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## When is Legal Aid Funding a Right in Criminal Cases?

**By:** Serena Eshaghurshan

**Case Commented On:** *R v Acain*, [2020 ABPC 6 \(CanLII\)](#)

On December 10<sup>th</sup>, 2019, the Honourable Judge L.R. Grieve of the Provincial Court of Alberta (ABPC) heard and rendered a decision on a *Rowbotham* application, which is an application made for court-ordered counsel. The Applicant, Rowel Acain, was charged with impaired driving related offences pursuant to sections 320.14(1)(a) and 320.12(1)(b) of the *Criminal Code*, RSC 1985, c C-46. Mr. Acain's application for state-funded counsel was denied.

### Facts:

On April 20<sup>th</sup>, 2019, Mr. Acain was charged with impaired operation of a motor vehicle, contrary to s 320.14(1)(a) of the *Criminal Code* and operating a vehicle with a blood alcohol concentration exceeding 80mg/100 ml of blood, contrary to s 320.14(1)(b) of the *Criminal Code*. As the charges were laid after the December 2018 modifications to impaired driving laws, the potential penalty was far more serious than previously. The Crown elected to proceed through summary conviction procedure, and Mr. Acain potentially faced two years less a day imprisonment, a hefty fine, or both. Fortunately for Mr. Acain, the Crown was 'only' seeking a \$2,000 fine and a one-year driving prohibition. While it appeared to be a typical impaired driving case, it was further complicated by the fact that Mr. Acain is a permanent resident. He was very worried about the impact a conviction would have on his citizenship application. Mr. Acain was also worried that a conviction may result in his deportation.

Mr. Acain made an application to receive legal aid funding for a lawyer. However, Legal Aid determined that Mr. Acain's household income (\$59,557.73 from June, 2018 to May, 2019) was too high for eligibility. Mr. Acain then made a *Rowbotham* application. He argued that "he is unlikely to have a fair trial unless represented by legal counsel" and that "the *Charter of Rights and Freedoms* will be breached unless the Applicant is represented by a lawyer" (at paras 11 and 12).

### The Law

In rendering his decision Judge Grieve outlined the relevant law for a *Rowbotham* application. In *R v Smart*, [2014 ABPC 175](#), the requirements for the application were laid out:

- a) The Applicant must have applied to Legal Aid, been rejected and exhausted any avenues of appeal.
- b) The Applicant must be indigent, (suffering from extreme poverty); and

- c) The charges must be sufficiently serious and complex to warrant judicial action. (cited in *Acain* at para 33; emphasis added)

The requirements of the *Rowbotham* test were further elaborated in *R v Crichton*, [2015 BCCA 138](#):

First, the applicant’s financial circumstances must be ‘extraordinary.’ The applicant must provide detailed financial evidence of his or her financial circumstances... The applicant must save money to hire counsel or contribute to his or her legal fees, and make efforts to borrow money from friends or family. The applicant should try to obtain employment or additional employment if already employed. The applicant should try to find counsel who would be willing to work at (Legal Aid) rates. The applicant must reasonably exhaust his or her own assets to pay for counsel before looking to the taxpayer to pay for a lawyer. The applicant must demonstrate that he or she was prudent with his or her personal living expenses and show foresight and planning of his or her financial affairs to pay for a lawyer. (cited in *Acain* at para 35, emphasis added)

### **Mr. Acain’s Financial Situation**

Mr. Acain’s financial situation was not fully disclosed to the Court. However, it was found that he lived with his wife, daughter, her spouse and their children in an apartment in Canmore. The total rent was \$1,400, but Mr. Acain and his wife only contributed \$400. Both Mr. Acain and his wife had a car, but no explanation was provided as to why one (let alone two) cars were necessary. In 2018, Mr. Acain’s income working as a hotel housekeeper was \$32,656, and he spent an extended time travelling to the Philippines in the earlier part of the year:

what the costs were for return flights to the Philippines, who all went and what the food, travel, and entertainment costs were while there for two months, was not disclosed to the Court. (at para 19)

The Court also discovered that Mr. Acain was constructing a 3,600 square foot house in the Philippines, stating: “one can only assume he owns the land he is building on” (at para 20). Mr. Acain also had credit cards with several banks, a tax-free saving account, an RSP and a line of credit. Many of details regarding the credit cards, saving accounts, RSP and line of credit were not adequately disclosed to the Court.

Interesting, Mr. Acain also received several deposits into his account from May 2019 to November 2019:

- a) Almost \$1,500 from the Great West Life Assurance Company. Why he received this and whether he will receive more funds is unknown.
- b) He received \$4,510 in e-transfer deposits. Why he receives this money in this fashion and unknown and whether he will receive more is unknown to this Court.
- c) \$3,535 in cash deposits. Why he received this money and whether there are to be more deposits is unknown. (at para 26)

After his criminal charges, Mr. Acain also withdrew nearly \$18,00 from his bank account, which was used for “various on-line purchases, for investments, money withdrawn as cash from ATM’s, or money transferred to other unknown bank accounts” (at para 27). Mr. Acain also spent nearly \$1200 at liquor stores, restaurants and other stores, and even admitted to the Court that he made no tangible effort to reduce his spending (at para 29). He also consulted only one lawyer, who instructed him the cost of a trial was \$11,000.

## Decision

Judge Grieve was not impressed with Mr. Acain’s lack of disclosure and his expensive lifestyle. He held that because incarceration was not a potential consequence of conviction, it was unlikely that Legal Aid would take Mr. Acain’s case. By applying the test laid out in *Smart*, Judge Grieve ruled that:

Mr. Acain is far from suffering the extremes of poverty. He appears to have modest employment income but his entire financial situation was not fully disclosed. If he does not have money set aside, or does not want to save for a lawyer, or does not want to be indebted for legal expenses, it is because he chooses to spend money on other things, such as travel expenses, financial gifts to family and constructing a home in the Philippines. (at para 37)

The Court also addressed Mr. Acain’s concerns regarding incarceration, deportation and citizenship. As incarceration was not sought by the Crown, there was no risk to Mr. Acain:

In my view, there is not even the ‘risk’ of jail in this case. The loss of driving privileges has never been upheld as a Section 7 *Charter* breach, being a loss of life, liberty or security of the person. (at para 38)

Furthermore, there was no tangible risk to Mr. Acain’s citizenship application:

The usual concern is when a Permanent Resident is sentenced on a ‘serious offence’ to a jail term longer than six month... there should be no concern for any jail time, let alone incarceration of six months or more. (at para 40)

The Court also dismissed Mr. Acain’s concerns regarding potential deportation. Mr. Acain would not be deported if convicted, and if he decided to leave Canada because of his conviction, it would be because of his own volition: “A criminal conviction relating to drinking and driving may influence his decision to leave, but such will not be mandatory.” (at para 41)

The Court also disagreed with Mr. Acain’s claim that his was a “rare and exceptional case” that required court-appointed counsel. The Court was not impressed with Mr. Acain’s dishonesty and expressive spending, and ruled that he failed in his duty to exhaust all avenues and means before tapping into the taxpayer’s wallet:

I disagree that this is ‘a rare and exceptional case’ warranting judicial intervention...his savings account may be empty, but that is because Mr. Acain drained it for other matters he decided to spend his money on... Mr. Acain has an obligation to be prudent, showing foresight and planning of his financial affairs to enable the financing of counsel... (at para 42)

As such, the Court dismissed Mr. Acain’s *Rowbotham* application and held that he failed to demonstrate his *Charter* rights would be violated by not having court appointed counsel.

## Commentary

In my opinion, the judgement was fair. Mr. Acain was not forthcoming with his disclosure, and what was disclosed illustrated that he was far from being destitute. Furthermore, Mr. Acain was not self-represented on this application, rather he “was assisted by experienced, very competent counsel” appointed as a Friend of the Court (at para 10). It is a sad fact that access to justice is a significant barrier in our legal system, and it is unfair when accused persons take advantage of an already over-burdened and stressed system. Organizations such as Legal Aid and Student Legal Assistance are designed with the intention of aiding the most vulnerable individuals with a competent and effective defence. However, these organizations are not designed or intended to be used by individuals who have the financial means available to hire a lawyer.

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