

CITATION: Sri Lankan Canadian Action Coalition et al. v. Attorney General of Ontario;
Hewage v Attorney General of Ontario, 2022 ONSC 3849
COURT FILE NOs.: CV-21-663853; CV-21-668250-0000
DATE: 20220628

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
Sri Lankan Canadian Action Coalition, Sri) *H. Scott Fairley, Nicolas Rouleau, N. Joan*
Lanka Canada Association of Brampton and) *Kasozi, and Salma Kebeich, for the*
Sena Munasinghe) *Applicants*
)
Applicants)
)
- and -)
) *Robin Basu and Ravi Amarnath, for the*
Attorney General of Ontario) *Respondent*
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Respondent)
)
-and-)
)
National Council of Canadian Tamils,) *Adriel Weaver and Geetha Philipupillai, for*
Canadian Tamil Academy, Canadian Tamil) *the Interveners National Council of*
Youth Alliance and Tamil Rights Group) *Canadian Tamils, Canadian Tamil Academy*
) *& Canadian Tamil Youth Alliance*
Interveners)
) *Janani Shanmuganathan, for the Intervener*
) *Tamil Rights Group*
)
)
AND BETWEEN:)
)
Neville Hewage) *Hasaka Ratnamalala, for the Applicant*
)
Applicant)
)
- and -) *Robin Basu and Ravi Amarnath, for the*
) *Respondent*
Attorney General of Ontario)
)
Respondent)
)

-and-)
)
 National Council of Canadian Tamils,) *Adriel Weaver and Geetha Philipupillai*, for
 Canadian Tamil Academy, Canadian Tamil) the Interveners National Council of
 Youth Alliance and Tamil Rights Group) Canadian Tamils, Canadian Tamil Academy
) & Canadian Tamil Youth Alliance
 Interveners)
) *Janani Shanmuganathan*, for the Intervener
) Tamil Rights Group
)
) **HEARD:** May 24 and 25, 2022

J.T. AKBARALI J.

Overview

[1] For 26 years, a civil war ravaged Sri Lanka. Its people suffered immensely.

[2] At least some factions in Sri Lanka’s minority ethnic Tamil community wanted an independent homeland. The Sri Lankan government, made up in large measure of people from the majority Sinhalese ethnic group, resisted the idea of Tamil self-determination.

[3] The war is now over. There is no independent Tamil state.

[4] A new battle has emerged over who gets to write the history of the war. While this new battle does not intuitively seem like an issue for the Ontario Superior Court of Justice, it has in fact become one.

[5] Ontario is home to a large Sri Lankan diaspora, of which the majority are ethnic Tamil Sri Lankans, and the minority are ethnic Sinhalese Sri Lankans.

[6] These two applications, which I heard together, are brought by members of Ontario’s Sinhalese diaspora and organizations representing Ontario’s Sinhalese diaspora. Each application seeks a declaration that a statute passed by the Ontario Legislature, the *Tamil Genocide Education Week Act, 2021*, S.O. 2021, c. 11 (“*TGEWA*” or “the *Act*”) is unconstitutional. At the risk of oversimplifying the legislation, at this stage, I observe only that it purports to encourage Ontarians to educate themselves about the Tamil genocide and other genocides that have occurred in world history.

[7] The applicants argue that the *TGEWA* is unconstitutional. They argue that no Tamil genocide has been recognized under international criminal law standards. They argue that the *TGEWA* (i) is *ultra vires* the province, and (ii) offends the applicants’ rights under ss. 2(b) and 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the “*Charter*”).

[8] Ontario argues that it is constitutionally competent to enact the *TGEWA* and denies any violation of ss. 2(b) or 15 of the *Charter*. It is supported by party interveners representing organizations and members of Ontario's Tamil diaspora.

What These Reasons are Not About

[9] Over the course of these applications, I heard evidence about the Sri Lankan civil war, and specifically, whether or not what occurred amounted to a genocide of Tamils.

[10] A finding of genocide at law can neither be made nor excluded based on the record before me. Such a determination, under international criminal law, cannot be made in a two-day application based on a few written affidavits from individuals who were in Sri Lanka during the civil war and evidence from dueling experts. I make no findings about whether there was, or was not, a Tamil genocide in Sri Lanka.

[11] In this application, I am not deciding who bears the blame, or who bears more of the blame, for the tremendous suffering and trauma that occurred as a result of the Sri Lankan civil war.

[12] Nor am I deciding whether it was wise for the Ontario Legislature to pass the *TGEWA*. The wisdom of the legislation is a question that belongs solely to the Legislature, and more indirectly, to the voters of the province.

[13] The question before me relates only to the constitutionality of the *TGEWA*. I confine my reasons to that issue only.

Brief Conclusion

[14] For the reasons that follow, I find that the *TGEWA* is *intra vires* the province and does not violate the applicants' ss. 2(b) or 15 *Charter* rights. As a result, the applications are dismissed.

Is the *TGEWA* *ultra vires* the province?

The Test for Determining Constitutional Validity of Legislation under the Division of Powers

[15] The parties agree on the applicable test for determining the constitutional validity of a legislative enactment under the federal division of powers. The question is whether in purpose and effect the law is in pith and substance within the enacting legislature's assigned jurisdiction. To determine this, a reviewing court must engage in a two-stage analysis, as set out in *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17, 447 D.L.R. (4th) 359, at para. 28; and *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at paras. 25-27:

- a. First, the court must identify the dominant characteristic, matter, or pith and substance of the legislation. In so doing, two aspects of the law must be examined:
 - i. the purpose of the enacting body; and

ii. the legal effect of the law.

b. Second, a reviewing court must classify the identified essential character by reference to the heads of power in ss. 91-95 of the *Constitution Act, 1867*.

[16] When determining the purpose of the legislation, the court may consider both intrinsic evidence, like the legislation's preamble or purpose clauses, and extrinsic evidence, such as Hansard. The court seeks to discern the true purpose of the legislation, as opposed to its stated or apparent purpose: *Canadian Western Bank*, at para. 27.

[17] Legislation whose pith and substance falls within the jurisdiction of the legislature that enacted it may affect matters beyond the legislature's jurisdiction without necessarily being unconstitutional. The "dominant purpose" of the legislation is, at this stage, decisive. Secondary objectives and effects do not impact the legislation's constitutionality. Incidental effects — effects that may be of significant practical importance but are collateral and secondary to the mandate of the enacting legislature — will not disturb the constitutionality of an otherwise *intra vires* law: *Canadian Western Bank*, at para. 28.

[18] The pith and substance doctrine recognizes that it is in practice impossible for a legislature to exercise its jurisdiction over a matter effectively without incidentally affecting matters within the jurisdiction of another level of government: *Canadian Western Bank*, at para. 29.

The TGEWA

[19] The *TGEWA* is not a lengthy piece of legislation. It is comprised of a five-paragraph preamble and two operative sub-sections. I reproduce it in its entirety below.

Preamble

The Tamil community in Ontario is one of the largest concentrations of Tamils outside southeast Asia. It stretches across the province but the highest concentration is in the Greater Toronto Area. Tamil-Ontarians play an important role in the social, economic and political fabric of the province.

Tamil-Ontarians have families still suffering in their homeland in the north and east of the island of Sri Lanka. They have lost their loved ones and have been physically or mentally traumatized by the genocide that the Sri Lankan state perpetrated against the Tamils during the civil war which lasted from 1983 to 2009, and especially so in May of 2009. Genocide is the deliberate and organized killing of a group or groups of people, with the intention of destroying their identity as an ethnic, cultural or religious group. Acts of genocide against the Tamils started in 1948 after Sri Lanka gained its independence and were perpetrated through Sinhala-Buddhist centric government policies, pogroms, land grabs and ethnic cleansing. The United Nations Organization estimates that in May 2009 alone about 40,000 to 75,000 Tamil civilians were killed. Other estimates place the death toll at 146,679

civilians. These figures only reflect the death toll in 2009 leading up to May 18, the day on which the civil war ended. The loss of Tamil civilian lives during the genocide, which continued for decades in Sri Lanka, is much higher.

In addition, the Sri Lankan state has systematically disenfranchised the Tamil population of their right to vote and to maintain their language, religion and culture. For example, the *Sinhala Only Act* of 1956 made Sinhalese the official language of Sri Lanka ignoring the 29 per cent of the population whose primary language was Tamil, thereby putting them at a serious disadvantage for participating in the public service of Sri Lanka.

It is important for many reasons to acknowledge publicly that the killings and all aspects of the genocide constitute a heinous act. Not only does this acknowledgement honour the lives that were lost, but it gives a sense of hope to those who have suffered since it represents the first step to healing and reconciliation. Most importantly, by recognizing the Tamil genocide, we affirm our collective desire to maintain awareness of this genocide and other genocides that have occurred in world history in order to prevent such crimes against humanity from happening again.

Therefore, Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

Tamil Genocide Education Week

1 (1) The seven-day period in each year ending on May 18 is proclaimed as Tamil Genocide Education Week.

Same

(2) During that period, all Ontarians are encouraged to educate themselves about, and to maintain their awareness of, the Tamil genocide and other genocides that have occurred in world history.

What is the proper characterization of the *TGEWA*?

[20] The preamble of the *TGEWA* describes its purpose as to “acknowledge publicly” what it identifies as a genocide, in order to give “a sense of hope to those who have suffered” as the “first step to healing and reconciliation”.

[21] It then describes its most important purpose in “recognizing the Tamil genocide” as affirming “our collective desire to maintain awareness of this genocide and other genocides that have occurred in world history in order to prevent such crimes against humanity from happening again”.

[22] The application record includes the record of the Legislature's discussion of the *TGEWA* in Hansard. The *TGEWA* originated as a private member's bill introduced by Member of Provincial Parliament ("MPP") Vijay Thanigasalam, a member of the Tamil community in Ontario. During first reading, Mr. Thanigasalam stated:

This May, the Tamil community will be remembering the lives lost in the Tamil genocide perpetrated by the Sri Lankan state. At this time the passing of the Tamil Genocide Education Week bill by the government of Ontario will give them some hope. The Tamil community in Ontario have suffered mental, physical and emotional trauma from the genocide. By recognizing the Tamil genocide, it will allow for the community to begin a healing process and continue to contribute to Ontario.

Education is the most powerful weapon in the world. By educating, we can change the world. The aim is to educate Ontarians about not only the Tamil genocide but also others across the world.

[23] The discussion of the legislature during the second reading of the bill was more in depth. Mr. Thanigasalam described at length what he referred to as a program of structural genocide that persisted against Tamils for decades, including restrictions on food available to Tamils, forced surgically implanted birth control for Tamil women, denial of treatment at selected hospitals, indiscriminate shelling towards civilian targets, abductions, rapes, murders, bombings, and destruction of cultural strongholds.

[24] Mr. Thanigasalam noted that the Sri Lankan state had denied responsibility for what he referred to as a genocide, which "has left many Tamils unable to heal and move forward". He indicated that the "diaspora Tamils have strongly urged their respective governments to help acknowledge the pain and suffering that they have endured and that has been endured by their kin". He stated that:

Through this bill, the House would help in honouring the memory of and naming the atrocities faced by the Tamils in Sri Lanka as genocide. Furthermore, an education week provides an opportunity to reflect on and to educate the public about the enduring lessons of the Tamil genocide and other crimes against humanity.

[25] Other statements made in the legislature during second reading of the bill include:

- a. Mr. Gurratan Singh: "Trauma is intergenerational. That means the next generation of Tamils will experience the pain of those before them. That is why it is so important to name the Tamil genocide, recognize it and continue to remember it, so the Tamil people can share their memories of those whose lives were lost to make sure their stories are told and to educate the community for generations to come, because we can only heal from trauma once we confront it."

- b. Minister Stephen Lecce: “Madam Speaker, there may be foreign governments and foreign agents who choose not to recognize this evil for what it is, but we know it to be genocide and we have a duty, a moral duty, to say so... I am proud that we have legislation that is here to educate the next generation, but also here to remember the sacrifices and atrocities committed of the generation behind us.”
- c. Ms. Rima Berns-McGown: “It’s really important that we have genocide education, because it is often in the interest of states who perpetrate these acts to deny them, and trauma is very, very difficult to speak about.”
- d. Ms. Natalia Kusendova: “[The *TGEWA*] will remind us of the tragic cost of war and of the precious lives lost. It will remind us that we must never stand by as a genocide unfolds. In declaring the week of May 18 to be Tamil Genocide Education Week, this bill will memorialize all of the innocent lives that were taken. It will make sure that current and future generations reflect on and educate the public about the enduring lessons of the Tamil genocide and other crimes against humanity.”
- e. Mr. Kaleed Rasheed: “[T]he pain and trauma of such atrocities are intergenerational. This education process will also create an open space for other communities to come together to share their stories and struggles. The recognition of the Tamil genocide and further education about it will serve to be an enormous milestone in this healing process.”
- f. Ms. Mitzie Hunter: “We must continue to recognize these tragedies... Education provides that pathway by which generations to follow will learn: Do not repeat the mistakes of the past.
- g. Mr. Paul Calandra: “[T]here are those who might ask why a provincial Legislature would be talking about this, but it our responsibility as elected officials to always bring this type of injustice forward so that everybody understands the plight of peoples. It is our job to advocate for those who cannot advocate for themselves.”

[26] During third reading of the bill, Mr. Thanigasalam referred to the lasting impact of intergenerational and historic trauma, then stated:

Recognition is a key part of healing. The Sri Lankan state has not only denied the responsibility for the genocide; they have been actively working to erase the memory of the genocide... These incidents continue to spark fear and reignite the trauma the Tamil community has been experiencing due to the genocide...

...A Tamil Genocide Education Week provides an opportunity to reflect on and educate the public about the enduring lessons of the Tamil genocide and other crimes against humanity. We need to ensure safe spaces for people to discuss topics like this, and recognize that healing needs to take place. There is greater power in collective healing.

...We stand together to denounce genocide and educate our future generations about the impacts of genocide. While we cannot bring back the lives that were lost, together, today, we can make a difference in the lives of many Tamil Canadians by acknowledging their pain and the loss of their family and friends.

We are giving space for the Tamil community to heal right here in Ontario.

[27] Other MPPs offered statements in support, including:

- a. Mr. Gurratan Singh: “Now, with the passage of Tamil Genocide Education Week, we are going to see an opportunity not just for Tamil communities to educate their next generations and their current generations about the Tamil genocide, but non-Tamils — for Ontarians — to learn about their Tamil neighbours, to learn about the genocide, the intergenerational trauma, that continues to devastate the Tamil community. It is an honour to rise today in support of this very, very important bill, of a week for us to ensure that as Ontarians we commit ourselves to building a province where Tamil people can remember those lost in the genocide without intimidation and, further, where we can continue to organize to ensure that those who conducted this genocide are held to account.”
- b. Mr. Logan Kanapathi: “Genocide is unfortunately part of all the Tamil diaspora’s history. And to move forward with peace, we must take a moment to recognize the wrongdoings so we can heal and ensure that history never repeats again... Today we are laying the foundation of healing that is needed in our society from a long history of generational trauma... By recognizing the Tamil genocide, we affirm our collective desire to maintain awareness of this genocide and other genocides that have occurred in world history in order to prevent such a crime against humanity from happening again.
- c. Ms. Doly Begum: “[T]he awareness week bill must be a tool to not just acknowledge the horror, but honour the lives of those who were lost — as well as a step towards reconciliation, recognizing the outcry of the Tamil community to maintain awareness of this genocide and other genocides that have occurred around the world in order to prevent such crimes against humanity from happening again... The path to healing and reconciliation requires us to tell these stories, recognize the trauma and work towards justice.”
- d. Mr. Aris Babikian: “It is important to address the Tamil genocide issue for two reasons. First, to bring closure and healing to the wounds of the past: without healing and closure to the victims, individually and collectively, there can be no reconciliation... The second reason... is because we owe it to humanity to learn from the mistakes of the past so that we will not repeat these atrocities again... Therefore, it is imperative to sensitize future generations and educate them of the importance of peaceful coexistence and respect for our diverse makeup and to protect the vulnerable in our society.”

[28] The *TGEWA* passed with unanimous support in the Legislature.

[29] The operative provisions of the *TGEWA* are brief. The legal effect of the legislation is to declare one week in May to be “Tamil Genocide Education Week”, and to encourage Ontarians to educate themselves about, and to promote their awareness of, the Tamil genocide and other genocides that have occurred in world history. The *TGEWA* does not require any particular educational initiatives to be undertaken by any particular institution.

[30] The fact that educational initiatives regarding what the Legislature has identified as the Tamil genocide are taking place is borne out by the evidence filed by the applicants and the interveners. For example, there is evidence that various school boards have publicly recognized a Tamil genocide during Tamil Genocide Education Week.

[31] One of the applicants’ affiants is a teacher with the Toronto Catholic District School Board (“TCDSB”). She deposes that when she learned about the *TGEWA* she voiced her concerns to the Superintendent of Diversity and Equity of the TCDSB. She states that the Superintendent did not engage in a meaningful way in the conversation, nor did he address her concerns. However, after further communication with her, he invited her to attend the Tamil Heritage Committee’s meetings, during which members discussed how to mark Tamil Heritage month, which takes place in January. The meeting was also attended by members of the Tamil Genocide Education Week Committee.

[32] The affiant deposes that, after stating her concerns that all ethnicities in Sri Lanka should have an opportunity to be heard and represented, and about the potential negative impact of the Tamil Genocide Education Week on the mental health of children, she was not invited to participate in any future meetings. Moreover, she was told that her opinion questioning the existence of a Tamil genocide was hate speech. I return to this evidence, below, in the context of the *Charter* claims at issue. At this point I note only that, clearly, at least some schools are organizing programming for Tamil Genocide Education Week.

[33] In terms of the *TGEWA*’s practical effects, an affiant for one of the interveners deposes to the stigma he has encountered by way of negative stereotypes that label Tamil Ontarians as terrorists, which he states is countered by the Legislature’s acknowledgement of the Tamil genocide. He also describes how the *TGEWA* is important for Tamil youth who, in learning about the Tamil genocide, can better understand their parents’ experiences and behaviour as well as the family dynamics that have shaped their own experiences. He also deposes that the Canadian Tamil Association has received funding from the Ontario government to create lesson plans to address the intergenerational trauma caused by the Tamil genocide.

[34] Moreover, the Canadian Tamil Youth Association has created a Tamil Genocide Mobile Museum, and expects that Tamil Genocide Education Week will increase interest in hosting the mobile museum, allowing more Ontarians to visit and learn from it. These practical effects are consistent with a conclusion that the legal effect of the *TGEWA* is to promote public education about the Tamil genocide.

[35] The applicants argue that the *TGEWA*'s legal effect is to recognize a Tamil genocide as a "political nod" to the Tamil community. They state that the call to action in the *TGEWA* to Ontarians to educate themselves is only hortatory, and so it cannot be the purpose of the *Act*. On this argument, the declaration of genocide is equally hortatory.

[36] According to the applicants, the *TGEWA*'s practical effects have been to shut down educational discussion about whether a Tamil genocide in fact occurred. Affidavit evidence they have filed suggest that members of the Sinhalese community who contest the claim of a Tamil genocide are bullied.

[37] In one case, an affiant deposes that they were bullied during a deputation to Brampton City Council by the Mayor of Brampton. This latter incident is the subject of an ongoing human rights complaint and, in any event, the record of proceedings indicates that the *TGEWA* was never mentioned during the exchange in issue. In another case, a letter from an anonymous student suggests they have been bullied by Tamil students. It does not indicate that the bullying was as a result of the *TGEWA* but rather, claims that the *TGEWA* will worsen the bullying. It seems that the bullying described in the letter relates to the history of the events in Sri Lanka, not the *TGEWA*. In any event, the evidence is hearsay, and cannot be tested.

[38] While I agree with the applicants that the *TGEWA* recognizes a Tamil genocide, the real question is, to what end? It is not just recognition for recognition's sake. In my view, the evidence I have reviewed demonstrates that the recognition of a Tamil genocide is in service of (i) educating the public about the Tamil genocide, and about other genocides, including the need to prevent such atrocities from occurring in the future; (ii) through education, allowing non-Tamil Ontarians the opportunity to better understand their Tamil neighbours, and Tamil youth to better understand their families, community and history; and (iii) through education, helping to create the conditions for Tamil Ontarians to share their stories and begin to heal from the trauma and inter-generational trauma that the Legislature has recognized.

[39] I thus conclude that the dominant characteristic of the law is to educate the public about what the Ontario Legislature has concluded is a Tamil genocide.

What is the proper classification of the *TGEWA*?

[40] Given my finding that the *TGEWA*'s purpose is educative, it falls squarely within Ontario's jurisdiction under s. 93 of the *Constitution Act, 1867* to "exclusively make Laws in relation to Education".

[41] The respondent also argues that the *TGEWA* is within the province's constitutional competence because it relates to civil rights in the province, and is a matter of a local nature in the province. It is not necessary to consider these jurisdictional claims given my conclusion that the law is within the province's competence because it is, in pith and substance, a law in relation to education.

[42] However, I will address the applicants' arguments that the law, properly classified, is within the Federal government's criminal law power, its federal executive jurisdiction over foreign affairs, and/or its power over foreign affairs under peace, order, and good government ("POGG").

[43] I do not agree that the *TGEWA* invades exclusive federal jurisdiction in relation to criminal law. First, to be criminal legislation, a statute must (i) consist of a prohibition; (ii) be accompanied by a penalty; and (iii) be backed by a criminal law purpose: *Genetic Non-Discrimination Act*, at para. 67. The *TGEWA* does not prohibit anything, and contains no penalty.

[44] Second, while the *TGEWA* makes reference to genocide using words in its preamble that invoke the definition of genocide in international criminal law, it does not claim to determine that genocide has taken place beyond a reasonable doubt, the standard of proof within criminal law.

[45] The proceedings in the Legislature did not purport to follow any kind of process that one would expect to precede a determination under international criminal law that a government engaged in genocide. No oral evidence was led. No documents were reviewed. No arguments were made. No law on genocide was referred to. A declaration of genocide for purposes of international criminal law follows lengthy investigations of the facts, and a careful analysis of the law, because declarations of genocide under international criminal law have international consequences.

[46] The fact that no such process was employed bolsters my conclusion that the purpose of the recognition of the Tamil genocide in the *TGEWA* is not criminal in nature, given the lack of any attempt by the Legislature to create a foundation for such a recognition consistent with the usual approach in international and criminal law. Rather, the *TGEWA* is designed to advance the Legislature's educative goals. Those goals are the Legislature's to set.

[47] Nor do I agree that the *TGEWA* encroaches impermissibly on the Federal government's power over foreign affairs, assuming the applicants properly characterize such a power.¹ First, as I have just said, the absence of any attempt to establish a Tamil genocide consistent with international criminal law requirements indicates that the recognition of the Tamil genocide is not for the purpose of wading into foreign affairs, where declarations of genocide follow rigorous investigation and legal analysis, but rather, is to advance the Legislature's educative goals.

[48] While the Federal government could legislate on the topic of whether what occurred in Sri Lanka was a genocide, I accept the respondent's argument that the "double aspect" doctrine applies. Under this doctrine, the Federal Parliament and a provincial legislature may both adopt

¹ The respondent argues that the applicants have mischaracterized the federal executive power over foreign affairs, and that the national concern doctrine under POGG does not apply. For purposes of these reasons, I need not reach any conclusions on the existence, origin, nature, or scope of a federal power over foreign affairs, or indeed, the scope of any provincial power to engage in foreign relations, although I note that provinces clearly do engage in at least some international relations for purposes such as trade, among others.

valid legislation on a single subject depending on the perspective from which the legislation is considered: *Canadian Western Bank*, at para. 30. Ontario is permitted to recognize a Tamil genocide for purposes of legislating with respect to educational initiatives related to it, or indeed, for commemorating it. This is no different than provincial legislation that recognizes and commemorates the Holocaust, or provincial education policy focusing on international aspects of world wars or any other international conflict.

[49] The double aspect doctrine is qualified by two doctrines, only one of which — paramountcy — the applicants invoke. Paramountcy renders constitutionally inoperative any provincial law that is operationally inconsistent with or frustrates the purpose of valid federal law. To invoke paramountcy, the party relying on it must establish the purpose of the relevant federal statute, and then prove that the provincial legislation is incompatible with the federal law’s purpose by establishing either that it is impossible to comply with both laws, or that to apply the provincial law would frustrate the purpose of the federal law: *Canadian Western Bank*, at para. 75.

[50] The applicants have not, however, identified any federal law that is frustrated. Rather, they point generally to the federal criminal law power, and the federal power over foreign affairs. This is not sufficient to invoke the doctrine.

[51] In any event, the Federal government has recently unanimously adopted a motion, “That this House acknowledge the genocide of Tamils in Sri Lanka and recognize May 18 of each year as Tamil Genocide Remembrance Day.” While not a statute, the unanimous passage of the motion recognizing a Tamil genocide is consistent with my conclusion that the *TGEWA* does not frustrate the purpose of any federal law.

[52] For these reasons, I find that the *TGEWA* is *intra vires* the Ontario Legislature.

Does the *TGEWA* violate the applicants’ s. 2(b) *Charter* rights?

[53] Section 2(b) of the *Charter* provides that everyone has the fundamental “freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication”.

[54] The applicants argue that the *TGEWA* violates their right to free expression under s. 2(b) of the *Charter*. They invoke a negative rights claim, not a positive rights claim. They do not argue that, by denying them access to a statutory platform, or that by otherwise failing to act, the government has substantially interfered with freedom of expression or had the purpose of interfering with freedom of expression: *Toronto (City) v. Ontario (Attorney General)*, 2019 ONCA 732, 146 O.R. (3d) 705, aff’d 2021 SCC 34, 462 D.L.R. (4th) 1, at para. 25. Although the respondent has argued that no positive rights claim has been made out, I do not address that question because no positive rights claim is being advanced at all.

[55] The question, therefore, is whether the *TGEWA* falls afoul of the three-part test described in *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2, [2011] 1 S.C.R. 19, at para. 38: (1) Does the activity in question have expressive content, thereby bringing it, prima

facie, within the scope of s. 2(b) protection? (2) Is the activity excluded from that protection as a result of either the location or the method of expression? (3) If the activity is protected, does an infringement of the protected right result from either the purpose or the effect of the government action?

[56] The applicants argue that the *TGEWA* infringes the freedom of expression of Sinhalese Ontarians by (i) infringing their freedom to contend that there was no Tamil genocide in public and institutional dialogue; and (ii) infringing their freedom to reveal their Sinhalese ethnic and Buddhist religious backgrounds, without fear of threats or intimidation.

[57] I have already referred to some of the evidence led in support of these claims. For example, one affiant deposes that she was precluded from attending meetings planning Tamil-related programming in schools because of her concerns regarding the *TGEWA* and its impact on students, and was told that her statement that there is no international finding that there was a Tamil genocide amounted to hate speech. Another affiant deposes to being bullied by the Mayor of Brampton. The applicant Mr. Hewage, a professor, deposes that, in his view, the *TGEWA* limits his ability to express himself in academic activities including teaching, addressing conferences, and having discussions on the subject matter of genocide. He also states that the *TGEWA* limits his ability to “express opposite views of the (alleged) Tamil genocide”.

[58] There is no dispute that the activities in question have expressive content, and there is nothing about the location or method of expression that would exclude them from protection under s. 2(b).

[59] The real question is whether an infringement of the protected right results from either the purpose or the effect of the government action, that is, the *TGEWA*.

[60] In *City of Toronto*, the Court of Appeal held that “governments may ... enter the marketplace of ideas to offer messages that counter expression. ... It is not part of a government’s constitutional duty to promote, enhance, or even preserve the effectiveness of anyone’s political expression”: at para. 43.

[61] The Ontario Legislature is entitled to enter the marketplace of ideas to recognize a Tamil genocide. That the applicants disagree with the Legislature’s characterization of what happened does not restrict their expression. The Legislature’s decision to enact the *TGEWA* may make the applicants’ expression denying that a Tamil genocide took place less effective, but the applicants are not constitutionally entitled to effective expression.

[62] Nothing in the *TGEWA* restricts or limits the expression the applicants can engage with. Their expression is not suppressed in any way.

[63] If actors bound by the *Charter* apply the *TGEWA* in an unconstitutional manner, the appropriate remedy lies against those actors. As the court held in *Thomas Christian Zaugg v. Ontario*, 2019 ONSC 2483, at para. 50, “[c]ourts have held that state institutions and those acting under public authority are to be held accountable in their own right under s. 32 of the *Charter*, as

respondents distinct from the Government”. This is particularly so in this case, where some of the actors complained about did not even mention the *TGEWA* and thus were not acting or purporting to act under its authority.

[64] I thus find that the *TGEWA* does not violate the applicants’ s. 2(b) *Charter* rights.

Does the *TGEWA* violate the applicants’ s. 15 *Charter* rights?

[65] Section 15(1) of the *Charter* provides:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[66] The respondent argues that the corporate applicants do not have standing to advance s. 15 rights; only the individual applicants are able to assert their personal claims under s. 15. For purposes of this analysis, I assume without deciding that the corporate applicants have standing. Doing so allows me to consider the applicants’ evidence in support of their claim that their s. 15 rights have been violated at its highest.

[67] Successful s. 15(1) claims must meet a two-part test, set out, for example, in *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, at para. 17:

- a. Does the law, on its face or in its impact, create a distinction based on an enumerated or analogous ground?
- b. Is the distinction discriminatory?

[68] In *R. v. Fraser*, 2020 SCC 28, 450 D.L.R. (4th) 1, at para. 81, the Supreme Court of Canada described the test as follows:

In sum, then, the first stage of the s. 15 test is about establishing that the law imposes differential treatment based on protected grounds, either explicitly or through adverse impact. At the second stage, the Court asks whether it has the effect of reinforcing, perpetuating, or exacerbating disadvantage.

[69] In *Ontario (Attorney General) v. G*, 2020 SCC 38, at paras. 41-42, the Supreme Court held:

[41] The first step — whether the law creates a distinction based on enumerated or analogous grounds — is not a preliminary merits test or “an onerous hurdle designed to weed out claims on technical bases”. It is aimed at ensuring that those who access the protection of s. 15(1) are those it is designed to protect. In cases involving laws that draw distinctions in their impact, the disproportionate impact

on a protected group is enough — the disproportionate impact need not be caused by the protected ground.

[42] The second step asks whether the challenged law imposes a burden or denies a benefit in a manner that is discriminatory. Importantly, it does not matter to either step of the analysis whether the challenged law *created* the social, political or legal disadvantage of protected groups. If the law reinforces, perpetuates, or exacerbates their disadvantage, it violates the equality guarantee and thereby gives discrimination the force of law. [Citations omitted.]

Does the law create a distinction based on an enumerated or analogous ground?

[70] In *Withler v. Canada (A.G.)*, 2011 SCC 12, [2011] 1 S.C.R. 396, at para. 62, the Supreme Court of Canada described what is meant by a “distinction”:

Inherent in the word “distinction” is the idea that the claimant is treated differently than others. Comparison is thus engaged, in that the claimant asserts that he or she is denied a benefit that others are granted or carries a burden that others do not, by reason of a personal characteristic that falls within the enumerated or analogous grounds of s. 15(1).

[71] The applicants argue that, in effect, the *TGEWA* creates distinctions based on ethnic or national origin and religion, in that it blames Sinhalese-Buddhists for the atrocities committed against Tamils during the civil war in Sri Lanka, framing them as oppressors in a genocide. The applicants argue that the *TGEWA* blames Sinhalese-Buddhists for having profited from the genocide “through Sinhalese-Buddhist centric government policies, pogroms, land grabs and ethnic cleansing”.

[72] The applicants state that the *TGEWA*’s message about Sinhalese-Buddhist culpability has led Ontarians to assess the Sri Lankan conflict through the Tamil lens, and that as a result, Ontarians wield the *TGEWA* in support of a one-sided marginalizing narrative.

[73] In support of these claims the applicants rely on the evidence from an affiant about the bullying he states he suffered at the hands of the Mayor of Brampton. They rely on the letter from an anonymous student who claims to have been bullied and subject to racist comments at school. They rely on the evidence in the record that shows that school boards have recognized Tamil Genocide Education Week and are developing programming to teach students about the Tamil genocide.

[74] According to the applicants, the *TGEWA* has entitled the Tamil community to monopolize the suffering and grief that resulted from the civil war in Sri Lanka, notwithstanding that Sinhalese civilians were often targets of terrorist attacks by the Liberation Tigers of Tamil Eelam, an organization that Canada has recognized, and continues to recognize, as a terrorist organization.

[75] The respondent argues that the *TGEWA* is symbolic only; it neither grants rights nor imposes obligations. Instead, the *TGEWA* is a statement of principle and social policy that establishes no statutory rights, as was the case in *Vanscoy v. Ontario*, [1999] O.J. No. 1661 (S.C.), at para. 22, where the court reviewed *An Act Respecting Victims of Crime*, S.O. 1995, c. 6.

[76] I agree that the *TGEWA* can properly be described as a statement of principle and social policy. The operative sections of the *Act* merely declare a specific week to be recognized as Tamil Genocide Education Week and encourage Ontarians to learn about the Tamil genocide and other genocides. The *Act* compels no one to do anything, nor does it confer any rights on anyone.

[77] But even if the recognition of a Tamil genocide through the enactment of Tamil Genocide Education Week could be said to create a benefit for Tamil Ontarians, there is no distinction in the *Act* based on an enumerated or analogous ground. The perpetrator of the genocide recognized by the Legislature is described in the *TGEWA* to be the Sri Lankan government. A claim or a finding of genocide perpetrated by a government or a state does not tar individuals who may be members of the same nationality, ethnicity, or religious affiliation as those people who dominate the government or state in question. As but one example, the Righteous Among the Nations recognized by Yad Vashem includes Germans.

[78] I conclude that the *TGEWA* does not create a distinction based on enumerated or analogous grounds.

Discriminatory Impact

[79] Given that the applicants have failed to establish a distinction based on enumerated or analogous grounds, there is no s. 15(1) violation, and no need to progress to the second stage of the s. 15(1) analysis. However, for completeness, I make brief comments on the issue.

[80] The evidence from the applicants does not establish any discriminatory impacts related to the *TGEWA*. Some of the evidence they have filed and that they allege reveals discriminatory impacts of the *TGEWA* does not involve the *TGEWA* at all. For example, the evidence about the exchange between an affiant and the Mayor of Brampton makes no reference to the *TGEWA* whatsoever.

[81] Moreover, as the Supreme Court held in *Fraser*, at para. 60:

Ideally, claims of adverse effects discrimination should be supported by evidence about the circumstances of the claimant group *and* about the results produced by the challenged law. Evidence about the claimant group's situation, on its own, may amount to merely a "web of instinct" if too far removed from the situation in the actual workplace, community or institution subject to the discrimination claim.
[Emphasis in original.]

[82] In this case, the applicants' evidence does not establish a nexus or causal connection between the *TGEWA* and the incidents that the applicants have experienced as discriminatory as

Ontarians who belong to the Sinhalese-Buddhist diaspora. As Iacobucci J. recognized in *Symes v. Canada*, [1993] 4 S.C.R. 695, at p. 764, the court must distinguish between effects that are wholly caused or contributed to by an impugned provision and those social circumstances which exist independently of the provision.

[83] Here, there is no evidence from the applicants that demonstrates any discriminatory effects were caused by the *TGEWA* as opposed to the social circumstances related to the Sri Lankan civil war. Nor is there evidence that the *TGEWA* caused or contributed to various actions taken by individuals (such as school officials at the York District School Board, or the Mayor of Brampton) that are deposed to in the record. The fact that some of these individuals, like the school equity officer, made mention of the *TGEWA* (after the affiant first raised the *Act* of her own accord) does not lead to a conclusion that the *TGEWA* has adverse effects. The *TGEWA* does not even confer discretion on a decision-maker that could be exercised in an unconstitutional manner.

[84] Discriminatory conduct against the Sinhalese diaspora is not an inevitable outcome of the *TGEWA*. To the extent that other actors invoke the *TGEWA* when acting in a discriminatory fashion towards any individual member of the Sinhalese Ontarian community, the remedy lies by way of human rights complaint or civil action against the individual.

[85] I conclude that the *TGEWA* does not violate s. 15 of the *Charter*.

Costs

[86] The respondent is the successful party on this application. It seeks no costs, and none are ordered.

Conclusion

[87] The applicants' applications are dismissed without costs.

J.T. Akbarali J.

CITATION: Sri Lankan Canadian Action Coalition et al. v. Attorney General of Ontario;
Hewage v Attorney General of Ontario, 2022 ONSC 3849
COURT FILE NOs.: CV-21-663853; CV-21-668250-0000
DATE: 20220628

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Sri Lankan Canadian Action Coalition, Sri Lanka Canada
Association of Brampton and Sena Munasinghe

Applicants

– and –

Attorney General of Ontario

Respondent

– and –

National Council of Canadian Tamils, Canadian Tamil Academy,
Canadian Tamil Youth Alliance and Tamil Rights Group

Interveners

AND BETWEEN:

Neville Hewage

Applicant

– and –

Attorney General of Ontario

Respondent

– and –

National Council of Canadian Tamils, Canadian Tamil Academy,
Canadian Tamil Youth Alliance and Tamil Rights Group

Interveners

REASONS FOR JUDGMENT

J.T. Akbarali J.

Released: June 28, 2022