

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF NEW BRUNSWICK)

B E T W E E N:

DENNIS JAMES OLAND

APPLICANT
(Appellant)

-and-

HER MAJESTY THE QUEEN

RESPONDENT
(Respondent)

APPLICATION FOR LEAVE TO APPEAL AND MOTION TO EXPEDITE
(DENNIS JAMES OLAND, APPLICANT)
(Pursuant to Section 40 of the *Supreme Court Act*, R.S.C. 1985, c. S-26, as amended)

**ALAN D. GOLD PROFESSIONAL
CORPORATION**

Ste. 210
20 Adelaide St. E.
Toronto, ON M5C 2T6

Alan D. Gold

Tel.: (416) 368-1726
Fax: (416) 368-6811
Email: info@alandgoldlaw.com

**GARY A. MILLER PROFESSIONAL
CORPORATION**

168 Woodbine Lane
Upper Kingsclear, NB E31 1S3

Gary A. Miller, Q.C.

Tel.: (506) 363-5390
Fax: (506) 209-2110
Email: garyamiller.gampc@gmail.com

SUPREME ADVOCACY LLP

340 Gilmore Street, Suite 100
Ottawa, ON K2P 0R3

Eugene Meehan, Q.C.

Marie-France Major

Tel.: (613) 695-8855
Fax: (613) 695-8580
Email: emeehan@supremeadvocacy.ca
mfmajor@supremeadvocacy.ca

**Ottawa Agent for Counsel for the Applicant,
Dennis James Oland**

COX & PALMER

Brunswick Square, Suite 1500
1 Germain Street
Saint John, NB E2L 4V1

James R. McConnell

Tel.: (506) 633-2767
Fax: (506) 632-8809
Email: jmcconnell@coxandpalmer.com

**Counsel for the Applicant, Dennis James
Oland**

CROWN PROSECUTOR'S OFFICE

Specialized Prosecutions
6th Flr., 520 King St.
PO Box 6000, Stn. A
Fredericton, NB E3B 5H1

Kathryn A. Gregory**Derek Weaver**

Tel.: (506) 453-2784
Fax: (506) 453-5364
Email: kathryn.gregory@gnb.ca
derek.weaver@gnb.ca

**Counsel for the Respondent, Her Majesty
the Queen**

GOWLING WLG (Canada) LLP

2600 - 160 Elgin St
Ottawa, ON K1P 1C3

D. Lynne Watt

Tel.: (613) 786-8695
Fax: (613) 563-9869
Email: lynne.watt@gowlingwlg.com

**Ottawa Agent for Counsel for the
Respondent, Her Majesty the Queen**

TABLE OF CONTENTS

<u>TAB</u>	<u>PAGE</u>
1. Notice of Application for Leave to Appeal and Request for an Expedited Determination.....	1
2. Judgments and Reasons Below	
A. Oral Decision of Richard J.A., dated February 17, 2016.....	4
B. Judgment of Court of Appeal for New Brunswick, dated April 4, 2016	19
3. Memorandum of Argument	
PART I – STATEMENT OF FACTS	35
Overview	35
The Decision of Richard J.A. Below: Public Interest and Added Requirements	37
<i>Outline of the Test at s. 679 of the Code</i>	37
<i>Application by Richard J.A.</i>	37
<i>Richard J.A.’s Examination of Public Confidence</i>	38
<i>Richard J.A. and Consideration of the Applicant’s Grounds of Appeal</i>	39
Application for Review: The Decision of Drapeau C.J.N.B. Below	40
PART II – STATEMENT OF ISSUES	42
PART III – STATEMENT OF ARGUMENT	43
<u>Issue One</u> : What is the proper test for determining bail pending appeal under s. 679(3)?	43
<i>The Novelty of Appellate Authority on Bail Pending Appeal</i>	43
<i>Situating the Debate on Consideration of the Grounds</i>	43
<i>The Decision of Richard J.A. Expands the Test</i>	43
<i>The Applicant was a Model Candidate</i>	47
<i>The Court of Appeal Added Further Extraneous Criteria on Review</i>	48
<i>Where the Law Could Go & Appeal Success Statistics</i>	48
<i>Effect of Decision Below</i>	49
<u>Issue Two</u> : What is the standard applicable to a review under section 680(1)?	50
<i>Debate Over Applicable Standard of Review</i>	50
<i>Code Provision and Application</i>	51
<i>Is the Court of Appeal Correct that Deference has Overtaken Liberty in the Interpretation of Statutes Respecting Bail?</i>	52
<i>Altering our Understanding of Public Confidence</i>	52

PART IV – SUBMISSION REGARDING COSTS	53
PART V – ORDER SOUGHT.....	53
PART VI – TABLE OF AUTHORITIES.....	54
PART VII – STATUTORY PROVISIONS	57

PART I – STATEMENT OF FACTS

Overview

1. This case¹ concerns the test and the surrounding principles to be engaged at a critical moment in the appellate process: the moment when courts are asked to determine whether or not to grant bail – one of the most common and important criminal law processes throughout Canada. In the absence of a constitutionally protected right to bail pending appeal,² along with a dearth of clear guidance from the Supreme Court of Canada, it has fallen to Courts of Appeal to determine the varying legal bases upon which such bail may be granted.
2. At present, there is surprisingly no consensus with respect to the “public interest” component of the test under s. 679(3) of the *Code*, or the standard of review applicable to bail pending appeal decisions at s. 680(1). Bottom line:
 - when and to what extent should courts consider the strength of the underlying grounds of appeal as part of the “public interest” component of the test?
 - what is the standard applicable to review a decision on bail pending appeal?
3. The answer to these questions will fundamentally define the liberty interests of all convicted persons in custody awaiting an appeal.
4. At the Court of Appeal below, the Applicant’s release or detention turned on just one issue: whether “public confidence in the criminal justice system would not be undermined by his release pending appeal.”³ The Judge of first instance, Richard J.A., held that none of the grounds of appeal advanced by the Applicant fell into the category of “unique circumstances” that “virtually assure a new trial or acquittal”.⁴ As such, Richard J.A. concluded that Mr. Oland’s release would undermine “public confidence” in the administration of criminal justice.
5. On the subsequent s. 680(1) appeal, the Applicant squarely raised the issue a second time: of what value are the grounds of appeal in the “public confidence” calculus? Instead of

¹ *Oland v R*, 2016 CanLII 7428 (NB CA) (“Oral Decision of Richard J.A.”) [Tab 2A]; *Oland v. R.*, 2016 NBCA 15 (“Court of Appeal Judgment”) [Tab 2B].

² See, in contrast, bail pending trial: *Canadian Charter of Rights and Freedoms*, s. 11(e).

³ Oral Decision of Richard J.A., at para. 16 [Tab 2A]; see also, Court of Appeal Judgment, at para. 2 [Tab 2B].

⁴ Oral Decision of Richard J.A., at para. 32 [Tab 2A].

resolving the question, the Court of Appeal went even further, referring to conduct of trial counsel as an additional factor. The Court noted there had been no motion for a directed verdict of acquittal and no request to recall the jury.⁵ The issue is thus unresolved.

6. Richard J.A. noted: “As for the strength of the grounds of appeal, there is no consensus on the appropriateness and value of such an evaluation in the context of a hearing under s. 679 of the *Criminal Code*.”⁶ In the absence of clear appellate guidance on the subject, Richard J.A. constructed the test under s. 679 of the *Criminal Code* in a manner that inappropriately emphasizes the Applicant’s grounds of appeal⁷, requiring him to produce evidence that would “virtually assure a new trial or acquittal”.⁸

7. Such an incredibly high standard goes beyond what is called for in the *Code* and exceeds the prescription offered even by case law favourable to an evaluation of the grounds, making it nearly impossible to meet the test in circumstances where a person is convicted of a serious offence – short of having conclusive evidence which nearly/clearly exonerates the convicted person.

8. By granting Leave in this case, this Honourable Court will have the opportunity to provide clear guidance on what should be, for Canada, the appropriate formulation of the test, a matter of central importance to the administration of criminal justice.

9. With respect to the standard applicable under s. 680(1) of the *Code*, the Court of Appeal below specifically took time to note that appellate courts are “divided” over the standard applicable to a review under the section.⁹ Chief Justice Drapeau found the decision under review was a “judgment call” and not one of law.

⁵ Court of Appeal Judgment, at para. 13 [Tab 2B].

⁶ Oral Decision of Richard J.A., at para. 26 [Tab 2A].

⁷ An approach which has been specifically cautioned against elsewhere, including by Wells C.J.N. in the matter of *R. v. Allen*, [2001] N.J. No. 243 at para. 51.

⁸ Oral Decision of Richard J.A., at para. 32 [Tab 2A].

⁹ Court of Appeal Judgment, at para. 3 [Tab 2B]; for decisions which treat the process as an ordinary appeal, see *R. v. West*, 1972 CanLII 547 (ON CA), [1972] O.J. No. 1962 (C.A.) (QL); *R. v. Webster*, [1995] P.E.I.J. No. 100 (C.A.) (QL); *R. v. D.P.F.*, 1999 CanLII 18941 (NL CA), [1999] N.J. No. 353 (C.A.) (QL). For decisions which treat the review as a *de novo* hearing, see, for example: *R. v. Hahn*, 2015 SKCA 148 (CanLII), [2015] S.J. No. 711 (QL); and *R. v. Gingras*; *R. v. Porisky*, 2012 BCCA 467 (CanLII), [2012] B.C.J. No. 2409 (QL).

10. Since Richard J.A. fundamentally altered the “public confidence” requirement of the test contemplated by s. 679(3), the question before the Court of Appeal below was, properly, a question of law subject to fulsome review and *not* simply a “judgment call” as framed by the Chief Justice below.¹⁰

The Decision of Richard J.A. Below: Public Interest and Added Requirements

Outline of the Test under s. 679 of the Code

11. The major issue before Richard J.A. below was whether the Applicant satisfied the test under s. 679 of the *Code*, which allows convicted persons to apply for release from custody pending determination of their appeal.

12. Critically, no crime is exempt from the application of s. 679 – a judge may release an appellant from custody provided three *Code* provisions are met:

679(3) In the case of an appeal referred to in paragraph (1)(a) or (c), the judge of the court of appeal may order that the appellant be released pending the determination of his appeal if the appellant establishes that

- (a) the appeal or application for leave to appeal is not frivolous;
- (b) he will surrender himself into custody in accordance with the terms of the order; and
- (c) his detention is not necessary in the public interest.¹¹

Application by Richard J.A.

13. Richard J.A. concluded the Applicant met the first two provisions contained at s. 679(3), having demonstrated his appeal was not frivolous (the Crown conceded there were arguable grounds of appeal)¹² and that he would not abscond upon release.

14. Richard J.A. focused the balance of his analysis on the third factor outlined at s. 679(3)(c) of the *Code*: whether the continued detention was necessary in the public interest.

15. Richard J.A. divided “public interest” into two sub-components:

- 1) public safety; and
- 2) public confidence.¹³

¹⁰ Court of Appeal Judgment, at para. 5 [Tab 2B].

¹¹ *Criminal Code*, RSC 1985, c C-46, s. 679(3).

¹² Oral Decision of Richard J.A., at para. 6 [Tab 2A].

¹³ Oral Decision of Richard J.A., at para. 10 [Tab 2A].

16. The first component, “public safety”, “...encompasses any danger Mr. Oland might pose to himself, the public at large, or to the administration of justice if he were released”.¹⁴ Richard J.A. was satisfied there would be no danger: “In light of the unique ‘relational/situational specific’ circumstances of the case”, Mr. Oland’s background, and attestations of good behaviour, he was not a danger to the public, himself, or to the administration of justice.

17. Turning to the “public confidence” component of the analysis, Richard J.A. asked whether public confidence in the administration of justice would be undermined by the Applicant’s release pending appeal.¹⁵

18. Since s. 679(3) has not been considered by the Supreme Court of Canada, Richard J.A. was forced to turn to decisions examining the principles governing applications for bail pending trial: *Hall*, *MacDougal*, and *St-Cloud*.¹⁶ From *St-Cloud*, Richard J.A. attempted to derive a coherent description of the term “public”:

[A] thoughtful person, not one who is prone to emotional reactions, whose knowledge of the circumstances of a case is inaccurate or who disagrees with our society’s fundamental values. But he or she is not a legal expert familiar with all the basic principles of the criminal justice system...¹⁷

19. Next, citing *Farinacci*¹⁸ and *Mapara*,¹⁹ Richard J.A. found that “public confidence” should be assessed by weighing two competing values: “enforceability” and “reviewability” from the perspective described in *St-Cloud* above.

Richard J.A.’s Examination of Public Confidence

20. Following the decision in *Farinacci*, Richard J.A. framed the test as a question to determine “...whether the reviewability of a verdict *outweighs* its enforceability such that public confidence would not be undermined by the temporary suspension of the verdict’s enforcement”.²⁰

¹⁴ Oral Decision of Richard J.A., at para. 11 [Tab 2A].

¹⁵ Oral Decision of Richard J.A., at para. 16 [Tab 2A].

¹⁶ *R. v. Hall*, 2002 SCC 64, [2002] 3 S.C.R. 309; *R. v. MacDougal* 1999 BCCA 509, [1999] B.C.J. No. 2034 (QL); *R. v. St-Cloud*, 2015 SCC 27, [2015] 2 S.C.R. 328

¹⁷ Oral Decision of Richard J.A., at para. 31 [Tab 2A].

¹⁸ *R. v. Farinacci*, 1993 CanLII 3385 (ON CA).

¹⁹ *R. v. Mapara*, 2001 BCCA 508, [2001] B.C.J. No. 1774 (QL).

²⁰ Oral Decision of Richard J.A., at para. 22 [emphasis added] [Tab 2A].

21. For Richard J.A., the following non-exhaustive list of factors are relevant to answering this question:

- the objective seriousness of the offence;
- the degree of any violence used in the commission of the offence;
- the appellant’s personal profile;
- the length of the sentence;
- the time it might take for the appeal to be heard; and
- the strength of the grounds of appeal (“to some degree”).²¹

22. Critically, although the “seriousness of the offence” and “degree of violence” were significant in this case, Richard J.A. found “nothing in Mr. Oland’s personal history that weighs in favour of enforceability”.²²

23. Richard J.A. described the time – eight months – that will elapse before the Applicant’s appeal is heard as “not inordinately long so as to factor heavily in the balance”.²³ To speak plainly, eight months is a long time to spend waiting in prison and, in any event, that may fall far short of the full measure of time until the decision.

Richard J.A. and Consideration of the Applicant’s Grounds of Appeal

24. The balance of Richard J.A.’s analysis focused on the strength of the grounds of appeal – this despite having stated at para. 22 that this was “to some degree” a factor in the analysis. The judgment illustrates the uncertainty caused by the absence of a clear decision on the subject from this Honourable Court. The appropriate extent to which the grounds of appeal factor should be considered – if at all – was not clear to the Court of Appeal below.

25. Richard J.A. contrasted the restrictive approach articulated by the Newfoundland and Labrador Court of Appeal in *Allen*²⁴ with a more permissive stance on consideration of grounds of appeal as endorsed by the British Columbia Court of Appeal in *Mapara*²⁵ and elsewhere.²⁶

²¹ Oral Decision of Richard J.A., at para. 22 [Tab 2A].

²² Oral Decision of Richard J.A., at para. 23 [Tab 2A].

²³ Oral Decision of Richard J.A., at para. 25 [Tab 2A].

²⁴ Oral Decision of Richard J.A., at para. 26 [Tab 2A].

²⁵ Oral Decision of Richard J.A., at para. 27 [Tab 2A].

²⁶ See, for example: *R. v. Baltovich*, 2000 CanLII 5680 (ON CA) and *R. v. Ruffolo*, 2011 BCCA 359.

26. Richard J.A. considered the decision of *Morin* as having “attenuated”²⁷ the controversy generated by more explicit reference to the grounds of appeal.

27. Ultimately, Richard J.A. preferred the approach found in both the Ontario Court of Appeal decision in *Morin*²⁸ and Quebec Court of Appeal decision in *Delisle*²⁹ (limiting his observations on the grounds of appeal to saying “some of the grounds will be clearly arguable when the appeal comes to be presented on its merits” and stating he is “not prepared to say more on any particular ground”).³⁰

28. Significantly, although Richard J.A. purportedly endorses the *Morin* approach, he does say more about the particular grounds – his decision fundamentally alters the test by suggesting the grounds of appeal should “fall in the category of the unique circumstances that would virtually assure a new trial or an acquittal.”³¹ This language is *obiter* taken out of context from *Allen*.

29. It was on this basis that the Applicant was initially denied bail pending appeal.

Application for Review: The Decision of Drapeau C.J.N.B. Below

30. On Application for Review, the Applicant submitted that Richard J.A.’s emphasis on the underlying grounds of appeal was an error of law, sourced in *dicta* from a precedent not in fact followed by other appellate courts (the *Allen* decision) and requiring too high and too limiting a standard for release pending appeal in a second-degree murder case.

31. Chief Justice Drapeau reproduced paras. 30-33 of Richard J.A.’s judgment, but a fulsome analysis of the point was effectively sidestepped as the Court struggled to determine the appropriate standard applicable to a review under s. 680(1).

²⁷ Oral Decision of Richard J.A., at para. 28 [Tab 2A].

²⁸ Oral Decision of Richard J.A., at para. 28 [Tab 2A].

²⁹ *Delisle v. R.*, 2012 QCCA 1250.

³⁰ Oral Decision of Richard J.A., at para. 30 [Tab 2A].

³¹ Oral Decision of Richard J.A., at para. 32 [Tab 2A].

32. Chief Justice Drapeau noted: “Appellate courts are divided over the standard applicable to a review under s. 680(1).”³² Simply put, there is no consensus as to whether the standard of review under the section is an ordinary appeal or a *de novo* hearing.

33. At para. 3 of the judgment, the Court concluded the appropriate approach in this case was to treat the process as an ordinary appeal – meaning “reversal would only be warranted if the decision under review is tainted by material error or unjustifiable on any reasonable view of the record”³³ pursuant to *West*,³⁴ *Webster*,³⁵ and *D.P.F.*³⁶ The Court emphasized the importance of deference over its prerogative to substitute a decision releasing an appellant where the criteria are met.

34. Chief Justice Drapeau described the decision of Richard J.A. as follows: “the decision being reviewed is not one of law: it is, in essence, a judgment call”³⁷. As such, the Court chose not to intervene, noting it was not aware of “...any adjudication based upon a judgment call which a reviewing court is allowed to reverse without a finding of material error or unreasonableness”.³⁸

35. That being said, Chief Justice Drapeau cited the decision of *Smith*,³⁹ which emphasized that, notwithstanding the 1973 Ontario Court of Appeal decision in *West*, “The duty of this court under s. 680(1) would appear to be to examine the record judicially and render the decision which we think ‘should have been made’ by the judge of first instance giving proper regard to his findings of fact and the inferences which he has drawn.”⁴⁰ The Court did not consider in any detail the contrary judgments of the Saskatchewan Court of Appeal in *Hahn*⁴¹ or the British Columbia Court of Appeal in *Gingras*.⁴²

³² Court of Appeal Judgment, at para. 3 [Tab 2B].

³³ Court of Appeal Judgment, at para. 3 [Tab 2B].

³⁴ *R. v. West*, 1972 CanLII 547 (ON CA).

³⁵ *R. v. Webster*, [1995] QJ No 100 (QL).

³⁶ *R. v. D.P.F.*, 1999 CanLII 18941 (NL CA), [1999] N.J. No. 353 (C.A.) (QL).

³⁷ Court of Appeal Judgment, at para. 5 [Tab 2B].

³⁸ Court of Appeal Judgment, at para. 5 [Tab 2B].

³⁹ *R. v. Smith*, [1973] N.B.J. No. 76.

⁴⁰ *R. v. Smith*, [1973] N.B.J. No. 76 at para. 8.

⁴¹ *R. v. Hahn*, 2015 SKCA 148.

⁴² *R. v. Gingras*, 2012 BCCA 467.

36. Instead, Chief Justice Drapeau held that “greater deference is accorded” to decisions such as the one made by Richard J.A. as part of the “modern emphasis on deference in the exercise of judicial review powers”⁴³ and found no material error or unreasonableness.

37. Far from acknowledging the degree to which Richard J.A.’s judgment altered the “public confidence” component of the test at s. 679(3), the Court of Appeal further emphasized the grounds of appeal, and referred to the conduct of counsel at trial as a potential relevant factor: “...at trial, there was no motion for a directed verdict of acquittal”; “...there was no request by the defence to recall the jury for corrective action”.⁴⁴

38. The Court of Appeal confirmed the decision under review.

PART II – STATEMENT OF ISSUES

39. This leave application raises the following issues of national interest and public importance:

Issue One: What is the proper test to be used uniformly throughout Canada for determining bail pending appeal under s. 679(3)?

What is the relationship between the nature and strength of the grounds of appeal and the question of public confidence (an element of public interest under s. 679(3)(c))? What prospect of success must an appellant’s grounds of appeal have (all other factors supporting release) to secure bail pending appeal of a second degree murder conviction?

Issue Two: What is the standard applicable to a review of a bail pending appeal decision under s. 680(1)?

If it is to be treated as an ordinary appeal, as opposed to a *de novo* review, to what extent does the court scrutinize the decision and when can it substitute its own decision? Is the Court of Appeal correct in adopting a deferential approach over liberty in the interpretation of statutes respecting bail?

⁴³ Court of Appeal Judgment, at para. 7 [Tab 2B].

⁴⁴ Court of Appeal Judgment, at para. 13 [Tab 2B].

PART III – STATEMENT OF ARGUMENT

Issue One: What is the proper test for determining bail pending appeal under s. 679(3)?

The Novelty of Appellate Authority on Bail Pending Appeal

40. This Honourable Court has not considered the application of s. 679(3) of the *Criminal Code* since 1995.⁴⁵ In *T(M)*, Sopinka J. simply stated “in criminal cases, orders for interim release on appeal to this Court are dealt with under s. 679...”⁴⁶

41. This Honourable Court has dealt with matters related to the provisions that govern bail pending trial – *St-Cloud* and *Hall*⁴⁷ – but has yet to consider the test for bail pending appeal.

42. In the absence of clear authority from this Honourable Court on the subject of bail pending appeal, there is significant regional variance respecting the proper test – particularly the “public confidence” component of “public interest” considerations under s. 679(3)(c) of the *Criminal Code*.

43. Richard J.A. canvassed these decisions and ultimately attempted to harmonize the different lines of authority. In doing so, the Applicant submits that Richard J.A. in fact established the most onerous public confidence test so far articulated by a Canadian appellate court by elevating *obiter* comment taken out of context from the decision of *Allen* to a requirement for bail pending appeal.

Situating the Debate on Consideration of the Grounds

44. Richard J.A. found there was an absence of certainty in the case law respecting the appropriate consideration of an Applicant’s grounds of appeal. On the one hand, he cited the decision in *Allen* for the proposition that Courts of Appeal should not consider or make a determination of the relative merits of the grounds. On the other hand, he referred to competing lines of authority across separate appellate jurisdictions – in British Columbia, the decisions of *Mapara* and *Ruffolo* express the view that “[t]he strength of the grounds of appeal is a significant part of the analysis”.⁴⁸

⁴⁵ *T. (M.) v. A. (H.)*, [1995] 1 SCR 445, 1995 CanLII 119 (SCC).

⁴⁶ *T. (M.) v. A. (H.)*, [1995] 1 SCR 445, 1995 CanLII 119 (SCC) at para. 4.

⁴⁷ *R. v. St-Cloud*, [2015] 2 SCR 328, 2015 SCC 27; and *R. v. Hall*, 2002 SCC 64, [2002] 3 S.C.R. 309.

⁴⁸ *R. v. Ruffolo*, 2011 BCCA 359 at para. 25.

45. There is appellate authority for the proposition that, as the degree of risk to public safety increases, the strength of the grounds of appeal must also increase if bail pending appeal is to be granted. An example is provided by the decision in *Rhyason*⁴⁹ where, as in the present case, the Alberta Court of Appeal stated there is no consensus among Canadian courts as to whether it is necessary or even appropriate to consider the strength of the grounds of appeal.

46. Despite the acknowledged absence of consensus on the point, the Court of Appeal described the level of strength required to overcome a compelling public interest in enforceability as follows:

Where the circumstances of the offence indicate little threat to public safety, an arguable appeal is enough to grant interim release: *Colville, supra*. It follows that where there is a moderate public interest to enforce a conviction, the strength of the appeal must be stronger than “not frivolous”, and where there is a compelling public interest the strength of the appeal should be considerably stronger. It follows that finding that an appeal has a “good prospect of success” may be enough to overcome a moderate concern for the protection of the public, but not enough to overcome a compelling concern for public safety.⁵⁰

47. On this standard, one would reasonably expect the Applicant’s release – because, the Court of Appeal found no risk to public safety. Consequently, moderate strength in the grounds should suffice to tip the scales in favour of reviewability (as *per* the test prescribed by *Farinacci*).

48. However, Richard J.A. does not examine *Rhayson*. Rather, he draws inspiration from the decisions in *Morin* and *Delisle*.⁵¹ These decisions suggest Courts should limit observations respecting the grounds, thus Richard J.A. used the following language to describe the Applicant’s grounds:

Having considered the grounds of appeal and the arguments made in support, as well as Crown counsel’s response, I am prepared to say that some of the grounds will be clearly arguable when the appeal comes to be presented on its merits. I am not prepared to say more on any particular ground...⁵²

⁴⁹ *R. v. Rhyason*, 2006 ABCA 120.

⁵⁰ *R v. Rhyason*, 2006 ABCA 120 at para. 15 [Emphasis added].

⁵¹ *Delisle v. R.*, 2012 QCCA 1250.

⁵² Oral Decision of Richard J.A., at para. 30 [Tab 2A].

49. Despite this adoption of the wording in *Morin* and *Delisle*, Richard J.A. clearly demonstrates he *was* prepared to say more – immediately extracting *dicta* from the case of *Allen* to point out that, in his view:

...none of the grounds fall into the category of the unique circumstances contemplated by Wells C.J.N., such as where there was an application to present convincing fresh evidence, or where a witness has recanted essential evidence or “some other clear error so patent as to make the case for entry of an acquittal or new trial virtually unavoidable”...⁵³

50. The result is that this case stands as a precedent sitting at one end of the spectrum, suggesting that not only must the grounds of appeal be considered as a significant factor to determining “public confidence” and the balance between enforceability and reviewability, but that the underlying grounds must be extremely compelling to secure interim release.

The Decision of Richard J.A. Expands the Test

51. Chief Justice Drapeau’s reasons make no reference to the fact Richard J.A. required, for release, grounds of appeal that “fall in the category of the unique circumstances that would virtually assure a new trial or an acquittal,” as described in *Allen*.

52. The significance of Richard J.A.’s emphasis on the grounds is not simply that it fundamentally alters the test, but also that it alters the test by misapplying *obiter* from a judgment of the Newfoundland and Labrador Court of Appeal which was explicitly attempting to circumscribe reference to the grounds of appeal. This is clearly demonstrated at para. 32 of the judgment, where the Court elevates a passing reference made by Wells C.J.N. to a new requirement for nearly conclusive grounds of appeal for individuals convicted of second degree murder.

53. It must be remembered that in *Allen*, Wells, C.J.N. was espousing a general policy that a court hearing a bail pending appeal application under the “public interest” ground should not consider the relative merits of the grounds of appeal. It was in that context that Wells, C.J.N. referred to “unique circumstances” (such as “convincing fresh evidence” or “a witness recanted essential evidence” or “was found to have committed perjury” or “some other error so patent as to make the case for entry of an acquittal or new trial virtually unavoidable”) where a court

⁵³ Oral Decision of Richard J.A., at para. 30 [Tab 2A].

hearing a bail pending appeal application should in fact make a determination on the relative merits of the grounds of appeal because in such cases those grounds cried out for release to be granted. As Wells, C.J.N. stated:

In such circumstances, the appeal becomes less of a review of the legal soundness of the trial court's decision, than a process whereby a very probable wrong, established as such by factors other than legal merit discernible from the record, can most conveniently and effectively be corrected.⁵⁴

54. In other words, given Wells C.J.N.'s general conclusion that the grounds should not be assessed in detail, he recognized there was a category of appeals where it was illogical and unreasonable not to recognize the exceptional strength of the grounds. That was the point being made by Wells, C.J.N. The opposite does not flow from *Allen* – the point is not that those exceptional grounds were a prerequisite to release.

55. These examples of “unique circumstances” were being offered as exceptions to a general policy articulated by Wells, C.J.N. – that an appellate court should not consider the strength of the grounds (beyond the issue of frivolity). Wells, C.J.N. was not stating a rule that those “unique circumstances” were a *sine qua non* for the reasonable member of the public to accept a decision for release.

56. It is relevant that in *Allen*, the grounds of appeal involved no claim of innocence but rather related primarily to issues arising (in some cases in reliance on provisions of the *Charter*) out of the Crown having entered into an agreement with the appellant to enter a stay of proceedings on the charge but subsequently laying the charge again.

57. The decision of Richard J.A. is based on a balancing that on one hand identifies the case simply as involving a murder conviction (without acknowledging it as a second degree murder and even, within that category, one at the lowest end in terms of sentence) and on the other hand asserts that the grounds are not strong fresh evidence, a recanting or perjurious witness or any patent error making success virtually a given (the “unique circumstances” referenced by Wells, C.J.N. and misapplied by Richard J.A.).

⁵⁴ *R. v. Allen*, [2001] N.J. No. 243 at para. 51.

58. On review, Chief Justice Drapeau simply states the decision below was “not the product of any error of law”. The reasons do not make clear whether the Court was saying this reliance on the *Allen* dictum was *not* an error of law or that it did not figure in the decision to detain, or explain in any way why this submission garnered no favour.

The Applicant was a Model Candidate

59. Richard J.A. paused to dispel the notion that “exceptional circumstances” are in any way a condition precedent to release under s. 679 of the *Code*.⁵⁵ Even if there were a case to require “exceptional grounds” where there are other negative aspects favouring enforceability – such as a serious criminal record, a risk of further offences or a strong case for guilt built on direct, credible and reliable evidence – this case has none of those factors.

60. Apart from the salient issue, the Applicant was in every respect an ideal candidate for release pending his appeal:

- No previous record or anything else in his “personal history that weighs in favour of enforceability”;⁵⁶
- Married with children;
- Strong roots in community and family support;
- Pre-trial release with no difficulties or issues;
- Poses no danger to public safety;
- Circumstantial evidence case described as “complex and convoluted” by the trial Judge;
- Took police nearly two years to determine they had sufficient evidence for a charge though they focused on him the same day the homicide was discovered;
- Applicant did testify at trial, exposed himself to cross-examination, and maintained his innocence throughout;
- Charge and conviction was for second-degree murder, characterized by the trial Judge as on the lower end of the spectrum closer to manslaughter than to first degree murder, a spontaneous homicide;
- Notwithstanding convicting, the jury unanimously recommended minimum 10-year parole eligibility which trial Judge accordingly imposed;
- If release were to be ordered, the Crown in submissions agreed with release on the same conditions imposed during pre-trial release with two sureties each in the amount

⁵⁵ Oral Decision of Richard J.A., at para. 20 [Tab 2A].

⁵⁶ Oral Decision of Richard J.A., at para. 24 [Tab 2A].

of \$200,000, the sureties being Constance Oland (Applicant's mother) and Derek Oland (Applicant's uncle and pre-trial bail surety).

61. There are no circumstances under the public interest ground favouring enforceability beyond the bare fact of the conviction for murder. In a case such as this there can be no warrant to require "exceptional grounds".

The Court of Appeal Added Further Extraneous Criteria on Review

62. On review, the Court of Appeal minimized the strength of the Applicant's unreasonable verdict ground by noting that "at trial, there was no motion for a directed verdict of acquittal". This was an erroneous consideration and diverted the Court from resolving the clear dispute before it. The issues are completely separate in law (as this Honourable Court described in *R. v. W.H.*).⁵⁷ The absence of such an application (or even lack of success on such an application) has no bearing on appellate review based upon the entire trial record and applying the different and wider ground of "unreasonable verdict".

63. Every successful unreasonable verdict ground of appeal must *necessarily* involve a trial where there was no directed verdict application brought or such was unsuccessful. If a directed verdict application was wrongly dismissed, such would be an error of law and be constituted under that heading. The unreasonable verdict ground by definition operates alone in the arena of trials otherwise free from error of law or fact.

64. The Court of Appeal agreed that "the grounds of appeal appear to be serious". Richard J.A. refused to say much on the issue except to agree they were "clearly arguable". Had the Court resolved the issue before it (was Richard, J.A.'s reliance on the *Allen* dictum an error or did it produce an unreasonable refusal to release the Applicant?), this observation would have justified a fresh look at the application for release.

Where the Law Could Go & Appeal Success Statistics

65. If the nature and strength of the grounds of appeal are relevant to the decision to release or not, it should be noted that consideration on this point is properly understood as falling over and above the *Code's* express minimalist requirement that the grounds be "not frivolous": s.

⁵⁷ *R. v. W.H.*, 2013 SCC 22, paras. 27 and 28.

679(3)(a). It is awkward to adopt this reasoning in the context of s. 679(3)(c) and “public confidence”.

66. As such, “extraordinary grounds” and/or “unique circumstances virtually ensuring an acquittal or new trial” is too high a standard. Instead, the Applicant submits a standard akin to “arguable grounds with a potential prospect of obtaining a new trial or acquittal” is the appropriate standard.

67. This standard aptly reflects the statistics on the success of bail pending appeal applications for murder convictions, which belie any suggestion that such applications are only rarely successful:

*Summary of Murder Bail Pending Appeal Decisions*⁵⁸

	Bail Granted	Bail Refused
First Degree Murder	10 (38%) (including 4 Ministerial Reviews)	16
Second Degree Murder	24 (47%) (including 2 Ministerial Reviews)	27
Totals	34 (44%)	43

68. The high standards relied upon by the Court of Appeal below do not accord with the practical reality of judicial interim release across Canada. It cannot be said that in the cases in which bail was granted that in each case there was a “virtual certainty” of success on appeal. The effect of the decisions below is that many of these successful bail hearings would be reversed.

Effect of Decision Below

69. The effect of the Court of Appeal's decision is that, absent crucial fresh evidence demonstrating innocence or credible recantation by a crucial witness (the sorts of grounds

⁵⁸ Note: this table reflects reported decisions. See list of reported cases in Part VI – Table of Authorities.

described in *Allen*), then bail pending appeal is not to be granted. This is the case even where the convicted person:

- is of previous good character;
- has substantial roots in the community;
- has a very substantial release proposal;
- was convicted of second degree (not first degree) murder; and
- has a conviction that rests upon a complex and complicated circumstantial evidence case where an acquittal would have been unsurprising.

70. This case provides an opportunity to settle definitively the appellate debate regarding the “public interest” requirement for bail pending appeal and whether and to what extent the strength of the grounds of appeal factor into the determination.

Issue Two: What is the standard applicable to a review under section 680(1)?

Debate Over Applicable Standard of Review

71. The Court of Appeal below stated that appellate courts are divided over the standard applicable to a review under s. 680(1).⁵⁹ The issue is whether an appellate court ought to treat the process as an ordinary appeal or treat the review as a *de novo* hearing. With a brief cursory analysis of the competing authorities, Chief Justice Drapeau concludes that the process should be treated as an ordinary appeal and not a *de novo* hearing of the application.

72. However, this leads to the issue that even within the camp that treats the process as an ordinary appeal, there is variance respecting the extent to which a court may substitute its own decision:

West.⁶⁰ treats ordinary review as something that would rarely trigger appellate intervention. (Chief Justice Drapeau reconciles this description of deference with the modern approach of according greater deference to decisions that he categorizes as “judgment calls”.)

⁵⁹ See also *R. v. St-Cloud*, 2015 SCC 27, [2015] 2 S.C.R. 328 at para. 99.

⁶⁰ *R. v. West*, 1972 CanLII 547 (ON CA).

Smith:⁶¹ emphasizes that, notwithstanding *West*, “The duty of this court under s. 680(1) would appear to be to examine the record judicially and render the decision which we think ‘should have been made’ by the judge of first instance giving proper regard to his findings of fact and the inferences which he has drawn.”⁶² This suggests a greater involvement of the reviewing court than *West*.⁶³

73. The debate between *Smith* and *West* remains a live one – both cases are from the early 1970’s (1973 and 1972 respectively) and engage fundamental issues of national importance. Chief Justice Drapeau found that the decision before him was a “judgment call,” yet this judgment fundamentally alters the test for seeking bail pending appeal by augmenting the “public confidence” component of the analysis in a way that drastically expands the significance of the grounds of appeal. The decision was reviewable on that basis and s. 680(1) of the *Code* requires that greater consideration be given to this point.

Code Provision and Application

74. Section 680(1) states as follows:

680(1) A decision made by a judge under section 522 or subsection 524(4) or (5) or a decision made by a judge of the court of appeal under section 261 or 679 may, on the direction of the chief justice or acting chief justice of the court of appeal, be reviewed by that court and that court may, if it does not confirm the decision,

(a) vary the decision; or

(b) substitute such other decision as, in its opinion, should have been made.⁶⁴

75. Having regard to the fundamental liberty interest involved, it is submitted that a fulsome mode of review should be deployed.

76. Even if s. 680(1) does call for a deferential standard of review as per *West*, the Applicant submits that Richard J.A.’s ruling was not simply a “judgment call.” It was a judicial decision tainted by a material legal error that required the review Court’s intervention.

⁶¹ *R. v. Smith*, [1973] N.B.J. No. 76.

⁶² *R. v. Smith*, [1973] N.B.J. No. 76 at para. 8.

⁶³ As with *R. v. Smith* [1973] N.B.J. No. 76., the following suggest a lower degree of deference: *R. c. Quinton*, [1993] J.Q. no 1661 (C.A.) at paras. 12-13; *R. v. F.F.B.*, [1992] N.S.J. No. 226 (C.A.) (p. 5); *R. v. Fothergill*, [1982] O.J. No. 44 (C.A.) at para. 4; *R. v. Massan*, [2012] M.J. No. 96 (C.A.) at para. 28, *R. v. White*, [2005] A.J. No. 1637 (C.A.) at para. 12.

⁶⁴ *Criminal Code*, s. 680(1).

77. This case provides an opportunity to settle definitively the appellate debate regarding the standard applicable to a review under section 680(1), as well as the principles applicable to release in murder cases. Although this Honourable Court has had recent occasion to offer guidance to trial courts on s. 515(10)(c) of the *Criminal Code*, this Honourable Court has not (yet) offered similar guidance regarding these sections.

Is the Court of Appeal Correct that Deference has Overtaken Liberty in the Interpretation of Statutes Respecting Bail?

78. The Court of Appeal acknowledged that in some provinces (British Columbia and Saskatchewan) a person who fails to obtain bail is entitled to *de novo* consideration of their application by a panel of the Court. In other provinces (Ontario, Newfoundland, and Prince Edward Island) the right is triggered *only if* there are material errors or unreasonableness. On this formulation, the decisive principle is deference to a “judgment call.”⁶⁵ This statutory construction of s. 680 is at odds with s. 52 of the *Constitution Act, 1982* and judgments of this Court.⁶⁶

79. It is constitutionally unsound to prefer tidiness or finality (“deference”) over liberty where the latter interpretation is reasonably available. This has long been the law, concisely stated by the majority in *MacIntosh*:⁶⁷

It is a principle of statutory interpretation that where two interpretations of a provision which affects the liberty of a subject are available, one of which is more favourable to an accused, then the court should adopt this favourable interpretation.

80. The decision of the Court of Appeal, which favours deference to a “judgment call” over the liberty of the Applicant, raises an issue of public importance. If the decision from which the proposed appeal is adopted, it will substantially reduce the availability of bail reviews to persons awaiting appeals in Canada.

Altering our Understanding of Public Confidence

81. Regardless of where one falls on the debate of *de novo* or ordinary review, the fact remains the Court of Appeal mischaracterized the decision of Richard J.A. as a mere judgment

⁶⁵ Court of Appeal Judgment, at para. 5 [Tab 2B].

⁶⁶ See, for example, *R. v. Sharpe*, 2001 SCC 2, at para. 33.

⁶⁷ *R. v. McIntosh* [1995] 1 S.C.R. 686 at para 29.

call. The formulation of the test as described by Richard J.A., as well as its application, fundamentally alter the understanding of the “public confidence” component of the test for bail pending appeal.

82. The failure of the Court of Appeal below to address a judicial innovation is a significant indicator of both:

- every appellate court’s essential responsibility under s. 680(1) of the *Code*; and
- the public importance at the very root of this Leave.

PART IV – SUBMISSION REGARDING COSTS

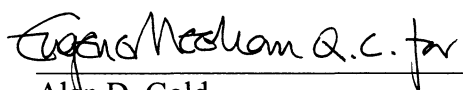
83. The Applicant does not request costs.

PART V – ORDER SOUGHT

84. The Applicant requests that the application for leave to appeal be allowed and that the determination of the leave to appeal be expedited.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Toronto this 29th day of April, 2016.

 *Alan D. Gold, Gary A. Miller Q.C.,
& James R. McConnell.*
 Alan D. Gold
 Gary A. Miller, Q.C.
 James R. McConnell
 Counsel for the Applicant

PART VI – TABLE OF AUTHORITIES

AT PARA.

Cases Referenced in Memorandum

<i>Delisle v. R.</i> , 2012 QCCA 1250	27, 48, 49
<i>R. v. Allen</i> , [2001] N.J. No. 243	6, 25, 28, 30, 43-44, 49, 51, 53-54, 56, 58, 64, 69
<i>R. v. Baltovich</i> , 2000 CanLII 5680 (ON CA)	25
<i>R. v. D.P.F.</i> , 1999 CanLII 18941 (NL CA), [1999] N.J. No. 353 (C.A.) (QL)	9, 33
<i>R. v. F.F.B.</i> , [1992] N.S.J. No. 226 (C.A.)	72
<i>R. v. Farinacci</i> , 1993 CanLII 3385 (ON CA)	19, 20, 47
<i>R. v. Fothergill</i> , [1982] O.J. No. 44 (C.A.)	72
<i>R. v. Gingras; R. v. Porisky</i> , 2012 BCCA 467 (CanLII), [2012] B.C.J. No. 2409 (QL)	9, 35
<i>R. v. Hahn</i> , 2015 SKCA 148(CanLII), [2015] S.J. No. 711 (QL)	9, 35
<i>R. v. Hall</i> , 2002 SCC 64, [2002] 3 S.C.R. 309	18, 41
<i>R. v. MacDougal</i> 1999 BCCA 509, [1999] B.C.J. No. 2034 (QL)	18
<i>R. v McIntosh</i> [1995] 1 S.C.R. 686	79
<i>R. v. Mapara</i> , 2001 BCCA 508, [2001] B.C.J. No. 1774 (QL)	19, 25, 44
<i>R. v. Massan</i> , [2012] M.J. No. 96 (C.A.)	72
<i>R. v. Rhyason</i> , 2006 ABCA 120	45-46
<i>R. v. Ruffolo</i> , 2011 BCCA 359	25, 44
<i>R. v. Sharpe</i> , 2001 SCC 2	78
<i>R. v. Smith</i> , [1973] N.B.J. No. 76	35, 72-73
<i>R. v. St-Cloud</i> , [2015] 2 SCR 328, 2015 SCC 27	18-19, 41, 71
<i>R. v. W.H.</i> , 2013 SCC 22	62
<i>R. v. Webster</i> , [1995] P.E.I.J. No. 100 (C.A.) (QL)	9, 33
<i>R. v. West</i> , 1972 CanLII 547 (ON CA)	9, 33, 35, 72-73, 76
<i>R. v. White</i> , [2005] A.J. No. 1637 (C.A.)	72
<i>T. (M.) v. A. (H.)</i> , [1995] 1 SCR 445, 1995 CanLII 119 (SCC)	40

List of Reported Cases (see Footnote 58)

First Degree Murder – Released Pending Appeal

<i>Ostrowski v. Canada (Minister of Justice)</i> , [2009] M.J. No. 426 (Q.B.)
<i>Proulx c. R.</i> , [1991] J.Q. No. 2620 (C.A.)
<i>R. v. Caouette</i> , [1995] J.Q. No. 1327 (C.A.)

R. v. Driskell, [2004] M.J. No. 7 (Q.B.)
R. v. Johnson, [1998] N.S.J. No. 381 (C.A.)
R. v. Khan, [1998] M.J. No. 443 (C.A.)
R. v. Mapara, 2001 BCCA 234
R. v. Morin, [1993] O.J. No. 267 (C.A.)
R. v. Mullins-Johnson, unreported (Ontario Superior Court of Justice, 2005)
R. v. Unger, [2005] M.J. No. 396 (Q.B.)

First Degree Murder – Not Released Pending Appeal

Delisle c. R., 2012 QCCA 1250
Levasseur c. R., [1992] J.Q. no 2592 (C.A.)
R. c. Bérubé, [2005] J.Q. no 24183 (C.A.)
R. c. Perron, [1990] J.Q. No. 638 (C.A.)
R. v Karas, [2007] A.J. No. 773 (C.A.)
R. v. Brown, [2013] A.J. No. 739 (C.A.)
R. v. Dunbar, [2002] B.C.J. No. 2780 (C.A.) & 2003 BCCA 111
R. v. Figliola, unreported (ONCA, 2013)
R. v. Heyden, [1999] O.J. No. 5553 (C.A.)
R. v. James, [2012] B.C.J. No. 751 (C.A.)
R. v. Larsen, 2001 BCCA 617
R. v. Le, [2009] M.J. No. 99 (C.A.)
R. v. Malley, 2015 ABCA 213
R. v. McAuley (1999), 113 C.C.C. (3d) 314 (Ont. C. A.)
R. v. Pan (1994), 23 W.C.B. (2d) 508 (Ont. C.A.)
R. v. Ruffolo, [2011] B.C.J. No. 1596 (C.A.)

Second Degree Murder – Released Pending Appeal

Mailhot c. R., 2008 QCCA 1460
R. c. Émond, [2000] J.Q. No. 5161 (C.A.)
R. c. Vaillancourt, [1996] J.Q. No. 4019 (C.A.)
R. v. Assoun, [2014] N.S.J. No. 607 (S.C.)
R. v. Baltovich, [2000] O.J. No. 987 (C.A.)
R. v. Davis (1976), 32 C.C.C. (2d) 526 (A.B.C.A.)
R. v. Effert, [2009] A.J. No. 841

R. v. Ellard, 2001 BCCA 630
R. v. Feng, unreported (BCCA, 2012)
R. v. Gunning, unreported (BCCA, 2003)
R. v. Ilina, 2001 MBCA 201
R. v. Latimer, [1994] S.J. No. 630 (C.A.)
R. v. Manasseri, 2013 ONCA 647
R. v. Molodowic, [1997] M.J. No. 275 (C.A.)
R. v. Nguyen, [1997] B.C.J. No. 2121 (C.A.)
R. v. O'Grady, [1997] B.C.J. No. 1399 (C.A.)
R. v. Parsons (1994), 117 Nfld. & P.E.I.R. 69 (Nfld. C.A.)
R. v. Phillion, [2003] O.J. No. 3422 (S.C.J.)
R. v. Smith, unreported (NFCA, 1993)
R. v. Toor, [2001] B.C.J. No. 305 (C.A.)
R. v. Trochym, [1999] O.J. No. 3307 (C.A.)
R. v. Wilson, [1983] B.C.W.L.D. 298 (C.A.)
R. v. Yebes, [1984] B.C.J. No. 1801 (C.A.)
R. v. Young, 2005 BCCA 261

Second Degree Murder – Not Released Pending Appeal

R. v. Allen, [2001] N.J. No. 243 (C.A.) & 2000 NFCA 43
R. v. Couture, [2004] B.C.J. No. 756 (C.A.)
R. v. Demyen (1975), 26 C.C.C. (2d) 324 (Sask C.A.)
R. v. Desjarlais, (1984), 14 C.C.C. (3d) 77 (Man. C.A.)
R. v. Durand, 2015 QCCA 1020
R. v. Griffin, [2001] M.J. No. 213 (C.A.)
R. v. Hanna, [1991] B.C.J. No. 2551 (C.A.)
R. v. Jack (1990), 69 Man. R. (2d) 5 (C.A.)
R. v. Klymchuk, 2008 ONCA 854
R. v. Koehn, [1996] B.C.J. No. 2055 (C.A.)
R. v. Kuli, [1996] O.J. No. 2260 (C.A.)
R. v. L.(Q.V.T.M.), 2001 BCCA 709
R. v. Lees, 1999 BCCA 441
R. v. Meda (1981), 23 C.R. (3d) 174 (B.C.C.A.)

R. v. Moore, [1979] N.S.J. No. 619 (C.A.)
R. v. Oakes, [2015] A.J. No. 561
R. v. Olsen, [1996] O.J. No. 3899 (C.A.)
R. v. Pabani (1991), 10 C.R. (4th) 381 (C.A.)
R. v. Quinn, 2009 BCCA 226
R. v. Rideout (1995), 134 Nfld. & P.E.I.R. 153 (Nfld. C.A.)
R. v. Roe, [2008] B.C.J. No. 1129 (C.A.)
R. v. Rose, [1991] B.C.J. No. 4026 (C.A.)
R. v. S.(R.), 1998 CarswellOnt 220 (C.A.)
R. v. Souliere, [1986] O.J. No. 2136 (C.A.)
R. v. Trotta (1999), 123 O.A.C. 277 (Ont. C.A.)
R. v. Walchuk, [2000] S.J. No. 432 (C.A.)
R. v. Walker, [2007] S.J. No. 144 (C.A.)

PART VII – STATUTORY PROVISIONS

Canadian Charter of Rights and Freedoms, s. 11(e)
Criminal Code, RSC 1985, c C-46, ss. 515(10)(c), 679, 680(1)

Canadian Charter of Rights and Freedoms, s. 11(e)

11. Any person charged with an offence has the right
(e) not to be denied reasonable bail without just cause;

11. Tout inculpé a le droit :
e) de ne pas être privé sans juste cause d'une mise en liberté assortie d'un cautionnement raisonnable;

Criminal Code, RSC 1985, c C-46, ss. 515(10)(c), 520, 679, 680(1)

515 (10) For the purposes of this section, the detention of an accused in custody is justified only on one or more of the following grounds:

(c) if the detention is necessary to maintain confidence in the administration of justice, having regard to all the circumstances, including

(i) the apparent strength of the prosecution's case,

(ii) the gravity of the offence,

(iii) the circumstances surrounding the commission of the offence, including whether a firearm was used, and

(iv) the fact that the accused is liable, on conviction, for a potentially lengthy term of imprisonment or, in the case of an offence that involves, or whose subject-matter is, a firearm, a minimum punishment of imprisonment for a term of three years or more.

520 (1) If a justice, or a judge of the Nunavut Court of Justice, makes an order under subsection 515(2), (5), (6), (7), (8) or (12) or makes or vacates any order under paragraph 523(2)(b), the accused may, at any time before the trial of the charge, apply to a judge for a review of the order.

Marginal note: Notice to prosecutor

(2) An application under this section shall not, unless the prosecutor otherwise consents, be heard by a judge unless the accused has given to the prosecutor at least two clear days notice in writing of the application.

Marginal note: Accused to be present

(3) If the judge so orders or the prosecutor or

515 (10) Pour l'application du présent article, la détention d'un prévenu sous garde n'est justifiée que dans l'un des cas suivants :

c) sa détention est nécessaire pour ne pas miner la confiance du public envers l'administration de la justice, compte tenu de toutes les circonstances, notamment les suivantes :

(i) le fait que l'accusation paraît fondée,

(ii) la gravité de l'infraction,

(iii) les circonstances entourant sa perpétration, y compris l'usage d'une arme à feu,

(iv) le fait que le prévenu encourt, en cas de condamnation, une longue peine d'emprisonnement ou, s'agissant d'une infraction mettant en jeu une arme à feu, une peine minimale d'emprisonnement d'au moins trois ans.

520 (1) Le prévenu peut, en tout temps avant son procès sur l'inculpation, demander à un juge de réviser l'ordonnance rendue par un juge de paix ou un juge de la Cour de justice du Nunavut conformément aux paragraphes 515(2), (5), (6), (7), (8) ou (12), ou rendre ou annulée en vertu de l'alinéa 523(2)b).

Note marginale : Avis au poursuivant

(2) Une demande en vertu du présent article ne peut, sauf si le poursuivant y consent, être entendue par un juge, à moins que le prévenu n'ait donné par écrit au poursuivant un préavis de la demande de deux jours francs au moins.

Note marginale : Le prévenu doit être présent

the accused or his counsel so requests, the accused shall be present at the hearing of an application under this section and, where the accused is in custody, the judge may order, in writing, the person having the custody of the accused to bring him before the court.

Marginal note:Adjournment of proceedings

(4) A judge may, before or at any time during the hearing of an application under this section, on application by the prosecutor or the accused, adjourn the proceedings, but if the accused is in custody no adjournment shall be for more than three clear days except with the consent of the accused.

Marginal note:Failure of accused to attend

(5) Where an accused, other than an accused who is in custody, has been ordered by a judge to be present at the hearing of an application under this section and does not attend the hearing, the judge may issue a warrant for the arrest of the accused.

Marginal note:Execution

(6) A warrant issued under subsection (5) may be executed anywhere in Canada.

Marginal note:Evidence and powers of judge on review

(7) On the hearing of an application under this section, the judge may consider

(a) the transcript, if any, of the proceedings heard by the justice and by any judge who previously reviewed the order made by the justice,

(b) the exhibits, if any, filed in the proceedings before the justice, and

(c) such additional evidence or exhibits as may be tendered by the accused or the prosecutor,

and shall either

(3) Si le juge l'ordonne ou si le poursuivant, le prévenu ou son avocat le demande, le prévenu doit être présent à l'audition d'une demande en vertu du présent article et, lorsque le prévenu est sous garde, le juge peut ordonner, par écrit, à la personne ayant la garde du prévenu, de l'amener devant le tribunal.

Note marginale :Ajournement des procédures

(4) Un juge peut, avant le début de l'audition d'une demande en vertu du présent article ou à tout moment au cours de cette audition, ajourner les procédures sur demande du poursuivant ou du prévenu, mais si le prévenu est sous garde, un tel ajournement ne peut jamais être de plus de trois jours francs sauf avec le consentement du prévenu.

Note marginale :Absence du prévenu à l'audition

(5) Lorsqu'un prévenu, autre qu'un prévenu qui est sous garde, a reçu d'un juge l'ordre d'être présent à l'audition d'une demande en vertu du présent article et n'est pas présent à l'audition, le juge peut décerner un mandat pour l'arrestation du prévenu.

Note marginale :Exécution

(6) Un mandat décerné en vertu du paragraphe (5) peut être exécuté n'importe où au Canada.

Note marginale :Preuve et pouvoirs du juge lors de l'examen

(7) Lors de l'audition d'une demande en vertu du présent article, le juge peut examiner :

a) la transcription, s'il en est, des procédures entendues par le juge de paix et par un juge qui a déjà révisé l'ordonnance rendue par le juge de paix;

b) les pièces, s'il en est, déposées au cours des procédures devant le juge de paix;

c) les autres preuves ou pièces que le prévenu

(d) dismiss the application, or

(e) if the accused shows cause, allow the application, vacate the order previously made by the justice and make any other order provided for in section 515 that he considers is warranted.

Marginal note: Limitation of further applications

(8) Where an application under this section or section 521 has been heard, a further or other application under this section or section 521 shall not be made with respect to that same accused, except with leave of a judge, prior to the expiration of thirty days from the date of the decision of the judge who heard the previous application.

Marginal note: Application of sections 517, 518 and 519

(9) The provisions of sections 517, 518 and 519 apply with such modifications as the circumstances require in respect of an application under this section.

679 (1) A judge of the court of appeal may, in accordance with this section, release an appellant from custody pending the determination of his appeal if,

(a) in the case of an appeal to the court of appeal against conviction, the appellant has given notice of appeal or, where leave is required, notice of his application for leave to appeal pursuant to section 678;

(b) in the case of an appeal to the court of appeal against sentence only, the appellant has been granted leave to appeal; or

(c) in the case of an appeal or an

ou le poursuivant peuvent présenter,

et il doit :

d) soit rejeter la demande;

e) soit, si le prévenu fait valoir des motifs justifiant de le faire, accueillir la demande, annuler l'ordonnance antérieurement rendue par le juge de paix et rendre toute autre ordonnance prévue à l'article 515, qu'il estime justifiée.

Note marginale : Limitation des demandes subséquentes

(8) Lorsqu'une demande en vertu du présent article ou de l'article 521 a été entendue, il ne peut être fait de nouvelle demande ou d'autre demande en vertu du présent article ou de l'article 521 relativement au même prévenu, sauf avec l'autorisation d'un juge, avant l'expiration d'un délai de trente jours à partir de la date de la décision du juge qui a entendu la demande précédente.

Note marginale : Application des art. 517, 518 et 519

(9) Les articles 517, 518 et 519 s'appliquent, compte tenu des adaptations de circonstance, à l'égard d'une demande en vertu du présent article.

679 (1) Un juge de la cour d'appel peut, en conformité avec le présent article, mettre un appellant en liberté en attendant la décision de son appel :

a) si, dans le cas d'un appel d'une déclaration de culpabilité interjeté devant la cour d'appel, l'appellant a donné un avis d'appel ou, lorsqu'une autorisation est requise, a donné un avis de sa demande d'autorisation d'appel en application de l'article 678;

b) si, dans le cas d'un appel d'une sentence seulement interjeté devant la cour d'appel, l'autorisation

application for leave to appeal to the Supreme Court of Canada, the appellant has filed and served his notice of appeal or, where leave is required, his application for leave to appeal.

Notice of application for release

(2) Where an appellant applies to a judge of the court of appeal to be released pending the determination of his appeal, he shall give written notice of the application to the prosecutor or to such other person as a judge of the court of appeal directs.

Circumstances in which appellant may be released

(3) In the case of an appeal referred to in paragraph (1)(a) or (c), the judge of the court of appeal may order that the appellant be released pending the determination of his appeal if the appellant establishes that

- (a) the appeal or application for leave to appeal is not frivolous;
- (b) he will surrender himself into custody in accordance with the terms of the order; and
- (c) his detention is not necessary in the public interest.

Idem

(4) In the case of an appeal referred to in paragraph (1)(b), the judge of the court of appeal may order that the appellant be released pending the determination of his appeal or until otherwise ordered by a judge of the court of appeal if the appellant establishes that

- (a) the appeal has sufficient merit that, in the circumstances, it would cause unnecessary hardship if he were detained in custody;
- (b) he will surrender himself into custody in accordance with the terms

d'appel a été accordée à l'appellant;

c) si, dans le cas d'un appel ou d'une demande d'autorisation d'appel devant la Cour suprême du Canada, l'appellant a déposé et signifié son avis d'appel ou, lorsqu'une autorisation est requise, sa demande d'autorisation d'appel.

Avis de demande de mise en liberté

(2) Lorsqu'un appellant demande à un juge de la cour d'appel d'être mis en liberté en attendant la décision de son appel, il donne un avis écrit de la demande au poursuivant ou à toute autre personne qu'un juge de la cour d'appel indique.

Circonstances dans lesquelles l'appellant peut être mis en liberté

(3) Dans le cas d'un appel mentionné à l'alinéa (1)a) ou c), le juge de la cour d'appel peut ordonner que l'appellant soit mis en liberté en attendant la décision de son appel, si l'appellant établit à la fois :

- a) que l'appel ou la demande d'autorisation d'appel n'est pas futile;
- b) qu'il se livrera en conformité avec les termes de l'ordonnance;
- c) que sa détention n'est pas nécessaire dans l'intérêt public.

Idem

(4) Dans le cas d'un appel mentionné à l'alinéa (1)b), le juge de la cour d'appel peut ordonner que l'appellant soit mis en liberté en attendant la décision de son appel ou jusqu'à ce qu'il en soit autrement ordonné par un juge de la cour d'appel, si l'appellant établit à la fois :

- a) que l'appel est suffisamment justifié pour que, dans les circonstances, sa détention sous garde constitue une épreuve non nécessaire;

of the order; and

(c) his detention is not necessary in the public interest.

Conditions of order

(5) Where the judge of the court of appeal does not refuse the application of the appellant, he shall order that the appellant be released

(a) on his giving an undertaking to the judge, without conditions or with such conditions as the judge directs, to surrender himself into custody in accordance with the order, or

(b) on his entering into a recognizance

(i) with one or more sureties,

(ii) with deposit of money or other valuable security,

(iii) with both sureties and deposit, or

(iv) with neither sureties nor deposit, in such amount, subject to such conditions, if any, and before such justice as the judge directs,

(c) [Repealed, R.S., 1985, c. 27 (1st Supp.), s. 141]

and the person having the custody of the appellant shall, where the appellant complies with the order, forthwith release the appellant.

Conditions

(5.1) The judge may direct that the undertaking or recognizance referred to in subsection (5) include the conditions described in subsections 515(4), (4.1) and (4.2) that the judge considers desirable.

Application of certain provisions of section 525

b) qu'il se livrera en conformité avec les termes de l'ordonnance;

c) que sa détention n'est pas nécessaire dans l'intérêt public.

Conditions dont est assortie l'ordonnance

(5) Lorsque le juge de la cour d'appel ne refuse pas la demande de l'appellant, il ordonne que l'appellant soit mis en liberté pourvu que, selon le cas :

a) il remette au juge une promesse, sans condition ou aux conditions que le juge fixe, de se livrer en conformité avec l'ordonnance;

b) il contracte un engagement :

(i) avec une ou plusieurs cautions,

(ii) avec un dépôt d'argent ou d'une autre valeur,

(iii) avec cautions et dépôt,

(iv) sans cautions ni dépôt,

pour un montant, aux conditions, s'il en est, et devant le juge de paix que le juge indique.

c) [Abrogé, L.R. (1985), ch. 27 (1^{er} suppl.), art. 141]

Lorsque l'appellant se conforme à l'ordonnance, la personne ayant la garde de l'appellant le met immédiatement en liberté.

Conditions d'une promesse ou d'un engagement

(5.1) Sont comprises parmi les conditions d'une promesse ou d'un engagement que le juge peut fixer aux termes du paragraphe (5) les conditions visées aux paragraphes 515(4), (4.1) et (4.2) qu'il estime souhaitables.

Application de certaines dispositions de l'art. 525

(6) Les paragraphes 525(5), (6) et (7)

(6) The provisions of subsections 525(5), (6) and (7) apply with such modifications as the circumstances require in respect of a person who has been released from custody under subsection (5) of this section.

Release or detention pending hearing of reference

(7) If, with respect to any person, the Minister of Justice gives a 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).

Release or detention pending new trial or new hearing

(7.1) Where, with respect to any person, the court of appeal or the Supreme Court of Canada orders a new trial, section 515 or 522, as the case may be, applies to the release or detention of that person pending the new trial or new hearing as though that person were charged with the offence for the first time, except that the powers of a justice under section 515 or of a judge under section 522 are exercised by a judge of the court of appeal.

Application to appeals on summary conviction proceedings

(8) This section applies to applications for leave to appeal and appeals to the Supreme Court of Canada in summary conviction proceedings.

Form of undertaking or recognizance

(9) An undertaking under this section may be in Form 12 and a recognizance under this section may be in Form 32.

Directions for expediting appeal, new trial, etc.

(10) A judge of the court of appeal, where on

s'appliquent, compte tenu des adaptations de circonstance, à l'égard d'une personne qui a été mise en liberté en vertu du paragraphe (5) du présent article.

Mise en liberté ou détention en attendant l'audition du renvoi

(7) Lorsque le ministre de la Justice prend une ordonnance ou fait un renvoi, en vertu de l'article 696.3, le présent article s'applique à la mise en liberté ou à la détention de la personne visée en attendant l'audition du renvoi et la décision y relative comme si cette personne était l'appelant visé à l'alinéa (1)a).

Mise en liberté ou détention en attendant le nouveau procès ou la nouvelle audition

(7.1) Lorsque la cour d'appel ou la Cour suprême du Canada ordonne un nouveau procès, le régime de mise en liberté ou de détention provisoire prévu par les articles 515 et 522 s'applique à la personne en cause comme si elle était accusée pour la première fois, et le juge de la cour d'appel dispose pour l'appliquer des pouvoirs conférés au juge de paix et au juge par ces articles.

Application aux appels dans les procédures sommaires

(8) Le présent article s'applique aux demandes d'autorisation d'appel et aux appels devant la Cour suprême du Canada dans les procédures par déclaration de culpabilité par procédure sommaire.

Forme de la promesse ou de l'engagement

(9) Une promesse en vertu du présent article peut être rédigée selon la formule 12 et un engagement en vertu du présent article peut être rédigé selon la formule 32.

Instructions pour hâter l'appel, le nouveau procès, etc.

(10) Lorsque, à la suite de la demande de l'appelant, il ne rend pas une ordonnance prévue par le paragraphe (5) ou lorsqu'il

the application of an appellant he does not make an order under subsection (5) or where he cancels an order previously made under this section, or a judge of the Supreme Court of Canada on application by an appellant in the case of an appeal to that Court, may give such directions as he thinks necessary for expediting the hearing of the appellant's appeal or for expediting the new trial or new hearing or the hearing of the reference, as the case may be.

680 (1) A decision made by a judge under section 522 or subsection 524(4) or (5) or a decision made by a judge of the court of appeal under section 261 or 679 may, on the direction of the chief justice or acting chief justice of the court of appeal, be reviewed by that court and that court may, if it does not confirm the decision,

(a) vary the decision; or

(b) substitute such other decision as, in its opinion, should have been made.

annule une ordonnance rendue auparavant en vertu du présent article, un juge de la cour d'appel ou, dans le cas d'un appel interjeté devant la Cour suprême du Canada, un juge de ce tribunal, sur demande d'un appellant, peut donner les instructions qu'il estime nécessaires pour hâter l'audition de l'appel de l'appellant ou pour hâter le nouveau procès ou la nouvelle audition ou l'audition du renvoi, selon le cas.

680 (1) Une décision rendue par un juge en vertu de l'article 522 ou des paragraphes 524(4) ou (5) ou une décision rendue par un juge de la cour d'appel en vertu des articles 261 ou 679 peut, sur l'ordre du juge en chef ou du juge en chef suppléant de la cour d'appel, faire l'objet d'une révision par ce tribunal et celui-ci peut, s'il ne confirme pas la décision :

a) ou bien modifier la décision;

b) ou bien substituer à cette décision telle autre décision qui, à son avis, aurait dû être rendue.