CITATION: Sri Lankan Canadian Action Coalition v. Her Majesty The Queen in Right of Ontario and Attorney General of Ontario, 2022 ONSC 1675
COURT FILE NO.: CV-21-668250 and CV-21-663853 (Joined)
DATE: 20220316

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: SRI LANKAN CANADIAN ACTION COALITION, SRI LANKA CANADA ASSOCIATION OF BRAMPTON and SENA MUNASINGHE, Applicants

-and-

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, Respondent

-and-

ATTORNEY GENERAL OF ONTARIO, Respondent

AND BETWEEN:

NEVILLE HEWAGE, Applicant

-and-

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, Respondent

-and-

ATTORNEY GENERAL OF ONTARIO, Respondent

BEFORE: W.D. Black J.

COUNSEL: *Nicolas M. Rouleau, N. Joan Kasozi, H. Scott Fairley and Salma Kebeich,* for the Applicants Sri Lankan Canadian Action Coalition, Sri Lanka Canada Association of Brampton and Sena Munasinghe

Neville Hewage, for himself

Hart Schwartz, Zachary Green and Ravi Amarnath, for the Respondent

Janani Shanmuganathan, for the Proposed Intervener Tamil Rights Group

Adriel Weaver and Dan Sheppard, for the Proposed Interveners National Council of Canadian Tamils, the Canadian Tamil Academy and the Canadian Tamil Youth Alliance

HEARD: March 14, 2022

ENDORSEMENT

Overview

[1] The Tamil Rights Group ("TRG") and a coalition of the National Council of Canadian Tamils, the Canadian Tamil Academy and the Canadian Tamil Youth Alliance (the "Tamil Coalition") bring motions seeking to intervene in two applications, either as parties (under Rule 13.01) or as friends of the Court (under Rule 13.02).

[2] In each application, in which the applicants are the Sri Lankan Canadian Action Coalition, the Sri Lanka Canada Association of Brampton and Sena Munasinghe (the "Sri Lankan Coalition") (in one application) and Neville Hewage (in the other), the applicants advance constitutional challenges to the *Tamil Genocide Education Week Act* (the "Act"), alleging that it is both *ultra vires* the provincial legislature and an unjustified violation of various rights and freedoms guaranteed by the Charter.

Proposed Intervention of TRG

[3] The TRG describes itself as an international not-for-profit organization that seeks justice and accountability for Eelam Tamils by promoting reconciliation initiatives, protecting the civil liberties of Eelam Tamils both within and outside Sri Lanka, and supporting transitional justice initiatives.

[4] Its stated goal in these proceedings is to ensure that the Court has the benefit of a complete and balanced factual record when it considers the constitutionality of the Act.

Proposed Intervention of the Tamil Coalition

[5] For its part, the Tamil Coalition is comprised of Tamil Canadian community organizations that are actively engaged in commemorating and raising awareness of the Tamil genocide, and describes its mission as seeking to address the effects of the acts committed by the Sri Lankan state by preserving Tamil language, culture and identity and promoting healing from intergenerational trauma.

[6] The Tamil Coalition's intention in intervening is:

(a) to ensure the Court has the benefit of a proper, balanced and comprehensive factual record concerning both the acts perpetrated by the Sri Lankan government and the importance of the Act to Tamil-Ontarians; and

(b) to make submissions on the use of the term "genocide" in the Act and on the interpretation and application of section 15 of the Charter, including the need to take into account the equality rights of Tamil-Ontarians in deciding whether or not the Act is Charter-compliant.

[7] As can be seen there is some overlap in the positions of the two proposed interveners. The proposed interveners recognize and acknowledge that overlap, and undertake, if granted intervener status, to cooperate to ensure that duplication of evidence or argument is minimized.

Historical Conflict and Question of Genocide

[8] At the risk of boiling down longstanding and complex historical events to unduly simplistic soundbites, there is considerable disagreement between Sinhalese-Ontarians and Tamil-Ontarians (and indeed between Sinhalese and Tamil people in Sri Lanka and elsewhere around the world), about the proper characterization and understanding of the longstanding conflict between these groups in Sri Lanka. At its core, both the constitutional challenge of the Act and the proposed interventions emanate from this disagreement, and from the debate about whether or not the treatment of the Tamils by the Sri Lankan state is properly understood as a genocide.

Applicant's Characterization of the Act

[9] The Sri Lankan Coalition, in its application, alleges that the Act is *ultra vires*, "propagates a factual and legal falsehood" and is "nothing more than a propaganda victory of the [Liberation Tigers of Tamil Eelam]". It alleges also that the Act has the effect of stigmatizing Sinhalese-Ontarians on the basis of religion and national or ethnic origin, thereby violating their equality rights under section 15 of the Charter.

[10] Neville Hewage, in his application, similarly alleges that the Act is *ultra vires* and violates section 15. He also maintains that the Act violates section 2(b) of the Charter by subjecting Ontarians to "learn[ing] untruth", and in his affidavit asserts that the Act is based on:

(a) false information about so-called Sinhala-Buddhist-centric government policies and pogroms;

(b) false information about so-called land grabs;

(c) false information about the so-called ethnic cleansing of Tamils;

(d) false information on death tolls claiming to be the United Nations' estimates;

(e) false narration about conflict;

(f) false narration of the claim that the Sri Lankan state has systematically disenfranchised the Tamil population of their right to vote;

(g) false narration on the so-called *Sinhala Only Act* of 1956; and

(h) false narration on Tamils experiencing a serious disadvantage in participating in the public service of Sri Lanka.

[11] It is in relation to these factual claims of the applicants in their respective applications, in particular, that the TRG and the Tamil Coalition seek to flesh out the record in the applications.

Proposed Contributions of Proposed Interveners

[12] The Tamil Coalition states that it has "distinct, extensive and intimate knowledge of the acts perpetrated against Tamils in Sri Lanka by the Sri Lankan state, and of the profound importance of public acknowledgement and awareness of the genocide to the Tamil community,

including through the [Act]". It says it also offers "a unique and useful perspective on the impact on the Tamil community if this Application succeeds".

[13] Similarly, the TRG suggests that it can "bring a necessary perspective" to the application(s), alleging that the applicants "have filed materials that are both factually inaccurate and incomplete" and that "present a one-sided view of the history that surrounds the legislation, and the impact that the legislation has in the community".

[14] I will address below the details of the material that the would-be interveners propose to file, and the role that they ask to play, but by way of broad summary, each potential intervener seeks to file material in the record to supplement and respond to allegations advanced by the applicants, to play at most a limited role in cross-examinations, and to provide written submissions and brief oral submissions at the hearing of the applications.

The Test to Intervene as a Party

[15] The parties agree that the criteria for being added as a party intervener and the criteria for being added as a friend of the court are set out in Rules 13.01 and 13.02 respectively.

[16] Rule 13.01 provides that a person who is not a party to a proceeding may move for leave to intervene as an added party if the person claims:

(a) an interest in the subject matter of the proceeding;

(b) that the person may be adversely affected by a judgment in the proceeding; or,

(c) that there exists between the person and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding.

[17] On a motion for leave to intervene as an added party, the Court must also consider whether the proposed intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding.

Proposed Interveners' Submission re Meeting the Test

[18] Both TRG and the Tamil Coalition rely on *Halpern v. Toronto (City) Clerk* (2000), 51 O.R. (3d) 742 (S.C.), a case that in fact all parties regard as authoritative, for the proposition that a party has a "clear interest" where it demonstrates that the party's interest in the proceedings is "over and above that of the general public" and where that interest is "genuine and direct". They also each note that the special circumstances of Charter litigation mean that greater latitude should be given to intervener motions because "such challenges generally involve a greater public interest", as emphasized recently in *Dorsey, Newton, and Salah v. Attorney General of Canada*, 2021 ONSC 2464, at para. 18.

[19] Both proposed interveners argue that they readily meet this test. They note that they are deeply and actively committed to promoting public acknowledgement and awareness of the Tamil genocide and to ongoing efforts to preserve Tamil culture and identity. They say that upholding the Act in fact falls squarely within their mandates and organizational interests.

[20] The proposed interveners maintain, in relation to the second part of the Rule 13.01 test, that inasmuch as the Act supports and contributes to their ongoing efforts to promote and protect Tamil culture and identity in the wake of the Tamil genocide, if the applications succeed the interveners' efforts will be substantially undermined.

[21] TRG and the Tamil Coalition both contend that they have a useful contribution to make to the proceedings (as *Halpern* requires). They argue that the applications are premised on a narrow and one-sided version of the history of the conflict in Sri Lanka, and, to the extent the Court will or may need to engage with those issues and claims, the proposed interveners can assist by ensuring that a more balanced and fulsome factual record is before the Court on these issues. They say that the applicants' arguments rest on claims about the nature of events in Sri Lanka and the impetus for and effects of the Act, and that the proposed interveners have particular knowledge and expertise to bring to the Court on these issues.

[22] The Tamil Coalition adds, with respect to the Charter issues, that it is uniquely positioned to assist the Court in assessing the impact of the Act on the Charter rights not only of the applicants but also on members of the Tamil community. The Tamil Coalition cites and relies on the observation of Justice Nordheimer on behalf of the Divisional Court (as he then was) in *Trinity Western University v. The Law Society of Upper Canada*, 2014 ONSC 5541, 122 O.R. (3d) 553, at para. 43, that,

> "The [principal] focus of the court is to resolve the issues that are in dispute between the parties in accordance with the applicable legal principles but, in doing so, to be guided by considerations of the broader impacts that the court's decision may have, that is, impacts beyond just the interests that the parties present."

In this regard, the Tamil Coalition says that its evidence and submissions will assist the Court in undertaking an informed consideration of those broader impacts.

[23] Finally, with respect to potential delay or prejudice, both proposed interveners confirm their plan to adhere to the pre-existing timetable established for this proceeding. That timetable was established by Justice Vermette in her endorsement of February 9, 2022, and establishes dates for the exchange of materials, cross-examinations and serving and filing of factums culminating in a two-day hearing on May 24-25, 2022.

[24] The would-be interveners are mindful of this schedule and confirm they will serve their materials - if granted intervener status - by March 21, 2022.

[25] While they would produce their deponents (if any) for cross-examination, they would only themselves cross-examine the applicants' witnesses if the respondent, Attorney General of Ontario ("AG"), declines to do so.

[26] They each then propose to file factums in accordance with the timetable (presumably by the deadline for the respondent's materials), and limited to 20 pages each, and then to make submissions limited to 30 minutes each at the return of the applications.

Position of the AG

[27] Having mentioned the AG, I should pause here to note its position.

[28] Mr. Schwartz for the AG confirmed in his submissions that the AG supports the proposed interventions and is of the view that the interventions meet the tests set out in Rule 13 and the parameters established in the *Halpern* decision. While he noted that the AG's primary position is that it is plain and obvious that there is no basis for the applicants' constitutional claims, such that no factual evidence is required, he acknowledged the possibility that the judge hearing the applications will find the historical record and related evidence relevant and helpful and submitted that in that scenario the material and role proposed by the interveners will assist the Court.

[29] Mr. Schwartz noted that the applicants have filed the affidavit of Professor Schabas, which refers extensively to historical facts and agrees with the proposed interveners that the contribution of the interveners would help balance the information for the Court about the factual underpinnings for the applications.

[30] Mr. Schwartz also pointed out that the AG could itself file the evidence proposed by the interveners and act as a conduit in that regard. In fairness, Mr. Schwartz did not commit to the AG doing so if the interventions are denied, but clearly adverted to the possibility that it would take that step and, in discussing that potential scenario, submitted that it would be better for all concerned if that evidence and argument would come directly from the interveners rather than indirectly from the AG itself.

[31] This submission of the AG applies equally to the second position advanced by the proposed interveners, that in the event the Court declines to give them party status as interveners, they should nonetheless be allowed to intervene as friends of the court pursuant to Rule 13.02.

Proposed Interveners' Submissions on Intervention as Friend of the Court

[32] The submissions of the proposed interveners on this front largely echo their submissions seeking to intervene as parties under Rule 13.01. They note that the considerations under Rule 13.02 involve similar factors to those required under Rule 13.01, and ultimately require the Court to assess the likelihood that the proposed intervener will make a useful contribution distinct from the perspective offered by the parties, and that that contribution is sufficient to counterbalance the disruption caused by the increase in timing, complexity, magnitude and costs of the original proceeding.

[33] Again the proposed interveners submit that they readily meet the criteria. If given the status of friend of the Court, the interveners would file somewhat more limited materials, in the case of TRG a collection of secondary source materials such as reports authored by the United Nations, Amnesty International, Human Rights Watch and other organizations, as well as articles and books, and in the case of the Tamil Coalition, limited affidavit evidence concerning the significance of the Act to Tamil-Ontarians.

[34] Again in this scenario the proposed interveners would each seek to file factums of 20 pages in length and to make submissions of 30 minutes each at the hearing of the applications.

[35] I should also note that in either scenario - Rule 13.01 or 13.02 - the proposed interveners undertake to coordinate their participation with other respondents and interveners to avoid duplication of evidence and submissions. They also agree that they would not seek any costs and would ask that none be sought against them.

Applicants' Position on Proposed Interventions

[36] In reviewing the position of the applicants in relation to the proposed interventions, I will focus primarily on the submissions of the Sri Lankan Coalition. Mr. Hewage in his submissions, largely adopted the positions of the Sri Lankan Coalition. There are some differences in the applicants' respective positions, as I have alluded to above (in terms of Mr. Hewage's evidence about certain factual matters) and as I will discuss briefly below, but on the fundamental issues relative to the potential interventions, the applicants' positions are largely aligned.

[37] The opposition of the applicants to the proposed interventions is essentially threefold.

[38] First, the applicants dispute the extent of the proposed interveners' relevant experience, knowledge and expertise, in effect disputing the ability of the proposed interveners to make a useful contribution to the record and hearing.

[39] Second, they argue that all that the interveners would offer is factual evidence that goes beyond the scope of and is in fact unnecessary and irrelevant to the matters in issue, and is in the nature of lobbying and/or witness testimony as opposed to helpful additional context. In this category, the applicants make the related submission that the AG can and should be relied upon to provide any evidence and submissions in support of the Act and that it is inappropriate for the AG to "abdicate" its role and to delegate that role to interveners.

[40] Third, the applicants express the concern that allowing the interventions would cause additional expense and prejudice to the applicants, and would require them to respond to evidence that would either duplicate or enlarge the scope of the applications.

[41] I will discuss these arguments in turn.

Discussion of Alleged Lack of Experience and Expertise

[42] Dealing with the proposed interveners' alleged lack of expertise, experience and knowledge, the applicants point out that none of the proposed interveners profess expertise in relation to the constitutional division of powers nor the relevant rights under the Charter, which the applicants say are the only legal issues at stake in the applications.

[43] They also note that neither proposed intervener has any past experience in prior interventions in Court.

[44] While in the argument of the Sri Lankan Coalition it is implicitly acknowledged that a proposed intervention is not necessarily limited to a contribution to legal issues and analysis, and that in the right circumstances a contribution to the factual matrix can ground an intervention, it argues that "The proposed interveners' factual focus on the specific acts committed during the Sri Lanka conflict is misguided". That is, the Sri Lankan Coalition alleges, quoting from its expert's evidence,

> "This is not a situation where there are conflicting factual narratives. The horrific accounts described by Members of the Ontario legislature in the debates about the Bill are consistent with the findings of the United Nations investigations and reports of the major international non-governmental organizations. The only difference of

> significance, it would appear, is that politicians who spoke in debates and activists within Tamil communities invoke the term 'genocide' whereas international human rights experts and academics do not."

[45] Punctuating this argument, the applicants submit that their attack on the Act is "not premised on what specific atrocities were committed during the war. Rather, it is centered on the issues of whether the Ontario legislature has the necessary jurisdiction to declare a genocide and, furthermore, whether its declaration of a genocide discriminates against Sinhalese Canadians".

[46] In my view, while on its face there is force to the argument that the applications are purely about jurisdiction, the contents of the applicants' records in fact undercut this suggestion.

[47] That is, as set out above, each of the applicants, to varying degrees and most particularly with respect to the evidence of Neville Hewage, make specific factual assertions about the alleged inadequacies and inaccuracies in the evidentiary basis on which the Act rests.

[48] The Sri Lankan Coalition, in its materials, alleges among other claims that the Act is part of a campaign encouraged by the Liberation Tigers of Tamil Eelam ("LTTE") and its successors, and that the Act "propagates a factual and legal falsehood that in both form and content is devoid of any valid educational purpose and is "nothing more than a propaganda victory of the LTTE that can be employed to influence other jurisdictions to follow suit".

[49] Neville Hewage, again as set out above, goes even further, alleging that the Act rests on "false information" about various aspects and outgrowths of the conflict.

[50] As such, in my view, it does not lie in the mouth of either applicant to maintain that their applications purely and only involve and require constitutional arguments, such that the only useful contributions from would-be interveners would be in the nature of circumscribed legal expertise on these constitutional issues.

[51] Having themselves asserted that the factual underpinnings of the Act are false, it is not open to them, in my opinion, to then purport to close the door on other points of view or debate about those propositions.

[52] Viewed in this way, the fact that the contribution of the interveners will be largely with respect to the factual record as opposed to lending constitutional expertise, is not a bar to the intervention, and in fact underlines the potential utility to the Court in having another perspective on the premises for the Act and the relevant context.

[53] To be clear, this is not to say that I have or even could have come to a determination about the respective versions of the underlying facts, nor about who is right or wrong. Rather, I find that it will likely be of assistance to the Court to understand that the factual claims and allegations of falsehoods in the applicants' materials are themselves controversial.

[54] Nor am I persuaded that the lack of a track record in Court as interveners or otherwise precludes the participation of the potential interveners in the applications.

[55] As counsel for TRG submitted, the conflict from which the Tamil diaspora arose is a creature of relatively recent history.

[56] Moreover, while potentially helpful and a relevant consideration, the extent of a proposed intervener's legal expertise and specific experience in interventions cannot be an absolute condition precedent to intervention; otherwise no "first time" interveners would ever come before the Court. In my view the extent to which a proposed intervenor is genuinely steeped and interested in the subject matter of the proceeding, and its apparent ability to assist the Court with either factual or legal matters, should be the overriding consideration. I find that the proposed interveners are well-positioned to make helpful contributions to the record for the applications.

Discussion of Argument that Proposed Interveners are Lobbyists

[57] As to the argument that the proposed interveners are nothing more than lobbyists, and the concern that the Court should avoid becoming a forum for public interest groups to advocate publicly for particular points of view, again in my view it is disingenuous for the applicants to point to this spectre.

[58] That is, I am advised that the applicant the Sri Lankan Canadian Action Coalition ("SLCAC", one of the groups that I have collectively defined as the Sri Lankan Coalition) was itself incorporated to respond to the Act. In paragraph 2(a) of the Sri Lankan Coalition's Notice of Application, it says, in part:

> "The SLCAC was formed in response to the outcry from the Sinhalese and other Sri Lankan Canadian communities following the first reading of [the Act] as Bill 104… After [the Act] received Royal Assent, SLCAC received a number of phone calls and email correspondence from people of the Sinhalese community expressing their disapproval of [the Act] and the negative effect that the Bill was having on the Sinhalese community in particular. A petition initiated by the SLCAC, to repeal [the Act], garnered approximately 26,000 signatures including a number of Tamil signatures."

[59] As such, it is apparent that the SLCAC was created in response to the Act, and organized to embody and advocate a particular public viewpoint in opposition to the Act.

[60] This is not intended as a conclusion that the Sri Lankan Coalition or any of its members is itself a lobby group. Neither the Sri Lankan Coalition nor either of the proposed interveners is registered as a lobbyist.

[61] Each of the Sri Lankan Coalition and the two proposed interveners, however, are actively involved in advocating and promoting particular points of view relative to the Act (in addition to other activities). This is by no means a criticism. I acknowledge that there can be a fine line between one who is advocating via the Court for a particular perspective and one who is in fact a lobbyist in service of that position.

[62] While I am mindful of the concern that our courts not become simply a stage for public interest groups, the Court nonetheless will frequently find itself as one forum where such debates will play out, albeit in relation to specific issues and causes that are directly or indirectly the subject of litigation.

[63] Within reason, this is not a cause for regret. We are fortunate to live in a country in which we need neither fear nor seek to foreclose competing points of view. In our Courts, subject to constraints to ensure that expressions of interest are closely tied to issues before the Court, there is latitude for parties to express competing points of view, often vehemently, without fear of recrimination or reprisal. Indeed competing arguments put at their highest, within the bounds of the law, are an important mechanism by which the Court strives to reach a just result.

[64] In the case before me, I do not find that the proposed interveners are engaged in nor seek to engage in impermissible lobbying. Rather, like the Sri Lankan Coalition they bring a particular perspective to the Court, in the potential interveners' case one which runs counter to the evidence and position of the applicants, but one that is fair and potentially helpful for the Court to consider as part of the relevant context from which the Act emerged and against which it should be assessed.

[65] I also do not accept the argument that it ought to be solely the task of the AG to harness and present any necessary evidence to the Court. To reach this conclusion would be to preclude virtually any intervention in any case. The AG is charged with ensuring the public interest is served by its efforts, but it is unrealistic to expect that mandate to encompass and facilitate each and every important perspective. As counsel for the Tamil Coalition eloquently put it, the proposed interveners can bring a different perspective than the broader, undifferentiated public interest represented by the AG.

Issues of Delay or Prejudice

[66] Having reached these conclusions, I nonetheless am concerned to ensure that the interventions not create substantial delay or procedural prejudice.

[67] As set out above, the would-be interveners are mindful of these concerns and propose a scope of intervention to avoid duplication and not unduly expand the proceedings.

[68] As mentioned, the proposed interveners ask to submit limited additional evidence to participate in cross-examination only if the AG determines not to cross-examine the applicants' witnesses, and to deliver factums of 20 pages each and arguments of 30 minutes each at the return of the applications.

[69] The Sri Lankan Coalition, in its factum, argues that to deal with a scenario in which this Court grants intervener status to the proposed interveners, any intervener should be limited to delivering a factum not to exceed 10 pages in length and to 15 minutes of oral submissions, and not to be permitted to participate in cross-examinations. The Sri Lankan Coalition also requests the right to file a 5-page factum in reply to the interveners.

Conclusions on Proposed Interventions

[70] Taking all of this together, it is my decision that:

(a) TRG and the Tamil Coalition are each granted status to intervene as parties in the applications, subject to the specific parametres set out below;

(b) TRG and the Tamil Coalition are each to file their materials by March 21, 2022, such materials to consist of and be limited to:

(i) in the case of TRG, affidavit evidence from Professor Joseph Chadrkanthan, not to exceed 10 double-spaced pages, and an affidavit filed jointly with the Tamil Coalition from a member of the Tamil community to explain the importance and impact of the Act to Tamil-Ontarians, again not to exceed 10 double-spaced pages;

(ii) in the case of the Tamil Coalition, the affidavit described in (i) above to be filed jointly with the TRG;

(c) TRG and the Tamil Coalition will be allowed to cross-examine on the applicants' evidence if and only if the respondent AG determines not to do so. In such circumstance, the cross-examination will be conducted by one counsel per witness on behalf of both TRG and the Tamil Coalition (in other words, counsel for TRG and the Tamil Coalition are not permitted to each cross-examine each witness and must choose one counsel or the other to cross-examine any given witness on behalf of both interveners), and each such cross-examination shall be limited to a maximum of one hour per witness;

(d) Each intervener may file with the Court a factum not to exceed 15 pages in length;

(e) Each intervener shall have 25 minutes to make oral submissions at the hearing of the applications;

(f) The applicants shall be allowed to file factums of no more than five pages in length to respond to the interveners' factums;

(g) There shall be no Order as to costs in favour of or against the interveners, subject only to the discretion of the judge hearing the applications to award costs against the interveners or either of them if in his or her opinion the conduct of the interveners or either of them has unnecessarily and inappropriately lengthened or delayed the proceedings.

No Order as to Costs

[71] Finally and in keeping with the conclusions articulated above, there will be no Order as to costs of this motion. I wish to thank counsel for all parties (and proposed interveners) who appeared before me on the motion. The record and the submissions reflected cooperation and civility and handled somewhat complex issues efficiently and clearly.

W.D. Black J.

Date: March 16, 2022