

**SUPREME COURT OF CANADA**

|  |  |
| --- | --- |
| **Citation:** R. *v.* Oland, 2017 SCC 17, [2017] 1 S.C.R. 250 | **Appeal heard:** October 31, 2016  **Judgment rendered:** March 23, 2017  **Docket:** 36986 |

Between:

Dennis James Oland

Appellant

and

Her Majesty The Queen

Respondent

- and -

Attorney General of Ontario, Attorney General of British Columbia, Attorney General of Alberta and Criminal Lawyers’ Association (Ontario)

Interveners

**Coram:** McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

|  |  |
| --- | --- |
| **Reasons for judgment:**  (paras. 1 to 70) | Moldaver J. (McLachlin C.J. and Abella, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ. concurring) |

R. *v.* Oland, 2017 SCC 17, [2017] 1 R.C.S. 250

Dennis James Oland Appellant

v.

Her Majesty The Queen Respondent

and

Attorney General of Ontario,

Attorney General of British Columbia,

Attorney General of Alberta and

Criminal Lawyers’ Association (Ontario) Interveners

**Indexed as: R. *v.*** Oland

2017 SCC 17

File No.: 36986.

2016: October 31; 2017: March 23.

Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

on appeal from the court of appeal for new brunswick

*Criminal law — Interim release — Appeals — Appeal judge dismissing application for release pending appeal because applicant failed to establish that detention “not necessary in the public interest” under s. 679(3)(c) of Criminal Code — Principles and policy considerations by which appellate courts should be guided in deciding whether someone convicted of serious crime and sentenced to lengthy term of imprisonment should be released on bail pending determination of appeal — Proper interpretation and application of s. 679(3)(c) of Criminal Code — Criminal Code, R.S.C. 1985, c. C‑46, s. 679(3)(c).*

*Criminal law — Interim release — Review hearing — Standard of review — Appeal judge dismissing application for release pending appeal — Chief Justice of Court of Appeal directing review of dismissal decision by three‑judge panel under s. 680(1) of Criminal Code — Test to be applied by Chief Justice in deciding whether to direct panel review — Standard of review to be applied by reviewing panel — Criminal Code, R.S.C. 1985, c. C‑46, s. 680(1).*

*Appeals — Mootness — Application for release pending appeal dismissed — Appeal against conviction subsequently allowed and new trial ordered — Accused released pending re‑trial — Appeal from decision refusing bail pending determination of appeal rendered moot — Whether Court should exercise discretion to hear appeal.*

O applied for release pending the determination of his appeal against conviction on a charge of second degree murder involving the death of his father. His application was denied under the third criterion set out in s. 679(3)(c) of the *Criminal Code*, which requires the applicant to establish that “his detention is not necessary in the public interest”. While public safety was not in issue in this case, the appeal judge was not persuaded that public confidence would be maintained if O were to be released. Accordingly, he dismissed O’s application. A review of that decision by a three‑judge panel, as directed by the Chief Justice of the Court of Appeal under s. 680(1) of the *Criminal* *Code*, was unsuccessful. The Court of Appeal later allowed O’s appeal from conviction and ordered a new trial. Because he was then released pending his re‑trial, O’s appeal of the review panel’s decision to this Court was rendered moot. However, in accordance with *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, the Court determined that it would proceed to hear the appeal on its merits because of the unanimous position taken by the parties and interveners that guidance was needed to resolve conflicting jurisprudence on the issue of bail pending appeal, which is otherwise evasive of appellate review.

*Held*: The appeal should be allowed.

Following *R. v. Farinacci* (1993), 86 C.C.C. (3d) 32, the public interest criterion of s. 679(3)(c) of the *Criminal Code* consists of two components: public safety and public confidence in the administration of justice. The public confidence component involves the weighing of two competing interests: enforceability and reviewability. While the *Farinacci* framework has withstood the test of time and remains good law, appellate judges continue to have difficulty resolving the tension between enforceability and reviewability, especially in cases like the present one, where they are faced with a serious crime on the one hand, and a strong candidate for bail pending appeal on the other.

In section 679(3)(c) of the *Criminal Code*, Parliament has not provided appellate judges with any direction as to how a bail pending appeal order is likely to affect public confidence in the administration of justice. Fortunately, it has done so in s. 515(10)(c) for the admittedly different but related context of bail pending trial. With appropriate modifications, the s. 515(10)(c) factors are also instructive in the appellate context.

In assessing public confidence under s. 515(10)(c) in the pre‑trial context, the seriousness of the crime for which a person has been convicted plays an important role and is determined by three factors: the gravity of the offence; the circumstances surrounding the commission of the offence; and the potential length of imprisonment. In considering the public confidence component under s. 679(3)(c), the seriousness of the crime should play an equal role in assessing the enforceability interest. The remaining factor that Parliament has identified as informing public confidence under s. 515(10)(c) is the strength of the prosecution’s case. In the appellate context, this translates into the strength of the grounds of appeal, which informs the reviewability interest. For this assessment, appellate judges should examine the grounds of appeal for their general legal plausibility and their foundation in the record to determine whether they clearly surpass the minimal standard required to meet the “not frivolous” criterion.

When conducting the final balancing of the factors that inform public confidence, including the strength of the grounds of appeal, the seriousness of the offence, public safety and flight risks, appellate judges should keep in mind that public confidence is to be measured through the eyes of a 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. There is no precise formula that can be applied to resolve the balance between enforceability and reviewability. A qualitative and contextual approach is required. Where the applicant has been convicted of murder or some other very serious crime, the public interest in enforceability will be high and will often outweigh the reviewability interest, particularly where there are lingering public safety or flight concerns and/or the grounds of appeal appear to be weak. On the other hand, where public safety or flight concerns are negligible, and where the grounds of appeal clearly surpass the “not frivolous” criterion, the public interest in reviewability may well overshadow the enforceability interest, even in the case of murder or other very serious offences.

A panel review under s. 680(1) of the *Criminal Code* should be guided by the following three principles. First, absent palpable and overriding error, the panel must show deference to the judge’s findings of fact. Second, the panel may intervene and substitute its decision for that of the judge where it is satisfied that the judge erred in law or in principle, and the error was material to the outcome. Third, in the absence of legal error, the panel may intervene and substitute its decision for that of the judge where it concludes that the decision was clearly unwarranted. It follows that the Chief Justice should consider directing a review under s. 680(1) where it is arguable that the judge committed material errors of fact or law in arriving at the impugned decision, or that the decision was clearly unwarranted in the circumstances.

In this case, the appeal judge was satisfied that there were no appreciable public safety or flight risk concerns and the grounds of appeal were “clearly arguable” — meaning that they clearly surpassed the “not frivolous” criterion. In addition, as found by the trial judge, O’s crime gravitated more toward the offence of manslaughter than to first degree murder, which attenuated the seriousness of the crime and hence the enforceability interest. The cumulative effect of these considerations made O’s detention clearly unwarranted. The appeal judge erred in law by looking for grounds of appeal that would have virtually assured a new trial or an acquittal. The review panel erred in failing to intervene.

**Cases Cited**

**Applied:** *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342; *R. v. Farinacci* (1993), 86 C.C.C. (3d) 32; **referred to:** *R. v. McNeil*, 2009 SCC 3, [2009] 1 S.C.R. 66; *R. v. Ponak*, [1972] 4 W.W.R. 316; *R. v. Iyer*, 2016 ABCA 407; *R. v. D’Amico*, 2016 QCCA 183; *R. v. Gill*, 2015 SKCA 96, 465 Sask. R. 253; *R. v. Xanthoudakis*, 2016 QCCA 1809; *R. v. Manasseri*, 2013 ONCA 647, 312 C.C.C. (3d) 132; *R. v. Passey*, 1997 ABCA 343, 121 C.C.C. (3d) 444; *R. v. Matteo*, 2016 QCCA 2046; *R. v. Sidhu*, 2015 ABCA 308, 607 A.R. 395; *R. v. Porisky*, 2012 BCCA 467, 293 C.C.C. (3d) 100; *R. v. Parsons* (1994), 117 Nfld. & P.E.I.R. 69; *R. v. Hall*, 2002 SCC 64, [2002] 3 S.C.R. 309; *R. v. Rhyason*, 2006 ABCA 120, 208 C.C.C. (3d) 193; *R. v. Roussin*, 2011 MBCA 103, 275 Man. R. (2d) 46; *R. v. Allen*, 2001 NFCA 44, 158 C.C.C. (3d) 225; *R. v. Delisle*, 2012 QCCA 1250; *R. v. Meda* (1981), 23 C.R. (3d) 174; *R. v. Olsen* (1996), 94 O.A.C. 62; *R. v. Roe*, 2008 BCCA 253, 256 B.C.A.C. 308; *R. v. Lees*, 1999 BCCA 441, 127 B.C.A.C. 280; *R. v. St‑Cloud*, 2015 SCC 27, [2015] 2 S.C.R. 328; *R. v. Baltovich* (2000), 47 O.R. (3d) 761; *R. v. Mapara*, 2001 BCCA 508, 158 C.C.C. (3d) 312.

**Statutes and Regulations Cited**

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

*Criminal Code*, R.S.C. 1985, c. C‑46, ss. 469, 515(1), (10)(c), 520, 521, 679(3), (4)(a), (10), 680(1).

**Authors Cited**

Trotter, Gary T. “Bail Pending Appeal: The Strength of the Appeal and the Public Interest Criterion” (2001), 45 C.R. (5th) 267.

Trotter, Gary T. *The Law of Bail in Canada*, 3rd ed. Toronto: Carswell, 2010 (loose‑leaf updated 2016, release 1).

APPEAL from a judgment of the New Brunswick Court of Appeal (Drapeau C.J. and Larlee and Quigg JJ.A.), 2016 NBCA 15, 446 N.B.R. (2d) 325, 1168 A.P.R. 325, [2016] N.B.J. No. 70 (QL), 2016 CarswellNB 126 (WL Can.), affirming the decision of Richard J.A. denying bail to the appellant pending the determination of his appeal against conviction, 2016 CanLII 7428, [2016] N.B.J. No. 25 (QL), 2016 CarswellNB 42 (WL Can.). Appeal allowed.

Alan D. Gold, Gary A. Miller, Q.C., and James R. McConnell, for the appellant.

Kathryn A. Gregory and Derek Weaver, for the respondent.

Gavin MacDonald and Leslie Paine, for the intervener the Attorney General of Ontario.

John M. Gordon, Q.C., for the intervener the Attorney General of British Columbia.

Christine Rideout, for the intervener the Attorney General of Alberta.

Michael W. Lacy, Susan M. Chapman and Andrew Menchynski, for the intervener the Criminal Lawyers’ Association (Ontario).

The judgment of the Court was delivered by

Moldaver J. —

1. Overview
2. This appeal provides the Court with an opportunity to consider and clarify the statutory regime in the *Criminal Code*, R.S.C. 1985, c. C-46, which governs bail pending appeal. In particular, we are concerned with the principles and policy considerations by which appellate courts should be guided in deciding whether a person, like the appellant Dennis James Oland, who has been convicted of a serious crime and sentenced to a lengthy term of imprisonment, should be released on bail pending the determination of his appeal against conviction.
3. The debate in this appeal focuses on the interpretation and application of two relatively brief provisions of the *Code* — s. 679(3) and s. 680(1). They read as follows:

**679** . . .

**(3)** In the case of an appeal [against conviction], the judge of the court of appeal may order that the appellant be released pending the determination of his appeal if the appellant establishes that

**(a)** the appeal . . . 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.

. . .

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

**(a)** vary the decision; or

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

1. In the present case, Mr. Oland applied for bail pending appeal following his conviction on a charge of second degree murder involving the death of his father. His application was denied under the public interest criterion set out in s. 679(3)(c). While public safety was not in issue, the appeal judge was not persuaded that public confidence in the administration of justice would be maintained if Mr. Oland were to be released. A review of that order directed by the Chief Justice of New Brunswick under s. 680(1) proved unsuccessful. In the opinion of the three-judge review panel, the decision of the appeal judge to detain Mr. Oland was “neither unreasonable nor the product of any material error of fact, law or mixed law and fact” (2016 NBCA 15, 446 N.B.R. (2d) 325, at para. 15).
2. For the reasons that follow, I am respectfully of the view that detaining Mr. Oland on the public interest criterion was clearly unwarranted in the circumstances. Moreover, in his reasons, the learned appeal judge made a material legal error that affected the outcome. It follows, in my respectful view, that the review panel erred in failing to intervene.
3. As it turns out, prior to Mr. Oland’s appeal being argued in this Court, the Court of Appeal of New Brunswick heard and allowed his appeal from conviction and ordered a new trial. In consequence, Mr. Oland was released on bail pending his re-trial. Accordingly, his appeal to this Court from the order of the review panel upholding his detention order was rendered moot. However, for reasons which I will explain, we chose to hear the appeal on its merits — and having done so, we would allow the appeal but make no further order.
4. Factual Background
5. On July 7, 2011, Mr. Oland’s father, Richard Oland, was found bludgeoned to death at his office in Saint John, New Brunswick. During the ensuing police investigation, Mr. Oland became the primary suspect. He was eventually arrested and charged with second degree murder on November 12, 2013.
6. On November 18, 2013, following a contested hearing, Mr. Oland was released on bail pending trial upon entering into a surety recognizance in the amount of $50,000, with conditions. On December 19, 2015, after a three-month trial by judge and jury, he was convicted of second degree murder. On February 11, 2016, the trial judge sentenced him to life imprisonment with no chance of parole for 10 years.
7. In his sentencing reasons, the trial judge found that apart from the offence for which he now stood convicted, Mr. Oland was “a well-educated 47 year old husband and devoted father without a criminal past”, and “a loving/caring man; a man at the heart of his family and a contributing member of his community” (2016 NBQB 43, 447 N.B.R. (2d) 7, at paras. 14 and 18). In the opinion of the trial judge, Mr. Oland posed no realistic risk of future dangerousness and his prospect of successfully reintegrating into society after serving his sentence was excellent. As for the offence, the trial judge characterized it as “brutal”, noting approximately 40 blunt and sharp force injuries inflicted to the deceased’s head. On the other hand, the crime involved a spontaneous outburst that was the product of a long-standing dysfunctional family dynamic and immense stress. For this reason, the trial judge found that it fell at the “lower end” on the continuum of moral culpability for second degree murder, closer to manslaughter than to first degree murder.
8. On January 20, 2016, Mr. Oland filed a notice of appeal from conviction with the Court of Appeal of New Brunswick. He advanced numerous grounds of appeal relating to three principal areas: errors in the jury charge; errors in admitting certain evidence; and the reasonableness of the verdict. At the same time, he applied under s. 679(3) of the *Code* for bail pending the determination of his appeal. The outcome of that application is the focus of this appeal.
9. Decisions Below
   1. Decision of the Appeal Judge, 2016 CanLII 7428 (Richard J.A.)
10. Mr. Oland’s application for release pending appeal proceeded before a single judge of the Court of Appeal. In support of his application, Mr. Oland filed numerous affidavits attesting to his good character, past compliance with release conditions, and his roots in the community. In addition, he filed affidavits from two family members who were prepared to act as sureties and risk substantial sums of money should he breach the terms of his release order. Finally, he submitted excerpts from the trial transcripts pertinent to his grounds of appeal.
11. In ruling on the application, the appeal judge found that Mr. Oland had discharged his onus on the first two criteria for release under s. 679(3)(a) and (b) of the *Code*, namely: his appeal was not frivolous and he would surrender into custody as required. The appeal judge then considered the public interest criterion under s. 679(3)(c), dividing it into two parts — public safety and public confidence in the administration of justice.
12. Commencing with public safety, the appeal judge was satisfied that Mr. Oland posed “no danger to the public at large” (para. 15). In this regard, he adopted the findings of the sentencing judge that Mr. Oland was a man of prior good behaviour, without criminal record, and that the offence was largely the product of unique relational and situation-specific difficulties existing between him and his father.
13. Turning to public confidence, the appeal judge found that the gravity and brutality of the offence weighed in favour of Mr. Oland’s detention. And while the grounds of appeal put forward by him were “clearly arguable”, they were not of such unique strength as to “virtually assure a new trial or an acquittal” (paras. 30 and 32). On balance, the appeal judge was not persuaded that public confidence in the administration of justice would be maintained if Mr. Oland were to be released. Accordingly, he dismissed the application for release pending appeal.
    1. Decision of the Review Panel, 2016 NBCA 15, 446 N.B.R. (2d) 325 (Drapeau C.J. and Larlee and Quigg JJ.A.)
14. On application by Mr. Oland under s. 680(1) of the *Code*, the Chief Justice of New Brunswick directed a review of his detention order before a three-judge panel of the court.
15. In arriving at its decision, the panel adopted a deferential approach to the review, characterizing the appeal judge’s decision to detain Mr. Oland as a “judgment call”. While the panel recognized that the grounds of appeal put forward by Mr. Oland were “serious”, he nonetheless stood convicted of a brutal murder for which he had received a mandatory life sentence. In the circumstances, denying him bail would not render his appeal pointless. Of primary significance, Mr. Oland had failed to show any error in the reasons of the appeal judge that would warrant interference; nor had he persuaded the panel that his detention in the circumstances was clearly unreasonable. Accordingly, the application for review was dismissed.
16. Analysis
    1. Mootness
17. On October 24, 2016, the Court of Appeal of New Brunswick allowed Mr. Oland’s appeal from conviction and ordered a new trial. On October 25, 2016, he was granted bail pending his re-trial. In view of these events, the parties were alerted that they should be prepared to address the issue of mootness.
18. At the commencement of the hearing, the Court raised the issue of mootness and we were urged by the parties and interveners to hear the appeal on its merits. Mr. Oland and the respondent Crown submitted that this Court’s decision was potentially of significance to them, as Mr. Oland might find himself in the same situation following his re-trial. In addition, all concerned submitted that guidance was needed from this Court to resolve inconsistent approaches to bail taken by appellate courts across the country. And as bail pending appeal was, by its temporary nature, evasive of appellate review, this was an appropriate case to resolve the conflicting jurisprudence: see *Borowski* *v. Canada (Attorney General)*, [1989] 1 S.C.R. 342; *R. v. McNeil*, 2009 SCC 3, [2009] 1 S.C.R. 66, at para. 2.
19. In view of the unanimous position taken by the parties and interveners, and considering that the appeal meets the criteria established in *Borowski*, the Court determined that it would proceed to hear the appeal on its merits.
    1. Bail Pending Appeal Under Section 679(3) of the Criminal Code
       1. The Three Statutory Criteria
20. The three statutory criteria for bail pending appeal are found in s. 679(3) of the *Code*:

**679** . . .

**(3)** In the case of an appeal [against conviction], the judge of the court of appeal may order that the appellant be released pending the determination of his appeal if the appellant establishes that

**(a)** the appeal . . . 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.

The applicant seeking bail bears the burden of establishing that each criterion is met on a balance of probabilities: *R. v. Ponak*, [1972] 4 W.W.R. 316 (B.C.C.A.), at pp. 317-18; *R. v. Iyer*, 2016 ABCA 407, at para. 7 (CanLII); *R. v. D’Amico*, 2016 QCCA 183, at para. 10 (CanLII); *R. v. Gill*, 2015 SKCA 96, 465 Sask. R. 253, at para. 14.

1. The first criterion requires the appeal judge to examine the grounds of appeal with a view to ensuring that they are not “not frivolous” (s. 679(3)(a)). Courts have used different language to describe this standard. While not in issue on this appeal, the “not frivolous” test is widely recognized as being a very low bar: see *R. v. Xanthoudakis*, 2016 QCCA 1809, at paras. 4-7 (CanLII); *R. v. Manasseri*, 2013 ONCA 647, 312 C.C.C. (3d) 132, at para. 38; *R. v. Passey*, 1997 ABCA 343, 121 C.C.C. (3d) 444, at paras. 6-8; G. T. Trotter, *The Law of Bail in Canada* (3rd ed. (loose-leaf)), at pp. 10-13 to 10-15.
2. The second criterion requires the applicant to show that “he will surrender himself into custody in accordance with the terms of the [release] order” (s. 679(3)(b)). The appeal judge must be satisfied that the applicant will not flee the jurisdiction and will surrender into custody as required.
3. The third criterion requires the applicant to establish that “his detention is not necessary in the public interest” (s. 679(3)(c)). It is upon this criterion that Mr. Oland’s bid for bail pending appeal failed — and it is on this criterion that guidance from the Court is sought. In particular, the parties ask this Court for guidance on how the strength of the grounds of appeal from a conviction should be considered in determining whether detention is necessary in the public interest.
   * 1. The *Farinacci* Approach to the Public Interest Criterion
4. In *R. v. Farinacci* (1993), 86 C.C.C. (3d) 32 (Ont. C.A.), Arbour J.A. (as she then was) considered the meaning of the words “public interest” in the context of s. 679(3)(c). In the course of her careful analysis, she determined that the public interest criterion consisted of two components: public safety and public confidence in the administration of justice (pp. 47-48).
5. Justice Arbour did not delve into the public safety component. She found that it related to the protection and safety of the public and essentially tracked the familiar requirements of the so-called “secondary ground” governing an accused’s release pending trial (pp. 45 and 47-48). The public confidence component, on the other hand, was more nuanced and required elaboration. It involved the weighing of two competing interests: enforceability and reviewability.
6. According to Arbour J.A., the enforceability interest reflected the need to respect the general rule of the immediate enforceability of judgments. Reviewability, on the other hand, reflected society’s acknowledgement that our justice system is not infallible and that persons who challenge the legality of their convictions should be entitled to a meaningful review process — one which did not require them to serve all or a significant part of a custodial sentence only to find out on appeal that the conviction upon which it was based was unlawful (pp. 47-49).
7. Almost a quarter of a century has passed since *Farinacci* was decided. The public interest framework which it established has withstood the test of time. It has been universally endorsed by appellate courts across the country: see, e.g., *R. v. Matteo*, 2016 QCCA 2046, at para. 20 (CanLII); *R. v. Sidhu*, 2015 ABCA 308, 607 A.R. 395, at paras. 5-6; *R. v. Porisky*, 2012 BCCA 467, 293 C.C.C. (3d) 100, at paras. 8 and 14-15; *R. v. Parsons* (1994), 117 Nfld. & P.E.I.R. 69 (C.A.), at paras. 30-34. Moreover, all of the parties and interveners in this appeal are content with the *Farinacci* framework. None has spoken against it; none has asked us to revisit it — and I see no reason to do so. *Farinacci* remains good law in my view.
8. In so concluding, I should not be taken to mean — nor do I understand *Farinacci* to have said — that the public safety component and the public confidence component are to be treated as silos. To be sure, there will be cases where public safety considerations alone are sufficient to warrant a detention order in the public interest. However, as I will explain, where the public safety threshold has been met by an applicant seeking bail pending appeal, residual public safety concerns or the absence of any public safety concerns remain relevant and should be considered in the public confidence analysis.
9. The challenge with *Farinacci* arises not from its framework, but from its application in cases where the public confidence component is raised. Appellate judges continue to have difficulty resolving the tension between enforceability and reviewability, especially in cases like the present one, where they are faced with a serious crime on the one hand, and a strong candidate for bail pending appeal on the other.
10. Fortunately, cases like this tend to be more the exception than the rule. Appellate judges across the country deal with applications for bail pending appeal on a regular basis. Of those, only a fraction are likely to involve the public confidence component. Rarely does this component play a role, much less a central role, in the decision to grant or deny bail pending appeal. As Donald J.A. observed in *Porisky*, at para. 47:

Not every offence is serious enough to engage an assessment of the merits. There is no need to go beyond the frivolous threshold in cases unlikely to arouse a concern about public confidence. . . . [W]e should expect Crown counsel to recognize that the continuum runs from petty theft to first degree murder and to exercise good judgment in raising public confidence only in those cases where the offence is at the serious end of the scale.

1. That said, difficult cases do occasionally arise in which the public confidence component is raised. In the hope of assisting appellate judges, I propose to elaborate somewhat on the competing interests of enforceability and reviewability identified in *Farinacci*. In particular, I will point out some of the key factors that inform these interests and provide appellate judges with guidance as to how to weigh them in any given case.
   * 1. Section 515(10)(c) of the *Criminal Code* Identifies Factors That Inform the Public Confidence Analysis
        1. The Rationales for Considering Section 515(10)(c)
2. In section 679(3)(c) of the *Code*, Parliament has not provided appellate judges with any direction as to how a release pending appeal order is likely to affect public confidence in the administration of justice. Fortunately, it has done so in the admittedly different but related context of bail pending trial. Under s. 515(10)(c), Parliament has identified four factors that judges may consider in assessing whether a detention order is necessary to maintain public confidence in the administration of justice:

**515** . . .

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

. . .

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

**(i)** the apparent strength of the prosecution’s case,

**(ii)** the gravity of the offence,

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

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

1. While these factors are tailored to the pre-trial context, a corollary form of the interest underlying each exists in the appellate context. In my view, these same factors — with appropriate modifications to reflect the post-conviction context — should be accounted for in considering how, if at all, a release pending appeal order is likely to affect public confidence in the administration of justice.
2. Approaching the matter this way advances an important policy consideration. It has the virtue of promoting consistency and harmony between the trial and appellate contexts so that, together, they may be seen as providing a cohesive and comprehensive statement of the law governing bail in Canada. Importantly, it accords with the basic principle that, in general, bail should not be more readily accessible for someone who has been convicted of a crime than for someone who is awaiting trial and is presumed innocent. Approaching the two contexts in that fashion can only serve to foster the goals of fairness and coherence and enhance society’s confidence in the administration of justice.
3. Greater accessibility to bail pending trial is rooted in the presumption of innocence. Accused persons charged with an offence in Canada are presumed to be innocent, and they remain so unless and until their guilt is proved beyond a reasonable doubt. With this in mind, the framers of the *Canadian Charter of Rights and Freedoms* saw fit to include in s. 11(*e*) the right of every person charged with an offence “not to be denied reasonable bail without just cause”: *R. v. Hall*, 2002 SCC 64, [2002] 3 S.C.R. 309, at para. 13.
4. By contrast, once a conviction is entered, the presumption of innocence is displaced and s. 11(*e*) of the *Charter* no longer applies. This is reflected in the shift in onus which occurs when a person who has been convicted and sentenced applies for bail pending appeal. Unlike the pre-trial context, where by and large the onus rests on the Crown to establish that an accused should be detained in custody, for appeal purposes, Parliament has seen fit to reverse the onus onto the applicant in all cases.[[1]](#footnote-1)
5. With these thoughts in mind, I turn to the enforceability and reviewability interests to explain how, with appropriate modifications, the public confidence factors listed in s. 515(10)(c) are instructive in identifying the factors that make up the public confidence component in s. 679(3)(c).
   * + 1. The Enforceability Interest
6. In assessing whether public confidence concerns support a pre-trial detention order under s. 515(10)(c), the seriousness of the crime plays an important role. The more serious the crime, the greater the risk that public confidence in the administration of justice will be undermined if the accused is released on bail pending trial. So too for bail pending appeal. In considering the public confidence component under s. 679(3)(c), I see no reason why the seriousness of the crime for which a person has been convicted should not play an equal role in assessing the enforceability interest.
7. With that in mind, I return to s. 515(10)(c), where Parliament has set out three factors by which the seriousness of a crime may be determined: the gravity of the offence, the circumstances surrounding the commission of the offence, and the potential length of imprisonment (s. 515(10)(c)(ii), (iii) and (iv)). In my view, these factors are readily transferable to s. 679(3)(c) — the only difference being that, unlike the pre-trial context, an appeal judge will generally have the trial judge’s reasons for sentence in which the three factors going to the seriousness of the crime will have been addressed. As a rule, the appeal judge need not repeat this exercise.
8. I pause here to note that while the seriousness of the crime for which the offender has been convicted will play an important role in assessing the enforceability interest, other factors should also be taken into account where appropriate. For example, public safety concerns that fall short of the substantial risk mark — which would preclude a release order — will remain relevant under the public confidence component and can, in some cases, tip the scale in favour of detention: *R. v. Rhyason*, 2006 ABCA 120, 208 C.C.C. (3d) 193, at para. 15; *R. v. Roussin*,2011 MBCA 103, 275 Man. R. (2d) 46, at para. 34. The same holds true for lingering flight risks that do not rise to the substantial risk level under s. 679(3)(b). By the same token, the absence of flight or public safety risks will attenuate the enforceability interest.
   * + 1. The Reviewability Interest
9. The remaining factor that Parliament has identified as informing public confidence under s. 515(10)(c) is the strength of the prosecution’s case (s. 515(10)(c)(i)). In the appellate context, this translates into the strength of the grounds of appeal — and, as I will explain, in assessing the reviewability interest, the strength of an appeal plays a central role. I say this mindful of the fact that some authorities have expressed concerns about assessing the merits of an appeal beyond the s. 679(3)(a) “not frivolous” criterion: see *R. v. Allen*, 2001 NFCA 44, 158 C.C.C. (3d) 225, at paras. 31-52; *Parsons*, at paras. 55-59. With respect, I do not see this as a problem.
10. In my view, allowing 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. On the contrary, the “not frivolous” criterion operates as an initial hurdle that produces a categorical “yes” or “no” answer, allowing for the immediate rejection of a release order in the face of a baseless appeal.[[2]](#footnote-2)
11. Justice Donald put the matter succinctly, and in my view correctly, in *Porisky*, at para. 37:

The express mention of “not frivolous” in s. 679(3)(a) and “sufficient merit” in s. 679(4)(a) does not, in my view, foreclose consideration of the merits for a purpose other than a threshold test. Once over the threshold, the applicant faces the question of the public interest, a phrase not defined in the legislation but which had to be given some limits if it was to survive constitutional scrutiny. That is what *Farinacci* did. In setting boundaries for the public interest criterion, in particular the public confidence element, *Farinacci* employed the merits assessment for a purpose different from the threshold test. So I see no redundancy; nor do I doubt our authority to consider the merits as part of the public confidence question.

See also: *R. v. Delisle*, 2012 QCCA 1250, at paras. 4 and 52 (CanLII).

1. Gary T. Trotter, now a Justice of the Court of Appeal for Ontario, reached a similar conclusion in his article “Bail Pending Appeal: The Strength of the Appeal and the Public Interest Criterion” (2001), 45 C.R. (5th) 267, where he explained:

. . . realistically, most cases do not raise strong claims regarding the public interest, at least not beyond the general concern that all criminal judgments ought to be enforced. . . . However, when an offence is serious, as with murder cases, such that public concern about enforceability is ignited, there should be a more probing inquiry into the chances of success on appeal. It is in this context that the balancing required by *Farinacci* requires some assessment of the merits, separate from the question of whether the appeal is frivolous or not. [Footnotes omitted; p. 270.]

1. In conducting a more pointed assessment of the strength of an appeal, appellate judges will examine the grounds identified in the notice of appeal with an eye to their general legal plausibility and their foundation in the record. For purposes of this assessment, they will look to see if the grounds of appeal clearly surpass the minimal standard required to meet the “not frivolous” criterion. In my view, categories and grading schemes should be avoided. Phrases such as “a prospect of success”, “a moderate prospect of success”, or “a realistic prospect of success” are generally not helpful. Often, they amount to little more than wordsmithing. Worse yet, they are liable to devolve into a set of complex rules that appellate judges will be obliged to apply in assessing the category into which a particular appeal falls.
2. In the end, appellate judges can be counted on to form their own “preliminary assessment” of the strength of an appeal based upon their knowledge and experience. This assessment, it should be emphasized, is not a matter of guesswork. It will generally be based on material that counsel have provided, including aspects of the record that are pertinent to the grounds of appeal raised, along with relevant authorities. In undertaking this exercise, appellate judges will of course remain mindful that our justice system is not infallible and that a meaningful review process is essential to maintain public confidence in the administration of justice. Thus, there is a broader public interest in reviewability that transcends an individual’s interest in any given case.
3. As a final matter, I note that the remedy sought on appeal may also inform the reviewability interest. For example, if a successful appeal can result only in a murder conviction being reduced to manslaughter, this will lessen the interest in reviewability, even if the grounds of appeal appear to be strong: *R. v. Meda* (1981), 23 C.R. (3d) 174 (B.C.C.A.); *R. v. Olsen* (1996), 94 O.A.C. 62, at para. 5; *R. v. Roe*, 2008 BCCA 253, 256 B.C.A.C. 308, at para. 14; *R. v. Lees*, 1999 BCCA 441, 127 B.C.A.C. 280, at paras. 4-5.
   * + 1. The Final Balancing
4. Appellate judges are undoubtedly required to draw on their legal expertise and experience in evaluating the factors that inform public confidence, including the strength of the grounds of appeal, the seriousness of the offence, public safety and flight risks. However, when conducting the final balancing of these factors, appellate judges should keep in mind that public confidence is to be measured through the eyes of a 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: *R. v. St-Cloud*, 2015 SCC 27, [2015] 2 S.C.R. 328, at paras. 74-80. In that sense, public confidence in the administration of justice must be distinguished from uninformed public opinion about the case, which has no role to play in the decision to grant bail or not.
5. In balancing the tension between enforceability and reviewability, appellate judges should also be mindful of the anticipated delay in deciding an appeal, relative to the length of the sentence: *R. v. Baltovich* (2000), 47 O.R. (3d) 761 (C.A.), at paras. 41-42. Where it appears that all, or a significant portion, of a sentence will be served before the appeal can be heard and decided, bail takes on greater significance if the reviewability interest is to remain meaningful. In such circumstances, however, where a bail order is out of the question, appellate judges should consider ordering the appeal expedited under s. 679(10) of the *Code*. While this may not be a perfect solution, it provides a means of preserving the reviewability interest at least to some extent.
6. In the final analysis, there is no precise formula that can be applied to resolve the balance between enforceability and reviewability. A qualitative and contextual assessment is required. In this regard, I would reject a categorical approach to murder or other serious offences, as proposed by certain interveners. Instead, the principles that I have discussed should be applied uniformly.
7. That said, where the applicant has been convicted of murder or some other very serious crime, the public interest in enforceability will be high and will often outweigh the reviewability interest, particularly where there are lingering public safety or flight concerns and/or the grounds of appeal appear to be weak: *R. v. Mapara*, 2001 BCCA 508, 158 C.C.C. (3d) 312, at para. 38; *Baltovich*, at para. 20; *Parsons*, at para. 44.
8. On the other hand, where public safety or flight concerns are negligible, and where the grounds of appeal clearly surpass the “not frivolous” criterion, the public interest in reviewability may well overshadow the enforceability interest, even in the case of murder or other very serious offences.
9. Before applying these principles to the case at hand, I propose to address the principles that govern a review hearing under s. 680(1) of the *Code*.
   1. The Review Hearing Under Section 680(1) of the Criminal Code
10. In this case, s. 680(1) of the *Code* operates as a review mechanism for an order of a single judge of the Court of Appeal made under s. 679(3). I note, however, that the provision applies as well to certain pre-trial bail orders made by superior court judges for various offences, including murder. For convenience, s. 680(1) is reproduced below:

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

**(a)** vary the decision; or

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

1. As the provision makes clear, the review process consists of two stages: first, an initial vetting by the chief justice; and second, a review by the court, if directed by the chief justice. In practice, the review will generally be conducted by a panel of three judges, as it was in this case.
2. The nature of the review and the standard to be applied by the panel in deciding whether to interfere with the impugned order are factors that the chief justice is likely to take into account in carrying out his or her initial screening function. Accordingly, I find it useful to address the review panel’s mandate before addressing the chief justice’s screening function.
   * 1. Panel Review
3. The parties disagree on the principles governing a s. 680(1) panel review. Mr. Oland and the intervener Criminal Lawyers’ Association (Ontario) (“CLA”) submit that a standard of correctness should apply, meaning that the panel should engage in a robust review of the record and come to its own independentdetermination, irrespective of whether the single judge’s decision was tainted by legal error. The respondent Crown and the Attorneys General of Ontario and Alberta submit that a more deferential standard is appropriate — one in which an error of law or principle must be found before intervention will be warranted.
4. In support of their position, Mr. Oland and the CLA make two main submissions. First, they point to ss. 520 and 521 of the *Code* — the bail review provisions that apply at the trial stage. Unlike s. 680(1), those provisions require the applicant to “show cause” to succeed on a bail review. In *St-Cloud*, this Court observed that the words “show cause” signal a less interventionist, more deferential approach to bail reviews at the trial stage. In doing so, the Court noted the absence of similar language in s. 680(1) (paras. 97-104). Hence, it is argued that s. 680(1) should be interpreted as invoking a less deferential standard than the standard applicable at trial.
5. I would not give effect to this argument. While the words “show cause” are not found in s. 680(1), I am not convinced that their absence is as significant as Mr. Oland and the CLA suggest. In the context of a review provision, I would have expected more explicit language than the language used in s. 680(1), if Parliament intended the review to be a process in which the panel could, without more, simply substitute its opinion for that of the judge. In so concluding, I note that in *St-Cloud*, at para. 104, Wagner J. for the Court stated that his comments were not determinative of the type of review contemplated by s. 680(1).
6. Second, Mr. Oland and the CLA submit that the constitutionality of s. 679(3)(c) hinges on the existence of a robust correctness review. They base this submission on an excerpt from *Farinacci*, where Arbour J.A. stated, at p. 47:

Although its application is often not free from difficulty, and although judges may differ in its application, it is a standard against which the correctness of individual decisions can be assessed. In contrast, a standardless sweep would preclude any debate regarding the correctness of a decision made under its authority as it would authorize judges to pursue their own personal predilections. [Emphasis added.]

1. I do not find this reference to be persuasive. In *Farinacci*, the Court of Appeal was focused on the constitutionality of s. 679(3)(c), a matter that does not concern us in this appeal. Moreover, the argument assumes that correctness is the only form of meaningful review which can protect against vagueness. While the availability of review may have been important to the Court of Appeal in considering the constitutionality of s. 679(3)(c), it does not follow that the nature of that review must invoke a correctness standard along the lines suggested by Mr. Oland and the CLA. In any event, in the absence of a constitutional challenge, I do not consider it necessary to decide this issue beyond concluding that the comments of the Court of Appeal are not dispositive in settling the nature of review contemplated under s. 680(1).
2. Ultimately, in my view, a panel reviewing a decision of a single judge under s. 680(1) should be guided by the following three principles. First, absent palpable and overriding error, the review panel must show deference to the judge’s findings of fact. Second, the review panel may intervene and substitute its decision for that of the judge where it is satisfied that the judge erred in law or in principle, and the error was material to the outcome. Third, in the absence of legal error, the review panel may intervene and substitute its decision for that of the judge where it concludes that the decision was clearly unwarranted.
3. This approach allows for meaningful review while extending a measure of deference to the judge’s decision. It also achieves symmetry with the review process at the trial stage, save for those offences identified in s. 469 of the *Code*, for which the review process is governed by s. 680(1). This symmetry is important because, as Gary T. Trotter explains in *The Law of Bail in Canada*, it avoids an anomaly that would otherwise result:

Focusing on the review of pre-trial bail orders, endorsing a correctness standard in the application of s. 680 creates differential standards of review for s. 469 vs. non-469 offences. It will allow a more generous scope of review in respect of the most serious offences in the *Criminal Code*. . . . There is no principled reason that supports a situation where someone detained on a murder charge enjoys a broader scope of review under s. 680 when compared to a person charged with manslaughter or attempted murder (both non-s. 469 offences) who is dealt with under the narrower s. 520. [p. 8-31]

* + 1. The Chief Justice’s Discretion to Direct a Review

1. There is no formal procedure in the *Code* governing the chief justice’s decision to direct a panel review. We are told that courts of appeal have adopted different approaches and levels of formality. The procedural aspects of the gatekeeping function are not before us and I do not propose to address them. Some guidance can, however, be given as to the test a chief justice should apply in deciding whether to direct a panel review.
2. The test, as I see it, should be relatively straightforward in its application. It flows from the principles the panel is required to apply when conducting a review. In short, the chief justice should consider directing a review where it is arguable that the judge committed material errors of fact or law in arriving at the impugned decision, or that the impugned decision was clearly unwarranted in the circumstances.
3. Application to This Case
4. By all accounts, aside from the seriousness of the offence for which Mr. Oland was convicted, he presented as an ideal candidate for bail. The notoriety of this case, which stemmed largely from his prominence in the community, and any uninformed public opinion about it, were rightly ignored by the appeal judge. Mr. Oland, I emphasize, was entitled to the same treatment as someone less prominent.
5. In the circumstances, there is considerable merit to Mr. Oland’s submission that if *he* did not qualify for release, no one convicted of a similarly serious offence would ever be released, absent a showing of unique or exceptionally strong grounds of appeal. That cannot be right. Parliament did not restrict the availability of bail pending appeal for persons convicted of murder or any other serious crime and courts should respect this. Thus, for the purposes of s. 679(3)(c), even in the case of very serious offences, where there are no public safety or flight concerns and the grounds of appeal clearly surpass the “not frivolous” criterion, a court may well conclude that the reviewability interest overshadows the enforceability interest such that detention will not be necessary in the public interest.
6. Every case is different and there may be operative factors in other cases, such as a prior criminal record, public safety and flight risk concerns, or a weaker release plan, which could raise concerns warranting detention. Emphatically, a contextual analysis that can account for these differences is required.
7. In this case, the appeal judge was satisfied that there were no appreciable public safety or flight risk concerns and the grounds of appeal were “clearly arguable” — which I take to mean that they clearly surpassed the “not frivolous” criterion. Those findings are not challenged on appeal. In addition, the appeal judge overlooked what I consider to be an important finding made by the trial judge, namely, that in the circumstances, Mr. Oland’s crime gravitated more toward the offence of manslaughter than to first degree murder. This finding was important because it served to lessen Mr. Oland’s degree of moral blameworthiness, thereby attenuating the seriousness of the crime and hence the enforceability interest. In my view, the cumulative effect of these considerations ought to have tipped the scale in favour of release. In other words, Mr. Oland’s detention was clearly unwarranted and the Court of Appeal erred in failing to intervene.
8. While that is sufficient to dispose of this appeal, I feel obliged to identify a legal error that the appeal judge made in his analysis. In particular, his reasons indicate that he did not apply the correct test in assessing the strength of Mr. Oland’s appeal and the implications flowing from it. Much as he was satisfied that Mr. Oland had raised “clearly arguable” grounds of appeal, this was not enough. As the following excerpt from his reasons shows, he required more, something in the nature of unique circumstances that would have virtually assured a new trial or an acquittal:

In the end, the reasonable member of the public, looking at this dispassionately, would balance the fact that the offence for which Mr. Oland was convicted ranks among the most serious in the *Criminal Code*, as well as the brutality with which the offence was committed and the trial judge’s imposition of a life sentence, against the other factors that weigh in favour of Mr. Oland’s release. In my respectful view, that reasonable member of the public would find that, although the grounds of appeal may be clearly arguable, none fall in the category of the unique circumstances that would virtually assure a new trial or an acquittal. In the end, I am forced to conclude that knowing all this, should Mr. Oland be released in these circumstances, the confidence of the reasonable member of the public in the administration of criminal justice would be undermined. [Emphasis added; para. 32.]

Respectfully, he erred in this regard. That Mr. Oland’s grounds were “clearly arguable” was enough to establish that they clearly surpassed the “not frivolous” criterion.

1. In the result, had intervening events not rendered the appeal moot, I would have set aside Mr. Oland’s detention order and ordered his release pending appeal. However, because the appeal is moot, I would simply allow the appeal and make no further order.

*Appeal allowed.*

Solicitors for the appellant: Alan D. Gold Professional Corporation, Toronto; Gary A. Miller Professional Corporation, Upper Kingsclear, New Brunswick; Cox & Palmer, Saint John.

Solicitor for the respondent: Attorney General of New Brunswick, Fredericton.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Vancouver.

Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Calgary.

Solicitors for the intervener the Criminal Lawyers’ Association (Ontario): Brauti Thorning Zibarras, Toronto; Ursel Phillips Fellows Hopkinson, Toronto; Presser Barristers, Toronto.

1. Whereas s. 679(3) requires an applicant “to establish” that the three statutory criteria have been met, s. 515(1) generally places the onus on the Crown to “sho[w] cause . . . why the detention of the accused in custody is justified”. [↑](#footnote-ref-1)
2. While it is not before us, a similar function may be fulfilled by the “sufficient merit” requirement for bail pending a sentence appeal under s. 679(4)(a) of the *Code*. That provision reads:

   **679** . . .

   **(4)** In the case of an appeal [from sentence], the judge of the court of appeal may order that the appellant be released pending the determination of his appeal or until otherwise ordered by a judge of the court of appeal if the appellant establishes that

   **(a)** the appeal has sufficient merit that, in the circumstances, it would cause unnecessary hardship if he were detained in custody; [↑](#footnote-ref-2)