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Advocacy and Independence

By Alice Woolley

Cases Considered:

Goold v. Alberta (Child and Youth Advocate), 2011 ABCA 63

Linda Goold was a lawyer on the roster of lawyers eligible to represent children through the Office of the Child and Youth Advocate. She was removed from the roster on January 15, 2008 due to allegations of unprofessionalism, and in particular allegations of persistent rudeness to caseworkers and others involved in the child welfare system. In addition, it was alleged that she did not comply with policies of the Legal Representation Service. Goold sought judicial review of this decision but her application was dismissed on the grounds of prematurity; she then sought review through the Office of the Child and Youth Advocate. By way of a letter dated October 3, 2008, Goold was advised that a review hearing would take place before the Advocate on October 30. In response to further correspondence from Goold, the Advocate advised that the process would allow her counsel to make submissions, and that he may have questions for her. On October 29, 2008 Goold advised the Advocate that she would not be attending the review hearing, requested a transcript and offered to answer questions in writing. The Advocate advised that given her non-attendance he would review her case by reviewing the documents before him, which included the affidavits prepared by Goold as part of her earlier judicial review application.

On November 25, 2008 the Advocate advised Goold that her review had been denied. The documentary evidence demonstrated that she had engaged in bullying and demeaning conduct to individuals in the child welfare system. She had taken no responsibility for her actions, instead blaming all incidents on the other people involved. She had shouted, been aggressive and insulted the Manager of the Child and Youth Advocate office. The Advocate concluded:

> The materials reviewed reveal that the nature of the complaints which led to the removal of Ms. Goold from the roster relate to conduct that is below the standard expected of a lawyer representing children and youth. LRCY expects that lawyers appointed to children and youth conduct themselves with the utmost professionalism with all members of the community. Ms. Goold has failed to meet this standard. (para. 12(g))

Goold sought judicial review of the substance of this decision and the procedure by which it had been made. A Chamber's Judge rejected her review on the basis that the applicable standard of review was reasonableness, and the decision was reasonable; further, there was no breach of procedural fairness or natural justice (para. 4). Goold appealed.

Summary of Decision

The Court of Appeal rejected Goold's appeal, with each judge on the panel writing separate concurring reasons. The point on which all the judges agreed, and which led to the rejection of her appeal, was that Goold had acceded to the procedure used by the Advocate through her decision not to attend the review, and could not now be heard to complain about the fairness of that procedure. The judges disagreed, however, on whether the procedure used by the Advocate would otherwise have been sufficient and as to the significance of independence of the bar to Goold's appeal.

In his reasons Slatter J.A. held that independence of the bar was not relevant to this case. The allegations against Goold were of incivility and unprofessionalism, and there is no inconsistency between maintaining independence of the bar and requiring civility. An issue of independence would only arise if there had been some attempt to interfere with Goold's actual advocacy for what she perceived as the best interests of the child:

> In my view, however, this appeal does not raise any issues of the independence of counsel. The allegations against the appellant were a lack of civility, unprofessionalism, and a refusal to follow established policies. The independence of counsel does not justify any conduct of that nature, should it be established. There is nothing on the record to suggest that the appellant was removed from the roster merely because she was advancing a position in the best interests of children, which was contrary to the views of caseworkers of the best interests of the children. It was the method the appellant used in advocating those positions that was an issue (para. 18).

Independence is also protected by the independence of the office of the Advocate – which is distinct from the service providers who complained about Goold. Slatter J.A. noted broader movements in the Canadian legal profession in favour of professionalism and civility, and the assertions by various lawyers about the compatibility between zealous advocacy, civility and professionalism – that it is possible "to disagree, even vigorously, without being disagreeable" (para. 22, citing the *Principles of Civility for Advocates*).

Justice Slatter further held that this case attracted only a "low level of 'fairness'" (para. 25) that was fully satisfied here, given Goold's declining to participate in the oral process and failure to raise any issue with the process chosen at the time.

Finally, Slatter J.A. held that the decision was reasonable. The reasons were intelligible and set out the basis for the decision. Further, the substance of the decision was sound. He noted Goold's unprofessional behaviour and her failure to acknowledge the problems with her behaviour. Slatter J.A. suggested that even if Goold had a point that others were not properly interpreting her actions and communication, she needed to deal with that problem, not simply refuse to acknowledge it.

In her concurring judgment Hunt J.A. agreed with Slatter J.A.'s analysis on independence of the bar and the reasonableness of the Advocate's decision. She held, however, that it was not necessary to consider the procedure appropriate for a case of this nature. Given Goold's waiver of any right to object to the procedure the matter was not raised and should not be determined.

In his concurring reasons Berger J.A. took exception both to Slatter J.A.'s analysis of the relevance of independence of the bar and, relatedly, to his conclusion that no oral hearing was

necessary in a case such as this. Berger J.A. pointed out that the lawyer's paramount duty is zealous advocacy to her client. Further, the difference between disagreeing and disagreeable is likely to be in the eye of the beholder, rather than objectively identifiable. That means that an allegation that a lawyer has been uncivil, or unprofessional, does have the capacity to impede a lawyer's zealous advocacy, and does raise issues of lawyer independence:

> It is trite to observe that adversaries and critics will sometimes confuse a vigorous and forceful defence of a principled position on behalf of a client with an unaccommodating and disagreeable attitude on the part of the lawyer. While a barrister must always conduct herself with civility and courtesy, she must remain loyal to her client and true to her oath to fiercely and fearlessly pursue her client's interests, even in the face of stinging criticism from her detractors. For that reason, when (as in this case) complaints are made accusing counsel of unprofessional conduct, great pains must be taken to ensure that the ensuing adjudicative process is substantively sound and procedurally fair. The independence of the Bar demands no less. (para. 42)

Berger J.A. viewed the Advocate's decision as "problematic and troubling" (para. 53) because in essence it assumed the truth of the allegations made against Goold even though in her sworn affidavit she denied those allegations. In his view because the allegations against Goold went to her professional conduct, and raised matters of credibility, she was entitled to an oral hearing. However, Goold waived her right to that hearing, and so cannot now object to the process she was given.

Analysis

The outcome in this case appears fair. The Advocate attempted to design a procedure that would allow Goold to be represented by counsel, to make submissions and to respond to questions. Goold did not request further procedure, and even declined to participate in the procedure offered her. In the circumstances, it cannot be reasonably maintained that she was treated unfairly.

On the more substantive issues, though – the implications of the power to remove counsel from the roster for independence of the bar, and the relationship between civility and independence – the reasons of Slatter J.A., concurred in on this point by Hunt J.A., raise serious concerns. The judgment of Berger J.A. is to be preferred.

As all of the judges recognize by implication, the concept of independence of the bar obtains meaning through the ethical and legal obligations of the lawyer. Independence is not an unmoored normative principle; rather, it exists to protect normative principles of significance – namely, the lawyer's ethical obligation to be a zealous advocate within the bounds of legality. Independence means that lawyers must be encouraged to be zealous advocates, protected from external pressures that would impede zeal and, at the same time, encouraged to remain within the bounds of the law and protected from external pressures that would push them to exceed the bounds of legality. Sometimes the concerns of independence do not run in the same direction or against the same forces. A wealthy and powerful client may exert pressure on a lawyer to exceed the bounds of legality in representation; an official of the state may exert pressure on a lawyer to act with less than zeal in pursuit of a client's case, particularly an unpopular or impoverished client.

Here, as Berger J.A. emphasizes, the problem is that the threat or reality of removing a counsel from the record raises the possibility of pressure on that lawyer to frame her representation of a child not in terms of the lawyer and child's identification of his best interests, but rather in terms of the caseworker or other state representative's identification of the child's best interests – i.e., as identified by the people who will otherwise seek to have her removed from the roster. That means that a decision to remove a lawyer from the roster must be made carefully, and with due attention to process, so that the lawyer representing a child need not be mindful that her choices in representing that child may affect her professional well being. The idea that being removed from the roster is not a matter of consequence, because it does not prevent the lawyer from practicing law, ignores the reality of legal specialization, and the fact that a lawyer may have framed her expertise and practice around that sort of representation. Further, so long as being removed would be a bad thing for the lawyer, and so long as a lawyer fears that the manner or substance of her representation of clients will raise the risk of removal, then the lawyer may represent clients in order to prevent that bad thing from happening, rather than in light of the client's best interests. And that is the point at which independence of the bar is threatened.

Also, the idea that disagreeing and being disagreeable can be so neatly separated seems unduly naïve and blasé. Think of any of these comments that one lawyer might make to another:

> "Your arguments are not legally sound"
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> "Your arguments show a total lack of understanding of the law"
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> "Your arguments are frivolous and vexatious"
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> "Your arguments are stupid"
>
> "You are simply trying to disrupt the progress of our negotiations"
>
> "You are being a jerk"

These comments are more or less polite versions of criticisms of another lawyer's arguments or his conduct of negotiations. They are each designed to further the interests of the lawyer's client, and to point out the problem with the other side's representation. Which is the most effective and offensive almost certainly depends, though, on the lawyers involved and the context. It is entirely conceivable, for example, that a lawyer might be less offended at being called a jerk, especially in a light tone of voice, than by being told that he is disrupting negotiations, since being called a jerk might be viewed as an acknowledgement of some good but difficult points being raised, while being told you are disrupting negotiations may be perceived as an accusation of bad faith. Language is ambiguous, tone is crucial, and the difference between being an advocate and simply being unpleasant cannot be easily ascertained.

No one likes dealing with a lawyer who is unpleasant or disagreeable. And certainly many lawyers successfully practice without being either of those things. However, the line between disagreeing and disagreeable is not as clean as Slatter J.A. suggests.

Ultimately, whether or not policing disagreeableness is a worthwhile activity for lawyer regulators, including the Child and Youth Advocate, is a matter on which people can, and do, disagree. However, I think Berger J.A. is on safe ground when he suggests that when a regulator embarks on such an activity he should do so cautiously, with care to ensure that the facts are

established, and that there is truly no risk of dampening a lawyer's zeal for the pursuit of the interests of her vulnerable clients.