

Citation: *R. v. Rutley*, 2012 YKTC 117

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Registry: Dawson City  
Heard: Whitehorse

**IN THE TERRITORIAL COURT OF YUKON**

Before: Her Honour Judge Ruddy

REGINA

v.

DARREN TROY RUTLEY

Appearances:

Noel Sinclair  
Lee Kirkpatrick  
Darren Rutley

Counsel for the Crown  
Agent for Territorial Crown  
Appearing on his own behalf

**RULING ON *ROWBOTHAM* APPLICATION**

[1] RUDDY T.C.J. (Oral): The matter before me today is an application filed by Mr. Rutley for a judicial stay pending the appointment of state-funded counsel or what is commonly known as a *Rowbotham* application. Mr. Rutley is currently self-represented. He does have a history with Legal Aid, and has had three separate counsel appointed to him by Legal Aid. The first counsel was changed as a result of, it appears, medical

issues that that counsel had that precluded him from continuing. Although it is also clear to me from the information provided that, notwithstanding Mr. Rutley did not request that change, he was nonetheless dissatisfied with the services that he had been provided. Both his second and third counsel were discharged by him on the eve of trial due to his dissatisfaction with their services.

[2] The trial commenced with Mr. Rutley representing himself. We have, to date, completed the evidence on a *voir dire* in relation to a *Charter* application which Mr. Rutley has brought on his own behalf. Argument with respect to that *Charter* application has not yet been heard. Mr. Rutley has filed a number of applications, including this one, which need to be considered and determined. This one in particular needs to be considered and determined before we proceed further with the trial. Mr. Rutley recognized, during the course of his numerous appearances with respect to this matter, that counsel would be of benefit to him and hence filed the *Rowbotham* application.

[3] I should note he has brought the *Rowbotham* application with respect to all of the matters that are before the Court. There are a number of Informations, including two Informations that relate to motor vehicle offences. The only matter which is before me for trial is one of the Informations related to an aggravated assault.

[4] Now, with respect to a *Rowbotham* application it is important to recognize that it is an extraordinary application. There is no absolute or constitutional right in this country to state-funded counsel. There are, however, a number of options in place with respect to state-funded counsel. In this Territory, that option, of course, is Legal Aid. We also have had a number of applications similar to the application that is before me

today for state-funded counsel where Legal Aid has been denied to an individual, for whatever reason. In this case, it is my understanding that Mr. Rutley was denied on the basis that he had discharged two of his previous counsel. He commenced the Legal Aid appeal process, but then declined to complete it when further information was sought. I should make it clear he did not decline to pursue his appeal right on the basis that further information was sought; he declined to pursue it on the basis that he has serious concerns about the representation he has received through Legal Aid and is not interested in further Legal Aid assistance as a result.

[5] Now, as noted, there are a number of considerations and pre-conditions with respect to a *Rowbotham* application that I am required to consider. Those are succinctly set out in the decision of *R. v. Gagnon*, 2006 YKSC 52, a decision of Mr. Justice Gower of the Supreme Court of Yukon, where he indicates in paragraph 9 -- Mr. Rutley, I am in the Crown's Book of Authorities at Tab 1, page 4:

For a *Rowbotham* order to be granted, an applicant must demonstrate that:

- 1) He or she is without financial means to retain counsel;
- 2) Legal Aid funding is not available and the legal aid appeal process has been exhausted;
- 3) The appointment of counsel is required to ensure a fair trial. Here, there are three basic considerations:
  - (a) the seriousness of the interests at stake;
  - (b) the duration and complexity of the case; and
  - (c) the ability of the applicant to participate effectively without counsel.

The primary test and preconditions are set out above in paragraph 9 of Mr. Justice Gower's decision. It is important to note that that is a decision of the Supreme Court of Yukon, a higher court in this jurisdiction, and as a result I am bound by the decision of

Mr. Justice Gower. That means I am required to follow it. I am required to apply the test and the preconditions that he has set out.

[6] Mr. Rutley provided detailed information through both affidavit evidence and his submissions when he was before me on the last date; we were here for a considerable period of time, during which he detailed his concerns with respect to his prior counsel, and his reasons for discharging them. I have considered, Mr. Rutley, what you have said; I am not going to repeat it at length for the purposes of this decision, but I have considered it, and I think the fastest way for me to summarize it is to say that Mr. Rutley believes that his three prior counsel conspired against him to get him convicted, and it is for that reason that he declined to have them continue representing him.

[7] When we reached the end of submissions at our first date with respect to this application, I had a lengthy discussion with Mr. Rutley wherein I raised with him the fact that there is a requirement in law that he exhaust his Legal Aid appeal options before a *Rowbotham* application can be considered. Again, it is a precondition as set out in the *Gagnon* decision. Mr. Rutley has indicated to me today that he is firm in his position that he will not pursue his Legal Aid appeal option, that he does not feel that he should have to because of his belief that his Legal Aid counsel have conspired against him, and his firm view that he wants nothing further to do with Legal Aid in terms of assisting or representing him in any way, shape or form, so sees no reason why he should have to pursue further Legal Aid assistance.

[8] Unfortunately, I was not able to locate any decisions supporting the proposition that a *Rowbotham* application may even be considered, let alone granted, in the

absence of the applicant demonstrating that all other options regarding state-funded counsel have been exhausted, including appeal processes that relate to those, and there are certainly no decisions in the Yukon that would allow me to grant the application in the absence of exhausting the Legal Aid appeal process.

[9] I understand your reasons why, and I understand your belief that they would not assist you and that Legal Aid assistance would, in fact, be detrimental to you. I understand your reasons for choosing not to pursue it. Unfortunately, I am required to consider the application in light of what the law says. That includes both the law in the *Criminal Code* and also case law. Where it is a decision out of a higher court in this jurisdiction I have no choice but to follow it, and the law in this jurisdiction, as set out in the *Gagnon* case, clearly says that I cannot entertain nor grant a *Rowbotham* application in circumstances where the Legal Aid option, including the Legal Aid appeal process, has not been exhausted.

[10] In all of the circumstances, I have no choice, Mr. Rutley, but to rule against you with respect to your *Rowbotham* application. It is simply not open to me to do so in the circumstances.

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RUDDY T.C.J