SUPREME COURT OF YUKON

Citation: *R.* v. *Everitt*, 2008 YKSC 86

Date: 20081103
S.C. No. 07-11036
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

And

GLEN NORMAN EVERITT

Before: Mr. Justice L.F. Gower

Appearances:

Eric Marcoux — Counsel for Her Majesty the Queen
Emily Hill — Counsel for Glen Everitt

REASONS FOR JUDGMENT

INTRODUCTION

[1] Mr. Everitt is applying for a stay of proceedings until the necessary funding to retain a lawyer for him is provided by the state. This type of an application is based upon the leading case of *R.* v. *Rowbotham* (1988) 25 O.A.C. 321, and is commonly referred to as a Rowbotham application. On such applications, the accused must show that:

1. they have been denied legal aid;
2. they cannot afford to fund their own counsel;
3. the charges against them are serious;

4. the charges are sufficiently complex that the accused does not have the capacity to deal with them without counsel.

See also *R.* v. *Newberry*, 2003 BCSC 1620, para. 2.

[2] Mr. Everitt is charged with two counts of breach of trust by a public officer, two counts of fraud, and two counts of theft over $5,000. The charges arise from the period of time when Mr. Everitt served as Mayor of Dawson City, between 1996 and 2004.

[3] Mr. Everitt has been denied Legal Aid and has exhausted all his appeals in that regard. However, Legal Aid provided him with counsel for the purpose of making this Rowbotham application.

[4] At the outset, Crown counsel objected that the application was premature because Mr. Everitt had not yet made his election as to the mode of trial or entered a plea. The Crown submitted that different considerations would apply to a Rowbotham application made prior to a preliminary inquiry versus one made prior to trial. I agreed that the Crown was entitled to know the case it had to meet on this application and, accordingly, sitting as a Territorial Court judge, I put Mr. Everitt to his election pursuant to s.536(2) of the *Criminal Code*. As Mr. Everitt was unsure of his election, he is deemed to have elected trial by judge and jury. I expect the information containing Mr. Everitt's charges will be returned to the Territorial Court and set down for a preliminary inquiry in due course.

[5] The specific issues on this application are:

1. Whether Mr. Everitt has met his onus in establishing that he cannot afford to fund his own counsel, and

2. Whether the charges are so complex that Mr. Everitt could not effectively represent himself at this stage of the proceedings.

[6] For the reasons which follow, I am dismissing the application.

JURISDICTION

[7] A preliminary point was raised relating to my jurisdiction to hear this application. As a result of Mr. Everitt being deemed to have elected trial by judge and jury, ordinarily the next step with the charges would be to hold a preliminary inquiry. Mr. Everitt's counsel relies on two cases for the proposition that I have jurisdiction, sitting as a Supreme Court judge, to hear a Rowbotham an application at the preliminary inquiry stage: *Canada (Attorney General)* v. *Lewis*, [1996] Y.J. No. 119 (S.C.); and *R.* v. *Newberry*, cited above. Kroft J. in *Lewis*, at paras. 8 and 32, opined in *obiter dicta* that if the accused in that case had made his application for state-funded counsel to a judge of this Court, as opposed to the Territorial Court judge presiding at the preliminary inquiry, then this Court would have had the jurisdiction to consider the matter and grant a remedy. Similarly, in *Newberry*, Groberman J., as he then was, accepted that there may be circumstances in which a failure to have counsel at a preliminary inquiry can constitute a breach of *Charter* rights (para.4).

[8] Crown counsel does not submit that I have no jurisdiction to hear this application at the preliminary inquiry stage, but rather says that there is no basis for *Charter* relief under s. 24(1), since Mr. Everitt cannot establish that any of his *Charter* rights would be breached if he is forced to proceed with the preliminary inquiry without counsel. In particular, the Crown says that s. 7 of the *Charter* can have no application, since it deals with the accused's right to life, liberty and security of the person, none of which are at

issue in a preliminary inquiry. Further, submits the Crown, s. 11(d) of the *Charter* does not apply because it speaks about an accused being "proven guilty…in a fair…hearing", and Mr. Everitt cannot be "proven guilty" following a preliminary inquiry. Crown counsel also submits that neither Kroft J. nor Groberman J. specifically discussed which of the *Charter* rights of an accused at a preliminary inquiry might be breached by requiring that person to proceed without counsel.

[9] In *Lewis*, Kroft J. stated at para. 13:

> "A preliminary hearing is not a trial. It is a very specific statutory procedure designed to "discover" the basic facts upon which a charge is laid and to determine if there is sufficient evidence to warrant a trial before a court, that is sufficient evidence upon which a judge or jury properly instructed could convict. The outcome of the preliminary inquiry does not resolve the rights of an accused. There can be no conviction or acquittal. <u>There is no kind of sanction or remedy that it can impose</u>. The only powers of the justice or judge presiding are circumscribed by the Code. Quite overwhelmingly the authorities in this country have continued to reinforce the proposition that the justice or judge presiding at a preliminary inquiry cannot order a stay of proceedings or make other orders even to prevent an abuse of the inquiries' own powers…" (my emphasis)

[10] In *Newberry*, Groberman J. stated, at paras. 13 to 15, that an accused at a preliminary inquiry is not facing any greater penalty than that the matter may be sent on to trial. Consequently, he said "…it is not clear to me that <u>any real detriment</u> is likely to accrue to the accused as a result of a failure to have counsel at the preliminary inquiry stage…" (my emphasis)

[11] Given the absence of any objection by the Crown to my jurisdiction to hear this application, I have proceeded on the assumption that I have jurisdiction. In any event, as a result of finding against Mr. Everitt on the merits of the application, the point seems

moot. However, before moving on, I would simply make a couple of comments. First, a justice presiding at a preliminary inquiry does have the authority to "discharge" an accused on one or more counts, if in the justice's opinion there is no evidence on which a reasonable jury, properly instructed, could convict: s. 548(1)(b) of the *Criminal Code*. This may be viewed as a form of "remedy" in a case where there is insufficient evidence to put the accused on trial for the offence charged. Alternatively, a justice at a preliminary inquiry may order the accused to stand trial if there is sufficient evidence for the offence charged "or any other indictable offence in respect of the same transaction": s. 548(1)(a). Thus, an accused may find that they are facing further and different charges following the completion of a preliminary inquiry than they faced at the outset. That, in turn, could theoretically lead to a review of the accused's bail status and, if previously released on process, might result in pre-trial incarceration. Those consequences could be considered both a "real detriment" to the accused and one which affects his "liberty" interest under s. 7 of the *Charter*.

LAW

[12] The onus on the applicant in these applications is a very heavy one. *Rowbotham* decided that a trial judge confronted with "an exceptional case" in "rare circumstances" may stay the proceedings until the accused is provided the necessary funding to retain counsel:

- where legal aid has been refused;
- where representation of the accused by counsel is essential to a fair trial; and

- where the judge is satisfied that the accused lacks the means to employ counsel

[13] Stromberg-Stein J. in *R.* v. *Malik*, 2003 BCSC 1439, thoroughly canvassed the principles applicable to Rowbotham applications at paras. 22 and 23, citing throughout the applicable case law. Paraphrasing from her judgment in a more summary form, I note the following principles are applicable to the current application:

1. There is a very heavy evidentiary burden on the applicant to demonstrate that all of the *Rowbotham* criteria have been satisfied on a balance of probabilities.
2. The issue is whether the accused is entitled to a remedy under s. 24(1) of the *Charter* based upon his constitutional right to a "fair hearing" under s. 11(d) of the *Charter.*
3. The test is not whether the accused receives a "perfect trial", nor does it involve removing "all risk" of an unfair trial.
4. There are three factors to consider:
    a) the seriousness of the interest at issue;
    b) the length and complexity of the proceedings; and,
    c) the ability of the applicant to participate alone and effectively.
5. The applicant's financial circumstances must be extraordinary. Difficult circumstances are not enough.

6. Applicants must provide detailed evidence of their financial circumstances and attempts to obtain legal representation. In particular, the applicant must make efforts to:

    a) save money;

    b) borrow money, including efforts to borrow from children or family members;

    c) obtain additional employment, if already employed; and

    d) look for counsel willing to work at legal aid rates.

7. The applicant must show either that he has no assets which can be utilized or that every effort has been made to utilize what assets are available to raise funds. See also *Italy* v. *Seifert*, 2003 BCSC 351, at paras. 12-22.

8. Applicants must be prudent with their expenses and show foresight in planning their financial affairs to enable the financing of counsel.

9. The inquiry into the applicant's financial circumstances will go back at least to the time the charges were laid.

10. The income and assets of a spouse are relevant considerations.

11. It is also relevant to inquire whether the applicant has children or other relatives in order to assess:

    a) his financial responsibilities to his family; and,

b) to determine whether he might be able to obtain assistance from those people.

[14] There may be circumstances in which failure to have counsel at a preliminary inquiry can constitute a breach of *Charter* rights. However, a preliminary inquiry is not a trial. The outcome of a preliminary inquiry does not resolve the rights of an accused. There can be no conviction or acquittal. The court presiding over a preliminary inquiry principally decides whether to order the accused to stand trial or not and on which charges. Therefore, an accused does not face the same jeopardy from the outcome of the preliminary inquiry as they do at trial: see *Newberry*, at para. 4, and *Lewis*, at para. 13.

ANALYSIS

The applicant's financial situation

[15] Mr. Everitt filed an affidavit in support of his application. He also provided further evidence during cross-examination by the Crown on that affidavit. His evidence is that he is employed full-time by the Tr'ondek Hwech'in First Nation, managing their automotive requirements and their plumbing and heating services. He has had that employment since April 2008. Prior to that he was employed by the First Nation as a Youth Worker from 2004. He deposed that his current net income is $1,150 every two weeks for a total of $27,600 annually. However, a recent pay statement attached as an exhibit to Mr. Everitt's affidavit indicates his "net pay" for a two week pay period was $1,181.36. That amount divided by two is $590.68 per week which, multiplied by 52 weeks per year, translates into a net annual income of $30,715.36.

[16] Mr. Everitt also deposed that his wife's net annual income is approximately $36,000. Therefore, the couple's combined net annual income is approximately $66,715.36.

[17] In total, the Everitts have six children and seven grandchildren. Mr. Everitt and his wife live with their three youngest children, aged 19, 17 and 12. The 19 year old is in the process of moving out. However, Mr. Everitt's oldest son, aged 32, also periodically lives in the family home and occasionally requires financial assistance, as he is unable to support himself on a regular basis.

[18] Mr. Everitt's eldest daughter, aged 33, also lives in Dawson City and has three children residing with her in her own home, three houses away from the Everitt family home. Mr. Everitt and his wife often assist this child financially and have her children over for meals and sleep-overs.

[19] As well, Mr. Everitt and his wife periodically allow troubled youth in Dawson City to sleep-over at the family home and share meals with them.

[20] The tenor of the case law is that applicants for a Rowbotham order must be prudent with their expenses and show foresight in the planning of their financial affairs in order to be able to hire a lawyer on their own, if possible. Further, the inquiry into the applicant's financial circumstances must go back at least to the time the charges were laid, in this case in mid-August 2007. Since then, a full 13 months have passed, and the preliminary inquiry has yet to be scheduled.

[21] Going further back in time, Mr. Everitt received a letter from the trustee of the City of Dawson at the end of August 2005 alleging that, during his term as Mayor of the City of Dawson (1996 to 2004), he received improper payments from the City in the amount of

$107,608.69, as itemized in a Report of Forensic Audit and Financial Review of the City of Dawson, dated March 16, 2005. The trustee informed Mr. Everitt that he intended to take all necessary steps to recover those public funds and that if the matter was not resolved, he would be instructing legal counsel to commence proceedings for what he alleged was “an abuse of public office”. As a result of receiving that letter, Mr. Everitt borrowed $5,000 from his brother-in-law and retained a Whitehorse lawyer, Gary Whittle, to represent him. Over the next number of months, Mr. Everitt deposed that he spoke with Mr. Whittle about preparing a response to the trustee’s letter. In cross-examination, Mr. Everitt testified that Mr. Whittle had advised him to start building up a “war chest” of least $20,000 in order to pay for his legal fees, in the event he was charged in the future and the matter went to trial. Thus, it is clear from this testimony that Mr. Everitt was aware of the possibility of criminal charges as a result of the trustee’s allegations. Indeed, he confirmed this in his affidavit, where he said that he instructed Mr. Whittle to close his file in January 2006 “since the government had not taken any steps to charge me or sue me.”

[22] Mr. Everitt’s counsel on this application submitted that I should not go back to the date of the trustee’s letter in August 2005 as the start of the time when Mr. Everitt should have begun planning his financial affairs in order to retain counsel to defend himself, because no steps had been taken to confirm whether the trustee was pursing a law suit or criminal charges. I disagree with this submission. The alleged misappropriation of funds was widely reported in the Yukon media at the time and was for a significant sum of money. Further, Mr. Everitt had been put on notice that the trustee was intent on recovering those funds through legal action. Mr. Everitt himself admits that he feared the

possibility of criminal charges also being laid as a result of these allegations. Indeed, he discussed that very possibility with his lawyer in 2005 and received advice to begin saving money for a possible trial. It would appear that, despite all these circumstances, Mr. Everitt took few, if any, steps to begin preparing his financial affairs in order to meet the trustee's allegations. If he simply assumed nothing was going to come of the matter because no obvious steps were being taken, then that was an imprudent assumption. I would think it likely that a simple inquiry with the City's trustee, the R.C.M.P., or the Crown's office would have resulted in confirmation that an investigation was ongoing.

[23] Even after the charges were laid in August 2007, Mr. Everitt's attempts to retain legal counsel were limited to a few phone calls to various lawyers in Whitehorse. Some were apparently unable to act because of a conflict of interest. One said that they would require an initial retainer of $10,000 in order to review the voluminous disclosure of particulars before quoting a fee for the trial. Another lawyer with whom Mr. Everitt spoke over the telephone did not provide an estimate of legal fees, other than to indicate generally that it was going to cost him "a lot of money". There is no further evidence from Mr. Everitt that he made any arrangements or inquires with other lawyers to get more detailed estimates of what it might cost to represent him in defence of the criminal charges. In that regard, Mr. Everitt has failed to meet the requirement in the case law that an applicant for a Rowbotham order must look for counsel willing to work at legal aid rates: *R.* v. *Malik*, cited above, at para. 22.

[24] I am satisfied that it is reasonable to expect that Mr. Everitt should have begun planning his financial affairs in order to defend against the trustee's allegations soon after receiving the letter at the end of August 2005. Allowing that he would have required

some time to arrange and meet with counsel, as he did do with Mr. Whittle, I conclude that Mr. Everitt ought to have begun saving for his defence, be it in a civil or criminal law context, in approximately January 2006, which is about 34 months ago to date. That is a significant period of time, and the preliminary inquiry has not even been scheduled yet. Even if Mr. Everitt was only able to save a modest sum of money each month, to date it would translate into several thousand dollars, which would very likely be sufficient to retain counsel, as the following analysis will show.

[25] Mr. Everitt drives a 2004 Toyota Tundra pickup truck, which he said he acquired because of his previous employment as Mayor, which took him away from Dawson City on business quite regularly. He deposed in his affidavit that the vehicle is "worth approximately $25,000" at "present market value". However, somewhat inconsistently, in cross-examination he testified that the "book value" is less than the amount of the outstanding loan on the truck, which is about $18,900. Accordingly, Mr. Everitt said that he has been unsuccessful in trying to sell the truck, despite two efforts to do so about a year ago and, again, about 3 months ago, although he conceded that his efforts to advertise the sale of his vehicle were limited to the Dawson City area. He also said that he has tried to return the truck to the Toyota dealer without success.

[26] In addition, Mr. Everitt deposed that his wife drives a 2006 Toyota RAV4, also worth about $25,000 at present market value. His wife owes about $18,000 on that vehicle. Mr. Everitt provided no evidence of any attempt, or indeed any intention, to sell that vehicle in order to reduce the family's monthly expenses. The combined amount for the monthly payments on both vehicles is $1,260.

[27] The case law requires that an applicant for a Rowbotham order must exhaust all efforts to utilize assets in order to raise funds for the costs of a lawyer. In my view, Mr. Everitt has fallen short in that regard. First of all, it was only in cross-examination that Mr. Everitt testified that the reason he has been unable to sell his vehicle to date is because the book value is below the amount he owes on it. If that is truly the case, I would have expected Mr. Everitt to be more careful in addressing this important fact in his affidavit. Secondly, although there is no evidence of when Mrs. Everitt purchased her vehicle, likely the earliest she could have done so would have been the fall of 2005, given that it is a 2006 model. Mr. Everitt testified that she used some pay equity from her previous employer for the purchase, although a good portion of the price was apparently financed. That would have been around the time Mr. Everitt was aware of the City trustee's intention to pursue legal action for recovery of the allegedly misappropriated funds. In my view, that money could have been saved for Mr. Everitt's legal defence, or alternatively, used to buy a cheaper vehicle without the necessity for financing. Lastly, even if the couple decided to hold on to Mrs. Everitt's present vehicle, Mr. Everitt could have acted with more diligence in attempting to sell his own vehicle. Even selling the Tundra at a loss would have saved the couple money over the longer term. If they were only making payments on one vehicle, that would likely have resulted in a potential saving of about $600 per month, which over the last 34 months, might have generated total savings in excess of $20,000.

[28] Further, Mr. Everitt and his wife bought a Skidoo snow machine for their 19 year old son as a gift for graduating from high school. Little was said about that in Mr. Everitt's affidavit, however on cross-examination he testified that this was purchased as a new

machine in 2007 for a cost of approximately $9,000. He and his wife are currently making the payments on the machine at $208 per month. He testified that he has not considered selling it because it was a graduation present. However, he also described the Skidoo as the “family” snow machine. There was no evidence as to when the snow machine was purchased in 2007. Had he done so in early 2007, that was again at a time when he was aware of the threat of legal action by the City’s trustee and the possibility of criminal charges. If it was purchased in the fall of 2007, then that was after the charges had been laid. Had Mr. Everitt given greater priority to the need to save for legal fees and not made that purchase, he might have been able to save about $2,000 to date, and this is a conservative estimate.

[29] I agree with Crown counsel that Mr. Everitt appears to have made certain lifestyle choices which have a cost associated with them. Indeed, Mr. Everitt concedes, through his counsel, that some of his family’s monthly expenses are “extras” for such things as satellite T.V. and a personal cell phone for Mr. Everitt (he already has one provided by his employer). However, I do not intend to get into an overly detailed examination of these expenses. Rather, it is sufficient for present purposes to focus on a few items where substantial savings might have been made.

[30] Mr. Everitt claims that the family’s monthly bill for groceries and household supplies is $2,300. While I appreciate that the cost of living in Dawson City is higher than that in Whitehorse, this amount still seems inordinately high for a household of five full time residents, and even more so for a family of four (once the 19 year old moves out). It is not unusual to expect Mr. Everitt and his wife to periodically extend their hospitality to their children and grandchildren living outside the family home. However, their choice to

house and feed other youth in the community, sometimes for days at a time, while commendable, would seem to have had an impact on the family's finances.

[31] If Mr. Everitt gave greater priority to saving for a lawyer and, until his charges are dealt with, declined to offer his hospitality to needy youth in Dawson City, it is reasonable to assume that he would, even conservatively, have reduced his monthly food bill by $100 or more. That would translate into a savings of $3,400 to date, and an even larger sum by the date of the preliminary inquiry.

[32] Mr. Everitt also claims that he has monthly expenses of $600 for vehicle insurance and registration. In cross-examination, he confirmed that this is for his vehicle, his wife's vehicle, the motor home, the snow machine and a car belonging to his 19 year old son, whom I noted earlier is currently in the process of moving out of the family home. If Mr. Everitt had taken steps to sell either his pickup or the vehicle owned by his wife, the Skidoo and the motor home, the monthly cost of his insurance and registration would presumably have been significantly reduced. Further, as a Rowbotham applicant, I would suggest that he is being overly generous in volunteering to pay for the insurance on the vehicle belonging to his 19 year old son, when that child is seemingly no longer dependant on him. If the monthly expense in this area was reduced by half to $300, then in the intervening 34 months, Mr. Everitt might have saved as much as $10,200. Even allowing for the fact that Mrs. Everitt's vehicle and the Skidoo were likely purchased more recently than 34 months ago, and reducing that estimate by half, the savings would still be about $5,000.

[33] Finally, with respect to Mr. Everitt's monthly expenses, he claims to pay $140 per month for cigarettes. He testified that he has tried to quit smoking, but has been

unsuccessful. While I acknowledge this may be an addiction which is difficult to resolve, had he made a greater effort in that regard, he might have benefited both his health and his bank account to the tune of approximately $4,700 to date.

[34] The case law also requires that a Rowbotham applicant must make efforts to borrow the money for legal fees, including, if necessary, from other family members. In this case, Mr. Everitt candidly concedes that he has never approached a bank to discuss borrowing money for this purpose. His explanation is that he assumed, because his present monthly expenses regularly exceed the family's monthly income, that he would not be eligible for a loan. However, following my analysis above, if Mr. Everitt had been more prudent in his financial planning in anticipation of having to pay for a lawyer to defend himself, his monthly financial budget might have looked significantly different and much more favourable for the purposes of obtaining financing from a bank.

[35] In addition, Mr. Everitt testified that his 28 year old son is a journeyman carpenter with Parks Canada in Dawson City. He described the son as being married with two children and said that he "does well for himself". Yet, Mr. Everitt hasn't approached his son for a loan to put towards his legal fees.

[36] Lastly, with respect to this issue, the law requires a Rowbotham applicant, if they are already employed, to make efforts to obtain additional employment to raise the necessary funds for a lawyer. Mr. Everitt testified that he works five days a week, but has chosen not to pursue additional weekend employment, as he prefers to spend that time with his family. Once again, his motivation is understandable, but it runs counter to the expectation that a Rowbotham applicant take all reasonable steps to try and raise the

necessary funds, before asking the Court to make an order which could result in the state having to pay for their legal fees.

The complexity of the matter

[37] In addition to an assessment of the accused's finances, the other general issue on a Rowbotham application is whether it is essential for the accused to be represented at this stage of the proceedings. That, in turn, requires consideration of the:

1. seriousness of the charge(s);

2. the length and complexity of the proceedings; and

3. the ability of the applicant to participate effectively without counsel.

On this last point, the court must also have in mind the duty of the presiding judge to assist an unrepresented litigant: *Italy* v. *Seifert*, cited above, para. 45.

[38] There is no dispute that the charges facing Mr. Everitt are serious. They involve two charges of breach of trust by a public officer, two charges of fraud, and two charges of theft over $5,000. Mr. Everitt's counsel has filed case law to indicate that the range of jail sentences which might be imposed for such offences is from about 12 months to more than 24 months.

[39] Crown counsel estimates that the preliminary inquiry will take three to five days. I would not characterize that as an overly lengthy proceeding.

[40] Mr. Everitt's counsel on this application says the charges are complex, at least with respect to the legal elements of the offences. I accept that submission as far as it goes, however I have concerns about whether the factual aspects of the charges are as complex as Mr. Everitt suggests.

[41] In his affidavit, he deposed:

> "I have attempted to review the disclosure that has been provided to me. However, I am overwhelmed by the material as I am not sure what the legal significance of all the documents that have been provided to me. I do not understand how the documents that have been disclosed to me relate to the charges that I am facing."

Earlier, Mr. Everitt deposed that the disclosure which has been provided to him consists of one large binder plus six compact disks containing over 1,000 documents. He complained in cross-examination that some of the documents he has reviewed to date seem to be completely irrelevant to the charges. However, he concedes that he has not yet reviewed all the disclosure provided. I find this very puzzling given the heavy onus that Mr. Everitt has on this Rowbotham application. It seems to me to be a very weak submission to say that he is unable to understand the significance of the disclosure provided if he hasn't yet reviewed it. For example, Crown counsel pointed out to him on cross-examination that one of the CD's contains a summary of each of 56 files (I presume from the City of Dawson) at issue and in each case there is a statement in plain language explaining the nature of the particular allegations being made. Indeed, Crown counsel asked Mr. Everitt to review a paper version of the summarized allegations on one of these files and he had no difficulty understanding that information. Thus, had Mr. Everitt been more diligent in his preparation to date, he eventually would have reviewed this CD and, I expect, obtained an understanding of the allegations against him in every instance. The fact that he has not done so is even more surprising given the concession by his counsel that some form of an index of the disclosure has also been provided to Mr. Everitt identifying the contents of each particular item. It seems as though Mr. Everitt reviewed a few documents, could not fathom their significance, and simply threw his

hands up in exasperation without going any further. In my view, more diligence is required in that regard.

[42] With respect to Mr. Everitt's ability to defend himself at the preliminary inquiry stage, his counsel points out that he has no formal training in law or in municipal accounting practices. While that may be, he does have two years of college education and appears to be both articulate and intelligent. In addition, he was elected to the Dawson City council in 1989 and served as Mayor from 1996 until 2004, and thus has a total of 15 years experience as a City councillor and Mayor. I would therefore assume that most, if not all, of the documentation from the City relating to the charges would at least be familiar to him. Further, in cross-examination, Mr. Everitt conceded that his responsibilities as Mayor were very broad and included numerous matters of complexity, often requiring consultation with lawyers. Accordingly, I am satisfied that Mr. Everitt has the capacity to deal with his charges at the preliminary inquiry stage. In that regard, I agree with the approach taken by Groberman J. in *Newberry*, cited above, at paras. 16 and 17:

> "[16] The final issue is the complexity of the charges and the accused's capacity to deal with them. Without doubt, a conspiracy charge involving wiretap evidence, on its face, is a complex matter. The law in this area is not easily understood by a lay person and there are very serious complexities in multi-party criminal trials, particularly when the admissibility of evidence as against one or all may be of some considerable difficulty. In a conspiracy trial, of course, there is a difficulty of determining when evidence becomes admissible against each individual alleged co-conspirator. These issues are not, however, likely to arise in any stark form at the preliminary inquiry stage. Again, I differentiate between the preliminary inquiry and the trial in this regard.
>
> [17] The accused has a Grade 10 education and he has not had any formal education beyond that, beyond passing a realtor's

> course. He does, however, in his evidence before me, appear to be quite articulate. He is obviously a person of tremendous intelligence who is able to handle complex issues. He has apparently successfully practiced as a realtor for some period of time and he expects to be able to pass a real estate course. I am not saying that I expect that the accused necessarily would be able to, without the assistance of counsel, properly prepare for and present his case at trial. I am, however, of the view that the accused is capable of representing himself without further assistance at a preliminary inquiry." (my emphasis)

[43] It must also not be forgotten that the justice presiding at the preliminary inquiry will likely be able to provide some assistance to Mr. Everitt in procedural and evidentiary matters.

CONCLUSION

[44] Mr. Everitt's counsel conceded that Rowbotham applications at the stage of the preliminary inquiry are unusual but not unheard of. Crown counsel pointed out that no cases have been discovered in which a Rowbotham order was made for the purposes of a preliminary inquiry. In *Newberry*, cited above, Groberman J. commented, at para. 4, that the court must look very closely at an application for counsel at a preliminary inquiry:

> "…The nature of the proceeding makes it less likely that a failure to have counsel at that stage of the proceedings will result in fundamental justice being denied. It is much more common, therefore, for these courts to be dealing with Rowbotham applications with respect to counsel at trial."

[45] In *Seifert*, Romilly J. noted, at para. 16, that a Rowbotham order is "an extraordinary remedy that should only be granted in rare and exceptional cases". Later, at para. 33, he referred to "the heavy burden" on a Rowbotham applicant to demonstrate that their financial circumstances warrant such an order. Mr. Everitt has failed to meet

this onus. Further, I am not satisfied that the charges are so complex that Mr. Everitt would be incapable of representing himself effectively at the preliminary inquiry.

[46] Accordingly, I dismiss his application.

Gower J.