

BACKGROUNDER

What are my options from here?

If you have been denied Legal Aid and cannot afford to pay for a lawyer, there is another option. You can apply to the Nova Scotia Provincial Court to ask for a lawyer who will be funded for you. This is called a *Rowbotham* application.

A *Rowbotham* application is named after the Ontario Court of Appeal decision in *R v. Rowbotham*, [1988] OJ No 271, 41 CCC (3d) 1 (ONCA). You can search and read more about the *Rowbotham* decision on the Internet.

The decision in *Rowbotham* means that you have a constitutional right to have a lawyer if it is necessary for fairness of trial and if you have unsuccessfully tried all possible ways to find a private or publicly funded lawyer to take your case.

If your application is successful, the court will stay (pause) the case. Next, the Attorney General will look at the Court's order and decide if the costs of a lawyer should be paid for in your case. The Attorney General is the top government lawyer. Nova Scotia has one and so does the Federal government. Which Attorney General will decide about funding the costs of a lawyer to represent you is dependent on the type of offence you are charged with. Usually it will be the Attorney General of Nova Scotia who decides, but if you are charged with a federal offence, such as a drug offence, then the Attorney General of Canada will make the decision about funding. The Attorney General of Nova Scotia funds the *Rowbotham* lawyer if your application is successful, no matter if you are charged with a federal offence or not.

If the Attorney General agrees with your application, then you will have to find a lawyer to take on your case. You will not be expected to pay for the lawyer yourself because the lawyer's costs will be covered for you.

If at all possible, it is strongly recommended that you get advice from a lawyer to help you with this application.

Where do I apply?

The information provided here is only for *Rowbotham* applications in the Nova Scotia Provincial Court.

If your case will be tried in Nova Scotia Provincial Court, then you must submit your application to the Nova Scotia Provincial Court. If your case will not be heard in Nova Scotia Provincial Court, you would apply to the court that will hear your case.

For example, if your case will be tried in the Nova Scotia Supreme Court, you would make the application to the Supreme Court, not the Nova Scotia Provincial Court. This is because the forms or processes for this application may be different in the Nova Scotia Supreme Court.

If my Rowbotham application is successful, what will the lawyer do?

The lawyer will represent you at trial. He or she will do this in a number of ways, such as questioning witnesses and making arguments to the court.

Rowbotham lawyers are usually only provided for trials. It is very unlikely for the court to approve a *Rowbotham* application for any other part of a case. This is because the trial is usually the longest and most complicated part of the proceeding, so there is a much greater chance of unfairness to you. Trial is also where the verdict of guilty or innocent is decided, so the stakes are higher. See the Ontario case *R. v. Valenti* 2010 ONSC 2433 for more information.

The factors for a successful *Rowbotham* application are explained below.

What does the application involve?

You have to convince the court that your application should be approved. If you are successful, the court can temporarily stay (pause) the case until you have retained a lawyer.

You must include evidence to support your *Rowbotham* application. At the very least, this evidence must focus on two areas, (1) fairness of trial and (2) that you cannot afford to pay for a lawyer. These are explained in more detail below.

1. Can there be a fair trial without a lawyer?

There are many reasons that effect the court's decision about whether a lawyer is necessary for a fair trial. You should bring up these factors in your application. The factors include:

- i. seriousness of the charge;
- ii. chance of going to jail if you are convicted;
- iii. how complex the case is;
- iv. length of the trial;
- v. your education level;
- vi. your reading and writing skills; and
- vii. experience or knowledge you have with the criminal process.

These factors are important to mention in your notice of application, your affidavit and/or your brief (there are more details on these in the next section, titled “How do I present this evidence to the court?”).

2. Are you unable to afford to pay for a lawyer?

It must be very clear that you cannot afford to hire a lawyer. The types of evidence you must include for this are:

- i. ***Proof of denial from Nova Scotia Legal Aid.*** You must not qualify for Legal Aid. This proof must include an appeal of the original decision to not provide Legal Aid. The appeal must have been denied as well, or else this requirement will not be made out. There are a number of steps to prove this denial of Legal Aid. They are listed here.
 - a. You will have to sign a Release of Information. This form will be provided to you by the Attorney General of Nova Scotia.
 - b. This release gives permission to Nova Scotia Legal Aid to release your application and all of the financial information you provided to them with your Legal Aid application. You should also provide the Legal Aid Appeal Committee Summary Sheet and/or the Legal Aid Appeal Committee decision to the court because it gives the reason why your appeal was denied.
 - c. Legal Aid will provide a copy of your application and the financial information you gave them to the Attorney General of Nova Scotia and the Provincial Court. Legal Aid will also confirm to the Attorney General that you do not qualify for Legal Aid.
- ii. ***You must show the court that you cannot afford to hire a lawyer on your own.*** It is important to know that the judge will look at your entire household income when he or she decides if you can afford a lawyer, not just your own individual income. This means the judge will take into account the income of your spouse or other family members. There are many other factors that will be considered by the judge to determine if you can afford to hire a lawyer. The evidence you provide should focus on:
 - a. the amount of expenses you have, including business and family expenses, and any current daily living expenses;
 - b. your efforts to save money to pay for a lawyer since charges were laid;
 - c. any attempts you made to borrow money to pay for a lawyer. This includes efforts to borrow from children, parents or other family members;
 - d. employment and income, including attempts to obtain employment or obtain additional employment to increase your income and be able to pay for a lawyer;

- e. efforts to look for lawyers who are willing to work at a rate you can afford;
- f. if there is anything you can sell or use to raise funds to help you pay for a lawyer; and
- g. the value of any other items you receive a financial benefit from, even if that item is registered in someone else's name or being held or used by someone else.

How do I present this evidence to the court?

To make this application to the court and present all the information in the right way, there are certain forms you will have to complete as part of the court's process.

The necessary forms are listed below and draft forms are available on the Courts of Nova Scotia website. You can complete these forms and submit them to the person or address noted on each form. Be careful when submitting these forms to be sure that you submit each one to the correct location. Also, please ensure that you keep for yourself a copy of all forms and any documents you attach.

- **Notice of Application** – see Form 1.A. This lets the court know that you are making a *Rowbotham* application. This is where you set out the reasons for your application.
- **Release of Information (Waiver) form** – see Form B. This is the form you will send to Nova Scotia Legal Aid to give permission for the release of information regarding your Legal Aid application, including proof that you were denied Legal Aid.
- **Affidavit** – see Form 2.A. An affidavit presents your sworn evidence. Sworn evidence means that you have promised that the information in your affidavit is true.

In the affidavit, you must include information about your financial situation. You should include and attach all documents that prove your written statements. These documents might include bank slips, pay stubs, income tax returns, credit reports, listings of bank accounts or investment holdings, credit applications, employment history, union memberships and more. You can also give some additional evidence at the hearing of your *Rowbotham* application. A lawyer for the Attorney General might ask you questions about the evidence you include in your affidavit. This is known as a cross-examination. Form 2.A is a sample affidavit to show how an affidavit should be written.

- **Brief** (*optional*) - Evidence, such as facts, has to go into your Affidavit. You can also prepare a brief, which is a document similar to a letter. The brief is optional. This gives more detail about the reasons you have included in your Notice of Application (see above or Form 1.A). The focus is on why your application should succeed. These reasons would include the factors noted above under the heading “What does the Application involve?” By writing about these factors, you can be sure the court knows that you cannot afford a lawyer and that you need a lawyer in order to have a fair trial. You can include the names of other court decisions that you feel are helpful to your case, but do not include printouts of those cases.