

IN THE MATTER OF an Application Under Section 696.1 of the Criminal Code;

AND IN THE MATTER OF an application for *habeas corpus*;

AND IN THE MATTER OF an application pursuant to sections 7 and 24(1) of the *Canadian Charter of Rights and Freedoms*;

AND IN THE MATTER OF section 52 of the *Constitution Act, 1982*;

AND IN THE MATTER OF the inherent jurisdiction of the Superior Court of Ontario.

IN THE SUPERIOR COURT OF JUSTICE

B E T W E E N:

ROMEO PHILLION

APPLICANT

- and -

HER MAJESTY THE QUEEN IN RIGHT OF  
THE MINISTER OF JUSTICE FOR CANADA,

- and -

HER MAJESTY THE QUEEN IN RIGHT OF  
THE ATTORNEY GENERAL OF ONTARIO

RESPONDENTS

**MEMORANDUM OF ARGUMENT**

**PART I**

**STATEMENT OF THE CASE**

1. On the afternoon of August 9, 1967, the deceased, Leopold Roy, interrupted an intruder in the apartment building in which he resided with his wife. He confronted the man in a stairwell. The man stabbed him in the chest and fled. Mr. Roy collapsed and died in the stairwell.

2. More than four years later, in the afternoon of January 11, 1972, the Applicant, Romeo Phillion, confessed to the murder of Mr. Roy while detained on a robbery charge in the Ottawa Police Station. Hours later that same evening, he recanted his confession. Nevertheless, he was charged with Mr. Roy's murder. On November 7, 1972 he was found guilty of non-capital murder following a three week trial before Madam Justice Van Camp and a jury. He was sentenced to life imprisonment. Mr. Phillion maintained his innocence in the trial and has continued to maintain it ever since.

3. On July 30, 1974, the Applicant's conviction appeal to the Court of Appeal for Ontario was dismissed. On December 19, 1974 he was granted leave to appeal to the Supreme Court of Canada. His appeal was heard on December 1, 1976 and dismissed on March 22, 1977.

4. Following the Applicant's conviction he was transferred to the Regional Psychiatric Centre in Kingston due to concerns that he was suicidal. He was held there for seven years. Since his release from the Regional Psychiatric Centre, he has served his sentence in Kingston Penitentiary, Warkworth Penitentiary, Joyceville Penitentiary, Collins Bay Penitentiary, Frontenac Institution and Bath Institution. Since 1996, the Applicant has been detained in the Bath Institution.

5. In 1991, Mr. Phillion began writing to the Minister of Justice to have his case re-opened. He made a request under the *Access to Information Act*, R.S.C. 1985, c. P-21 for the original Ottawa Police files on his case. He received a heavily edited copy of the file with large portions blacked out.

In 1996, the Criminal Conviction Review Group at the Department of Justice prepared a draft investigation brief in response to his application.

6. In 1997, Mr. Phillion contacted the *Innocence Project* at Osgoode Hall Law School. At the request of the *Project*, further action by the Department of Justice on his application to the Minister of Justice was halted.

7. In 1998, a brown manilla envelope, containing Ottawa Police reports from his Corrections Canada security file, was given to Mr. Phillion by his parole officer. The file included a report dated 12 April 1968, by the investigating officer, Detective McCombie. He wrote the report in response to a suggestion by the New Liskeard police, who had interviewed Gail Brazeau, Mr. Phillion's former girlfriend, that Mr. Phillion might be the one who had murdered Mr. Roy. Detective McCombie reported that his investigation had established that Mr. Phillion had been in Trenton, Ontario, less than two hours before the murder, such that it was impossible for him to have been the man who murdered Mr. Roy. His report included the following:

“It was also verified by the Service Station operator on Aug. 9/67, Romeo Phillion had been in the service station between 12 and 1:00 p.m. and left his car radio because he could not pay for the service call and therefore making it impossible for him to return to Ottawa by 2:45 p.m at the time the murder was committed.

A letter will be sent to the New Liskeard Police Department informing them of our theories and that we do not believe that Romeo Phillion is responsible for this murder. It might be noted that Gail Brazeau has had a fight with Phillion and it is believed by the writer that this person being of simple mind is trying to implicate him in something in order to get him put away so that she may operate on her own.”

Detective McCombie's report also referred to interviews conducted the previous year, in 1967, by Detective McCombie with four material witnesses, Paul and Denise Barbe, and Marie and Gail Brazeau. The contents of the interviews materially contradicted evidence given by them during their testimony at Mr. Phillion's preliminary hearing and trial which was designed to prove he was in Ottawa at the time of the murder.

Investigation report of McCombie, Apr. 12/68

8. In January 2000, disclosure of some police investigation reports was provided to the *Project* by the Ministry of the Attorney General. Requests for physical exhibits, witness statements and the Crown brief were unsuccessful. Howard Leibovich, the Crown assigned to the case, advised that no more information was available.

9. In December 2001, preparation of Mr. Phillion's Section 696.1 application to the Minister of Justice was commenced.

10. In January 2002, as a result of further inquiries by counsel, the Archives of Ontario confirmed it was in possession of the "Crown Investigative File" on the Roy murder. Murray Segal, the Deputy Attorney General of Ontario, advised that there were over 700 pages of documents to be disclosed. In February 2002, James K. Stewart, General Counsel at the Crown Law Office, Criminal, was assigned to the case. In the ensuing months, Mr. Stewart provided counsel with copies of materials that had been retrieved from the archives. On August 1, 2002, counsel attended at the Archives of Ontario with Mr. Stewart and reviewed the contents of the archival files *in specie*.

11. Commencing in April 2002, Dr. Gisli Gudjonsson, a world renowned expert on false confessions, and Dr. Graham Turrall, a Toronto psychologist, were retained to review Mr. Phillion's case and, in particular, his confessions to the police and Neil Miller, his lover. In September, 2002, Dr. Gudjonsson came to Canada. He spent a day with Romeo Phillion, met with his sister, conducted a thorough review of the case, and was aided by Dr. Turrall's psychological assessment of Mr. Phillion. In his conclusion to his 35 page report, he wrote:

“Having carefully considered this case, I am in no doubt that it is unsafe to rely on the confession Mr. Phillion made to the police in 1972 concerning the murder of Mr. Roy. The confession, without good independent corroboration, is inherently unreliable due to Mr. Phillion's psychological problems and psychopathology at the time.”

Dr. Gudjonsson made similar findings regarding Mr. Phillion's confessions to Neil Miller.

12. It seems that numerous aspects of the homicide investigation are still missing. Missing documents, whether in the form of police investigation reports or police notes, include those from 1967 that would provide the source information for McCombie's 12 April 1968 report. These would include Phillion's statements wherein he related how his car broke down near Trenton on August 9, the statement of the service station operator who confirmed this information, Detective McCombie's notes in this regard, and original statements of Mr. And Mrs. Barbe, and Mrs. Ellen Brazeau and her daughter Gail.

13. On May 15, 2003, Mr. Phillion's application to the Minister of Justice for a review of his 1972 conviction was filed. At the same time, Mr. Phillion filed this application for his release on bail pending the Minister's decision on his application.

## **PART 2**

### **ISSUES AND THE LAW**

#### ***Introduction***

14. The new Part XXI.1 of the *Criminal Code*, “*Applications for Ministerial Review – Miscarriages of Justice*” does not contain provisions for bail between the time of the filing of a section 696.1 application and a section 696.3 decision by the Minister. The Minister is not subject to any statutory time restrictions in his consideration of an Application. The ministerial process frequently takes several years to complete. As a result, unless there is an entitlement to bail in the period between the filing of an application and the Minister’s decision, an Applicant detained pursuant to a miscarriage of justice must remain in custody for an indeterminate period of time pending ministerial action on his case. Despite the absence of a direct statutory right to bail, it is submitted that the Superior Court has the jurisdiction to grant bail pursuant to section 24(1) of the *Charter*, pursuant to a writ of *habeas corpus*, and pursuant to the inherent jurisdiction of the Superior Court.

#### ***The Existing Statutory Right to A Bail Application After the Minister Has Made A Reference***

15. There has always been a statutory right for an applicant to seek his release on bail after the Minister has given a direction or made a reference under section 696.3. The bail pending appeal provisions of the *Code* include Section 679(7) which provides for the applicant’s right to seek release once this happens. Section 679(7) provides as follows:

679 (7) If, with respect to any person, the Minister of Justice gives direction or makes a reference under section 696.3, this section applies to the release or detention of that person pending the hearing and determination of the reference as though that person were an appellant in an appeal described in paragraph 1(a).

*Criminal Code*, R.S.C. 1985, c.C-46, ss. 679, 696.1 to 696.6

16. The *Code* contains no provision for bail after an application has been filed with the Minister but before any action is taken by the Minister. Traditionally, at common law, the superior courts of criminal jurisdiction have responded to similar situations (such as in court martial appeals and extradition cases *infra*) by granting applicants access to bail. Since the *Charter*, a constitutional element has been recognized in an applicant's right to be considered for bail. It is the nature of this right to seek bail in the context of a Part XXI.1 application to the Minister, and the basis of this Court's jurisdiction to act, which are at issue on this application.

## **1. The Interplay Between the Charter and Ensuring That Innocent People Are Not Wrongly Convicted**

17. Since the advent of the *Charter*, the interplay between the *Charter*, especially the principles of fundamental justice, and the need to ensure that an innocent person is not wrongly convicted has been recognized. Examples abound. In *Reference re S. 94(2) of Motor Vehicle Act*, Lamer J., in emphasizing the need for *mens rea* as a prerequisite to criminal liability, said:

“It has from time immemorial been part of our system of laws that the innocent not be punished. This principle has long been recognized as an essential element of a system for the administration of justice which is founded upon a belief in the dignity and worth of the human person and on the rule of law. It is so old that its first enunciation was in latin *actus non facit reum nisi mens sit rea.*”

In *Seaboyer*, McLachlin J. said:

“The precept that the innocent must not be convicted is basic to our concept of justice. One has only to think of the public revulsion felt at the improper conviction of Donald Marshall in this country or the Birmingham Six in the United Kingdom to appreciate how deeply held is this tenet of justice.”

In *Leipert*, McLachlin J., during a discussion of informer privilege, said:

“This Court has consistently affirmed that it is a fundamental principle of justice, protected by the *Charter*, that the innocent must not be convicted: *R. v. Seaboyer*, [1991] 2 S.C.R. 577 at p. 611; *Stinchcombe*, *supra*; *O’Connor*, *supra*. To the extent that rules and privileges stand in the way of an innocent person establishing his or her innocence, they must yield to the *Charter* guarantee of a fair trial.”

*Reference re S. 94(2) of Motor Vehicle Act* (1985), 23 C.C.C. (3d) 289 (S.C.C.) at 310  
*R. v. Seaboyer* (1991), 66 C.C.C. (3d) 321 (S.C.C.) at 387  
*R. v. Leipert* (1997), 112 C.C.C. (3d) 385 (S.C.C.) at 396

18. In *Burns and Rafay*, the Supreme Court of Canada, in deciding on the framework within which the Minister of Justice must work in a case of extradition for an offence to a country where the death penalty could be imposed for that offence, placed considerable emphasis on the interplay between the principles of fundamental justice and avoiding convicting the innocent. The Court recognized the increasing awareness in Canada and other countries that not all convictions are sound.

The Court opened its judgment by saying:

“Legal systems have to live with the possibility of error. The unique feature of capital punishment is that it puts beyond recall the possibility of correction. In recent years, aided by the advances in the forensic sciences, including DNA testing, the courts and governments in this country and elsewhere have come to acknowledge a number of instances of wrongful conviction for murder despite all of the careful safeguards put in place for the protection of the innocent. The instances in Canada are few, but if capital punishment had been carried out, the result could have been the killing by the government of innocent individuals. The names of Marshall, Milgaard, Morin, Sophonow and Parsons signal prudence and caution in a murder case. Other countries have also experienced revelations of wrongful convictions, including states of the United States where the death penalty is still imposed and carried into execution.

The possibility of a miscarriage of justice is but one of many factors in the balancing process which governs the decision by the Minister of Justice to extradite two Canadian citizens, Glen Sebastian Burns and Atif Ahmad Rafay, to the United States. A competing principle of fundamental justice is that Canadians who are accused of crimes in the United States can ordinarily expect to be dealt with under the law which the citizens of that jurisdiction have collectively determined to apply to offences committed within their territory, including the set punishment.

Awareness of the potential for miscarriages of justice, together with broader public concerns about the taking of life by the state, as well as doubts about the effectiveness of the death penalty as a deterrent to murder in comparison with life in prison without parole for 25 years, led Canada to abolish the death penalty for all but a handful of military offences in 1967, and subsequently to abolish the death penalty for all offences in 1998.”

Later in its judgment, the Court, under the heading “*An Accelerating Concern about Wrongful Convictions is a Factor of Increased Weight since Kindler and Ng Were Decided*”, said:

“The avoidance of conviction and punishment of the innocent has long been in the forefront of “the basic tenets of our legal system”. It is reflected in the presumption of innocence under s. 11(d) of the *Charter* and in the elaborate rules governing the collection and presentation of evidence, fair trial procedures, and the availability of appeals. The possibility of miscarriages of justice in murder cases has long been recognized as a legitimate objection to the death penalty, but our state of knowledge of the scope of this potential problem has grown to unanticipated and unprecedented proportions in the years since *Kindler* and *Ng* were decided. This expanding awareness compels increased recognition of the fact that the extradition decision of a Canadian Minister could pave the way, however unintentionally, to sending an innocent individual to his or her death in a foreign jurisdiction.

(a) *The Canadian Experience*

Our concern begins at home. There have been well-publicized recent instances of miscarriages of justice in murder cases in Canada. Fortunately, because of the abolition of the death penalty, meaningful remedies for wrongful conviction are still possible in this country.”

The Court then related the facts behind the wrongful conviction cases of Donald Marshall, David Milgaard, Guy Paul Morin, Thomas Sophonow and Gregory Parsons.

*U.S.A. v. Burns* (2000), 151 C.C.C. (3d) 97 (S.C.C.) at 106, 137-138

19. The Supreme Court of Canada has constantly returned to the issue in other cases. In *Lifchus*,

Cory J. said:

“The onus resting upon the Crown to prove the guilt of the accused beyond a reasonable doubt is inextricably linked to the presumption of innocence. That jurors clearly understand the meaning of the term is of fundamental importance to our criminal justice system. It is one of the principal safeguards which seeks to ensure that no innocent person is convicted. The Marshall, Morin and Milgaard cases serve as a constant reminder that our system, with all its protections for the accused, can still make tragic errors. A fair trial must be the goal of criminal justice. There cannot be a fair trial if jurors do not clearly understand the basic and fundamentally important concept of the standard of proof that the Crown must meet in order to obtain a conviction.”

In *Starr*, Iacobucci J. was reviewing the need for reliability and necessity as prerequisites for exceptions to the traditional hearsay rules. Their need, he said:

“... is particularly true in the criminal context given the ‘fundamental principle of justice, protected by the *Charter*, that the innocent must not be convicted’ ... It would compromise trial fairness, and raise the spectre of wrongful convictions, if the Crown is allowed to introduce unreliable hearsay against the accused, regardless of whether it happens to fall within an existing exception.”

In *Burke*, Major J. said:

“The memory of recent miscarriages of justice suffered by David Milgaard, Donald Marshall and Guy Paul Morin, to name only three, have raised concerns about the efficacy of our system, where years after conviction and imprisonment of an accused, the convicted person has been cleared of the crime.”

These statements form a backdrop to consideration of whether the availability of bail pending the

Minister’s decision on a section 696.1 application is a constitutional imperative.

*R. v. Burke* (2002), 164 C.C.C. (3d) 385 (S.C.C.) at 421

*R. v. Starr* (2000), 147 C.C.C. (3d) 449 (S.C.C.) at 529

*R. v. Lifchus* (1997), 118 C.C.C. (3d) 1 (S.C.C.) at 6

See also *R. v. Stinchcombe* (1992), 68 C.C.C. (3d) 1 (S.C.C.) *infra*

## 2. The Right to Bail and Section 7 of the Charter

20. In *Farinacci*, the Ontario Court of Appeal had occasion to review the relationship of the right to bail and Section 7 of the *Charter*. Arbour J.A. considered that section 7 played a role in post-conviction bail proceedings. She said:

“There is, in my view, a sufficient residual liberty interest at stake in the post-conviction appellate process to engage s. 7 in some form. In *R. v. Gamble*, the Supreme Court held that non-eligibility for parole encompassed enough of a residual liberty interest to come within the ambit of s. 7.

The contention that bail pending appeal is a privilege rather than a right and, as such, escapes the reach of s. 7, is unacceptable in the Charter context. The respondent’s submission that s. 7 does not apply to bail pending appeal because, after conviction and sentence to a term of imprisonment, bail operates to enhance rather than to restrict, liberty, proceeds from the same formalistic and narrow analytical approach which has no place in the interpretation of constitutionally protected rights. In so far as the state purports to act to enhance life, liberty or security of the person, it incurs the responsibility to act in a non-arbitrary, non-discriminatory fashion and cannot deprive some persons of the benefits of the enhancement without complying with the principles of fundamental justice.”

Arbour J.A. found that reviewability of convictions for indictable offences was a principle of fundamental justice. She continued:

“If reviewability, even in some minimum form, of convictions leading to imprisonment does constitute a principle of fundamental justice, then some ancillary right to bail pending review would have to follow, if only to prevent the review from being nugatory.

When the right of appeal exists by statute, as in this case, then access to bail or to some equivalent relief has been held ancillary to the right of appeal, even when bail entitlement was not provided by statute.

.....

Although there are decisions denying the availability of each of the procedures employed in these cases, the desirability, in non-constitutional terms, for the existence of a right to bail pending appeal is undeniable if a statutory right of appeal is not to be rendered nugatory by inevitable appellate delays. Similarly, if reviewability, in broad terms, is a principle of fundamental justice, then access to bail pending review would have to be incorporated into an effective right of review.”

The same principles apply with equal force and logic to the post-conviction review process under Part XXI.1 of the *Code*.

*R. v. Farinacci* (1993), 86 C.C.C. (3d) 32 (Ont.C.A.) at 40-44  
See also *Re Hrynkiw and the Queen* (1999), 134 C.C.C. (3d) 349 (Ont.Gen.Div.)

### **3. The Principles of Fundamental Justice as They Apply to an Application Under Part XXI.1, and to an Applicant's Access to Bail**

21. The principles of fundamental justice applied to the Minister's conduct of the actual review process under the old section 690. In *Thatcher*, Rothstein J. considered the Minister's constitutional obligations on a section 690 review. He said:

#### “Consequence of the Decision of the Applicant

An adverse decision by the Minister in exercising his discretion under section 690 can result in the continuation of a lengthy, if not lifetime, incarceration of a convicted person. This deprivation of liberty is what engages the applicant's rights under section 7 of the *Charter*, and requires that the Minister act fairly in exercising his discretion. However, it is important to remember, even in the context of the *Charter*, that the applicant is asking for mercy. In this respect, there is no lis between the applicant and the Minister, and the applicant has already had the full benefit of the *Charter* in the antecedent judicial proceedings leading to the conviction.

#### Content of the Minister's Duty

Having regard to the nature of proceedings under section 690 and the consequences to the individual, I am of the view that the content of the Minister's duty of fairness under section 690 is less than that applicable to judicial proceedings. In exercising his discretion under section 690, the Minister must act in good faith and conduct a meaningful review, provided that the application is not frivolous or vexatious. The convicted person should have a reasonable opportunity to state his case. However, proceedings under section 690 do not constitute an appeal on the merits. There is no general right of disclosure to everything

considered by the Minister or his officials.”<sup>1</sup>

Campbell J., in *W.R.*, agreed with these sentiments<sup>2</sup>. In *Bonamy*, Dawson J. reviewed Rothstein J.’s decision in *Thatcher*, and said:

“This makes it clear that as long as the requirements of the *Charter* are met, proceedings

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<sup>1</sup> Rothstein J.’s views on the right to post-conviction post-appellate disclosure are open to question. The *Martin Committee* recommended that:

“Crown counsel’s obligation to disclose is a continuing one and disclosure of additional relevant information must be made when it is received. Even after conviction, including after any appeals have been decided or the time for appealing has lapsed, Crown counsel must disclose information which he or she realizes shows an accused is innocent or which raises a doubt as to the accused’s guilt.”

In its *commentary*, the *Committee* said:

“While the obligation to disclose extends throughout any appellate litigation that follows a conviction, it is not tied to the currency of any appeal periods. In a number of recent cases, the disclosure of evidence, whether fresh or otherwise, sometimes even years after all appeal routes had been exhausted and convictions upheld, has led to new trials being ordered, or convictions quashed outright. See, for example, *R. v. Marshall* where the Supreme Court concluded that the original trial and appeal were error free and fair, but ordered a new trial based on fresh evidence; and *Reference re Nepoose*. The *Nepoose* reference is particularly instructive on the importance of police disclosure to Crown counsel. The Alberta Court of Appeal, in ordering a new trial based on the fresh evidence, commented, at 423, that much of the fresh evidence “was either known to the investigators or in the possession of the investigators, but not made available either to the Crown prosecutor or to the accused.”

Report of the Attorney General’s Advisory Committee, (1993), pp. 206-208

<sup>2</sup> *W.R.* was appealed to the Federal Court of Appeal. In a short judgment dismissing the appeal, LeTourneau J.A. said:

“In dismissing the appeal ..., we ought not to be taken as endorsing the judge’s statement that, in this proceeding, section 7 of the Charter of Rights and Freedoms was engaged.”

under s. 690 are not the subject of legal rights. The Minister is required by the *Charter* to act in a manner consistent with the right of a person not to be deprived of liberty except in accordance with the principles of fundamental justice. Aside from that imperative there are no directions to the Minister as to how applications for mercy are to be investigated.”

*Thatcher v. Canada (Attorney General)* (T.D.) (1997) 1 F.C. 289

*Bonamy v. Canada (Attorney General)* (2001, 156 C.C.C. (3d) 110 (F.C.T.D.)

*W.R. v. Canada (Minister of Justice)* (1999) F.C.J. No. 1059

22. The former section 690 of the *Criminal Code* was enacted under the heading “Powers of Minister of Justice” and framed the Minister’s powers in the most precatory of words as follows:

“The Minister of Justice may, on an application for the mercy of the Crown by or on behalf of a person who has been convicted in proceedings by indictment ...”

The section then listed in subsections (a), (b) and (c) the three remedies available to the Minister, namely the power to direct a new trial, the power to make a reference to an appellate court as an appeal, and the power to refer to an appellate court for an opinion. The focus of the section, and on an application brought under it, was placed on the notion of “mercy”. It is in this context that Rothstein J.’s judgment in *Thatcher*, and the cases following it, should be considered.

23. The new Part XXI.1 of the *Code* presents a dramatic change in emphasis. No longer are the Minister’s powers contained in a single, short section of the *Code*, but now are contained in a whole “Part” of the *Code*, with several sections, under the title

“APPLICATIONS FOR MINISTERIAL REVIEW  
MISCARRIAGES OF JUSTICE”

No longer is an application referred to as being “an application for the mercy of the Crown”. Now it is called

“an application for ministerial review on the grounds of miscarriage of justice.”

*(Section 696.1(1))*

Unlike the previous section 690, the new sections in Part XXI.1 place mandatory obligations on the Minister. The Minister of Justice “*shall review*” an application (*section 696.2(1)*). The Minister has, for the first time, the powers of a commissioner (*section 696.2(2)*), including the power of subpoena and the power to enforce the attendance of witnesses (both of which have already been exercised in the outstanding application of *Steven Truscott*). The new legislation lays down a statutory test for the Minister, making him a *quasi* judicial officer, requiring him to act if he

“is satisfied that there is a reasonable basis to conclude that a miscarriage of justice likely occurred.” (*section 696.3(a)*)

The Minister is provided with a mandate:

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

The section then lists some guidelines for the Minister in this regard. Finally, he is required to submit an annual report to Parliament (*section 696.5*).

24. Regulations were proclaimed pursuant to Part XXI.1 on November 25, 2002.<sup>3</sup> They prescribe the manner in which applications must be brought, and the process for the review to be carried out by the Minister. The regulations place numerous obligations on the Minister. For example,

“(section 3) The Minister *shall ...* (b) conduct a preliminary assessment of the application.

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

(a) *shall conduct an investigation* in respect of the application if the

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<sup>3</sup> There were no regulations under the previous section 690.

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

.....  
(section 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." (emphasis added)

Regulations Respecting Applications for Ministerial Review - Miscarriages of Justice

25. These new provisions significantly elevate the duties of the Minister and, of necessity, elevate the constitutional obligations which he must observe in the exercise of his duties. The status of an applicant has, in turn, been elevated from that of a person seeking "the mercy of the Crown" to that of a person demanding the Minister exercise his duty of ministerial review to remedy an alleged miscarriage of justice. Section 7 not only prevails upon the engagement of the process itself, but also on matters ancillary to the process which, in Mr. Phillion's case, involve the need, at the level of a principle of fundamental justice, that jurisdiction to grant release be available pending a Minister's decision on a section 696.1 application. Section 7 considerations are especially appropriate to section 696.1 applications because they will usually be based on assertions of factual innocence. This brings to mind the many evocative statements made by the Supreme Court of Canada about the link between section 7 and preventing wrongful convictions. In this way, an applicant, who satisfies the standard criteria for appellate bail release, who is subsequently proved innocent, will have had the opportunity to satisfy a court in advance that he should be released pending the Minister's decision.

26. In addition, Mr. Phillion's application has already moved beyond the first step of the process mandated by the regulations. Sections 3 and 4(1) of the regulations read in full as follows:

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

- (a) send an acknowledgement 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 respect of the application if the Minister determines that there may be a reasonable basis to conclude that a miscarriage of justice likely occurred;
- (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.”

The preliminary assessment in Mr. Phillion's case has already been completed. On May 21, 2003, Kerry Scullion, Senior Counsel of the Criminal Conviction Review Group at the Department of Justice, advised counsel in writing that Mr. Phillion's case had been assigned to an outside agent, John Briggs, Executive Director of the Nova Scotia Law Reform Commission. Counsel has since met with Mr. Briggs. The Minister's preliminary assessment has, therefore, been completed and, through Mr. Briggs, he has already commenced an investigation after determining that there may be a reasonable basis to conclude that a miscarriage of justice likely occurred to Mr. Phillion. Consequently, Mr. Phillion's application for release is being brought at a time when his application is no longer just "an application" but has already moved on past the first step in the process described

in the regulations.

27. Cases can be easily postulated which, if they came to pass, would demand intervention and, at least, interim release from a superior court of criminal jurisdiction. If, for example, David Milgaard had still been serving his life sentence in 1997 when the DNA results exonerating him were obtained, and the Minister had delayed ordering instant relief, whether by way of a Reference or a free pardon, the principles of fundamental justice would have enabled the Saskatchewan Court of Queen's Bench to intervene and release him, until the Minister made his decision, on the footing that his continued imprisonment would be contrary to section 7 principles. This hypothetical is not entirely without precedent. There have been several cases in the United States in which *the executive and the courts* have refused to intervene to free a prisoner despite a post-conviction DNA exoneration. Two of these cases are described in Appendix A. Other cases of a similar nature are still ongoing in the United States.

28. It may be a rare case that will meet the necessary pre-requisites for a release order pending the Minister's decision, but Mr. Phillion's application is an example of a case that meets the threshold because its merits are so strong:

- He has put forward a substantial, if not overwhelming, case for innocence
- His right to full answer and defence at his trial was almost certainly violated. In *Stinchcombe*, Sopinka J. said:

“The right to full answer and defence is one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted. Recent events have demonstrated that the erosion of this right due to non-disclosure was an important factor in the conviction and incarceration of an innocent person. In the *Royal Commission on the*

*Donald Marshall Jr. Prosecution* [1989], the commissioners found that prior inconsistent statements were not disclosed to the defence. This was an important contributing factor in the miscarriage of justice which occurred and led the commission to state that “anything less than complete disclosure by the Crown falls short of decency and fair play.”

- He has commenced the process under which the Minister must review his conviction and determine whether he

“is satisfied that there is a reasonable basis to conclude that a miscarriage of justice likely occurred.” (*section 696.3(3)(a)*)

- His case has already passed the first stage of the Ministerial review process, the Minister having already determined that “there may be a reasonable basis to conclude that a miscarriage of justice likely occurred” and having ordered that an investigation be conducted into his application.

In these circumstances, the principles of fundamental justice dictate that Mr. Phillion should be able to seek his release from the Superior Court of Justice ancillary to his application for ministerial review because he can establish that he is imprisoned likely as a result of a miscarriage of justice, and has been so imprisoned for more than 32 years. If he were not to be given access to a bail hearing in the circumstances, his continued imprisonment would violate section 7 of the *Charter*.

*R. v. Stinchcombe* (*supra*) at p. 9

#### **4. The Mechanisms Available**

29. There are three possible sources of jurisdiction for Mr. Phillion’s release: section 24(1) of the *Charter*, the writ of *habeas corpus*, and the inherent jurisdiction of the Superior Court. Ultimately whether the source of the jurisdiction is one, or a combination of one or more of these, matters little. In context, all three methods of jurisdiction reflect, and derive from, principles

fundamental to a civilized society that no innocent person shall be imprisoned, or continue to be imprisoned, for a crime he did not commit. Meritorious ministerial review applications will almost always involve assertions of factual innocence which may take years to resolve. There is no reason in principle why Mr. Phillion, having brought an application for ministerial review based on factual innocence for which, it is alleged, he has had to wait for so long due to the state withholding material evidence from him for 30 years or more, should have his ability to secure his interim release frozen until the Minister makes his decision. It does not look well for the administration of justice if a superior court of criminal jurisdiction cannot even *consider* releasing an applicant on bail pending the Minister's decision. It is submitted that the Superior Court of Criminal Jurisdiction, the Court that has traditionally been seen as the guardian of individual liberty in the criminal justice system, has the necessary jurisdiction to grant Mr. Phillion bail.

30. Combining section 24(1) of the *Charter* and the writ of *habeas corpus* is the most appropriate mechanism for Mr. Phillion's release. In *Gamble*, the appellant sought to review the legality of her detention because it was continuing as a result of the operation of a parole ineligibility order which had been imposed twelve years earlier in violation of her section 7 rights. The Supreme Court of Canada held that the Supreme Court of Ontario as a court of competent jurisdiction under section 24(1) was the appropriate forum of first instance to consider the legality of Ms. Gamble's detention, and that the writ of *habeas corpus* was the appropriate method to declare the appellant eligible for parole forthwith in order to prevent a continued violation of her section 7 rights. In so holding, Wilson J. reviewed the principles behind the writ of *habeas corpus*:

“A purposive approach should, in my view, be applied to the administration of Charter remedies as well as to the interpretation of Charter rights and, in particular, should be

adopted when *habeas corpus* is the requested remedy since that remedy has traditionally been used and is admirably suited to the protection of the citizen's fundamental right to liberty and the right not to be deprived of it except in accordance with the principles of fundamental justice. *The superior courts in Canada have, I believe, with the advent of the Charter and in accordance with the sentiments expressed in the habeas corpus trilogy of Miller, Cardinal and Morin, displayed both creativity and flexibility in adapting the traditional remedy of habeas corpus to its new role. ... I agree with the general proposition reflected in these cases that Charter relief should not be denied or "displaced by overly rigid rules": see Swan at p. 14 C.C.C., 148 C.R.*" (emphasis added)

[Wilson J. then cited a number of cases in which "innovative uses of *habeas corpus* as a Charter remedy" had been engaged.]

Wilson J. noted that the writ could be used

"without either circumventing the appeal process or becoming *de facto* an appeal on the merits. The role of *habeas corpus* as a remedy under s. 24(1) of the *Charter* reinforces the policy of flexibility and generously adapting the writ in order that it continue to protect liberty interests now constitutionally protected under the *Charter*."

*R. v. Gamble* (1988), 45 C.C.C. (3d) 204 (S.C.C.) at 237 - 241

31. In *Sarson*, the appellant who had pleaded guilty to second degree murder at his trial, sought to review his conviction by way of *habeas corpus* after the constructive murder provisions of the *Criminal Code* had been struck down by the Supreme Court of Canada. Sopinka J., in rejecting the application on the grounds that the cause of the appellant's continued detention did not violate section 7, said:

"The basis of the court's decision in *Gamble* was that the technical rules surrounding the writ of *habeas corpus* do not accord with the purposive interpretation of Charter rights. As a result, old technical rules involving the nature of the convicting court or finality concerns may not apply where the writ is sought as a Charter remedy. However, the court's decision in *Gamble* makes it clear that the expanded availability of the writ will only apply where the applicant is able to demonstrate that his or her detention fails to accord with the principles of fundamental justice, or otherwise offends the Charter of Rights. Where the detention of the accused does not give rise to a Charter violation, the expanded scope of *habeas corpus* review does not apply."

*R. v. Sarson* (1996), 107 C.C.C. (3d) 21 (S.C.C.) at 37

32. If Mr. Phillion is factually innocent of the crime which is causing his continued detention, his detention fails to accord with the principles of fundamental justice. While his case is being reviewed, the Superior Court should be able to review his continued detention as a proceeding ancillary to his application to set aside his conviction.

33. The jurisdictional issue presented by the case is not unique. It has been faced previously in criminal, or quasi-criminal, proceedings involving the liberty of the subject, in which the applicant has, in the absence of any statutory authority for release, sought release during the course of the process. This has happened in the Court Martial process, and in the extradition process, before and after the advent of the *Charter*.

**(i) *The Court Martial appeal cases***

34. Formerly, the *National Defence Act* R.S.C. 1970, c. N.4 did not contain any provision for bail pending a conviction appeal to the Court Martial Appeal Court.<sup>4</sup> In *Hicks*, a pre-*Charter* case, the appellant applied to the Alberta Superior Court of Criminal Jurisdiction, the Court of Queen's Bench, for *habeas corpus* to secure his release pending his appeal. The Court of Queen's Bench found it had no jurisdiction. On appeal to the Court of Appeal, Kerans J.A., in a majority judgment allowing the appeal, said:

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<sup>4</sup> Provisions for release pending an appeal of a court martial can now be found in section 248.1 ff. in the *National Defence Act*

“The question then remains whether *habeas corpus* is available for bail pending appeal when no other bail is available. In my view it is.

It is said that *habeas corpus* is available only to free those unlawfully detained. With respect, it would be more accurate to say that *habeas corpus* is available to free those who are unreasonably detained. These include, to be sure, those unlawfully detained, but also those lawfully but unnecessarily detained. *Habeas corpus* was, in the 17th century, the instrument by which the Courts stopped oppressive detention by the arresting power. If an accused was not to be promptly tried, he would be freed, however lawful his arrest. One could say that the detention originally lawful became unlawful because it became oppressive and became oppressive because it became unreasonably delayed. In any event, this use of the *habeas corpus* power was the foundation of the modern law of bail. Later, a bail application was a summary form of *habeas corpus*. I am much in debt for this analysis to the *Law of habeas corpus* (1976), by Professor Sharpe, and I make particular reference to p. 131.”

(In Mr. Phillion’s case, it might fairly be said that while his detention was lawful when he was arrested, it has long since become unlawful as a result of non-disclosure.) Kerans J.A. then noted the rule that “in general, *habeas corpus* is not available after conviction as a means of appeal”. He continued:

“*The earlier cases, however, were not concerned about bail pending appeal. That concern does not arise until there is a thing like an appeal. But, given the right of appeal, the question of reasonable bail again arises, and the need to resort again to habeas corpus to insure fairness again arises. But it arises only rarely. Most forms of appeal are statutory in origin and most statutes do not overlook the need for a scheme of interim release.*

.....

In my view, for the same reason *habeas corpus* became available to create bail before conviction, *habeas corpus* is available to create bail after conviction and pending appeal.”  
(emphasis added)

Kerans J.A. concluded that the Court of Queen’s Bench had jurisdiction to grant release pending an appeal to the Court Martial Appeal Court. As regards the submission that the *National Defence Act* provided a complete code for Court Martial appeals, he said:

“Lastly, the Crown speaks of a complete Code of Service Discipline. But it is not complete: it does not provide for reasonable bail pending appeal, and no reason has been advanced why the unique needs of the military discipline require that convicts always be denied bail

pending appeal. In any event, this consideration would go to merits for and against bail and not to jurisdiction.”

Similarly, Part XXI.1 does not provide a complete code for wrongful conviction claimants because no reason can be advanced for why, in a meritorious case, an applicant should not be entitled to bail pending the Minister’s decision.

*R. v. Hicks* (1981), 63 C.C.C. (2d) 547 (Alta.C.A.)  
*R. v. Farinacci* (*supra*) at 43

35. In *Gingras*, another pre-*Charter* case, the Court Martial Appeal Court held that the power to grant release pending appeal was “necessarily included” as a part of the Court Martial Appeal Court’s appellate jurisdiction. In a separate opinion, Addy J. doubted the power of a provincial superior court to grant release pending appeal by way of *habeas corpus*. He considered a convicted serviceman was entitled to equality before the law (section 15 of the *Charter*), and so was entitled to bail pending appeal like any convicted non-serviceman. In *Hinds*, the appellant brought an application under section 24(1) of the *Charter* for his release pending the hearing of an appeal of his conviction to the Court Martial Appeal Court. Ruttan J. held that he had jurisdiction to grant bail pursuant to section 11(e) of the *Charter*. He said:

“However, s. 11(e) is relevant for consideration in the present case.

Mr. Frankel [for the Crown] has submitted that s. 11 cannot apply here, because it commences with the phrase any person “charged” with an offence, etc., and that cannot govern the present applicant who has not the status of being charged but has been convicted. However, I think that it is too narrow an interpretation to define s. 11 as applying only to persons “charged”, *i.e.*, in custody pending trial prior to conviction or dismissal. I find that “charged” under s. 11 includes in its definition the status of an accused person throughout the period of his involvement in the offence until the final determination of any appeal procedures and until he is ultimately punished or dismissed. He remains “charged” until the final determination of his case, and the ambit of s. 11 is not limited to the point where he is first committed for trial. Thus s. 11(h) and (i) extend to cover the accused until he is “finally acquitted”, or “found guilty of the offence”.”

*R. v. Gingras* (1982), 70 C.C.C. (2d) 27 (C.M.A.C.)  
*R. v. Hinds* (1983), 4 C.C.C. (3d) 322 (B.C.S.C.)

36. *Hicks, Gingras and Hinds* were all cited with apparent approval *as to the result* by Arbour J.A. in *Farinacci*. However, Arbour J.A. considered section 7 to be the foundation of any claim for a right to bail and so the *Charter* remedy, in cases in which bail is sought in the absence of statutory authority, is best founded in the principles of fundamental justice. In *Glowczeski*, a post-*Charter* case, Muldoon J. of the Federal Court Trial Division was faced with an application for release by a serviceman pending an appeal of a decision by his Commanding Officer. It was framed in terms of sections 7, 9, 11(e), 15(1) and 24(1) of the *Charter*. Muldoon J. concluded:

“The Court declares that the applicant’s incarceration is illegal and contrary to sections 7, 9, paragraph 11(e) and subsection 15(1) of the Charter to the extent that the cited legislation makes no provision for the applicant to secure interim judicial release, on reasonable bail, before the time at which he can have his conviction and sentence tested by an independent judicial tribunal. It is unconstitutional and makes no sense to keep the applicant imprisoned for the whole term to which he was sentenced, before a judicial tribunal can determine whether the applicant ought lawfully to have been so convicted and sentenced in the first place.”

In *Muise*, another post-*Charter* Court Martial appeal, Smith J. approved the Alberta Court of Appeal’s judgment in *Hicks* that the provincial superior court had jurisdiction to grant bail pending a Court Martial appeal,<sup>5</sup> and continued:

“The question may well be academic since if *habeas corpus* does not avail, the power of a provincial superior court to uphold the rights contained in the Charter on a s. 24 application is in my view beyond question.”

*Re Muise and the Queen* (1984), 16 C.C.C. (3d) 285 (Ont.H.C.)  
*Glowczeski v. Minister of National Defence* (1989), 3 F.C. 281

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<sup>5</sup> Smith J. specifically disagreed with Ruttan J. of the Federal Court (Trial Division) in *Hinds* that a provincial superior court had no jurisdiction to grant bail pending a Court Martial appeal.

**(ii) The Extradition cases**

37. Extradition cases have, in the past, been another area in which Canadian courts have found an inherent jurisdiction to grant bail despite the absence of any statutory authorization to do so. Formerly, the *Extradition Act* did not provide any right to release pending the extradition hearing, or pending an appeal of an order of committal. In a number of pre-*Charter* cases, in the face of the injustice of detaining fugitives without review while their cases were decided, courts of different levels found that they had jurisdiction to grant interim bail. This jurisdiction was said variously to be founded on the Superior Court's inherent common law jurisdiction to grant bail, the Canadian Bill of Rights, and on somewhat tortuous interpretations of provisions of the *Criminal Code* and the *Extradition Act*.

See *Re Yugoslavia and Rajovic* (1981), 60 C.C.C. (2d) 32 (F.C.T.D.)  
*Re Di Stefano* (1976), 30 C.C.C. (2d) 310 (N.T.S.C.)  
*Re Barnes and Tennessee* (1972), 34 C.C.C. (2d) 122 (Ont.H.C.)  
*Re Armstrong and Wisconsin* (1977), 37 C.C.C. (2d) 397 (Ont.Co.Ct.)  
*Re Arizona and Thompson* (1976), 30 C.C.C. (2d) 148 (Ont.Co.Ct.)  
*Re McVey and U.S.A.* (1989), 50 C.C.C. (3d) 277 (B.C.C.A. in Chambers)  
See also *R. v. Daniels* (1997), 119 C.C.C. (3d) 413 (Ont.C.A.)  
*Germany v. Rauca* (1983), 1 F.C. 525 (C.A.)

**(iii) Regina v. Pacificador (1998) 37 O.R. (3d) 312 (Ont.Gen.Div.)**

38. Most recently, in *Pacificador*, Dambrot J. identified *habeas corpus* as the appropriate vehicle to grant bail in circumstances that parallel those of Mr. Phillion. The appellant, Rudy Pacificador, had been ordered committed for extradition, and had exhausted all his appellate remedies therefrom.

Subsequently, the Minister of Justice signed a warrant for surrender. Dambrot J. explained:

“Pacifador then brought a *habeas corpus* application before me on December 8, 1997 seeking a review of the decision of the Minister. That application now stands adjourned while the applicant asks the Minister to consider new material produced subsequent to the Minister’s decision. Pacifador has now brought a further application for *habeas corpus* as a vehicle to apply for bail pending the determination of his case, there being no statutory basis for him to make an application for judicial interim release.”

Mr. Pacifador’s position was, then, like that of Mr. Phillion. His appellate remedies for challenging his committal had been exhausted, like Mr. Phillion’s appellate remedies to quash his conviction were exhausted in 1977. However, the Minister of Justice still had the statutory power of executive decision to refuse to order that he be surrendered, just as the same Minister has the power of ministerial review in the case of a miscarriage of justice. And, like Mr. Pacifador, Mr. Phillion has no explicit statutory basis to make an application for interim release.

*R. v. Pacifador*, [1998] 37 O.R. (3d) 312 (Ont.Gen.Div.)

39. Dambrot J. held that he had the necessary jurisdiction to order Mr. Pacifador’s release pending the determination of his case. He said:

“Before dealing with the merits of this application, I must address a preliminary issue which was raised before me, relating to the procedure which is to be followed on this bail hearing. There is no statutory right to bring this application. While the *Extradition Act*, R.S.C. 1985, c. E-23, now makes provision for judicial interim release, the bail provisions have no application to Pacifador, whose entire extradition proceeding is governed by the statute as it stood prior to the recent amendments. It is common ground, however, that (1) a person arrested in Canada and facing extradition proceedings has the right not to be denied reasonable bail without just cause (see *Global Communications Ltd. v. Canada (Attorney General)* (1984), 44 O.R. (3d) 609 at p. 618, 10 C.C.C. (3d) 97 at p. 106 (C.A.), although, as a result of the decision of the Supreme Court in *R. v. Schmidt*, [1987] 1 S.C.R. 500 at p. 520, 33 C.C.C. (3d) 193 at p. 212, the right arises from s. 7 of the Canadian Charter of Rights and Freedoms, and not from s. 11(e)); and (2) that *habeas corpus* is available as a vehicle for obtaining bail.”

*R. v. Pacifador (supra)* at p. 3<sup>6</sup>

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<sup>6</sup> Subsequently, Mr. Pacifador’s *habeas corpus* application was dismissed in the Superior Court. He successfully appealed this decision to the Ontario Court of Appeal (see *R. v. Pacifador* (2002), 166 C.C.C. (3d) 321 (Ont.C.A.)). He was further granted bail by the Ontario Court of Appeal pending

See also *U.S.A. v. Ivanov* (2003), 172 C.C.C. (3d) 551 (Nfld.C.A.)

***Conclusion***

40. In *Mills*, McIntyre J. spelt out the jurisdiction of the provincial superior courts:

*“Provincial superior court*

In each province and in the Territories, the superior court has been created by statute. This court has generally been given all the historic jurisdiction and power of the High Court in England and in all matters arising between the Crown and subject and subject and subject. The jurisdiction of the superior court is derived from the creating statutes and common law and from its nature as a superior court, a court in which jurisdiction is generally presumed. This court will always be a court of competent jurisdiction under s. 24(1) of the Charter at first instance, that is to say, in cases where the issue arises in matters proceeding before it or where the proceeding originated in that court because of the absence of another forum with jurisdiction. The superior court will, of course, continue to have jurisdiction as a reviewing court where prerogative claims are advanced. The superior court jurisdiction will not displace that of other courts of limited jurisdiction. Considerations of convenience, economy and time will dictate that remedies under s. 24(1) will ordinarily be sought in the courts where the issues arise. Save for cases originating and proceeding in the superior court, resort to it will be necessary only where prerogative relief is sought.”

Mr. Phillion is seeking a section 24(1) remedy through the prerogative writ of *habeas corpus* in the Superior Court (and/or asking the Superior Court to exercise its inherent jurisdiction) while he awaits ministerial prerogative relief.

*R. v. Mills* (1986), 26 C.C.C. (3d) 481 (S.C.C.) at 494

## **5. The Process Applicable to the Bail Hearing**

41. The provisions of section 679, which provide the regime for bail after the Minister has made

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his appeal, apparently without any jurisdictional argument being raised by the Crown or the Court.

a decision on an application, are equally appropriate for use in deciding a pre-reference bail application. These require that Mr. Phillion satisfy the court that

- his application is not frivolous
- he will surrender as and when required
- his detention is not necessary in the public interest.

Section 679(3) of the *Criminal Code*

42. As is the case in bail pending appeal applications, the onus should be on the applicant to satisfy the Court that he has met the pre-conditions. In *Pacificador*, Dambrot J. drew the same conclusion:

“I am fortified in my decision to approach the matter in this fashion by the fact that, in any event, there is no obvious touchstone in domestic criminal procedure to apply here. *Pacificador* is not awaiting a preliminary hearing (or extradition hearing) in Canada. He is not awaiting an appeal from the extradition decision, nor is he awaiting trial. He is seeking bail pending the reconsideration of the executive decision to surrender him to the Philippines, and pending a review of that decision, should it be unfavourable, in this court. Nothing similar to these circumstances exists in domestic criminal law.

Having regard to the advanced stage in the proceedings at which the applicant stands, and having regard in any event to the fact that he is charged with murder, I conclude that he should bear the onus of establishing that his release is justified. In view of the fact that he has not yet been tried, and would, if he were charged in Canada, have the benefit of the presumption of innocence, I conclude that his detention can only be justified on the grounds set out in s. 515(10) of the *Criminal Code*, modified as required by the extradition procedure, that is: (a) to ensure his attendance in court or his availability for surrender; (b) for the protection or safety of the public; or (c) for any other just cause, including the maintenance of confidence in the administration of justice. In considering whether detention is justified, however, the history of proceedings, and the stage which has been reached will of course be relevant.”

Like Mr. *Pacificador*, Mr. Phillion is also awaiting an executive decision on his case.

*R. v. Pacificador (supra)* at

## **6. The Merits of the Application for Mr. Phillion’s Release**

43. Adapting the provisions of section 679 to Mr. Phillion's circumstances, it is respectfully submitted that he should be granted bail for the following reasons.

**(i) Mr. Phillion's application to the Minister is not frivolous**

44. Mr. Phillion's application to the Minister is far from being frivolous. It contains:

- new evidence that establishes, directly and inferentially, that he was not near the City of Ottawa at the time of Mr. Roy's murder,
- new evidence that establishes that the testimony of key witnesses at his trial ought not to have been believed,
- fresh evidence from the world's premier expert on false confessions that Mr. Phillion's confessions to Neil Miller and the police were likely false,
- substantial evidence that the materials found in the archives were known to the authorities at the time of his trial but were withheld *in toto* from the defence,
- evidence that in 1967 and 1968, and likely thereafter, Detective McCombie and other senior police officers believed Mr. Phillion was innocent,
- evidence that Mr. Phillion has asserted his innocence to anyone who would listen for more than 31 years commencing late in the evening of January 11, 1972,
- evidence that he has sought to demonstrably prove his innocence since his arrest, including taking (and passing) two polygraph tests.

**(ii) Mr. Phillion will surrender into custody in accordance with the terms of any release order**

45. The evidence suggests that the Minister will not render a decision on Mr. Phillion's case for at least a year. He has been in prison for 32 years. He is undoubtedly institutionalized. He has been

eligible for parole since 1978 but has refused to apply for it on the assertion that “only guilty people need parole”. He has no realistic ability to flee the jurisdiction.

46. The Applicant’s sister, her family and friends, have taken on Mr. Phillion’s cause. They are people of limited means but, as responsible citizens, can be relied upon to supervise and, most important, *help* him on his release. Professional help, from the John Howard Society who have a particular understanding of the problems that Mr. Phillion will face on his release, has been kindly offered.

***(iii) Mr. Phillion’s detention is not necessary in the public interest***

47. The Applicant is a 64 year old man, rather frail and not in the best of health. He poses no risk to the community. He has assured the Court that he will not engage in the same kind of behaviour as he did when he robbed a bank in 1990. Things are different now – he can finally see that his wrongful conviction may soon be recognized.

48. The Applicant’s well-being will be ensured by his sister, her family and friends, and the John Howard Society. They have all promised to provide the necessary assistance to Mr. Phillion upon his release.

49. The strength of Mr. Phillion’s application to the Minister provides overwhelming support for the view that it is in the public interest for him to be released. Thus, in *Baltovich*, Rosenberg J.A., in releasing the applicant on bail pending his second degree murder appeal, said:

“In my view, the matter that is most influential on the question of the public interest is the strength of the grounds of appeal...”

In *Johnson*, Freeman J.A. ordered the applicant released on a \$10,000.00 surety bail after his first degree murder conviction had been referred to the Nova Scotia Court of Appeal by the Minister of Justice. He said:

“For present purposes, I am satisfied that [new] evidence, if found to be admissible, and if believed, could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result. The jury would have had a further option for resolving the narrow opportunity issue.

The new expert reports, if admitted by the panel, would be cogent evidence in support of AIDWYC’s contention that Mr. Johnson is “factually innocent”, as he has maintained from the outset. It would be unrealistic to deny, that at the end of the day, there is at least a reasonable possibility that he has been wrongly convicted.

If that should be the final outcome, neither justice nor the public interest can be served by requiring him to remain in prison until the process has worked itself through what appears to be two separate hearings in this court and possibly a new trial. As his counsel point out, the months unjustly taken from him, if he is innocent, can never be restored to him, but if at the end of the day he is still found to be guilty, they can be added to the time he must serve. I find that Mr. Johnson’s detention is not necessary in the public interest.”

The same sentiments apply to Mr. Phillion’s case. It is unrealistic to deny that there is at least a reasonable possibility that he has been wrongly convicted.

*R. v. Baltovich* (2000), 144 C.C.C. (3d) 233 (Ont.C.A.)

*R. v. Johnson* (1998), 131 C.C.C. (3d) 343 (N.S.C.A.)

**PART III**

**ORDER REQUESTED**

50. It is respectfully submitted that the Applicant should be released on bail pending the decision of the Minister on his application for ministerial review on such terms and conditions as this Court considers just.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED.**

DATED this 18th day of June, 2003.

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James Lockyer

Counsel for the *Innocence Project*

## SCHEDULE A - AUTHORITIES CITED

*Reference re S. 94(2) of Motor Vehicle Act* (1985), 23 C.C.C. (3d) 289 (S.C.C.)

*R. v. Seaboyer* (1991), 66 C.C.C. (3d) 321 (S.C.C.)

*R. v. Leipert* (1997), 112 C.C.C. (3d) 385 (S.C.C.)

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*R. v. Starr* (2000), 147 C.C.C. (3d) 449 (S.C.C.)

*R. v. Lifchus* (1997), 118 C.C.C. (3d) 1 (S.C.C.)

*R. v. Stinchcombe* (1992), 68 C.C.C. (3d) 1 (S.C.C.)

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*Re Yugoslavia and Rajovic* (1981), 60 C.C.C. (2d) 32 (F.C.T.D.)

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*Re Barnes and Tennessee* (1972), 34 C.C.C. (2d) 122 (Ont.H.C.)

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*Re Arizona and Thompson* (1976), 30 C.C.C. (2d) 148 (Ont.Co.Ct.)

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*R. v. Pacificador*, [1998] 37 O.R. (3d) 312 (Ont.Gen.Div.)

*U.S.A. v. Ivanov* (2003), 172 C.C.C. (3d) 551 (Nfld.C.A.)

*R. v. Mills* (1986), 26 C.C.C. (3d) 481 (S.C.C.)

*R. v. Baltovich* (2000), 144 C.C.C. (3d) 233 (Ont.C.A.)

*R. v. Johnson* (1998), 131 C.C.C. (3d) 343 (N.S.C.A.)