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Constitutional



Chief justice's rare order in Trinity Western case ensures 'all voices could be heard'

Wednesday, August 09, 2017 @ 12:19 PM | By Paula Kulig

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Chief Justice Beverley McLachlin's unusual decision to vary an order from one of her colleagues that denied intervenor status to LGBTQ groups in a major case involving equality rights and religious freedom is a largely procedural matter that stemmed from a desire to hear more points of view, say several observers of the Supreme Court of Canada.



Justice Richard Wagner

"I think this is a very important case, with potential ramifications not just for the parties but for administrative law and equality law in general," Elin Sigurdson, a lawyer with Vancouver's Mandell Pinder LLP who represents a coalition of LGBTQ groups in B.C., told *The Lawyer's Daily*.

"Given the issues at stake, the chief justice was likely motivated to ensure all voices could be heard [so that] the court can make the best informed decision in the circumstances. ... Courts understand that justice must not only be done, it must be seen to be done."

The chief justice's order, made on July 31, came four days after Justice Richard Wagner granted the applications of nine intervenors in two appeals being heard jointly later this year involving law societies in Ontario and British Columbia, and Trinity Western University, a Christian school in B.C. that forbids students from having sex outside heterosexual marriage.

Both the Law Society of Upper Canada and the Law Society of British Columbia, along with the Nova Scotia Barristers' Society, decided in 2014 not to accredit the university's proposed law school, preventing its graduates from practising in the provinces. Appeals by TWU failed at Ontario's Divisional Court and Court of Appeal, while the university won its case before B.C.'s Supreme Court and Appeal Court. Both the Ontario and B.C. rulings — *Trinity Western University v. Law Society of Upper Canada* 2016 ONCA 518 and *Trinity Western University v. Law Society of British Columbia* 2016 BCCA 423 — are being appealed, and the cases are scheduled for Nov. 30 and Dec. 1 before the Supreme Court of Canada.

Justice Wagner denied the applications of 17 other intervenors, including all four LGBTQ groups seeking to be heard before the top court, unleashing anger from activists and lawyers on social media. Chief Justice McLachlin then stepped in with a new order giving all 26 applicants the right to intervene and, on Aug. 2, issued an unprecedented news release explaining both decisions.



Elin Sigurdson, Mandell Pinder LLP

"The court does not give reasons for decision in motions for intervention. To do so would disproportionately burden the court's workload. In this instance, however, the concerns raised by some LGBTQ+ groups and others call for a response," the statement said.

It noted that when Justice Wagner's order was made, only one day had been set aside to hear the appeals. With at least five minutes of oral argument given to each intervenor, and at least one hour allotted to each of the appellants and respondents, "scheduling considerations informed Justice Wagner's decision not to grant all applicants the right to intervene," it added.

"In considering intervention applications, the court always strives to ensure it will hear a wide range of views, while also managing the court's time efficiently. The court also bears in mind the duty of the parties of record (appellants and respondents) to fully canvass the issues raised by the appeal."

In her July 31 order, Chief Justice McLachlin, after discussing the matter with Justice Wagner, added a second day to the hearing, the statement said, noting that scheduling is the chief justice's "responsibility."

"With Justice Wagner's agreement and support, the chief justice issued a new order to add a second hearing day and give all the remaining applicants the right to intervene. This was a variation of Justice Wagner's order and did not overrule his order, which remains in place," the statement said.

A spokesperson for the Supreme Court, as well as lawyers acting for the university, did not respond to requests for comment.

Sigurdson said she and her clients "were surprised and deeply disappointed" with the initial order.

"This is a case about exclusion of LGBTQ people from the opportunity to join the legal profession at the very start of that journey," she said. "To exclude from the court the voices of those affected by that form of exclusion would commit the very wrong that drives the concern with TWU's admission policy. It would perpetuate the stigma that is faced by LGBTQ people and that is encouraged by TWU's admission policy and its acceptance by law societies."



Eugene Meehan, Supreme Advocacy LLP

In addition to the coalition represented by Sigurdson, the other LGBTQ groups granted intervenor status include LGBTQOUT, OUTlaws and Start Proud (formerly Out on Bay Street). They are joined by organizations that represent religious, secular, academic and students' views, as well as women's rights.

The nine groups that initially received intervenor status included Christian Legal Fellowship, National Coalition of Catholic School Trustees, Association for Reformed Political Action, the Advocates' Society, the Canadian Bar Association, International Coalition of Professors of Law and Lawyers' Rights Watch Canada.

Eugene Meehan, a former executive legal officer of the Supreme Court and a partner at Ottawa's Supreme Advocacy LLP, noted that at 26, the case attracted a record number of intervenor applications, and when Justice Wagner was making his decision, only one day had been set aside to hear from intervenors.

"His job was to consider which ones are best able to assist the court in the limited time then available," he said in an interview. "That's the job. He consulted and collaborated with his chief justice and she exercised her own inherent jurisdiction as chief justice. That's her job. They both did their job. What's not to like?"

He added that once the case is heard and the judgment is released, "literally no one can say they weren't heard. It's the pragmatic equivalent of that said in *Game of Thrones*: 'Leave one wolf alive and the sheep are never safe.' "



Gavin MacKenzie, MacKenzie Barristers

Meehan said he's not aware of a rule that gave the chief justice the legal authority to step in and vary the order. "But it's always been the case that the chief justice has jurisdiction to decide procedural matters, and ultimately that's what this is. It's a procedural and management matter."

Gavin MacKenzie, a former treasurer of the Law Society of Upper Canada whose practice at MacKenzie Barristers in Toronto includes appeals, judicial review applications and professional responsibility, said it was "surprising that none of the four applications of LGBTQ groups were granted in the first instance," and he called the chief justice's order adding a second hearing day "a constructive way to resolve the problem."

He added, "I expect that the chief justice's order and the court's media release were motivated primarily by an effort to improve the quality of the hearing process by providing the court with the benefit of more varied perspectives than it would have received under Justice Wagner's original order."

Chief Justice McLachlin is retiring at the end of the year, and Justice Wagner, the court's senior francophone judge, is seen as a leading contender for the top job. Both Meehan and MacKenzie said they don't believe the chief justice's decision to step in and vary Justice Wagner's order is linked to his candidacy — with Meehan calling the notion "way out there."

But criminal and constitutional lawyer Clayton Ruby of Toronto's Ruby & Shiller said the chief justice's decision is more than a procedural matter. "If the original order had not been varied, the court's impartiality on the issue would be questioned. So I look not just to his candidacy for chief justice, but more importantly to the court's integrity and impartiality."



Clayton Ruby, Ruby & Shiller

Ruby, who in a separate case represented a gay applicant to the university who was suing the B.C. government for authorizing the law school (the government withdrew its support in 2013 before the case was heard), said he's not aware of a chief justice varying an order of a colleague.

"I think they had a talk and decided this should be done and just make sure we don't set a precedent for revising these orders," he said. "They don't want to encourage more people to come back and say please reconsider your order. So they sent it to the chief justice I think for that reason, just not to encourage the ordinary litigants that were refused intervenor status to try again."

In an interview with *The Globe and Mail*, Justice Wagner said he made "a judgment call" and did not intend to exclude LGBTQ groups. "I was convinced that some intervenors for which I accepted the application in fact will convey the interests, preoccupations and concerns" of those groups, he said.

Sigurdson said she accepts the justice's statement "as genuine, while respectfully disagreeing with the initial assessment that the other groups could capture the interests of the LGBTQ persons whose equality rights are impaired by the approval of the TWU law school."

But Ruby called the comment "weird," noting that "the inference is that he does not know what groups are the LGBTQ groups. ... You could never think that those other groups would speak for" the LGBTQ community. "They're not speaking from a 'gay' perspective."

He also said the criticism directed at Justice Wagner was warranted, "but it doesn't lead to an inference of him being against the gay position or against gays in the community. It just leads to an inference of ignorance."

MacKenzie said the court's media outreach was a positive development, "and may be seen as a commendable effort to improve transparency and to be responsive to concerns of the public. I don't expect that we will see the court issuing media releases frequently. The court isn't going to respond to every tweet."

Meehan agreed, noting that "in terms of legal matters, the court exclusively speaks through its judgments. ... The court is not in the media business, they're in the law business." But, he said, it's clear from the news release and from Justice Wagner's comments that the court is aware of what's said on social media. "Judges get feedback on their judgments faster and more intensely than before," he said. "While we're watching them, they're clearly watching us."

Photo of Justice Richard Wagner by: David Balfour Photography

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