
CANADA / JUDGMENT

U.S.A. v. Vasquez

2016 BCSC 198

COURT

Supreme Court of British Columbia

DECIDED

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2016 BCSC 198 U.S.A. v. Vasquez

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

U.S.A. v. Vasquez,

2016 BCSC 198

Date: 20160121

Docket: 26732

Registry: Vancouver

In the Matter of the Extradition Act,

S.C. 1999, c. 18 as amended

and

In the Matter of

The Attorney General of Canada on behalf of

the United States of America

and

David Ramon Vasquez

Before: The Honourable Madam Justice Ker

Oral Reasons for Judgment on Rowbotham Application

Counsel for Attorney General of Canada on behalf of the Requesting State:

J.M. Hansen

Appearing on his own behalf:

D. Vasquez

Place and Date of Trial/Hearing:

Vancouver, B.C.

October 23, 2015

December 11, 2015

January 6, 2016

Place and Date of Judgment:

Vancouver, B.C.

January 21, 2016

- [1] THE COURT: David Vasquez, the applicant, has filed an application for an order staying the current proceedings he faces under the Extradition Act, S.C. 1999, c. 18, until the Attorney General of Canada provides the necessary funding for legal counsel for the extradition hearing. The application is commonly referred to as a Rowbotham application, in reference to the Ontario Court of Appeal decision in *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1, 25 O.A.C. 321, which is seen largely as the genesis of this type of application in the era of the Canadian Charter of Rights and Freedoms.
- [2] The United States of America seeks the applicant's return to face a charge equivalent to conspiracy to traffic cocaine, contrary to s. 5(1) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19, and s. 465(1) of the Criminal Code, R.S.C. 1985, c. C-46.
- [3] The allegations underlying the extradition request are that the applicant is part of a conspiracy that had as its aim the trafficking of multi-kilogram quantities of cocaine within the United States. On May 1, 2014, Mr. Vasquez is alleged to have conspired to drive a load of cocaine from the State of Kentucky to the State of Ohio, and to then courier cash hidden in his car from a previous cocaine deal from the State of Ohio to the State of Kentucky.
- [4] The applicant was arrested on a warrant of provisional arrest issued under the Extradition Act on February 12, 2015, and was ordered released on bail on March 23, 2015. While the applicant was detained, he applied for and received legal aid funding for the extradition proceedings he is facing.
- [5] The applicant's girlfriend, Jessica Serrano, who attends school in the United States, used money she had saved for her tuition to post the \$10,000 cash bail that the applicant was ordered released upon on March 23, 2015. That amount has been deposited with the Court and the applicant owes it to his girlfriend.

- [6] The applicant perfected his bail and was released by approximately April 1, 2015. A lawyer was appointed by the Legal Services Society ("LSS") to represent the applicant in the extradition proceedings. The extradition hearing was scheduled for August 19, 2015. However, on July 27, 2015, the applicant's counsel was granted leave to withdraw and the extradition hearing was adjourned. The applicant sought new counsel through LSS, but his application was denied on or about August 5, 2015. LSS determined the applicant was no longer financially eligible, indicating in the termination documents (Ex. #2) filed on this application:

Your income is more than double our guidelines and the balance of your account was over our asset guidelines on July 24, 2015. The money paid back to a friend could have gone to paying for a lawyer.

- [7] On October 9, 2015, the applicant filed his Rowbotham application with an accompanying affidavit. The matter came on for hearing before me on October 23, 2015, but was adjourned as it was apparent the applicant's materials with respect to his financial circumstances were wholly inadequate to address the rigorous disclosure requirements mandated by the jurisprudence in order to demonstrate that the applicant lacks the means to retain counsel.
- [8] When the applicant's Rowbotham application was adjourned on October 23, 2015, to December 11, 2015, the applicant was directed to provide the Crown with his full financial details in terms of bank account statements and all pay slips and credit card statements so that an accurate assessment could be made of his true financial circumstances. The applicant indicated he understood and would obtain the materials.
- [9] The Rowbotham application continued before me on December 11, 2015. At that time, the applicant provided some more details of his financial circumstances and unsigned letters of support outlining his attempts to borrow money from family, as well as a failed loan application. Not enough time had been set for the hearing, and so a continuation date of January 6, 2016, was scheduled.
- [10] At the conclusion of the evidence on December 11, 2015, the applicant was directed to obtain signed copies of his letters of support. He was also directed to obtain his full bank account statement for his only bank account for the period of July 27, 2015, through January 4, 2016. The applicant indicated he understood and would do so.
- [11] I will now outline the documentation the applicant produced during the course of these proceedings. The only financial information originally before the Court on October 23, 2015, was that found in Ex. #1, the applicant's affidavit, and Ex. #2, the financial eligibility information from LSS. Exhibit #2 included the following materials:
- 1) bank account statements for a TD unlimited chequing account opened on May 25, 2015, with account activity statements through July 27, 2015;

- 2) a letter of explanation from the applicant as to the \$8,000 in his bank account, representing a loan from his cousin, Walter Maldonado, which was intended for repaying his girlfriend but was actually returned to his cousin;
 - 3) copies of four cheques to the applicant from his uncle, Roger Banegas, paying him for painting labour in June and July 2015, with a total amount of \$4,188;
 - 4) a letter from his aunt, Ingrid Acosta, confirming that the applicant resides in her home and pays \$300 a month for rent and \$150 a month for utilities;
 - 5) a letter from his uncle, Roger Banegas, confirming that the applicant was employed on his painting crew between January 2015 and February 13, 2015;
 - 6) a partial bank statement for a chequing account with CIBC showing the state of the account between March 9 and 19, 2015.
- [12] Additional financial disclosure materials were filed on December 11, 2015, and included the following:
- 1) Exhibit 3, a TD Canada Trust personal account statement as of October 23, 2015, showing the applicant to have a mutual fund TFSA account with a balance of \$249.87 and an unlimited chequing account with a balance of \$91.10. The chequing account statement is the same chequing account as the statements in Exhibit 2, which show a balance of \$1,427.86 as of July 27, 2015, and then a further balance of \$474.19 as of August 4, 2015, with no accompanying explanation for the \$953.67 of funds depleted between July 27 and August 4, 2015.
 - 2) Exhibits 4 and 5, consisting of documentation from a CIBC branch in Surrey, BC, from November 3, 2015, outlining that the applicant only has a credit card account with CIBC.
 - 3) Exhibits 6, 7, and 8, consisting of letters from the applicant's girlfriend, who has loaned him \$10,000 for his bail; his mother and siblings in Columbus, Ohio, who write that they cannot loan him any money; and, a letter from his cousin, Walter Maldonado, explaining why he sought the return of \$8,000 he loaned the applicant for the applicant to pay back his girlfriend for the bail money. It appears Mr. Maldonado was nervous that the applicant might be returned to custody and not be able to repay him the \$8,000 loan. The applicant transferred this money back to his cousin on July 24, 2015. This loan transaction was, I understand, part of the reason the applicant's legal aid certificate was cancelled in August 2015.
 - 4) Exhibit 10, a loan application completed by the applicant on November 3, 2015, with TD Canada Trust, seeking a personal credit loan of \$10,000. The applicant testified that this application was rejected.

- 5) Exhibits 11 and 12, consisting of a letter of confirmation of the applicant's employment by his uncle, as well as four duplicate cheques for wages from September 11 through October 9, 2015, totalling \$2,278.
 - 6) Exhibit 13, a CIBC credit card statement in the applicant's name showing the account activity from October 25 to November 24, 2015. The credit limit is \$4,000. Significantly, on November 2, 2015, after this Rowbotham application was commenced, the applicant put \$2,500 U.S. on this card with the foreign currency exchange recorded as \$3,361.66, to retain an attorney in Columbus, Ohio, for the charges upon which the United States of America seeks his extradition. Two other transactions totalling \$259.30 appear to be monthly charges for two different cellphone accounts.
- [13] No further updated or detailed bank account statements were provided on December 11, 2015. The applicant also neglected to provide all relevant credit card statements. These gaps in his evidence remained notwithstanding the Court's October 23, 2015, direction that the applicant provide such documentation.
- [14] On January 6, 2016, the hearing continued. The applicant provided some further documentation, including the following:
- 1) Exhibit 14, signed versions of the letters from his family members previously filed.
 - 2) Exhibit 15, an online banking statement for his TD unlimited chequing account for the period of October 1, 2015, through December 31, 2015, showing a balance of \$219.25 as of January 4, 2016.
 - 3) Exhibit 16, three duplicates of paycheques from his uncle for work installing Christmas lights between November 21 and December 19, 2015, for a total of \$1,788.
 - 4) Exhibit 17, confirmation from the TD Bank that he did not qualify for a personal loan.
 - 5) Exhibit 18, two Visa slips from November 2, 2015, each for \$2,500 U.S., paying a retainer of \$5,000 U.S. to attorney Scott Nolder in Columbus, Ohio. The applicant put \$2,500 on his Visa card and his uncle, Mr. Banegas, put \$2,500 on his Visa card. Accordingly, his uncle has loaned him \$2,500 American to help retain a lawyer in the United States of America.
- [15] In addition to the exhibits filed, I heard from the applicant. He testified about the origin of the various exhibits, the efforts he has made to borrow money, to find counsel to assist him, and his current personal circumstances.
- [16] The applicant is 22 years old. He lives with his aunt and uncle and in addition to his \$300 a month rent and \$150 a month for utilities, he pays between \$300 and \$600 a month for groceries. He does not own anything of value. He owes his girlfriend the \$10,000 currently on deposit with the court for his cash bail. He worked for his uncle as a painter and labourer from January 2015 until his arrest on February 13, 2015. He resumed working for his uncle once released on bail. He has endeavoured to obtain copies of all his paycheques from his uncle, but acknowledges a few may be missing.

- [17] The applicant testified that on January 4, 2016, he started to work as a customer services assistant at Hari Stones Ltd., a marble and granite supplier in Langley, BC. He testified his wage will be \$14.10 an hour, working eight hours a day, and he is expected to work five days a week.
- [18] The applicant failed to produce any bank statements for the period of August and September 2015, notwithstanding the opportunity to obtain those statements shortly after the commencement of the hearing on October 23, 2015, and again after the December 11, 2015, hearing. In his evidence on January 6, 2016, he explained that his bank would charge him \$15 a transaction for anything older than 90 days. While I am skeptical of that assertion, given the state of online banking services, the applicant, had he exercised some diligence after the October 23, 2015, hearing and even after the December 11, 2015, hearing, would have been able to obtain those records within the 90-day window. His failure to do so leaves a significant gap in the picture of his financial circumstances. He has also failed to provide his credit card statements from the timeframe of May 2015 through October 23, 2015, and further from November 25, 2015, through December 24, 2015.
- [19] In addition to the gaps in the evidence as to the applicant's financial circumstances, there is the fact that the applicant has, for some reason, decided to retain a lawyer in the United States. He explained in his evidence that he thought the lawyer in Ohio would be able to assist him with the extradition proceedings here, but has since learned that is not correct.
- [20] The legal principles governing Rowbotham applications are not in dispute. Counsel for the respondent provided the leading authorities and a helpful written argument outlining the governing principles and, at the outset of the hearing of the application, conceded that the applicant needs the assistance of counsel to defend himself in the extradition hearing.
- [21] Accordingly, the applicant was only required to prove, on a balance of probabilities, that he lacked the means to retain counsel.
- [22] In *R. v. Mostowy*, 2014 BCSC 2479 at paras. 8-24, I reviewed the governing legal principles that inform the analysis on Rowbotham applications. For the purposes of this application, it is sufficient to refer only to paragraphs 21-23 of *Mostowy*:
- [21] In *Malik*, Stromberg-Stein J. reviewed the governing principles and provided a comprehensive framework for assessing Rowbotham applications at paras. 22-23:

RELEVANT ROWBOTHAM PRINCIPLES

- [22] It is important to recall the relevant principles applicable to an application for state-funded counsel. These principles can be summarized as follows.

Basic Framework of Rowbotham

A trial judge confronted with:

An exceptional case;

Where legal aid has been refused;

Who is of the opinion that representation of the accused by counsel is essential to a fair trial; and

Who is satisfied that the accused lacks the means to employ counsel;

may stay the proceedings against the accused until the necessary funding of counsel is provided.

[Rowbotham]

Burden

The evidentiary burden is on the applicant to demonstrate all aspects on a balance of probabilities. (Black Pine, Jantzen; Crossman; Beauchamps)

It is a very heavy burden. (Black Pine; Seifert)

For a prospective or an anticipated breach of the right to fair trial, relief is available only on proof there is a sufficiently serious risk that the alleged violation will in fact occur. (Cai)

Standard of proof is "high degree of probability" or "real and substantial risk" (Cai); "the existence of a sufficiently serious risk or of a strong or high degree of probability". (Beauchamps)

Fair Trial

The question is whether or not, in all the circumstances, the applicant will receive a fair trial. (Rowbotham; Beauchamps; Ewing; Black Pine)

The test "is not a perfect trial, nor even removing all risk of an unfair trial". (Cai)

The essence of the test is the very real likelihood that in the absence of relief the applicant's Charter rights will be prejudiced. (Cai)

Three factors to consider: i) the seriousness of the interest at issue; ii) the length and complexity of proceedings; and iii) the ability of applicant to participate alone and effectively. (Beauchamps)

Right to Counsel

To impose a constitutionally entrenched positive duty on the government to expend public funds on the defence of persons accused of crimes would require a specific constitutional guarantee in express language. (Rowbotham; Deutsch)

Where representation of an accused by counsel is essential to a fair trial (as found by the trial court), an accused has a constitutional right to be provided with counsel at the expense of the state if she lacks the means to employ one. (Rowbotham)

There is a right to competent counsel to ensure fair trial. (Seifert)

- a. Competent counsel with the necessary experience (Beauchamps)
- b. The required level of legal representation ensures that the applicant's answer to the allegations of guilt is made available to the adjudicating court (Cai)

There is no right to counsel of choice (Cai; Crossman; Seifert)

- a. The "best around" is not the test. (Cai)
- b. The applicant is not entitled "to the most favourable proceedings that it is possible to imagine". (Beauchamps)
- c. The right to funded counsel is not synonymous with a right to free counsel. (Spellacy; Guilbride)
- d. The right to counsel does not amount to the right to unlimited fees or funds. (Crossman; Dobbie)
- e. Evidence is required as to why a particular client-solicitor relationship merits preserving at the state's expense. (Seifert)
- f. Consider whether a reduced role by counsel would suffice. (Keating; Rowbotham)

Cost of Counsel

The availability of legal aid is a relevant consideration. (Crossman, White)

- a. The applicant must be denied legal aid. (Black Pine; Rowbotham; Beauchamps; Cai)
- b. The applicant must have exhausted all appeal processes. (Black Pine)

Unfairness to counsel paid the legal aid tariff is not the same as an unfair trial. (Cai)

There is no jurisdiction to order the Attorney General to pay the fees of counsel where legal aid is available. (Johal)

Cost of fees must be determined to:

- a. Show the court whether fees can or cannot be paid by applicant.
- b. To consider the reasonableness or adequacy of the legal aid tariff to obtain competent counsel. (Beauchamps)
- c. However, there is a presumption the legal aid scheme constitutes sufficient provision of counsel. (Cai)

Financial eligibility

The applicant's financial circumstances must be extraordinary. (Jantzen; Black Pine; Francis; Crossman; Seifert). Difficult circumstances are not enough. (Normand)

The applicant must provide detailed financial evidence of his/her financial circumstances. (Jantzen; Black Pine; Kovach, Regier, Seifert)

The applicant must provide detailed evidence of attempts to obtain legal representation. (Black Pine)

The applicant must make efforts to:

- a. Save money; (Jantzen; Black Pine)
- b. Borrow money; (Jantzen; Beauchamps). This include efforts to borrow from children or family members; (Seifert)
- c. Obtain employment or additional employment; (Jantzen; Black Pine)
- d. Look for counsel willing to work at legal aid rates; (Jantzen)
- e. Exhaust all efforts to utilize assets that the applicant owns to raise funds. (Jantzen; Black Pine; Beauchamps; Regier; Mitton)

If the applicant can pay some of the costs, s/he is expected to do so. (Jantzen)

The applicant must be prudent with his/her expenses and show foresight and planning of financial affairs to enable financing of counsel: (Jantzen; Regier; Dobbie; Normand; Nightingale; Guilbride)

Lack of planning or foresight need not be planned or deliberate.

The inquiry into the applicant's financial circumstances go back to the time the charges were laid or time of arrest. (Jantzen; Regier; Black Pine)

An applicant who claims to be indigent is not entitled to state-sponsored funding where they have made themselves indigent. (Seifert; James)

An applicant who declines to borrow funds on reasonable terms may properly be considered to have chosen to represent himself. (Dennis; Couture)

An applicant may be obliged to repay the Attorney General all or a portion of the legal costs. (Rowbotham; Couture; Spellacy; Dennis)

Consideration of Spouse

In assessing the applicant's financial circumstances, the income and assets of a spouse are relevant considerations. (Jantzen; Mitton; Pearen)

- a. This principle could apply to the family generally (especially children). (Bruneau)
- b. It would be understandable for a spouse to decline to assist if resources came from her or her family. (Seifert; James)

- c. There is no legal requirement for a spouse to fund an applicant's defence. (Hopfner; Spellacy)

It is relevant to inquire whether the applicant has a spouse, children or other relatives in order to assess:

- a. His or her financial responsibilities to his or her family; and
- b. To determine whether s/he might be able to obtain assistance from those people. (Beauchamps; Ciglen; Deutsch; Mitton; Normand; Bruneau)

Remedies

Stay of Proceedings (Rowbotham; Beauchamps)

- a. This is an appropriate remedy under Charter s. 24(1). (Rowbotham)
- b. It is a remedy of last resort, only to be entered in the clearest of cases. (Keating)

Order requiring government to provide applicant with the services of state-funded counsel. (Beauchamps)

- a. Government enjoys flexibility in fulfilling its constitutional duty. (Beauchamps)
- b. Courts are not the best qualified to determine spending priorities for public funds. (Cai)

The court does not have jurisdiction to set the amount of fees it considers reasonable. (Beauchamps; Cai; Johal; Mitton; Deutsch; Crossman; Seifert)

- a. It is not the task of court to interfere in the allocation of limited resources of the state. (Beauchamps)
- b. The court does not have jurisdiction to interfere with the internal administration of legal aid (Beauchamps; Cai)

Charter s. 24(1) is designed to promote an effective, convenient and just solution in order to avoid cost, delay and inconvenience. (Beauchamps)

There may come a point in the trial where an applicant may have to come back to court and establish a financial need. (Mitton)

CRITERIA REQUIRED TO ESTABLISH INDIGENCY

[23] The Rowbotham jurisprudence establishes that, to be eligible for state funding, Mr. Malik must present detailed financial evidence to demonstrate:

- a) extraordinary financial circumstances;
- b) attempts to obtain funds to retain counsel;
- c) prudence with expenses and prioritization of payment of his legal fees;

- d) efforts to save for the cost of counsel and to raise funds by earning additional income;
- e) he has made all reasonable effort to use his assets to raise funds, for example by obtaining loans;
- f) whether he is in a position to pay some of the costs of counsel;
- g) the income and assets of his spouse and family.

[22] In *Edrissi, Stromberg-Stein J.* confirmed the primacy of Malik and reiterated the heavy burden placed upon the applicant, stating at para. 7:

[7] The evidentiary burden is on the applicant; it is on a balance of probabilities however. It has been described as a heavy burden. The authorities, including Malik, state that a substantial degree of evidentiary disclosure is required before the extraordinary remedy of a conditional stay of proceedings may be considered. That includes income, employment particulars, bank and credit card statements, income tax returns, assessments, invoices, contracts, mortgages, loan agreements, receipts of living expenses, property and financial statements breaking down the applicant's financial circumstances, as well as corroborating documentation including with respect to value and ownership of property, assets, and equity, as well as efforts made to pursue all possible avenues of financial assistance available to obtain funds to retain counsel.

[23] In *D.N., Verhoeven J.* added the following about the financial information that must be provided on such applications, stating at paras. 9-10:

[9] In *R. v. J.D.J.*, [2002] B.C.J. No. 1436 (B.C.S.C.) Lander J. summarized the financial information the applicant must provide, and some of the relevant financial considerations: (para. 11)

- Applicant's financial circumstances must be "extraordinary";
- Applicant must provide detailed financial evidence of his/her financial circumstances which includes supporting evidence;
- Applicant must make own efforts such as:
 - saving money;
 - borrowing money;
 - obtaining employment or additional employment if already employed;
 - looking for counsel who may be willing to work at LSS rates;
 - exhausting all efforts to utilize assets that the applicant owns to raise funds;
 - applicant who is in a position to pay some of the costs of counsel will be expected to do so;

- applicant must be prudent with his/her expenses and show foresight & planning of financial affairs in order to enable the financing of counsel;
- in assessing an applicant's financial circumstances, the income and assets of his/her spouses is a relevant consideration;
- the inquiry into the applicant's financial circumstances must go back to the time the charges were laid or time of arrest.

[10] Similarly, Ross J. described the level of financial disclosure necessary for the applicant to demonstrate financial eligibility in *R. v. Black Pine Enterprises Ltd.*, [2001] B.C.J. No. 2926 (paras. 3 - 4):

The applicant must establish first to the court's satisfaction that he or she is not able to afford to retain counsel. In the course of this investigation, the case law has settled that the applicant must provide detailed evidence of his or her financial circumstances and their attempts to obtain legal representation, including such matters as property and financial statements, statements of expenses and income, affidavit evidence with respect to the possibility of additional sources of income having been investigated and found wanting, possible sources of economy not being available, for example, in relation to matters of discretionary spending.

The applicant must show that he or she has made efforts to obtain counsel at reasonable rates. The applicant must show planning and foresight at least from the stage of arrest so that it is not enough to come to court and say that today my expenses exceed my income. There must be evidence of efforts to organize the financial affairs to accommodate the retaining of counsel. The cases have said that the applicant's financial circumstances must be truly extraordinary in order to justify the extraordinary remedy of a conditional stay. The applicant must show that he or she has made efforts to save and to earn additional income, and finally the applicant must show either that he or she has no assets which can be utilized or that every effort has been made to utilize what assets are available to raise funds.

[23] The only issue then on this application is whether Mr. Vasquez has established, on a balance of probabilities, that his financial circumstances are beyond simply difficult and are such that they can be described as extraordinary. Counsel for the respondent argues that the applicant has failed to meet the heavy burden imposed upon him to show he cannot retain counsel. Essentially, the respondent argues the applicant has failed to provide a clear picture of his true financial circumstances. I agree.

[24] The applicant was given two opportunities to obtain all his banking documents for the period between May 2015 and the time of the hearing of this application. He told the Court that he would and then failed to do so. This oversight has left a two-month gap in the applicant's banking records for August and September 2015, a two-month period where he was working for his uncle during the summer months as a painter.

- [25] More significantly, however, he decided to use his limited funds and a loan from his uncle to retain counsel in the United States. This outlay was not a prudent use of resources in the current circumstances. His first priority has to be dealing with the extradition proceedings here, as that is the first step in the process. Moreover, it was done at a time after the Rowbotham application in this Court had already commenced.
- [26] In Mostow, I further addressed the issue of indigency at paras. 51-54 and 56-58:
- [51] The second branch of the test on this application, the financial circumstances of the applicant, is the most challenging to decide. Most accused persons who come before the court on a Rowbotham application are not sophisticated businessmen like Mr. Malik or Mr. Edrissi. They are often unsophisticated individuals with little financial support to assist them in dealing with their legal problems.
- [52] As Smart J. noted in Kim at para. 53:
- [53] While the burden on an accused to establish financial need is quite properly an onerous one, it is not an unrealistic one. We do not expect perfection from people in planning their finances to ensure they can retain counsel. We do, however, expect a reasonable and sincere effort to save or otherwise obtain the funds necessary to retain counsel when they do not qualify for legal aid. Rowbotham orders are not for those accused who deliberately or recklessly fail to do all they reasonably can to be able to fund counsel themselves.
- [53] The nature of the applicant's financial circumstances must be extraordinary. There must be evidence of diligent efforts to obtain counsel, what counsel would cost, what can be done by way of personal circumstances, either doing without certain discretionary expenses, calling on family and friends, taking additional employment, seeking more remunerative types of employment, those [sorts] of efforts. There must also have been a degree of prudence, foresight, and planning.
- [54] The applicant must allocate his resources once he knows he is going to be criminally charged in such a way that a court can say he has done everything possible to place himself in a situation of being able to fund counsel but still cannot do so.
- ...
- [56] In Malik, Stromberg-Stein J. addressed the issue of indigency at para. 33, stating:
- [33] As the principles above suggest, indigency is an inability to pay or contribute to legal fees despite best efforts to prioritize payment of those legal fees by saving, borrowing or otherwise raising funds for such payment, and consequently being incapable of retaining counsel in ample time to ensure a fair trial. However, even where an applicant is found to be indigent, if he is able to contribute to his legal fees, either in whole or in part, presently or in the future, then he has a legal obligation to do so. The provision of legal services at no cost to the applicant is not a Charter right. As a result, where the Province offers funding to an applicant for this purpose, it can establish repayment requirements consistent with an

applicant's ability to pay.

[57] The numerous cases relied upon by counsel for the respondent clearly establish that an applicant must provide the court with evidence sufficient to prove that:

- a) he has lacked the means to retain or contribute to the cost of counsel since he became aware that counsel would be required to defend him;
- b) he has behaved proactively and prioritized his legal expenses throughout the time he knew he needed counsel; or
- c) he has fully explored all avenues of raising funds, making efforts to save, reduce expenses, and borrow against or dispose of assets; and
- d) he has made efforts to locate counsel willing to work at affordable rates solely to fulfill the required function.

[58] Moreover, an applicant must demonstrate:

- a) he has been prudent and prioritized legal expenses: Grindlay at paras. 21-23. Lack of foresight and planning militate against such an order;
- b) he has made every effort to raise funds from equity and assets, including raising funds based on business assets and good will: Seifert at para. 36; R. v. Guilbride, 2003 BCPC 59;
- c) where there is manoeuvrability in the applicant's finances such that he could realize or offer security in assets held or marshal other resources in order to contribute to the cost of counsel, he must do so before he can be considered financial eligible for a Rowbotham order: Edrissi; D.N.

[27] What the evidence establishes in this case is that the applicant is of limited means. However, there is an absence of evidence that the applicant has organized his financial affairs or otherwise prioritized his legal expenses since the time his legal aid certificate was terminated and he became aware he needed to retain counsel.

[28] There is an evidentiary gap in the banking records for the two months of August and September, and no explanation for the expenditure of \$950 between July 27 and August 4, 2015. There is no evidence of the efforts to retain counsel here in British Columbia or what counsel would cost to retain.

[29] There has been little explanation of the applicant's personal circumstances or efforts to curb discretionary expenses, such as what appears to be two rather expensive cellphone costs on his credit card statement. In short, there is little to no evidence of a degree of prudence, foresight, or planning.

[30] Finally, the applicant now appears to have a full-time job. While his wage is modest, it would appear he might be able to contribute some funds to retaining counsel, or at least contribute to the cost of counsel through legal aid.

- [31] Accordingly, given the state of the evidence presented on this application, I am unable to conclude that the applicant has made adequate financial disclosure to establish that he is indigent. Moreover, I am unable to conclude that he has made every effort to organize his financial affairs from the time that his legal aid certificate was terminated and his counsel withdrew on July 27, 2015, in order to pay the cost of counsel for the extradition hearing in this jurisdiction or to contribute to the cost of counsel.
- [32] Accordingly, the applicant has failed to satisfy the financial eligibility branch of the Rowbotham test. For these reasons, the burden in this case has not been met and the application is dismissed.

"Ker J."

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