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A Smart Decision – Access to Counsel for the Poor and Disabled in a Legal Aid Crisis

Written by: Sarah Burton

Case commented on: *R v Smart*, 2014 ABPC 175

Access to justice advocates should to take a few moments to review *R v Smart*, 2014 ABPC 175, where the Honourable Assistant Chief Judge Anderson stayed proceedings against three accused persons who could not afford counsel, but did not qualify for Legal Aid. While such applications are not uncommon, the evidence considered in *Smart* extends far beyond the norm. This extensive evidence, coupled with Judge Anderson's probing commentary on access to justice, places a welcomed spotlight on Alberta's Legal Aid funding crisis. In *Smart*, Judge Anderson sought to provide concrete guidance to courts facing similar applications. While he accomplished this task, his engagement with access to justice issues may be the more lasting legacy of the judgment.

Facts

Three accused persons in unrelated cases were denied Legal Aid counsel because they exceeded the program's financial limits. Each accused derived substantially all of their income from the Assured Income for the Severely Handicapped ("AISH") program – $1,588.00/month (in one case $1608.00/month). They each submitted affidavits stating that they were denied legal aid, had little to no disposable income and could not afford to pay a lawyer. They all expressed discomfort self-advocating and communicating orally. With the exception of one accused, they had each made various unsuccessful efforts to retain counsel outside of Legal Aid.

Each accused was facing a charge of assault in addition to other offences (including possession of a weapon for a dangerous purpose, uttering threats, indecent exposure, breaking and entering, and breach of probation). Their defences were varied – self-defence, deceit by the alleged victim, and issues relating to mental capacity. Each accused was afflicted with at least one mental disorder (including Fetal Alcohol Spectrum Disorder, Attention Deficit Hyperactivity Disorder, and anxiety with a severe lack of memory). The Crown was seeking jail time in all cases.

The applicants sought to stay the proceedings against them pending the appointment of state counsel (commonly known as a "Rowbotham Application"). To increase efficiency, and to allow for extensive evidence on Alberta Legal Aid, the separate applications were consolidated.

The Nature of a Rowbotham Application

A Rowbotham Application (named for *R v Rowbotham*, [1988] OJ No 271, 1988 CanLII 147 (Ont CA)) is a conditional stay of proceedings granted where trial fairness is compromised by a lack of counsel. While the *Charter* does not contain a blanket right to legal representation, ss. 7 and 11(d) of the *Charter* demand

that counsel be appointed if a case is so complex and serious that a fair trial cannot proceed without a lawyer. Judge Anderson aptly described the Rowbotham Order as a "pay or stay" system – either the government pays for state-funded counsel, or the charges against the accused are stayed (at para 17).

There are three basic elements of a successful Rowbotham Application: "(a) the accused must have sought the assistance of Legal Aid and been rejected, having exhausted any avenues of appeal, (b) the accused must be indigent, and (c) the charges must be sufficiently serious and complex to warrant judicial action" (at para 19). When jail time is sought, the case is often considered sufficiently serious (at para 149). Complexity requires an examination of the charge, the defences and the capacities of the accused (at para 161).

Evidence and Submissions

A typical Rowbotham Application focuses on the accused's income and expenses, and an assessment of the case against him or her. In this regard, the accused persons in *Smart* submitted affidavit evidence of their financial circumstances, and the Court received summaries outlining the nature of the charges against them.

The affidavits were not ideal – they outlined each accused person's estimated income and expenses with little (or no) exhibits to back up the figures. These estimates sometimes created the impression that the accused had a significant surplus of cash at the end of each month. Yet in oral examination, each accused indicated they never had extra money by month-end.

In addition to this typical evidence, *Smart* also considered the social restraints and background context of the applications. This evidence was provided through the CEO of Legal Aid (Ms. Suzanne Polkosnik Q.C.) and a member of the junior Edmonton criminal defence bar with experience working for Edmonton Student Legal Services (Ms. Tara Hayes). This additional evidence was candid and striking. It detailed the extent of Legal Aid's limitations, and the relative lack of options for persons who (barely) do not qualify for Legal Aid. For present purposes, the following key points were discussed:

- Legal Aid has three categories of service. As the level of service increases, the financial eligibility limit decreases. Only the third category (with the lowest eligibility cap) provides the full legal representation relevant to a Rowbotham Application (at para 26).

- Financial eligibility guidelines are based on income and family size. Legal Aid officers have the discretion to exceed these guidelines by up to 15%, and no more. For a single person seeking full legal representation, the financial guideline is $1,348/month, and $16,170/year (both thresholds must be satisfied). Persons receiving AISH earn $38.00 more than the 15% discretionary threshold permits (at paras 3, 30).

- $2.5 million of Legal Aid's budget is a "contingency fund" to cover unpredicted costs, which includes court-ordered legal aid representation. This amount is in peril of being exhausted, at which point money will come from a different source of Legal Aid's budget (at paras 23, 24).
- Student Legal Services is a student legal assistance office. The students operate as agents, not lawyers for an accused. They only act on summary conviction offences, and they do not act in cases where there is a foreseeable risk of jail (at para 43).

- For a non-complicated matter, Ms. Hayes seeks a retainer of $1,500. Her quoted fee for an uncomplicated one-day trial was approximately $3,000 (at para 44).

The Decision

Judge Anderson granted the three Rowbotham Applications. He did this despite significant shortages in the affidavit evidence, unexplored appeals to Legal Aid, and questions regarding the prospect of jail time.

With regards to the affidavit evidence, the applicants' quoted figures were often lacking in both accuracy and documentary corroboration. In some cases, they failed to demonstrate that the accused could not afford counsel. Judge Anderson held that the affidavits were made with best efforts, but that they (significantly in some cases) understated the applicants' expenses (see e.g. at paras 194, 195). Each applicant lived below the poverty line and testified that they had no money at the end of the month. The Court accepted this evidence. Further, the Crown's complaints did not resonate, because it failed to question these inaccuracies while cross examining the applicants (see e.g. at para 184).Thus, these clearly lacking affidavits (somewhat counterintuitively) lent credence to the applicants' claims that they required counsel.

Judge Anderson was not persuaded that the charges were insufficiently serious to require counsel. The Crown argued in one case that jail time, while sought, was unlikely to be ordered. Judge Anderson was not swayed, noting that the Crown's decision to seek jail time caused the accused's Student Legal Services counsel to withdraw (at para 199). The fact that jail time was possible, though unlikely, seemed to further support the applicant's position that he needed counsel.

Judge Anderson's decision was also impacted by the accused persons' clear (though yet unproven) brain injuries and/or mental disorders. While there was no proof that the persons suffered from the mental disorders, Judge Anderson refused to ignore "the elephant in the room" (at para 206). A person under a mental disorder is less able to defend themselves adequately. Moreover, proving that a mental disorder impacted the accused persons' *mens rea* (as in the FASD case) is very difficult and complex. Being under a mental disorder added weight to the argument that counsel was needed.

Lastly, Judge Anderson was not swayed by the fact that unexplored (though likely futile) efforts to retain counsel existed. Each of the accused persons in some respects failed to (a) follow through the Legal Aid appeal process, (b) contact community and support groups, and/or (c) exhaust the gambit of private criminal defence lawyers. Judge Anderson drew from Ms. Polkosnik's and Ms. Hayes' evidence to conclude that these efforts had no realistic chance of success. The accused persons had no money to retain counsel and an appeal to Legal Aid would plainly not succeed. In the interests of the timely administration of justice, the accused persons should not have to jump through useless hoops to be appointed counsel (at para 203).

Commentary on Access to Justice

While the *Smart* decision will undoubtedly be a valuable tool when adjudicating future Rowbotham Applications, its utility will extend beyond those borders. Anyone grappling with access to justice (accused persons, civil litigants and academic commentators) will find value reviewing this decision, which touches on several recurring themes in access to justice commentary. A few of these themes are explored below.

The Focus on Practical Reality

Judge Anderson repeatedly emphasized the need to focus on the practical reality that courts and accused persons face when attempting to access justice. The Legal Aid budget has created a crisis for the poor and middle class to access counsel. While lawyers are comfortable making legalistic arguments grounded in evidentiary thresholds, precedents and technical language, this approach can frustrate rather than facilitate justice. As such, when faced with access to justice concerns, judges should be focused on the realistic lived experience of the applicants. For example, Judge Anderson held that:

- The technical possibility that an accused could, over a series of months, possibly save enough to retain a lawyer should not lead to a rejection of counsel. Judges must remain focused on the accused's ability to retain counsel in a realistic timeframe (at paras 7, 197, 205).

- Applying precedents from complex cases with sizable assets may only muddy the water. The vast majority of Rowbotham Applications deal with those who are "poor…marginalized…at a low

point in life" and "tend to be those just getting by" (at para 130). The precedents from more complicated cases may not be of use for the majority of these applications (para 96, referring to *R v Malik*, 2003 BCSC 1439).

- Just because an affidavit would, on its face, suggest that counsel could be retained, a judge should look at the substance of the material and inquire if those figures are realistic. In doing so, judges should not ignore the presence of mental injuries or disorders (at para 194).

- Judges should not demand that accused persons jump through useless hoops before their application is granted. Legal Aid's discretion is set in stone. Until funding changes, there is no point delaying justice while the accused pursues a doomed appeal (at paras 176, 203, 204).

- When assessing case complexity, judges often underestimate or ignore the complexity of a defence. Cases that first appear simple can become exceptionally complex when a defence is raised. In these cases, judges will find themselves drawing heavily on basic life and judicial experience (at paras 164, 167).

Underlying this focus on practicality is the recognition that Rowbotham applicants are often self-represented. They are often the least equipped to be making their application, and they often arise in the least favourable setting (a faced-paced, high volume docket court) (at para 115).

In such circumstances, judges must recognize that self-represented parties should not be treated as though they are experienced counsel. Assistance is needed, but at the same time, judges have to respect the boundaries of the adversarial system (at para 113).

The Proper Role of Judges

Stemming from this, some have suggested that the risk of trial unfairness without counsel is overblown because judges can ensure that a trial proceeds fairly. Judge Anderson cautioned against this approach for two reasons. First, it ignores the role of defence counsel in creating a fair playing field. Judges cannot advise an accused on strategy or preparation – they can only address the unfairness present in the courtroom. The trial is only the tip of the iceberg when launching a criminal defence (at paras 111-112).

Second, relying on the trial judge to protect self-represented parties draws the judge "into the fray" and risks creating a reasonable apprehension of bias (at para 110). Judges have to remain impartial and neutral in the courtroom. They must not only ensure a fair trial proceeds, but that the trial appears fair in the eyes of the public. When judges get pushed out of the neutral role, the appearance of fairness to in the courtroom can be compromised.

The Costs Associated with Legal Aid

Discussions about Legal Aid must proceed unburdened by false assumptions. In particular, people generally believe that Legal Aid and Rowbotham Orders are a drain on taxpayer dollars. This belief is built on two false notions.

First, Rowbotham Orders are not an additional cost on taxpayers – the money to pay a lawyer comes out of Legal Aid's existing budget (at para 14). Second, the assumption that Legal Aid costs money fails to consider the costs incurred by the justice system when counsel is not present. As Judge Anderson noted:

> [15] Anyone on the front lines of the justice system will recognize the important role that defence counsel plays in allowing matters to proceed efficiently. Judicial experience shows that when accused persons are not represented, the number of appearances tends to increase, the number of adjourned trials tends to increase and the length of trials tends to increase, each of which involves

> significant cost to the government through judicial, prosecutorial, clerical and security costs.

The Responsibility to Support Indigent Accused Persons

The Crown attempted to argue that Rowbotham Applicants must seek out *pro bono* counsel or financial assistance from friends or family before being appointed counsel. Judge Anderson unequivocally rejected both suggestions.

As for *pro bono* counsel, Judge Anderson found it insulting to suggest that the criminal bar ought to be burdened with fulfilling the government's obligation to provide counsel. He stated:

> [140] The Court categorically rejects this expectation as a requirement to show need in a Rowbotham application. As is well known to the courts, no segment of society does more to assist the indigent facing prosecution by the state, on a pro bono basis, than the defence bar.
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> [141] Providing access to justice is the obligation of the government, not good-willed citizens. The *Charter* protects against state failures not the failure of citizens to make up for state short-comings. With the greatest of respect to the contrary views expressed in some of the jurisprudence, this expectation and its underlying assumptions are insulting to both the impecunious and to the Bar.

He was equally affronted by the suggestion that an accused must seek money from family and friends:

> 144 … [I]t would be dangerous and in many cases unfair to both the accused and the third parties, if the Court was to make [requesting money from family or friends] a pre-requisite to a Rowbotham Order.
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> [145] It is the state that is seeking to hold the accused to account for his or her actions and ensure that the prosecution of that action is fair. Prosecutions are not brought by individuals and it would not be fair to require individuals to fund a matter that is not being brought on their behalf but rather on behalf of society at large.

These statements firmly place the responsibility for ensuring counsel on the government. While members of society can step in to assist a particular person in need, this cannot minimize the government's *Charter* obligation to guarantee a fair trial.

Concluding Thoughts: Rowbotham Orders and the Future of Civil Legal Aid

Given the position of the accused persons in *Smart*, I would predict that most readers approve of Judge Anderson's order to appoint them counsel. This is a sentiment I share, but one which is complicated by my concerns for the civil legal aid system.

The vast majority of Rowbotham Orders are made in criminal cases. Persons accused in the criminal legal system do not enjoy a blanket constitutional right to counsel, but Rowbotham Orders provide a solid footing to prevent trial unfairness. This is not so in the civil system. Section 11(d) of the *Charter* does not apply outside the criminal sphere. As jail time is not on the table in civil actions, they are often not serious enough to trigger s. 7 *Charter* protections. As such, civil litigants largely operate without any right to counsel (for an exception to this rule, see *New Brunswick (Minister of Health and Community Services) v G. (J.)*, [1999] 3 SCR 46).

Presently, Legal Aid offers assistance to parties outside the criminal system under extremely restrictive financial guidelines. This would include (for example) family law, immigration, foreclosure, bankruptcy,

and general civil actions. However, as Ms. Polkosnik's testimony made clear, the increasing number of Rowbotham Orders have exhausted Legal Aid's contingency fund. Future orders must draw from another source of Legal Aid's budget. While not stated, one may assume that the money to fund Rowbotham Orders is coming at the expense of the civil Legal Aid budget.

Any civil litigator can attest to the fact that the litigation system is flooded with self-represented parties who plainly cannot afford a lawyer. This slows the justice system while these litigants attempt to navigate a complex and seemingly impenetrable maze of legal procedures. For the self-represented litigant, facing (for example) financial ruin, a child custody battle, or losing their home, "access to justice" is an empty phrase that means nothing for those without money or connections (The Canadian Bar Association, Access to Justice Committee, *Reaching Equal Justice: An Invitation to Envision and Act*, (Ottawa: The Canadian Bar Association, November 2013) at Part 1).

So, while Judge Anderson's decision may be applauded, we cannot ignore the fact that criminal Rowbotham Orders are merely re-shuffling the burden of an underfunded Legal Aid system to other unfortunate people with fewer protections.