

If You Can't Get
a Lawyer for Your
**Criminal
Trial**



Legal
Services
Society

British Columbia
www.lss.bc.ca

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How to Make a
Rowbotham
Application

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This booklet explains the law in general. It is not intended to give you legal advice on your particular problem. Because each person's case is different, you need to get legal help. The information in this booklet was up to date as of November 2009.

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When can I ask a judge to appoint a lawyer for me?

If you:

- have been denied legal aid,
AND
- want a lawyer but cannot afford one,
AND
- face a serious criminal charge,
AND
- face a complex criminal charge,

you can ask a judge to appoint a lawyer for you.

This booklet explains:

- Why a judge can appoint a lawyer for you.
- What you have to prove to the judge.
- When and how to ask the judge to appoint a lawyer for you.
- How to prepare for court.
- What happens in court.
- Where you can get legal help

Why can a judge appoint a lawyer for me?

The Canadian Constitution (Charter of Rights and Freedoms) says you have the right to a fair trial.

Judges have a duty to protect your right to a fair trial. The courts have decided that sometimes a person can't have a fair trial if he or she doesn't have a lawyer.

If you want a lawyer and you have been denied legal aid, you can ask the judge to appoint a lawyer for you.

The judge decides on the basis of four things:

1. You have been denied legal aid.
2. You can't afford a lawyer.
3. You face a serious charge.
4. You can't defend yourself because the charge is too complex for you.

If the judge decides that you need a lawyer to get a fair trial, the judge can order a delay of your case, which is called a "stay."

If the judge orders a stay, you won't have to return to court for a trial unless the Crown (the government) agrees to pay for your lawyer.

What do I have to prove to the judge?

You have to convince the judge of four things.

1. You have been denied legal aid

You need to show the judge proof that you have been denied legal aid. If the legal aid refusal letter said you could appeal, you will also have to show that you appealed, but legal aid turned you down again.

The judge will want to know why legal aid denied your application.

Be prepared to show the judge any written documents you received about your legal aid application.

2. You can't afford a lawyer

You have to show the judge that you can't afford a lawyer. Give the judge a clear picture of your finances.

Be prepared to tell the judge about such things as:

- your job situation
- your monthly income and expenses
- your assets and debts, if any
- your dependants (for example, children that you support)

It helps if you have some documents to support what you tell the judge. For example, if you are on social assistance (welfare), bring your recent cheque stubs. You could also bring a personal financial statement along with an income tax return, bank records, or the receipts for support payments.

If you don't provide enough information, the judge will probably not appoint a lawyer for you.

It may also help if you can estimate what it will cost to have a lawyer defend you. This will depend on how long your trial is expected to last. To help you figure this out, ask a lawyer for an estimate of his or her time and fees for a case like yours (to find a lawyer who can answer this question, see "Where can I get legal help?" on page 8).

3. You face a serious charge

You have to show the judge that you are charged with a serious offence. Usually “serious” means you will probably go to jail if convicted. If the Crown will be seeking a jail sentence if you are convicted, you are facing a serious charge.

Ask the prosecutor to give you (in writing) his position on sentencing if you are convicted *after a trial*. This may be different from what is written on Crown counsel’s **initial sentencing position**, which only states the prosecutor’s position if you plead guilty to the charge.

Sometimes penalties other than jail can be serious too. For example, if you need a car to do your work, and a conviction might mean you lose your driver’s licence, that would be a serious consequence.

You have to show the judge that the penalties you face if convicted will have a serious impact on your life.

4. You can’t defend yourself because the charge is too complex for you

You have to show the judge that your case is too complex for you to defend yourself. For example:

- Your case may raise technical legal issues.
- The trial procedure may be difficult for you to follow.
- There may be too much evidence or too many witnesses for you to handle on your own. (This may be especially true if you’re in jail.)

Ask a lawyer to explain what is complex about your case (to find a lawyer who can answer this question, see “Where can I get legal help?” on page 8). Also ask the lawyer to help you identify what defences you plan to use.

If you can, talk to a lawyer *before* you go to court. If you can’t talk with a lawyer beforehand, ask the judge to help you identify what is complex about your case.

Let the judge know about your:

- education level
- language ability
- knowledge of the criminal process

This will help the judge decide if you are able to defend yourself.

When and how do I ask the judge to appoint a lawyer?

To get the judge to appoint a lawyer for you, you have to make a request for a government-funded lawyer.

This request is called a *Rowbotham* application.

Rowbotham is the name of an important Ontario case about the right to a government-funded lawyer.

Apply to the court where your trial will be heard

Criminal trials in BC take place in Provincial Court or Supreme Court. Where your trial is heard depends on what kind of offence you're charged with. It may also depend on how you choose to be tried (some offences give you a choice of courts).

Do not wait to make an application even if you are not sure which court will hear your trial. Ask a lawyer to explain where you should apply (to find a lawyer who can answer this question, see "Where can I get legal help?" on page 8).

Apply as soon as possible

Try to apply as soon as you know you can't get legal aid. What you need to do depends on whether your trial has started.

- If your trial *has not yet started*, see below.
- If your trial *has already started*, see page 5.

If your trial has not yet started

If you want to make a *Rowbotham* application and your trial has not yet started, you have to fill out two forms. Copies of these forms (with instructions) are in this booklet, starting on page 13. They are:

- **Affidavit:** This is a sworn, written statement that gives background information. You take this form to a lawyer, a commissioner, or a notary public and you swear in front of him or her that the information is true. Then you sign the form. The Affidavit form is on page 13.
- **Notice of Application and Constitutional Issue:** This is a document that tells the local Crown office as well as the federal and provincial governments that you're asking for your case to be delayed until a government-funded lawyer is appointed to represent you (you're asking for a **stay of**

proceedings, which you may be entitled to do under the Constitution). The constitutional issue is based on your right to a fair trial. The Notice of Application and Constitutional Issue form is on page 15.

Here's what you need to do:

1. Follow the instructions on the two forms. The instructions are in the left-hand column.
2. Take the Affidavit to a lawyer, a commissioner, or a notary public to be sworn and signed. There is usually a commissioner at the court registry.
3. Make four copies of the signed Affidavit and Notice of Application and Constitutional Issue.
4. Take the originals and all copies of the forms with you to the court where your case will be heard.

The staff at the court registry will look at the forms and ask you to correct any mistakes. They will give you the file number and the date of hearing so that you can fill in the remaining blanks. (Remember to fill them in on all the copies). When you are finished, they will stamp all the documents and keep the originals. Your application is now **filed** with the court.

1. Ask the registry staff for the **address for service** of the local Crown counsel. Put one copy of the Affidavit and one copy of the Notice of Application and Constitutional Issue in an envelope and mail them to this address (copy 1).
2. Mail one copy of the Affidavit and Notice of Application and Constitutional Issue to the Attorney General of Canada, and mail another copy to the Attorney General of British Columbia. Their addresses are on the form (copies 2 and 3).
3. It's a good idea to send all these documents by registered mail to keep track of them and get proof of delivery.
4. Make sure you keep one copy of each document for yourself (copy 4).

If your trial has started

You can make a *Rowbotham* application even if your trial has started. If you appear in court without a lawyer, the judge is likely to ask you if you plan to represent yourself. Tell the judge:

"I want to make a *Rowbotham* application because I can't afford a lawyer and I can't get legal aid."

Be prepared to show the judge why you need a lawyer.

Fill out the Affidavit on page 13. If possible, go to a lawyer, commissioner, or notary public and have the Affidavit sworn. (You swear in front of the lawyer, commissioner, or notary that the information in

the Affidavit is true.) Take the sworn Affidavit to court with you to show to the judge.

Fill out the checklist on page 10 and take it with you to court. This will help you explain things to the judge.

How do I prepare for going to court?

Think about what you're going to tell the judge. Use the Affidavit on page 13 and the checklist on page 10 to help you organize your thoughts.

Think about how you can prove the four points. Remember, you can use:

- your own testimony (what you say to the judge under oath)
- your Affidavit
- other documents (letters, forms, bank statements, cheque stubs, etc.)
- witnesses

Meet with a lawyer and ask for help

Ask a lawyer to go over the four points and what to expect in court (to find a lawyer, see "Where can I get legal help?" on page 8).

If you don't get legal help, you can still make a *Rowbotham* application

If you follow the instructions in this booklet, the judge will know what you are asking for.

What happens in court?

Whether you apply before or after your trial starts, at some point the judge will hold a short hearing about your application to have a lawyer appointed for you.

You go first

You speak first. Call the judge “Your Honour,” in Provincial Court, or “My Lord/My Lady,” in Supreme Court.

When you have finished, your witnesses speak.

You want to convince the judge that:

1. You have been denied legal aid.
2. You can't afford a lawyer.
3. You face a serious charge.
4. You can't defend yourself because the charge is too complex for you.

You need to give evidence on all four points.

To present your evidence, you can:

- testify under oath
- use your Affidavit
- present documents (for example, cheque stubs)
- call witnesses

The prosecutor may ask you and your witnesses some questions about your application to get a lawyer. The judge may have some questions too. When you address the judge, refer to your documents or the other parts of your evidence that support the four points that you must convince the judge of.

If the judge says you have made a mistake in the procedure, or that you are missing some documents, *don't give up*. Ask the judge for an adjournment so you can apply again. Also ask the judge to explain what you should have done in the first place.

Crown goes next

The Crown will probably try to prove that you can defend yourself because the charge is not serious or complex, or that you can afford a lawyer.

You get a chance to speak again after the Crown has finished speaking. When you address the judge, refer to the parts of your evidence that support the points you are trying to make.

The judge decides

After you and the Crown have presented evidence, the judge will decide whether to grant your application. Sometimes the court will adjourn before the judge gives the decision.

If the judge decides you should have a government-appointed lawyer, he or she will probably order a stay of proceedings. This means you won't have to return to court unless the Crown agrees to pay for your lawyer.

Where can I get legal help?

Even if you can't afford a lawyer to represent you in court, it's a good idea to talk to a lawyer before your trial. To talk to a lawyer:

- Speak to a **duty counsel lawyer** at the courthouse. If you don't have your own lawyer, duty counsel can give you advice about the charges against you, court procedures, and your legal rights (if time permits). This service is free. Duty counsel can also speak on your behalf the first time you appear in court, but they can't act as your permanent lawyer.
- Call the LSS Call Centre at **604-408-2172** (in the Lower Mainland) or **1-866-577-2525** (call no charge, outside the Lower Mainland), or your local courthouse to find out when duty counsel will be there.
- You can also hire your own lawyer. Even if you pay for just two meetings to get basic advice about your particular case, it could be worth the cost. Find out at your first meeting what kind of help the lawyer can give you and what it will cost.
- If you don't know a lawyer who handles criminal cases, call the **Lawyer Referral Service**. For \$25 (plus tax), you can call a lawyer for a half-hour appointment. If you decide you want to hire him or her, remember to ask how much you can expect to pay. Contact the service at **1-800-663-1919** (call no charge) or **604-687-3221** in the Lower Mainland.

If you live in the Lower Mainland, you may be able to get help from the **Law Students' Legal Advice Program (LSLAP)**, run by the University of British Columbia. You can get free legal advice or assistance from LSLAP if you're charged with a summary offence and aren't likely to get a jail sentence if convicted. Call **604-822-5791** to find the nearest LSLAP clinic. If you live in Victoria, the Law Centre may be able to help you. Call **250-385-1221** for more information.

For more information about the law, see the **Clicklaw** website at www.clicklaw.bc.ca. This website provides links to legal information, education, and help for British Columbians. You can find out about your rights and options to solve legal problems, find toll-free numbers for law-related help, and learn about the law and the legal system.

Checklist of points to cover in court on a *Rowbotham* application

1. I have been denied legal aid

I was turned down by legal aid

- details of when and where

I appealed and was denied again

- details of when and where

the reasons for refusing me legal aid

- details of what the legal aid worker said

To prove point 1, I will use:

- my own testimony
- my Affidavit
- letters or forms from legal aid
- evidence of my witnesses

2. I can't afford a lawyer

because of my job situation

- job record
- proof of employment or lay-off

because of my monthly income and expenses

- personal financial statement
- cheque stubs
- support payment receipts
- bills (rent, hydro, etc.)

because of my assets and debts (if any)

- personal financial statement
- bank statements
- cheque stubs
- income tax return
- property tax assessment
- bills (mortgage, taxes, etc.)

because of my dependants (children I support)

To prove point 2, I will use:

- my own testimony
- my Affidavit
- documents (see the lists above)
- evidence of my witnesses

3. I face a serious charge

I am likely to go to jail if convicted

- details of the charge (the court document also called the “Information”)
- the Crown’s position on sentencing if I am convicted *after a trial*
- my criminal record, if any

other penalties may have a serious impact on my life

- for example, driver’s licence needed for work

To prove point 3, I will use:

- my own testimony
- my Affidavit
- documents, such as paystubs that show what I do for a living
- evidence of my witnesses

4. I can't defend myself because the charge is too complex for me

- technical legal issues are involved in my defence
 - details from lawyer or ask the judge to explain
- the trial procedure is too difficult for me to follow because of
 - my education level
 - my language ability
 - my knowledge of legal process
- there is too much evidence, too many witnesses for me to handle

To prove point 4, I will use:

- my own testimony
- my Affidavit
- documents, such as a letter from a lawyer about the legal issues
- evidence of my witnesses

You will need four copies of the forms on pages 13 to 17.

INSTRUCTIONS

Staff at the court registry will give you the file number. Print the name of the registry. Print the name of the court where your trial will be heard: Provincial or Supreme.

File No. _____
_____ Registry

IN THE _____ COURT OF BRITISH COLUMBIA

BETWEEN:

HER MAJESTY THE QUEEN

and

(Applicant's name)

You are the applicant. Print your name on the line.

AFFIDAVIT

Print your name on the line.

I, _____, swear that the following is true:

List the charges you are facing.

1. That I am the accused in these proceedings and have personal knowledge of the matters referred to in this Affidavit.

2. That I am charged with:
(List the charges) _____

Check your:

- cheque stubs
- bank statement
- rent, hydro
- tax return
- bills

3. That my financial circumstances are:

- (a) my income is: \$ _____
- (b) my expenses are: \$ _____
- (c) my debts total: \$ _____
- (d) all the things that I own have a value of: \$ _____

4. That I have been refused legal aid.

5. That I have not been able to hire a lawyer because I cannot afford one.

You can list any additional reasons why a conviction may be serious: e.g., loss of driver's licence if you drive for a living.

Put down what grade you completed in school.

You can explain why you think your case is complex, if you want.

Where it says, Attorney General of _____ you will probably put "British Columbia." However, if you are charged under certain federal laws, such as the Controlled Drugs and Substances Act or the Fisheries Act, you will put "Canada."

You *must* sign in front of the lawyer or notary public.

The lawyer or notary public fills out the date and place, and signs.

6. That I believe my case is serious because I believe I may go to jail if convicted.

My case is also serious because: _____

7. That I do not know how to represent myself in a criminal trial. My education level is: _____

8. That I believe my case is complex.

My case is complex because: _____

9. I swear this Affidavit in support of an application to have a judge order that I be provided with counsel and for a stay of proceedings against me until the Attorney General of _____ provides the necessary funding for counsel.

SWORN BEFORE ME at the city of _____)
_____, in the province of _____)
British Columbia, this ___ day _____)
of _____, 20 _____. _____)

_____)
_____)
_____)
A commissioner for taking _____)
Affidavits within British Columbia _____)

Signature of applicant

When the lawyer or notary has completed this Affidavit, make **4 COPIES**.

Take these copies plus the original to the court registry. Ask for the **ADDRESS FOR SERVICE** of the local Crown counsel. Put one copy of this Affidavit and the Notice of Application and Constitutional Issue in an envelope and MAIL IT to this address (**copy 1**).

Then, MAIL ONE COPY of this Affidavit and the Notice of Application to the ATTORNEY GENERAL OF CANADA and MAIL ONE COPY to the ATTORNEY GENERAL OF BC at the addresses on the Notice of Application form (**copies 2 and 3**).

It's a good idea to send all documents by registered mail to keep track of them and get proof of delivery.

KEEP ONE COPY for yourself (**copy 4**).

INSTRUCTIONS

Staff at the court registry will give you the file number. Print the name of the registry. Print the name of the court where your trial will be heard: Provincial or Supreme.

File No. _____

_____ Registry

IN THE _____ COURT OF BRITISH COLUMBIA

BETWEEN:

HER MAJESTY THE QUEEN

and

(Applicant's name)

You are the applicant. Print your name on the line.

NOTICE OF APPLICATION AND CONSTITUTIONAL ISSUE

*(Constitutional Question Act, R.S.B.C. 1996, c. 68, Section 8;
Constitution Act, 1982, Part I, Sections 7, 11 (d) and 24(1))*

TO: **Attorney General of Canada
900 – 840 Howe Street
Vancouver BC V6E 3P9**

and

TO: **Attorney General of British Columbia
Parliament Buildings, Room 232
Victoria BC V8V 1X4**

Print the court name: Provincial or Supreme.

You get the hearing date, time, and place from the staff at the court registry.

TAKE NOTICE that the applicant will make an application to a judge of the _____ Court on the day of _____, 20 _____ at _____, or as soon after that time as the application can be heard at the _____ Court at (address): _____

Where it says, Attorney General of _____, you will probably put "British Columbia." However, if you are charged under certain federal laws, such as the Controlled Drugs and Substances Act or the Fisheries Act, you will put "Canada."

THE APPLICATION IS FOR an Order staying the proceedings until the Attorney General of _____ provides the necessary funding for counsel subject to any assessment of counsel's bill.

THE GROUNDS FOR APPLICATION ARE:

Write in the date the registry gives you.

1. The applicant has a hearing date of _____ with respect to offences, including charges of:

List all of the charges you are facing.

(list charges here) _____

Give your age and what grade you completed in school.

2. The applicant wishes to retain counsel to defend these charges. To that end, the applicant applied to the Legal Services Society for legal aid and legal aid has been refused.

3. The applicant cannot pay for a lawyer.

4. Representation of the applicant by counsel is essential to a fair trial and to the ability of the applicant to make full answer and defence. The applicant believes that the charges are serious and complex. The applicant is _____ years old and his/her level of education is _____.

5. The appropriate remedy is a stay of proceedings until the necessary funding of counsel is available.

THE CONSTITUTIONAL ISSUES TO BE RAISED AND PRINCIPLES TO BE ARGUED ARE:

6. The applicant relies on Sections 7 and 11 (d) and 24 (1) of the *Charter*, Section 650(3) of the *Criminal Code of Canada*, and the common law.

7. Sections 7 and 11(d) of the *Charter* guarantee the applicant the right to a fair hearing in accordance with the principles of fundamental justice and accordingly require funded counsel to be provided if the accused wishes counsel, cannot pay a lawyer, and representation of the accused by counsel is essential to a fair trial: *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 (Ont. C.A.).

8. Sections 7 and 11 (d) of the *Charter* also guarantee the right to make full answer and defence.

9. The proper remedy is a stay of proceedings pursuant to Section 24 (1) of the *Charter* until the necessary funding of counsel is provided: *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 (Ont. C.A.).

10. At common law the court also has authority to order a conditional stay of proceedings pending the appointment of funded counsel where representation by counsel is essential to a fair trial and the accused cannot otherwise obtain counsel: *R. v. Ewing and Kearney* (1974), 18 C.C.C. (2d) 356 (B.C.C.A.); and *R. v. White* (1976), 32 C.C.C. (2d) 478 (Alta. S.C. - T.D.).

IN SUPPORT OF THIS APPLICATION, THE APPLICANT RELIES UPON THE FOLLOWING:

- (a) the Affidavit of the applicant;
- (b) such further and other evidence as the court may permit.

Fill in this line at the registry.

DATED at _____, BC this ____ day of _____, 20____.

Sign and print your name.

Applicant's signature: _____

Applicant's name: _____

Write in your address and phone number

Address: _____

Phone: _____

Once you have completed this Notice of Application and Constitutional Issue, make **4 COPIES**.

Take these copies plus the original to the court registry. Ask for the **ADDRESS FOR SERVICE** of the local Crown counsel. Put one copy of this Notice of Application and Constitutional Issue and the Affidavit in an envelope and **MAIL IT** to this address (**copy 1**).

Then, **MAIL ONE COPY** of this Notice of Application and Constitutional Issue and the Affidavit to the **ATTORNEY GENERAL OF CANADA** and **MAIL ONE COPY** to the **ATTORNEY GENERAL OF BC** at the addresses on this form (**copies 2 and 3**).

It's a good idea to send all documents by registered mail to keep track of them and get proof of delivery.

KEEP ONE COPY for yourself (**copy 4**).

Also available

How Does a Court Order Affect Me?

If You Are Charged with a Crime

If You Can't Pay Your Court Fine on Time

Representing Yourself in a Criminal Trial

Speaking to the Judge Before You Are Sentenced

What to Do If You Are Charged with a Breach of a Court Order

What to Do If You Are Charged with Assault

What to Do If You Are Charged with a Drinking and Driving Offence

What to Do If You Are Charged with Mischief

What to Do If You Are Charged with Possession of an Illegal Drug

What to Do If You Are Charged with Possession of Property Under \$5,000 Obtained by Crime

What to Do If You Are Charged with Theft Under \$5,000

All of these guides can be read online at www.lss.bc.ca/publications

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