SUPREME COURT OF FLAVELLE

ON APPEAL FROM

THE COURT OF APPEAL FOR FALCONER

BETWEEN:

SCOTT CAMERON

Appellant

– and –

HER MAJESTY, THE QUEEN

Respondent

FACTUM OF THE APPELLANT

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PART I – OVERVIEW

1. Mr. Scott Cameron appeals from a conviction that highlights the myriad ways in which Falconer's criminal justice system disadvantages vulnerable accused. Mr. Cameron is a working single father who struggled to make ends meet working as a delivery man earning $25,000 a year. On January 16, 2013, he was charged with theft and breaking and entering contrary to s. 332 and s. 338 of the *Criminal Code,* respectively. Mr. Cameron was unable to secure representation from Falconer Legal Aid ("**FLA**"), because his annual income fell marginally above the outdated eligibility criteria established in 1988 by Falconer's *Legal Services Act*. Instead, Mr. Cameron relied on a charitable legal clinic, City Law Services ("**CLS**"), to represent him.

2. Subsequently, Mr. Cameron was:

   (a) deprived of the opportunity to accept a plea offer from the Crown due to ineffective assistance from his overworked CLS lawyer;

   (b) coerced into self-representing at trial after his application for state-funded counsel was inappropriately denied; and,

   (c) convicted of a crime that the Crown previously argued he could not have committed during the trial of his co-accused.

3. Mr. Cameron's conviction constitutes a serious miscarriage of justice, brought about by his difficult financial situation, the increasing disconnect between FLA's eligibility criteria and the challenges confronting Falconer's most vulnerable residents, and the Crown's prioritization of securing a conviction over a fair and transparent trial process. Accordingly, Mr. Cameron's conviction is both an infringement of his s. 7 protected right to liberty and an abuse of process. His conviction should be vacated without prejudice, with conditions applied in case of a re-trial.

PART II – FACTS

Factual Background

4. Mr. Cameron is a resident of Stewart, Falconer. He is the sole caregiver for his young daughter, Maggie. He lives with his brother, Manas Vinnie, and works as a delivery person for a restaurant in his neighbourhood.[1]

5. On December 6, 2012, Mr. Vinnie approached Mr. Cameron with a plan to rob the residence of a wealthy family (the "**McAlister Residence**"). On December 28, 2012, the Stewart Police discovered evidence of a break-in and theft at the McAlister Residence. The police solicited eye-witness evidence from the McAlisters' neighbours and received the following accounts:

(a) two neighbours (Mr. Donald and Mr. Mike) claimed they had seen one man, closely resembling Mr. Vinnie, fleeing the crime scene on the night in question;

(b) one neighbour (Ms. Jill) told the Stewart Police that she had seen one man, closely resembling Mr. Cameron, fleeing the McAlister residence on the night of the theft;

(c) two neighbours (Mrs. Hilary and Mr. Bill) described two men they had seen fleeing the McAlister residence. One closely resembled Mr. Cameron, while the other bore a moderate resemblance to Mr. Vinnie.[2]

6. Acting on a tip from one of Mr. Cameron's neighbours, the Stewart Police searched Mr. Cameron and Mr. Vinnie's residence. They found silverware bearing the McAlister family crest. Mr. Cameron and Mr. Vinnie were arrested that same day.[3] Mr. Vinnie opted to be tried before a jury. Mr. Cameron did not, and their trials were severed.

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[1] 2016 Grand Moot Problem at para 11 [Problem].
[2] *Ibid.,* at para 16.
[3] *Ibid.*, at para 18.

7. Mr. Cameron sought legal representation through Falconer Legal Aid ("**FLA**"). His application was denied because his annual income fell narrowly above the $21,000 eligibility threshold established in Falconer's *Legal Services Act* for a parent with one child.[4] FLA referred Mr. Cameron to City Law Services ("**CLS**"), a charitable clinic whose four lawyers have been publically recognized by various academics and commentators as being chronically overworked.[5] CLS agreed to represent Mr. Cameron and assigned Mr. John Doe to his case.

8. Mr. Doe engaged in plea negotiations with the Crown on Mr. Cameron's behalf. On July 8, 2013, the Crown offered to charge Mr. Cameron with theft under $5,000 and proceed summarily in exchange for a guilty plea from Mr. Cameron. The offer was to expire in two weeks. Due to his grueling workload, Mr. Doe failed to communicate the Crown's plea offer to Cameron within the specified time-frame. The offer expired, and Mr. Cameron's case proceeded to trial.[6] When he found out about the error, Mr. Cameron fired Mr. Doe.[7]

Mr. Vinnie's Trial

9. Mr. Vinnie was tried prior to Mr. Cameron. At his trial, the Crown argued that he had been solely responsible for the theft at the McAlister residence. The Crown's opening address to the jury identified Mr. Vinnie as the sole perpetrator of the theft. The Crown called only those witnesses that placed Vinnie alone at the crime scene, and sought to discredit Ms. Jill's credibility and reliability when she was called as a defence witness by Mr. Vinnie. Throughout their opening address, cross-examinations and closing submissions, the Crown insisted that Mr. Cameron was not physically able to climb through the second-floor window of the McAlister

[4] *Ibid.,* at para 20.
[5] *Ibid.,* at paras 24-25.
[6] *Ibid.,* at paras 29-30.
[7] *Ibid.,* at para 41.

Residence. In closing, the Crown— for the first time—advanced an alternate theory that Cameron may have participated in the theft.[8]

10. Mr. Vinnie was convicted by a jury of theft over $5,000 and sentenced to three years' imprisonment.

Mr. Cameron's *Rowbotham* Application

11. Prior to his trial, Mr. Cameron brought a *Rowbotham* application before the Falconer Court of Justice. He claimed that state-funded counsel was necessary to ensure a fair trial, and that he lacked the means to fund counsel without state assistance. Wyngaarden J. rejected Mr. Cameron's *Rowbotham* application. He ruled that Mr. Cameron had the financial means available to fund counsel, as he could have sold his house and moved in with his parents. Despite accepting Mr. Cameron's evidence that the move would have endangered his employment and forced his daughter to relocate to a lower-quality school district, Wyngaarden J. found that these burdens did not "constitute the sort of exceptional circumstances needed to justify a *Rowbotham* order".[9]

Mr. Cameron's Trial

12. At trial, the Crown advanced a radically different theory of the crime: Mr. Cameron, they claimed, had been an active participant in the planning and execution of the theft of the McAlister Residence. The Crown called none of their principal witnesses from Mr. Vinnie's trial, and instead based the case on the testimony of the two witnesses—Mrs. Hilary and Mr. Bill—that they had opted not to call in earlier proceedings. The Crown's previous arguments were not mentioned at the trial. Mr. Cameron, at this point a self-represented litigant, was unable

[8] *Ibid.*, at paras 32-41.
[9] *Ibid.*, at para 46.

to cast significant doubt on the witnesses' testimony. He was convicted and sentenced to four years' imprisonment.[10]

Mr. Cameron's Appeal

13. On appeal, Mr. Cameron raised the issue of ineffective assistance of counsel for the first time. He also appealed Wyngaarden J.'s rejection of his *Rowbotham* order, and alleged that the Crown's conduct in his trial amounted to an abuse of process. The Falconer Court of Appeal granted Mr. Cameron leave to file fresh evidence relating to his ineffective assistance of counsel claim.[11]

14. The Court of Appeal upheld Mr. Cameron's conviction. Writing for a two-judge majority, Lewis J.A. found that Mr. Doe's failure to communicate the Crown's plea offer had not infringed Mr. Cameron's section 7 rights, because Mr. Cameron had been convicted "pursuant to a full and fair trial." However, Lewis J.A. accepted that Mr. Cameron would likely have accepted the Crown's plea deal had it been properly communicated, and that there was a reasonable possibility that the Court of Justice would have enforced it.[12]

15. Lewis J.A. agreed with Wyngaarden J.'s disposition of Mr. Cameron's *Rowbotham* application. She also found that, while "unseemly", the Crown's seemingly inconsistent theories at Mr. Vinnie's and Mr. Cameron's respective trials did not amount to an abuse of process.[13]

16. Williams J.A. dissented on all three issues raised on appeal. She found that Mr. Cameron had been prejudiced by his counsel's deficient performance during the plea bargaining process. She rejected Wyngaarden J.'s characterization of *Rowbotham* orders as an 'exceptional remedy'. She also dissented from her colleague's disposition of the abuse of process issue, finding that the

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[10] *Ibid.,* at paras 51-55.
[11] *Ibid.,* at para 58.
[12] *Ibid.,* at para 55.
[13] *Ibid.,* at para 57.

Crown's decision to pursue inconsistent theories in Cameron and Vinnie's trials undermined public confidence in the administration of justice.[14]

PART III – ISSUES AND ARGUMENT

17. This appeal raises four issues:

A. Did counsel's ineffective assistance during plea negotiations with the Crown infringe Mr. Cameron's s. 7 rights?

B. Did Wyngaarden J.'s rejection of Mr. Cameron's *Rowbotham* application infringe his s. 7 rights?

C. Was the Crown's trial strategy against Mr. Cameron an abuse of process in light of Mr. Vinnie's trial?

D. What remedy, if any, is Mr. Cameron entitled to?

18. Mr. Cameron submits that:

A. Mr. Cameron's s.7 rights were infringed by lack of effective assistance of counsel;

B. Wyngaarden J.'s rejection of Mr. Cameron's *Rowbotham* application infringed his s.7 rights;

C. The Crown's trial tactics against Mr. Cameron were an abuse of process;

D. The conviction against Mr. Cameron should be vacated without prejudice. Should the Crown opt to pursue a new trial, the Falconer government should be obligated to provide state funded counsel and re-offer the Crown's plea offer from July 8, 2013.

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[14] *Ibid.,* at paras 58-64.

Issue 1: Cameron's s. 7 *Charter* Rights were Infringed by Ineffective Assistance of Counsel

19. Deficient performance by counsel amounts to a miscarriage of justice when it undermines the reliability of a trial verdict, or when it leads to "procedural unfairness".[15] Guarantees of procedural protection are not restricted to the trial process.[16] Courts should take a broad approach, recognizing that procedural unfairness may arise during the plea bargaining process. A broader approach recognises that in today's justice system, the sentencing process that ultimately deprives the accused of their liberty right is usually over before a trial begins.

20. The courts below erred in holding that the Appellant failed satisfy the test for ineffective assistance of counsel (the **"*GDB* Test"**), which requires that the accused prove two elements:[17]

(a) that counsel's acts or omissions constituted incompetence; and,

(b) that a miscarriage of justice resulted.

21. In this case, it is not contested that the first branch of the *GDB* Test is satisfied. Mr. Doe failed to communicate the only offer extended by the Crown to the accused and, in doing so, failed to fulfill a basic professional obligation to his client.[18]

22. In holding that there had been no "miscarriage of justice", the Court of Appeal erred in three respects. First, the *GDB* Test must be interpreted broadly, so as to encompass ineffective assistance—and any resulting procedural unfairness—in the plea bargaining process. Second, a miscarriage of justice resulted in this case, as Mr. Cameron was deprived of an opportunity to accept a plea offer by counsel's deficient performance. Third, a workable remedy is possible in this case, and future cases, through s. 24(1).

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[15] *R v. G.D.B.,* 2000 SCC 22 at para 28 [*GDB*].
[16] *R v. Nixon*, 2011 SCC 34 [*Nixon*].
[17] *GDB*, *supra* note 15 at para 26.
[18] See: The Law Society of Upper Canada, *Rules of Professional Conduct*, s. 3.1-1(d) and (e). s. 3.1-2; and s. 3.2-1.

i. The Doctrine of Effective Assistance of Counsel Applies in Plea Bargaining

23. The right to effective counsel is a principle of fundamental justice, derived as an "evolution of the common law, s. 650(3) of the *Criminal Code* and ss. 7 and 11(d) of the Canadian Charter of Rights and Freedoms".[19] It is a right that extends to all accused persons.[20] As such, when a criminal defendant is deprived of their life, liberty or security of the person, absent effective assistance of counsel, their s. 7 rights have been infringed.

24. Although traditionally applied in the context of trials, the ineffective assistance of counsel doctrine should apply with equal force in the plea bargaining process. The doctrine is designed to prevent a miscarriage of justice, which is equally possible during plea bargaining.

25. The Supreme Court of Canada has recognized the importance of providing protections in the plea bargaining process, stating in *R v. Burlingham* that "to the extent that the plea bargain is an integral element of the Canadian criminal process, the Crown and its officers engaged in the plea bargaining process must act honourably and forthrightly."[21] To an accused, it makes little difference if the Crown acted in bad faith or their counsel acted ineffectively; both circumstances can constitute miscarriages of justice and require a remedy.

26. Over the past fifteen years there has been a "dramatic shift in attitude" in relation to plea bargains.[22] Historically seen as an unfortunate necessity, The Supreme Court of Canada now describes plea bargains as an "integral element" of the criminal process.[23] For 90% of criminal defendants found guilty, their guilt sentence is determined through plea negotiations.[24] As the US Supreme Court recognized in *Lafler v. Cooper*, assuming a fair trial wipes clean any deficient

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[19] *GDB*, *supra* note 15 at para 24.
[20] *Ibid*.
[21] *R v. Burlingham*, [1995] 2 S.C.R. 206 at para 23 [*Burlingham*].
[22] Simon Verdun-Jones and Adamira Tijerino, "Victim Participation in the Plea Negotiation Process in Canada: A Review of the Literature and Four Models for Law Reform", Catalogue No RR2002-5e (Ottawa: Department of Justice Policy Centre for Victim Issues, 2014) at vi.
[23] *Burlingham*, *supra* note 21 at para 23.
[24] Problem, at para 8.

performance by defense counsel during plea bargaining "ignores the reality that criminal justice today is for the most part a system of pleas, not a system of trials".[25]

27. The Crown's power to determine sentencing outcomes for an accused in a "system of pleas" must be accompanied by robust protection of the accused's *Charter* rights. The right to effective assistance of counsel helps solve for the imbalance of power that exists between the state and the accused. Relatedly, the Supreme Court of Canada has acknowledged the coercive nature of the power exercised by the state to enforce its laws.[26] The coercive nature of the Crown's power is no less acute when a plea is being negotiated pre-trial, so the doctrine of ineffective assistance of counsel should apply with equal force to the plea bargaining process.

ii. The Failure to Convey a Plea Offer can Constitute a Miscarriage of Justice

28. In finding that Mr. Cameron's conviction did not amount to a miscarriage of justice, Lewis J.A. erred in two respects.

29. First, Lewis J.A.'s position rests on an untenable view of the role of effective assistance of counsel in the modern criminal justice system. Rejecting a plea offer due to ineffective assistance of counsel infringes an accused person's rights under s.7, even if the accused is subsequently convicted pursuant to an otherwise fair trial. Although an accused is not formally deprived of their liberty until a trial judge renders a verdict, plea negotiations often "set the stage" for the accused's loss of liberty by determining the Crown's charging and sentencing decisions at trial. This is equally true where negotiations end with the accused's rejection of a plea offer. Where, as in this case, an accused proceeds to trial under different charges that carry more severe penalties, a fair trial will not 'wipe clean' counsel's deficient performance during the plea bargaining process. On the contrary, as Kennedy J. noted in *Lafler*:

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[25] *Lafler v. Cooper*, 132 S. Ct. 1376 at 1388 (2012) [*Lafler*].
[26] *B(R) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 at 340.

> "Far from curing the error, the trial caused the injury from the error. Even if the trial itself is free from constitutional flaw, the defendant who goes to trial instead of taking a more favorable plea may be prejudiced from either a conviction on more serious counts or the imposition of a more severe sentence".[27]

30. The Supreme Court of Canada's decision in *Nixon* demonstrates the limited curative powers of a subsequent fair trial.[28] In the same way that a fair trial will not necessarily restore public confidence in the administration of justice following an abuse of process, a fair trial will not always remedy the specific prejudice caused by counsel's failure to communicate a plea offer. This approach is consistent with the United States Supreme Court's jurisprudence regarding effective assistance of counsel, concisely summarised in *Lafler* as follows:

> "The Court, moreover, has not followed a rigid rule that an otherwise fair trial remedies errors not occurring at the trial itself. It has inquired instead whether the trial cured the particular error at issue."

31. In this case, Mr. Cameron's s. 7 rights were infringed when he received a sentence eight times greater than the maximum sentence he would have received under the terms of the Crown's plea offer. His case is consistent with Canadian jurisprudence that has considered ineffective assistance of counsel in the sentencing process, when the only issue in question is the accused's sentence. [29] The Court of Appeal found that, but for his counsel's ineffective assistance, Mr. Cameron would have accepted the Crown's plea offer and been sentenced to at least forty-two fewer months in a provincial penitentiary. Those forty-two months represent a

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[27] *Lafler*, *supra* note 25 at 1386.
[28] *Nixon*, *supra* note 16.
[29] See: *R v. Lee,* 2016 ONSC 3425 at para 28.

deprivation of his liberty that is inconsistent with the principles of fundamental justice, as they flowed from the ineffective assistance of his counsel.

32. Second, Lewis J.A. incorrectly concluded that a miscarriage of justice had not occurred because Mr. Cameron's right to a fair trial was upheld. In doing so, she failed to consider the impact of counsel's incompetence on the procedural fairness of Mr. Cameron's broader sentencing process.

33. A miscarriage of justice can occur where counsel's deficient performance leads to procedural unfairness , even where the reliability of a trial verdict is not in doubt. In considering an ineffective assistance of counsel claim, the Ontario Court of Appeal explained the connection between preserving procedural fairness and upholding public confidence in the justice system as follows:

"[counsel's] condition so skewed the appearance of fairness at trial that no inquiry into the reliability of the verdict was needed in order to conclude that a miscarriage of justice had occurred. Martin J.A. put it this way at p. 224:

> No citation of authority is required for the proposition that justice must not only be done, but must be manifestly seen to be done. We are of the view that in the circumstances this principle was infringed and on the strong and uncontradicted material before us we have grave doubts whether in these circumstances the appellant can be said to have received a fair trial.[30]

34. This approach is consistent with the Supreme Court's jurisprudence on admission of evidence. The Court has been clear that "(e)nsuring that an accused receives a fair trial, deterring police misconduct, and preserving the integrity of the administration of justice are all laudable goals to which this Court must strive in its rules of evidence, at times to the detriment of full access to the truth".[31] Like the principles governing the law of evidence, the right to effective assistance of counsel facilitates the truth-seeking function of the adversarial trial process, but is

[30] *R. v. Joanisse*, [1995] O.J. No. 2883 at para 78.
[31] *R v. Noël*, 2002 SCC 67 at para 85.

not restricted to that end. It also plays a vital role in preserving the procedural fairness of a defendant's sentencing process, and by extension, the integrity of the justice system as a whole.

35. It is inappropriate, on technical grounds that are unlikely to be appreciated by society at large, to restrict the inquiry into procedural unfairness to the trial process. In the eyes of the public, ineffective assistance of counsel is no less unfair when it arises during plea bargaining than at trial. In this case, Mr. Cameron was arbitrarily denied the opportunity to accept a plea offer because of his counsel's incompetence. This act alone would strike the public as manifestly unfair and undermine confidence in the justice system.

36. The public would also perceive Mr. Cameron's exposure to a more serious charge as a result of his counsel's incompetence to be unfair. The alleged reliability of Mr. Cameron's subsequent conviction does not offset this perception of unfairness. Charges flowing from unfair processes are not sanitized when they are proven at trial. For example, it is well established law that the Crown cannot charge individuals for an improper collateral motive and justify those charges by proving them beyond a reasonable doubt at trial.[32]

37. A similar approach is appropriate for ineffective assistance of counsel leading to more serious charges. Whether exposure to a more serious charge flows from the Crown's conduct, or defence counsel's incompetence, is of little difference to accused persons, or to the public's perception of fairness. The integrity of the justice system cannot be dissociated from the performance of defence counsel, who have special responsibilities as "officers of the court".[33]

38. The Appellant is not contending that he had a free-standing right to a plea offer. Rather, he asks this Court to affirm a right to effective assistance of counsel in <u>interacting</u> with an existing plea offer. At its core, it is a right to competent assistance from a designated and trusted

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[32] *R v. Paul Magder Furs Ltd*, [1989] O.J. No. 531.; *R v. Appelby*, [1990] O.J. No. 1329.
[33] *R v. Felderhof*, [2003] O.J. No. 4819 at para 84.

representative when making crucial choices necessitated by the Crown's decision to offer a plea. Mr. Cameron was deprived of this right because of counsel's incompetence and is entitled to a remedy from this Court.

iii. A Workable Remedy is Possible In This Case

39. The right to effective assistance of counsel can be extended to plea negotiations in a workable and coherent manner. In *Lafler*, Justice Kennedy established a "but for" standard to assess whether the accused was prejudiced by counsel's incompetence. Under this approach, an accused person is entitled to a remedy if, "but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court … that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that were in fact imposed."[34] This test should be adopted in the Canadian context to ensure that counsel's incompetence does not unduly infringe an accused's liberty rights.

40. Under the approach outlined above, Mr. Cameron is entitled to a remedy. But for his counsel's ineffective assistance, Mr. Cameron would have accepted the Crown's plea offer and received a drastically shorter sentence.[35] These factual findings, coupled with the Appellant's submissions on the miscarriage of justice in this case, provide a sufficient basis for this Court to compel the Crown to re-offer Mr. Cameron it's plea offer from July 8, 2013.

Issue 2: Cameron should have been granted a *Rowbotham* Order

41. An accused who is ineligible for Legal Aid may apply to the Court for a *Rowbotham* order, which stays the prosecution until the State agrees to fund the accused's legal

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[34] *Lafler*, *supra* note 25 at 1385.
[35] Problem, at paras 51 and 55.

representation. Canadian jurisprudence recognizes three criteria necessary for granting such an order: 1) the accused has been denied legal aid; 2) the accused is without the means to employ counsel; and 3) representation is essential to a fair trial ("***Rowbotham* Test**").[36]

42. In this case, Wyngaarden J. correctly held that criteria 1) and 3) were satisfied, but made at least two extricable errors of law in holding that Cameron did not satisfy criterion 2), the financial branch of the *Rowbotham* Test. First, he inappropriately characterized *Rowbotham* orders as an exceptional remedy. Second, he incorrectly held that a *Rowbotham* application was never available to an accused person technically able to fund counsel, even when doing so required exceptional personal sacrifice.

i. A Rowbotham Order is No Longer an Exceptional Remedy

43. In adjudicating Mr. Cameron's *Rowbotham* application, Wyngaarden J. applied an unduly strict test based on his characterization of a *Rowbotham* order as an "exceptional" remedy. This mischaracterization constitutes an error of law reviewable on the correctness standard.

44. Originally only available in exceptional circumstances,[37] *Rowbotham* orders have been recognized as a crucial mechanism for protecting the *Charter* rights of accused persons who are ineligible for Legal Aid, but unable to afford privately funded counsel. As Justice Nordheimer noted in *R v. Moodie*: "It should be obvious to any outside observer that the income thresholds being used by Legal Aid Ontario do not bear any reasonable relationship to what constitutes poverty in this country."[38] The Ontario Court of Appeal held in *R v. Rushlow* that it is not only in

[36] *R v. Rowbotham*, 41 C.C.C. (3d) 1 (CA) at para 156 [*Rowbotham*].
[37] *Ibid.* at para 167.; *R v. Rushlow*, 2009 ONCA 461 at para 19 [*Rushlow*].
[38] *R v. Moodie*, 2016 ONSC 3469 at para 6.

"exceptional" circumstances that someone not eligible for Legal Aid is nonetheless entitled to state-funded counsel.[39]

45. At present, courts are applying inconsistent standards in determining whether *Rowbotham* applicants have the means to afford counsel. One line of jurisprudence recognizes that limiting *Rowbotham* orders to exceptional circumstances is untenable. In *R v. Davidson*, the Ontario Superior Court of Justice accepted a lower threshold for granting a *Rowbotham* order:

> "I also cannot accept that Mr. Davidson should be required to sell his little all, and give up everything he has, including his apartment, in order to satisfy a Court that he is doing everything he can to fund a lawyer. It is one thing to require some personal sacrifices in order to obtain legal assistance, it is quite another to require a person to become destitute, and dispose of everything they have in order to defend criminal charges."[40]

46. As noted above, the Ontario Court of Appeal recognized in *R v. Rushlow* that the "exceptional" nature of *Rowbotham* orders is not an indication that counsel is only required in exceptional cases. [41]

47. A contradictory line of jurisprudence emphasizing the "exceptional" nature of *Rowbotham* orders demonstrates the need for this Court to clarify the financial branch of the *Rowbotham* Test. As in *Hryniak v. Mauldin,* this Court ought to recognize that the access to justice crisis demands a "culture shift", in which *Rowbotham* remedies are no longer reserved for the most exceptional cases.[42]

48. This second line of cases demonstrates the unworkability of a strict test for *Rowbotham* orders. In 2006, the Ontario Court of Justice found that "(s)urely, it is reasonable to think that the

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[39] *Rushlow*, *supra* note 36 at para 19.
[40] *Davidson v. Her Majesty the Queen*, 2015 ONSC 2655 at para 19.
[41] *Rushlow*, *supra* note 36 at para 19.
[42] *Hryniak v. Mauldin*, 2014 SCC 7 at paras 2, 23-33.

legal aid program in the province is capable of assessing financial eligibility in a sensible, logical and humane fashion".[43] In 2009, the Ontario Court of Appeal held that a seasonal worker facing bankruptcy needed to go into further debt to obtain legal representation.[44] In 2016, the Alberta Court of Queen's Bench suggested that *Rowbotham* orders are an "exceptional remedy with a high onus on the applicant".[45] While the first line of jurisprudence signals a broadening of protections for vulnerable accused persons, the second line of cases reveals that this progress is inconsistent.

ii. A Rowbotham Order May be Appropriate even if it is not Impossible for an Accused to Pay for Private Counsel

49. On the basis of his incorrect assessment of *Rowbotham* orders as "exceptional", Wynngaarden J. held that they could only be issued where the accused was otherwise entirely without the means to retain counsel. To the contrary, a *Rowbotham* order should be available where it would be unreasonable to require the accused to self-fund counsel, or where doing so would unduly coerce the accused to either self-represent or accept a guilty plea.

50. Coercing the Appellant into self-representation imperils both the trial's fairness and the fulfilment of its truth-seeking function. Coercion occurs when the choice faced by an accused can hardly be considered a choice, because the detrimental outcome of retaining a lawyer is so acute, that an accused it pushed to self-represent. Such an outcome is inconsistent not only with the rights of the accused, but also with the pressing societal interest in "ensur[ing] that only the

[43] *Children's Aid Society of Huron-Perth v. J. (J.)*, 2006 ONCJ 534 at para 38.
[44] *Ontario v. Martell*, 2009 ONCA 46.
[45] *R v. Sup*, 2016 ABQB 110 at para 21.

guilty are convicted."[46] Courts are willing to invalidate an agreement made as a result of coercion when accepting a plea bargain[47], signing a contract[48], or creating a will[49]. Similarly, courts should ensure that an accused is not coerced into self-representation.

51. Mr. Cameron was coerced into self-representation by the failure of his *Rowbotham* application. After failing to get approval for a second mortgage, Mr. Cameron reasonably chose to self-represent rather than sell his home, force his daughter to change schools, and risk losing his employment. The practical pressures on Mr. Cameron were tantamount to coercion. As a result, Mr. Cameron was denied the full scope of the procedural protections to which he was entitled, and the efficacy of the truth-seeking and adversarial functions of the criminal process was limited.

52. Given these considerations, Wyngaarden J. incorrectly held that a *Rowbotham* application was not available to Mr. Cameron. The denial of Mr. Cameron's *Rowbotham* application cannot be characterized as having engaged strictly "proprietary" interests. Such an assertion fails to recognize the nature of the sacrifices that Mr. Cameron was required to make and the substantial consequences for trial fairness arising from his reasonable unwillingness to do so. Furthermore, society had a collective interest in the fair and correct determination of Mr. Cameron's trial, which cannot be characterized as proprietary.

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[46] *R v. Seaboyer*, [1991] 2 S.C.R. 577 at 607, quoting David Doherty, "'Sparing' the Complainant 'Spoils' the Trial" (1984), 40 CR (3d) 55 at 66.
[47] See *Burlingham*, *supra* note 21.
[48] CED 4th (online), *Contracts*, VIII "Duress, Undue Influence, and Unconscionability" (VIII.1.(a)) at §528.
[49] See *Vout v. Hay*, [1995] 2 S.C.R. 876.

Issue 3: The Crown Committed an Abuse of Process by Advancing an Account of the Theft that was Incompatible with that Advanced at Vinnie's Trial

53. By first arguing that there was significant doubt regarding Mr. Cameron's participation in the McAlister theft, and then subsequently arguing that there was no reasonable doubt that Mr. Cameron was guilty of that same crime, the Crown engaged in oppressive conduct that offends societal standards of fair play and undermines public confidence in the administration of justice. This trial strategy was particularly high-handed given the Crown's knowledge that Mr. Cameron was self-represented and did not have the legal acumen to challenge the discrepancies between the narratives. The Court should therefore vacate the conviction against Cameron without prejudice.

i. The Test for Abuse of Process

54. The test for an abuse of process was outlined recently by the Supreme Court of Canada in *R. v. Babos*:[50]

i. Has the state engaged in conduct that is offensive to societal notions of fair play and decency, or that would undermine public confidence in the administration of justice?

ii. Will any remedy short of a stay adequately dissociate the justice system from the impugned conduct going forward?

iii. Does a balancing of societal interests weigh in favor of setting aside the trial result?

[50] 2014 SCC 16, at paras 35-40 [*Babos*].

ii. The Crown Made Inconsistent Representations Before the Court and the Public

55. The Crown's conduct in this case was blatantly and unjustifiably inconsistent. At Mr. Vinnie's trial, the prosecution made affirmative statements before the court and the public that Mr. Cameron could not have been part of the burglary, and subsequently put forward an opposite narrative in Mr. Cameron's trial:

a. At Vinnie's trial, the Crown first made an opening statement in which they posited "Vinnie *and Vinnie alone"*[51] as the perpetrator of the crime.

b. The Crown examined *only* the two witnesses (Donald and Mike) who had seen a person resembling Vinnie at the crime scene, further developing their opening narrative.

c. The prosecutor resolutely attacked the theory that Cameron had been present at the crime scene, by attacking the credibility and reliability of a witness (Jill) who placed him there.

d. In cross, the prosecutor pressed the argument that Cameron could *not have participated in the offence* because he lacked "the physical agility necessary to break into the McAlister's second floor window."[52] She also argued that the *only* explanation for the presence of the stolen goods at Mr. Cameron's residence was that Mr. Vinnie had stolen them.

e. In closing, the Crown again strongly implied that Mr. Cameron could not have participated in the theft, stating that Mr. Vinnie had given the jury "no reason to doubt" the witness testimony that implicated him as the *sole* perpetrator, nor was there any explanation of how Mr. Cameron could have scaled up to the second floor window.

f. Then, at Mr. Cameron's trial, the prosecution's narrative "flip-flopped": they opened by positing Cameron as a key player in the theft; they examined none of the same witnesses

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[51] Problem at para 34.
[52] *Ibid.* at para 37.

from Vinnie's trial, and they put forward only the two witnesses (Hillary and Bill) who had not testified in the prior trial.

This dramatic shift in narrative creates a strong impression that the Crown acted single-mindedly to secure a conviction, particularly in light of the fact that there was no material shift in evidence between Mr. Vinnie and Mr. Cameron's trials.

iii. Advancing Inconsistent Theories is Oppressive Because it Jeopardizes Trial Fairness

56. Where, as in this case, a single offense leads to related but separate proceedings, the prosecution has the opportunity to adopt inconsistent positions to persuade the separate fact-finders that the evidence more strongly inculpates the defendant before them. This conduct is distinct from advancing inconsistent theories about a single accused's culpability.[53] Within a single trial, advancing inconsistent theories does not threaten trial fairness, because a single fact-finder evaluates all allegations and evidence, and can weigh inconsistent alternatives in the context of the whole case.

57. Such protections are unavailable in separate trials against multiple defendants. Because the proceedings are severed, the prosecution can convince the separate fact-finders, for example, that each defendant committed specific acts central to the crime. By doing so, the prosecution may obtain more serious convictions and sentences than would be possible in a single trial. Such inconsistency is oppressive because "it unfairly burdens the defendant, and bring[s] the administration of justice into disrepute."[54]

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[53] As approved by the Supreme Court of Canada in *R v. Thatcher*, [1987] 1 S.C.R. 652.

[54] Anne B. Poulin, "Prosecutorial Inconsistency, Estoppel, and Due Process: Making the Prosecution Get Its Story Straight", (2001) 89:5 California L.R. 1423 at 1427. Poulin mentions numerous U.S. cases where these tactics have

58. These concerns are material to Mr. Cameron's case. Awareness of the Crown's assertions may have created reasonable doubt with the fact-finder at trial. At the very least, knowledge of the assertions may have led to a lower sentence than that meted out against Mr. Cameron.

iv. The Crown's Conduct Brings the Administration of Justice into Disrepute

59. The public is more keenly attuned to criminal trials than other areas of law, and expects a high level of fairness because the liberty interest of the accused is at stake.[55] In this area more than others, it does not suffice for justice to be done – it must be seen to be done.[56] And for justice to be seen to be done, a level of consistency in argument is required – one that was not met in this case. The Crown's conflicting assertions about Mr. Cameron create the impression that prosecutors are willing to put whatever spin on the evidence is necessary to garner a conviction – which is precisely what prosecutors are forbidden from doing.

60. Pursuing convictions explicitly violates Crown obligations as "ministers of justice." The oft-quoted words of the Supreme Court of Canada in *R. v. Boucher* are instructive:

> …The role of prosecutor **excludes any notion of winning or losing**; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.[57]

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been used to obtain harsh judgements against co-accused: e.g. *State v. Fondren* (810 S.W.2d 685 (Mo. Ct. App. 1991) – two accused posited as "initial aggressor" at separate trials); *United States v. Salerno* (937 F.2d 797 (2d Cir. 1991) – individual identified as victim of aggression in previous trial successfully prosecuted as perpetrator); *People v. Cruz* (643 N.E.2d 636 (II1.1994) – prosecution changed narrative around a key fact to deflect exculpatory evidence of second accused).

[55] Bruce A. Green, "Why Should Prosecutors "Seek Justice"?" (1999) 26 Fordham Urb. L.J. 607, 635-36

[56] *R v. La,* [1997] 2 S.C.R. 680*,* at para 55.

[57] *R v. Boucher*, (1954), 110 C.C.C. 263 at 270 [emphasis added]. See also *R v. McNeil*, 2009 SCC 3 at para 49. *Nelles v. Ontario*, [1989] 2 S.C.R. 170 at 191; *R v. Stinchcombe*, [1991] 3 S.C.R. 326 at 333; *R v. Regan*, 2002 SCC 12 at paras 151 and 155-56; *R v. Davey,* 2012 SCC 75 at para 32; *R v. Quesnelle,* 2014 SCC 46 at para 18; *Toronto (City) v. CUPE Local 79*, 2003 SCC 63 at para 31.

61. Academic literature concurs with the courts on this point. Professor Layton and the late Justice Proulx state in their authoritative text, *Ethics in Criminal Law*, that any proper analysis of a prosecutor's role must begin by acknowledging their duty to "[seek] justice in the form of a reliable result through a fair process."[58] Most Canadian ethical codes similarly state that "when engaged as a prosecutor, the lawyer's prime duty is not to seek to convict, but to see that justice is done through a fair trial on the merits."[59]

62. Prosecutors themselves acknowledge their responsibility to be seen as fair and just actors in the legal system. The *Public Prosecution Service of Canada Deskbook* states that "Crown counsel must not only act fairly, their conduct must be seen to be fair. One can act fairly while unintentionally leaving an impression of secrecy, bias, or unfairness."[60] Thus, a prosecutor may undermine public confidence merely because he or she is perceived to have acted in an unfair manner.

63. Advancing irreconcilable theories of a crime undermines public confidence in the justice system almost by default. It directly leads to prosecutors being reasonably perceived as opportunistic. Even those US courts that allow inconsistent prosecutorial theories against co-accused lament that "[w]hether or not the United States Constitution allows [prosecutors] to argue inconsistent theories to different juries, it surely does not inspire public confidence in our criminal justice system..." The words of Judge Clark in *Drake v. Kemp* are particularly apt:

> [The] flip flopping of theories of the offense was inherently unfair… the actions by the prosecutor violate the fundamental fairness essential to the very concept of justice… The state cannot divide and conquer in this manner. Such actions reduce

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[58] David Layton and Michel Proulx, *Ethics and Criminal Law (*Toronto: Irwin Law, 2015) at 577.
[59] See for instance Alta. r. 4.01 (4) & commentary; Sask. r. 4.01 (3) & commentary; B.C., Man., N.S.,N.L. r. 5.1-3 & commentary; Ont. r. 5.1-3 & commentary; CBA Code ch. IX commentary 9; N.B. ch 8 commentary 13.
[60] *PPSC Deskbook,* (Ottawa: PPSC, 2014) ch. 2.3.

criminal trials to mere gamesmanship and rob them of their supposed search for truth.[61]

64. The Crown's conduct in this case is particular egregious because, as a self-represented litigant, Mr. Cameron was unable to take advantage of Crown disclosure by which he could have challenged the Crown narrative. Professors Shatz and Whitt have stated that courts are more reluctant to convict if they are informed of the prosecution's inconsistency in a previous trial;[62] however, without counsel and the knowledge to access trial records, Mr. Cameron could not provide this information to the court.

v. Restricting Inconsistent Theories is A Reasonable Limit on Prosecutorial Discretion

65. For the Crown's ethical duties to have meaningful content, courts must clearly delineate which prosecutorial tactics are unacceptable.[63] Restricting the Crown from advancing irreconcilable theories is a reasonable limit on prosecutorial tactics that safeguards both the rights of the accused and public confidence in the justice system.

66. The prohibition on irreconcilable theories does not unduly burden the Crown. Asking prosecutors to bring consistent theories against co-accused is not a high bar to surmount, especially given that such conduct falls in line with other exercises of prosecutorial discretion that courts have recognized as abusive, such as "judge shopping"[64], "overcharging"[65], and being

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[61] *Drake v. Kemp*, 762 F.2d 1449, 1479 (11th Cir. 1985) (Clark, J., concurring).
[62] Steven F. Shatz & Lazuli M. Whitt, "The California Death Penalty: Prosecutor's Use of Inconsistent Theories Plays Fast and Loose with the Courts and Defendants" (2002) 36 U.S. Fed. L.R. 853 at 866.
[63] Alice Wooley, "Prosecutors as Ministers of Justice?" online: ABlawg < http://ablawg.ca/2015/06/29/prosecutors-as-ministers-of-justice/>.
[64] *R. v. Reagan*, 2002 SCC 12, at para 61.
[65] *See Babos, supra* note 48.

unduly harsh or disrespectful during cross-examination.[66] Like those tactics, advancing inconsistent theories, even if undertaken without malice or bad faith, represents overzealous advocacy on the part of Crowns and calls for sanction.

67. Advancing irreconcilable theories against co-accused will sometimes be acceptable: if the prosecution can identify evidence discovered after the first proceeding that prompted the change, or, if the judge or jury in the first proceeding rejected the prosecution's initial position, advancing an inconsistent narrative will not undermine public confidence, as the first narrative has effectively been displaced or rejected.

68. In Mr. Cameron's case, none of the above justifications are present. The fact that the Crown made affirmative statements in the initial trial, and the lack of a suitable reason for the subsequent reversal in posture (for instance, through new evidence or a material shift in the available evidence) pushes this matter well into the domain of abuse of process.

vi. Vacating the Conviction Against Cameron Without Prejudice Dissociates the Crown from the Abuse of Process and Adequately Balances Societal Interests

69. In light of the Crown's conduct in these proceedings, public confidence in the result against Cameron is not possible. Vacating Mr. Cameron's conviction will dissociate the justice system from the Crown's conduct, because it reflects society's regard for fair process over convictions.

70. If this Court leaves Cameron without a remedy, it will send a the message that oppressive tactics by the Crown can go unchecked. The Supreme Court of Canada has criticized courts for being too reluctant to grant relief under the abuse of process doctrine, rendering it a "paper

[66] *R. v. Lowe*, 2009 BCCA 338, at para 51.

tiger." [67] Doing so in this case would have the added disadvantage of incentivizing prosecutors in adopting "divide and conquer" tactics.

71. A balancing of society's interests also supports vacating the conviction without prejudice. In *Babos,* the Supreme Court of Canada suggested a number of factors to be weighed in balancing: "the nature and seriousness of the impugned conduct, whether the conduct is isolated or reflects a systemic and ongoing problem, the circumstances of the accused, the charges he or she faces, and the interests of society in having the charges disposed of on the merits."[68]

72. In this case, the relevant factors militate in favor of the proposed remedy. The Crown's flip-flopping narrative was dangerously close to misleading the court. And while this is an isolated incident, allowing it to go unchecked could easily lead to a more systemic problem. The accused, as mentioned above, was self-represented and therefore particularly vulnerable. The Crown's offer to proceed summarily in their plea reflects that this was not a serious offence. And the proposed remedy still allows society to have the charges disposed of on the merits, provided the Crown brings a cohesive case against the accused.

Issue 4: Remedies

73. In light of the Crown's abuse of process, the Appellant requests that the Court vacate Mr. Cameron's conviction without prejudice. Should the Crown choose to prosecute Mr. Cameron again, the Crown's plea offer dated July 8, 2013 should be re-offered, putting Mr. Cameron in the position he would be in 'but for' the ineffective assistance he received from counsel. Should Mr. Cameron proceed to trial, the Crown should be required to ensure that Mr. Cameron has access to state funded counsel. In essence, for each grounds of appeal in this case, a different

[67] *R v. Hart*, 2014 SCC 52, at para 79.
[68] *Babos*, *supra* note 48, at para 41.

remedy would be appropriate and the Appellant asks this Court to consider each remedy in context of the individual ground of appeal.

PART IV – ORDER SOUGHT

74. Appellant requests that this Honourable Court allow the Appeal and vacate Mr. Cameron's conviction without prejudice, including an order that should the crown choose to bring charges against Mr. Cameron again, he is entitled to state funded defense counsel and re-issuance of the plea bargain originally offered July 8, 2013.

75. ALL OF WHICH is respectfully submitted this 12th day of September, 2016 by:

Victoria Hale
Counsel for the Appellant

Zacharia Al-Khatib
Counsel for the Appellant

SCHEDULE A – TABLE OF AUTHORITIES

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SCHEDULE B – TEXT OF RELEVANT STATUTES AND RULES

Duties of Prosecutor – r.9

When engaged as a prosecutor, the lawyer's prime duty is not to seek a conviction, but to present before the trial court all available credible evidence relevant to the alleged crime in order that justice may be done through a fair trial upon the merits.

Law Society of Alberta Code of Conduct

Duty of Prosecutor – r. 4.01(4) & commentary

When acting as a prosecutor, a lawyer must act for the public and the administration of justice resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy and respect.

Commentary

When engaged as a prosecutor, the lawyer's primary duty is not to seek to convict but to see that justice is done through a fair trial on the merits.

Law Society of British Columbia Code of Professional Conduct

Duty of Prosecutor – r. 5.1-3 & commentary

When acting as a prosecutor, a lawyer must act for the public and the administration of justice resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy and respect.

Commentary

When engaged as a prosecutor, the lawyer's primary duty is not to seek to convict but to see that justice is done through a fair trial on the merits.

Law Society of Saskatchewan Rules of Professional Conduct

Duty of Prosecutor – r. 4.01(3) & commentary

When acting as a prosecutor, a lawyer must act for the public and the administration of justice resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy and respect.

Commentary

When engaged as a prosecutor, the lawyer's primary duty is not to seek to convict but to see that justice is done through a fair trial on the merits.

Law Society of Upper Canada Rules of Professional Conduct

Duty of Prosecutor – r. 5.1-3 & commentary

When acting as a prosecutor, a lawyer shall act for the public and the administration of justice resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect.

Commentary

When engaged as a prosecutor, the lawyer's prime duty is not to seek to convict but to see that justice is done through a fair trial on the merits.

Public Prosecutor Service of Canada Deskbook (Attorney General of Canada, Queen's Printer, 2014)

The duty to be fair and to maintain public confidence in prosecutorial fairness - r. 2.3

In order to maintain public confidence in the administration of justice, Crown counsel must not only act fairly; their conduct must be seen to be fair. One can act fairly while unintentionally leaving an impression of secrecy, bias or unfairness.