necessary to provide certain details with regard to the issues that have been raised. See Annex B.

[2] As I will indicate later, there is no transcript of all of the evidence presented at the trial or of the judge's instructions to the jury.

[3] Given that this person was not charged there is no need to identify her by her full name.

[5] In his application for review of his criminal conviction in February 2001,[4] Mr. Bilodeau claimed that he had an alibi that had never been raised and he maintained that he had been asleep (drunk) in the automobile used by the four accomplices that night. Apparently Mr. Beaulieu was the only one who had gone into the billiard room, and therefore it was allegedly he who bore sole responsibility for the murder which took place that night.

[6] In support of this "new important question", Mr. Bilodeau submitted an affidavit from Mr. Cloutier, with whom he claimed he had never spoken from the time he was convicted until a chance encounter with Mr. Cloutier in a supermarket in the summer of 2000. It is important to note at once that Mr. Cloutier had pleaded guilty to a charge of manslaughter and did not testify at the trial of Messrs. Bilodeau and Beaulieu.

[7] Mr. Bilodeau also submitted that he had been the victim of a miscarriage of justice due to the criminal behaviour of the investigating police officers and the compliance of the Crown prosecutor. The officers are alleged to have fabricated evidence and pressured witnesses to perjure themselves.

[8] Specifically, he argued that the testimony of Ms. M, who was a minor at the time (aged 16) was biased if it is taken into account that it was in her interest to help the police out of fear of being charged along with the three men she was with the night of the murder, in addition to the fact that she had been pressured and even sexually abused by the police. In support of these allegations, Mr.

[4] Mr. Bilodeau first wrote to the Minister to request the royal prerogative of mercy on February 12, 2001, and his counsel, Mr. Michel Poirier, made a second request on behalf of his client on February 21, 2001.

Bilodeau relied on Mr. Cloutier's affidavit, which states that he too was pressured and physically abused by the police into making a false statement incriminating Messrs. Bilodeau and Beaulieu, as well as on recent conversations he allegedly had with Ms. M.

[9] Mr. Bilodeau indicated that, at the time of the incidents, he was young (he was 20 years old when the trial took place), rebellious and had little education. According to him, he understood little of what was happening. Mr. Bilodeau also noted that he did not trust his counsel (Mr. Robert Forest) at the time the trial was held and that he refused to speak with him. However, he also claimed that his counsel had dissuaded him from testifying because of his criminal past and the difficulties he had expressing himself and keeping calm (see D-21). Although Mr. Bilodeau raised the incompetence of his counsel, the applicant did not press the issue before me, given the lack of evidence on this point.[5]

[10] Mr. Bilodeau stated that he had always maintained his innocence and had been unable to appeal the decision for various reasons such as the difficulty in communicating with the outside world at that time, as well as his lack of education and means. He claimed to have tried to have his case reopened around 1980-82 but that the legal fees were too expensive for him.

Available evidence from 1971

[11] In his letter dated February 21, 2001, Mr. Poirier indicated that his mandate was to gather all of the necessary documentation for a review of his client's conviction. At that time, the transcripts of the trial and the instructions to the jury were no longer in the record. According to him, all that

[5] The simple fact of having advised him not to testify in the circumstances of that case when there is nothing to indicate that Mr. Bilodeau had advised him of his alibi does not constitute evidence of incompetence.

remained was the transcript of the preliminary hearing, the notes of the clerk at trial, a transcript of a visit to the scene of the crime by the judge, the jury, the accused and witness Maria Koliff, as well as the last part of her testimony on December 10, 1971.[6]

[12] At the trial the Crown presented 18 testimonies, the most relevant being those of Ms. Koliff, Ms. M, and Mr. Kit Wong, a 23-year-old student who was part of the last group of clients to leave the billiard hall around midnight. The defence (Mr. Forest) called only one witness, namely, Mr. Boulais, the counsel who had represented Mr. Bilodeau at the preliminary inquiry. The Crown, in rebuttal, called Detective Sergeant Roger David, presumably to respond to the testimony of Mr. Boulais. Counsel for Mr. Beaulieu did not submit evidence.

[13] The only transcript that exists, namely, the one from December 10, 1971, indicates that Ms. Koliff, a waitress at the tavern, was in the billiard hall at the time of the murder. She confirmed:

(i) that there was only one entrance;

(ii) that on the night in question, around midnight (closing time), she was arranging the tables when two men entered the hall. She assumed that Mr. Elieff, whom she could not see from her position, would take care of them;

(iii) that she heard the gunshot but did not see who had fired. Nor did she see that Mr. Elieff had been wounded;

(iv) that she clearly saw the two individuals near the cash register and described their behaviour;

(v) that she found the victim, Mr. Elieff, wounded on the floor after the two men had fled.

[6] It is clear, however, from the court clerk's notes that most of this witness' testimony in chief had been given the previous day, namely, on December 9, and we have no details about what was said that day. This is all the more

The judge and a few members of the jury asked Ms. Koliff questions to verify what she had seen and what she had been able to see from her vantage point that night.

[14] There is nothing in her brief testimony when she returned to court on December 10, 1971, that indicates whether, the previous day, she had identified the two men she claimed to have clearly seen. However, in response to one specific question, she did state that she had never seen these two men before that night.[7]

[15] The parties assumed that the testimonies of Mr. Wong and Ms. M in court were probably more or less consistent with their statements at the preliminary inquiry.[8] Although Mr. Bilodeau was present and heard this evidence, he did not make any specific comments about it. Nor did he comment on Ms. Koliff's testimony in chief on December 9, 1971.[9]

[16] At the preliminary inquiry, Mr. Wong testified that he had passed four individuals[10] who were going up the narrow staircase (three men and one woman) when he was leaving the billiard hall coming down the same staircase. His testimony on this point was not called into question. He clearly identified the woman as being Ms. M and stated that he recognized Messrs. Beaulieu and Cloutier. He was unable to clearly identify Mr. Bilodeau as the fourth person.

---

important given that Ms. Koliff did not testify at the preliminary inquiry.

[7] Mr. Cloutier stated that he was the only one who knew the establishment and that it was he who had suggested to Mr. Beaulieu that they go there. In fact, Mr. Cloutier even explained that the reason why he had waited outside the hall at the time was because he did not want to be recognized. It also appears that his roommate, Mr. Gaston Ducharme, worked at this tavern. See, *inter alia*, D-41 at p 396.

[8] It was only when commenting on Mr. Boro's further investigation that Mr. Bilodeau indicated that it was not really known which version Ms. M had given at trial. This is quite surprising considering that he was there. Does this mean that he does not remember whether this witness directly incriminated him in the murder or whether she stated that he was the one who fired the gun?

[9] As will be indicated later, the investigation revealed that the counsel involved could no longer recall any details about this matter.

[17] As for Ms. M, it appears that during her testimony she had started by recounting a rather farfetched story whereby none of the four companions had even gone to the Brasserie Normandie. According to her, all of them supposedly went dancing.[11] Then they allegedly went to Toronto and later she claimed to have slept with Mr. Beaulieu in a "tourist room" in Montréal. Then they returned to Quebec City.[12]

[18] After the judge remarked on her bad attitude and the court adjourned at the end of the day, Ms. M changed her testimony the next day. She admitted that she had in fact been outside the billiard hall (second-floor landing) with Mr. Cloutier the night of the crime when Mssrs. Beaulieu and Bilodeau entered the billiard hall. She heard a gunshot and they came out saying that they had shot at but thought they had missed Mr. Elieff. She further stated that the four accomplices had apparently walked to the Brasserie from Mr. Cloutier's place, which was two blocks away.

[19] It should be noted that during Ms. M's testimony she was asked a number of questions by Mr. Boulais (counsel for Mr. Bilodeau) to determine why she had changed her version. She indicated that Detective Sergeant David had told her that he was very disappointed with her for not following his advice to tell the truth and that he allegedly told her that she could be charged with perjury.[13] She also indicated that the previous day in court, during a break, she had overheard

---

[10] While Mr. Bilodeau and his counsel referred to three or four individuals in their comments, the transcript is absolutely clear about the fact that he had clearly seen four individuals.
[11] This version is similar to the one given by Mr. Cloutier at the preliminary inquiry, although the times and some other details differ.
[12] It should be noted that Messrs. Beaulieu and Bilodeau and Ms. M were in Quebec City the day before and that she had handled a 22-calibre revolver and accidentally fired at the wall of the room they were staying in. A balistics expert testified that the 22-calibre bullet extracted from the wall of the motel came from the same weapon as the bullet that was extracted from the victim's body.
[13] D-10 at pp 153-154.

Detective Sergeant David tell the Crown prosecutor that he was going to have her charged with murder. During close cross-examination by Mr. Boulais, she also testified that the same police officer had told her at one point that she would not be charged with murder if she testified against Messrs. Bilodeau and Beaulieu.

[20] As Ms. M had done before him, Mr. Cloutier testified at the preliminary inquiry that after spending the evening at the Altesse Tavern until about 20 minutes after midnight, he, Messrs. Beaulieu and Bilodeau and Ms. M supposedly went dancing at the Le Crazy Cat discotheque. They allegedly drove to the said discothèque before leaving around 2:30 a.m. and heading for Toronto.

[21] Since Mr. Cloutier had been called as a witness by the prosecution, after this statement, the Crown prosecutor obtained the court's permission to cross-examine him about an earlier statement, in particular, a statement he had given to police on March 19, 1971. It should be noted that at the beginning of his testimony Mr. Cloutier had asked if he could obtain the protection of the court, which was granted, albeit with a warning that he had to tell the truth,[14] failing which he could be charged with perjury.

[22] It appears from this cross-examination that the earlier statement read at the coroner's inquest indicated that M. Cloutier apparently stayed at the Altesse Tavern until about 11:30 p.m. with Mr. Beaulieu, Michel Larivière[15] and [TRANSLATION] "some other friends of Michel's" he did not know. They also are alleged to have gone to his place with Mr. Beaulieu, Michel and Ms. M and later

[14] In the application for review, Mr. Cloutier would later tell Mr. Beaulieu that he had never had a chance to tell the real story.

purportedly walked over to the billiard hall. Mr. Cloutier apparently stayed on the sidewalk because they [TRANSLATION] "knew me". Following an objection to the earlier statement being read in its entirety, Mr. Beaulieu clearly indicated that the statement was false and that the police had pressured him into making it, telling him that if he did not testify then it [TRANSLATION] "would be the others who would testify against him". It appears that Mr. Cloutier had an opportunity to explain in detail how he had been pressured by the police into making this statement (including having his hair pulled by them).

[23] Following the trial, Messrs. Beaulieu and Bilodeau were sentenced to life imprisonment (D-1), while Mr. Cloutier, who, as was previously mentioned, had pleaded guilty to a lesser charge, was sentenced to seven (7) years' imprisonment.

Mr. Boro's investigation reports

[24] After a lengthy correspondence between the Criminal Conviction Review Group (CCRG) and Mr. Bilodeau, on or about March 12, 2003,[16] the Minister instructed Mr. Boro, a criminal lawyer who the parties acknowledged at the hearing before me as being very experienced, to conduct the investigation.

[25] On October 2, 2003, Mr. Boro completed his investigation report[17] and sent it to Mr. Bilodeau for comments. Among other things, Mr. Boro indicated that since Mr. Bilodeau's counsel

---

[15] D-11 at p 199. In his supplementary submissions on March 2011, Mr. Bilodeau (and this expression includes his counsel when referring to submissions) argued that the Minister failed to consider the possibility that the fourth individual seen by Mr. Wong in the staircase was Mr. Larivière.

[16] On June 18, 2002, Mr. Bilodeau was informed that his application for a review of his conviction would progress to the second level where a more thorough investigation would be conducted (D-29).

[17] The evidence before him included Mr. Bilodeau's correctional file.

confirmed that his client had no further comments or evidence to adduce at that point, and that Mr. Bilodeau, in a letter dated October 10, had indicated that Ms. M did not remember the sequence of events (30 years later) very well, he decided not to meet with Messrs. Bilodeau and Beaulieu or Ms. M. In his report he summarized the evidence, the law with regard to alibis, the arguments raised in support of the application for review and, in his conclusion, indicated that Mr. Bilodeau had one year to submit additional comments to the Minister, in accordance with section 5 of the *Regulations Respecting Applications for Ministerial Review - Miscarriages of Justice*, SOR/2002-416 (Regulations).

[26] On October 15, 2003, Mr. Bilodeau commented at length on the investigation report. He submitted that, given the importance of the testimony of Ms. M at trial, it was unacceptable that she was not interviewed. In response to this, and to ensure that the matter was investigated fairly and thoroughly, Mr. Boro investigated further. The second report, dated May 6, 2004, summarized the interviews with Mr. Bilodeau and his counsel, with Mr. Cloutier, and with Ms. M. It appears from the said report, which was sent to Mr. Bilodeau,[18] that Mr. Cloutier had changed his version, telling the investigator that it was he and Mr. Beaulieu who had gone into the billiard hall, his role being to point out the proprietor. He added that when he was going into the billiard hall he recalled that he had passed several people who were going down the staircase, including one individual who was of Chinese origin. Mr. Beaulieu was the one who allegedly killed the victim, and everything had happened very quickly. They fled and hid out in his apartment. All that time, according to Mr. Cloutier, Mr. Bilodeau was asleep in the car, which was parked on Peel Street, because he had driven the car to the Brasserie Normandie and later returned home by means of the said car.

[27] According to the report, Mr. Cloutier is alleged to have stated that:

a. the only evidence he had given was at the coroner's inquest and that he had not been asked to testify at the preliminary inquiry;

b. he was allegedly placed in protective custody after Mr. Beaulieu had threatened him; and

c. he had always denied having participated in the murder.

[28] As for Ms. M, who is now married and who, it seems, has never told her husband about these events, the interview with her revealed little about the alibi issue, because she was accompanied by her husband, who initially refused to allow her to answer questions, believing that the whole thing was a conspiracy cooked up with Mr. Bilodeau to make money. It appears that he gained a better understanding of the situation after it was explained to him.

[29] The report dated May 6, 2004, indicated that Ms. M is a fragile person who is still haunted by these events but that "she stated categorically that she had no intention of renouncing the testimony she had given to the court thirty years earlier … [and] denied having been the victim of threats when she made her deposition at the time".

[30] Apparently, Mr. Bilodeau had gone to her place of work three times on the pretext that he was writing a book about the case. It should also be noted that Ms. M's refusal to participate in the investigation stems from her fear of having to testify. The interview had obviously troubled her a great deal.

---

[18] Without the Minister's reccommendations, see paragraph 32.

[31] She did not respond directly when asked whether it was possible that Mr. Bilodeau had been asleep in the car and merely repeated that she was sticking to the version of the facts she had given before the court.

Other measures between May 6, 2004, and the decision

[32] Given that all of the correspondence between the parties (as well as the evidence[19] before the decision-maker) is not before the Court, the period between May 6 and November 29, 2004, the date on which Mr. Bilodeau commented on Mr. Boro's second report, remains nebulous. The Court understands from Exhibits D-42 and D-43 that on August 9, 2004, Mr. Bilodeau requested that he be sent a complete and unredacted official translation of the second report. This request was denied on August 31, 2004, because the redacted passages were not part of the investigation. According to the CCRG, these passages contained the legal opinion and recommendations to the Minister. On October 5, 2004, Mr. Bilodeau reiterated his request, which was once again denied on October 7, 2004.[20]

[33] However, on November 17, the CCRG changed its mind and confirmed that it would soon send him a complete translation of the report, minus the recommendations. An English version of the non-redacted text, minus the recommendations, is attached.[21]

[19] For example, the coroner's report.
[20] Apparently, Mr. Bilodeau never received this letter.
[21] The Court has not seen the various copies exchanged between the parties and it is far from clear whether the text used during oral submissions in December 2010 (D-41) was in fact the final version sent after November 17, 2004. In this respect it should be noted that the correspondence in the record is presented chronologically and that the November 17 letter is in D-43.

[34] On November 29, 2004, Mr. Bilodeau submitted brief comments on the further investigation. He wondered how the investigator was able to deliver a recommendation, given the fact that there were no transcripts from the trial, as most of them had been destroyed in 1986 and the remainder were destroyed after his application for ministerial review in 2001.[22] Given that the transcript of Ms. M's testimony was destroyed in 1986, it was therefore impossible to verify her version of the facts. In his view, the preliminary inquiry provided only a vague idea of her testimony, which was riddled with implausibilities, inconsistencies and lies. It was at this moment that the applicant submitted for the first time that the Minister of Justice and his predecessors had an obligation to keep his court record in a secure location, given the length of the sentence (life) and the type of case (murder).

[35] In his view, the Minister should have been aware of the importance of trial transcripts,[23] which is emphasized by the fact that care was taken to set out, at paragraph 2(2)(*c*) of the Regulations, that the application for review must be accompanied by, among other things, a true copy of the trial transcript. According to him, this in itself was sufficient to conclude that an injustice had occurred and warranted acceptance of his application.

[36] Mr. Bilodeau also wrote that [TRANSLATION] "[o]n October 7, 2004, upon reading the report, Mr. Cloutier reiterated the version he gave in February 2001 and emphasized that he had never made the statements attributed to him by Mr. Boro" (D-44 at page 404).

---

[22] The Court does not understand this last claim, given that the letter dated February 21, 2001, shows that Mr. Bilodeau's counsel had an opportunity to check the record before the information that had not been destroyed in 1986 was later destroyed in 2002-2003.

[23] Mr. Bilodeau indicated that in December 1971 the mercy of the Crown could be requested by or on behalf of a convicted person (section 617 of the *Criminal Code*) and that such requests could only proceed if the Minister of Justice, after reviewing the matter, was convinced of the need to hold a new trial.

[37] On December 1, 2004, the CCRG informed Mr. Bilodeau that it would review the entire file in order to further examine the application. The CCRG indicated that the file would be examined in light of the information in the record as well as Mr. Boro's investigation. The eight- (8) page letter listed all of the evidence that had been adduced up to that point, including various references to the relevant parts of Mr. Bilodeau's prison record that were attached.

[38] It appears that on January 23, 2005, Mr. Bilodeau responded to this letter by filing an access to information request,[24] which was not filed with the Court (see D-46). and by requesting that the Department hire and supervise a polygraph expert in order to remove all doubt as to the [TRANSLATION] "veracity" of his version of the facts. The CCRG informed him that, upon reviewing his record, it was not convinced that a polygraph test was necessary in this case. It was also confirmed that the time limit to submit additional information was extended to November 29, 2005.

[39] On November 10, 2005, Mr. Bilodeau, in accordance with the Regulations and the provisions of sections 696.1 *et seq.* of the *Criminal Code*, submitted his comments, corrections and additional information (30 pages).

[40] Given the scope and diversity of Mr. Bilodeau's comments, the Court will limit itself to the following points:

a. In his view, Ms. M is not a very credible witness, given the three different versions given before the trial. It was noted that [TRANSLATION] "at no time did Ms. M

[24] It appears from D-47 that the request sought to obtain information about the fees paid to Mr. Boro for the investigation.

mention having kept watch with Denis Cloutier".[25] In her testimony before the coroner, she instead stated that she had waited outside with Mr. Cloutier. According to Mr. Bilodeau and as indicated by Mr. Boro, on October 2, 2003, Ms. M's testimony, under the circumstances, could not have been sufficient to warrant the verdict rendered. In support of this argument, he emphasized the fact that Mr. Boro mentioned that her version of events had changed so often that her value as a witness for the purposes of the application for review seemed to him to be extremely dubious.

b. Mr. Bilodeau added that since Mr. Wong was unable to identify him and that Ms. Koliff saw two men, and assuming the fact that he was asleep in the car, the only logical inference was therefore that Mr. Beaulieu and Mr. Cloutier had been at the scene of the crime, in spite of the latter's affidavit. He further stated that in 2005, at a meeting at the office of his counsel, Mr. Cloutier confirmed that the version described in Mr. Boro's report (meeting of January 19, 2004) was the correct one.

c. On the important question of when he first revealed his alibi to a third party, it seems there exists no documentary evidence in this regard prior to August 1991.[26] That said, Mr. Bilodeau submitted that there is other, older evidence that generally confirms that he had always maintained his innocence.

d. Mr. Bilodeau argued that, given the nature of the alibi, no prejudice resulted from the fact that he had not declared it earlier because the police would have been unable to verify its authenticity one way or another.

---

[25] D-48, at p 424.
[26] Letter referring to a meeting with a psychiatrist (E-23) D-48, at p 433, which was therefore after Mr. Beaulieu's death in December 1990.

e. Mr. Bilodeau also explained statements he made during his incarceration in which he admitted having committed the murder[27] as well as the reason why his counsel at the time, Mr. Daoust, had not raised this alibi at his parole hearing in 1999.

f. He reviewed the investigation reports in detail and the arguments he raised in finding that the investigation was tainted are more or less the same arguments that have been raised before me.

g. Finally, he submitted two polygraph tests taken by Mr. Bilodeau (the first was inconclusive) and commented on the value of this evidence in the following terms: [TRANSLATION] "We acknowledge from the outset that criminal courts do not recognize the value of a polygraph test for the purpose of determining an individual's innocence. However, it should be remembered that even the Honourable Antonio Lamer, sitting on the Supreme Court of Canada, assigned a <u>certain value</u> to polygraph tests, notably in the *David Milgard* case.[28] In fact, before our Supreme Court made a determination regarding Mr. Milgard's innocence, a request for a polygraph test was successfully received. Our civil courts also recognize that polygraph tests have a certain value. Thus, in cases of fire insurance claims, the line of jurisprudence provides that a judge is entitled to make an adverse inference against an applicant who refused to take a polygraph test sought by a representative of the respondent company. Other authorities also recognize the value of polygraph tests. One need only re-read the 'Manuel de Directives du Ministère de la Justice du Québec' on the subject of informant witnesses to see that polygraph tests are important" (D-48 at page 447).

---

[27] D-48, at pp. 434-435.
[28] This is not mentioned in the Supreme Court of Canada's decision on this matter.

[41] On December 5, 2005 (D-50), the CCRG acknowledged receipt of Mr. Bilodeau's comments and informed him that a final verification of the information provided in his comments would be conducted before everything was sent to the Minister along with the recommendations of the CCRG. This letter specifically addressed the issue of the destruction of the records and indicated that although Mr. Bilodeau's file would today be considered incomplete and inadmissible given the absence of transcripts, the Minister had agreed to review his application even though this meant that it would have to be determined solely on the available evidence. It was also indicated that they hoped the prison records of Messrs. Cloutier and Beaulieu would help [TRANSLATION] "shed some light".

[42] That same day, the CCRG requested these two records from the Correctional Service of Canada. On February 13, 2006, Mr. Bilodeau received Mr. Beaulieu's record, as he is deceased, and was informed that Mr. Cloutier's record (personal information) could only be disclosed to him if Mr. Cloutier consented to this. The applicant was also advised that this record contained information placing him with Mr. Beaulieu in the billiard hall on the day of the crime.

[43] In response, it appears that Mr. Bilodeau chose to send two letters, dated March 16, 2006. The one sent to the CCRG included a report on Mr. Cloutier's polygraph test while the other was addressed to Mr. Boro and raised various questions.

[44] It appears from D-55, that the letter to the Minister was sent to the wrong address and had to be remailed on March 29, 2006, along with a copy of the letter to Mr. Boro. There was no further communication prior to the Minister's decision eight months later.

The decision

[45] In his 28-page decision dated November 28, 2007, the Minister reviewed, in detail, the questions raised in support of the application for review. After referring to certain specific documents, he indicated that he had considered the entirety of the record in the Department.

[46] The decision deals with the nature of the application and the test that was applied − whether there was a reasonable basis to conclude that a miscarriage of justice likely had occurred.

[47] The Minister relied on the guiding principles governing the exercise of his discretionary authority under the former section 690 that had been adopted and formulated in April 1994 in an application regarding Mr. Thatcher. Having regard to the issues in this case, it is worthwhile to refer to paragraph 5, which reads as follows:

> Where the applicant is able to identify such "new matters," the Minister will assess them to determine their reliability. For example, where fresh evidence is proffered, it will be examined to see whether it is reasonably capable of belief, having regard to all of the circumstances. Such "new matters" will also be examined to determine whether they are relevant to the issue of guilt. The Minister will also have to determine the overall effect of the "new matters" when they are taken together with the evidence adduced at trial. In this regard, one of the important questions will be: "is there new evidence relevant to the issue of guilt which is reasonably

> capable of belief and which, taken together with the evidence adduced at trial, could reasonably have affected the verdict?"[29]
>
> [Emphasis added.]

[48] According to the Minister, the 1994 guidelines were reproduced and codified in sections 696.1 *et seq*., which came into force on November 25, 2002, and he confirmed that he used these provisions as a guide while reviewing the application.

[49] Once again, since it is relevant to the issues in this case, it is worth noting that while the Minister specifically refers to Mr. Bilodeau's polygraph tests at page 7 of his decision, he does not indicate how much weight he assigned to this evidence and he makes no reference to Mr. Cloutier's polygraph test.

[50] In addition to reviewing the evidence, the Minister relied on the applicable principles of law with respect to an alibi defence, which is an exception to the general principle that the accused has the right to remain silent. He noted that although it is acknowledged that the defence is under no obligation to disclose an alibi and that such an omission does not prevent future disclosure of the alibi at trial, the accused runs a significant risk that the probative value and credibility of his or her defence may be particularly affected if the alibi is not disclosed in a timely manner. He indicated that when an accused only mentions their alibi at the trial stage, the trier of facts may even draw a negative inference against them. Finally, he noted the difference between an alibi that is not believed − it has no probative force and should not be considered with the rest of the evidence – and

[29] While there is no specific reference to this test, it is one of the three tests applied in the Supreme Court of Canada's decision in ***Re v. Milgaard***, [1992] 1 SCR 866, paras 2(*c*) and 5. It should be noted that the original English version of the decision refers to ''credible evidence,'' which was translated in French as ''preuve digne de foi''.

a false alibi. When an accused has participated in the fabrication of a false alibi, a guilty inference may be drawn if it was a deliberate attempt to mislead.

[51] As for the application of these principles in this case, the Minister confirmed that none of the accomplices had testified at trial and that the alibi defence was not raised. He noted the explanations as to the lack of an appeal and the fact that the first time this alibi was recorded in writing was on August 26, 1991, more than 20 years after the murder was committed, and that, consequently, the lapse of this time in specifying the nature of the alibi defence raised in support of "your innocence … directly affects its credibility" (D-60 at page 779).

[52] He referred, *inter alia*, to the admissions made by Mr. Bilodeau to Correctional Service officers in which he stated that he had fired at the victim out of a reflex he could not explain because everything had happened so fast. This reflex theory was also put forward more than once.

[53] As for Yvon Beaulieu's record, it appears that throughout his detention he claimed that it was Mr. Bilodeau who had shot the victim when he tried to resist and he did not seem to understand why he too had been sentenced to life imprisonment. In this regard, the Minister noted that even if Mr. Bilodeau claimed to have an affidavit of Mr. Beaulieu in his possession[30] confirming that Mr. Bilodeau was not involved in the murder, this was never filed in support of his application.

[54] As for Denis Cloutier's affidavit, the Minister noted certain obvious errors such as the fact that he described his prison sentence as being 10 years rather than 7 years. He also noted that the

[30] If such an affidavit existed one might believe that Mr. Bilodeau had started gathering evidence for an application for review before Mr. Beaulieu's death and before he disclosed the details of his alibi for the first time (August 1991).

version described in the affidavit was contradicted by other testimony (explained in detail in the decision) and by Mr. Cloutier himself and that there was no doubt Ms. Koliff had clearly seen two individuals inside the billiard hall. The Minister also indicated that not only did the affiant change his version often, but that the version in which Mr. Bilodeau was inside the billiard hall is consistent with the versions found in both his and Mr. Beaulieu's file, as well as in all of Ms. M's testimony. In the Minister's view, the version of Ms. M's testimony whereby she waited at the top of the staircase while the two men entered the billiard hall is supported by the testimony of Mr. Wong and Ms. Koliff.

[55] Finally, the Minister noted that, aside from the testimony of Ms. M and Ms. Koliff, there was circumstantial evidence that could have been used by the jury to draw a negative inference with regard to Mr. Bilodeau's guilt (such as fleeing to Toronto and changing his appearance by dyeing his hair). In short, the Minister found that there was very little reliable information that supported the thesis of the alibi defence that was advanced and concluded:

> The first argument alleges a defence that could be characterized as an alibi the effect of which is to place you somewhere other than on the site of the crime at the time of the commission of the non-capital murder. I note however that this defence is contradicted by the testimony of the eyewitnesses who were heard at the preliminary inquiry and at the trial.
>
> Furthermore, the elapse of more than 20 years before you actually invoked your alibi defence in 1991 directly affects its credibility. I note as well, from reading your correctional file, that you have not always claimed to be innocent of the non-capital murder charged against you and that you have even admitted your responsibility on various occasions.
>
> This alibi defence is also shaken by the fickle version of the affiant Denis Cloutier and is not supported by the information taken from

> your correctional file. This alibi defence is not supported either by the information taken from the correctional files of your accomplices Denis Cloutier and Yvon Beaulieu since they both place you in the billiard hall on the night of the non-capital murder.

[56] As for the claim of a miscarriage of justice with regard to the criminal conduct of the investigating police officers and the compliance of the Crown prosecutor, as I indicated, given what was disclosed at the preliminary inquiry, the new issue was whether Ms. M had been the victim of sexual abuse on the part of the police officers. The Minister noted that Mr. Bilodeau's first allegation to this effect had been altered in his letter of October 17, 2001, in which he explained that, during a more recent conversation he had with her, the police had simply [TRANSLATION] "attempted" to abuse her. The Minister also indicated that when she met with Mr. Boro, Ms. M denied having been the victim of threats when she gave her evidence at the time and stated categorically that she had no intention of recanting her testimony. He found that there was therefore no reasonably credible evidence in the record in support of this new allegation.[31]

[57] As to this last element and the issue of negligence by his counsel, the Minister concluded:

> However, you have not provided any new significant information or proffered any evidence in support of your allegations that the police threatened the witnesses [[32]] in order to obtain your conviction. …[As for the] conduct of your lawyer, … you have presented no new information that would suggest that you were the victim of a miscarriage of justice in this regard. There is every indication from your file that your lawyer vigorously represented your interests throughout the trial.

[58] The application for review was dismissed.

---

[31] The Court reiterates here that the facts in evidence at the preliminary inquiry were well known by both Mr. Bilodeau and his counsel and that there is no indication, Mr. Bilodeau not having addressed this question, as to which fact Mr. Boulais, his counsel at the preliminary inquiry, testified at trial.

Legislation

[59] The parties agree to have the Court determine the issues in light of the *Criminal Code* provisions in effect as of November 2002 and the Regulations adopted at the same time. The relevant provisions are included in Annex A.

Issues

[60] After the lengthy background analysis which seemed to me to be absolutely essential to place the many issues in their proper perspective, we must now summarize them.

[61] The applicant submits that the Minister breached his duty to comply with the applicable principles of fundamental justice under section 7 of the *Canadian Charter of Rights and Freedoms* (the Charter) and his common law duty of fairness in applying the rules of natural justice. In particular, he cites the following breaches:

a. The Minister or his delegate did not conduct a thorough and neutral investigation. Furthermore, Mr. Boro had illegally delegated certain tasks to other members of his firm and failed to exercise the powers conferred upon him to compel Ms. M to answer his questions;
b. The review, on his own initiative, of the correctional files of the three individuals involved;
c. The failure to disclose Denis Cloutier's correctional file to him because in his view it was up to the Minister to obtain the necessary consent in order to be able to meet his obligations;

---

[32] The Court understands here that this refers to the witnesses at trial.

d. The disclosure, beyond the time limit set out in the Regulations, of the information contained in Mr. Beaulieu's file and its use as an alternative argument by Mr. Cloutier;
e. The lack of a transcript of the meetings between the witnesses and the investigator that would have allowed him to check the accuracy of the investigation report;
f. The refusal to provide him with a complete copy of the report from May 6, 2004 (second report);
g. The failure to refer to and assess his polygraph tests and that of Mr. Cloutier.

[62] He further argues that the Minister's decision is unreasonable because he clearly disregarded evidence − polygraph tests – or lacked transparency by failing to deal with this important and relevant evidence and by not explaining the reasons why he accepted Ms. M's ever-changing decision. Moreover, he failed to consider that it was Michel Larivière who went up the staircase and not Michel Bilodeau.[33] Finally, he points out that the Minister misunderstood and exceeded his mandate when he examined the credibility of the evidence submitted rather than simply assessing its reliability and relevance as set out in paragraph 696.4(*b*) of the *Criminal Code*.

Analysis

[63] All arguments related to a decision-maker's breach of the duty of fairness, whether under common law or under section 7 of the Charter, are to be determined on the basis of a correctness standard of review (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43), except those relating to adequacy of reasons, as the Court concurs with the opinion of the Newfoundland Court of Appeal in *Newfoundland and Labrador Nurses' Union v Newfoundland*

and Labrador (Treasury Board), 2010 NLCA 13, to the effect that the transparency, intelligibility and justification required by the reasonableness standard is sufficient to determine whether the decision maker provided sufficient reasons for his or her decision.

[64] The parties agree and the Court is satisfied that the Minister's decision with respect to the application for review as such is a question of mixed fact and law, particularly centred on the facts, and is reviewable on a reasonableness standard (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 51, 53; *Daoulov v Canada (Attorney General)*, 2008 FC 544 at para 22, aff'd by 2009 FCA 12 at para 11).

[65] This is to say, therefore, that aside from the above-mentioned question of transparency, the Court must determine whether the Minister's findings fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law". It is not for the Court to substitute its own assessment of the evidence or the material provided for that of the Minister.

A. The scope of the Minister's duty

[66] Let us state from the outset that whether it is founded on common law or on section 7 of the Charter, the scope of the Minister's duty of fairness varies according to the context (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 21-22; *Idziak v Canada (Minister of Justice)*, [1992] 3 SCR 631 at para 50). It is also clear that the principles of fundamental justice first require that the protections provided by the rules of natural justice and procedural fairness be respected. Even if in certain cases the parameters set out in section 7 of the Charter can extend beyond the principles of natural justice, they do not necessarily do so in every case.

---

[33] Pages 10-12 of the supplementary notes filed on March 11, 2011.

[67] That said, the Court will analyze this issue by taking into consideration the criteria set out by the Supreme Court in *Baker*, above.

i) Type of decision

[68] The applicant argues that even if the Minister's authority is based on the royal prerogative, the fact remains that he is exercising a fundamental right not to be the victim of a miscarriage of justice.

[69] In *Bilodeau v Canada (Ministre de la Justice)*, 2009 QCCA 746 at paras 12-25, a recent decision that dealt with Mr. Bilodeau's application, the Quebec Court of Appeal considered the issue. It concluded at paragraph 25 that:

> [TRANSLATION]
>
> … the statutory amendments in 2002 did not alter, in its essence, the nature of ministerial authority as it has been codified since 1892. The scope of this authority is outside the traditional sphere of criminal law in that it begins after legal remedies are exhausted. It is a discretionary power which has historically been considered as one of the forms of exercise of the royal prerogative of mercy.

[70] Justice Rothstein had arrived at a similar conclusion several years earlier in *Thatcher v Canada (Minister of Justice)*, [1997] 1 FC 289, and in *W.R. v Canada (Minister of Justice)*, 2001 FCA 35, at para 2, the Federal Court of Appeal clearly indicated that applications under section 690 of the *Criminal Code* are applications for mercy.

[71] The Minister's decision is final and may only be reviewed in judicial review proceedings before this Court.

[72] In my opinion, this requirement points toward a minimum duty. At best, it is a neutral factor.

ii) Impact of the decision

[73] The parties agree that this decision is very important for the applicant. While the respondent characterizes it as an important privilege, the applicant, as I have already stated, sees it as a fundamental right.

[74] In *Thatcher*, above, Justice Rothstein had expressed serious doubts as to the application of section 7 of the Charter, indicating that there was no *lis* between the parties. The Federal Court of Appeal in *W.R.*, above, took pains to indicate that it was not endorsing the decision of the motions judge regarding the application of section 7 of the Charter.

[75] While it is obvious that the rights protected under section 7 must be interpreted broadly and in accordance with the underlying principles and values of the Charter as a whole, the Court is far from being convinced in the particular circumstances of the case that the applicant has shown that he passed the first step (*Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at para 47), because his submissions regarding the impact of the decision on his parole conditions were rather vague.[34]

[34] It appears that the applicant was granted parole shortly before the month of February 1989, because at that time he was convicted of conspiracy to traffick in narcotics in Vancouver, of escaping lawful custody on November 22, 1990, and of three counts of conspiracy to commit forgery in Sherbrooke in 1996. He was once again paroled on June 13, 2000. See applicant's additional submissions.

[76] In several cases, including *Bryntwick v Canada (National Parole Board)*, [1987] 2 FC 184, it was held that a decision having a direct impact on the release of an offender in the context of a parole hearing involved section 7 of the Charter. In *Schmidt v Canada*, [1987] 1 SCR 500, the Supreme Court of Canada applied section 7 in the context of a decision of the Minister to extradite Ms. Schmidt to the United States in order for her to be retried. In that case, it seems that section 7 was applied even if the Minister's decision did not directly affect Ms. Schmidt's liberty but instead created the opportunity for her to be put on trial a second time.

[77] The Minister's decision in this case has no direct effect on the applicant's parole conditions; at most, it creates an opportunity. However, in my opinion, the opportunity is not of the same nature as that created by the Minister's decision in *Schmidt* or *Idziak*, above.

[78] That said, the Court does not believe it is necessary to determine whether section 7 applies since I am satisfied that even if it did apply, the Minister did not breach his duty, which, in my view and having regard to all the circumstances, would be very similar to that imposed by the common law in this case (see *Németh v Canada (Justice)*, 2010 SCC 56 at para 70).

[79] Upon reading the *Idziak* decision, above, it is relatively clear that the same kind of procedural advantages as those before criminal or civil courts cannot be imposed on the exercise of the royal prerogative. The scope of the duty imposed on decision-makers on matters of parole that have a direct impact on the offender clearly indicates that there are important differences even where section 7 of the Charter applies.

[80] Therefore, at most this requirement weighs in favour of a higher duty.

iii) Legitimate expectations

[81] The applicant did not indicate on what basis he could legitimately expect the Minister to do more than that which is set out in the Regulations and section 696 of the *Criminal Code*. The applicant presented no evidence that would allow the Court to conclude that representations were made to him regarding the transcripts of interviews or other specific points[35] raised in the issues described above.

iv) Process adopted by the decision-maker

[82] The Supreme Court of Canada instructs us that, where the decision-maker has the authority to control its own process, some measure of deference is owed. Parliament expressly provided in the *Criminal Code* the test to be applied by the Minister and the criteria to be considered. The Regulations set out the stages of the process, which include conducting an investigation in certain cases only (paragraph 4(1)(*a*) versus subparagraphs 4(1)(*b*)(i) and (ii)), as well as the applicant's right to participate (subsections 4(3), 4(5) and 5(1)) and the Minister's obligation to render a decision (section 6). The Court notes, however, that there is no provision requiring the Minister to provide reasons for his or her decision.

[35] At page 440 of his record the applicant indicates that Mr. Boro had told him that he would send him his report for comments before issuing a final recommendation. This has nothing to do with the issues raised in this proceeding and, moreover, there is nothing in the record to indicate that the recommndations contained in the report of May 6, 2004, were in fact the final recommendations.

[83] The *Criminal Code* gives the Minister the powers of a commissioner under the *Inquiries Act*, RSC 1985, c I-11 (Part 1 and the powers under section 11). The Court understands that these powers were conferred upon the Minister in order to provide him or her with more tools to conduct a prompt investigation and not to oblige him or her to use them in every case.

[84] The Court carefully examined all of the case law cited by the parties including the recent decision of the Supreme Court of Canada in *Németh*, above, which once again involved a ministerial decision in an extradition matter and in which Justice Thomas Cromwell, writing on behalf of the entire Court, dealt generally with the Minister's duty of fairness both at common law and in accordance with the application of section 7 of the Charter. This duty, as it is described in paragraph 70, is not new. The difficulty always arises in the application of a general principle, such as the disclosure of evidence.

[85] In this regard, the Court notes that in *Idziak*, above, where the appellant was also challenging a Minister's decision to issue a warrant of surrender, the question being whether the Minister, who was bound to act in accordance with the "principles of fundamental justice", had breached her duty by refusing to disclose a memorandum which she had considered. Justice Peter Cory indicated that the Minister, although she was bound to act in accordance with the "principles of fundamental justice", was not obliged, when she decided to issue the warrant of surrender, to disclose the memorandum she had received from her staff counsel, which was not evidence to be used in an adversary proceeding, and that failure to disclose it did not constitute unfairness.[36]

[86] Justice Gérard La Forest noted that in considering the issue of surrender in that case, the Minister was engaged in making a decision rather in the nature of an act of clemency (royal prerogative) and that she was entitled to consider the views of her officials who were versed in the matter without being compelled to reveal those views.

[87] The Court concludes from all the foregoing that the Minister's duty includes, when an investigation is conducted, ensuring that it is neutral and thorough, and providing an applicant with a genuine opportunity to submit any relevant information and evidence and to comment on additional information (evidence) that the Minister intends to consider. Finally, the Minister must render a decision that is adequately reasoned in order to enable the applicant to exercise his or her right to judicial review and to enable the Court to exercise that jurisdiction. It is in light of these general principles that the Court will examine the omissions and breaches raised by the applicant.

B. Was there a breach of the duty of fairness?

i) A neutral and thorough investigation

[88] Let it be noted at the outset that a duty of this order surely does not mean that the Minister is required to order a new trial or a commission of inquiry. Indeed, the applicant acknowledges that in this case the investigator has a certain amount of discretion in the way he or she wishes to proceed, given the circumstances of the case. For example, in certain cases it may be appropriate to issue a summons, while in others this is not necessary.

---

[36] Justice Cory noted that this memorandum would have, at any rate, been protected by solicitor-client privilege, while Chief Justice Lamer and Justices McLachlin, Sopinka and La Forest indicated that they did not need to deal with this particular issue.

[89] In fact, the Federal Court of Appeal in *Tahmourpour v Canada (Solicitor General)*, 2005 FCA 113 and *Sketchley v Canada (Attorney General)*, 2005 FCA 404 aptly describes what is generally meant by a neutral and thorough investigation. The principle has been applied regularly by our Courts and this jurisprudence seems to me to be quite appropriate in this case.

[90] As Justice Karen Sharlow indicated in *Morrison v HSBC Bank of Canada*, 2008 FCA 340, at para 31, the obligation to conduct a thorough investigation does not mean an investigator is required to turn over every possible stone. The Court will intervene only if the investigator fails to investigate crucial evidence, given the nature of the application and the information already available. Moreover, certain omissions may be compensated for by the simple fact that the applicant was given the opportunity to rectify the situation by bringing such omissions to the attention of the decision-maker (*Slattery v Canada (Human Rights Commission)*, [1994] 2 FC 574, at paras 56-57).

[91] Similarly, the Court must also consider the various steps taken even after the investigation to ensure that all of the relevant information was gathered and commented on before the decision was made.

[92] In this case, the Minister first tried to obtain all of the available evidence from the applicant before asking Mr. Boro to investigate and to summarize the evidence. It is clear that his mandate was to proceed with the investigation as he saw fit in light of the evidence in the record and that which was no longer available. It is also clear that the investigator considered the applicant's comments in his first report when he decided to further investigate. Moreover, given the information and comments received from Mr. Bilodeau, the CCRG continued to seek information to verify

additional issues he had raised, thereby extending the duration of the process to ensure that it was as complete as possible in the circumstances.

[93] The applicant simply did not raise any omission relating to a crucial element or one that could not be compensated for.

[94] In his comments on the first report, Mr. Bilodeau never mentioned that he wanted a transcript of the interviews which he later demanded. After having met with the investigator himself, he obviously ought to have known that there was no transcript of the interview. The Regulations clearly indicate that he was only entitled to the investigation report. It was only later that he complained about the lack of a transcript.

[95] The Court is not convinced that it must impose such a rigid framework on the Minister where there is no right to appeal and where the Court can exercise its jurisdiction in judicial review in the absence of such notes. In this regard, it should be noted that in a number of other kinds of judicial review that involve, for example, the Human Rights Commission or reviewing adjudication decisions, the Court has no access to such transcripts.

[96] That said, the applicant also failed to establish that the lack of a transcript had caused him prejudice in this case, as he had rectified all of the perceived inaccuracies with regard to his own version and that of Mr. Cloutier. Furthermore, Mr. Bilodeau even ended up agreeing with Mr. Cloutier's version described in the second report, quickly abandoning his previous comments on the subject. With regard to Ms. M, he also did an about-face, finally adopting the position that this

witness was not credible, given her numerous previous versions, even going so far as to rely on the opinion expressed by Mr. Boro in his first report.

[97] As for the argument that Mr. Boro ought to have compelled the witnesses involved, particularly Ms. M, to testify under oath and to answer his questions, once again the Court notes that it is up to the Minister and his investigator to decide whether or not they need to use all of the powers conferred upon them in the *Criminal Code*. It should be remembered that the obligation to conduct a neutral and thorough investigation does not mean it must be perfect. As to the general competence of Mr. Boro, here again the Court notes that both counsel at the hearing confirmed that he was an experienced criminal lawyer and that there was no error in the description of the applicable law with regard to alibis. There is no evidence that he was not impartial.

[98] There is simply no reason to invalidate on grounds that the investigation was not thorough.

ii) Illegal subdelegation

[99] There is little to be said for the allegation of illegal subdelegation[37] since this argument is based solely on a dubious textual analysis focused on the use of the word "we" in Mr. Boro's reports (in particular the one from May 6, 2004).

[37] No useful purpose would be served in commenting on whether the secretary or a junior counsel from Mr. Boro's firm could, for example, have scheduled meetings or contacted witnesses in this regard.

[100] In the conclusion of his first report Mr. Boro uses the expressions [TRANSLATION] "our investigation" and "we inform you". In his second report, when referring to the interview with Mr. Cloutier, he uses similar expressions such as "we met with him". Yet Mr. Bilodeau, who met with Mr. Cloutier after the report was issued, never claimed that it was not Mr. Boro who had met with that witness. An impersonal form was also used when referring to the interview with Mr. Bilodeau himself; for example, at page D-41, Mr. Boro states [TRANSLATION] "when we asked him… when we asked him" twice (emphasis added). Yet it is clearly established that it was in fact Mr. Boro who met with Mr. Bilodeau. In the circumstances, on what basis could the Court conclude that he did not meet with Ms. M?

[101] Given the lack of any clear evidence of subdelegation, there is no need for the Court to deal with this issue.

iii) Applicant's right of participation

[102] The applicant is not challenging the Minister's discretion to limit his right to make written comments. What he is arguing is that his right to comment in writing necessarily implies having precise knowledge of all of the information before the Minister. As I have already indicated, the Minister's duty is in no way similar to that of a court of law, either civil or criminal. Prudence is called for when analyzing the parameters of the Minister's obligation to disclose evidence. In this regard, it is worth noting that Parliament clearly chose to limit disclosure to an "investigation report". This is not new and is in fact the norm in a number of circumstances[38] in which confidential

[38] Disciplinary authority of the Correctional Service of Canada, Human Rights Commission investigations, to name but a few.

information can be accessed, information such as the correctional files of the accomplices in this case.

[103] While I do not wish to imply that the Minister was required to disclose Mr. Beaulieu's entire file, it appears that he chose to do so, in light of the fact that Mr. Beaulieu was deceased and that there was therefore no longer any personal information to protect. However, it is clear that he could not legally disclose the content of Mr. Cloutier's file without his consent.

[104] In this regard, the Court is satisfied that the Minister had no obligation other than the one to advise the applicant that this file contained information placing him in the billiard hall, contrary to Mr. Cloutier's statements and to information put forward by Mr. Bilodeau. The Minister also had an obligation to provide him with a real opportunity to obtain the consent of this witness who was clearly accessible to him.

[105] This is all the more evident when one considers that Mr. Bilodeau never asked the Minister to obtain this consent himself. He did not explain why he was unable to do so. In fact, his only response with regard to this information was to submit Mr. Cloutier's polygraph test from February 14, 2006. Under the circumstances, there was no breach on the Minister's part regarding the disclosure of Cloutier's file.

[106] As to the allegation that the Minister could not on his own initiative consult the files of Messrs. Beaulieu and Cloutier and, alternatively, that the information was disclosed too late, here again the Court cannot agree.

[107] There is no doubt as to the fact that the Minister is entitled to take into account all matters he considers relevant to the application (subsection 696.4). Even though the burden of proof rests on the applicant, it is absolutely essential that the Minister be satisfied as to the validity of the information that is presented. This is the very essence of his role. Once again, the applicant seems to have misunderstood the nature of the process.

[108] As for the time limit, it is true that the information was disclosed after November 25, 2005.[39] The reasons were explained to him and the explanation given fully justified the extension. At no time did Mr. Bilodeau complain of any prejudice caused by the delay. In fact, it seems that he understood full well at the time that he would also have an opportunity to take advantage of this extension to comment on the information and not only to obtain Mr. Cloutier's consent since he had written three letters after February 13, 2006.[40]

[109] At any rate, subsections 2(3) and 5(2) of the Regulations do not state (expressly or implicitly) that the Minister must render a decision after the limitation periods have expired or that he can no longer at that time take into account matters he considers relevant to the application. The Court should not intervene on this point.

[110] As for the failure to provide a complete translation of Mr. Boro's report dated May 6, 2004, in its entirety, the Court is satisfied that on November 17, the CCRG had agreed to provide him with the entire report, minus Mr. Boro's legal opinions and recommendations. As before the hearing,

[39] The Court notes that this time limit was extended for Mr. Bilodeau's benefit because a further investigation was conducted to take into account his first comments.

there was nothing to indicate that the applicant was arguing that the blacked-out parts concealed more than that information, and the respondent did not have an opportunity to file an affidavit to that effect. This cannot be held against him, particularly since, as I indicated in footnote 18, the Court is not satisfied that the last version provided to the applicant contained any blacked-out parts other than the section under [TRANSLATION] "Recommendations to the Minister". There is no reason in this case for the Minister to go further than a minister charged with reviewing an application for a warrant of surrender. Like Justice Cory in *Idziak*, above, the Court finds there was no unfairness in this case since it did not involve commenting on the evidence or on objective information relevant to the review of the application.

[111] As to the obligation to provide adequate reasons, this will be examined under the heading: C. "Is the Minister's decision reasonable?" below. I will also deal with the issue of the lack of transcripts of the evidence at trial under the same heading since the applicant indicated that the absence of this material had a direct impact on the Minister's powers and on the conclusions he could legally have drawn.

C. Is the Minister's decision reasonable?

i) Was the Minister entitled to dismiss the application given the destruction of the criminal file in 1986 and in 2002?

[112] It should be noted at the outset that the Minister was under no obligation to intervene after the filing of the letter dated February 21, 2001, since Mr. Bilodeau's counsel had clearly indicated that his mandate was to verify the court record and to ensure that he produced everything that was in

---

[40] The applicant had known since December 5, 2005, that the time limit would be extended.

the record. The question is therefore confined to determining the extent of the impact of the destruction of the record in 1986.

[113] It would be helpful, before I begin my analysis, to state that the rules governing the archiving of this documentation are set out in a provincial statute and that nothing in the evidence or information submitted by the parties tells us what such rules were prior to 1986, the year in which both parties agree these documents were destroyed (about 15 years after the trial). Having said that, it seems that the applicant is arguing that no matter what rules applied to the destruction of records, the simple fact that this occurred means that the Minister could not exercise his authority under section 696.1, since he did not have the necessary elements before him to do so because without the court record, the Minister's decision would be based on proof that a charge was laid and not proof of conviction. In his view, only one court of law, such as the Quebec Court of Appeal, had the jurisdiction to measure the real consequences of the destruction. Thus, the Minister had a *de facto* duty to refer the decision to a court of law.[41]

[114] This argument is difficult to understand given that it was the applicant himself who asked the Minister to investigate (see application for review of criminal conviction dated February 21, 2001). At that time, he was aware of the destruction of the record.

[115] In his comments dated November 29, 2004 (D-44), Mr. Bilodeau raised for the first time what he considered to be the impact of the destruction of his record. He indicated that he seriously questioned whether there had been negligence on the Minister's part and submitted that he had to

[41] See supplementary notes from December 3, 2010, at paras 20-24.

conclude that he had been the victim of an injustice that had deprived him of his right to a complete, thorough, fair and impartial investigation.

[116] In his lengthy comments dated November 10, 2005, Mr. Bilodeau raised this issue once again, insinuating that there had been negligence on the Minister's part (D-48 at page 444), and he did not indicate that the rules of fundamental justice would favour referring his case directly to a court of appeal. On the contrary, not only did he request that corrections be made to complete the investigation, he further submitted to the Minister that the polygraph tests he had attached to his comments would constitute [TRANSLATION] "an essential tool for his cognition" and reiterated that he was willing to undergo another test if the Minister felt this would be appropriate (at page 451). He further submitted that considering all of the foregoing he hoped the Minister would respond favourably to his application by taking into account the position put forth in section 9, in which Mr. Bilodeau discussed the three different decisions the Minister could make in this case, namely:

> [TRANSLATION]
>
> i. to issue a written order for a new trial;
> ii. to refer the entire matter to a court of appeal as if it were an appeal; and
> iii. to simply dismiss the application outright.
>
> [Emphasis added.]

[117] As acknowledged by the applicant, any breach of the rules of natural justice or fundamental justice must be cited at the earliest opportunity. It is not a means by which to ambush the decision-maker. It is clear that the applicant does not meet this requirement.

[118] Having said that, I should note that the analogy used by the applicant is a poor one. In fact, in his additional submissions he refers to the fact that the Court of Appeal of Quebec, in *Lepage c R* (April 26, 1971), Montréal 20552/67 (CA), ordered a new trial following the partial destruction of the trial transcript. The right to appeal a criminal conviction is a fundamental right of the applicant. That right bears no resemblance to the right provided for under sections 696 *et seq*. since, as stated above several times, it is nothing like an appeal. No one has the right to the exercise of the royal prerogative without having first established that they meet the test set out by Parliament.

[119] It appears to me that the applicant has a rather poor understanding of the nature of the proceeding he is engaged in. In fact, in the *Criminal Code* itself, it is referred to as an "extraordinary" remedy. It is up to him to meet the necessary conditions for the exercise of this relief. The Minister is under no duty in law to provide him with the means to meet the requirements set out in the case law and in the Act.

ii) Did the Minister apply the wrong test by assessing the credibility of the evidence in support of the applicant's alibi?

[120] I will now examine the argument that the Minister exceeded his powers by taking into account the credibility of the information and evidence submitted by Mr. Bilodeau. According to the applicant, the Act (paragraph 696.4(*b*)) clearly and exhaustively sets out that he can take into account only "the relevance and reliability of information that is presented". The case law of the Supreme Court of Canada prior to the coming into force of the said section made an important distinction between the reliability and the veracity of evidence (*R v Khan*, [1990] 2 SCR 531; *R v Khelawon*, [2006] 2 SCR 787).

[121] He notes as an example that in his decision the Minister stated:

> … this contradiction directly affects the credibility of the argument that is advanced in this case. [Exhibit D-60, page 786, second last paragraph]
>
> …
>
> There is simply no reasonably credible evidence in the record to justify your allegations. [Exhibit D-60, page 787, first paragraph]
>
> …
>
> The elapse of more than twenty years before you raised an alibi defence … [in 1991] …directly affects its credibility. [D-60, page 787, third paragraph]
>
> [Emphasis added.]

He argues that once the reliability and relevance are established, credibility and probative value are within the purview of a court.

[122] The Court cannot subscribe to the statutory interpretation proposed by the applicant.

[123] If we apply the approach advocated by the Supreme Court of Canada, which has for some time adopted the test proposed in E. A. Driedger's *Construction of Statutes* (2nd ed. 1983), at page 87:

> … the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.

[124] Section 696.4 of the *Criminal Code* confirms in its header that the Minister of Justice "shall take into account all matters that the Minister considers relevant" (emphasis added). In this context the word "including" ("notamment" in French) followed by a brief list (paragraphs (*a*), (*b*) and (*c*)) indicates that this list is not exhaustive.

[125] The latitude given to the Minister in this regard is completely consistent with the other provisions under sections 696.1 *et seq.* of the *Criminal Code*. Especially when one considers that it involves the exercise of the royal prerogative.

[126] That said, the Court would like to point out that its decision must not be interpreted as acquiescence to the limited interpretation of the word "reliability" ("fiabilité" in French) at paragraph 696.4(*b*) of the *Criminal Code*. On the contrary, a simple reading of the principles adopted in 1994 (see paragraph 41 above) and paragraphs 2(c) and 5 of the Supreme Court of Canada's decision in *Milgaard*, above, clearly shows that reliability is a broad concept whose scope changes depending on the context.

[127] In *Milgaard*, the expressions "reasonably capable of belief" at paragraph 2 (*c*) and "credible evidence" at paragraph 5 are translated in French as "raisonablement digne de foi" and "une prevue digne de foi".

[128] The expressions "reliability" or "reliable" do not seem to have been translated the same way in all of the sections of the *Criminal Code.* To cite but one example, at paragraph 278.3(4)(*f*) "reliability" is rendered as "véracité" in French.

[129] From this one cannot help but conclude that a much more detailed analysis would be required in order to appropriately define the expression "reliability" in this case. The statutory interpretation of this paragraph is simply not necessary to determine the issue before me.

iii) Did the Minister disregard evidence?

[130] According to the evidence filed in the applicant's record, it appears that the Minister received Mr. Bilodeau's polygraph tests with his letter dated November 10, 2005, as well as Mr. Cloutier's polygraph test with the letter dated March 16, 2006. Given that there was no request under Rule 317, the Court has no reason to believe that this correspondence was not before the Minister because he specifically mentions Mr. Bilodeau's tests (D-60 at page 777) and refers to "the entirety of your file with the Department" (D-60 at page 772).

[131] Moreover, the decision-maker benefits from a presumption that he or she examined all of the evidence in the record. A decision-maker is not obliged to list each and every piece of evidence before him or her. The Court must only consider the presumption to be rebutted where it can infer that the decision-maker would necessarily have had to mention the evidence if he or she had taken it into account given its probative value and the fact that it related to a crucial element (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCA No 1425 (QL), 157 FTR 35; *Ozdemir v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 331).

[132] In determining whether it can be inferred that the decision-maker failed to consider Mr. Beaulieu's test, the Court considered the fact that the Minister did not further discuss Mr.

Bilodeau's polygraph tests in his decision because, as he indicated in his letter dated February 16, 2005 (D-46), he was not convinced that this evidence was necessary to the case.

[133] The explanation provided in this letter is entirely justified in light of the Supreme Court of Canada's decision in *R v Béland,* [1987] 2 SCR 398, in which Justice William Rogers McIntyre, writing for the majority, indicated that such expert polygraph evidence ran counter to the well-established rules of evidence and was not admissible in particular because credibility is a matter solely for the trier of fact based on his or her common sense and everyday experience (see also *R v Oickle*, [2000] 2 SCR 3 at paras 95 and 138).

[134] Even if, as the applicant argues, such tests may be have been found useful in certain other contexts, in the circumstances of this case, the Court cannot conclude that it could reasonably infer that these tests were overlooked simply because they were not specifically dealt with in the decision. These documents have no probative value and the Minister had absolute discretion to use or not use them.

iv) Did the Minister fail to discharge his duty to render a transparent, intelligible and justified decision?

[135] In *Vancouver International Airport Authority v Public Service Alliance of Canada*, 2010 FCA 158 (*Airport Authority*), and in *Holmes v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FCA 112, at para 43, the Federal Court of Appeal once again reflected on the

duty to give reasons and what sort of reasons this implies. It summarized the four fundamental purposes sought and dealt specifically with the "justification, transparency and intelligibility" purpose. It is therefore worth citing paragraph 16 of *Airport Authority* in this regard:

> Where, as here, an administrative decision-maker, acting under a procedural duty to receive and consider full submissions, is adjudicating on a matter of significance, what sort of reasons must it give? From the above authorities, and bearing in mind a number of fundamental principles in the administrative law context, the adequacy of the decision-maker's reasons in situations such as this must be evaluated with four fundamental purposes in mind:
>
> (a) *The substantive purpose*. At least in a minimal way, the substance of the decision must be understood, along with why the administrative decision-maker ruled in the way that it did.
>
> (b) *The procedural purpose*. The parties must be able to decide whether or not to invoke their rights to have the decision reviewed by a supervising court. This is an aspect of procedural fairness in administrative law. If the bases underlying the decision are withheld, a party cannot assess whether the bases give rise to a ground for review.
>
> (c) *The accountability purpose*. There must be enough information about the decision and its bases so that the supervising court can assess, meaningfully, whether the decision-maker met minimum standards of legality. This role of supervising courts is an important aspect of the rule of law and must be respected: *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220; *Dunsmuir*, *supra* at paragraphs 27 to 31. In cases where the standard of review is reasonableness, the supervising court must assess "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir*, *supra* at paragraph 47. If the supervising court has been prevented from assessing this because too little information has been provided, the reasons are inadequate: see, *e.g.*, *Canadian Association of Broadcasters, supra* at paragraph 11.
>
> (d) *The "justification, transparency and intelligibility" purpose*: *Dunsmuir*, *supra* at paragraph 47. This purpose overlaps, to some extent, with the substantive purpose. Justification and intelligibility are present when a basis for a decision has been given, and the basis is understandable, with some discernable rationality and logic. Transparency speaks to the ability of observers to scrutinize and

> understand what an administrative decision-maker has decided and why. In this case, this would include the parties to the proceeding, the employees whose positions were in issue, and employees, employers, unions and businesses that may face similar issues in the future. Transparency, though, is not just limited to observers who have a specific interest in the decision. The broader public also has an interest in transparency: in this case, the Board is a public institution of government and part of our democratic governance structure.

[136] The Court also lists a number of important principles established in the case law which judges must take into consideration when determining whether the fundamental purposes set out above have been met. The first of these principles is that the Court may consider extraneous material, that is to say, it should consider the broader context, notes in the decision-maker's file and other matters in the record which may explain the decision-maker's reasoning. Second, the adequacy of the reasons is not measured by the pound. Third, the judges must not use this principle to frustrate Parliament's intention to remit subject-matters to specialized administrative decision-makers. The courts should make allowances for the "day to day realities" of administrative tribunals. Finally, the Court's assessment of reasons should be aimed only at ensuring that legal minimums are met (see paragraph 17 of *Airport Authority*).

[137] Applying these principles to this case, the Court is satisfied that the Minister's decision meets the standards of reasonableness (and the duty of fairness).

[138] In fact, the Court understands the Minister's reasoning perfectly. The decision is rational and logical. The applicant is merely complaining that the decision-maker should have elaborated further. As I have previously stated, polygraph tests would not constitute admissible evidence in any new

trial. They were merely a tool to help him make his decision. In my view, there was simply nothing further to add, given that the grounds on which the Minister based his decision were sufficient and that he had already advised Mr. Bilodeau that this tool was not necessarily of much use in this case.

[139] The issue regarding the destruction of the record warrants the same response. The letter dated December 5, 2005 (D-50), had already sufficiently dealt with this issue. In light of Mr. Bilodeau's submissions and comments in this regard (see paragraphs 113-116, above), the Minister, in my opinion, was under no obligation to add comments in order to fulfill his duty and ensure that legal minimums were met. Finally, as to the lack of reasons with regard to Ms. M's credibility, there is really nothing further to add. The Minister clearly explained how he dealt with that evidence. His reasoning is clear and there is no need to revisit the issue.

[140] For all the foregoing relevant reasons, the Court is convinced that the Minister's decision with respect to this application is reasonable. Not only does it meet the above-mentioned transparency test, it also falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[141] The application is therefore dismissed.

.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application is dismissed.

"Johanne Gauthier"
Judge

Certified true translation

Sebastian Desbarats, Translator

ANNEX A

***Criminal Code,* RSC 1985, c. C-46**

PART XXI.1
APPLICATIONS FOR MINISTERIAL REVIEW — MISCARRIAGES OF JUSTICE

Application
696.1 (1) An application for ministerial review on the grounds of miscarriage of justice may be made to the Minister of Justice by or on behalf of a person who has been convicted of an offence under an Act of Parliament or a regulation made under an Act of Parliament or has been found to be a dangerous offender or a long-term offender under Part XXIV and whose rights of judicial review or appeal with respect to the conviction or finding have been exhausted.

Form of application
(2) The application must be in the form, contain the information and be accompanied by any documents prescribed by the regulations.

Review of applications
696.2 (1) On receipt of an application under this Part, the Minister of Justice shall review it in accordance with the regulations.

Powers of investigation
(2) For the purpose of any investigation in relation to an application under this Part, the Minister of Justice has and may exercise the powers of a commissioner under Part I of the Inquiries Act and the powers that may be conferred on a

PARTIE XXI.1
DEMANDES DE RÉVISION AUPRÈS DU MINISTRE — ERREURS JUDICIAIRES

Demande
696.1 (1) Une demande de révision auprès du ministre au motif qu'une erreur judiciaire aurait été commise peut être présentée au ministre de la Justice par ou pour une personne qui a été condamnée pour une infraction à une loi fédérale ou à ses règlements ou qui a été déclarée délinquant dangereux ou délinquant à contrôler en application de la partie XXIV, si toutes les voies de recours relativement à la condamnation ou à la déclaration ont été épuisées.

Forme de la demande
(2) La demande est présentée en la forme réglementaire, comporte les renseignements réglementaires et est accompagnée des documents prévus par règlement.

Instruction de la demande
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.

Pouvoirs d'enquête
(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.

commissioner under section 11 of that Act.

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

Delegation
(3) Despite subsection 11(3) of the Inquiries Act, the Minister of Justice may delegate in writing to any member in good standing of the bar of a province, retired judge or any other individual who, in the opinion of the Minister, has similar background or experience the powers of the Minister to take evidence, issue subpoenas, enforce the attendance of witnesses, compel them to give evidence and otherwise conduct an investigation under subsection (2).

Définition de « cour d'appel »
696.3 (1) Dans le présent article, « cour d'appel » s'entend de The Court 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.

Definition of "court of appeal"
696.3 (1) In this section, "the court of appeal" means the court of appeal, as defined by the definition "court of appeal" in section 2, for the province in which the person to whom an application under this Part relates was tried.

Pouvoirs de renvoi
(2) Le ministre de la Justice peut, à tout moment, renvoyer devant The Court 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 The Court d'appel donne son opinion en conséquence.

Power to refer
(2) The Minister of Justice may, at any time, refer to the court of appeal, for its opinion, any question in relation to an application under this Part on which the Minister desires the assistance of that court, and the court shall furnish its opinion accordingly.

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

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

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

(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

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

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

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

(b) dismiss the application.

No appeal
(4) A decision of the Minister of Justice made under subsection (3) is final and is not subject to appeal.

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

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

délinquant dangereux ou délinquant à contrôler en vertu de la partie XXIV, une nouvelle audition en vertu de cette partie,

(ii) à tout moment, renvoyer la cause devant The Court 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.

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

Facteurs
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 relativement à la demande;

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

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

(c) the fact that an application under this Part is not intended to serve as a further appeal and any remedy available on such an application is an extraordinary remedy.

Annual report
696.5 The Minister of Justice shall within six months after the end of each financial year submit an annual report to Parliament in relation to applications under this Part.

Regulations
696.6 The Governor in Council may make regulations

(a) prescribing the form of, the information required to be contained in and any documents that must accompany an application under this Part;

(b) prescribing the process of review in relation to applications under this Part, which may include the following stages, namely, preliminary assessment, investigation, reporting on investigation and decision; and

(c) respecting the form and content of the annual report under section 696.5.

des recours extraordinaires.

Rapport annuel
696.5 Dans les six mois suivant la fin de chaque exercice, le ministre de la Justice présente au Parlement un rapport sur les demandes présentées sous le régime de la présente partie.

Règlements
696.6 Le gouverneur en conseil peut prendre des règlements :

a) concernant la forme et le contenu de la demande présentée en vertu de la présente partie et les documents qui doivent l'accompagner;

b) décrivant le processus d'instruction d'une demande présentée sous le régime de la présente partie, notamment les étapes suivantes : l'évaluation préliminaire, l'enquête, le sommaire d'enquête et la décision;

c) concernant la forme et le contenu du rapport annuel visé à l'article 696.5.

REVIEW OF THE APPLICATION

2. (1) For the purposes of subsection 696.1(2) of the Code, an application for ministerial review under Part XXI.1 of the Code shall be in the form set out in the schedule and contain the following information:

(a) with respect to the applicant,

(i) the applicant's name, including any alias or former name,

(ii) the applicant's address, date of birth and, if any, the number assigned to the applicant under the Royal Canadian Mounted Police Automated Fingerprint Identification System,

(iii) the name, address and telephone number of the person making the application on the applicant's behalf, if any,

(iv) whether the alleged miscarriage of justice relates to a conviction on an offence punishable on summary conviction or on an indictable offence, or, in the case of a finding of dangerous offender or long-term offender under Part XXIV of the Code, particulars of the finding, and

(v) whether the applicant is in custody;

(b) with respect to any pre-trial hearings,

(i) the date of the preliminary inquiry, if any,

EXAMEN DE LA DEMANDE

2. (1) Pour l'application du paragraphe 696.1(2) du Code, la demande de révision auprès du ministre visée à la partie XXI.1 du Code doit être en la forme prévue à l'annexe et doit comprendre les renseignements suivants :

a) relativement au demandeur :

(i) son nom, y compris ses noms d'emprunt ou les noms qu'il a portés auparavant,

(ii) son adresse, sa date de naissance et, le cas échéant, le numéro qui lui a été attribué par le Système automatisé d'identification dactyloscopique de la Gendarmerie royale du Canada,

(iii) le nom, adresse et numéro de téléphone de la personne qui présente la demande en son nom, le cas échéant,

(iv) si l'erreur judiciaire alléguée se rapporte à une déclaration de culpabilité pour une infraction punissable par procédure sommaire ou pour un acte criminel, ou, dans le cas où il a été déclaré délinquant dangereux ou délinquant à contrôler en application de la Partie XXIV du Code, le détail de la déclaration,

(v) la mention qu'il est ou non incarcéré,

b) relativement à la conférence préparatoire, le cas échéant :

(i) la date de l'enquête préliminaire, le cas échéant,

(ii) les nom et adresse du tribunal,

(ii) the court and its address, and

(iii) the number, type and date of any pre-trial motions, as well as the court decision on those motions;

(c) with respect to the trial,

(i) the date on which it started,

(ii) the court and its address, the plea entered at trial, the mode of trial and the date of the conviction and that of sentencing,

(iii) the names and addresses of all counsel involved in the trial, and

(iv) the number, type and date of any motions made, as well as the date of the court decision on those motions;

(d) particulars regarding any subsequent appeals to the court of appeal or the Supreme Court of Canada;

(e) the grounds for the application; and

(f) a description of the new matters of significance that support the application.

(2) The application must be accompanied by the following documents:

(a) the applicant's signed consent authorizing the Minister

(i) to have access to the applicant's personal information that is required for reviewing the application, and

(iii) le nombre de requêtes préliminaires présentées ainsi que leur nature, la date de leur présentation et la décision rendue par la tribunal à leur égard;

c) relativement au procès :

(i) la date à laquelle il a débuté,

(ii) les nom et adresse du tribunal, le plaidoyer enregistré, le mode de procès, la date de la condamnation et celle du prononcé de la peine,

(iii) les nom et adresse de tous les avocats du procès,

(iv) le nombre de requêtes présentées pendant le procès, ainsi que leur nature, la date de leur présentation et la date de la décision rendue par le tribunal à leur égard;

d) le détail des appels devant The Court d'appel et devant The Court suprême du Canada;

e) les motifs de la demande;

f) une description des nouvelles questions importantes sur lesquelles repose la demande.

(2) La demande est accompagnée des documents suivants :

a) un consentement, signé par le demandeur, donnant au ministre le droit :

(i) d'avoir accès aux renseignements personnels le concernant qui sont nécessaires à l'examen de sa demande,

(ii) de rendre accessible les renseignements personnels obtenus dans

(ii) to disclose to any person or body the applicant's personal information obtained in the course of reviewing the application in order for the Minister to obtain from that person or body any information that is required for reviewing the application;

(b) a true copy of the information or indictment;

(c) a true copy of the trial transcript, including any preliminary hearings;

(d) a true copy of all material filed by the defence counsel and Crown counsel in support of any pre-trial and trial motions;

(e) a true copy of all factums filed on appeal;

(f) a true copy of all court decisions; and

(g) any other documents necessary for the review of the application.

3. On receipt of an application completed in accordance with section 2, the Minister shall

(a) send an acknowledgment letter to the applicant and the person acting on the applicant's behalf, if any; and

(b) conduct a preliminary assessment of the application.

4. (1) After the preliminary assessment has been completed, the Minister

(a) shall conduct an investigation in

le cadre de l'examen de la demande à quiconque pour obtenir de celui-ci tout renseignement nécessaire à l'examen de la demande;

b) une copie conforme de l'acte d'accusation ou de la dénonciation;

c) une copie conforme de la transcription du procès, y compris, le cas échéant, de l'enquête préliminaire;

d) une copie conforme de tous les documents déposés par l'avocat du défendeur et par le procureur de The Courtonne à l'appui de toute requête présentée avant le procès et pendant celui-ci;

e) une copie conforme de tout mémoire d'appel;

f) une copie conforme de tous les jugements rendus par les tribunaux;

g) tout autre document nécessaire à l'examen de la demande.

3. Sur réception d'une demande de révision présentée conformément à l'article 2, le ministre :

a) transmet un accusé de réception au demandeur et, le cas échéant, à la personne qui a présenté la demande en son nom;

b) procède a une évaluation préliminaire de la demande.

4. (1) Une fois l'évaluation préliminaire terminée, le ministre :

a) enquête sur la demande s'il constate qu'il pourrait y avoir des motifs raisonnables de conclure qu'une erreur

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

(b) shall not conduct an investigation if the Minister

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

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

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

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

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

(5) If further information in support of the application is provided after the

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) 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) 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.

period prescribed in subsection (3) has expired, the Minister shall conduct a new preliminary assessment of the application under section 3.

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

(2) If the applicant fails, within the period prescribed in subsection (1), to provide any further information, or if the applicant indicates in writing that no further information will be provided in support of the application, the Minister may proceed to make a decision under subsection 696.3(3) of the Code.

6. The Minister shall provide a copy of the Minister's decision made under subsection 696.3(3) of the Code to the applicant and to the person acting on the applicant's behalf, if any.

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

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

***Canadian Charter of Rights and Freedoms*, Part I of the C*onstitution Act, 1982*, constituting Schedule B of the *Canada Act 1982* (UK), 1982, c 11**

Life, liberty and security of person

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Vie, liberté et sécurité

7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

ANNEX B

December 23, 1971	Mr. Bilodeau convicted of murder
June 13, 2000	(Final) parole of Mr. Bilodeau
February 12, 2001	Application for royal prerogative filed by Mr. Bilodeau
February 21, 2001	Application for review of conviction by Mr. Michel Poirier
June 18, 2002	Mr. Bilodeau is informed that his application will progress to the second stage
March 12, 2003	The Minister instructs Mr. Boro to conduct an investigation
October 2, 2003	Mr. Boro's first investigation report
October 15, 2003	Mr. Bilodeau's comments on first investigation report
May 6, 2004	Mr. Boro's second investigation report
August 9, 2004	Mr. Bilodeau requests that he be sent a complete copy of the official translation of Mr. Boro's May 6 report
August 31, 2004	Mr. Bilodeau's request denied
October 5, 2004	Second request by Mr. Bilodeau for a complete copy of the May 6 report
October 7, 2004	Mr. Bilodeau's request denied again
November 17, 2004	Mr. Bilodeau's request granted, minus recommendations to Minister
November 29, 2004	Mr. Bilodeau's comments on second investigation report
December 1, 2004	The CCRG reviews Mr. Bilodeau's entire file in order to further examine the application
January 23, 2005	Access to information request and request to Department to hire polygraph expert
November 10, 2005	Additional information submitted by Mr. Bilodeau
December 5, 2005	The CCRG summarizes the situation, addresses destruction of

	records and advises Mr. Bilodeau that records of Messrs. Beaulieu and Cloutier will need to be consulted
February 13, 2006	Correspondence regarding records of Messrs. Beaulieu and Cloutier
March 16, 2006	Mr. Bilodeau sends letters to the CCRG and to Mr. Boro with Mr. Cloutier's test
March 29, 2006	New copies of letters dated March 16, 2006, sent to CCRG
November 28, 2007	Minister's decision

Federal Court  Cour fédérale

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-417-10
STYLE OF CAUSE:	MICHEL BILODEAU v. MINISTER OF JUSTICE OF CANADA AND CRIMINAL CONVICTION REVIEW GROUP
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	December 6 and 7, 2010
REASONS FOR JUDGMENT:	GAUTHIER J.
DATED:	July 12, 2011

APPEARANCES:

Gaétan Bourassa	FOR THE APPLICANT
Jacques Savary Toni Abi Nasr	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Des Longchamps Bourassa Trudeau & LaFrance Montréal, Quebec	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENTS