

CANADA / JUDGMENT

R. v. Lai

2021 BCCA 342

COURT

British Columbia Court of Appeal

DECIDED

2 September 2021

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2021 BCCA 342 R. v. Lai

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Lai,

2021 BCCA 342

Date: 20210902

Docket: CA45808

Between:

Regina

Respondent

And

Alan Teck Meng Lai

Appellant

Restriction on publication: A publication ban has been mandatorily imposed under s. 486.4 of the Criminal Code restricting the publication, broadcasting, or transmission in any way of evidence that could identify a complainant or witness under the age of 18. This publication ban applies indefinitely unless otherwise ordered.

Before:

The Honourable Chief Justice Bauman

(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated

May 28, 2018 (conviction) (R. v. Lai, 2018 BCSC 1838, Vancouver Docket 26899A).

Oral Reasons for Judgment

Counsel for the Appellant:

E. Purtzki

Counsel for the Respondent:

L.A. Chu

Place and Date of Hearing:

Vancouver, British Columbia

August 31, 2021

Place and Date of Judgment:

Vancouver, British Columbia

September 2, 2021

Summary:

The appellant has an appeal as of right to the Supreme Court of Canada from a judgment of this Court and applies for bail pending that appeal. He had been previously released on bail subject to conditions but has since been arrested and charged with breach of those conditions. Held: Application allowed. The s. 679(3) factors and the framework from Oland support granting release on the terms agreed to by the parties.

BAUMAN C.J.B.C.:

I. Introduction

- [1] There are two applications, one brought by each party to this proceeding. The ultimate question for both is whether the appellant, Alan Teck Meng Lai, who is currently in custody, should be released pending the resolution of his appeal as of right to the Supreme Court of Canada.
- [2] Mr. Lai was convicted of sexual assault and administering a stupefying drug. His appeal from conviction to this Court was dismissed on 9 March 2021, for reasons indexed as 2021 BCCA 105. Justice Butler dissented; he would have allowed the appeal, set aside Mr. Lai's conviction, and entered a judicial stay of proceedings on the basis of unreasonable delay, pursuant to s. 11(b) of the Canadian Charter of Rights and Freedoms and the application of the principles in R. v. Jordan, 2016 SCC 27. Due to the dissent in this Court, Mr. Lai has an appeal as of right to the Supreme Court of Canada, pursuant to s. 691(1)(a) of the Criminal Code, R.S.C. 1985, c. C-46. His appeal is scheduled to be heard by that Court on 8 December 2021.

- [3] On 12 March 2021, this Court granted Mr. Lai judicial interim release, or "bail," pending his appeal to the Supreme Court of Canada. On 23 July 2021, Mr. Lai was arrested, and subsequently charged, on the allegation that he had breached the terms of his release by being alone with a female person in private without his bail supervisor's consent and by failing to carry a copy of his release order on his person at all times.
- [4] The first application before me, brought by the Crown, is to cancel, or revoke, the 12 March 2021 bail order that had been granted to Mr. Lai pending his appeal to the Supreme Court of Canada. As I will explain below, at the hearing of these applications on 31 August 2021, I indicated that I would grant that order, which was not contested by Mr. Lai.
- [5] The second application, brought by Mr. Lai, is for a new order granting him bail pending his appeal to the Supreme Court of Canada. For the reasons that follow, I would grant Mr. Lai's application for release pending his appeal to the Supreme Court of Canada, on the terms agreed to by the parties.

II. Background

a) Procedural History

- [6] Mr. Lai was charged on 9 August 2013, with several offences alleged to have been committed against four complainants. Of his initial charges, some were stayed, and he was tried on four charges relating to two complainants, K.P. and S.K. He was released on bail early in the proceeding.
- [7] Mr. Lai's trial proper began on 20 February 2017. On 28 November 2017, Mr. Lai applied for a judicial stay of proceedings on the basis of s. 11(b) of the Charter and the Jordan principles. On 3 April 2018, the trial judge dismissed that application, for reasons indexed as 2018 BCSC 867.
- [8] On 28 May 2018, Mr. Lai was found guilty of: (1) sexual assault; and (2) administering a stupefying or overpowering drug (GHB) to enable him to commit sexual assault. Both convictions related to the complainant K.P. He was acquitted of the two charges relating to the complainant S.K. The reasons for conviction are indexed as 2018 BCSC 1838.
- [9] On 10 December 2018, Mr. Lai was sentenced cumulatively to three years and six months' imprisonment, less time served of 27 days. The reasons for sentence are indexed as 2018 BCSC 2441.
- [10] On 21 December 2018, Mr. Lai filed his notice of appeal from conviction.
- [11] On 8 March 2019, Justice Fitch of this Court granted Mr. Lai bail pending his appeal on a recognizance with one surety of \$50,000, without a deposit. That order was renewed by this Court on a number of occasions on largely the same conditions pending the determination of his appeal, namely on 22 November 2019 by Justice Garson, and 4 May 2020 by Justice Griffin.

- [12] The initial hearing date for the conviction appeal was adjourned due to the COVID-19 pandemic. The conviction appeal was eventually heard on 14 July 2020, by a division composed of Justices Newbury, Willcock, and Butler. The Court reserved judgment, and Justice Newbury ordered that Mr. Lai's bail be renewed again until the date of the release of the reserved judgment.
- [13] On 9 March 2021, Justices Newbury and Willcock dismissed Mr. Lai's appeal. As indicated, Justice Butler dissented and would have allowed the appeal and entered a judicial stay of proceedings. I will review the key details of the division's reasons in the next section.
- [14] On 11 March 2021, Mr. Lai filed his notice of appeal by right from conviction with the Supreme Court of Canada. He applied to this Court for bail pending that appeal. Pursuant to that application, he swore an affidavit deposing that he had complied with the conditions of his bail since 2019.
- [15] On 12 March 2021, Justice Goepel of this Court granted Mr. Lai bail pending his appeal to the Supreme Court of Canada, on terms largely similar to his previous bail orders. The Crown did not oppose that application for bail. Justice Goepel noted that Mr. Lai had been on bail for approximately five years before the trial court and two years before this Court without incident, and that it was appropriate to release Mr. Lai on the terms set out in Justice Newbury's last bail order, with minor modifications agreed to by the parties.
- [16] On 23 July 2021, Mr. Lai was arrested by Coquitlam RCMP on suspicion of violating the conditions of the 12 March release order. On 30 July 2021, Justice Dickson of this Court granted, on application by the Crown, a warrant of arrest for Mr. Lai, "so that he may be brought before a Justice to be dealt with in accordance with the law."
- [17] After some amendments, Mr. Lai is currently charged with two counts of breaching the terms of his release, contrary to s. 145(5)(a) of the Code. The terms alleged to have been breached are as follows:
- (m) The Appellant shall not be alone in the company of a female who is not a family member in any private place including residences, hotels and motor vehicles, except with the prior written permission from his Bail Supervisor to facilitate his search for employment.
 - (s) The Appellant shall carry a copy of this release order on his person at all times and produce it upon demand by a Peace Officer or Bail Supervisor.
- [18] The Crown has provided affidavits from the lead police investigator on the breach charges and from Mr. Lai's bail supervisor. It has also provided various documents such as reports to Crown Counsel and witness statements. In light of the ongoing charges against Mr. Lai for breach, of which he is presumed innocent, a general overview of the circumstances of the alleged breaches will suffice.

- [19] In short, the police apparently responded to a family dispute involving a man, a woman, and their six-year-old son. In the course of speaking with the man, it came to the police's attention that the woman was allegedly seeing Mr. Lai and had been in a relationship with him since October 2020. Mr. Lai's bail supervisor confirmed that she had not given Mr. Lai permission to be with the woman. The bail supervisor said she had repeatedly asked Mr. Lai if he was in a relationship or was having contact with women outside his family, both of which he continually denied.
- [20] The police apparently obtained from the man photographs of Mr. Lai with the woman between October 2020 and July 2021. On 23 July 2021, the police arrested Mr. Lai as he was walking out of a house with the woman. At the RCMP detachment after his arrest, Mr. Lai allegedly informed the lead investigating officer that he did not have a copy of his bail conditions on his person, and that they were in his bag; the investigating officer deposes that when Mr. Lai was arrested, he did not have a bag in his possession.
- [21] The police interviewed the woman in question. The woman said she had met Mr. Lai in October 2020 playing tennis, she had continued to "hang out" with Mr. Lai after meeting him, Mr. Lai had never hurt her, her son liked Mr. Lai, she was aware of Mr. Lai's requirement not to be in a relationship, they were "just close friends" and had never been in a sexual relationship, and she "cannot say how often they are alone together but it does happen."
- [22] Mr. Lai has no criminal record apart from the convictions on appeal.
- b) The Issues on Appeal
- [23] A full review of this Court's reasons on Mr. Lai's conviction appeal is not necessary on these applications. They are, however, relevant to the requisite preliminary consideration of the merits of Mr. Lai's pending appeal to the Supreme Court of Canada.
- [24] The trial judge, in dismissing Mr. Lai's application for a stay of proceedings, estimated 57 months would elapse between the initial charge and his judgment. Of particular issue was an approximately 12-month delay occasioned by Mr. Lai's re-election to be tried at the Supreme Court of British Columbia, six weeks before his Provincial Court trial was scheduled to begin. The judge noted that re-election is a legitimate procedural step available to an accused that is not characterized as defence delay under the Jordan framework; nonetheless, the judge considered Mr. Lai's re-election amounted to a "discrete, exceptional circumstance" that should be deducted from the calculation of delay.
- [25] The judge ultimately found the net delay was 32 months, after subtracting the delay occasioned by the re-election and a separate delay of around 13 months due to the underestimated length of the trial. The 32-month delay still exceeded the presumptive ceiling of 30 months under Jordan. The judge applied the transitional exceptional circumstance, as explained in Jordan at para. 96, and found that the amount of time the case took was justified by the parties' reasonable reliance on the state of the law as it existed prior

to Jordan, namely the framework under *R. v. Morin*, [1992] 1 S.C.R. 771. The judge accordingly dismissed Mr. Lai's application for a stay.

- [26] On appeal to this Court, Justice Willcock, writing for a unanimous division on this point, concluded the judge had erred in categorizing the re-election as an exceptional circumstance. The Court accordingly concluded the net delay was 43 months.
- [27] The majority of the Court nonetheless found that the transitional exceptional circumstance continued to apply to justify refusing a stay. The majority referred to authorities such as *Jordan* and *R. v. Cody*, 2017 SCC 31, and concluded it was "a close case" but that, in the circumstances, giving deference to the judge's conclusions, there was no basis to interfere with the judge's application of the transitional exceptional circumstance.
- [28] Justice Butler, dissenting, would have allowed the appeal and ordered a stay of proceedings. He considered the transitional exceptional circumstance could not justify the 43-month net delay. He considered that, as the judge's transition analysis was incorrectly premised on a significantly shorter net delay of 32 months, the Court did not need to defer to his analysis. He further considered the judge had erred in various respects and that it was not reasonable for the parties to expect the entire 16-month period from Mr. Lai's re-election to the Supreme Court until the start of the trial to be defence delay or inherent time requirements, rather than at least partially attributable to institutional delay. He found the *Morin* factors would have weighed in favour of a stay.
- [29] Mr. Lai's appeal before the Supreme Court of Canada will relate to the issue of law on which Justice Butler dissented, which is described in the division's order as follows:

Did the trial judge err in ruling that the appellant's right to be tried within a reasonable time under s. 11(b) of the Charter was not infringed?

- [30] For its part, the Crown has provided a draft of its factum for the appeal before the Supreme Court of Canada. The Crown intends to argue that the division as a whole erred in concluding the re-election delay was not an exceptional circumstance, or not otherwise defence delay. If that argument is accepted by the Supreme Court of Canada, then the delay would be 32 months, as considered by the trial judge, and there would be a lesser basis on which to interfere with the judge's application of the transitional exceptional circumstance. Alternatively, the Crown intends to argue that the majority was correct, and that Justice Butler inappropriately interfered with the judge's application of the transitional exceptional circumstance.

III. Revocation of Bail

- [31] Section 679 of the Criminal Code governs applications for bail pending appeal. Section 679(6) establishes the procedure to revoke or cancel an order for bail pending appeal. It provides that ss. 495.1, 512.3, and 524 apply with necessary modifications to a person released pending appeal. Section 524 concerns the circumstances in which the court may

cancel, or revoke, an accused person's bail. Sections 495.1 and 512.3 concern the power for, respectively, a peace officer to arrest an accused without a warrant, and for a justice to issue a warrant on reasonable grounds to believe a release order has been contravened, both for the purpose of bringing the accused before a justice to be dealt with under s. 524.

- [32] Mr. Lai's most recent bail was granted by Justice Goepel on 12 March 2021. The Crown's application to revoke that bail arises from the procedural question of whether Justice Dickson's order of 30 July 2021, termed a "warrant of arrest", effected the revocation of Mr. Lai's bail. If not, then the 12 March bail order was not revoked, necessitating an order of the court revoking bail pursuant to s. 524 of the Code, as modified through s. 679(6).
- [33] Justice Dickson was not asked to revoke Mr. Lai's bail, and I agree in the circumstances that bail has not yet been revoked.
- [34] I noted during the hearing of these applications on 31 August 2021, that I was allowing the Crown's application. Mr. Lai did not contest that s. 524(3)(b) is made out. That section provides that the judge or justice "shall cancel a release order in respect of the accused if the judge or justice finds that (b) there are reasonable grounds to believe that the accused has committed an indictable offence while being subject to the release order." Mr. Lai has been charged with breaching the terms of his release, contrary to s. 145(5)(a) of the Code, which is a hybrid offence. The fact that Mr. Lai has been charged with an offence can be properly considered in bail matters: *R. v. Mehan*, 2016 BCCA 129 at para. 24 (Chambers). I am satisfied from the materials filed on appeal, and mindful that Mr. Lai is presumed innocent of the separate charges against him for breach of his conditions, that there are reasonable grounds to believe that Mr. Lai has committed that offence.
- [35] I note that the procedure followed in this case may not have been ideal, as Mr. Lai was arrested on 23 July 2021, and thus appears to have already been in custody at the time Justice Dickson was asked to issue a warrant for his arrest. Mr. Lai has accordingly been detained without an actual revocation of his bail for around a month. Nonetheless, as the application to revoke Mr. Lai's bail is before me, it is appropriate to make that order and address the key issue, as agreed upon by the parties: whether Mr. Lai should now be released on a new bail order.

IV. Application for Release

a) Legal Framework

- [36] Mr. Lai's application is brought under s. 679(1)(c) of the Criminal Code. It is governed by three factors under s. 679(3) of the Code. Those provisions provide:

Release pending determination of appeal

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

- (c) in the case of an appeal or an application for leave to appeal to the Supreme Court of Canada, the appellant has filed and served his notice of appeal or, where leave is required, his application for leave to appeal.

Circumstances in which appellant may be released

- (3) In the case of an appeal referred to in paragraph (1)(a) or (c), the judge of the court of appeal may order that the appellant be released pending the determination of his appeal if the appellant establishes that
- (a) the appeal or application for leave to appeal is not frivolous;
 - (b) he will surrender himself into custody in accordance with the terms of the order; and
 - (c) his detention is not necessary in the public interest.
- [37] The onus is on Mr. Lai to demonstrate that each statutory criterion under s. 679(3) is met, on a balance of probabilities: *R. v. Oland*, 2017 SCC 17 at para. 19. The presumption of innocence does not apply to the convictions that are appealed to the Supreme Court of Canada, and he must be considered guilty for the purposes of this application: *Oland* at para. 35.
- [38] The Crown does not contest that the first two factors under s. 679(3) are still met. It argues, however, that Mr. Lai can no longer satisfy the requirement to show that his detention is not necessary in the public interest.
- [39] I agree with the parties that the first two factors under s. 679(3) are met. The "not frivolous" threshold test for merits under s. 679(3)(a) is a very low bar: *Oland* at para. 20; *United States of America v. Bennett*, 2014 BCCA 159 at para. 14. As Mr. Lai has an appeal as of right to the Supreme Court of Canada on the basis that a justice of this Court dissented on a question of law alone, it cannot be said that Mr. Lai's appeal is frivolous. I will return to the merits when assessing the third factor under s. 679(3)(c).
- [40] Turning to the second factor, there is no indication that Mr. Lai will not surrender himself into custody. I note, as did Justice Goepel in issuing the 12 March order, that Mr. Lai has been on bail for the better part of the past eight years without incident, until these alleged breaches.
- [41] I agree, then, that the third factor is the key issue on this application. The third factor has two distinct components: 1) public safety; and 2) public confidence in the administration of justice: *Oland* at para. 23. In assessing the second of those components, the court must weigh two competing public interests: the interest in the immediate enforceability of judgments (the "enforceability interest"), and the interest in permitting appellate review of court decisions that may undermine a conviction before all or a significant part of a custodial sentence has been served (the "reviewability interest"): *Oland* at paras. 24-25.

b) Analysis

- [42] Is Mr. Lai's detention necessary in the public interest? Consideration of the circumstances and the relevant factors pulls in both directions.
- [43] Mr. Lai submits that his detention is not necessary in the public interest. He says the charges of breach against him, while relating to important terms of release, are not violent in nature, and there is no allegation that he engaged in any sexual offences. He says the circumstances attenuate the seriousness of the new charges, and that he has otherwise been on bail without incident for the better part of the past eight years, with no other criminal history. No doubt understanding the implications of his alleged breach, Mr. Lai has proposed several further conditions of bail that may be imposed, should bail be granted. He proposes various additional conditions of release, which I will return to.
- [44] I will first consider whether there are public safety concerns occasioned by the new charges for breach. I note that even where a new charge is of a violent nature or relates to the original conviction, that does not necessarily preclude granting bail, especially where modified conditions can address the new concerns: see, e.g., *Mehan*; *R. v. Czechowski*, 2020 BCCA 237 (Chambers). In *Mehan*, at para. 28, Justice Donald noted that, "[a] new charge should not automatically result in revocation or denial; it should be considered contextually and on a practical sense of public safety."
- [45] The Crown emphasizes that Mr. Lai's underlying convictions for sexual assault and administering a stupefying drug are extremely serious and raise public safety concerns. I note that, although the convictions are serious, the public safety concerns occasioned by those convictions did not preclude the numerous bail orders granted to Mr. Lai over the past several years, including after this Court's dismissal of his appeal. I consider the question before me to be whether the new allegations of breach shift the circumstances such that it is now necessary to detain Mr. Lai.
- [46] I agree with Mr. Lai that the new charges against him for breach do not pertain, on their face, to fresh allegations of a violent or sexual nature, such that the public is at risk. There is presently no strong indication that Mr. Lai's alleged relationship with the woman in question is coercive, deceptive, not consensual, or even sexual in nature. I note that aspects of the allegations are currently founded on hearsay, although they are suggestive in the circumstances of repeated breaches by Mr. Lai since at least October 2020.
- [47] The Crown observes that Mr. Lai may not have been entirely forthright with the woman about the terms of his release, as she appears to have been unaware, for example, that he was not permitted to be alone with her in private. The Crown also refers to the woman's statements that she has had troubles with alcohol, which are relevant to whether she has been alone with Mr. Lai while intoxicated, contrary to condition (p) of his terms of release. More generally, the Crown submits that the condition not to be alone with a woman, which Mr. Lai is said to have breached, was carefully tailored to protect the public, and specifically women, from the re-occurrence of Mr. Lai's predatory behaviour. The Crown says the

breach of that condition thus "strike[s] at the heart of his bail order."

- [48] Although there are some arguable concerns for the safety of the woman or the public at large in light of the serious nature of Mr. Lai's convictions, I do not consider there are now sufficient public safety concerns such that it is necessary to detain Mr. Lai. This is particularly so in light of the new conditions of bail proposed by Mr. Lai. These include an additional surety and for both sureties to offer a further \$25,000, a curfew, a general prohibition from being in a dating relationship, and a no-contact or similar orders relating to the woman, her husband, or their child.
- [49] The Crown does not contest that these further conditions are appropriate, if bail is granted. I note, however, that the responsiveness of those conditions to the circumstances is diminished by the fact that Mr. Lai is alleged to have breached his bail conditions repeatedly and to have lied to his bail supervisor and to this Court by saying otherwise.
- [50] Nonetheless, in light of Mr. Lai's long and hitherto uneventful time on bail, as well as the limited evidence of any pattern of flagrant breaches, I consider the new conditions alleviate the concerns occasioned by the new charges.
- [51] In *Mehan*, at para. 29, Justice Donald provided a non-exhaustive list of factors relevant to an application for bail where the appellant has been arrested for another offence, which is the circumstance in the present case. Those factors are discussed by both parties, and they are:
- (1) Is the offence charged in the same class as the index offence?
 - (2) Are the circumstances alleged in direct contravention of a specific term of the release order, for example, a curfew breach or association with persons named, or a prohibited activity?
 - (3) Does the appellant have a record of offences similar to the charge?
 - (4) What is the gravity of the allegations?
 - (5) Has there been any difficulty with bail compliance?
 - (6) Is there any allegation of violence in the commission of the offence?
- [52] The new charges are for direct contraventions of the release order. However, the new charges are not squarely akin to the underlying convictions, although they are not entirely unrelated; Mr. Lai has no record of similar offences; the new allegations, while serious, do not raise significant public safety concerns; there is no allegation of violence; and there is no other indication of a failure to comply with bail conditions, notwithstanding that the allegations are suggestive of an unknown pattern of non-compliance.

- [53] The next question is whether Mr. Lai's detention is necessary to preserve public confidence in the administration of justice, in light of the interests of enforceability and reviewability. The Crown relies on the notion that, where the court of appeal has upheld a guilty verdict, "[t]he pendulum must swing towards enforceability and away from bail pending further review after the correctness of the convictions entered at trial has been affirmed on appeal": *R. v. Drabinsky*, 2011 ONCA 647; see also *R. v. Boima*, 2018 BCCA 498 (Chambers).
- [54] These propositions were said, however, in the context of applications for bail pending an application for leave to appeal to the Supreme Court of Canada. In the present case, Mr. Lai's appeal is as of right. Where the appellant has a pending appeal before the Supreme Court of Canada, the same criteria apply as with an application for bail pending appeal to this Court: *R. v. Mapara*, 2004 BCCA 310 at para. 25 (Chambers).
- [55] With regard to the enforceability interest, the seriousness of the crime is again relevant. Once again, I consider the question is whether the new charges are such that the public confidence in the administration of justice requires that Mr. Lai be detained. The Crown again emphasizes that Mr. Lai's alleged breaches of his bail conditions are serious, especially in light of the nature of his underlying convictions. The Crown says the new allegations reveal an ongoing and deliberate flaunting of the bail order, as Mr. Lai has allegedly been meeting with the woman since October 2020 and appears to have repeatedly lied to his bail supervisor. This also puts into question Mr. Lai's sworn evidence in support of his initial application for release pending appeal to the Supreme Court of Canada, resulting in the 12 March 2021 order.
- [56] I, in no way, diminish the seriousness of an allegation that an individual has breached the terms of a release order, which is an order of the court. However, the new charges are for an offence principally against the administration of justice, rather than an individual or the public. Mr. Lai's alleged actions, but for the bail order, would otherwise be lawful: *R. v. Zora*, 2020 SCC 14 at para. 25. The principles of punishment and deterrence for these new allegations are appropriately dealt with pursuant to the ongoing criminal proceeding against Mr. Lai for breaches under s. 145(5)(a), for which he may be tried in the future. For the purposes of this application, the question is whether Mr. Lai's continued detention is necessary from a "risk-management" perspective: *Zora* at para. 65. On bail revocation, there is a greater flexibility for the appellant to demonstrate that, despite a contravention of bail, he should be released again, potentially on revised conditions: *Zora* at para. 67.
- [57] I note again that there is no indication that Mr. Lai is a flight risk, and the new charges do not occasion significant public safety risks, which attenuates the enforceability interest: *Oland* at para. 39.
- [58] With regard to the reviewability interest, I note that it is highly unlikely that, if bail is denied, Mr. Lai will have served all or even a significant portion of his sentence before the Supreme Court of Canada determines his appeal. Again, Mr. Lai has spent much of the past eight years on bail. He has accordingly served very little of his three-and-a-half-year

sentence, and his appeal at the Supreme Court of Canada is scheduled for December 2021. This diminishes the risk that the reviewability interest will be rendered meaningless should bail be denied.

- [59] The key question with regard to reviewability is the merits of the proposed appeal. A "more pointed" assessment of the merits of the appeal is appropriate in considering the reviewability interest: Oland at para. 41. The Crown submits Mr. Lai's appeal to the Supreme Court of Canada, while not frivolous, is weak. Based on the reasons of the trial judge and this Court, as well as the Crown's draft factum at the Supreme Court of Canada, I cannot say that the appeal is of such weak merit that the reviewability interest is diminished. This Court divided on the exact issue on appeal. In doing so, the Court unanimously found the judge had erred in one respect, and divided on the issue of the transitional exceptional circumstance. Further, the Crown's draft factum challenges not only the dissenting conclusions of Justice Butler but also the Court's conclusion that the re-election delay was not an exceptional circumstance. There are clearly a number of live issues on which different judges have disagreed.
- [60] Further, where the issue before the Supreme Court of Canada arises for the first time on appeal, that factor may amplify the reviewability interest, as the ground of appeal has not yet been subject to appellate review: *R. v. Czechowski*, 2021 BCCA 19 at paras. 26-27 (Chambers). Although the circumstances of the present case are somewhat different, the appeal before the Supreme Court of Canada involves issues that were engaged for the first time before this Court, such as the deference to be afforded to the trial judge on his conclusions on the transitional exceptional circumstance.
- [61] The Crown also submits that the remedy sought on appeal is relevant to the reviewability interest: Oland at para. 46. Mr. Lai's appeal relates to s. 11(b) of the Charter and the remedy sought is a stay, but he does not challenge the finding of his factual guilt by the trial judge. In my opinion, the potential for a stay of proceedings on the basis of an infringement of an accused's Charter rights is not an insignificant remedy such that the reviewability interest is lessened.
- [62] I consider the reviewability interest is not insignificant in this case. Weighed against the enforceability interest, I conclude Mr. Lai's detention is not necessary in the public interest.
- [63] In these circumstances, I would grant Mr. Lai judicial interim release on the terms agreed to by the parties with the additional surety as indicated.

"The Honourable Chief Justice Bauman"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/ca/21/03/2021BCCA0342.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-lai-2021-bcca-342>

Prepared on 28 October 2026 · Esheria