

CANADA / JUDGMENT

R. v. Nowack

2026 ONCA 279

COURT

Court of Appeal for Ontario

DECIDED

15 April 2026

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R. v. Nowack

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C67831, M56765

Judges

Sossin, Lorne; Copeland, Jill M.; Pomerance, Renee M.

Subject

Criminal

Decision Content

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Nowack, 2026 ONCA 279

DATE: 20260415

DOCKET: M56765 (C67831)

Sossin, Copeland and Pomerance JJ.A.

BETWEEN

His Majesty the King

Respondent/Responding party

and

Steven Nowack

Appellant/Moving Party

Paul Slansky and John K. Phillips, K.C., for the appellant/moving party

David Friesen and Maria Anghelidis, for the respondent Crown

Scott C. Hutchison and Brandon Anand Chung, for the responding party, Toronto Police Service

Heard: April 1, 2026

REASONS FOR DECISION

- [1] This motion arose out of the appellant's appeal from conviction on 12 counts of fraud. In the motion, the appellant sought what he characterized as directions from the court and assistance in the cross-examination of a Toronto Police Services ("TPS") officer and a civilian information technology employee on affidavits provided during the appeal process to explain the failure to provide disclosure during his trial of the emails of two TPS officers. The focus of the motion is portions of emails disclosed to the appellant while the appeal was pending, which contain redactions.
- [2] On April 2, 2026, the day after the hearing of the motion, we issued an endorsement confirming the April 10, 2026 perfection deadline, previously set by the case management judge, and dismissing the motion, with reasons to follow. These are our reasons.

Factual background

- [3] After the jury returned verdicts of guilt on 12 counts of fraud over \$5,000, the appellant brought an application before the trial judge for a stay of proceedings on the basis of abuse of process. The trial judge dismissed the abuse of process motion, finding that it had no reasonable prospect of success. That decision and a related disclosure application are reported, respectively, at 2019 ONSC 5551 and 2019 ONSC 5345. One aspect of the abuse of process application was an allegation that two TPS officers had deleted emails relevant to the investigation that should have been produced as disclosure. During the hearing of the disclosure and abuse of process applications before the trial judge, the Crown took the position, based on information provided by TPS, that the emails had been deleted and were not available for disclosure.
- [4] That turned out to be wrong. During the appeal process, in 2021, the TPS discovered that the emails of the two officers still existed. In February 2022, the Crown provided disclosure to the appellant of: the two officers' emails; an explanation of why it had been believed that

they were deleted; and details of the investigation that led to the discovery that the emails were still available. The disclosure was provided in the form of affidavits from one of the TPS officers whose emails had been thought deleted but were subsequently found, from a civilian TPS information technology employee, and from another civilian TPS employee.[1] The affidavits included the emails of the two officers at issue.

- [5] The appellant has cross-examined extensively on these affidavits.
- [6] In March 2024, a panel of this court heard and decided a motion brought by the appellant which sought, *inter alia*, the appointment of a special commissioner to conduct an inquiry under s. 683(1)(e) of the Criminal Code, 1985 R.S.C., c. C-46, in relation to the emails, and to preside over the examination of various witnesses in furtherance of the inquiry. The panel dismissed the motion, with reasons reported at 2024 ONCA 180.
- [7] The March 2024 motion panel concluded that the appellant had failed to demonstrate any reasonable possibility that pursuing an inquiry could lead to the discovery of evidence that might meet the admissibility test for fresh evidence. Now in possession of the emails, the appellant had failed to point to anything in the emails that would have been relevant at trial or could have affected the result. He failed to show in any way that his right to make full answer and defence was hampered by the late disclosure of the emails. The panel further found that the record provided no basis to suggest that the TPS or the prosecuting Crown was ever anything but honest and open about what they knew at the various times they advised the trial judge that the emails had been deleted. As such, there was no air of reality to the appellant's submission that the conduct of the police or the Crown could amount to an obstruction of justice or that it was undertaken in a manner that undermines the integrity of the administration of justice: at paras. 8-11.
- [8] The appellant cross-examined the three affiants in October 2024. After that round of cross-examination, the appellant requested additional disclosure from the Crown. In particular, he requested the email correspondence for the years 2021 to 2024 of the three affiants related to the emails that had wrongly been thought deleted. This time period was long after the investigation into the appellant was completed and after the trial was completed. The Crown voluntarily provided the emails for the 2021 to 2024 time period, but with redactions for claims of privilege by the TPS and lack of relevance for the Crown.
- [9] The appellant requested to conduct further cross-examination of two of the affiants. These cross-examinations took place in October 2025 and produced hundreds of pages of transcript. The only questions refused were those where the TPS asserted privilege over redacted material.
- [10] We discuss in more detail in the analysis below the context of the emails containing redactions.

- [11] The appellant brought a second panel motion in December 2025. In that motion, the appellant sought to compel answers to questions in cross-examination of the affidavits about the emails, and further disclosure related to the emails. The panel dismissed the motion, with reasons reported at 2025 ONCA 857.
- [12] The December 2025 motion panel found that the record was clear that everything relevant to the emails had been produced and the only productions or answers refused related to documentation over which solicitor-client privilege was claimed. The panel also concluded that nothing in the remaining documents produced after the March 2024 panel motion or answers during cross-examinations that had occurred since the March 2024 panel motion altered the conclusions reached in the March 2024 panel motion – namely, that nothing in the record showed that the TPS and the Crown was ever anything but honest and open about the emails, and that there was no air of reality to the appellant’s claim of abuse of process and no reasonable possibility that further disclosure could reasonably be expected to produce evidence that would support the claim of abuse of process.
- [13] Because of a scheduling conflict for counsel for the TPS, the TPS did not participate in the December 2025 panel motion. Both the case management judge and the December 2025 motion panel in its decision made clear that issues related to the redacted portions of the emails and the TPS’s claim of privilege were not to be and were not decided in that motion.
- [14] Paciocco J.A., in his role as case management judge, held two further case management conferences with the parties after the December 2025 panel motion decision. In the directions from those conferences, Paciocco J.A. expressed the opinion that, although the appellant wished to pursue a motion to determine whether refusals to answer questions in cross-examinations related to the redactions from the exhibits to the affidavits about the emails were subject to solicitor-client privilege, such a motion had no apparent merit. He wrote:

First, there is no interest in resolving privilege claims in the absence of an air of reality that the information sought may ultimately be admissible as fresh evidence. Although the panel motions did not address directly the privilege claims, even with the benefit of extensive disclosure and cross-examination Mr. Nowack has been unable to provide a factual foundation to demonstrate an air of reality for the underlying abuse of process claim he seeks to make. There is no reasonable basis for believing that a privilege motion could lead to cogent evidence capable of supporting appellate intervention.

- [15] Paciocco J.A. set a deadline for the appellant to perfect the appeal of April 10, 2026, which was not to be delayed for purposes of bringing a further motion or preparing the fresh evidence record. He scheduled this motion for April 1, 2026.

Positions of the parties

- [16] The appellant argues that the information sought – details of the redactions in the 2021 to 2024 emails – is first-party disclosure covered by the principles in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326. He further argues that he is simply exercising his right to cross-examine on documentation already produced, and on which this court has permitted cross-examination under s. 683(2) of the Criminal Code. As such, he argues that the TPS must justify its claim of solicitor-client privilege with evidence. The appellant argues that the TPS has not established that the redacted material is subject to solicitor-client privilege, and even if it were, the TPS has waived the privilege by the partial disclosure of the emails.
- [17] The respondents argue that the appellant's motion is a motion for production under s. 683(1) (a) of the Criminal Code, and as such, the test for production from *R. v. Trotta* (2004), 23 C.R. (6th) 261 (Ont. C.A.), applies. They argue that the appellant's request for production does not satisfy the Trotta test. As a result, it is not necessary to consider whether the redacted material is subject to solicitor-client privilege. In addition, the TPS argues that if the court reaches the issue of privilege, the record establishes its claim of privilege and there has been no waiver.

Analysis

- [18] As we will explain, we reach the conclusion that this is a motion for production under s. 683(1)(a) of the Criminal Code. Therefore, the Trotta test applies. The appellant has not satisfied the court that there is a reasonable possibility that ordering production of the redacted portions of the emails will result in evidence that may be received as fresh evidence on appeal. In other words, we are not satisfied that there is a reasonable possibility that ordering production of the redacted portions of the emails will assist in developing a successful, or even a viable, ground of appeal.
- [19] Pursuant to ss. 683(1)(a) and (b) of the Criminal Code, this court may order the production of “any writing, exhibit or other thing connected with the proceedings” and order a witness to be examined where the court “considers it in the interests of justice” to do so. In *Trotta*, at para. 25, this court held that a two-part test is to be applied where a party seeks production of records and testimonial evidence in aid of a fresh evidence motion. The applicant must demonstrate that:
- There is a reasonable possibility that the order for production or testimony could assist on the motion to produce fresh evidence; and
 - There is a reasonable possibility that the order for production or testimony will result in evidence that may be received as fresh evidence on appeal – i.e., that it will meet the fresh evidence admissibility test.

- [20] In the context of this appeal, the second branch of the test from Trotta must be read in light of this court's subsequent decision in *R. v. Singh*, 2010 ONCA 11, 250 C.C.C. (3d) 187 at paras. 39-40. The fresh evidence application the appellant ultimately seeks to pursue relates to the integrity of the trial process – disclosure and his related claim of abuse of process – rather than the substance of the convictions. Thus, when considering whether there is a reasonable possibility that an order for production will produce information which may be received as fresh evidence on appeal, the relevant fresh evidence test is that outlined in *R. v. Widdifield* (1995), 100 C.C.C. (3d) 225 (Ont. C.A.), rather than the test from *R. v. Palmer*, [1980] 1 S.C.R. 759; *R. v. Tran*, 2024 ONCA 542, at para. 26.
- [21] The fundamental concern under the second branch of the Trotta test is the same in either situation. As this court explained in *Singh*, at para. 40, it is “aimed at requiring that the moving party show a reasonable possibility that a production order will assist in developing a successful ground of appeal.”
- [22] The appellant argues that the Trotta test does not apply because the material he is seeking should be characterized as first-party disclosure and not third-party disclosure. Respectfully, the appellant is wrong for two reasons.
- [23] First, the appellant misreads Trotta. The test outlined in Trotta applies to motions for production under s. 683(1)(a) whether the material sought is characterized as first-party or third-party disclosure. In Trotta, at para. 23, Doherty J.A. explained that, while the Crown's disclosure obligation continues through the appellate process, “the resolution of disclosure disputes on appeal will require a somewhat different analytical framework than that described in *Stinchcombe*.” He explained that there are at least two reasons for applying a different framework to disclosure disputes on appeal: first, a convicted person is no longer presumed innocent; and second, a convicted person has exhausted their right to make full answer and defence: see Trotta at paras. 20-25.
- [24] Thus, whether the test enunciated in Trotta applies hinges on the fact that a dispute about disclosure arises during the appeal process, not on whether it is third-party, rather than first-party disclosure. As a result, in this case, the Trotta test applies whether the documents sought by the appellant are characterized as first-party or third-party disclosure.[2]
- [25] Second, even if the appellant were correct as a matter of law that the Trotta test does not apply to documentation characterized as first-party disclosure, the record does not support the conclusion that the material he seeks is first-party disclosure. While the relevance threshold in *Stinchcombe* extends beyond matters directly impacting guilt or innocence (for example, issues related to Charter breaches or abuse of process), it is not infinitely elastic.
- [26] As outlined above, the aspect of the appellant's abuse of process claim that gives rise to this motion concerns the failure of the Crown to disclose emails of two TPS officers during the trial. The Crown has now provided disclosure to the appellant of the officers' emails, an explanation of why it was believed that they were deleted, and details of the investigation that led to the discovery that the emails were still available. The appellant has been provided

with the opportunity to cross-examine extensively on the substance of all issues related to why it had been believed that the emails were deleted and the investigation that led to the emails being found.

- [27] What the appellant now seeks is one step removed from the two officers' emails that he was earlier told had been deleted and the investigation into that issue. He seeks information about the process by which the TPS worked with TPS legal counsel and Crown counsel, several years after his conviction, to respond to further disclosure inquiries from the appellant. All the factual information about why the two officers' emails were not initially disclosed and the subsequent finding of the emails has been provided to the appellant and has been subject to cross-examination by the appellant. The information that the appellant now seeks about the process by which the TPS prepared responses to his further disclosure inquiries – covering the period between 2021 and 2024 – goes beyond first-party disclosure under Stinchcombe.
- [28] While the appellant argues that he is merely seeking to exercise his right to cross-examine, we agree with the respondents that this is, practically speaking, a request for production governed by the test in Trotta. The appellant's production request also goes beyond what would reasonably be covered by the right to cross-examine on the circumstances leading to the belief that the emails of the two officers had been deleted and the investigation leading to the emails being found. The redacted material the appellant seeks to access is not about the investigation leading to the discovery of the missing emails. Rather, as stated above, it is about the process followed by TPS officers and employees, working with TPS legal counsel and Crown counsel, to respond to the appellant's further disclosure inquiries.
- [29] We return then to whether the appellant has satisfied that Trotta test for production under s. 683(1) of the Criminal Code.
- [30] Two panels of this court, differently constituted, have reached the conclusion that there is no air of reality to the appellant's abuse of process claim relating to the emails of the two officers. While we are not bound by the conclusions of those panels, we reach the same conclusion on the record before us.
- [31] Reviewing the voluminous record compiled to date, there is no reasonable possibility that ordering further production will result in evidence that may meet the admissibility threshold for fresh evidence as discussed in Trotta and Singh. The appellant has not pointed to any use he could have made of the late-disclosed emails at trial or any impact the late disclosure had on his right to make full answer and defence. Nor is there any reasonable basis to conclude that the TPS or the Crown acted dishonestly or in a manner that would undermine the integrity of the administration of justice in relation to the emails mistakenly believed to have been deleted. Because there is no viable factual foundation – no air of reality – to the appellant's claim of abuse of process, there is no reasonable possibility that the additional production sought would contribute to a successful ground of appeal.

- [32] At base, the appellant's claim has two problems. First, there is no air of reality to the appellant's abuse of process claim, and thus, no reasonable possibility that ordering production of the redacted portions of the emails would lead to admissible fresh evidence or a viable ground of appeal. Second, the material now sought by the appellant – about the process of responding to the appellant's further disclosure inquiries while the appeal was pending – is at one remove from the abuse of process claim.
- [33] As a result of our conclusion that the Trotta test applies and that the appellant has not satisfied the test, it is not necessary to consider whether the redacted portions of the emails are covered by solicitor-client privilege.

Disposition

- [34] For these reasons, the motion is dismissed.

“L. Sossin J.A.”

“J. Copeland J.A.”

“R. Pomerance J.A.”

- [1] The other officer whose emails had been thought deleted and were subsequently found was no longer employed by the TPS at the time of the disclosure.
- [2] In *R. v. Jaser*, 2023 ONCA 24, at paras. 29-30, this court held that additional procedural requirements will apply when the documents for which production is sought implicate significant privacy interests of third parties. It is not necessary for the court to reach those concerns in light of our conclusion that the appellant has not satisfied the Trotta test.

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