

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. D.D., 2026 ONCA 400

DATE: 20260608

DOCKET: M57086 (COA-26-CR-0590)

Gomery J.A. (Motion Judge)

BETWEEN

His Majesty the King

Respondent/Responding Party

and

D.D.

Appellant/Moving Party

Mark C. Halfyard, for the moving party

Matthew Asma, for the respondent Crown

Heard: June 5, 2026

REASONS FOR DECISION

[1] The moving party seeks a stay of Dunphy J.'s May 12, 2026 order pending the determination of his appeal of that order.

[2] Dunphy J. dismissed the moving party's application for *certiorari* to quash three search warrants. The police obtained the warrants to further their

investigation into who uploaded a video through Dropbox¹ on January 19, 2026, showing a child being sexually abused. This video was capable of satisfying the definition of child sexual abuse and exploitation material. The police executed the warrants in late January and February of 2026. During the search of D.D.'s home and office, they seized ten electronic devices.

[3] In addition to the stay of Dunphy J.'s order, D.D. seeks the reinstatement of an interim order he obtained from Wojciechowski J. on March 20, 2026, suspending the police investigation and preventing them from searching the seized devices "until a decision in this application has been delivered".

[4] Before hearing the parties' submissions on the motion's merits, I asked them for submissions on the jurisdiction of this court, and of a judge of this court sitting alone, to make the orders sought. Having considered those submissions, I conclude that the motion should be referred to a panel for determination of the jurisdictional questions and the merits.

Section 683 of the *Criminal Code*

[5] Section 683(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, gives a court of appeal the power to make various procedural orders "in the interests of justice" for the purposes of an appeal. A stay is not one of the orders listed in s. 683(1). Pursuant to s. 683(3), however:

¹ Dropbox is an internet file-sharing service.

A court of appeal may exercise, in relation to proceedings in the court, any powers not mentioned in subsection (1) that may be exercised by the court on appeals in civil matters, and may issue any process that is necessary to enforce the orders or sentences of the court, but no costs shall be allowed to the appellant or respondent on the hearing and determination of an appeal or on any proceedings preliminary or incidental thereto.

[6] Assuming s. 683(3) allows this court to grant the orders sought, this power would have to be exercised by a panel, not a judge sitting alone. In *R. v. Gibson* (October 15, 2024), Toronto, M55414 (COA-24-CR-0580) (Ont. C.A.), Nordheimer J.A. interpreted “court of appeal” to mean a panel, not a single judge.

Section 134(2) of the *Courts of Justice Act* and r. 63.02(1)(b) of the *Rules of Civil Procedure*

[7] D.D. relies on r. 63.02(1)(b) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. This rule specifically empowers a judge of the court to which an appeal has been taken to issue a stay pending the determination of the appeal. Section 134(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, more generally provides that, on a motion, a court to which an appeal is taken may make “any interim order that is considered just to prevent prejudice to a party pending the appeal”.

[8] I am doubtful that provincial legislation supplements and expands the jurisdiction of this court in criminal matters. In *R. v. Thangarajah*, 2025 ONCA 897, leave to appeal to the S.C.C. requested, 42166, this court held that s. 7(5) of the *Courts of Justice Act* did not empower the court to hear a review or appeal of a

motion judge's decision dismissing a motion for an extension of time in a criminal appeal. At paragraph 4, it explained that s. 7(5) "cannot create rights of appeal in criminal proceedings because the province does not have constitutional competence to legislate in relation to criminal law or procedure": citing *R. v. J.M.*, 2021 ONCA 735, 158 O.R. (3d) 81, at paras. 25-26.

[9] The same logic applies with respect to r. 63 of the *Rules of Civil Procedure*, particularly since the *Criminal Appeal Rules* no longer incorporate the *Rules of Civil Procedure*.

Rules 21(12)(e) and (t) of the *Criminal Appeal Rules*

[10] Rule 21(12)(e) of the *Criminal Appeal Rules* provides that a single judge may determine "[a] motion for a stay under ss. 320.25 or 683(5) of the *Code* or any other motion to stay an order to prevent frustration of the appeal".² The moving party argues that this rule should be interpreted disjunctively and that the second part of the rule confers jurisdiction on a single judge to hear appeals of orders made pursuant to a common law power, such as *certiorari*. The moving party further relies on rule 21(12)(t), which empowers a single judge to hear "[a]ny motion that the court or a judge directs or orders shall be heard and determined by a judge".

² Section 320.25 provides that, pending the determination of an appeal of conviction or sentence, a judge of an appeal court may stay a prohibition order under s. 320.24. Section 683(5) empowers the court, or a single judge of the court of appeal to suspend other orders made on conviction.

[11] I have not been provided with any decisions interpreting r. 21(12)(e) or (t). I note, however, that the *Criminal Appeal Rules* cannot be interpreted in a way that is inconsistent with the *Criminal Code* or any Act of Parliament: *Criminal Code*, s. 482(1). The *Criminal Appeal Rules* furthermore cannot be used to expand the court's jurisdiction: *R. v. M.H.*, 2026 ONCA 19, at para. 13, citing *J.M.*, at paras. 27-28. The moving party's interpretation of r. 21(12)(e) and (t) would arguably be inconsistent with the power specifically conferred on a panel of the court under s. 683(3) of the *Criminal Code*.

[12] The jurisdictional analysis is further complicated because Wojciechowski J.'s order arguably lapsed when Dunphy J. delivered his decision on the *certiorari* application. If so, the moving party is not just seeking a stay of the order under appeal but something more.

The court's ancillary jurisdiction

[13] The court could potentially order the relief sought based on its ancillary jurisdiction. Such ancillary jurisdiction may be exercised to prevent the frustration of an appeal: *R. v. Church of Scientology* (1986), 25 C.C.C. (3d) 149 (Ont. C.A.), at pp. 150-51; *R. v. E.F.H.* (1997), 33 O.R. (3d) 202 (C.A.), at fn. 7. The court's ancillary jurisdiction is generally exercised by a panel. It may nonetheless be exercised by a single judge if "a specific basis is provided either by statute or by regulation": *Church of Scientology*, at p. 151.

[14] In *R. v. Jones* (1996), 111 C.C.C. (3d) 351 (Ont. C.A.), at p. 352, McMurtry C.J.O. (as he then was) concluded that, as a single judge of the Court of Appeal, he was empowered to order a stay based on the ancillary jurisdiction of the court. He relied on *Church of Scientology* and the fact that r. 63.02(1) of the *Rules of Civil Procedure* was incorporated in the *Criminal Appeal Rules* then in force.

[15] The current *Criminal Appeal Rules* no longer incorporate the *Rules of Civil Procedure*. The moving party suggests that r. 1(4) of the *Criminal Appeal Rules* “fills the gap”. This rule states:

Where matters are not provided for in these rules or the court’s practice directions, the court, a judge or the Registrar may adopt any procedure that is not inconsistent with these rules.

[16] The Crown contends that r. 21 sets out the motions that may be heard by a single judge. Since the matter is provided for, r. 1(4) has no application to this motion.

Conclusion

[17] In *R. v. D.W.*, 2023 ONCA 638, at para. 14, Hourigan J.A. acknowledged that it was an open question whether a single judge had the jurisdiction to stay an order under the *Sexual Offender Information Registration Act*, S.C. 2004, c. 10. He accordingly referred the request to the panel hearing the sentence appeal on the merits. In *R. v. Metro News Ltd.* (1985), 21 C.C.C. (3d) 492 (Ont. C.A.), as noted

by Grange JA at p. 497, the jurisdictional issues were similarly before a panel on referral by a single judge.

[18] Given the murky jurisdictional waters here, I am following the precedent set in *D.W.* and *Metro News* and referring the motion to a panel of this court to consider both the jurisdictional issues and the merits. The motion is adjourned to Monday, June 8, 2026 at 2:30 p.m. At my request, Crown counsel will ask the police to continue to refrain from searching the seized devices in the interim.