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ISBN-10: 1-55093-698-0
ISBN-13: 978-1-55093-698-8

Digest of Alberta Court of Appeal Cases Considering *R v Oland*

Appellate Advocacy

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For presentation in:
Calgary, Alberta – October 12, 2018
Edmonton, Alberta – November 2, 2018



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DIGEST OF ALBERTA COURT OF APPEAL CASES CONSIDERING *R v Oland*

Introduction	2
The Legal Test	2
Section 515(10)(c) of the <i>Code</i> Informing the Public Confidence Analysis.....	3
Enforceability.....	4
Reviewability.....	4
Final Considerations When Balancing Enforceability Against Reviewability	5
Case Summaries	5
Alberta Court of Appeal.....	5
Ontario Court of Appeal	19
British Columbia Court of Appeal	24
New Brunswick Court of Appeal	24
Cases That Followed <i>Oland</i> but Did Not Comment.....	25
Appendix	
PowerPoint –Single Justice Applications – Criminal Matters	

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INTRODUCTION

This digest provides a summary of *R v Oland*, 2017 SCC 17, [2017] 1 SCR 2015 [*Oland*], followed by summaries of appellate decisions regarding bail pending appeal since *Oland*. The majority of these decisions are from the Alberta Court of Appeal. The decisions summarized in Part III have elaborated on or interpreted *Oland*. The decisions summarized in the Appendix have applied *Oland* in a straight-forward manner without elaboration. The decisions are presented in chronological order, from earliest to most recent, with the exception that subsequent decisions involving the same parties will be directly sequential.

***R v Oland*, 2017 SCC 17, [2017] 1 SCR 2015**

In *Oland*, Justice Moldaver clarified the principles and policy considerations appellate courts should apply in determining whether bail pending appeal should be granted.

At trial, the applicant was convicted of the second degree murder of his father (at para 1). Mr. Oland appealed the conviction to the New Brunswick Court of Appeal, and applied for bail pending appeal. The Court of Appeal denied Mr. Oland's application for bail pending appeal, asserting that public confidence in the administration of justice would not be maintained if he were released. Mr. Oland appealed this decision to the Supreme Court, which held that detaining Mr. Oland on the public interest criterion was clearly unwarranted as the reviewability interest outweighed the enforceability interest (at paras 4-5).

The Legal Test

Justice Moldaver set out the three-part test for bail pending appeal in s 679(3) of the Criminal Code, RSC 1985 c C-46 [Code]. An applicant is no longer entitled to the presumption of innocence (at para 35); therefore, they bear the burden of meeting all three criteria on a balance of probabilities (at para 19):

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 first and second criteria are briefly discussed in the decision. The Supreme Court clarified that the first criterion requires a determination that the grounds of appeal are “not frivolous” – the bar to meet this criterion is very low (at para 20). The second criterion requires the applicant to satisfy the appeal judge that they will not flee the jurisdiction and will surrender into custody as required (at para 21).

The third criterion was the focus of the Court in *Oland*. The Court agreed with the approach applied by Justice Arbour in *R v Farinacci* (1993), 86 CCC (3d) 32 (Ont CA) [*Farinacci*], which was that the public interest criterion consists of two components: (1) public safety and (2) public confidence in the administration of justice (at para 23). She elaborated on the public confidence component, and stated that two competing interests were to be balanced: enforceability and reviewability (at para 24). Both will be discussed in detail below.

Section 515(10)(c) of the Code Informing the Public Confidence Analysis

Section 679(3) of the *Code* does not provide any direction as to how bail pending appeal may affect public confidence in the administration of justice; however, s 515(10)(c) does in the context of bail pending trial. Section 515(10)(c) identifies four factors that, with appropriate post-conviction modifications, should be applied when assessing the public confidence component (at paras 31-32):

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