



Legal Aid Alberta

A Just Alberta – one person at a time

If you can't get a lawyer for your criminal trial:

How to make an application to have a lawyer appointed (*Rowbotham Application*) if you have been denied representation through Legal Aid Alberta and cannot afford a lawyer.

Acknowledgement and Warning

This pamphlet has been prepared using information contained in a booklet entitled “If You Can't Get a Lawyer for Your Criminal Trial” prepared by the *Legal Services Society, BC* and is available on its website: <http://www.legalaid.bc.ca>.

The purpose of this document is to explain 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. See page 8 for further information.

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

The Court has the power, in limited circumstances, to require that a lawyer be appointed for you. This is called a “*Rowbotham Application*” and is named after an important Ontario case about the right to a government-funded lawyer.

IF YOU:

- have been denied legal aid,

AND

- want a lawyer but cannot afford one,

AND

- are facing a serious criminal charge,

AND

- this serious criminal charge is too complex for you to run your own trial,

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

Reading this document will help you to understand:

- 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; and
- what happens in court.

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 without 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. You need to prove four things to the judge:

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, Alberta Justice may have Legal Aid Alberta appoint a lawyer for you. You will have to contact Legal Aid Alberta to ensure that they have correct contact information so that the lawyer appointed will be able to contact you.

What do I have to prove to the judge?

You have to convince the judge of 4 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 Alberta Service Plan said you could have the decision reviewed, you may also have to show that you did that if Legal Aid Alberta turned you down again. However a recent Provincial Court decision, called *R. v Smart*, stated if you were denied legal aid based on financial eligibility alone, there would generally be no point in adjourning a *Rowbotham* application for the purpose of an internal Legal Aid Alberta appeal.

The judge will want to know why Legal Aid Alberta denied your application. Be prepared to show the judge the Service Plan you received from Legal Aid Alberta, and any other written documents you received about your legal aid assessment.

If you do not have a copy of your Service Plan, contact Legal Aid Alberta's Legal Services Centre at 1.866.845.3425 and ask for a copy.

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; and
- your dependents (for example, a spouse or children that you support).

It helps if you have some documents to support what you tell the judge. For example, if you are on *Alberta Works* (welfare) or *Assured Income for the Severely Handicapped* (AISH), bring your recent payment stubs. You could also bring a personal financial statement along with income tax returns, payroll records, bank records, or the receipts for support payments.

If you don't provide enough information, it may affect the ability of the judge to order the appointment of a lawyer for you.

You will also have to estimate what it will cost to have a lawyer defend you. This will depend on how long your trial is expected to last and the type of charge. To help you figure this out, ask 3 lawyers for an estimate of time and fees for a case like yours (to find lawyers 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 prosecutor will be seeking a jail sentence if you are convicted, you are facing a serious charge.

Ask the prosecutor to give you (in writing if possible) the prosecutor's position on sentencing if you are convicted *after a trial*. This may be different from what is written on prosecutor's **initial sentencing position**, which may only state the prosecutor's position if you plead guilty to the charge. You may also ask Legal Aid Alberta Duty Counsel to obtain this information and to give you a *Referral to Legal Aid Alberta*. This form will indicate why Duty Counsel felt your case was serious and whether Duty Counsel believes that the prosecutor will be seeking a jail sentence.

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; or
- there may be too much evidence or too many witnesses for you to handle on your own (this may be especially true if you are 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; and
- 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 order the appointment of a lawyer for you, you have to make a request for an order that you obtain a government-funded lawyer. This request is called a *Rowbotham* application for criminal cases.

Apply to the court where your trial will be heard

Criminal trials in Alberta take place in Provincial Court or the Court of Queen's Bench. Where your trial is heard depends on what kind of offence you are 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 cannot 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 6.

If your trial has not yet started

It is best to make your application before your trial. To make a *Rowbotham Application* when your trial has not yet started, you have to complete two forms. A copy of a **Notice of Application** and an **Affidavit of the Applicant** is attached to this pamphlet. Read them carefully, and fill in the blanks with information about yourself and your case. The forms are:

- **Affidavit of the Applicant:** This is a sworn, written statement that gives the Court background information about you and your case. Carefully complete this form, using the checklist in this document to assist you. Take this form to a lawyer, commissioner for oaths, notary public, or court clerk in order to swear that the information is true. Then you sign the form and the person who sworn you also signs.

- **Notice of Application:** This is a document that tells the local prosecutor's office that you're asking for your case to be delayed until a government-funded lawyer is appointed to represent you (you are asking for a **stay of proceedings**, which you may be entitled to have granted under the Constitution). This is a constitutional issue based on your right to a fair trial.

Here's what you need to do:

1. Complete the form by filling in the blanks and attaching any documents you have gathered.
2. Take the Affidavit to a lawyer, a commissioner for oaths, or a notary public to be sworn and signed. There is usually a commissioner for oaths at the court clerk's office.
3. Make 4 copies of the signed **Notice of Application** and **Affidavit of the Applicant**.
4. In areas where the courts have a *Case Management Office (CMO)*, you must attend at the CMO to obtain a date and time for the hearing. Once you have the date and time, fill in the file number and the date of the hearing on the **Notice of Application** on all the copies. If there is not a CMO in your area go directly to the Clerk's Office in the court house.
5. Ask the *Case Management Office (CMO)* if your matter is prosecuted by the provincial or federal prosecutor. Check the appropriate box on the first page of the **Notice of Application**.
6. Take the originals and all copies to the Clerk's Office of the court where the trial will be heard. Ask to file all the copies at this office.

The Clerk will stamp all the documents and keep the originals. Your application is now **filed** with the court. *If your case is in Court on the same or a later date, you must go to the Courtroom and adjourn the matter to the date set for the Rowbotham Application.*

You must now serve the application so that the prosecutor knows you are making a Rowbotham Application.

1. If your application is to be heard outside of Calgary or Edmonton, ask the Clerk's office for the **address** of the prosecutor's office in that location. If the application is to be served in Calgary or Edmonton, you will have already checked off the address on your **Notice of Application**.

Take the **Notice of Application** and **Affidavit of the Applicant** to the prosecutor's office. After you have taken these documents to the office and given them to the receptionist, you have then served the prosecutor.

If your matter is scheduled for Court on the same day you file your forms, you can give your **Notice of Application** and **Affidavit of the Applicant** to the prosecutor in the courtroom where you are scheduled to appear.

2. You may also mail your **Notice of Application** and **Affidavit of the Applicant** to the prosecutor's office at the addresses listed on the **Notice of Application**.

If you mail the documents, it is a good idea to send all these documents by *registered mail* to keep track of them and get proof of delivery. Bring the proof of delivery to court for your application.

3. 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. Complete and swear the **Affidavit of the Applicant** attached. If possible, go to a lawyer, commissioner, or notary public and have the **Affidavit of the Applicant** sworn. (You swear in front of the lawyer, commissioner, or notary that the information is true.) Take the sworn **Affidavit of the Applicant** to court with you to show to the judge.

Fill out the checklist on page 9 and take it with you to court. This will help you explain things to the judge.

The application may not go ahead on the same day. Be patient if the judge decides that your case must be adjourned to another day to allow the prosecutor to prepare properly for the hearing.

How do I prepare for going to court?

Think about what you are going to tell the judge. Fill in the **Affidavit of the Applicant** using the checklist on page 9 to help you organize your thoughts.

Think about how you can prove the 4 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.); and
- witnesses.

Meet with a lawyer and ask for help

Ask a lawyer to go over the 4 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 pamphlet, 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 the Court of Queen’s Bench. When you have finished, your witnesses speak.

You want to convince the judge that:

1. you have been denied legal aid;
2. you cannot afford a lawyer;
3. you face a serious charge; ***and***
4. you can’t defend yourself before the charge is too complex for you.

You need to give evidence on all 4 points. To present your evidence, you can:

- testify under oath;
- use your Affidavit;
- present documents (for example, cheque stubs) during your evidence; ***and***
- call witnesses.

After you or your witnesses testify, the prosecutor may ask you or your witnesses some questions about your application to get a lawyer. The judge may have some questions, too. Make sure they are answered truthfully. When you address the judge or the prosecutor, refer to your documents or the other parts of your evidence that support the 4 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 the last submission

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 effectively means that Alberta Justice will be ordered to provide a lawyer for you. You should contact Legal Aid Alberta's Legal Services Office at 1.866.845.3425 to arrange to give Legal Aid Alberta a copy of the court's order, and ensure they know your address, telephone number, and email. If a lawyer is not appointed, this concludes our Rowbotham application.

If the judge denies your application, you cannot appeal it. However, if your circumstances change, you can make another *Rowbotham Application* or reapply to Legal Aid Alberta.

Where can I get legal help?

Even if you cannot afford a lawyer to represent you in court, it is a good idea to talk to a lawyer before your application. Here are some suggestions:

- Speak to a **Duty Counsel lawyer** at the courthouse. *Legal Aid Alberta* has Duty Counsel available at all docket courtrooms in Alberta. 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. If Duty Counsel does not have enough time, ask when a better time would be and come back. Duty Counsel can also speak on your behalf when

you appear in court, but Duty Counsel is unable to act as your permanent lawyer. You can also ask the Clerk's Office when Duty Counsel may be available.

- You can call the *Legal Aid Alberta Legal Services Centre* at 1-866-845-3425.

- 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*. You can call a lawyer and receive a free telephone or other half-hour appointment. If you decide you want to hire the lawyer, remember to ask how much you can expect to pay. Call 1-800-661-1095 toll free.

- If you live in Calgary, you may also be able to get help from *Student Legal Assistance (SLA)* at the *University of Calgary* or in Edmonton from *Student Legal Services (SLS)* at the *University of Alberta*. You don't need to be a student to ask for help.

For more information about the law, CLG also provides a website with some information. See <http://clg.ab.ca/dial-a-law/>. This website provides links to legal information, education, and help. 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.

