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- [2] The applicant is charged with one count of fraud over \$5000, and a breach of trust with intent to defraud, pursuant to their respective provisions in the *Criminal Code*, RSC 1985, c. C-46.
- [3] The applicant's case is in the Ontario Court of Justice and a preliminary inquiry is scheduled for October, 2024.
- [4] This hearing commenced before me with *viva voce* evidence adduced by the applicant. Following her evidence, I raised a threshold issue as to whether the application ought to continue on the basis of the record filed. Having reviewed the relevant materials and hearing the submissions of counsel, I ruled that the application was premature and without the appropriate conditions precedent in place. The application was adjourned pending certain procedural steps to be undertaken by the applicant. These are my brief reasons.

**Preliminary Issue:**

- [5] Without delving into the merits of the application, the issue at this juncture is whether the applicant had taken all of the necessary steps in advance of this hearing to request that her *Rowbotham* application be considered by this court.
- [6] Counsel for the applicant asserts that the jurisprudence provides that his client can move for such an application and a stay of proceedings pending the granting of this application, without having to submit a formal application to Legal Aid or, if unsuccessful, having filed an appeal or review undertaken.
- [7] Counsel submits that the proper interpretation of the first prong of the *Rowbotham* criteria, read disjunctively, provides that an individual can review the legal aid income threshold and criterion online, and then determine whether he or she is eligible for legal aid funding based on one's own income. It is submitted that this is not only permissive but can be accomplished without

having to proceed with the formal hurdle of submitting an application or an appeal or through the established prerequisite steps for such an application.

[8] I did not have to call on the Crown for any legal submissions.

### **Discussion of Legal Principles:**

[9] In accordance with the *Rowbotham* principles, a court's determination of whether to stay proceedings to ensure a fair trial pending the appointment of publicly funded counsel, depends on the applicant satisfying all three of the following conditions:

- i. The applicant is ineligible for or has been refused Legal Aid and has exhausted all appeals for reconsideration of his eligibility;
- ii. The applicant is indigent and unable to privately retain counsel to represent him; and
- iii. The applicant's right to a fair trial will be materially compromised absent public funding for counsel.

[10] The onus is on the applicant to satisfy each of these factors, including a basis to establish the likelihood of a s. 7 *Charter* violation. There is no absolute right to counsel in order for an accused to receive a fair trial.

[11] It is the first criterion at issue here. Apparently, the applicant contacted Legal Aid but never made any formal application to be provided with state-funded counsel. Instead, she relied on some information provided to her.

[12] With respect, counsel for the applicant misinterprets the law regarding the *Rowbotham* application process. I reject counsel's interpretation of the "disjunctive language" as referenced in some of the cases referring to the first of the three prong test in *Rowbotham*. I also disagree that there will always be some circumstances where an application to Legal Aid in the first instance will be "futile", and hence there is no need to submit an application to Legal Aid.

[13] The applicant's approach to the legal analysis to sustain avoidance of the Legal Aid process is incongruent in the jurisprudence and in reference to some of the language in the cases referred to in argument. For example, Carpenter-Gunn J.'s *obiter* comments on page 3 of *R. v. Strong*, (unreported) referring to the "ineligibility or refusal of Legal Aid, may be standard prose, but does not address the well-established process as outlined in *Rowbotham*, at para. 167, and its progeny. In fact, the preponderance of the prevailing jurisprudence suggests otherwise.

[14] In other words, while an individual may be "ineligible" *per se*, it does not negate an accused's onus or responsibility to apply for legal aid.

[15] In order to advance a request for state-funded counsel through the auspicious of a *Rowbotham* application, the applicant must comply with the recognized and well- established procedures. Such conditions precedent entail that an individual must first apply for legal aid and must be subsequently rejected on the basis of the criteria established by Legal Aid, which includes an assessment of income. Next, the applicant must advance an appeal of that decision and await the results. If the appeal is denied, a further review is required in most cases, with the eventual determination of a denial of funding.<sup>1</sup>

[16] It is settled law that a trial judge has a discretion to order a stay of proceedings pending state-funded counsel. In *R. v. Rushlow*, 2009, 96 O.R. (3d) 302 (C.A.), Rosenberg J.A., writing for the court stated:

This Court has never said that a *Rowbotham* Order is limited to an extreme case where Legal Aid's decision is completely perverse and there is a substantial possibility of lengthy imprisonment. Nor need the case be one posing "unique challenges." The authorities hold that the case must be of

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<sup>1</sup> In some limited cases, the final step of a "review" from the LAO committee's appeal decision may not be a bar to bringing a *Rowbotham* application. For example, see *R. v. Conklin*, 2012 ONSC 5259, at paras. 30-31.

some complexity, but a requirement of unique challenges puts the threshold too high. It is enough that there is a probability of imprisonment and the case is sufficiently complex that counsel is essential to ensure that the accused receives a fair trial.

[17] Various Superior courts have held that there is an evidentiary burden on the applicant and requires the applicant to demonstrate that all aspects of the application for publicly-funded counsel are properly supported and substantiated on the record: *R. v. Kizir*, 2014 ONSC 1676.

[18] In *R. v. Peterman*, [2004] O.J. No. 1758, 70 O.R. (3d) 481, Rosenberg J.A., for the court, had occasion to re-address the *Rowbotham* criteria, (albeit the issue was counsel's rate in excess of the legal aid tariff.) Nonetheless, he confirmed the applicable process and stated at para. 22, as follows:

In some cases legal aid has been refused because in accordance with legal aid guidelines the person does not qualify financially for legal aid. Where the accused seeks a *Rowbotham* order the court while giving appropriate deference to the decision of legal aid must reach his own decision about whether the accused can afford counsel. As stated in *Rowbotham* at page 69 C.C.C., 'there may be rare circumstance in which legal aid is denied but the trial judge, after an examination of the means of the accused, is satisfied that the accused because of the length and complexity of the proceedings or for other reasons cannot afford to retain counsel to the extent necessary to ensure a fair trial.' However when a court makes a *Rowbotham* order, it is not conducting some kind of judicial review of the decision made by legal aid authorities rather, it is fulfilling its independent obligation to ensure that the accused receives a fair trial.

[19] I observe that in the case of *R. v. Bancroft*, 2019 ONSC 1931, Ratushny J. denied a *Rowbotham* application for one set of charges arising out of Belleville, as the applicant failed to complete the application process for Legal Aid: at paras. 26-28. She also commented on whether the final denial or review was necessary in the circumstances of the case: at para. 31. This presupposes that the applicant initiated the original application to Legal Aid.

[20] In *Bancroft*, at para. 3, the jurist reiterated that "the courts determination of whether to stay proceedings pending the appointment of publicly funded council

depends on the applicant satisfying all three of the following prerequisites on the balance of probabilities: (a) Legal Aid: the applicant is ineligible or has been refused legal aid and has exhausted all appeals for reconsideration of his eligibility ...”

[21] In *R. v. Martel*, [2009] 94 O.R. (3d) 60, (C.A.) at para. 8, the court stated:

In our view, the respondent’s decision not to avail himself of the legal representation available to him through the Legal Aid services cannot be equated with the denial of Legal Aid. On the facts of this case, it is agreed that legal representation was available and that council was prepared to act for the respondent under the terms of the certificate offered by Legal Aid. In a circumstance of this case he denial of Legal Aid was a prerequisite to the granting of a *Rowbotham* order. Absent that denial, there was no need to consider the other factors relevant on a *Rowbotham* application.

[22] In *R. v. Odah*, 2016, ONSC 6370, Durno J. held at para. 13: “A failure to provide full and frank financial disclosure to LAO or providing materially different information on the court application will be relevant on the *Rowbotham* application. The onus is on the applicant and a finding that he or she failed to provide full and frank financial disclosure to LAO has the potential to impact on his or her credibility and or reliability on the *Rowbotham* application: See also paras. 6, 7, and 8.

[23] In sum, the applicant must avail herself of the well-established process for state-funded counsel through Legal Aid – and be denied on appeal and review, as one of three fundamental criteria prior to seeking a *Rowbotham* application. As mentioned the jurisprudence is replete with this form of direction: For example, see *R. v. James*, 2011 O.J. No. 4651, at paras. 20, 22, *R. v. Abbott*, 2016 ONSC 1284, at para. 9; *R. v. Chugta*, 2021 ONSC 1735, at para. 20; *R. v. Myers*, [2016] O.J. No. 7326, at para. 16; *R. v. Lascelles-Williams*, 2011 ONSC 7406, at paras. 5 – 7; *R. v. Montpelier*, [2002] O.J. No. 4279 (S.C.) at para. 37; *R. v. Atkinson*, 2017 ONSC 2658, at para. 10; *R. v. Baoteng*, 2011 ONSC 739, at paras. 6, 16-17.

**Conclusion:**

[24] The *Rowbotham* application is adjourned. The conditional stay will be extended for 30 days and may continue, provided that the applicant takes the appropriate steps and provides a fulsome and complete application to Legal Aid, without undue delay. Should an appeal of any denial to the local area committee be required, the stay may be continued if the applicant undertakes such appeal expeditiously. Following an unsuccessful appeal, a review is generally necessary. However, in this case, given the imminent date for the preliminary inquiry, such a review may not necessarily be required, if time is of the essence.

[25] Any failure to take the appropriate, timely steps in advance of the potential *Rowbotham* application will warrant a lifting of the stay. This order is made without prejudice to the applicant to renew this application, should the appropriate factors be satisfied.

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A. J. GOODMAN, J.

**Date:** March 28, 2024

**CITATION:** R. v. Cayuga, 2024 ONSC 1889

**DATE:** 2024-03-28

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**B E T W E E N:**

HIS MAJESTY THE KING

Respondent

**- and -**

SHARON CAYUGA

Applicant

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**PRELIMINARY RULING ON ROWBOTHAM  
APPLICATION**

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A. J. GOODMAN, J.

**Released:** March 28, 2024