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The Unfortunate Incident of the TWU Intervention Decisions

By: Alice Woolley

Cases Commented On: *Trinity Western University, et al. v Law Society of Upper Canada*, SCC file no 37209; *Law Society of British Columbia v Trinity Western University, et al*, SCC file no 37318

On July 27, 2017 Justice Wagner denied intervenor status to 17 of 26 applicants in the Trinity Western University cases before the Supreme Court, including the applications of all LGBTQ+ identifying groups. Following an immediate and negative public reaction, particularly on social media, Chief Justice McLachlin used her scheduling power to add a second day to the TWU hearings, and then extended intervention status to the 17 applicants whom Justice Wagner originally rejected (Both orders can be found here). Two days later, Justice Wagner gave an interview to the Globe and Mail explaining that he had "no intention to exclude" members of the LGBTQ+ community, and that he and the Chief Justice had decided together how best to proceed after "he was made aware of concerns on social media". The Supreme Court also issued a News Release explaining what had occurred.

Like I think many in the legal community, my first reaction to all of this was, "well that was weird". And concerning. See, e.g., these terrific columns by Patrick Baud and Maxime St-Hillaire, Tom Harrison, and Omar Ha-Redeye, exploring the uncertain legal foundations for the Chief's order (Baud and St-Hillaire), the general question of how much authority a chief justice has and should have over scheduling and assignments (Harrison), and the Chief's order as an example of public dialogue and as a potentially troubling precedent (Ha-Redeye).

Here I want to explore three thoughts about the Court's response to Justice Wagner's original order: that it was understandable; that it was regrettable; and that it shows a now urgent need to change the Court's process for deciding applications to intervene.

I of course don't know why Justice Wagner wanted to do something in response to the concerns on social media. But it's possible that the public reaction made him realize that he had made a mistake. That while he did not intend to exclude anyone, he realized that he had, and that doing so was an error: it undermined confidence in the administration of justice and the comprehensiveness of the interventions the Court would receive. It's easy to accuse a judge who reacts to public criticism as pandering, but it's just as likely that the judge – especially if they are self-critical and self-aware – has realized they messed up. If that characterization is accurate, Justice Wagner's desire to fix the mistake was understandable and even admirable.

That does not, however, make the Court's response less regrettable. The problem here was that the Court's process does not allow it to fix this sort of mistake – there is no express power in the Court's Rules to review or reverse intervention decisions. As Baud and St-Hillaire note, there

may be some legal grounds for the Court to change its decision (through s 3(1) of the Court's Rules or by implication) but those grounds are at best uncertain; Baud and St-Hillaire describe the Chief's decision as a "seemingly unprecedented use of…an unclearly established power".

Further, the Chief did not purport to rely on any such grounds to reverse Justice Wagner; she instead used her "scheduling" authority to deal with the problem. Indeed, the Court claimed in the News Release that the Chief had *not* reversed Justice Wagner's decision: "This was a variation of Justice Wagner's order and did not overrule his order, which remains in place".

That explanation is, at least to me, extremely troubling. It is asking us to accept a characterization of the Chief Justice's order that seems on its face implausible. Justice Wagner denied intervenor status to 17 groups. All 17 of those groups now have intervenor status. Justice Wagner said that that change was made in response to the public reaction to his decision – to his realization that he had done something that needed to be dealt with. That looks like a reversal to me, and I think would look like a reversal to the affected parties (in a Facebook status, "Let's OUT-law TWU" described the Chief's order as a "stunning reversal"). That the reversal was accomplished through a scheduling power does not turn it into a scheduling decision.

The Chief Justice's order also uses the scheduling power for a purpose that it is hard to see as within the scope of that power. The schedule was changed in order to effectively reverse Justice Wagner's denial of intervention status to those 17 groups; the schedule was not changed because those groups had been granted intervenor status and now needed to be accommodated. To use the means of the scheduling power in order to accomplish some unrelated end may be understandable, but in my view does not fit plausibly within the scope of what the law's interpretive community would understand a scheduling power to include.

And those two things – asking people to believe something they can see isn't true, and stretching the law beyond what it can reasonably incorporate to justify an end the Court wants to achieve – are troubling precedents for the functioning of the law and our legal system. As I and many others have argued, the most fundamental constraint on what lawyers do is the law itself; respect for law as a meaningful limit on their actions and those of their clients is one of the two principles underpinning lawyers' ethics (the other principle of course being client advocacy). In making a decision like this, the Court undermines the sense that the law is a meaningful constraint, or that there is any reason for lawyers to treat it as such. If the Court will stretch and manipulate the law to achieve a goal – even if the goal is a good one – what message does that send to lawyers and the public about how they should view the law? If the Court treats the law as a tool rather than a limit, why should lawyers or their clients do any different?

It also feeds the current belief of some (like Trump) that public authorities and experts cannot be relied upon to tell the truth, that they tell you what they want you to believe, but not what is true. When a public authority says something that looks fake even to a sympathetic reader – for example, that this was an exercise of a scheduling power, and not a reversal of Justice Wagner's decision – they make it easier for the "fake news" allegation to stick even in cases when it's unfair.

The Court's decision to communicate its reasons through the media, rather than through reasons, is also disturbing. Courts have a voice. They have the power and responsibility to explain their decisions, and to respond to arguments against what they have decided to do. But courts speak in

only one way – through their reasons. Judges do not speak directly to the media about what they have done. They do not do interviews to respond to public criticism. They write reasons and those reasons speak for themselves. Presumably Justice Wagner spoke to the Globe, and the Court issued a News Release, because they had not issued reasons here. But engaging with the press directly is a radical shift in how courts talk to the public (as Omar Ha-Redeye pointed out) and to me it is a problematic one.

Courts need to explain themselves through reasons. They need to write reasons that can withstand public scrutiny, and that have authority for other judges or lawyers who may rely on them. Speaking directly to the press risks distracting judges from providing the reasons they ought to provide ('I can explain it later if I need to'). It also creates statements that are authoritative – because a judge made them – but are not legal authority. What should a lawyer or judge do with the Court's News Release here? Should it be treated as precedent for what the scheduling power includes? Or should it be viewed as legally irrelevant? We know what a legal decision means, but not a "News Release". And even if our legal system can withstand the change of a Supreme Court judge doing a media interview in an exceptional case like this one, what if a trial judge takes this as meaning that they can talk to the press about a controversial case, or even just a difficult one? Given what the Supreme Court has done here, on what basis do we criticize a judge who, say, gave a media interview about the emotional difficulty of trying a gruesome sexual assault and murder trial? There are of course arguments in favour of that kind of direct media engagement, but there are also real risks associated with it, particularly in cases where the engagement relates to the substantive issues that were before the court. Certainly so significant a change in judicial practice ought to happen thoughtfully and incrementally, not because the Supreme Court got itself in a jam and needed to find a way out.

Finally, this whole debacle emphasizes the long-overdue need for changes in how the Supreme Court deals with applications for intervention. In a superb 2010 article on Supreme Court interventions ("Interventions at the Supreme Court of Canada: Accuracy, Affiliation and Acceptance" (2010) 48 OHLJ 381) Ben Alarie and Andrew Green conducted an intensive review of the intervention process at the Supreme Court. They noted that while the process for applying for intervenor status is clear, "it is considerably less clear what is motivating the Court to allow interventions" (at 383). The Court needs to fix that. It needs to explain the basis on which intervention decisions are made, and the function that interventions serve in judicial decision-making.

It needs to do so because interventions are not mere window-dressing. As Alarie and Green explain through their review of the cases, intervenors affect Supreme Court decision-making (albeit modestly) (at 408). If interventions matter, the basis on which interventions are granted ought to be articulated and justified. Moreover, explaining a decision helps judges avoid mistakes, such as Justice Wagner feels he made here. In his comment to the Globe he said that he did not intend to exclude anyone, and this was just a "judgment call". But if he had had to explain why these groups were not getting intervention status, the exclusionary effect of his decision may have been more evident to him, and he would in any event have had to explain why his judgment call was as it was.

The Court's claim in its News Release that issuing reasons in intervention decisions "would disproportionately burden the Court's workload" is hard to accept given the small number of cases the Court hears, and the significant resources it enjoys (including, this coming September,

an extra clerk per judge). Issuing reasons in intervention decisions is something that other courts have been able to do (see, e.g., *Canada (Citizenship and Immigration) v. Ishaq* 2015 FCA 151). But even giving it some credence, avoiding that increase in workload must be balanced against the real benefits that giving reasons in intervention decisions would offer – benefits that seem especially important in light of what happened here.

When the public (including the legal community) reads a decision, and sees an outcome they find troubling, knowing why that outcome was reached allows them to engage with the merits, rather than with only the outcome itself. It may change their minds, and if it doesn't it will at least help them understand why it was as it was. It allows them to engage with the issues deeply, rather than superficially. Personally I find it difficult to think of reasons which could have made me agree with Justice Wagner's original decision, but it would be much more fruitful to engage with reasons than solely with the fact of his decision to exclude all LGBTQ+ identifying groups. To say that a decision is wrong because I don't like the result, is the worst kind of reductive legal reasoning – it's what any law professor criticizes their students for doing – but the lack of reasons in this case meant that it was the only thing with which we were left.

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