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Lawyer, Not Intervenor

By Alice Woolley

Cases Considered:
R. v. B.P., 2010 ABQB 204

In *R. v. B.P.*, 2010 ABQB 204, Madam Justice Strekaf denied intervenor status to the former lawyer for the appellant accused. The accused had entered a plea to a charge of possession of a weapon for a dangerous purpose. He sought to have the plea set aside on the basis of ineffective assistance by his trial lawyer, Mr. McAviney. Mr. McAviney sought intervenor status in the appeal on the basis that the argument for ineffective assistance of counsel gave him a "direct interest in the outcome of the case" (*B.P.* at para. 8). He suggested that the "real *lis*" of the appeal was between Mr. McAviney and the accused, rather than between the accused and the Crown.

Justice Strekaf denied Mr. McAviney's application. She began by noting that intervenor status should only be granted where the applicant will be directly affected, and/or the intervention is necessary for the Court's decision. Prior case law provides that such status should rarely be granted in criminal cases. Both B.P. and the Crown opposed Mr. McAviney's application. The Crown was concerned with the precedent that would be set by allowing a third party to participate in the appeal; B.P. suggested that Mr. McAviney's intervention was unnecessary because the appeal was "not about Mr. McAviney but rather about his right to a fair trial" (*B.P.* at para. 10).

Justice Strekaf acknowledged that in some cases from other jurisdictions intervenor status had been granted to lawyers whose effectiveness has been questioned. She declined to follow those decisions. In her view allowing a third party to participate in a criminal appeal has the potential to "distort the process" (at para. 15), a matter of particular concern where the intervention would be in opposition to the interests of an accused. Lawyers should, she concluded, have no better right than ordinary citizens to participate in criminal proceedings to which they are not a party.

Justice Strekaf's decision is commendable. When a criminal accused brings an appeal based on ineffective assistance of counsel, it is tempting for the former lawyer to try and shift the focus of the inquiry to the dignity and reputation of the lawyer, rather than on the impact of that lawyer's decisions on the fairness of the accused's trial. Certainly lawyers in such cases appear anxious to defend themselves against what they perceive as damaging allegations. In numerous cases lawyers have sought to present otherwise privileged information to the court to demonstrate that they acted properly in the representation (see, for example, *R. v. Read* (1993), 36 BCAC 64; *R. v. Li* (1993), 36 BCAC 181; *Cewe Estate v. Mide-Wilson*, 2009 BCSC 975; *R. v. Hobbs*, 2009 NSCA 90; *R. v. West*, 2009 NSCA 63; *R. v. Brundia*, 2007 ONCA 725).

As Justice Strekaf noted, allowing the lawyers to participate actively in the proceeding is, however, to distract the Court from the heart of the issue (the fairness of the accused's trial), to give lawyers a privileged position relative to other affected parties (such as the complainant or victim) and to jeopardize the fairness of the process given that the intervention will be aligned against the accused. In one case – *R. v. Li* (1993) 36 BCAC 181 – the lawyer swore an affidavit that disclosed the accused's confession to participating in a robbery, even though that confession was not relevant to the matters raised by the accused's appeal. While the Court disregarded the affidavit in reaching its decision, the unnecessary disclosure by the lawyer risked real prejudicial to the accused. Where the lawyer participates as an intervenor acting to protect his own interests, rather than being called as a witness by the Crown or by the accused to provide information relevant to the matters being argued, the likelihood for such unnecessary and excessive disclosure and arguments seems much greater.

I would simply add to Justice Strekaf's reasons an observation about the ethical obligations of a lawyer in situations such as these. In my view, the ethical duty of the lawyer is to give evidence if requested to do so by the Crown or by the appellant accused, but not to seek actively to participate in the process. The lawyer's duty of loyalty to her former client is not eliminated by the client's allegations. Even though the client is making an allegation that the lawyer may believe to be false, and that may be injurious to the lawyer in some sense, the lawyer should not take steps to participate in the matter unless requested or required to do so.

This conclusion may seem counter-intuitive. After all, if a friend made a false allegation about me in court I would feel – and could impartially justify – no longer acting with loyalty towards that friend. However, the lawyer's duty of loyalty is not personal. The lawyer's duty of loyalty arises from the lawyer's professional role, and is not dependent on the virtue, kindness or actions or the client. The lawyer may, in some circumstances, withdraw positive assistance from the client by withdrawing from the representation. However, the withdrawal of positive assistance is qualitatively different than taking positive steps to injure the legal interests the lawyer was formerly acting to protect. That step requires more than allegations made by the client in a matter to which the lawyer is not a party. In essence, it requires that the hearing actually *be* about the lawyer – a disciplinary hearing or civil trial – not about the client.

The reason for the lawyer's participation in ineffective assistance appeals is because it is necessary to adjudicate properly the allegations the accused is now making. But participation for that reason can be – and almost certainly will be – facilitated by the Crown. It does not require additional initiative by the lawyer. And when the lawyer takes such initiative he acts injuriously to a person to whom he owed – and still owes – a professional and legal duty of loyalty. The lawyer should not do so.

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