

Child Protection Court *Rowbotham* Applications for a Court Appointed Lawyer

If you can't get a lawyer for your child protection 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.

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 9 for further information.

Steps:

- Read this package.
- Complete the **Notice of Application** and **Affidavit of the Applicant**.
- Get supporting documents.
- Make 3 copies of the application and supporting documents.
- Bring to court to sign with the clerks.
- File 1 copy with the court, serve 1 copy to the Attorney General, keep 1 copy (details starting on page 5).
- At Court if the Attorney General is agreeing then the Justice will make an order. If the Attorney General does not agree, then a hearing will be booked.

When can I ask a Justice 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,
- want a lawyer but cannot afford one, and
- are facing a serious child protection application, and
- the child protection proceeding is too complex for you to run your own trial, you can ask a justice to appoint a lawyer for you.

Reading this document will help you to understand:

- why a justice can appoint a lawyer for you;
- what you have to prove to the justice;
- when and how to ask the justice to appoint a lawyer for you;
- how to prepare for court; and
- what happens in court.

Why can a justice appoint a lawyer for me?

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

The Supreme Court of Canada in 1999 held that indigent parents may have a constitutional right under s7 of the *Charter of Rights and Freedoms* to state-funded counsel in child protection proceedings where the right to security of the person is affected (by state removal of a child from parental custody) and where legal counsel is required to ensure a fair hearing.

Justices 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 justice to appoint a lawyer for you. You need to prove four things to the justice:

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

If the justice decides that you need a lawyer to get a fair trial, the justice can order a delay of the child protection proceedings. If the justice orders an adjournment, Alberta Justice may have Legal Aid Alberta appoint a lawyer for you.

What do I have to prove to the justice?

You have to convince the justice of 4 things:

1. You have been denied legal aid.

You need to show the justice proof that you have been denied legal aid and whether any appeal of that decision has been denied by Legal Aid Alberta.

The justice will want to know why Legal Aid Alberta denied your application and whether any appeal has been denied. You will need to provide the letter you received from Legal Aid Alberta to prove this. If you do not have the documents from Legal Aid Alberta, contact Legal Aid Alberta at 1.866.845.3425 and ask for them.

2. You can't afford a lawyer.

You have to show the justice that you can't afford a lawyer. Give the justice a clear picture of your finances. Be prepared to tell the justice 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 justice. 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 justice to order the appointment of a lawyer for you.

You will also have to estimate what it will cost to have a lawyer represent you in the child protection proceedings. This will depend on how long your trial is expected to last and the type of child protection application it is (Supervision Order, Temporary Guardianship Order, Permanent Guardianship Order). 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 9).

3. *You are responding to a complex child protection application.*

You have to show the justice that you are opposing and responding to a serious child protection application. Usually "serious" means the state has removed your child from parental custody and is seeking to keep the child for an extended period of time or permanently and seeking to permanently sever your guardianship rights. If the Director will be seeking a Temporary Guardianship Order or a Permanent Guardianship Order, you are facing a serious child protection application.

Ask the Director's counsel to give you a copy of the Notice of Application and Court Report in support of their application. You may also ask Legal Aid Alberta Duty Counsel to help obtain this information and tell you how to contact Legal Aid Alberta.

You have to show the justice that the application to remove your child from your care will have a serious impact on your children and your family.

4. *You can't defend yourself because the child protection proceeding is too complex for you.*

You have to show the justice that the child protection case is too complex for you to represent 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.

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 9). Also ask the lawyer to help you identify what evidence you plan to use in the child protection proceeding.

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

Let the justice know about your:

- education level;
- language ability; and
- knowledge of the child protection court process.

This will help the justice decide if you are able to represent yourself.

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

To get the justice 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 child protection cases.

Apply to the court where your trial will be heard.

Child protection proceedings trials in Alberta take place in the Alberta Court of Justice.

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.

How to Make the Application.

It is best to make your application well before your child protection trial starts. To make a *Rowbotham* Application you have to complete two forms. A copy of a Notice of Application and an Affidavit of the Applicant. These forms are available from Legal Aid. 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. Take this form to the court clerk in order to swear that the information is true. **You cannot sign the form until you are in front of the clerk.**

- **Notice of Application:** This is a document that tells the local Attorney General/Director'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 an adjournment 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 the Court Clerks to be sworn and signed.
3. Make 3 copies of the signed **Notice of Application** and **Affidavit of the Applicant**.

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.*

You must now serve the application so that the Attorney General/ Director 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 Attorney General/Director'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 Director's office. After you have taken these documents to the office and given them to the receptionist, you have then served the Attorney General/Director.

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.

In Outside of Calgary or Edmonton ask the Court Clerks or Duty Counsel how to serve the application.

2. Make sure you keep one copy of each document for yourself.

How do I prepare for my Rowbotham Hearing?

If the Attorney General/Director does not consent to your request the matter will proceed to a hearing. A date for your hearing will be set by the Court. Think about what you are going to tell the justice.

Think about how you can prove the 4 points. Remember, you can use:

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

Meet with a lawyer or ask Duty counsel 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 9).

If you don't get legal help, you can still make a Rowbotham Application?

If you follow the instructions in this document, the justice will know what you are asking for.

What happens in court at a hearing?

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

You speak first.

You speak first. Call the justice "Your Honour," in the Alberta Court of Justice. When you have finished, your witnesses speak.

You want to convince the justice that:

- you have been denied legal aid;

- you cannot afford a lawyer;
- you face a serious child protection proceeding; and
- you can't represent yourself because the child protection proceeding 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 Attorney General/ Director may ask you or your witnesses some questions about your application to get a lawyer. The justice may have some questions, too. Make sure they are answered truthfully. When you address the justice or the Attorney General/Director, refer to your documents or the other parts of your evidence that support the 4 points that you must convince the justice of.

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

Attorney General/Director goes next.

The Attorney General/Director will probably try to prove that you can represent yourself because the child protection proceeding 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 Attorney General/ Director has finished speaking. When you address the justice, refer to the parts of your evidence that support the points you are trying to make.

The justice decides.

After you and the Attorney General/Director have presented evidence, the justice will decide whether to grant your application. Sometimes the court will adjourn before the justice gives the decision.

If the justice decides you should have a government-appointed lawyer, he or she will probably order an adjournment of the child protection proceedings. This effectively means that Alberta Justice will be ordered to provide a lawyer for you. You should contact Legal Aid Alberta at 1.866.845.3425 a few days after the granting of the order to make arrangements for the appointment of counsel.

If the justice 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 Family Duty Counsel available at some Alberta Court of Justice docket courtrooms in Alberta. If you don't have your own lawyer, Duty Counsel can give you advice about the child protection proceeding, 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 call Legal Aid Alberta 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 need assistance with making your application and 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.