Citation: R v Ross, 2017 MBCA 77 Date: 20170822
Docket: AR14-30-08179

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Michel A. Monnin
Madam Justice Barbara M. Hamilton
Madam Justice Jennifer A. Pfuetzner

IN THE MATTER OF SECTION 696.1 OF THE CRIMINAL CODE, S.C. 2002, c. 13;	
AND IN THE MATTER OF A REFERENCE BY THE MINISTER OF JUSTICE TO THE MANITOBA COURT OF APPEAL UPON AN APPLICATION FOR MINISTERIAL REVIEW ADVANCED BY DEVERYN DONALD ALEXANDER ROSS, CONVICTED AT BRANDON, MANITOBA ON MAY 26, 1995 OF TWO COUNTS OF FRAUD OVER ONE THOUSAND DOLLARS;	***J. W. I. Lockyer*** *and* ***R. P. Campbell*** *for Deveryn Ross*
	P. S. Lindsay *for the Respondent*
AND IN THE MATTER OF A REQUEST BY THE MINISTER OF JUSTICE PURSUANT TO SECTION 696.3(2) OF THE CRIMINAL CODE FOR THE OPINION OF THE MANITOBA COURT OF APPEAL AS TO THE ADMISSIBILITY OF CERTAIN NEW INFORMATION AS FRESH EVIDENCE;	*Motion heard:* ***June 6, 2017***
AND IN THE MATTER OF A REFERENCE BY THE MINISTER OF JUSTICE TO THE MANITOBA COURT OF APPEAL PURSUANT TO SECTION 696.3(3)(a)(ii) OF THE CRIMINAL CODE THAT, SHOULD THE MANITOBA COURT OF APPEAL CONCLUDE THAT ANY OF THE NEW INFORMATION WOULD BE	*Decision pronounced:* ***August 22, 2017***

ADMISSIBLE AS FRESH EVIDENCE, THE COURT DETERMINE THE CASE AS IF IT WERE AN APPEAL BY DEVERYN DONALD ALEXANDER ROSS BASED ON A CONSIDERATION OF THE EXISTING RECORD, THE EVIDENCE ALREADY HEARD, AND SUCH FURTHER EVIDENCE AS THE COURT IN ITS DISCRETION MAY RECEIVE AND CONSIDER	)
B E T W E E N :	)
HER MAJESTY THE QUEEN	)
Respondent	)
- and -	)
DEVERYN DONALD ALEXANDER ROSS	)
(Accused) Appellant	)

PFUETZNER JA

[1] This is a motion for directions to determine the scope of a reference by the Minister of Justice of Canada (the Minister) to this Court under Part XXI.1 of the *Criminal Code* (the *Code*)—Applications for Ministerial Review—Miscarriages of Justice. This motion raises issues regarding the approach to construction of the language of a ministerial reference and the authority of ministerial staff to delineate the scope of a reference.

[2] To bring the motion into context, some detail of the background is required.

[3] In 1995, Deveryn Ross (Ross) was tried on nine counts of fraud in the

Court of Queen's Bench by a judge sitting without a jury. After a lengthy trial, Ross was convicted of two counts of fraud over $1,000 and acquitted of the other seven counts.

[4] The fraud charges arose out of the failure of a Perkins Family Restaurant franchise in Brandon, Manitoba. Ross, who was a practicing lawyer, together with two of his clients, William Knight (Knight) and Sheldon Gray (Gray), who were mutual-fund salespeople, formed a limited partnership called Perkins Limited Partnership (PLP). They sold units in PLP in order for PLP to raise funds to acquire land and construct the restaurant building. False statements were allegedly made to elderly and unsophisticated investors to induce them to invest in PLP units. Ross, Knight, Gray and their spouses were issued units (the unfunded units) in PLP without investing any funds.

[5] After the initial units were sold to the investors, Ross resold two of the unfunded units to Ronald Simpson (Simpson), one of the original investors. Simpson testified at trial that Ross led him to believe that he was buying the additional two units from another investor whom he recalled as "[the] lady . . . up north". Ross' conviction on one count of fraud related to this transaction.

[6] The actual cost of building and equipping the restaurant was more than originally estimated. Ross arranged for a loan of $400,000 from the Canadian Imperial Bank of Commerce (CIBC). Prior to obtaining the loan, Ross formed a new limited partnership (2613981 Manitoba Limited Partnership). Ross caused PLP to transfer its assets to the new limited partnership, which then pledged all of its assets to CIBC in exchange for the

loan. Ultimately, the restaurant business faltered and CIBC called its loan. The allegation at trial was that Ross failed to disclose to the investors the transfer of assets from PLP or the CIBC loan. This transaction was the basis for Ross' conviction for the second count of fraud.

[7] Ross was sentenced to eighteen months' imprisonment, concurrent, on the two charges. In 1996, this Court dismissed Ross's appeal from his convictions (see *R v Ross*, 1996 CarswellMan 14 (CA)).

[8] Following his convictions, but prior to the hearing of his appeal, Ross's counsel came into possession of settlement agreements that Knight and Gray, both of whom were witnesses for the Crown at Ross's trial, had entered into with the Manitoba Securities Commission (MSC). The settlement agreements resolved disciplinary proceedings brought against Knight and Gray by the MSC and contained detailed admissions by Knight and Gray which contradicted the evidence they gave at Ross's trial. In the settlement agreements, Knight and Gray also agreed to assign to the investors their interest in civil actions that they had commenced against Ross.

[9] After his appeal was dismissed, Ross hired a private investigator, Brian Savage (Savage), who surreptitiously recorded telephone conversations with Simpson. Ross's position is that Simpson made comments to Savage that were inconsistent with the evidence he gave at trial. Both Simpson and Savage are now deceased.

[10] In 2004, Ross applied to the Minister, pursuant to section 696.1 of the *Code* (see Appendix A), for ministerial review of his two convictions. The Minister appointed Alexander Pringle, Q.C. (Pringle) to conduct an investigation pursuant to section 696.2 of the *Code*. Pringle conducted a

lengthy investigation and provided a Final Investigative Report to the Minister in 2009.

[11] On May 14, 2014, the Minister directed a dual reference to this Court (the Reference). The Reference was signed by The Honourable Peter MacKay, Minister of Justice, and was addressed to the Chief Justice of the Manitoba Court of Appeal. The complete text of the Reference is set out in Appendix B. For a discussion of dual references, see *R v Kelly*, 2001 SCC 25; and *Reference re: Gruenke* (1998), 131 CCC (3d) 72 (Man CA).

[12] The first part of the Reference refers three separate questions (the three questions) to this Court for its opinion, pursuant to section 696.3(2) of the *Code* (see Appendix A), and states, in part:

> I HEREBY REQUEST, that this Honourable Court, pursuant to section 696.3(2) of the *Criminal Code*, provide its opinion on the following questions:
>
> Having regard to the existing record and such further material and evidence as this Honourable Court sees fit to receive:
>
> 1) Would the new information concerning the conversations between Mr. Ronald Simpson and Mr. Brian Savage be admissible as fresh evidence on an appeal to this Honourable Court?
>
> 2) Would the new information concerning the non-disclosure of Settlement Agreements executed by William Knight and Sheldon Gray on April 18, 1995, which were presented to the Manitoba Securities Commission on that date, be admissible as fresh evidence on an appeal to this Honourable Court?
>
> 3) Would the new information concerning the non-disclosure of the Assignment Agreement whereby William Knight and Sheldon Gray had assigned their interest in civil actions that they had instituted against Deveryn Ross to the investors of

> Perkins Limited Partnership be admissible as fresh evidence on an appeal to this Honourable Court?
>
> [emphasis added]

[13] The second part of the Reference, made pursuant to section 696.3(3)(a)(ii) of the *Code* (see Appendix A), states:

> If this Honourable Court concludes that any of the information listed in paragraphs 1 through 3, inclusive, would be admissible as fresh evidence, I do hereby respectfully refer to this Honourable Court pursuant to subsection 696.3(3)(a)(ii) of the *Criminal Code*, based on a consideration of the existing record, the evidence already heard, and such further evidence as this Honourable Court in its discretion may receive and consider, to determine the case as if it were an appeal by Deveryn Ross.
>
> [emphasis added]

[14] Approximately two weeks after the Reference was signed by the Minister, Ross's counsel wrote a letter to Kerry Scullion (Scullion), Director/General Counsel at the Criminal Conviction Review Group in the Department of Justice, stating concerns about the narrow scope of the Reference. The letter states, in part:

> Narrowly interpreted, this language could be taken to mean that the case can be resolved in favour of Mr. Ross only if the Court of Appeal first determines that one or more of the three enumerated items of evidence "would be admissible as fresh evidence" on appeal. That could have the effect of precluding relief for Mr. Ross even if exculpatory evidence, fitting within the opening words of the Reference ("such further material and evidence as this Honourable Court sees fit to receive"), but not being evidence within paragraphs 1 through 3 of the Reference, justifies appellate relief for Mr. Ross.

> Our concern is not merely theoretical. We provided the Minister with two items of evidence (*infra*) which formed part of the Crown brief, and were available to Mr. Ross at trial, but were not presented as evidence on his behalf at trial. Neither item is listed in paragraphs 1 through 3 of the Reference.
>
> [A]ny ambiguity in the terms of the Reference that could allow (or require) them to be excluded from consideration by the Court of Appeal is a matter for considerable concern.

[15] The following day, Scullion sent a letter in response, addressed to Ross's counsel (Scullion's letter). Neither the Attorney General of Manitoba (the Attorney General) nor the Chief Justice of this Court was sent a copy of Scullion's letter.

[16] Scullion's letter states (in part):

> As you correctly point out the preamble to this Reference, as is the case in every Reference, authorizes consideration by the Court of "the existing record and such further material and evidence as this Honourable Court sees fit to receive…". The purpose of this wording is to provide the Court with the widest possible latitude to consider any and all evidence that it deems relevant in providing the Minister with its opinion or in treating the matter as if it were an appeal from a convicted person. It has never been anyone's intention to limit the Court in any way to receive any evidence from an applicant or from the Attorney General/Minister of Justice from the Province concerned in determining the issues that have been placed before it by the Minister of Justice.
>
> I note your reference to the specific questions asked by the Minister and the language that suggests that these and only these issues can be raised and subsequently considered by the Court. This wording is meant to suggest that the Minister is interested in the Court's opinion on these particular issues but <u>should not be interpreted to limit the Court in considering any important evidence when providing its opinion or in deciding to treat the matter as an appeal if the Court considers it appropriate to do so</u>.

> If the Court were to accept your suggestion that there exists evidence that establishes Mr. Ross' innocence, it would be highly counter-productive to interpret the wording in the Reference so restrictively so as to prevent the Court from considering this evidence in the very process that is designed to correct miscarriages of justice. It is therefore imperative that matters associated with a Reference by the Minister of Justice be given the widest and most open interpretation.
>
> [emphasis added]

[17] Scullion's letter states that he is the Director/General Counsel, Criminal Conviction Review Group in the Department of Justice Canada. There is nothing in the record on this motion indicating the scope of that position or its relative seniority within the Department of Justice. Nor does the record indicate that the Minister purported to delegate to Scullion the power to order or revise the terms of a reference.

The Motion

[18] The Attorney General brought a motion for directions seeking an order directing that the scope of the Reference be limited to the three questions.

[19] The grounds for the Attorney General's motion are: that Scullion's letter purports to expand the scope of the Reference and only the Minister has that authority; and that the manner in which Scullion purported to expand the scope of the Reference, without notice to or the involvement of the Attorney General, resulted in a denial of natural justice to the Attorney General.

[20] Ross's position is that the Court should treat Scullion's letter as having expanded the scope of the Reference. In dealing with a reference,

Ross submits that this Court should focus on the possibility of factual innocence and should avoid a technical approach if it may prevent correction of a miscarriage of justice. Ross argues that Scullion, being a senior official in the Department of Justice, has authority to speak on behalf of the Minister in respect of matters dealt with under Part XXI.1 of the *Code* and relies on section 24(2)(d) of the *Interpretation Act*, RSC 1985, c I-21. As for the issue of denial of natural justice, Ross's position is that the Attorney General is not a party to Ross's application to the Minister for ministerial review. He says that the settling of the terms of the Reference is a matter only between him and the Minister; however, once the Reference is before the Court, the Attorney General is a party.

Discussion

[21] In Canada, appellate courts have no inherent jurisdiction in criminal matters; their jurisdiction is purely statutory (see section 674 of the *Code*). Part XXI of the *Code* exhaustively defines the jurisdiction and powers of an appellate court on an ordinary criminal appeal (see *R v Thomas*, [1998] 3 SCR 535 at para 14).

[22] Part XXI.1 of the *Code* deals with the application process and the powers of the Minister in connection with applications for ministerial review of convictions on the grounds of a miscarriage of justice. Under this Part, an application to the Minister can be made by a convicted person whose rights of appeal with respect to the conviction have been exhausted (see section 696.1(1) of the *Code*).

[23] One of the powers of the Minister is to "refer to the court of appeal, for its opinion, any question in relation to an application . . . on which the

Minister desires the assistance of that court" (at section 696.3(2) of the *Code*). Another power of the Minister is to refer the matter "to the court of appeal for hearing and determination by that court as if it were an appeal by the convicted person" (at section 696.3(3)(a)(ii)).

[24] A reference is an extraordinary, and relatively rare, discretionary remedy. On a reference, the only source of the court's jurisdiction is the terms of the reference itself. Part XXI.1 of the *Code* does not define the jurisdiction and powers of a court of appeal in dealing with a reference from the Minister.

[25] Accordingly, the wording of the Reference is crucial in considering the issues raised on this motion.

[26] I agree with Ross that, under the terms of the Reference, this Court has been given broad discretion to receive evidence at both the opinion stage and the appeal stage. At the opinion stage, the Court can have regard to the existing record, as well as "such further material and evidence" as we see fit to receive. At the appeal stage, we can consider the existing record, the evidence already heard at the opinion stage, and such further evidence as we may, in our discretion, receive and consider. Determinations on the evidence that we will receive will be made as and when issues arise later on in these proceedings.

[27] Despite the discretion given to us to receive evidence, the wording of the Reference is clear. Unless we are of the view that any of the three listed items of evidence would be admissible as fresh evidence on an appeal, we do not have jurisdiction to proceed to the appeal stage. See *Kelly* at paras 8-9.

[28] Moreover, even if I were to agree with Ross that Scullion, in his position as Director/General Counsel at the Criminal Conviction Review Group, has the authority to change the scope of the Reference, there is nothing in Scullion's letter that clearly states that the Court can move to the appeal stage of the Reference absent a finding that one of the three listed items of evidence would be admissible as fresh evidence. The entire tenor of Scullion's letter is to opine that this Court should not be limited in "considering any important evidence . . . if the Court considers it appropriate to do so." This merely confirms my view, stated earlier, that the Reference does not limit the Court's ability to receive evidence at either the opinion or appeal stage of the Reference.

[29] However, I cannot interpret these words to be a direction to the Court to ignore the clear limits put on our ability to move to the appeal stage of the Reference if we are not satisfied that one of the three listed items of evidence would be admissible as fresh evidence. This was the interpretation urged upon us by Ross. As stated by Major J in *Kelly* (at para 10):

> It was open to the Minister to refer as much or as little as was considered appropriate to the case. The Minister used clear language to emphasize the limited and sequential nature of the mandate. The argument of substance over form invites us to ignore these precise and explicit limitations, and it should be rejected.

[30] In the event that I am wrong in my interpretation of Scullion's letter, I will deal briefly with Ross's argument that Scullion's letter should be treated as being capable of amending the terms of the Reference.

[31] Ross relies upon section 24(2)(d) of the *Interpretation Act*, which states:

> **Power to act for ministers**
> **24(2)** Words directing or empowering a minister of the Crown to do an act or thing, regardless of whether the act or thing is administrative, legislative or judicial, or otherwise applying to that minister as the holder of the office, include
>
> > **(a)** a minister acting for that minister or, if the office is vacant, a minister designated to act in the office by or under the authority of an order in council;
> >
> > **(b)** the successors of that minister in the office;
> >
> > **(c)** his or their deputy; and
> >
> > **(d)** notwithstanding paragraph (c), a person appointed to serve, in the department or ministry of state over which the minister presides, in a capacity appropriate to the doing of the act or thing, or to the words so applying.
>
> [emphasis added]

[32] Section 24(2) of the *Interpretation Act* is a codification of the "*Carltona*" principle (see *Carltona Ltd v Works Comrs*, [1943] 2 All ER 560 (CA)). The *Carltona* principle can be stated as follows: it is implicit in most cases that powers conferred by statute on a minister of the Crown, even discretionary powers, can be exercised by senior officials in the minister's department.

[33] This principle was recognized by the Supreme Court of Canada in *The Queen v Harrison*, [1977] 1 SCR 238 (at p 245):

> Although there is a general rule of construction in law that a person endowed with a discretionary power should exercise it

> personally (*delegatus non potest delegare*) that rule can be displaced by the language, scope or object of a particular administrative scheme. A power to delegate is often implicit in a scheme empowering a Minister to act.
>
> Thus, where the exercise of a discretionary power is entrusted to a Minister of the Crown it may be presumed that the acts will be performed, not by the Minister in person but by responsible officials in his department: *Carltona, Ltd. v. Commissioners of Works*, [1943] 2 All ER 560 (C.A.). The tasks of a Minister of the Crown in modern times are so many and varied that it is unreasonable to expect them to be performed personally.

See also *Comeau's Sea Foods Ltd v Canada (Minister of Fisheries and Oceans)*, [1997] 1 SCR 12 at para 28.

[34] However, the *Carltona* principle, as codified in the *Interpretation Act*, does not establish an absolute rule, as explained by MacPherson JA in *Edgar v Canada (Attorney General)*, 1999 CarswellOnt 3922 (CA) (at paras 27-28):

> Neither s. 24(2) of the *Interpretation Act* nor the case law establishes the *Carltona* principle as an absolute rule. Thus, s. 3(1) of the *Interpretation Act* potentially qualifies s. 24(2):
>
> 3(1) Every provision of this Act applies, *unless a contrary intention appears*, to every enactment, whether enacted before or after the commencement of this Act.
>
> With respect to the case law, the leading Canadian authorities establish that several factors must be considered before determining whether the general maxim *delegatus non potest delegare*, or the *Carltona* exception to this maxim, applies in a particular situation. In *Harrison*, *supra*, Dickson J. identified those factors as "the language, scope or object of a particular administrative scheme".

[35] To similar effect is *Peralta v Ontario*, 1985 CarswellOnt 1077 (CA), aff'd [1988] 2 SCR 1045 (at paras 35-36):

> When courts have considered whether delegation of ministerial powers was intended considerable weight has been given to "administrative necessity", that is, it could not have been expected that the Minister (in this case the Governor in Council) would exercise all the administrative powers given to him.
>
> "There is no rule or presumption for or against sub-delegation": Driedger, "Subordinate Legislation" (1960), 38 Can. B. Rev. 2 at p. 22. The language of the statute must be interpreted in light of what the statute is seeking to achieve.

[36] I now turn to consider the language, scope and object of Part XXI.1 of the *Code*, the complete text of which is set out at Appendix A.

[37] I begin by noting that the language used in the other Parts of the *Code*, dealing with the powers, duties and functions of the Crown, refers to the Attorney General rather than to the Minister of Justice. I pause here to mention the distinction made under the *Department of Justice Act*, RSC 1985, c J-2, between the powers, duties and functions of the Minister and the powers, duties and functions of the Attorney General (see sections 4-5). One of the main functions of the Attorney General is to "have the regulation and conduct of all litigation for or against the Crown" (section 5(d)). In her role as prosecutor, the Attorney General is to "act independently of partisan concerns" and "independently of political pressures from government" (*R v Cawthorne*, 2016 SCC 32 at paras 23-24). On the other hand, the *Department of Justice Act* states that, "The Minister is the official legal adviser of the Governor General and the legal member of the Queen's Privy Council for Canada" (at section 4).

[38] Section 2 of the *Code* defines the term Attorney General, in respect of various proceedings under the *Code*, as either the Attorney General of Canada or the Attorney General or Solicitor General of the province in which those proceedings are taken "and includes his or her lawful deputy" (emphasis added). This indicates Parliament's intention that the powers of the Attorney General under the *Code* may be exercised by appropriate members of his or her staff.

[39] On the other hand, Part XXI.1 of the *Code* refers only to the "Minister of Justice", a term that is not defined in the *Code*. There is no definition similar to that for "Attorney General" where references to the Minister would include his or her lawful deputy. Notably though, the Minister is given the specific authority to delegate his or her investigative powers in relation to an application under Part XXI.1. Section 696.2(3) states in part:

> 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).
>
> [emphasis added]

[40] The Minister is not explicitly given the authority to delegate any other powers under Part XXI.1. On this motion, the Attorney General argues that, if Parliament had intended the Minister to be able to delegate her other powers under this Part, it would have clearly done so, especially in light of the fact that delegation of the Minister's investigative powers were specifically

addressed. In response, Ross submits that the authority to delegate investigative powers was specifically added to address a requirement under the *Inquiries Act*, RSC 1985, c I-11, that only a commissioner appointed under that *Act* by an Order in Council could exercise such investigative powers. Without this provision, each investigation under Part XXI.1 would require a separate Order in Council unless conducted personally by the Minister.

[41] I agree with the position of the Attorney General. Unlike the definition of Attorney General used in the other Parts of the *Code*, there is no definition in Part XXI.1 indicating that "Minister of Justice" includes "his or her lawful deputy". Delegation of only the investigative powers of the Minister is specifically authorized. The inference is that Parliament intended the other powers of the Minister under Part XXI.1 to be performed personally. I note that counsel were not aware of any reference signed by anyone other than the Minister then in office.

[42] As for the scope and object of Part XXI.1 of the *Code*, I indicated earlier that the power to order a reference is an extraordinary one. The power that is now codified in Part XXI.1 of the *Code* is derived from the royal prerogative of mercy. When the prerogative of mercy was incorporated into Canadian law, it was conferred on the Governor General by letters patent (see *Hinse v Canada (Attorney General)*, 2015 SCC 35 at para 28). The power, as it now stands in the *Code*, is given to the Minister. The Supreme Court of Canada has characterized the discretionary decision to order a reference as a "policy" decision, as opposed to an "operational" decision. The decision involves policy choices; engaging economic, social and political factors (see *Hinse* at paras 23, 33, 42). Indeed, in *Hinse*, Wagner and Gascon JJ stated (at para 35):

> [B]ecause the decision maker's role may also be a relevant factor in characterizing the power in question, it should be borne in mind that the Minister, in making such policy decisions, does not act as a mere public servant working in an administrative or operational capacity.

[43] The extraordinary policy nature of a decision to order a reference supports my view that this power must be exercised personally by the Minister. If Parliament had intended that the Minister could delegate such a power, it would have specifically authorized delegation.

[44] I agree with Ross that this Court has broad discretion to receive evidence at both stages of the Reference. However, for the above reasons, this Court cannot proceed to the appeal stage of the Reference unless we are of the opinion that any of the three listed items of evidence would be admissible as fresh evidence.

[45] As I have concluded that Scullion's letter does not affect the scope of the Reference, it is not necessary to deal with the issue of natural justice.

Pfuetzner JA

I agree: Monnin JA

I agree: Hamilton JA

APPENDIX A
Criminal Code Provisions

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
696.1(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
696.2(2) For the purpose of any investigation in relation to an application under this Part, the Minister of Justice has and may exercise the powers of a commissioner under Part I of the *Inquiries Act* and the powers that may be conferred on a commissioner under section 11 of that Act.

Delegation
696.2(3) Despite subsection 11(3) of the *Inquiries Act*, the Minister of Justice may delegate in writing to any member in good standing of the bar of a province, retired judge or any other individual who, in the opinion of the Minister, has similar background or experience the powers of the Minister to take evidence, issue subpoenas, enforce the attendance of witnesses, compel them to give evidence and otherwise conduct an investigation under subsection (2).

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

Power to refer
696.3(2) The Minister of Justice may, at any time, refer to the court of appeal, for its opinion, any question in relation to an application under this Part on which the Minister desires the assistance of that court, and the court shall furnish its opinion accordingly.

Powers of Minister of Justice
696.3(3) On an application under this Part, the Minister of Justice may

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

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

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

(b) dismiss the application.

No appeal
696.3(4) A decision of the Minister of Justice made under subsection (3) is final and is not subject to appeal.

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

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

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

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

Annual report

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

Regulations

696.6 The Governor in Council may make regulations

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

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

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

APPENDIX B
Reference

IN THE MANITOBA COURT OF APPEAL

IN THE MATTER OF SECTION 691.1 OF THE *CRIMINAL CODE*, S.C. 2002, c. 13;

AND IN THE MATTER OF A REFERENCE BY THE MINISTER OF JUSTICE TO THE MANITOBA COURT OF APPEAL UPON AN APPLICATION FOR MINISTERIAL REVIEW ADVANCED BY DEVERYN ROSS, CONVICTED AT BRANDON, MANITOBA ON MAY 26, 1995 OF TWO COUNTS OF FRAUD OVER ONE THOUSAND DOLLARS

REFERENCE

WHEREAS Deveryn Donald Alexander Ross was convicted of two counts of fraud over one thousand dollars by the Honourable Mr. Justice Degraves sitting without a jury, in the Court of Queen's Bench of the Province of Manitoba at Brandon on May 26, 1995, upon the following counts in an indictment which read:

> 1. THAT he, the said Deveryn Donald Alexander Ross, between the 1st day of January, 1991, and the 1st day of March, 1991, both dates inclusive, at or near the City of Brandon, in the Province of Manitoba, did unlawfully by deceit, falsehood or other fraudulent means, defraud Ronald Simpson of money of a value exceeding One Thousand Dollars.
>
> 2. THAT he, the said Deveryn Donald Alexander Ross, between the 1st day of June, 1990, and the 4th day of January, 1992, both dates inclusive, at or near the City of Brandon, in the Province of Manitoba, did unlawfully by deceit, falsehood or other fraudulent means, defraud Perkins Limited Partnership of money or other valuable security of a value exceeding One Thousand Dollars, by causing the said Perkins Limited Partnership to transfer money in the amount of $700,000.00 from its assets to 2613981 Manitoba Limited Partnership.

AND WHEREAS, Deveryn Donald Alexander Ross was sentenced to eighteen months imprisonment, concurrent, with respect to both of the counts for which he was convicted;

AND WHEREAS, an appeal to the Manitoba Court of Appeal was dismissed on January 9, 1996;

AND WHEREAS, an application pursuant to Section 696.1 of the *Criminal Code* was made to the Minister of Justice by counsel on behalf of Deveryn Donald Alexander Ross;

AND WHEREAS, new information has arisen of which I am satisfied that my intervention is warranted;

I HEREBY REQUEST, that this Honourable Court, pursuant to section 696.3(2) of the *Criminal Code*, provide its opinion on the following questions:

Having regard to the existing record and such further material and evidence as this Honourable Court sees fit to receive:

1) Would the new information concerning the conversations between Mr. Ronald Simpson and Mr. Brian Savage be admissible as fresh evidence on an appeal to this Honourable Court?

2) Would the new information concerning the non-disclosure of Settlement Agreements executed by William Knight and Sheldon Gray on April 18, 1995, which were presented to the Manitoba Securities Commission on that date, be admissible as fresh evidence on an appeal to this Honourable Court?

3) Would the new information concerning the non-disclosure of the Assignment Agreement whereby William Knight and Sheldon Gray had assigned their interest in civil actions that they had instituted against Deveryn Ross to the investors of Perkins Limited Partnership be admissible as fresh evidence on an appeal to this Honourable Court? The new information in the Assignment Agreement consisted of the following:

    (a) The investors were to receive from Knight and Gray cash payments over time totalling $500,000.00. These cash payments consisted of an initial payment of $300,000.00 with $50,000.00 being paid per year for four years commencing June, 1996.

    (b) William Knight, Sheldon Gray and W.G. Knight and Associates Inc. agreed to a consent judgment in favour of the investors in the amount of $1 million. This judgment was

intended to ensure Knight's and Gray's continued compliance with the terms of the Assignment Deal.

(c) Sheldon Gray, William Knight and W.G. Knight and Associates agreed to assign to the investors their right of action against Deveryn Ross for negligent legal advice in the lawsuit that they instituted against him to a maximum of $500,000.00.

(d) The investors undertook not to enforce their $1 million judgment against Knight, Gray and W.G. Knight and Associates Inc. provided the cash payments described above were made and undertook to file a Notice of Satisfaction of this judgment when the assigned civil lawsuit against Deveryn Ross was concluded.

(e) Knight and Gray were to fully cooperate with Douglas Bedford, the investors' counsel, in attempting to obtain recovery against Deveryn Ross through the professional misconduct suits filed against him on behalf of Knight and Gray.

If this Honourable Court concludes that any of the information listed in paragraphs 1 through 3, inclusive, would be admissible as fresh evidence, I do hereby respectfully refer to this Honourable Court pursuant to subsection 696.3(3)(a)(ii) of the *Criminal Code*, based on a consideration of the existing record, the evidence already heard, and such further evidence as this Honourable Court in its discretion may receive and consider, to determine the case as if it were an appeal by Deveryn Ross.

DATED at Ottawa, this 14 day of May, 2014

"Peter MacKay"
The Honourable Peter MacKay
Minister of Justice

To: The Chief Justice of the
Manitoba Court of Appeal