

The More Things Change, the More They Stay the Same: Bail Pending Appeal After *R v Oland*

K E N N E T H G R A D *

ABSTRACT

In 2017 the Supreme Court of Canada rendered its decision in *R v Oland*. The *Oland* case presented a rare opportunity for the Court to clarify the test for bail pending appeal in *Criminal Code* s. 679(3), which asks: (a) whether the appeal is frivolous; (b) whether the appellant will surrender into custody; and (c) whether the appellant's detention is necessary in the public interest. *Oland*'s focus was on the public interest ground and particularly the sub-question of whether public confidence in the administration of justice supports the applicant's release. *Oland* held that it is appropriate to provide a detailed assessment of the merits of the appeal as part of the public confidence inquiry. However, the Court emphasized that public confidence should play a role only in the most serious cases. Consideration of public confidence was to be the exception, not the rule. This article provides an empirical analysis of over 200 bail pending appeal decisions in the five years preceding and following *Oland*. This data suggests that *Oland* has been widely misinterpreted. Contrary to its intent, *Oland* has led to application judges routinely providing detailed analyses of the grounds of appeal. This is concerning because application judges lack the proper record to assess the appeal's merits at the bail stage. Accordingly, *Oland*'s misapplication has created a disturbing risk of injustice. This article further argues that *Oland* was incorrectly decided. The merits of the appeal should have no role beyond the not frivolous criterion in s. 679(3)(a). This

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is the interpretation the Supreme Court should adopt if it further considers the issue of bail pending appeal.

Keywords: Bail; Appeal; Bail pending appeal; *Oland*; Criminal law; Supreme Court of Canada; New Brunswick; Empirical; Quantitative; Qualitative; Public interest; Public Confidence

I. INTRODUCTION

Richard Oland was found dead in his office on the morning of July 7, 2011. His killing would lead to the lengthiest and most expensive trial in the history of Saint John, New Brunswick. Richard's son, Dennis Oland, was subsequently convicted of murdering his father. Dennis' conviction was later overturned on appeal and he was acquitted in a re-trial. Richard's killing remains unsolved.¹

Richard Oland's death has fundamentally shaped our criminal law jurisprudence. *R v Oland* reached the Supreme Court of Canada ("SCC"), although not on the merits.² *Oland's* primary jurisprudential significance arises from a related issue that arose during the litigation: whether Dennis Oland was entitled to bail pending appeal following his murder conviction. The Court of Appeal of New Brunswick denied Dennis bail pending appeal. The SCC overturned the Court of Appeal's decision, ruling that Dennis should have been granted bail.

The Oland case presented a rare opportunity for the Supreme Court to opine on the framework for bail pending appeal. Bail pending appeal is governed by the three-part test in s. 679(3) of the *Criminal Code*.³ This test asks: (a) whether the appeal is frivolous; (b) whether the applicant will surrender into custody; and (c) whether the applicant's detention is necessary in the public interest. The focus of *Oland* was on the public

¹ Meagan Campbell, "The murder trial that took New Brunswick by storm," *Maclean's* (30 December 2015), online: <www.macleans.ca/news/canada/the-oland-murder-trial-that-took-new-brunswick-by-storm/> [perma.cc/XRY8-QKU6]; Kevin Bissett, "Judge's acquittal of Dennis Oland 'erects a complete barrier' to Crown appeal," *Toronto Star* (13 August 2019), online: <www.thestar.com/news/canada/2019/08/13/crown-wont-appeal-dennis-oland-acquittal.html> [perma.cc/XX4L-27RK]. To avoid confusion due to their same last names, I generally refer to Richard Oland and Dennis Oland by their first names throughout this article.

² *R v Oland*, 2017 SCC 17 [*Oland SCC*].

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

interest ground—the third part of the test—and particularly the sub-question of whether public confidence in the administration of justice would be maintained should the appellant be released.

A central feature of the SCC's judgment was its affirmation that in applying the public confidence inquiry it is appropriate to conduct a detailed assessment of the strength of the grounds of appeal. Stronger grounds will weigh in favour of the applicant's release. Weaker grounds will weigh in favour of the applicant's detention.

The SCC emphasized that most applications for bail pending appeal will not engage the question of public confidence. The Court held that this inquiry should play a role only in cases involving the most serious offences, such as murder. By limiting its application, the SCC suggested that the difficulties inherent in applying this component of the test—especially the vexed question of opining on the strength of the appeal at the bail stage—would be greatly mitigated.

The goal of this article is to gain insight into how bail pending appeal decisions were being reached prior to *Oland* and what impact, if any, *Oland* has had on bail pending appeal. I provide an empirical study of all reported appeal bail decisions in three jurisdictions—Ontario, Alberta, and British Columbia—in the five-year periods preceding and following *Oland*. This study suggests two main findings. First, the SCC wrongly assumed that prior to *Oland* only in rare cases—those involving the most serious offences—were courts weighing public confidence in the administration of justice. Second, *Oland* has exacerbated this trend, resulting in greater focus on the public interest ground and the public confidence inquiry.

This overutilization of the public interest ground is concerning because it has led to application judges routinely conducting detailed examinations into the strength of appeals in the absence of a proper evidentiary record or full argument on the grounds of appeal. Accordingly, undue emphasis on the appeal's merits risks leading to injustice by denying bail to deserving candidates.

I divide the body of this article into four parts. In Part II, I summarize the facts and decisions of the Court of Appeal of New Brunswick and the Supreme Court in *Oland*. I explain how the SCC's judgment was designed to limit reliance on the public interest criterion. In Part III, I provide a quantitative and qualitative analysis of bail pending appeal in the five years preceding and following *Oland*. This data suggests that courts frequently invoke the public interest criterion—and especially the issue of public

confidence—in applications for bail pending appeal. This was occurring prior to *Oland* and has accelerated following *Oland*. Despite *Oland*'s clear instruction that the public confidence inquiry should be reserved for exceptional cases, following *Oland* consideration of public confidence is far from exceptional. Nor is this examination reserved only for the most serious offences like murder. In Part IV, I argue that we should be concerned about these findings because of the manifest problems with focusing too closely on the grounds of appeal at the bail stage. In Part V, I contend that under a proper interpretation of *Criminal Code* s. 679(3), the merits of an appeal should have no role in the bail pending appeal analysis aside from the not frivolous criterion in s. 679(3)(a). This is the interpretation the SCC should have adopted in *Oland* and which it should endorse if it reconsiders this issue.

II. SUMMARY OF THE FACTS AND DECISION IN *R V OLAND*

A. The Death of Richard Oland and Conviction of Dennis Oland

Richard Oland was a scion of one of the wealthiest families in New Brunswick. The Olands own and operate Moosehead Breweries Limited, founded by Susannah Oland in 1867. Although Richard Oland was passed over for leadership of the company in 1981, he acquired a fortune of about \$37 million through his investment and transport companies. Along with his fortune, Richard amassed a curmudgeonly reputation, accused of frequently subjecting his wife and children to verbal abuse.⁴

On the morning of July 7, 2011, Richard was found dead, face-down in a pool of his own blood, in his Saint John office. He had likely been bludgeoned to death the prior evening from forty-five blows to the head, neck, and limbs. Richard's son Dennis was the last person seen with Richard at his office on the night of his killing. In November 2013, Dennis was charged with Richard's murder. The Crown alleged that Dennis—who was deeply in debt and had a tumultuous relationship with his father—may have had a financial motive for the killing.⁵

⁴ See e.g. Robin Levinson-King, "Richard Oland: A millionaire, a murder and a mystery killer," *BBC News* (19 July 2019), online: <www.bbc.com/news/world-us-canada-49024677> [perma.cc/7UJQ-UQB2]; Campbell, *supra* note 1.

⁵ Campbell, *supra* note 1; Levinson-King, *supra* note 4.

A jury convicted Dennis of second-degree murder in December 2015. He was sentenced to life imprisonment with no possibility of parole for ten years.⁶

B. Denial of Bail Pending Appeal by the Court of Appeal of New Brunswick

Dennis appealed his conviction and sought bail pending appeal under s. 679 of the *Criminal Code*. Section 679(3) states that a court may release an appellant from custody if the appellant satisfies three conditions:

- (a) the 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.⁷

A bail hearing before a single justice, Justice Marc Richard,⁸ was held on February 12, 2016. Justice Richard denied Dennis bail pending appeal. He found that Dennis had satisfied the first two conditions—that the appeal was not frivolous and that he would surrender himself into custody—but that Dennis’ release was not in the public interest.

Justice Richard commented that the public interest criterion is typically interpreted to have two sub-components: (1) public safety and (2) public confidence in the administration of justice. The former contemplates any danger the appellant might pose if released. Justice Richard was satisfied that Dennis posed no public safety risk.⁹ However, Justice Richard concluded that Dennis’ release would undermine public confidence in the administration of justice. Applying the test for public confidence established by the Court of Appeal for Ontario in *R v Farinacci*,¹⁰ Justice Richard assessed public confidence by weighing the competing values of enforceability and reviewability.¹¹ Enforceability connotes the need to enforce judgments to maintain confidence in the judicial system; reviewability is the competing concern that appellants be provided with the

⁶ See *R v Oland*, [2016] NBJ No 25 (QL), 2016 CanLII 7428 (NB CA) [*Oland NBCA*].

⁷ *Criminal Code*, *supra* note 3. The masculine pronoun is used in the provision itself.

⁸ As he then was. Justice Richard has since been elevated to Chief Justice of New Brunswick.

⁹ *Oland NBCA*, *supra* note 6 at para 15.

¹⁰ *R v Farinacci*, [1993] OJ No 2627, 109 DLR (4th) 97 (ONCA) [*Farinacci*].

¹¹ *Oland NBCA*, *supra* note 6 at para 21, quoting *Farinacci*, *supra* note 10 at paras 41-44.

opportunity to have their convictions reviewed and any errors corrected. Justice Richard noted that judges may consider several criteria in assessing public confidence, including the seriousness of the offence, the length of the sentence, the time it might take for the appeal to be heard, and the strength of the grounds of appeal.¹²

Justice Richard found that public confidence in the administration of justice would be undermined by Dennis' release. Dennis had been convicted of a brutal crime, elevating the enforceability interest. On the other hand, the strength of the reviewability criterion was attenuated by the fact that there was no chance of Dennis' entire sentence being served before having the opportunity to challenge his conviction on appeal. In terms of the strength of the grounds of appeal, Justice Richard found that Dennis had "clearly arguable" grounds, but this was not a unique circumstance where the appellant was "virtually assure[d] a new trial or an acquittal." Thus, on balance, Dennis' detention was required to maintain public confidence in the administration of justice.¹³

Dennis applied for a review of Justice Richard's decision by a panel of three judges of the Court of Appeal of New Brunswick, as permitted by s. 680(1) of the *Criminal Code*.¹⁴ On April 4, 2016, a three-judge panel of the Court of Appeal upheld Justice Richard's decision.¹⁵ Among other things, the panel deemed it important that there was no possibility that Dennis would serve the bulk of his sentence by the time his appeal was heard.¹⁶ Indeed, Dennis' appeal was scheduled for a hearing in about six months, on October 18-21, 2016.¹⁷

C. Supreme Court of Canada

Dennis applied for leave to appeal to the Supreme Court on the question of bail pending appeal. He emphasized that the SCC had not yet considered the test for bail pending appeal and there was no consensus among the provincial courts on how to assess the public interest ground in

¹² *Ibid* at para 22.

¹³ *Ibid* at paras 32-33.

¹⁴ Section 680(1) of the *Criminal Code* states that a "decision made by a judge of the court of appeal under section...679 may, on the direction of the chief justice of the court of appeal, be reviewed by that court."

¹⁵ *Oland v R*, 2016 NBCA 15.

¹⁶ *Ibid* at para 14.

¹⁷ *Ibid*.

Criminal Code s. 679(3)(c).¹⁸ The division between the provincial courts of appeal centred primarily on the extent to which courts may consider the strength of the grounds of appeal.¹⁹ For example, the Newfoundland Court of Appeal²⁰ was of the view that it was generally improper to consider the grounds of appeal under the public interest component, since, among other things, this would duplicate the assessment under the first part of the test as to whether the appeal is frivolous.²¹ Other provinces held that some assessment of the strength of the appeal over and above the not frivolous criterion was proper, but disagreed on how to articulate the appropriate standard.²² More particularly, Dennis argued that the Court of Appeal of New Brunswick had set the bar too high regarding the strength of the appeal, apparently requiring the appellant to demonstrate he was “virtually assure[d] a new trial or acquittal.”²³

On June 30, 2016, the SCC granted leave to appeal.²⁴ A hearing date was set for October 31, 2016.²⁵ In the meantime, on October 24, 2016, the

¹⁸ *R v Oland*, Appellant’s Memorandum of Argument on Application for Leave to Appeal at paras 40-42, online (pdf): <www.scc-csc.ca/WebDocuments-DocumentsWeb/36986/MM010_Appellant_Dennis-James-Oland.pdf> [perma.cc/DF9R-QNH8] [*Oland* SCC Leave Factum]. The Appellant noted that the SCC had considered *Criminal Code* s 679(3) in *T (M) v A (H)*, [1995] 1 SCR 445, but only in a cursory fashion.

¹⁹ See *Oland* SCC Leave Factum, *supra* note 18 at paras 2, 39, 44-50, 70. The appellant was also granted leave to appeal on the question of the standard of review under *Criminal Code* s 680(1). I leave this issue aside since this article’s focus is on *Criminal Code* s 679.

²⁰ Prior to 2018, this Court operated as the appeal division of the Supreme Court of Newfoundland. The Court has since become an independent institution called the Court of Appeal of Newfoundland and Labrador. For simplicity, I will refer to it as the Newfoundland Court of Appeal throughout this article.

²¹ See *R v Oland*, Appellant’s Factum, SCC File No 36986 at para 91, online (pdf): <www.scc-csc.ca/WebDocuments-DocumentsWeb/36986/FM010_Appellant_Dennis-James-Oland.pdf> [perma.cc/V9B3-XYNF] [*Oland* Appellant’s Factum], citing *R v Allen*, [2001] NJ No 243 (NL CA) at para 49 [Allen].

²² *Oland* Appellant’s Factum, *supra* note 21 at paras 61-97, citing, among other cases, *R v Mapara*, 2001 BCCA 508; *R v Baltovitch*, [2000] OJ No 987, 2000 CanLII 5680 (ONCA); *R v Rhayson*, 2006 ABCA 120; *Delisle c R*, 2012 QCCA 1250.

²³ *Oland* Appellant’s Factum, *supra* note 21 at paras 6-7 and 28.

²⁴ See Docket, *Dennis James Oland, et al v Her Majesty the Queen, et al* (36986), online: <scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=36986> [perma.cc/K2K7-8JEE].

²⁵ *Ibid*; Kevin Bissett, “New Brunswick court grants Dennis Oland bail pending new murder trial,” *The Canadian Press* (25 October 2016), online:

Court of Appeal of New Brunswick rendered its decision on Dennis's appeal of his first-degree murder conviction. The Court of Appeal vacated Dennis's conviction, ordered a new trial, and released him from prison.²⁶ The SCC appeal on the issue of bail pending appeal was thereby rendered moot.

Oral argument nevertheless proceeded as scheduled before the Supreme Court on October 31, 2016. The appellant, joined by the Crown and interveners,²⁷ argued that the appeal should proceed despite its mootness because it raised issues of public importance. This was a valuable opportunity to clarify the framework for bail pending appeal.²⁸ There was also the risk that Dennis would be convicted again at his re-trial and would need to re-apply for bail pending appeal.²⁹ The Court agreed to hear the appeal.

The Supreme Court rendered judgment on March 23, 2017.³⁰ Justice Michael Moldaver, writing for a unanimous Court, found that the Court of Appeal of New Brunswick had erred in denying Dennis bail pending appeal. The SCC sought to clarify the principles applicable to future bail pending appeal applications. The Supreme Court took no issue with the Court of Appeal's application of the first two parts of the test. The more difficult question was the public interest ground.

In assessing the public interest, the SCC enthusiastically endorsed the framework set out by the Court of Appeal for Ontario in *Farinacci*.³¹ Applying *Farinacci*, the SCC agreed that the public interest criterion is divided into public safety and public confidence in the administration of justice.³² The public safety component is concerned with the protection or safety of the public—including whether there is any substantial likelihood that the accused will commit a criminal offence while on bail—and is

<www.ctvnews.ca/canada/n-b-court-grants-dennis-oland-bail-pending-new-murder-trial-1.3129882> [perma.cc/GND8-RGY5].

²⁶ *Oland v R*, 2016 NBCA 58.

²⁷ The interveners were the Attorney General of Ontario, Attorney General of British Columbia, Attorney General of Alberta, and Criminal Lawyers' Association (Ontario).

²⁸ See Transcript, *Dennis James Oland v Her Majesty the Queen* at 2-3 [*Oland* SCC Transcript].

²⁹ *Ibid* at 7.

³⁰ *Oland* SCC, *supra* note 2.

³¹ *Ibid* at para 26.

³² *Ibid* at para 23.

essentially the same as the “secondary ground” governing release of an accused pending trial.³³

The public confidence component required greater explanation. As Justice Richard noted in the Court below, it involves the weighing of two competing interests: enforceability and reviewability.³⁴ With respect to enforceability, the seriousness of the offence is a central factor: the more serious the conviction, the greater the enforceability interest.³⁵ In addition, a court may consider any lingering public safety concerns that fall short of substantial risk, including concerns that the appellant might abscond.³⁶

As for reviewability, the SCC held that the strength of the appeal is a proper consideration.³⁷ According to the Court, “a more pointed consideration of the strength of an appeal for purposes of assessing the reviewability interest does not render the ‘not frivolous’ criterion in s. 679(3)(a) meaningless.”³⁸ Rather, the function of the not frivolous criterion is to operate as an initial hurdle that allows for swift rejection of baseless appeals.³⁹ When assessing public confidence, a court will conduct “a more probing inquiry” based on the materials filed by counsel, including aspects of the trial record relevant to the grounds of appeal and applicable case law.⁴⁰

After assessing enforceability and reviewability, the application judge should conduct a final balancing of these two factors. When conducting this balancing exercise, “appellate judges should keep in mind that public confidence is to be measured through the eyes of the reasonable member of the public. This person is someone who is thoughtful, dispassionate, informed of the circumstances of the case and respectful of society’s fundamental values.”⁴¹ Courts should consider the length of the sentence and any anticipated delays in deciding the appeal. The reviewability interest will weigh stronger where there is a risk that the appellant will serve all or

³³ *Ibid* at para 24, referring to *Criminal Code* s 515(10)(b).

³⁴ *Ibid* at para 24.

³⁵ *Ibid* at paras 37-38.

³⁶ *Ibid* at para 39.

³⁷ *Ibid* at para 40.

³⁸ *Ibid* at para 41.

³⁹ *Ibid*.

⁴⁰ *Ibid* at paras 43-45, quoting Gary T Trotter, “Bail Pending Appeal: The Strength of the Appeal and the Public Interest Criterion” (2001), 45 CR (5th) 267 [Trotter, “The Strength of the Appeal”].

⁴¹ *Ibid* at para 47 (internal citations omitted).

a significant portion of their sentence prior to having the opportunity to appeal their conviction.⁴² Ultimately, “where the applicant has been convicted of murder or another very serious crime,” enforceability will often outweigh reviewability, especially if the grounds of appeal are weak and/or there are lingering public safety or flight concerns.⁴³ However, bail pending appeal may be granted even in cases of murder or other very serious crimes where public safety and flight risks are negligible and “the grounds of appeal clearly surpass the ‘not frivolous’ criterion.”⁴⁴ For this reason, the Court of Appeal of New Brunswick had erred in refusing to grant Dennis Oland bail pending appeal; his grounds were “clearly arguable” and he was otherwise an ideal candidate for bail. The Court of Appeal had set the bar too high by requiring Dennis to establish that success on appeal was virtually assured.⁴⁵

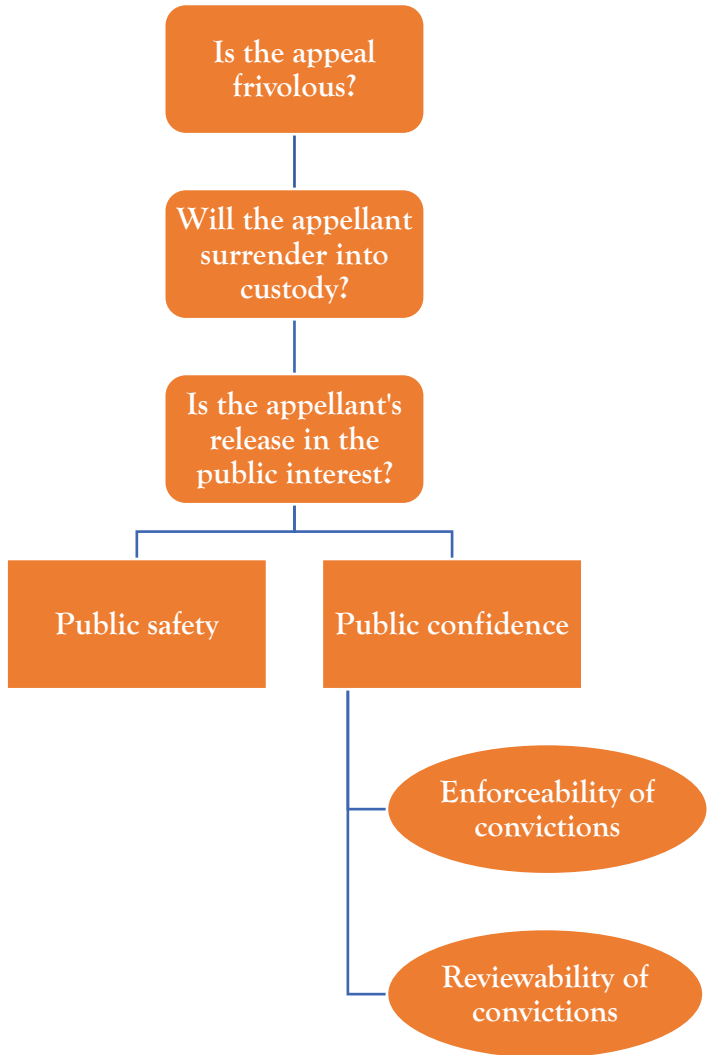
⁴² *Ibid* at para 48.

⁴³ *Ibid* at para 50.

⁴⁴ *Ibid* at para 51.

⁴⁵ *Ibid* at paras 68-69.

Framework for Bail Pending Appeal



Justice Moldaver acknowledged that the public confidence component can be challenging to apply.⁴⁶ But this was not a significant concern because, in his view, most cases of bail pending appeal do not engage the public confidence inquiry. In fact, Justice Moldaver concluded that “[r]arely

⁴⁶ *Ibid* at para 28.

does this component play a role, much less a central role, in the decision to grant or deny bail pending appeal.”⁴⁷ Crown counsel should raise public confidence “only in cases where the offence is at the serious end of the scale.”⁴⁸ Since assessment of public confidence was a rare occurrence, Justice Moldaver found that most cases would not involve a more searching examination of the grounds of appeal. Only “when an offence is serious, as with murder cases, such that public concern about enforceability is ignited, [should there] be a more probing inquiry into the chances of success on appeal.”⁴⁹ Nevertheless, “difficult cases do occasionally arise in which the public confidence component is raised.”⁵⁰

D. Summary of *Oland*

Oland signals that only in exceptional cases should the question of public confidence—including a more probing inquiry into the strength of the grounds of appeal—be raised in applications for bail pending appeal. Indeed, Gary Trotter, author of the leading treatise on the law of bail in Canada and a Justice of the Court of Appeal for Ontario, comes to the same conclusion regarding *Oland*’s straightforward instruction. As Trotter writes: “The message [of *Oland*] is clear – the public interest criterion ought not be overused by Crown counsel or appellate judges to deny access to bail pending appeal.”⁵¹ This dovetails with what Justice Trotter has written elsewhere; as he previously commented (in an article cited approvingly by Justice Moldaver in *Oland*): “If the case is unremarkable and the conviction fails to transcend the general concern relating to enforceability, all other things being equal, the public interest is not engaged.”⁵²

III. HOW COURTS AND CROWNS ARE GETTING *OLAND* WRONG: A QUANTITATIVE AND QUALITATIVE ASSESSMENT OF BAIL PENDING APPEAL

⁴⁷ *Ibid* at para 29.

⁴⁸ *Ibid*, quoting *R v Porisky*, 2012 BCCA 467 at para 47.

⁴⁹ *Ibid* at para 43, quoting Trotter, “The Strength of the Appeal,” *supra* note 40 at 270.

⁵⁰ *Ibid* at para 30.

⁵¹ Gary T Trotter, *The Law of Bail in Canada*, 3rd Ed, (date accessed 10 September 2021), (Toronto: Thomson Reuters Canada), ch 10 at s 10.2(e)(iii)(C), Thomson Reuters Proview. [Trotter, *Law of Bail*].

⁵² See Trotter, “The Strength of the Appeal,” *supra* note 40 at 270.

A. Overview

The primary difficulty with the SCC's assessment of the public interest ground in *Oland* is that it does not appear to align with the situation prior to *Oland* or what has occurred since. A review of the case law suggests that before *Oland* courts were placing heavy reliance on the public interest component—including a detailed assessment of the grounds of appeal—and that this has increased following *Oland*. The jurisprudence further suggests that this is true for all offences, not just the most serious.

B. Methodology

The data set consists of reported bail pending appeal decisions from Ontario, Alberta, and British Columbia. I selected these jurisdictions due to their population density and to incorporate provinces from both eastern and western Canada. I conducted targeted searches⁵³ with the goal of obtaining all reported decisions during the period of January 1, 2012 (approximately five years before *Oland*) through December 31, 2021 (approximately five years after *Oland*).⁵⁴ These searches yielded 216 judgments: 55 from Ontario, 125 from Alberta, and 36 from British Columbia.⁵⁵ I have assessed only initial bail pending appeal applications under s. 679(3) of the *Criminal Code*, thus excluding related applications such as:

- bail pending sentence appeals under s. 679(4);
- bail reviews under s. 680;
- subsequent applications for bail pending appeal based on (1) a material change in circumstances after an initial unsuccessful application or (2) following a bail revocation (i.e. petitions for release following a breach of bail pending appeal);
- applications for bail pending appeals to the SCC;⁵⁶ and

⁵³ I conducted searches on Westlaw Canada using the following search terms: (1) (judicial /s interim /s release) /25 appeal; (2) release /s pending /s appeal; and (3) bail w/s pend! w/s appeal.

⁵⁴ Recall that *Oland* was released on March 23, 2017.

⁵⁵ It is not clear why Alberta had so many more reported decisions but may reflect a more regular practice of providing reasons on bail applications and/or reporting same.

⁵⁶ Applications for bail pending appeal to the SCC are also governed by the test in *Criminal Code* s 679(3). See *Criminal Code* s 679(1)(c).

- bail pending appeal of a committal order awaiting extradition.⁵⁷

The primary goals of these exclusions were to compile a set of cases decided based on the same criteria and to create a more manageable data set. In addition, for the same reasons, I have examined only indictable appeals and excluded summary conviction appeals.

Two notes of caution are warranted before examining the data. First, it is important to consider that applications for bail pending appeal are routinely decided on multiple criteria. Therefore, for instance, simply because a court conducted a more pointed assessment of the grounds of appeal, we should not thereby infer that the strength of the appeal was the sole basis for denying or granting the application. Indeed, the data suggests that, aside from the merits of the appeal, important predictors of whether an application will be granted are the applicant's criminal record and compliance with bail pending trial. Applicants with lengthy criminal records—especially those with a history of failing to comply with court orders—were unlikely to obtain bail pending appeal, no matter the strength of their grounds.⁵⁸ Moreover, the SCC in *Oland* cautioned that the two subcomponents of the public interest ground—public safety and public confidence in the administration of justice—are not meant to be treated as silos, and residual public safety concerns may blend together with the public confidence analysis.⁵⁹ To address the presence of multiple factors, I have sought to identify instances where bail applications were decided based on more than one component.

Second, an important limitation of the data set is that it only contains reported decisions. Decisions on applications for bail pending appeal are often unreported, particularly when granted with the Crown's consent. One might reasonably speculate that more serious cases are more likely to result in reported decisions, thereby potentially skewing the data toward cases that involved consideration of public confidence concerns.⁶⁰ We

⁵⁷ Bail pending appeal of a committal order awaiting extradition is governed by the *Extradition Act*, SC 1999, c 18, which incorporates s 679(3) of the *Criminal Code* “with any modifications that the circumstances require.”

⁵⁸ See e.g. *R v DRS*, 2021 ABCA 171; *R v Murtagh*, 2016 ABCA 272; *R v LD*, 2021 ONCA 786; *R v Mauger*, 2017 NSCA 94; *R v Pinkney*, 2017 NSCA 93; *R v Myles*, 2020 BCCA 105; *R v Summerton*, 2013 BCCA 545; *R v Bullerwell*, 2013 BCCA 287.

⁵⁹ *Oland* SCC, *supra* note 2 at para 27.

⁶⁰ As addressed below, the concern that the data skews toward more serious cases is attenuated by the fact that a qualitative analysis of the jurisprudence reveals numerous

should be cautious in drawing conclusions from a data set that excludes unreported judgments.

However, there are several reasons why a focus solely on reported decisions may nevertheless provide an accurate reflection of the entire bail pending appeal landscape. The first is comments made by the judges themselves that support what we observe in the data. For example, in *R v Qhasimy*, decided shortly after *Oland*, a justice of the Court of Appeal of Alberta opined that the SCC was wrong to assert that public confidence rarely played a role in bail pending appeal; in his experience, the contrary was true:

In *Oland*, the Supreme Court suggested that cases involving the public confidence component tended to be the exception, rather than the rule. “Rarely” the Supreme Court stated, “does this component play a role, much less a central role, in the decision to grant or deny bail pending appeal”. All I can say is that has not been my experience in my six short years on this Court. In most of the applications for release pending appeal that I have heard, the grounds of appeal were not frivolous, flight risk was minimal to non-existent and public safety was not engaged. The issue typically was one of public confidence in the administration of justice.⁶¹

Similar comments were made in 2018 by a justice of the Court of Appeal for Ontario. Speaking extrajudicially, Justice Ian Nordheimer suggested that the only material impact of *Oland* was greater emphasis on public confidence and on the merits of the appeal, including Crown counsel more frequently opposing bail applications on this basis:

[W]e seem now to spend a lot of time listening to arguments about the merits of the appeal, from the Crown saying they’re frivolous to the appellant saying they’re basically a slam dunk and somewhere in between. ... I think because of the way that *Oland* transpires it has kicked in this issue about the merits because ... in *Oland* they start talking about “well the appeal may not be frivolous but the grounds are weak” as another reason why perhaps bail shouldn’t be granted. ... [T]hat’s been an invitation ... to want to get into the merits of the appeal much more and basically—particularly from the Crown’s point of view—say “well ok even if my friend convinces you that the appeal isn’t frivolous it’s so weak that you’re still in the position that you should deny bail.” And so you get into this argument about the issues.⁶²

instances of cases on the less serious end of the scale that nevertheless attracted a public confidence analysis.

⁶¹ *R v Ohasimy*, 2017 ABCA 243 at para 13 (internal citations and parentheses omitted).

⁶² The Honourable Justice Ian V B Nordheimer, “Updates and Advice on Bail Pending Appeal” (Remarks delivered at Criminal Litigation Program: Criminal Appellate

A second reason is that the total number of reported bail pending appeal decisions across these three jurisdictions after *Oland* is significantly higher than before *Oland*.⁶³ This suggests that there have been more contested bail applications after *Oland*. We can draw this inference because bail decisions are more likely to go unreported if the application is uncontested and/or produces only an endorsement rather than a full decision. In contrast, contested applications are more likely to lead to detailed, and reported, judgments. If the number of contested applications has gone up following *Oland*, this further supports two conclusions suggested by the data and by Justice Nordheimer's comments above: (1) *Oland* has incentivized Crown counsel to oppose bail pending appeal on the public interest ground; and (2) *Oland* has encouraged courts to provide more detailed analyses of the merits of the appeal at the bail pending appeal stage.

Third, even if reported judgments provide an incomplete account, the comparison of bail decisions prior to *Oland* and after *Oland* should offer significant insight. If the clear message of *Oland* was that reliance on the public confidence component should be reserved for only the most serious cases, we might expect this to show up in the difference between reported decisions prior to *Oland* and reported decisions following *Oland* - with less engagement of public confidence in the latter than the former. However, as discussed below, the opposite is true.

I make one further comment on the data set. Absent from the following discussion is any analysis of the total number of bail applications granted/denied, whether after *Oland* or before. I omit this information because the focus of this article is on the public interest ground. I have, however, also tracked this data, which suggests that bail pending appeal is being granted at roughly similar rates following *Oland* as prior to *Oland*.⁶⁴

Advocacy, The Advocates' Society Education Centre, Toronto, 24 February 2018) [unpublished].

⁶³ The total number of reported bail pending appeal decisions across all three jurisdictions prior to *Oland* (commencing January 1, 2012) is 83 (Ontario - 13; Alberta - 48; British Columbia - 22). The total number of reported applications after *Oland* (through December 31, 2021) is 133 (Ontario - 42; Alberta - 77; British Columbia - 14).

⁶⁴ For example, in Alberta, in the five-year period prior to *Oland*, 71% of reported bail pending appeal applications were dismissed and 29% were granted; after *Oland*, 69% were dismissed and 31% were granted. In contrast to Alberta, Ontario and British Columbia show small increases in the number of applications granted.

If *Oland* was designed to make bail pending appeal easier to obtain—and this is certainly arguable, particularly if read alongside other recent SCC decisions that have liberalized access to bail pending trial⁶⁵—but has instead made it more difficult to access, one might infer that these statistics also signify *Oland*'s misapplication. I leave this discussion for another day, but it is deserving of further inquiry.

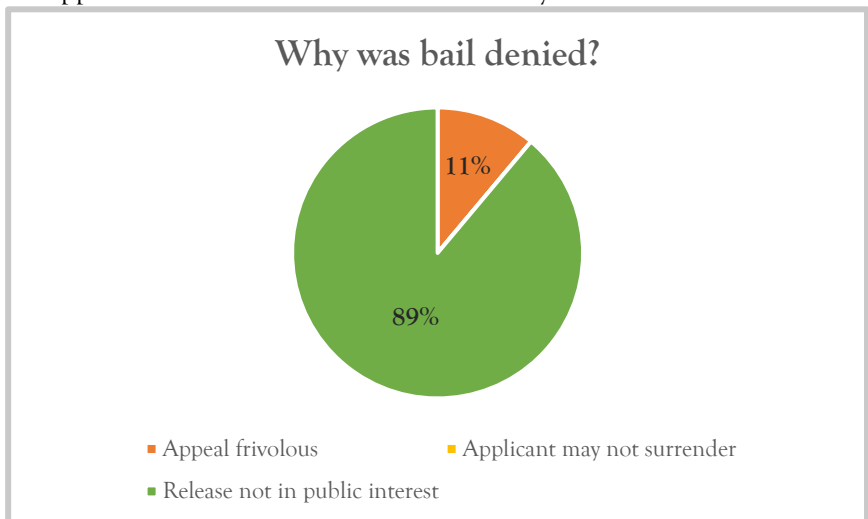
C. Bail Pending Appeal Before *Oland*

I provide below a quantitative assessment of bail pending appeal in the five years prior to *Oland*. This evidence suggests that the public interest ground was frequently invoked before *Oland*, calling into question the SCC's assumption that it was seldom a focal consideration.

1. Ontario

i. On What Basis Were Bail Pending Appeal Applications Dismissed?

Starting with Ontario, out of unsuccessful applications for bail pending appeal before *Oland*, 89% were denied because the applicant's release was found not to be in the public interest; 11% were denied because the appeal was deemed frivolous; and no applications were denied due to the risk that the applicant would not surrender into custody.

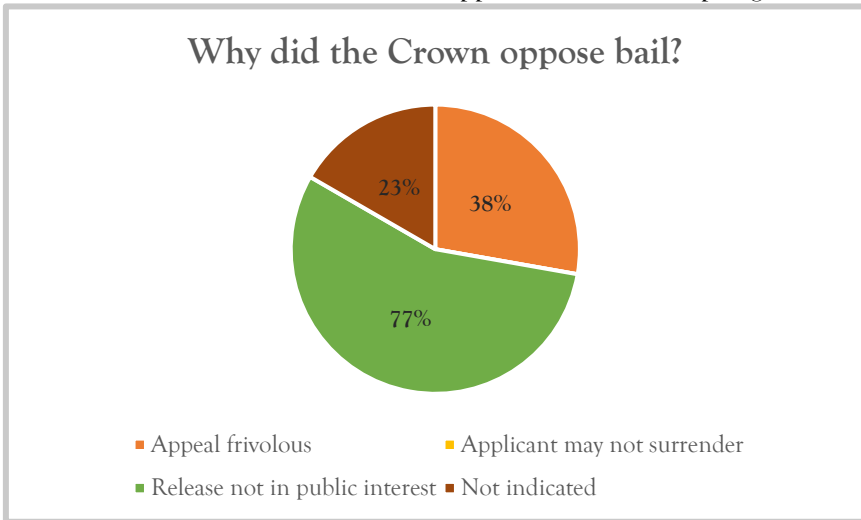


⁶⁵ See e.g. *R v Antic*, 2017 SCC 27; *R v Myers*, 2019 SCC 18; *R v Zora*, 2020 SCC 14.

It is important to note that here and below, all or most applications dismissed under the public interest criterion were denied at least in part under public confidence rather than solely out of concern for public safety. In other words, when courts dismissed applications under the public interest ground, this typically signified concern over public confidence instead of public safety, although judges were not always clear which was the primary basis for the decision.⁶⁶

ii. Why Did the Crown Oppose Bail Pending Appeal?

Prior to *Oland*, in 77% of all reported bail pending appeal decisions (whether granted or denied) the Crown objected, at least in part, on the public interest ground.⁶⁷ Note that here and below, where the percentages are greater than 100%, this reflects multiple grounds invoked (i.e., here, that the Crown contested the bail application on multiple grounds).



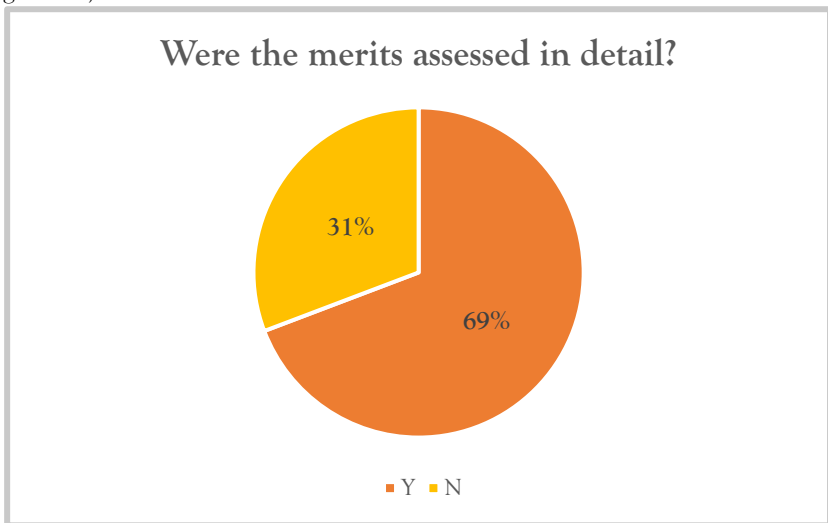
⁶⁶ Indeed, in Ontario, out of applications dismissed prior to *Oland* under the public interest criterion, approximately 63% were dismissed under the heading of public confidence and about 38% were dismissed based on a combination of public confidence and public safety or the court was unclear which was the primary reason for dismissal. No applications were dismissed solely because of public safety concerns.

⁶⁷ With respect to Crown objections on the public interest ground, note again that most of these cases involved an objection based on public confidence, rather than solely public safety.

iii. Did the Court Assess Public Confidence and/or the Merits of the Appeal?

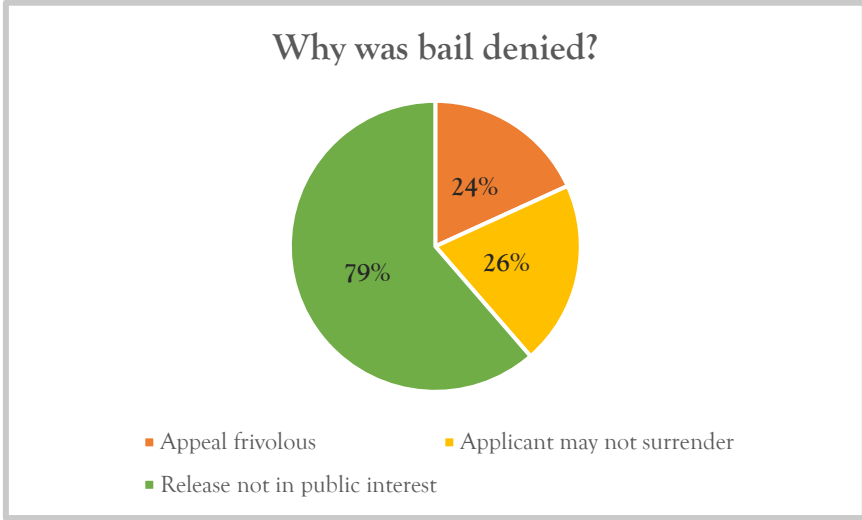
It is useful to assess two additional questions in light of *Oland*. The first is how frequently in all applications (whether granted or denied) public confidence was a factor in the court's analysis. Doing so is helpful in assessing whether the SCC was correct that only in rare cases did public confidence play a role. The evidence from Ontario certainly calls this assumption into question. Indeed, the public confidence component was assessed in all reported applications for bail pending appeal in the five-year period prior to *Oland*.

A second, related, inquiry is how frequently courts conducted a detailed assessment of the grounds of appeal at the public interest stage – that is to say, a more probing assessment of the strength of the appeal beyond the not frivolous criterion. In Ontario, about 70% of all reported bail pending appeal applications (whether granted or denied) involved a more pointed assessment of the grounds of appeal under the public interest ground, while about 30% did not have such an assessment.



2. Alberta

Similar results were observed in Alberta. Most unsuccessful applications were denied under the public interest ground, and more specifically under public confidence.⁶⁸

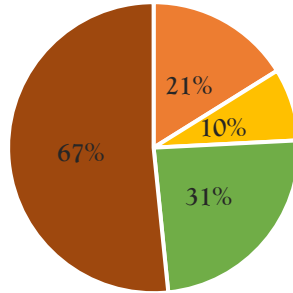


In addition, although many decisions did not indicate the reason for the Crown's objection, it appears the Crown was more likely to oppose bail under the public interest ground than the other grounds.⁶⁹

⁶⁸ Out of cases dismissed under the public interest criterion, approximately 52% were dismissed under public confidence, 15% were dismissed under public safety, and 33% were dismissed based on a combination of public confidence and public safety or the court did not specify the primary consideration.

⁶⁹ In most of these cases (80%) the Crown objected both as a matter of public safety and public confidence or the court was unclear which was the focus of the Crown's objection. In the remaining cases (20%) the Crown objected solely under public confidence.

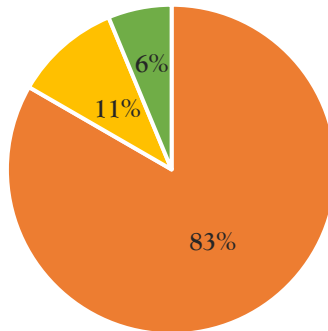
Why did the Crown oppose bail?



- Appeal frivolous
- Applicant may not surrender
- Release not in public interest
- Not indicated

Furthermore, courts weighed public confidence in most reported decisions (whether granted or denied).

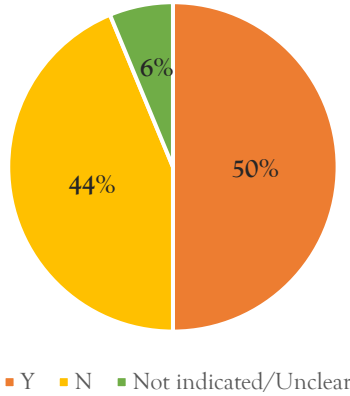
Was public confidence assessed?



- Y
- N
- Not indicated/Unclear

Moreover, courts often provided a probing inquiry into the merits of an appeal beyond the not frivolous criterion in assessing whether bail should be granted or denied, although less frequently than in Ontario.

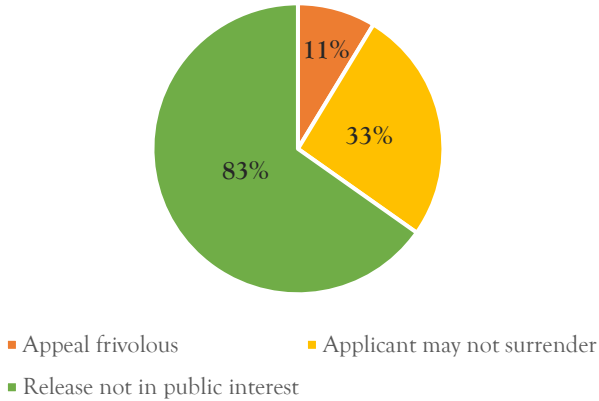
Were the merits assessed in detail?



3. *British Columbia*

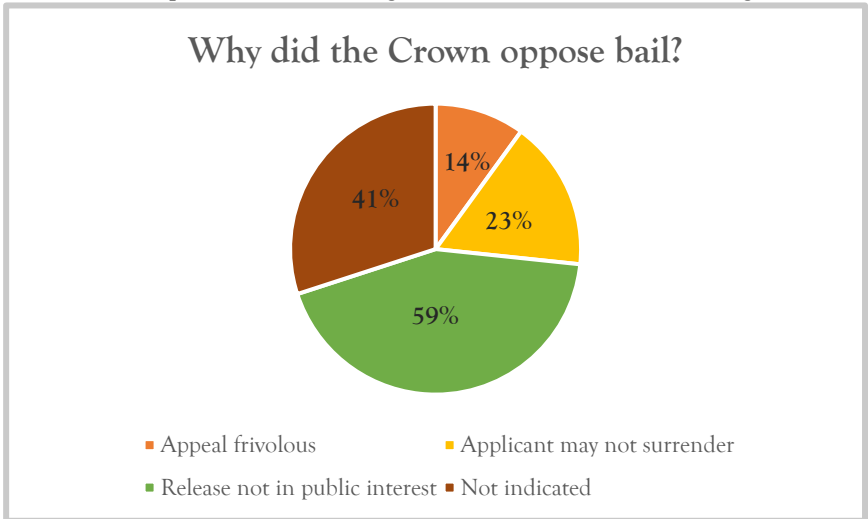
British Columbia had analogous statistics. First, most unsuccessful applications were dismissed under the public interest criterion.⁷⁰

Why was bail denied?



⁷⁰ Out of applications denied under the public interest criterion, approximately 67% were dismissed under public confidence, 7% were denied under public safety, and 27% were dismissed on both bases or the court was not clear which was the dominant factor.

Second, Crowns appeared more likely to oppose bail pending appeal under the public interest ground than the other grounds.⁷¹

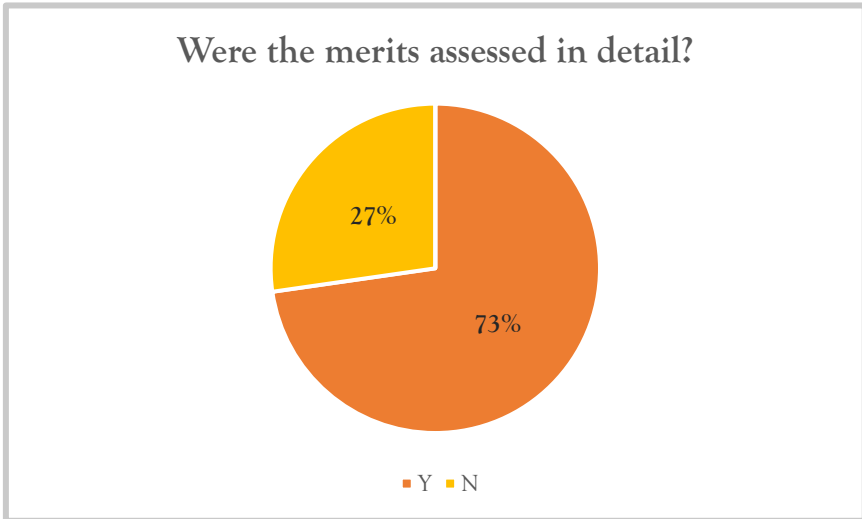


Third, in most reported decisions public confidence was engaged.



⁷¹ Out of cases where the judgment indicated that the Crown opposed under the public interest ground, approximately 46% were under public confidence; 54% were under both public confidence and public safety or it was unclear which was the primary basis of the objection; and there were no objections solely based on public safety.

And fourth, courts routinely weighed the merits of the appeal beyond the not frivolous criterion.



D. Bail Pending Appeal After *Oland*

The foregoing indicates that the SCC may have erred when it signaled that public confidence was seldomly engaged prior to *Oland*. What of the situation after *Oland*? One would have expected *Oland* to cause a shift in the jurisprudence, with less emphasis on public confidence and decreased focus on the merits of the appeal. The data suggests this has not been the case. It appears *Oland* has further entrenched the trend in favour of deciding bail pending appeal under public confidence and especially the application judge’s assessment of the grounds of appeal.

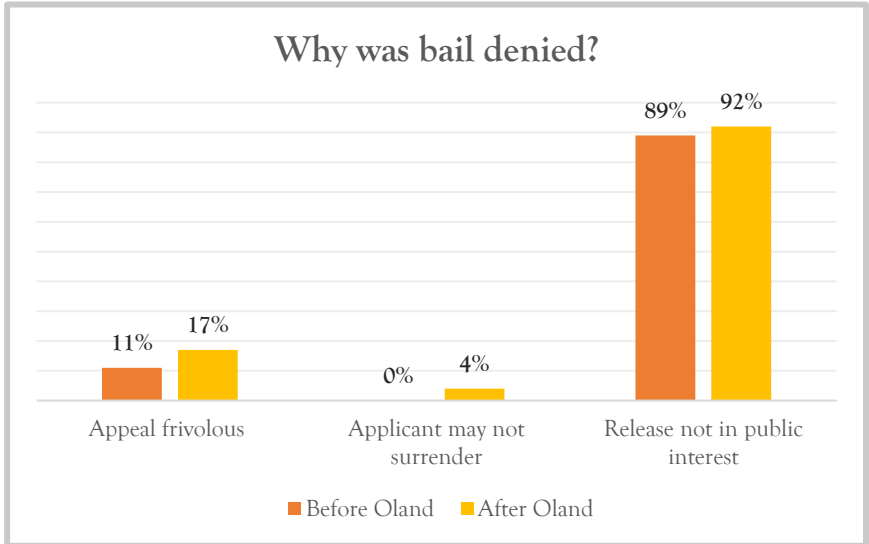
I divide the ensuing discussion into two parts. In the first part I present a quantitative analysis of bail pending appeal in the five-year period following *Oland*, comparing the pre-*Oland* data to the post-*Oland* data. In the second part I address the question of why *Oland* is being misapplied, including a qualitative analysis of the case law.

1. Comparison of Pre-Oland Data to Post-Oland Data

i. Ontario

Among unsuccessful bail applications in Ontario after *Oland* that were reported, approximately 92% were dismissed under the public interest

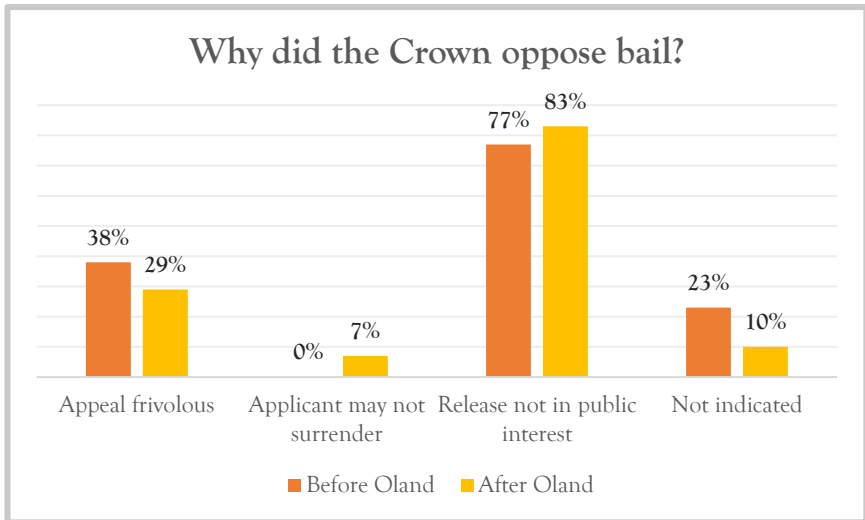
criterion.⁷² This is a slight increase compared to 89% pre-*Oland*.



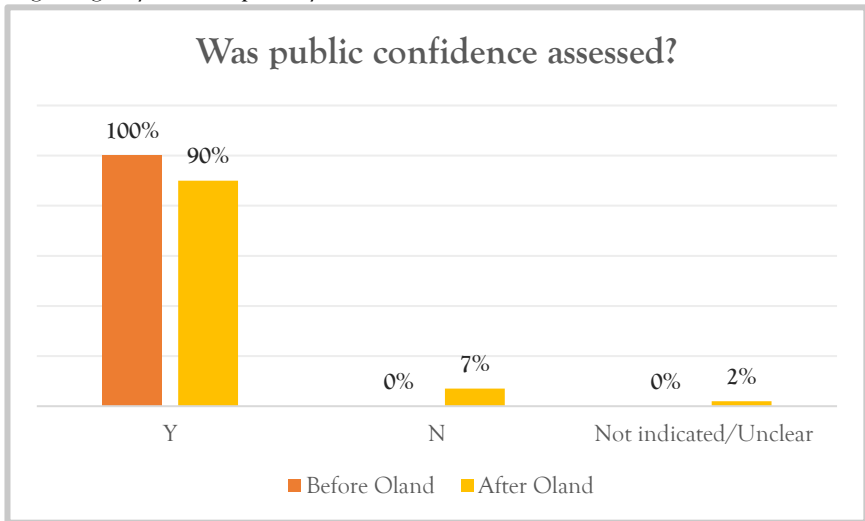
Furthermore, the data suggests Crown counsel are now more likely to object on the public interest ground than they were before *Oland*.⁷³

⁷² As with the pre-*Oland* data, reliance on the public interest ground after *Oland* typically relates to public confidence rather than solely public safety. In Ontario, out of applications dismissed under the public interest ground, 68% were dismissed under public confidence; 32% were dismissed under a combination of public confidence and public safety or the court was unclear which component was the primary basis for the dismissal; and no applications were dismissed solely under public safety.

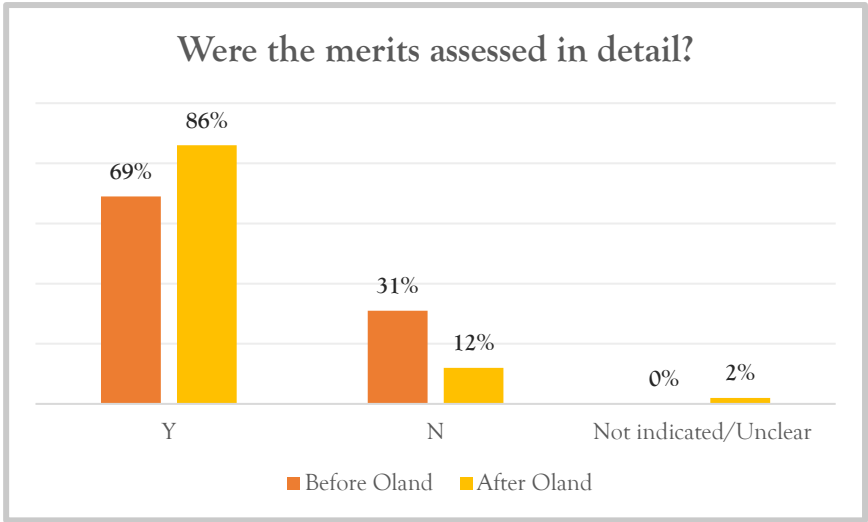
⁷³ In cases where the judgment indicated that the Crown opposed the application under the public interest ground, 43% were solely under public confidence; 57% were under both public confidence and public safety or it was unclear from the decision which was the primary basis of the objection; and none were solely under public safety.



Courts assessed the public confidence component in nearly all reported bail pending appeal decisions after *Oland* (whether granted or dismissed), although slightly less frequently than before *Oland*.



However, following *Oland*, courts appear significantly more likely to conduct a detailed assessment of the grounds of appeal beyond the not frivolous criterion in deciding whether bail should be granted.

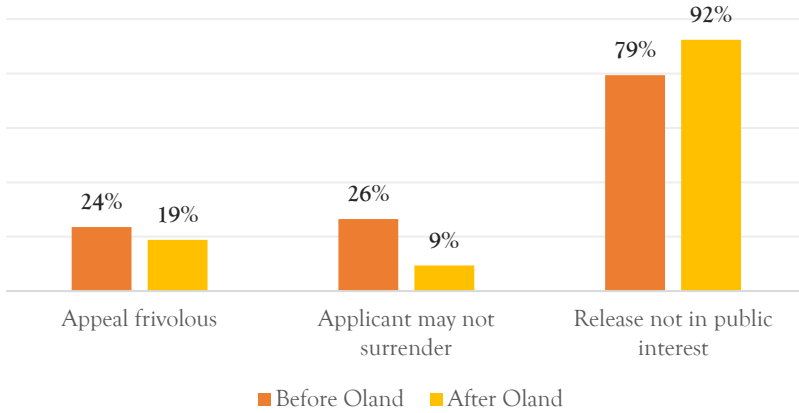


ii. Alberta

In Alberta, following *Oland*, courts appear more likely to deny bail pending appeal on the public interest ground than before *Oland*, and have relied on the other grounds less often.⁷⁴

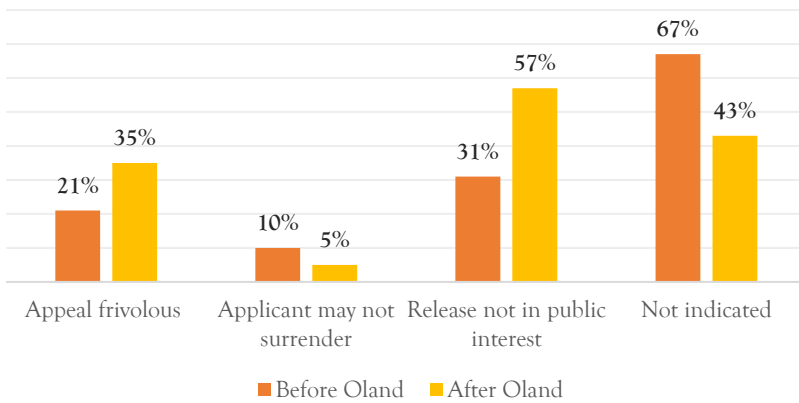
⁷⁴ Out of dismissals on the public interest ground after *Oland*, 67% were dismissed solely on the basis of public confidence; 6% were dismissed solely due to public safety concerns; and 27% were dismissed based on a combination of both components or the court was unclear which was the dominant factor.

Why was bail denied?



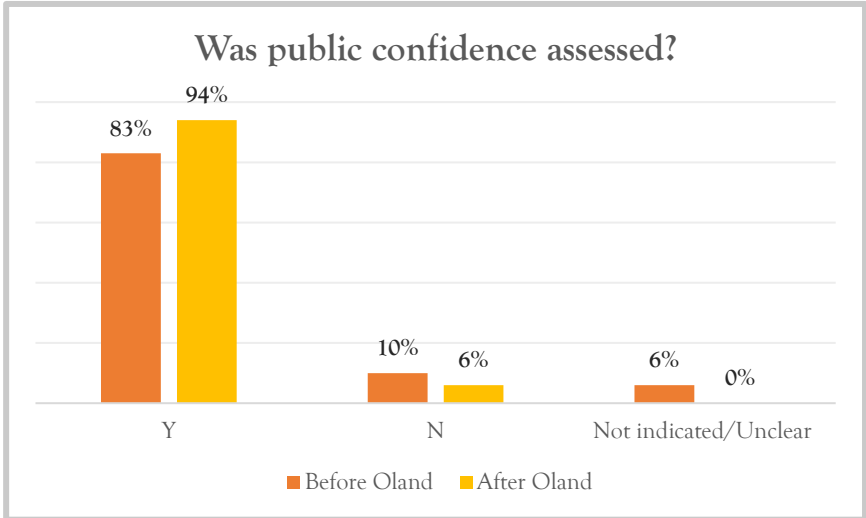
Similarly, Crown counsel appear more likely to object on the public interest ground after *Oland* than before.⁷⁵

Why did the Crown oppose bail?

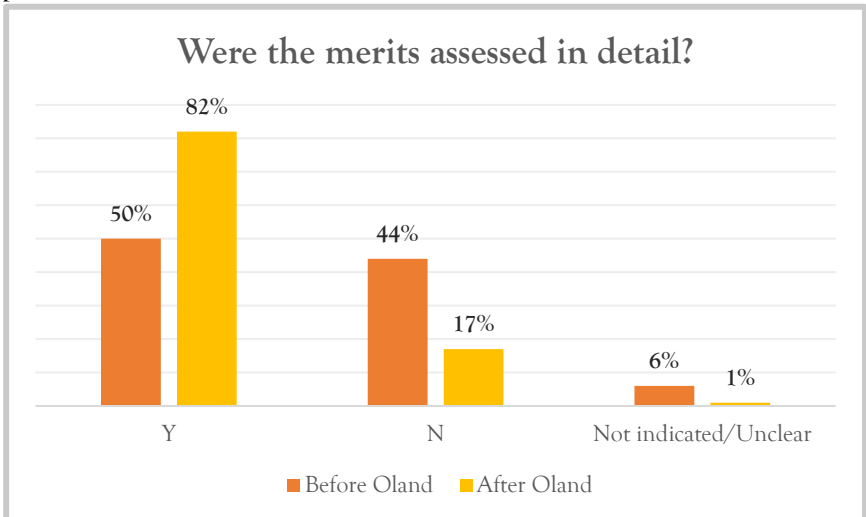


⁷⁵ Following *Oland*, where the Crown opposed the application under the public interest ground, 30% were solely under public confidence; 70% were based on a combination of public safety and public confidence or the judgment was not clear which was the primary reason for the Crown's objection; and none were solely under public safety.

Following *Oland*, courts appear more likely to weigh the public confidence component when deciding bail pending appeal, doing so in almost all reported cases.

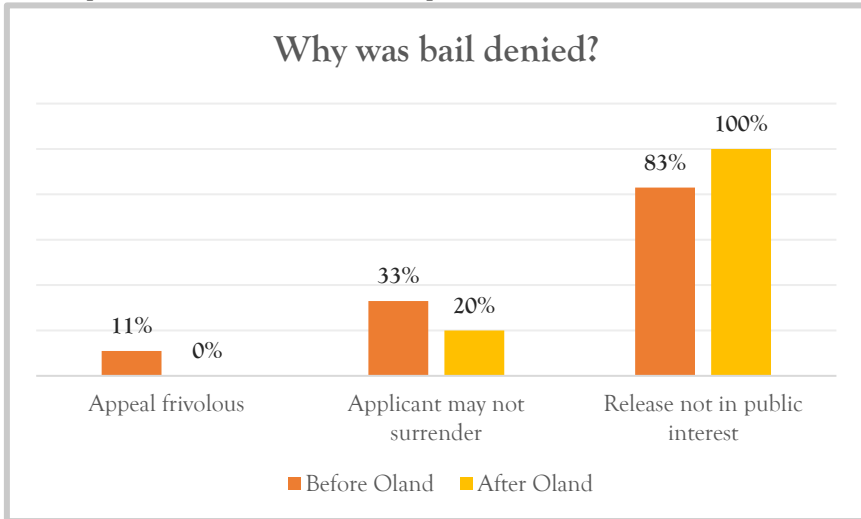


And, as in Ontario, Alberta judges appear much more likely to provide a detailed assessment of the grounds of appeal after *Oland* than before. They did so in 82% of all reported cases following *Oland* compared to only 50% prior to *Oland*.



iii. British Columbia

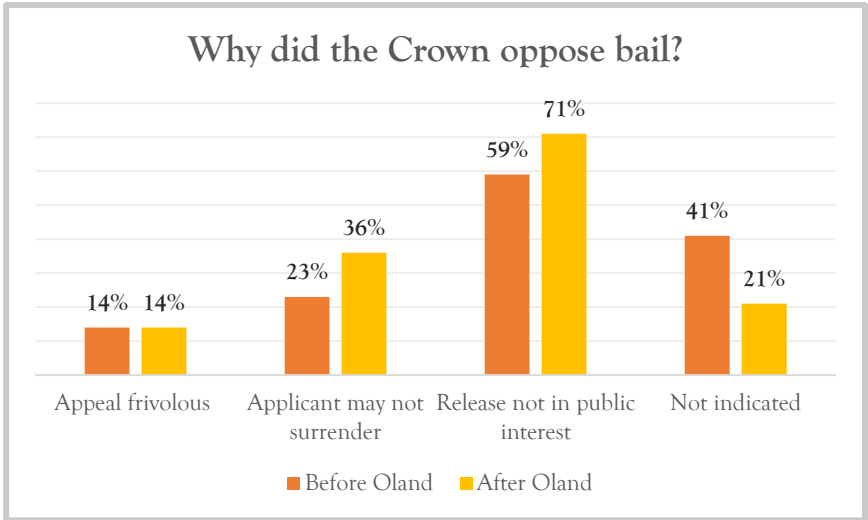
The post-*Oland* view from British Columbia is similar. First, it appears bail was much more likely to be denied on the public interest ground than the other grounds. In fact, all unsuccessful applications after *Oland* that were reported were dismissed under public interest.⁷⁶



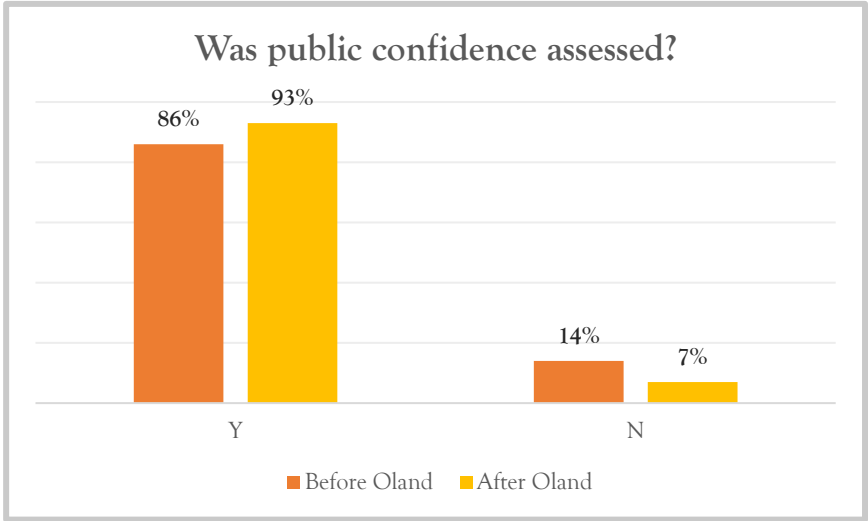
Second, the Crown appears more likely to oppose bail on the public interest ground after *Oland* than before.⁷⁷

⁷⁶ With respect to applications dismissed on the public interest ground in British Columbia after *Oland*, 60% were dismissed solely under public confidence; 20% were dismissed solely under public safety; and 20% were dismissed based on a combination of public interest and public safety or the court was unclear which was the primary basis for its decision.

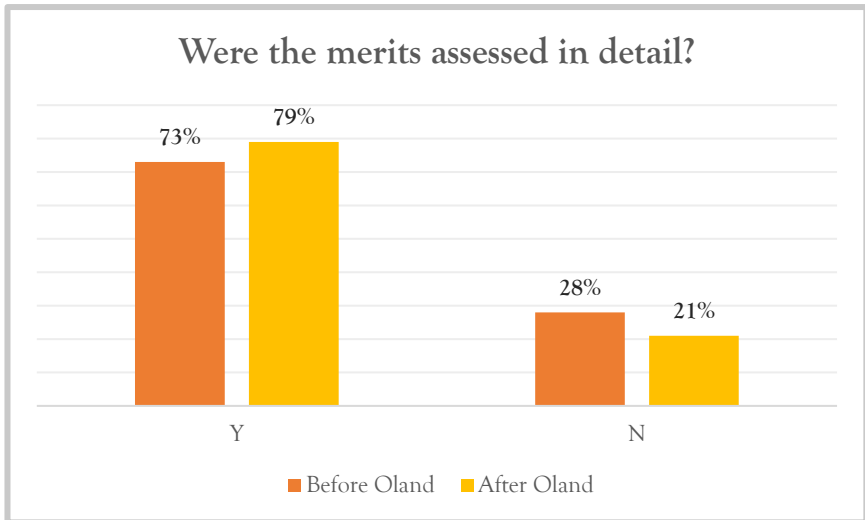
⁷⁷ Where the Crown opposed bail on the public interest ground after *Oland*, 38% were solely on the basis of public confidence; 63% were under both public confidence and public safety or the court was unclear as to which component was the basis of the Crown's objection; and no applications were opposed solely under public safety.



Third, courts appear more likely to weigh the public confidence component after *Oland*.



And fourth, courts appear more likely after *Oland* to focus on the merits of the appeal beyond the not frivolous criterion.



2. Why has Oland been misinterpreted?

The data suggests that *Oland* is being misapplied. Reliance on the public confidence inquiry—including a detailed assessment of the grounds of appeal—is commonplace. But why has *Oland* been misconstrued?

The confusion likely stems from the SCC’s instruction that a more probing inquiry into the chances of success on appeal is appropriate “when an offence is serious as with murder” as well as the Court’s further comment that “for murder and some other very serious crime” the applicant may be detained if the grounds are weak but released if the grounds “clearly surpass the ‘not frivolous’ criterion.”⁷⁸ Courts and Crowns have overlooked the SCC’s qualification that only a fraction of bail applications should engage the question of public confidence and that a more probing assessment of the grounds of appeal should be limited to crimes akin to murder.⁷⁹ Instead, application judges are routinely conducting searching inquiries into the grounds of appeal when they deem the offences serious in a colloquial sense. The difficulty with this interpretation is that all matters that come before the courts of appeal—

⁷⁸ *Oland* SCC, *supra* note 2 at paras 43 and 50-51.

⁷⁹ *Ibid* at para 29.

which are necessarily indictable crimes—involve serious offences.⁸⁰ Accordingly, courts are treating the language of *Oland* as authorization to frequently explore the question of public confidence and examine the merits of the appeal.

As part of his extrajudicial comments quoted above, Justice Nordheimer highlighted this misinterpretation, with application judges failing to appreciate how *Oland* sought to limit its definition of “serious” crimes:

[Y]ou have this paragraph...where they say that well if it’s a serious offence and your grounds are weak then enforceability may...surpass...reviewability....And so I think that’s why we get into these issues now at some length. And the problem with that is when you read *Oland* they keep talking about the seriousness of the offence...[T]here is a tendency now to forget that there is a spectrum of seriousness in criminal offences. Any criminal offence is serious by definition, but there’s a spectrum...But they all sort of get lumped on this [serious] end of the spectrum and I don’t think that is consistent with what the Supreme Court of Canada was talking about in *Oland*.⁸¹

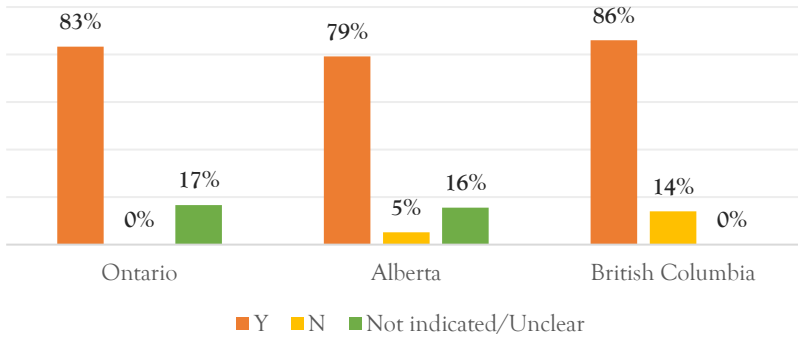
This tendency to deem all crimes serious for purposes of bail pending appeal is observable in our data set. The jurisprudence from Ontario, Alberta, and British Columbia reveals that following *Oland* most reported decisions specifically describe the offences as “serious” within the meaning of *Oland*.⁸² This has opened the door to greater use of the public confidence inquiry and increased emphasis on the merits of the appeal.

⁸⁰ Recall that I have excluded summary conviction appeals from the data set (although a similar argument could perhaps be made with respect to the seriousness of summary offences).

⁸¹ Nordheimer, *supra* note 62.

⁸² It is impossible to provide an “apples to apples” comparison here with the pre-*Oland* data, because use of the term “serious” offence has been widely adopted by the courts after *Oland* to reflect the *Oland* decision itself. However, the data suggests that courts are, after *Oland*, significantly more likely to focus on the purported seriousness of the offence(s) and that this is a primary reason for the increased emphasis on the grounds of appeal in the post-*Oland* case law.

Was the offence deemed "serious" (post-Oland)?



We may also observe this tendency to treat all crimes as serious through a qualitative analysis of the jurisprudence. To take one recent example, in *R v Noor*, the applicant sought release pending his conviction on two charges of unlawful possession of a firearm, for which he received a sentence of approximately fifteen months in custody.⁸³ The Crown conceded that the appellant was not a flight risk but contested the application on the basis that the appeal was frivolous or that the appellant's release was not necessary in the public interest.⁸⁴ The application judge found the appeal was not frivolous.⁸⁵ However, he had no hesitation concluding that the offences were serious—justifying a more probing inquiry into the grounds of appeal—because the convictions involved firearms. The application judge commented that “the seriousness of the offences is apparent to anyone living in Toronto where firearms offences now occur with great frequency.”⁸⁶

There is no doubt that firearms offences are troubling and have plagued the City of Toronto. But unlawful possession of a firearm attracting a term of incarceration of fifteen months is not the type of serious offence, akin to murder, contemplated by *Oland*. In fact, illegal gun possession is routinely

⁸³ *R v Noor*, 2021 ONCA 469 at paras 1 and 4. The specific offences were (1) possessing a loaded restricted firearm without an authorization, licence or registration certificate and (2) possessing a firearm, knowing the serial number had been removed.

⁸⁴ *Ibid* at para 6.

⁸⁵ *Ibid* at para 11.

⁸⁶ *Ibid* at para 13.

treated as a serious offence for purposes of bail pending appeal, regardless of the length of incarceration or whether violence was intended or involved, sometimes resulting in bail being denied because of purportedly weak grounds of appeal.⁸⁷

Numerous other examples abound of cases deemed serious where the underlying offences were relatively minor and/or resulted in a term of imprisonment on the shorter end of the scale. In *R v Belakziz*, the applicant was convicted of conspiracy to commit robbery and sentenced to 18 months in prison.⁸⁸ The application judge concluded that there “can be no doubt that conspiracy to commit robbery is a serious offence,” even though the appellant had abandoned her intention to rob the bank and had not participated in the robbery.⁸⁹ The Court proceeded to find that the grounds of appeal, although not frivolous, were too weak to justify release.⁹⁰ In *R v Omitiran*, the applicant was convicted of credit card fraud and received 48 months’ incarceration.⁹¹ The application judge denied bail under the public interest ground on account of, among other things, “the weak grounds of appeal [and] the seriousness of the offences of which the applicant was convicted.”⁹² In *R v Morris*, the applicant was convicted of assault causing bodily harm and sentenced to twelve-months’ incarceration; the application judge held that, due to the seriousness of the offence, “a more pointed consideration of the merits of the appeal” was necessary.⁹³

⁸⁷ See e.g. *R v Walters*, 2020 ONCA 825 (application judge found appellant—who had been convicted of six counts of possession of a firearm and a “drug-related offence” and sentenced to 38 months’ incarceration—to have “no doubt” committed serious offences within the contemplation of *Oland*); *R v Chowdhury*, 2018 ABCA 77 (appellant, convicted of various firearms offences and sentenced to 40 months’ incarceration, deemed to have committed “serious crimes”); *R v Iraheta*, 2018 ONCA 229 (appellant, convicted of possession of a loaded prohibited firearm and possession of a prohibited firearm, deemed to have committed serious offences and denied bail pending appeal on public interest ground in part because grounds of appeal were “a good way from being sure to succeed”); *R v Myles*, 2020 BCCA 105 (offences deemed serious and bail denied under public interest ground where appellant, who had been convicted of numerous firearms and property offences and sentenced to 21 months’ incarceration, did not have strong grounds of appeal).

⁸⁸ *R v Belakziz*, 2018 ABCA 242 at para 2.

⁸⁹ *Ibid* at para 15.

⁹⁰ *Ibid* at para 18.

⁹¹ *R v Omitiran*, 2020 ONCA 261 at para 1.

⁹² *Ibid* at para 28.

⁹³ *R v Morris*, 2019 ABCA 196 at paras 1 and 36. The application judge emphasized that the assault was committed against a six-year-old child.

And in *R v Zacharias*, the applicant was convicted of possessing marijuana for the purposes of trafficking and sentenced to 14 months in prison. He was denied bail on the public interest ground in part because, while not frivolous, “the merits of the appeal are not strong.”⁹⁴

Despite this widespread misapplication of *Oland*, we can point to at least one example where the court applied *Oland* correctly. In *R v Greer*, the applicant was convicted of three offences related to unlawful possession of a firearm and sentenced to 40 months incarceration.⁹⁵ The Crown opposed bail pending appeal on all grounds, arguing, among other things, that the offences were serious and the appeal had insufficient merit.⁹⁶ After finding that the appeal was not frivolous and that the appellant would surrender himself into custody, the application judge proceeded to assess the public interest ground. Citing *Oland*, he emphasized that “only a fraction of cases involve the public confidence component” and that, in relation to the grounds of appeal, “[t]here is no need to go beyond the frivolous threshold in cases unlikely to arouse a concern about public confidence.”⁹⁷ Acknowledging the harms caused by firearms offences, the application judge deemed the convictions not at the “most serious end of the scale.”⁹⁸ Accordingly, he declined to conduct a more probing assessment of the grounds of appeal.⁹⁹ The application judge also noted that the relatively short sentence of 40 months created the risk that the applicant, if detained, would likely serve a significant portion of his sentence before his conviction appeal could be heard and decided.¹⁰⁰

⁹⁴ *R v Zacharias*, 2020 ABCA 471 at paras 1 and 18. With respect to drug trafficking, see also *R v Bearisto*, 2017 ABCA 225 (application judge concluded that appellant, who was convicted of trafficking in cocaine and sentenced to 5 ½ years in prison, had committed an “extremely serious offence ... that is wholly antithetical to, incompatible with and disrespectful of Canadian society’s fundamental values” and denied bail pending appeal on the public interest ground).

⁹⁵ *R v Greer*, 2021 BCCA 148 at para 4. The specific offences were possession of a loaded prohibited/restricted firearm; possession of a firearm without a license; and storage of a weapon in a careless manner.

⁹⁶ *Ibid* at paras 31-33.

⁹⁷ *Ibid* at paras 42-43 and 45, quoting *R v Gingras*; *R v Porisky*, 2012 BCCA 467 at para 47.

⁹⁸ *Ibid* at para 44.

⁹⁹ *Ibid* at para 45.

¹⁰⁰ *Ibid* at para 46. For a more recent example outside the timeframe under discussion, see *R v Mitchell*, 2022 ABCA 151 (where applicant had been convicted of sexual assault and sentenced to 14 months’ incarceration, application judge held “that this is not a

IV. WHY SHOULD WE BE CONCERNED BY *OLAND*'S MISAPPLICATION?

Having explored *Oland*'s misapplication, the next question is why it should concern us. What is the harm of increased emphasis on the grounds of appeal?

The main problem with overreliance on the grounds of appeal is that application judges do not have sufficient information to make an accurate appraisal of an appeal's merits at the bail stage. Assessing the strength of an appeal with precision typically requires a detailed trial record. However, bail decisions are generally made without a complete record because the record may not be available until well after the trial. Trial transcripts, particularly in indictable matters, run hundreds or thousands of pages and take significant time and expense to produce.¹⁰¹ Vital pieces of the record such as the reasons for judgment, jury charge, or key exhibits may not be available immediately. As Justice Trotter notes: "Time does not permit the preparation of the entire trial record [and] even if an entire record could be instantly produced, the burden on busy chambers judges and counsel would be enormous."¹⁰² Indeed, bail applications are decided by a single judge, who—even if provided with sufficient material to make this determination—may not have the time to fully delve into a voluminous record.¹⁰³ In addition, appeals that hinge on fresh evidence will necessarily take time to develop and may require expert evidence that is not available until long after the appeal has been commenced. There is also the issue of time needed for oral argument on the merits. At the appeal hearing counsel may have multiple hours for oral argument. Far less time is provided for a bail application; in Ontario, for example, the default time given to the

case where the public confidence component of the public interest test should play a central role" and granted bail pending appeal upon satisfaction of the other grounds).

¹⁰¹ For example, the Court of Appeal for Ontario's *Criminal Appeal Rules* generally permit the transcriptionist 90 days from the date of order to prepare the transcript. See Rule 37(2), online (pdf): <www.ontariocourts.ca/coa/files/rules-forms/criminal-rules-en.pdf> [perma.cc/RHV9-2XPV].

¹⁰² Trotter, *Law of Bail*, *supra* note 51, ch 10 at s 10.2(e)(iii)(C).

¹⁰³ Furthermore, although the applicant may be entitled to a bail review under *Criminal Code* s 680 by a full panel, a highly deferential standard is applied to the application judge's initial decision. See *Oland* SCC, *supra* note 2 at para 61.

applicant for oral argument is fifteen minutes.¹⁰⁴ Some of this time will be taken up by the other s. 679(3) grounds, leaving precious little time to flesh out the appeal's merits.¹⁰⁵

A second and related concern with undue focus on the grounds of appeal is that it imposes an additional hurdle that will delay access to bail. Recall that the appellant bears the onus of establishing entitlement to bail pending appeal.¹⁰⁶ In order to satisfy the application judge of the appeal's merits, applicant's counsel may need to wait for a significant portion of the record to be produced and may also need to prepare more extensive written or oral argument setting out the strength of the grounds. In fact, on account of *Oland*, Justice Nordheimer recommends that appeal counsel now prepare an opinion letter or factum addressing the grounds of appeal.¹⁰⁷ It bears emphasis that in many cases the appellant will be unrepresented, at least initially; numerous appellants cannot afford private counsel and it can take months to obtain legal aid funding, which may require an opinion letter establishing the appeal's merits. For those applicants who are

¹⁰⁴ See Practice Direction Concerning Criminal Appeals at the Court of Appeal for Ontario at 7.1.1, online: ontariocourts.ca/coa/how-to-proceed-court/practice-directions-guidelines/criminal/#7_APPLICATIONS_AND_MOTIONS_IN_THE_COURT_OF_APPEAL_IN_CRIMINAL_MATTERS [perma.cc/Q7YF-3DXN] (default time for oral argument on single judge motions in the Court of Appeal is 15 minutes for the moving party and 10 minutes for the responding party).

¹⁰⁵ These concerns related to the propriety of assessing the merits of an appeal based on an incomplete record at the bail hearing were well expressed by Justice Marvin Catzman of the Court of Appeal for Ontario in *R v Morin*, [1993] OJ No 59 (CA), 1993 CarswellOnt 82 at para 6. Justice Catzman explained that as a single judge deciding an application for bail pending appeal of a complex matter, he did not feel that he had the adequate time or material to make a detailed appraisal of the grounds of appeal, even though counsel had encouraged him to do so: “[Counsel] urged upon me, respectively, the strength and weakness of each of these grounds. Having heard these submissions, I am prepared to record that I consider all of these grounds of appeal to be clearly arguable when the appeal comes to be presented on its merits. I am, however, not prepared to record any more precise assessment of the strength of particular grounds of appeal or of the overall probability of success of the appeal. As a single judge hearing an application incidental to an appeal involving over 300 volumes of transcript, most of which were not before me, I have considerable diffidence about the propriety and the utility of expressing an assessment of grounds of appeal which (together with other grounds which were not addressed) remain to be fully developed in the context of the argument of the appeal on its merits.”

¹⁰⁶ *Oland* SCC, *supra* note 2 at para 19.

¹⁰⁷ Nordheimer, *supra* note 62.

fortunate to obtain counsel, their lawyer may not have the time or resources to adequately flesh out the grounds of appeal for purposes of the bail application, especially if they do not have the complete trial record. An important consideration is that a legal aid lawyer's hourly rate and hourly allowance are strictly capped; Legal Aid Ontario, for instance, authorizes only five hours to prepare for and argue an application for bail pending appeal.¹⁰⁸ In short, requiring detailed argument on the appeal's merits is likely to significantly delay access to bail pending appeal, if not prevent it entirely. It also grants an appellant who can afford private counsel and pay for prompt transcription of the trial record a huge advantage in access to bail pending appeal.

All of this creates the risk of injustice. Appellants with meritorious applications may nevertheless spend lengthy terms in custody waiting to obtain counsel, compile the record, and prepare for argument. There is also the concern that application judges will make mistakes when scrutinizing the grounds of appeal based on a limited record. This may result in persons whose convictions are overturned on appeal—including those who are acquitted or not re-prosecuted following a successful appeal—serving substantial periods of incarceration. This is precisely what happened in *Oland* itself, where Dennis Oland was denied bail pending appeal but subsequently freed after a successful appeal and acquitted in a re-trial. Many criminal appeals are granted, heightening the risk that someone who is denied bail may nevertheless have a meritorious appeal. In British Columbia, for example, almost half of all criminal appeals in 2020 were allowed.¹⁰⁹

¹⁰⁸ See Legal Aid Ontario, “Legal Aid Services Rules” at Table 7, online (pdf): legalaid.on.ca/wp-content/uploads/Legal-Aid-Services-Act-2020_Rules-EN.pdf [perma.cc/ZAX3-SFVP].

¹⁰⁹ The precise number of criminal appeals allowed by the Court of Appeal for British Columbia in 2020 was 45% (49 allowed, 61 dismissed). The Court defines an appeal as “allowed” when the Court overturns or varies the order under appeal from the lower court. See Court of Appeal for British Columbia, “2020 Annual Report” at 18, online (pdf): bccourts.ca/Court_of_Appeal/about_the_court_of_appeal/annual_report/2020_CA_Annual_Report.pdf [perma.cc/D8YY-TN6M]. In 2021, 35% of criminal appeals were allowed. See Court of Appeal for British Columbia, “2021 Annual Report” at 14, online (pdf): www.bccourts.ca/Court_of_Appeal/about_the_court_of_appeal/annual_report/2021_CA_Annual_Report.pdf [perma.cc/J42V-WD8N]. I asked the Ontario and

In at least a dozen cases in our data set the appellant was denied bail but succeeded on appeal, meaning that they had their conviction(s) quashed and were acquitted by the appellate court or had a new trial ordered.¹¹⁰ This number is sure to grow, since many recent applicants have not yet had their appeals heard and decided. This is unsettling; in the words of the Report of the Canadian Committee on Corrections (the Ouimet Committee): “While [the appellant] is no longer entitled to be presumed innocent, he may nevertheless not be guilty. If he is denied bail and is acquitted by the court of appeal, an injustice has resulted.”¹¹¹ Furthermore, an even greater number of appellants in our data set likely abandoned their appeals after an unsuccessful bail application, thereby constructively losing their right of appeal because they were denied bail.¹¹² The right to have

Alberta Courts of Appeal for similar data and was advised by each that it is not available.

¹¹⁰ See *R v Grey*, 2012 BCCA 431 (bail decision) and 2013 BCCA 232 (appeal decision) (appeal granted and acquittal entered); *R v Switzer*, 2013 ABCA 446 (bail decision) and 2014 ABCA 129 (appeal decision) (appeal granted and stay of proceedings entered); *R v DJR*, 2014 ABCA 13 (bail decision) and 2014 ABCA 263 (appeal decision) (appeal allowed and new trial ordered); *R v SBS*, 2014 ABCA 67 (bail decision) and 2016 ABCA 194 (appeal decision) (appeal allowed and new trial ordered); *R v Oakes*, 2015 ABCA 178 (bail decision) and 2016 ABCA 90 (appeal decision) (appeal allowed and new trial ordered); *R v Huot*, 2016 ABCA 180 (bail decision) and 2016 ABCA 339 (appeal decision) (appeal allowed and new trial ordered); *R v Tessier*, 2018 ABCA 434 (bail decision) and 2020 ABCA 289 (appeal decision) (appeal allowed and new trial ordered) (note that the SCC granted leave to appeal in this case (2021 CanLII 15597)). Oral argument was heard on December 6, 2021 and the judgement was reserved. As of the date of writing no decision has been rendered by the Supreme Court); *R v Cyr*, 2019 ABCA 231 (bail decision) and 2020 ABCA 230 (appeal decision) (appeal allowed and new trial ordered); *R v Shevalev*, 2018 BCCA 333 (bail decision) and 2019 BCCA 296 (appeal decision) (appeal allowed and new trial ordered); *R v Louie*, 2019 BCCA 257 (bail decision) and 2020 BCCA 24, *sub nom R v Charlie* (appeal allowed and acquittal entered); *R v Bus*, 2019 BCCA 336 (bail decision) and 2020 BCCA 278 (appeal decision) (appeal allowed and acquittal entered); and *R v Chukwu*, 2015 ABCA 335 (bail decision) and 2016 ABCA 146 (appeal decision) (appeal granted in part and acquittal entered on one count of the indictment).

¹¹¹ Report of the Canadian Committee on Corrections, *Toward Unity: Criminal Justice and Corrections* (Ottawa: Ministry of Supply and Services, 1969) at 126, quoted in Trotter, *Law of Bail*, *supra* note 51, ch 10 at s 10.2(e)(iii)(C).

¹¹² In the following cases, bail pending appeal was denied and I could find no record of a decision on the appeal proper, suggesting that the appeal was abandoned. This is almost certainly an undercount, as I have only considered cases from 2018 and prior, to recognize that appeals brought more recently may still be awaiting a decision: *R v*

one's conviction reviewed is illusory if the appellant must serve a significant part of their sentence prior to receiving an appeal decision, and many appellants—especially those serving shorter sentences—may not proceed with their appeal unless they also obtain bail.¹¹³

It is inevitable that some appellants with meritorious appeals will be denied bail. But we should take steps to mitigate this risk. Where the

Dhesi, 2012 BCCA 9; *R v Billing*, 2013 BCCA 54; *R v Pocasangre*, 2013 BCCA 144; *R v Bullerwell*, 2013 BCCA 287; *R v Summerton*, 2013 BCCA 545; *R v P (J)*, 2013 ONCA 505; *R v Nevill*, 2013 ONCA 640; *R v. S (VB)*, 2014 ABCA 53; *R v B (H)*, 2014 ONCA 334; *R v Kaguytan*, 2014 ONCA 384; *R v Jensen*, 2014 ABCA 435; *R v Siggelkow*, 2014 ABCA 450; *R v Hunter*, 2015 ABCA 81; *R v MacMullin*, 2015 ABCA 82; *R v Murtagh*, 2016 ABCA 272; *R v Luckese*, 2016 ONCA 359; *R v PLB*, 2018 ABCA 263; *R v Habimana*, 2018 ABCA 426; *R v Rogerson*, 2018 ABCA 436; *R v. C.L.*, 2018 ONCA 470; *R v Spring* 2018 CarswellOnt 3029 (ONCA).

¹¹³ See *Farinacci*, *supra* note 10 at para 44 (“[P]ublic confidence in the administration of justice requires that judgments be reviewed and that errors, if any, be corrected. This is particularly so in the criminal field where liberty is at stake. Public confidence would be shaken, in my view, if a youthful first offender, sentenced to a few months imprisonment for a property offence, was compelled to serve his or her entire sentence before having an opportunity to challenge the conviction on appeal. Assuming that the requirements of s. 679(3)(a) and (b) of the *Criminal Code* are met, entitlement to bail is strongest when denial of bail would render the appeal nugatory, for all practical purposes.”)

Another potential source of injustice is that the application judge's detailed assessment of the merits may influence the panel deciding the appeal proper. See *Allen*, *supra* note 21 at para 31 (“Acceptance ... that a panel of the Court determine that the appeal presently before the Court ‘has overwhelming merit’, while another panel of the Court is in the process of deciding precisely what level of merit that specific appeal has, would be greatly disruptive of the normal processes of the Court The panel hearing the appeal could not avoid feeling some pressure from the finding made by the panel hearing the judicial interim release issues. Public confidence in the soundness of the final appeal judgment could be affected by skepticism as to whether the appeal received full consideration on the merits. There could be suggestions that the appeal panel simply adopted the determination of the judicial interim release panel if the decisions were the same, and claims of error if they were different.”) For the contrary view, see *R v Rhyason*, 2006 ABCA 120 at para 12 (“[I]t is unlikely that a chambers judge's view will sway the panel. A chambers judge's initial assessment of the strength of an appeal is hardly conclusive.”). Even if the appeal panel is unlikely to be influenced by the application judge's assessment of the merits, it may create an appearance of unfairness if the panel adopts a similar view. See *Allen*, *supra* note 21 at para 48 (“Even in cases where the two panels come to the same conclusions, skepticism as to whether the appeal panel felt pressured by or simply followed the determination of the judicial interim release panel, without giving full and fair consideration to the real merits of the appeal, could serve to diminish public confidence in the administration of justice.”)

appellant's detention is ordered because they have failed to convince the application judge that their appeal is not frivolous, that they will surrender into custody, or that they do not pose a threat to public safety, the prospect that a successful appellant will serve time in custody is more tolerable. It is far less clear why we should accept the potential for injustice based on the application judge's detailed assessment of the grounds of appeal – an exercise for which the application judge is poorly equipped.

V. WAS *OLAND* CORRECTLY DECIDED IN THE FIRST PLACE?

A. Assessment of the Merits Should Be Limited to the Not Frivolous Criterion

Oland's misapplication is thus heightening the risk of injustice. One solution is for judges to follow *Oland* and reserve the public confidence inquiry only for the most serious cases. This would reduce reliance on the merits of the appeal.

Another solution would be to re-imagine *Oland* entirely. In my respectful view, *Oland* was incorrectly decided. As noted above, prior to *Oland*, there was disagreement among the courts of appeal over the extent to which the merits should be considered under the public interest ground. Alone among the courts of appeal, Newfoundland's practice was not to consider the merits of appeal beyond the not frivolous threshold.¹¹⁴ The Newfoundland Court of Appeal was correct and the Supreme Court should have adopted its approach. This is for three main reasons: it would alleviate the interpretive difficulty caused by *Oland's* emphasis on "serious" cases; it would keep the focus on the factors most relevant to whether the applicant deserves bail pending appeal; and this interpretation better accords with the statutory language.

First, as we have seen, *Oland's* instruction to conduct a detailed assessment of the grounds of appeal only in "serious" cases has created a nebulous standard that encourages overreliance on the merits of the appeal. Although the courts of appeal deserve blame for misinterpreting *Oland*, the *Oland* decision invited this misapplication. Application judges are

¹¹⁴ See *Allen*, *supra* note 21 at paras 31-52. The Newfoundland Court of Appeal did permit discussion of the grounds of appeal under the public interest ground where it was clear during the bail application that the applicant had a very strong appeal, such that an injustice had likely occurred and public confidence would be undermined should bail be denied (see at para 51). This approach is sensible.

understandably reluctant to deem the offences before them—which, to reiterate, are crimes that are serious in a colloquial sense—as not serious and therefore undeserving of heightened scrutiny. Furthermore, *Oland* declined to set precise guidelines on the type of crime it deemed serious enough to warrant the public confidence inquiry, leading to inconsistency and confusion. Confining assessment of the appeal’s merits to the question of frivolity under s. 679(3)(a) would present a clearer standard that courts are familiar with applying. It would also greatly reduce reliance on the merits at the bail stage.¹¹⁵

Second, removing the appeal’s merits from the public interest ground would focus the bail application where it should be—the other elements of the s. 679(3) test—and take it away from where it should not be—the grounds of appeal. I have discussed above why a detailed assessment of the grounds of appeal at the bail stage is problematic. In contrast, the application judge is well situated to assess the other considerations. Frivolity can be judged with a limited trial record. Nor is a detailed trial record required to determine whether the appellant will surrender into custody or poses a risk to public safety. These questions rest on factors that are readily demonstrable, such as the applicant’s release plan, prior criminal record, and record of compliance with court orders. Concerns with respect to these factors may be alleviated through stricter bail conditions.

These other considerations are also far more central to the bail question than a detailed assessment of the grounds. Where, for instance, the applicant may abscond or commit another criminal offence if granted bail, the prospect of irreparable damage means that a reasonable member of society would understand the applicant’s detention even if the appeal might ultimately succeed. The same cannot be said of denying bail because the appeal seems weak. Absent concerns regarding the other factors—that is, where the concern stems only from purportedly weak grounds of appeal—if the applicant is granted bail but is then unsuccessful on appeal the only harm is that the applicant’s punishment has been delayed. This is a reasonable price to pay to breathe life into the right of appeal and reduce

¹¹⁵ See *Oland* SCC, *supra* note 2 at para 20 (“the ‘not frivolous’ test is widely recognized as being a very low bar”). It may be argued that if courts were not permitted to assess the grounds of appeal under the public interest criterion they might take a more exacting view of the appeal’s merits at the frivolity stage. While this is a legitimate concern, it is, in my view, undeniable that proscribing assessment of the grounds of appeal at the public interest ground will result in less focus on the merits.

the likelihood that innocent persons will serve time in custody. As Justice Trotter notes, it is more accurate to think of the enforceability interest “in terms of immediate enforceability, not ultimate enforceability” because “[i]f the appeal is ultimately unsuccessful, the judgment entered at trial will be enforced. The grant of bail merely suspends the enforcement of the punitive aspect of the judgment.”¹¹⁶ Accordingly, when the other considerations are satisfied it is reasonable to delay enforcement rather than court injustice.

Third, removing analysis of the appeal’s merits from the public interest ground better aligns with the plain language of s. 679 of the *Criminal Code*. Factoring the merits into the public interest analysis renders the not frivolous criterion in s. 679(3)(a) redundant, at least in cases deemed serious within the meaning of *Oland*. The SCC’s explanation that the purpose of s. 679(3)(a) is to operate “as an initial hurdle that produces a categorical ‘yes’ or ‘no’ answer” is unconvincing.¹¹⁷ There is no need to assess the merits under s. 679(3)(a) if the merits will be assessed again under s. 679(3)(c). The Newfoundland Court of Appeal made this point succinctly in *Allen*:

If the relative merit of the grounds of appeal is always a factor in determining whether detention is necessary in the public interest, then surely it is not necessary to make a determination as to whether or not the appeal...is frivolous. An appeal that would be found, under paragraph (c), to have “overwhelming merit”...or even a high, reasonable or simple possibility of success cannot possibly be found to be frivolous. If the appeal were found to have no possibility of success then, clearly, it could be said to be frivolous. In no one of those circumstances would it be necessary to make a separate finding, under paragraph (a), as to whether or not the appeal was frivolous.¹¹⁸

It is a central canon of statutory interpretation that every word in a statute is presumed to have a specific role to play and that courts should avoid interpretations that render any portion of a statute meaningless or redundant.¹¹⁹

It becomes even clearer that the SCC’s interpretation in *Oland* contravenes legislative intent if we compare s. 679(3) to s. 679(4). The latter provision governs applications for bail pending sentence appeals (appeals challenging the sentence only and not the underlying conviction). Section

¹¹⁶ Trotter, *Law of Bail*, *supra* note 51, ch 10 at s 10.2(e)(iii)(C).

¹¹⁷ *Oland* SCC, *supra* note 2 at para 41.

¹¹⁸ *Allen*, *supra* note 21 at para 49.

¹¹⁹ *Placer Dome Canada Ltd v Ontario (Minister of Finance)*, 2006 SCC 20 at para 45.

679(4) states that bail pending a sentence appeal may be granted where the applicant has established three conditions:

- (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 of the order; and
- (c) his detention is not necessary in the public interest.¹²⁰

Thus, the test for bail pending a sentence appeal also contains three grounds, with the latter two grounds the same as the test under s. 679(3). The difference is the first ground. In contrast to s. 679(3)(a), which requires the applicant to demonstrate that the appeal is not frivolous, an applicant seeking bail pending a sentence appeal must show the appeal has sufficient merit that, in the circumstances, it would cause unnecessary hardship if they were detained in custody. In other words, the legislature specifically demanded a stronger appeal than “not frivolous” to justify release pending a sentence appeal. This makes sense given the difference between a merits appeal and a sentence appeal. Unlike a merits appeal, even if the appellant is successful in an appeal against sentence, their conviction will remain intact and they may still have to serve a period of incarceration. Accordingly, the risk of injustice is reduced and the enforceability interest is higher. Having explicitly set out a more demanding test in s. 679(4), it is reasonable to infer that if Parliament had wanted to create a higher threshold under s. 679(3) it would have said so expressly. It makes little sense to interpret s. 679(3)(c) as importing a higher standard for the grounds of appeal when Parliament deliberately created a lower threshold.

B. Why Did the SCC Not Adopt This Interpretation?

If the argument is compelling for removing consideration of the merits of the appeal from the public interest ground, why did the SCC seemingly reject this position unanimously? In fairness to the Court, a likely reason is that no one advanced this interpretation. In fact, Dennis Oland’s counsel conceded that a detailed assessment of the grounds of appeal was appropriate, asking only that the SCC set the standard as “arguable grounds with a potential prospect of ordering a new trial or acquittal.”¹²¹ The

¹²⁰ The appellant must also obtain leave to appeal from the court. See *Criminal Code* s 679(1)(b).

¹²¹ *Oland Appellant’s Factum*, *supra* note 21 at para 63.

intervener Criminal Lawyers' Association (Ontario) ("CLA") took a similar stance, conceding that "[i]f the case is one that raises...compelling public interest concerns – either by virtue of the aggravated nature of the serious offence and/or the manner by which it was committed, or due to some residual concern for public safety – an appellant may be required to demonstrate that the grounds of appeal are clearly arguable or compelling."¹²² The appellant's position may be explained by his limited goal of obtaining bail pending appeal should he be convicted again. The CLA's position is more difficult to understand and, with respect, was imprudent.

Despite these concessions, during oral argument members of the SCC panel seemed open to limiting assessment of the grounds of appeal. Chief Justice McLachlin, for example, signalled that she was uncomfortable with a detailed assessment of the merits based on a limited record at the bail hearing, questioning why it was necessary to go beyond the not frivolous standard:

I'm very uncomfortable with "reasonable prospect of success"...[I]t will very quickly devolve into the appellate court trying to figure out whether they would allow the appeal without proper argument on the grounds of appeal...So I'm really worried about a test as amorphous as "potential to succeed"...If you have an appeal and it has some grounds and those grounds are arguable, i.e. not frivolous, then there is a potential to succeed so what more are you asking the Court of Appeal judge to do?¹²³

Later, Chief Justice McLachlin expressed skepticism as to why the Court should adopt an interpretation that would render the not frivolous criterion redundant:

I'm just really puzzled. We go to the language of the section and Parliament set out three criterion [sic]... Surely you would say, "Is it frivolous?" No. "Will he surrender?" "Yes." Then we would think something else ought to be under (c) than simply a reconsideration or a higher standard than not frivolous...Parliament must have had something else in mind....That's what I would have thought is the way to read the section, but then I find myself being invited by everybody to go back to (a) and say (a) really mean[s] something more than frivolous, whereas I

¹²² Factum of the Intervener, Criminal Lawyers' Association (Ontario), SCC File No. 36986, online (pdf) <www.scc-csc.ca/WebDocuments-DocumentsWeb/36986/FM060_Intervener_Criminal-Lawyers-Association-Ontario.pdf> [perma.cc/9W4L-7HBK] at para 2.

¹²³ Oland SCC Transcript, *supra* note 28 at 26 (emphasis added).

would have thought (c) is dealing with other tertiary considerations in a particular case.¹²⁴

Furthermore, some of the Justices picked up on the incongruity that the Court was being asked to ignore the fact that s. 679(4)—the provision for bail pending a sentence appeal—specifically outlined a higher standard for the merits than s. 679(3). As Justice Suzanne Côté commented, “you have the same legislator in the next provision – not 10 provisions later, but in the next provision – making a distinction between not frivolous and the appeal has sufficient merit...[S]hould we [not] draw any conclusion from that?”¹²⁵ Ultimately, however, no one put forward this argument, although counsel for the CLA conceded that the parties may have fallen into the trap of accepting the *Farinacci* framework without imagining a different way to formulate the test.¹²⁶

One cannot be too critical of the SCC for failing to adopt a position that was not advanced before it – and in fact was disavowed by the appellant and the CLA. Nevertheless, with the vantage of hindsight and with the benefit of the research and analysis provided in this article, it is apparent that removing consideration of the merits of the appeal from the public interest ground would help remedy the confusion created by *Oland*, reduce the likelihood of bail being unjustly denied, and more faithfully track the statutory language governing bail pending appeal.¹²⁷

¹²⁴ *Ibid* at 52-54.

¹²⁵ *Ibid* at 67 (emphasis added).

¹²⁶ *Ibid* at 54.

¹²⁷ At least one other argument may be put forward in the Supreme Court’s defence. In justifying consideration of the appeal’s merits under the public interest ground, Justice Moldaver noted that in the context of bail pending trial, the *Criminal Code* explicitly states that a court should consider “the apparent strength of the prosecution’s case” in assessing whether detention is necessary to maintain public confidence in the administration of justice (see *Criminal Code* 515(c)(i)). Justice Moldaver concluded that because Parliament did not provide explicit guidance on how to assess public confidence in the context of bail pending appeal, it is sensible to refer to the statutory language on bail pending trial and adapt the same factors. Accordingly, Justice Moldaver opined that it was appropriate to consider the strength of the prosecution’s case—translated in the appeal context to the strength of the grounds of appeal—when assessing public confidence for purposes of bail pending appeal. See *Oland* SCC, *supra* note 2 at paras 31-33, 40.

While this position is logical on its surface, in my respectful view it fails to consider the different statutory language governing bail pending trial (s 515(10)) and bail pending appeal (s 679(3)). Paragraph 515(10)(c), which explains how to assess public confidence for purposes of bail pending trial, contains explicit language

VI. CONCLUSION

In *Oland*, the SCC was provided with the rare and valuable opportunity to address a matter that appears regularly in our appellate courts and is essential to the proper functioning of our criminal justice system: entitlement to bail pending appeal. The Court deserves much credit for agreeing to hear the appeal despite its mootness and for drafting a thoughtful judgment that attempted to clarify the relevant principles. An important way in which the Court sought to rationalize bail pending appeal was by limiting consideration of the appeal's merits under the public interest ground. The SCC acknowledged the difficulties inherent in assessing the strength of an appeal at the bail stage and was clear that this assessment should be limited to exceptional cases.

Unfortunately, the empirical data presented in this article suggests that *Oland* has been widely misinterpreted. Far from limiting assessment of the merits to a select group of serious appeals, *Oland* has opened the door to routine exploration of the grounds of appeal in bail applications. Consequently, access to bail pending appeal may have become highly contingent on the application judge's—as well as the Crown's—view of the appeal's likelihood of success. This is troubling. Predicting the success of an appeal at the bail stage is an assessment that application judges are poorly equipped to make. A regrettable by-product is that less emphasis may be placed on the other grounds, which are far more important to the question of whether bail pending appeal is warranted. This state of affairs risks exacerbating inequalities in access to bail pending appeal and creating an unacceptable risk of injustice, including by denying bail to meritorious appellants or leading to appellants abandoning their appeals because they were unable to obtain bail.

Where do we go from here? An important first step is for courts and Crowns to adhere to *Oland*'s teachings and reduce their emphasis on the

instructing the court to consider the strength of the Crown's case as part of the public confidence inquiry. Notably, 679(3)(c) does not. More importantly, in the context of bail pending appeal (unlike bail pending trial), the *Criminal Code* has a separate provision (s 679(3)(a)) that specifically governs the strength of the Crown's case. As I have discussed above, assessing the merits of the appeal twice—under 679(3)(a) and then again under 679(3)(c)—renders the former provision redundant. As further noted above, this interpretation also ignores the clear distinction created by Parliament between bail pending a merits appeal (s 679(3)) and bail pending a sentence appeal (s 679(4)).

appeal grounds when considering applications for bail pending appeal. A second step would be for the SCC to rethink its approach and remove analysis of the appeal's merits from the public interest ground. Doing so would help remedy the confusion created by *Oland* and expand access to bail pending appeal for deserving applicants. Although further consideration of this issue in the near future is unlikely, the Court would do well to reconsider its approach.