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Rowbotham Order, Publication Ban, Sealing Order and *In Camera* Proceeding

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Case Commented On: *R v Vader*, 2018 ABCA 389

The Appellant, Her Majesty the Queen, appealed a *Rowbotham* order granted by Justice DRG Thomas on March 11, 2016, which directed the Alberta government to pay Mr. Vader's (the Respondent's) legal fees for work previously completed. The order also allowed a publication ban, a sealing order and an *in camera* hearing of the *Rowbotham* application.

Facts

In 2012, Mr. Vader was charged with two counts of first-degree murder. Mr. Beresh was retained as counsel pursuant to a Legal Aid Certificate. The certificate also approved a fixed number of hours for a student, Ms. Purser. In March 2014, the Crown stayed the charges and the certificate was cancelled (at para 2).

When the Crown reactivated the charges in December 2014, Legal Aid issued a new certificate to Mr. Beresh, who then applied to stay the charges based on abuse of process and delay. Mr. Whitling, who did not have a Legal Aid Certificate, assisted Mr. Beresh with the application. Ms. Purser also assisted but exceeded the hours pre-approved by Legal Aid (at para 3).

On March 4, 2016, when the trial was scheduled to begin, Mr. Vader submitted a Rowbotham application seeking payment for the work which Mr. Whitling and Ms. Purser had already completed. The application also included a request for continued funding for legal counsel. and that Legal Aid fund Mr. Beresh's representation of Mr. Vader at trial. By the time the application was heard on March 11, 2016, there was a new Legal Aid Certificate for Mr. Beresh's representation of Mr. Vader at trial. Accordingly, the application heard by the trial judge dealt only with the work done prior to trial without a Legal Aid Certificate (at para 3).

The Trial Judge granted the *Rowbotham* order and directed that Her Majesty the Queen pay the fees for the work completed by Mr. Whitling and Ms. Purser in the total amount of approximately $21,000. The order further directed that the application be heard *in camera*, was subject to a publication ban and that all materials filed and transcripts of the application were sealed (at para 4).

The Crown appealed the *Rowbotham* order. The Canadian Broadcasting Corporation (CBC) and CTV were given intervener status to dispute that they were not given notice in accordance with Court of Queen's Bench Criminal Practice Note #4, which deals with providing notice to the media when publication bans, or related applications are made.

Issues

This case dealt with two issues:

1- Whether there was a substantial likelihood that Mr. Vader's right to a fair trial, under sections 7 and 11 of the *Charter*, would be breached if he did not have counsel.

2- Whether a publication ban, sealing order and *in camera* hearing can be ordered in the absence of notice to the media.

Decision

The appeal was allowed. The Court of Appeal (per Justices Patricia Rowbotham, Barbara Lea Veldhuis and Frederica Schutz) held that the Trial Judge erred in granting the *Rowbotham* order and in granting the publication ban, sealing order and *in camera* hearing in the absence of notice to the media. The Court of Appeal also held that it is a trial judge's responsibility to make certain that notice to the media is provided.

Discussion

First Issue

In order to answer the first question: "whether there was a substantial likelihood that Mr. Vader's right to a fair trial would be breached if he did not have counsel" (at para 6), we have to address the *Rowbotham* application and when it is granted by the court.

In a criminal case, an accused can file for a *Rowbotham* application to have a lawyer appointed if the accused has been denied representation through legal aid and cannot afford hiring a lawyer. In this situation, the accused has the right to ask a judge to stay (suspend) their charges until the government approves the funding for a lawyer to represent them. The accused has to prove their financial situation and the nature of the offences to the court, in order for the judge to order a stay (delay of the case).

Rowbotham applications are named after a significant Ontario case (*R v Rowbotham*, 1988 CanLII 147 (ON CA)) which addressed situations when the government should fund a lawyer to represent an accused.

According to Legal Aid Alberta, if the accused has been denied legal aid, and wants a lawyer but cannot afford one, and is facing a serious criminal charge, and this serious criminal charge is too complex for the accused to run their own trial, the accused can ask a judge to appoint a lawyer for them.

The *Robowtham* application is based on the idea that the accused has a right to a fair trial, and consequently should be represented by a lawyer. This right is set out in sections 7 and 11(d) of the *Canadian Charter of Rights and Freedoms.* These sections read:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

> 11. Any person charged with an offence has the right
>
> (*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

An accused who seeks a *Rowbotham* order must prove that there is a breach under sections 7 and 11(d) of the *Charter*. The Ontario Court of Appeal stated (*R v Rowbotham* at para 156):

> …those who framed the Charter did not expressly constitutionalize the right of an indigent accused to be provided with counsel, because they considered that, generally speaking, the provincial legal aid systems. were adequate to provide counsel for persons charged with serious crimes who lacked the means to employ counsel. However, in cases not falling within provincial legal aid plans, ss. 7 and 11(d) of the Charter, which guarantee an accused a fair trial in accordance with the principles of fundamental justice, require funded counsel to be provided if the accused wishes counsel, but cannot pay a lawyer, and representation of the accused by counsel is essential to a fair trial.

The Court added that the decision of a legal aid official regarding an accused's financial means to employ counsel is entitled to the greatest respect. Nevertheless, it held that there may be rare circumstances in which legal aid is denied but the trial judge is satisfied that, due to the length and complexity of the trial, the accused is entitled to counsel. If a judge decides that an accused cannot afford a lawyer and that a lawyer is essential to a fair trial, proceedings may be stayed under s 24(1) of the *Charter* until counsel is provided (*R v Rowbotham*, at para 167).

In considering the question of whether an accused's right to a fair trial would be infringed if he is required to defend himself without counsel, the Court must consider a number of factors. The factors include the number and nature of the charges, the seriousness of the consequences upon conviction, the length of the trial, the types of issues that will be litigated during the course of the trial, the accused's education and experience, the accused's ability to understand the trial process, the accused's ability to learn about the trial process, and the accused's familiarity with the disclosure and ability to understand it (*R v Nason*, 2014 ABPC 33 at para 15).

In *R v Vader*, the Court of Appeal applied the *Rowbotham* test and stated that in order to obtain a *Rowbotham* Order, "an accused must establish that there is a substantial likelihood that his right to a fair trial under sections 7 and 11 of the *Charter* will be breached if he is without the assistance of a lawyer. The accused must also establish that he cannot afford a lawyer and that he has exhausted all possible routes to obtain counsel, including Legal Aid" (at para 5).

The Court of Appeal held that "the trial judge failed to consider and apply the test" (at para 6). According to the Court it could be assumed that Mr. Vader could not afford a lawyer. However, what was lacking "was any examination of whether there was a substantial likelihood that Mr. Vader's right to a fair trial would be breached if he did not have counsel" (at para 6). The Court considered the context in which the application arose. Legal Aid had granted a certificate to Mr. Beresh to represent Mr. Vader at the trial. The case had a long history and Mr. Beresh had represented Mr. Vader throughout. The application was argued on March 11, 2016, three days after the trial had commenced (at para 6).

Moreover, the Court of Appeal stated that there was no application to withdraw as counsel and noted (at para 7):

> Rather, counsel, Mr. Beresh, employed a pressure tactic designed to skirt any proper consideration of the Rowbotham test. The trial judge was placed in the difficult position of either resolving a fee dispute between Mr. Beresh and Legal Aid over past fees (which is not the role of the court), or facing a potential application by Mr. Beresh to withdraw.

According to the Court of Appeal, a "proper consideration of the *Rowbotham* test would have resulted in the definitive answer that the accused's right to a fair trial was not compromised because he had counsel" (at para 7).

In addition, the Court of Appeal added that (at para 8):

> A *Rowbotham* order is not, strictly speaking, a direct order to the Crown to simply pay the accused's legal fees. A *Rowbotham* order provides for a conditional stay of the accused's proceedings pending the Crown determining whether it will pay for the defence. Here, although the application sought a conditional stay, the Order does not grant a conditional stay. However, when this was pointed out to the trial judge after he had given his order, he directed that the Crown be given seven days to pay the fees.

Lastly, the Court of Appeal stated that if a *Rowbotham* application is contested, the Crown must be given the opportunity to respond, including leading evidence, cross-examining witnesses and making submissions (at para 9). The Court of Appeal cited *R v Rain*, 1994 ABCA 373 and declared that the trial judge in this case did not permit the Crown to call three witnesses from Legal Aid who were in the courtroom and ready to testify. In the Court's view, this was procedurally unfair to the Crown, and "it is not a sufficient answer to say that one affidavit, tendered by Mr. Vader, from a retired Legal Aid employee, rendered the process fair" (at para 9).

Second Issue

The second issue is related to a publication ban, sealing order and *in camera* hearing that were ordered without giving notice to the media.

Publication ban, sealing order and *in camera* hearing

Usually, judicial proceedings are open to the public where the names of witnesses, victims and accused persons are released with some exceptions. An exception can take place when the court deems a publication ban is necessary to protect victims, witnesses (for example, children and vulnerable people) and others who might have an interest in the case. The court will take into consideration the nature of charges, whom the publication ban is for, and other related factors when deciding whether to make the order.

Orders that limit access usually contain confidentiality orders, sealing orders and orders for an *in camera* (private or closed court) hearing. Orders that restrict publication generally include a ban

on identifying a person (such as a victim or witness) or on publishing facts related to the proceedings.

When a court orders a publication ban, the media is prevented from publishing certain aspects of the proceedings that are generally public, for example if the publicity may breach the accused's right to a fair trial or impact the outcome of the case. Publication bans generally take place in two ways: they can be ordered because they are required by statute (statutory) or they may be ordered at the discretion (non-statutory) of a judge to protect an accused's right to a fair trial.

Section 2(b) of the *Charter* talks about freedom of expression. This right must be protected by the government under section 1 of the *Charter* as being justifiable in a free and democratic society. However, the public's right to be informed about court proceedings has, in certain circumstances, to be balanced with the accused's right to a fair trial.

The leading case involving publication bans is *Dagenais v Canadian Broadcasting Corp.,* [1994] 3 SCR 835, 1994 CanLII 39 (SCC), which is cited by the Court of Appeal in *R v Vader*. The Court of Appeal also cited *R v Mentuck*, 2001 SCC 76. Those two cases are now referred to as *Dagenais/Mentuck* framework (at para 10).

Dagenais initiated the idea of comparing the positive outcomes of the publication ban with the negative effects to the freedom of expression of those impacted by the ban. *Mentuck* strengthened and broadened *Dagenais*' concept of discretionary publication bans. Judges apply the *Dagenais/Mentuck* test when they consider making a discretionary court order that restricts access or publication, and that was the case in *R v Vader*.

The Supreme Court in *Dagenais* (at p 878) held that a publication ban should only be ordered when:

> (a) Such a ban is necessary in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and
>
> (b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban.

When the interests are broader, courts apply the *Mentuck* test where the Supreme Court stated (at para 32) that a publication ban should only be ordered when:

> (a) Such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
>
> (b) The salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

Notifying the media

In *R v Vader*, the Court of Appeal applied Rule 6.28 of the *Alberta Rules of Court*, AR 124/2010 and Court of Queen's Bench Criminal Practice Note #4 that deals with orders that ban publication, restrict public access to criminal proceedings and deal with *in camera* hearing.

According to *Criminal Practice Note #4*, the procedure for the application is the following:

> a: The applicant must file three copies of the Notice of Application, prescribed in Form A, with the Clerk of the Court in the appropriate Judicial District and serve all interested parties except the media at least two clear days before the beginning of the proceeding to which the application relates.
>
> b: The applicant must also transmit an electronic copy of the Notice of Application to the electronic address of the Clerk of the Court of the appropriate Judicial District, at least two clear days before the proceeding to which the application relates.
>
> (i) The Clerk of the Court shall re-transmit the Notice of Application electronically to the media noted on a list to be kept by the Clerk of the Court, or his/her designate.

In *R v Vader*, the Court of Appeal affirmed that the Practice Note states that the applicant must file a Notice of Application prescribed in Form A and otherwise comply with the directions of the Clerk of the Court for providing notice to the media (at para 10). According to the Court, "the obvious purpose of the provisions is to ensure that where a party seeks to exclude the media, the media have notice of the proceeding" (at para 10).

The Court of Appeal declared that when freedom of expression is at stake, the media is entitled to an opportunity to be heard and must be provided with notice because it is fundamental to the process of applying the *Dagenais/Mentuck test* (at para 10).

According to the Court of Appeal, the prescribed procedure was not followed in this case. The Notice of Application was not in Form A. The Court of Appeal stated that it appeared that the application was never filed and they could only assume that counsel handed it to the trial judge on March 4, 2016. In the result, there was no notice to the media, and despite the Crown's repeated submissions to the trial judge that notice should be given to the media, the trial judge refused to do so (at para 11).

The trial judge ordered a publication ban and sealing order without requiring Mr. Vader to give notice to the media in accordance with the practice note. The media was entitled to notice of the application, and it was the trial judge's responsibility to see that notice was given (at para 11):

> Once notice had been given, the trial judge, upon hearing submissions from the media, could have weighed the advantages and disadvantages of granting the various confidentiality protections sought by the respondent.

Conclusion

In both criminal and civil cases, courts have ruled that individuals might have a right to ask the government to fund a lawyer to represent them in order to protect their right to a fair trial. Nowadays, more people are going to courts to request a *Rowbotham* order, because they were denied legal aid.

However, counsel should not take advantage of that. In *R v Vader*, Mr. Vader was represented by Mr. Beresh who had a Legal Aid Certificate. The fact that Mr. Vader had counsel, did not compromise his right to a fair trial under the *Charter* and did not meet the requirements for a *Rowbotham* order.

As for the publication ban, sealing order and *in camera* hearing, the Court of Appeal in *R v Vader* made it clear that the media was entitled to notice, and to an opportunity to be heard and take part in the proceedings. A party who makes an application for a discretionary publication ban must give notice to the media, and it is the trial judge's responsibility to ensure that the notice had been given.

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