

COURT OF APPEAL FOR ONTARIO

CITATION: Sri Lankan Canadian Action Coalition v. Ontario (Attorney General),
2024 ONCA 657
DATE: 20240905
DOCKET: C70919 & C70970**

Fairburn A.C.J.O., van Rensburg and Zarnett JJ.A.

*DOCKET: C70919

BETWEEN

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

Applicants (Appellants*)

and

Attorney General of Ontario

Respondent (Respondent)

and

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

Interveners

*DOCKET: C70970

AND BETWEEN

Neville Hewage

Applicant (Appellant)

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and

Attorney General of Ontario

Respondent (Respondent)

and

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

Interveners

H. Scott Fairley, N. Joan Kasozi, Salma Kebeich and Nicolas M. Rouleau, for the appellants Sri Lankan Canadian Action Coalition and Sri Lanka Canada Association of Brampton

Dhiren R. Chohan, for the appellant Neville Hewage

Ravi Amarnath and Priscila Atkinson, for the respondent

Adriel Weaver and Geetha Philipupillai, for the interveners National Council of Canadian Tamils, Canadian Tamil Academy and Canadian Tamil Youth Alliance

Janani Shanmuganathan, for the intervener Tamil Rights Group

Heard: December 4, 2023

On appeal from the judgments of Justice Jasmine T. Akbarali of the Superior Court of Justice, dated June 28, 2022, with reasons reported at 2022 ONSC 3849, 513 C.R.R. (2d) 109.

By the Court:

A. OVERVIEW

[1] This appeal concerns the constitutional validity of the *Tamil Genocide Education Week Act, 2021*, S.O. 2021, c. 11 (the “TGEWA”). The Act’s preamble purports to recognize that the Sri Lankan state perpetrated a genocide against the Tamils leading up to and during the Sri Lankan Civil War. The Act’s operative provisions proclaim the week ending May 18 (the date in 2009 on which the civil war ended) as “Tamil Genocide Education Week”, and encourages Ontarians to “educate themselves about, and to maintain their awareness of, the Tamil genocide and other genocides that have occurred in world history” each year during that week.

[2] The Sinhalese people comprise a majority of Sri Lanka’s population. The Sri Lankan Canadian Action Coalition and Sri Lanka Canada Association of Brampton (collectively, the “Coalition Appellants”) are community organizations that advocate for the interests of Sinhalese Ontarians.

[3] The appellant Neville Hewage is an Adjunct Professor and Research Fellow at the International Centre for Interdisciplinary Research in Law at Laurentian University. He is a member of Ontario’s Sinhalese community.

[4] The Coalition Appellants and Mr. Hewage oppose the *TGEWA*. They dispute its factual predicates and fear that it further marginalizes Ontario’s small

Sinhalese diaspora. They sought to have their perspectives included in the *TGEWA* before it was enacted. After the Act received royal assent, they applied for a declaration of constitutional invalidity. They argued that the *TGEWA* is *ultra vires* Ontario, and that it infringes their rights to free expression and equality under ss. 2(b) and 15(1) of the *Canadian Charter of Rights and Freedoms*.

[5] The respondent Attorney General of Ontario (“Ontario”), and the interveners, the National Council of Canadian Tamils, the Canadian Tamil Academy, the Canadian Tamil Youth Alliance (collectively, the “Tamil Canadian Coalition”) and the Tamil Rights Group sought to uphold the *TGEWA*. Collectively, they argued that the Act constitutes a valid exercise of provincial power that neither suppresses the appellants’ expression nor discriminates against them. Ontario and the Tamil Canadian Coalition argued that the *TGEWA* advances the substantive equality of Tamil-Ontarians,¹ who have suffered from intergenerational trauma and stigma in the wake of the Sri Lankan Civil War.

[6] The application judge upheld the *TGEWA*. She determined that the Act has an “educative” purpose that falls within Ontario’s powers under s. 93 of the *Constitution Act, 1867*. She further held that the Act does not infringe the appellants’ rights to free expression and equality.

¹ We adopt the language of the *TGEWA* for purposes of referring to the Tamil community in Ontario.

[7] The appellants submit that the application judge mischaracterized the purpose of the *TGEWA*. They say that its purpose is to recognize and declare a genocide, a purpose which they submit is reserved exclusively to Parliament. Mr. Hewage further contends that the application judge erred in holding that the *TGEWA* does not breach their rights to free expression and equality.

[8] We dismiss the appeal but, in upholding the constitutionality of the Act, our analysis differs in certain respects from that of the application judge.

[9] We agree with the application judge that the *TGEWA* is *intra vires* Ontario, but we disagree with her characterization of the Act as “educative”. We conclude that the *TGEWA*’s dominant purpose is to affirm and commemorate the Tamil-Ontarian community’s experience of the Sri Lankan Civil War and thus promote, within Ontario, the values of human rights, diversity and multiculturalism. Ontario may legislate to recognize the experiences of local communities by way of commemorative days observed solely within the province. This power derives from the provinces’ authority over “local matters” under s. 92(16) of the *Constitution Act, 1867*.

[10] As for ss. 2(b) and 15 of the *Charter*, we agree with the application judge that the *TGEWA* does not infringe the appellants’ free expression and equality rights. The Act does not suppress expression, directly or in its impact. Nor does the Act draw an adverse distinction cognizable under s. 15(1). The *TGEWA*

attributes responsibility to the Sri Lankan state at the time of the civil war, not Sinhala-Buddhists, for what it deems a “Tamil genocide”. Anyone who cites the *TGEWA* to marginalize Sinhalese Ontarians, as perpetrators or supporters of the “Tamil Genocide” or otherwise, does so in error.

B. BACKGROUND AND PROCEDURAL HISTORY

(1) Historical Context

[11] We are not being asked to decide whether the *TGEWA* is a wise use of government power. Our decision should not be interpreted as such.

[12] Nor are we being asked to decide if a genocide occurred in Sri Lanka. As the application judge emphasized, this case is not about whether a Tamil genocide occurred. The application judge was not called upon to decide, nor are we, the character of the acts of violence and marginalization that took place in Sri Lanka, who is responsible for them, nor the intent with which they may have been committed.² To this end, our discussion of the Sri Lankan conflict is limited to the undisputed facts necessary to understand the historical context underlying the *TGEWA*.

² The appellants delivered an expert report of Dr. William Schabas, a professor of international law. He opined that, after reviewing, among other information, reports of United Nations investigations and major international human rights non-governmental organizations about the events of the Sri Lankan civil war, there existed “much evidence to support charges of both war crimes and crimes against humanity.” But in his view, “[t]he inference that the Government of Sri Lanka, and its agents, intended to destroy the Tamil population of Sri Lanka, or even a substantial part of it, cannot be drawn to the exclusion of other reasonable explanations.” As noted, we do not decide the correctness of this view or of other competing opinions on the intention point.

[13] As noted, a majority of Sri Lankans are Sinhalese. Tamils have historically comprised a minority of the population. Some factions of the Tamil minority have sought an independent homeland. The Sri Lankan state has resisted their efforts.

[14] From 1983 to 2009, a civil war occurred between the Sri Lankan state and an organization called the Liberation Tigers of Tamil Eelam (“LTTE”).³ The people of Sri Lanka suffered greatly. Thousands were killed or displaced.

[15] Many Sri Lankans fled to Canada. Ontario is now home to one of the largest Tamil diasporas outside of southeast Asia. There is also a significant – though much smaller – Sinhalese community in Canada, including in Ontario.

[16] Some organizations have accused the Sri Lankan state of having committed a “genocide” against the Tamil minority leading up to and during the civil war.

[17] The *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 U.N.T.S. 277 (entered into force 12 January 1951) (the “*Genocide Convention*”) – a United Nations treaty to which Canada is a party – criminalizes acts of genocide under international law. Article II defines genocide to mean “[any of five listed] acts committed with intent to destroy, in whole

³ The LTTE has been listed as a terrorist organization under the *Anti-Terrorism Act*, S.C. 2001, c. 41 since April 10, 2006.

or in part, a national, ethnical, racial or religious group”.⁴ Canada has enacted a domestic offence that largely replicates this language: *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24, s. 4.

[18] To date, however, the International Court of Justice has not found the Sri Lankan state responsible for a genocide. According to the appellants’ expert, Dr. Schabas, there has been no international recognition of genocide, with respect to the Tamils in Sri Lanka, by political declaration of United Nations organizations or a judicial finding by an international court.

[19] Nor have the parties brought to our attention any case suggesting that a Canadian court has found anyone associated with the Sri Lankan state, or who participated in the civil war, guilty of genocide.⁵

(2) Legislative History

[20] MPP Vijay Thanigasalam introduced the *TGEWA* in the Legislative Assembly of Ontario on April 30, 2019 as a private member’s bill. The Act’s

⁴ The listed acts are (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group.

⁵ One person who purportedly “interrogated and killed people whom they identified as Liberation Tigers of Tamil Eelam” while a member of the Special Forces of the Sri Lankan Army was denied a temporary resident visa because there were “reasonable grounds to believe that [he] had personally committed, or those under his command had committed ... genocide”: *Priyanta Jayasinghe v. Canada (Citizenship and Immigration)*, 2007 FC 193, 309 F.T.R. 185, at paras. 3, 7, 43.

preamble and operative provisions are relatively brief, providing in relevant part as follows:

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.

[21] During the first reading, MPP 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 [has] 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.

Legislative Assembly of Ontario, *Official Report of Debates (Hansard)*, 42nd Parl., 1st Sess., No. 98 (30 April 2019), at p. 4629.

[22] We will examine the legislative debates on the *TGEWA* more closely when analyzing its pith and substance below. At this stage, we simply note that it passed unanimously without amendment. It received royal assent on May 12, 2021.

[23] The appellants say that they sought to have their perspectives included during the debates on the *TGEWA*, but their efforts were ignored or rebuffed.

(3) The Aftermath

[24] Sri Lankan government officials expressed displeasure with the *TGEWA* shortly after its enactment. On October 8, 2021, Sri Lanka's Foreign Minister met with the High Commissioner of Canada to Sri Lanka partly to convey Sri Lanka's opposition to the Act. Later, on February 5, 2022, the Sri Lanka High Commission in Ottawa issued a press release in which it criticized Ontario for "caus[ing] strain in [Sri Lankan] intercommunity relations" with the passage of the *TGEWA*.

[25] Despite this criticism, on May 18, 2022, the House of Commons unanimously adopted a motion "acknowledg[ing] the genocide of Tamils in Sri Lanka and recogniz[ing] May 18 of each year as Tamil Genocide Remembrance Day": House of Commons, *Official Report of Debates (Hansard)*, 44th Parl., 1st Sess., Vol. 147, No. 74 (18 May 2022), at p. 5519. One year later, on May 18, 2023, Prime Minister Justin Trudeau made a public statement in which he noted:

Today, we reflect on the tragic loss of life during the armed conflict in Sri Lanka, which ended 14 years ago. Tens of thousands of Tamils lost their lives, including at

the massacre in Mullivaikal, with many more missing, injured, or displaced.

...

The stories of Tamil-Canadians affected by the conflict – including many I have met over the years in communities across the country – serve as an enduring reminder that human rights, peace, and democracy cannot be taken for granted. That’s why Parliament last year unanimously adopted the motion to make May 18 Tamil Genocide Remembrance Day. Canada will not stop advocating for the rights and survivors of this conflict, as well as for all in Sri Lanka who continue to face hardship.⁶

The Right Honourable Justin Trudeau, “Statement by the Prime Minister on the First Tamil Genocide Remembrance Day” (18 May 2023), online: <www.pm.gc.ca/en/news/statements/2023/05/18/statement-prime-minister-first-tamil-genocide-remembrance-day>.

[26] The appellants have submitted affidavits claiming that, since Ontario enacted the *TGEWA*, those disputing the occurrence of a Tamil genocide have been mistreated and excluded. For example, a teacher of Sinhalese descent who worked for the Toronto Catholic District School Board deposed that she was excluded from a Tamil Genocide Education Week Committee after she disputed the occurrence of a Tamil genocide. As justification, the School Board’s

⁶ Mr. Hewage sought judicial review of this statement, arguing that its characterization of the Sri Lankan conflict as a “genocide” was unreasonable and contrary to his *Charter* rights. The Federal Court recently struck out his application in its entirety because it was plain and obvious that no recognized administrative law claim had been brought: *Hewage v. Canada (Prime Minister)*, 2024 FC 901.

Superintendent of Diversity and Equity purportedly told the teacher that the Board “follows the narrative of the province”, as expressed in the *TGEWA*.

(4) The Applications

[27] The Coalition Appellants and Mr. Hewage each applied for declarations that the *TGEWA* was constitutionally invalid. Collectively, they argued that the Act was *ultra vires* Ontario, and Mr. Hewage argued that it infringed their rights to free expression and equality. Their applications were heard together.

[28] The Tamil Canadian Coalition and Tamil Rights Group successfully moved to intervene in the proceeding as parties: *Sri Lankan Canadian Action Coalition v. Ontario (Attorney General)*, 2022 ONSC 1675, 505 C.R.R. (2d) 173. They, along with Ontario, made submissions in support of the *TGEWA*, though their submissions focussed on ensuring there was a balanced record and on the *Charter* issues. By order of this court dated February 15, 2023, they have continued in their status as interveners through to this appeal.

[29] The application judge dismissed the appellants’ applications. She held that the *TGEWA* was *intra vires* Ontario, and that it did not breach ss. 2(b) and 15(1) of the *Charter*. We will examine her reasons more closely in the following sections to which they correspond.

C. GROUNDS OF APPEAL

[30] On appeal, the appellants collectively press each of the constitutional submissions they made below:

- i. The *TGEWA* is *ultra vires* Ontario;
- ii. The *TGEWA* breaches s. 2(b) of the *Charter*; and
- iii. The *TGEWA* breaches s. 15(1) of the *Charter*.

[31] We will address these submissions in turn.

D. ANALYSIS

(1) The Division of Powers

i. Overview

[32] Federalism is a “fundamental guiding principle” of our constitutional order: *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at para 21. The framers of the Constitution sought to achieve national unity by reserving to Parliament powers better exercised in relation to the country as a whole, while allocating broad powers to the provinces in order to recognize their diversity. In the result, “[e]ach head of power was assigned to the level of government best placed to exercise the power”: *Canadian Western Bank v. Alberta*, at para. 22.

[33] There are two stages to determining whether laws fall within the heads of power assigned to the enacting legislature. Courts apply the pith and substance

doctrine to make this determination. First, the court characterizes the law in issue, identifying its pith and substance. Second, on the basis of that characterization, the court classifies the law by reference to the heads of power enumerated in the *Constitution Act, 1867: Reference re An Act respecting First Nations, Inuit, and Métis children, youth and families*, 2024 SCC 5, 488 D.L.R. (4th) 189, at para. 37.

[34] The fundamental objectives of federalism must guide this analysis. The court should aim “to reconcile unity with diversity, promote democratic participation by reserving meaningful powers to the local or regional level and to foster co-operation among governments and legislatures for the common good”: *Canadian Western Bank*, at para. 22. This “cooperative” approach to federalism requires that courts “facilitate interlocking federal and provincial legislative schemes and ... avoid [imposing] unnecessary constraints on provincial legislative action”: *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, [2018] 3 S.C.R. 189, at para. 18; *Québec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14, [2015] 1. S.C.R. 693, at paras. 17-19. Legislative overlap is “inevitable”, “proper and to be expected”: *Canadian Western Bank*, at paras. 24, 28.

[35] With these principles in mind, we dismiss the division of powers ground of appeal. However, we do so for different reasons than the application judge. In brief, we conclude that the application judge mischaracterized the *TGEWA* by describing its pith and substance as “educative”. In our view, the *TGEWA*’s dominant purpose is to affirm and commemorate the Tamil-Ontarian community’s experience of the

Sri Lankan Civil War and thus promote, within Ontario, the values of human rights, diversity and multiculturalism. At the classification stage, we conclude that this purpose constitutes a valid exercise of Ontario's powers over matters of a merely local or private nature in the province under s. 92(16) of the *Constitution Act, 1867*.

ii. Characterization

General Principles

[36] We begin by setting out some of the general principles applicable at the characterization stage of the division of powers analysis.

[37] At this stage, the court must identify a law's "dominant purpose": *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 29. The aim of this exercise is to determine the *TGEWA*'s "main thrust or dominant characteristic": *Reference re An Act respecting First Nations, Inuit, and Métis children, youth and families*, at para. 39. In doing so, the court looks at both the Act's purpose and its effects.

[38] In determining the *TGEWA*'s purpose, the court may look to both intrinsic and extrinsic evidence. Intrinsic evidence refers to the Act's title, preamble, text, structure and any provisions setting out its purpose. Extrinsic evidence includes the Act's legislative history and the legislative debates surrounding its enactment: *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, [2021] 1

S.C.R. 175, at paras. 58-62; *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17, [2020] 2 S.C.R. 283, at para. 34.

[39] In determining the *TGEWA*'s effects, the court may look at both the legal effects that flow directly from the Act's provisions and the practical effects that flow from its application: *Reference re Genetic Non-Discrimination Act*, at para. 51; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31, [2002] 2 S.C.R. 146, at para. 54.

[40] The court must keep the characterization and classification stages distinct – that is, it must identify the pith and substance of the *TGEWA* without regard to the heads of legislative power listed under ss. 91-93 of the *Constitution Act, 1867*: *References re Greenhouses Gas Pollution Pricing Act*, at para. 56. Failure to keep these two stages of the analysis distinct would create “a danger that the whole exercise will become blurred and overly oriented towards results”: *Chatterjee v. Ontario (Attorney General)*, 2009 SCC 19, [2009] 1 S.C.R. 624, at para. 16.

[41] Additionally, the court should not describe the *TGEWA*'s pith and substance too generally. Instead, it “must strive to be as precise as possible, because a precise statement more accurately reflects the true nature of what [the legislature] did and what it intended to do”: *References re Greenhouse Gas Pollution Pricing Act*, at para. 69. Further, identifying the pith and substance of the

law as precisely as possible “discourages characterization that is overly influenced by classification”: *References re Genetic Non-Discrimination Act*, at para 31.

The Reasons Below

[42] The application judge concluded that the dominant purpose of the *TGEWA* is to “educate the public about what the Ontario Legislature has concluded is a Tamil genocide”.

[43] In her assessment of the intrinsic evidence, the application judge focussed principally on the *TGEWA*’s preamble:

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”.

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”.

[44] The application judge also briefly referenced the *TGEWA*’s operative provisions. She noted that the “legal effect” of the Act is to “encourage Ontarians to educate themselves about, and to promote their awareness of, the Tamil genocide and other genocides”. She acknowledged, however, that the Act “does not require any particular educational initiatives to be undertaken”.

[45] In her assessment of the extrinsic evidence, the application judge focussed on the legislative debates on the *TGEWA*. She surveyed several statements in which MPPs indicated that promoting awareness of a Tamil genocide was an important step in furthering reconciliation and preventing future genocides. Many of these MPPs described this process as education.

[46] As to the *TGEWA*'s effects, the application judge noted that "school boards have publicly recognized a Tamil genocide during Tamil Genocide Education Week" and that "some schools are organizing programming" for that week. She accepted evidence that, as a practical effect, the *TGEWA* might reduce stigma against Tamil-Ontarians, who suffer from a stereotype that they support alleged acts of LTTE terrorism. The application judge also accepted that some Tamil educators had received funding to create Tamil Genocide Education Week programming.

[47] Considering all this evidence, the application judge rejected the appellants' submission that the dominant purpose of the *TGEWA* was to declare a genocide:

While I agree with the [appellants] 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 that 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.

[48] Although this paragraph appears to describe the *TGEWA* as having multiple precise purposes, at the classification stage the application judge subsequently described the Act's purpose as simply "educative".

The Parties' Submissions

The Appellants

[49] The appellants each submit that the application judge mischaracterized the *TGEWA*'s pith and substance as "educative". They argue that the Act's dominant purpose is instead to "recognize" or "declare" a genocide.

[50] As support, Mr. Hewage contends that, logically, it is impossible to educate about a genocide that has not yet been declared by either international law tribunals or Canada – the sole bodies he considers competent to make such a declaration. He also points to numerous instances during the legislative debates on the *TGEWA* in which MPPs indicated that the Act would "recognize" and "name" a Tamil genocide.

[51] To this, the Coalition Appellants add that the *TGEWA*'s operative provisions set out no educational requirements. They further assert that the *TGEWA* lacks an "educational foundation" because, in their view, there are no

authoritative sources that support the Act's factual predicates. Finally, the Coalition Appellants contend that the *TGEWA*'s practical effect is to prevent education because, they say, government officials have relied on the Act to shut down dissent concerning the occurrence of a Tamil genocide.

The Respondent

[52] Ontario reiterates its position below that the pith and substance of the *TGEWA* is "educational". It argues that the preamble to the *TGEWA* creates no legal rights or obligations. Ontario further points to multiple occasions throughout the legislative debates on the *TGEWA* where MPPs described the Act as "educational".

Analysis

[53] Questions concerning the division of powers between Parliament and the provinces are questions of law: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, at paras. 53, 55. The application judge's determination that the *TGEWA* is *intra vires* Ontario is therefore subject to correctness review: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 8.

[54] In our view, the application judge erred in characterizing the *TGEWA*'s pith and substance. She failed to keep the characterization and classification of the analysis distinct and to characterize the law with sufficient precision, instead

concluding that the Act's purpose is "educative" and therefore a valid exercise of the education power under s. 93 of the *Constitution Act, 1867*.

[55] We conduct the characterization exercise afresh with reference to the governing principles, the intrinsic and extrinsic evidence and the *TGEWA*'s effects. We conclude that the *TGEWA*'s dominant purpose is to affirm and commemorate the Tamil-Ontarian community's experience of the Sri Lankan Civil War and thus promote, within Ontario, the values of human rights, diversity and multiculturalism.

Intrinsic Evidence

[56] We begin with the *TGEWA*'s preamble. While Ontario seeks to downplay its significance, it is well-established that a court may look to an act's preamble to understand its pith and substance: *Chatterjee*, at para. 17; *Abitibi Power and Paper Company Limited v. Montreal Trust Company*, [1943] U.K.P.C. 37, at p. 548; *References re Greenhouse Gas Pollution Pricing Act*, at para. 59.

[57] As the application judge acknowledged, the *TGEWA*'s preamble describes its purposes in recognizing a Tamil genocide. The preamble states in part:

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 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.

[58] There are four main objectives identified in this passage:

- i. to “honour the lives that were lost”;
- ii. to give “a sense of hope to those who have suffered”;
- iii. to promote “healing and reconciliation”; and
- iv. to “affirm our collective desire to maintain awareness of [a Tamil] genocide and other genocides ... in order to prevent [them] from happening again”.

[59] The preamble describes the last objective as the most important one.

[60] It is important to read this passage in context. Earlier in the preamble, the *TGEWA* notes that the “Tamil community in Ontario is one of the largest concentrations of Tamils outside southeast Asia”. It then describes the experience of Tamil-Ontarians and their families during the Sri Lankan Civil War in detail.

[61] Taken together, these aspects of the preamble suggest that the purpose of the *TGEWA* is to affirm and commemorate the Tamil-Ontarian community’s experience of the Sri Lankan Civil War. Ontario understood that it had a large Tamil diaspora that had suffered. Ontario wanted to support this community by honouring its lost loved ones and acknowledging its view of the civil war so as to give it “a sense of hope” and further its “healing and reconciliation” process. Ontario also aimed to reduce stigma and “prevent” future acts of violence against the

community. By also referring to “other genocides” and the need to maintain awareness of them, Ontario strengthened that aim by placing the experience of the Tamil community in a relevant context shared by other communities.

[62] The preamble contains no reference to education. It mentions “maintaining awareness”, but that is not synonymous with “education” in the ordinary sense. Moreover, the preamble states that people should “maintain awareness” not for awareness’ own sake, but for the further end of preventing future violence.

[63] As to the *TGEWA*’s operative provisions, ss. 1(1)-(2) state:

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

(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.

[64] These provisions do mention the term “education”, both by naming the commemorative period an “Education Week” and by encouraging Ontarians to “educate themselves”.

[65] But the provisions stipulate no specific educational requirements. Nor do they displace the objectives identified in the preamble concerning the recognition of the experience of Ontario’s large Tamil community within the broader context of other genocides. To the extent that the operative provisions of the *TGEWA* encourage “education”, they do so as a means to this further end.

Extrinsic Evidence

[66] Throughout the second and third readings of the *TGEWA*, multiple MPPs indicated that the Act's central purpose was to recognize the experience of the Tamil-Ontarian community during the Sri Lankan Civil War and situate that experience within the context of other genocides.

- **MPP Thanigasalam:** “Diaspora Tamils have strongly urged their respective governments to help acknowledge the pain and suffering they have endured and that have been endured by their kin.... I have been receiving tremendous support for moving forward with this bill. There are so many Tamil youth in Ontario who came forward to share their stories about their pain and suffering through the ‘I am Tamil’ campaign. Thousands of people from Barrie, Sudbury, Windsor, Waterloo, Hamilton, across the [Greater Toronto Area] and all the way to Ottawa have been writing letters to their MPPs asking to pass this bill.... While we cannot bring back the lives that were lost [during the Tamil genocide] 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”: Legislative Assembly of Ontario, *Official Report of Debates (Hansard)*, 42nd Parl., 1st Sess., No. 259 (6 May 2021), at p. 13372.
- **MPP Stephen Lecce:** “We met with the Tamil youth council and other young leaders from Canada’s Tamil community ... to express the solidarity that we have and the responsibility as a government and as parliamentarians to never forget the sacrifices and those who have lost their lives.... It is incumbent on political leaders to name [the Tamil genocide] and to shame it, to acknowledge the genocide that was committed”: Legislative Assembly of Ontario, *Official Report of Debates (Hansard)*, 42nd Parl., 1st Sess., No. 108 (16 May 2019), at p. 5193.
- **MPP Doly Begum:** “Ontario and, notably, the [Greater Toronto Area], has one of the largest concentrations of Tamils outside southeast Asia. Tamil Canadians have families still suffering in their homeland as a result of the state-led genocide perpetrated against Tamil people between 1983 and 2009, with the peak of this brutal violence during the month of May 2009. Tamil Canadians continue to carry the pain and suffering from the loss of loved ones and the physical and mental trauma they themselves have experienced.... That is why the 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”: Legislative Assembly of Ontario, *Official Report of Debates (Hansard)*, 42nd Parl., 1st Sess., No. 259 (6 May 2021), at p. 13375.

[67] By enacting the *TGEWA*, these MPPs aimed to express their “solidarity” with Ontario’s Tamil community by “acknowledg[ing] [its] pain and suffering” and “recognizing [its] outcry ... to maintain awareness” of its experience of the Sri Lankan Civil War. They hoped that doing so would promote healing and “reconciliation” and prevent future human rights abuses.

[68] The application judge was correct that several MPPs described the *TGEWA* using the term “education”. However, read in context, these MPPs’ comments were not referring to education as an end in itself, but as a means to recognize or affirm the experiences of Tamil-Ontarians for the purposes noted above. Consider the following examples cited by the application judge in support of her characterization of the *TGEWA* as “educative”:

- **MPP Gurratan Singh:** “Trauma is intergenerational. That means that 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, 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”: Legislative Assembly of Ontario, *Official Report of Debates (Hansard)*, 42nd Parl., 1st Sess., No. 108 (16 May 2019), at p. 5193.
- **MPP 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 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 the current and future generation reflect on and educate the public about the enduring lessons of the Tamil genocide and other crimes against humanity”: (Legislative Assembly of Ontario, Official Report of Debates (Hansard), 42nd Parl., 1st Sess., No. 108 (16 May 2019), at p. 5195).

- **MPP Thanigasalam:** “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”: Legislative Assembly of Ontario, Official Report of Debates (Hansard), 42nd Parl., 1st Sess., No. 259 (6 May 2021), at p. 13372.

[69] These MPPs viewed “education” as a mechanism by which Tamil-Ontarians could “share their stories”, “memorialize” their loved ones and “heal from trauma”.

Effects

[70] As noted, the sole direct legal effect of the *TGEWA* is to create a commemorative week during which “all Ontarians are encouraged” to reflect on what Ontario describes as a “Tamil genocide”, as well as other historical genocides.

[71] As to practical effects, the application judge accepted evidence that the *TGEWA* may counter the stereotype that Tamil-Ontarians support alleged acts of terrorism perpetrated by the LTTE. She also accepted evidence that Ontario has provided funding to Tamil educators to develop programming for Tamil Genocide Education Week.

[72] These practical effects further confirm that the *TGEWA* is aimed at commemorating the Tamil-Ontarian community's experience of the Sri Lankan Civil War. In response to the Act, Tamil voices have received platforms from which to share this experience – they are being seen and heard.

[73] We do not accept the appellants' suggestion that the evidence of anti-Sinhalese bullying in the record is a practical effect of the *TGEWA* that is probative of its pith and substance. As we address in greater detail below, we agree with the application judge's conclusion that the evidence did not establish a causal connection between the *TGEWA* and the alleged bullying of members of the Sinhalese community. Most of the impugned actors did not reference the *TGEWA* and where they did, they did so in error. The *TGEWA* does not authorize bullying, there is nothing to suggest that that Ontario intended to promote anti-Sinhalese bullying, and even if there have been incidents of bullying, this is not an "actual or predicted practical effect" of the *TGEWA* that assists in determining its pith and substance: *Chatterjee*, at para. 19. It does not follow that the practical effect of reducing stereotypes about Tamil Ontarians would promote stereotypes about Sinhalese Ontarians.

Conclusions on Characterization

[74] Considering the *TGEWA*'s intrinsic and extrinsic evidence, as well as its effects, we conclude that the *TGEWA*'s dominant purpose is to affirm and

commemorate the Tamil-Ontarian community's experience of the Sri Lankan Civil War and thus promote, within Ontario, the values of human rights, diversity and multiculturalism.

[75] We reject the appellants' submission that the dominant purpose of the *TGEWA* is to simply "declare" or "recognize" a genocide. This characterization lacks the requisite precision for division of powers purposes and ill-reflects the legislature's actual – much narrower – objectives. The *TGEWA* may recognize the view that acts of genocide occurred leading up to and during the Sri Lankan Civil War. But as the application judge noted: "It is not just recognition for recognition's sake." It is recognition for the purpose of affirming and commemorating the Tamil-Ontarian experience of the conflict. Nor is it recognition for all purposes, without qualification. None of the evidence suggests an intent to recognize a genocide for the purposes of attributing criminal or international legal liability, for example.

[76] We also reject Ontario's submission that the dominant purpose of the *TGEWA* is simply to educate the public about a genocide. The word "education" may appear many times in the legislative record, but that alone does not make the pith and substance of the *TGEWA* educational. We accept that the *TGEWA* has spurred certain educational initiatives. The *TGEWA* represents an act of affirmation towards a local community that has suffered historical marginalization. Any education that it spurs is but a means to this further end.

[77] We now turn to the classification analysis.

iii. Classification

General Principles

[78] Three general principles guide our classification analysis.

[79] First, in classifying the *TGEWA*, the focus must be on its dominant characteristic – as identified at the pith and substance stage of the analysis – and not on its “secondary” or “incidental” effects: *Reference re Impact Assessment Act*, 2023 SCC 23, 486 D.L.R. (4th) 379, at para. 113.

[80] If the legislation’s dominant characteristic falls within a provincial head of power then, generally, the fact that it “incidentally touches on a head of power belonging to [Parliament] does not affect its validity”: *Reference re Impact Assessment Act*, at para. 113; *Reference re An Act respecting First Nations, Inuit, and Métis children, youth and families*, at para. 103.

[81] “Incidental” effects are those that “may be of significant practical importance but are collateral and secondary to the mandate of the enacting legislature”: *Canadian Western Bank*, at para. 28. These effects are permissible and “should not be seen as altering the balance of constitutional powers”: *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, at p. 669; *Canadian Western Bank*, at para. 28; *Chatterjee*, at para. 32.

[82] Second, legislation is presumed compliant with the division of powers. As the Supreme Court observed in *Murray-Hall v. Québec (Attorney General)*, 2023 SCC 10, 425 C.C.C. (3d) 277, at para. 79:

The presumption of constitutional validity remains a cardinal principle of our division of powers jurisprudence. According to this presumption, every legislative provision is presumed to be *intra vires* the level of government that enacted it. [Internal citations and quotations omitted.]

[83] Although not a determining factor, Wagner C.J. also noted that a court should be particularly cautious about invalidating a provincial law under a division of powers analysis when (as here) the federal government does not contest its validity: *Murray-Hall*, at para. 82.

[84] Third, and relatedly, the principle of cooperative federalism must guide the analysis. The “dominant tide” of modern Canadian constitutional interpretation is “that a court should favour, where possible, the ordinary operation of statutes enacted by *both* levels of government”: *Canadian Western Bank*, at para. 37 (emphasis in original). This more flexible view of federalism “accommodates overlapping jurisdiction and encourages intergovernmental cooperation”: *Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837, at para. 57.

[85] The double aspect doctrine – which we discuss in more detail below – gives effect to this principle. In *Murray-Hall*, at para. 76, the Supreme Court explained the doctrine as follows:

[It] reflects the contemporary view of federalism and constitutional interpretation, which recognizes that overlapping powers are unavoidable. According to the double aspect doctrine, Parliament and the provincial legislatures may make laws in relation to matters that, by their very nature, have both a federal and provincial aspect. It will therefore be possible to apply the double aspect doctrine where each level of government has a compelling interest in enacting legislation on different aspects of the same activity or matter. In practice, without creating concurrent jurisdiction over a matter, the double aspect doctrine allows for concurrent application of both federal and provincial legislation. [Internal citations and quotations omitted.]

The Reasons Below

[86] The parties made numerous classification submissions before the application judge. She held that the *TGEWA* was a valid exercise of the province's education power under s. 93 of the *Constitution Act, 1867*. Her reasoning was brief:

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".

[87] The application judge rejected the appellants' submissions that the *TGEWA* either constituted an exercise of or otherwise impermissibly encroached upon the federal government's criminal law, foreign affairs, or peace, order and good government ("POGG") powers. She noted that the *TGEWA* had no criminal or international legal effect that could bring it within the ambit of those powers.

[88] The application judge accepted that "the Federal government could legislate on the topic of whether what occurred in Sri Lanka was a genocide".

However, she relied on the double aspect doctrine to uphold the *TGEWA*: “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.”

[89] The application judge rejected the appellants’ submission that the *TGEWA* should be struck down pursuant to the paramountcy doctrine. That doctrine renders inoperative any provincial law that is operationally inconsistent with or frustrates the purpose of valid federal law: *Murray-Hall*, at para. 84. The application judge held that the doctrine did not apply because the appellants had failed to identify any federal law with which the *TGEWA* is inconsistent.

[90] Having upheld the *TGEWA* under the education power, the application judge declined to address Ontario’s submissions on the private rights and local matters powers.

The Parties’ Submissions

[91] On appeal the parties repeat the classification submissions they made before the application judge. We will begin by outlining the application judge’s reasons and the parties’ submissions generally, and we will explain them in more detail below in the sections to which they correspond. Collectively, the parties raise six categories of legislative power into which they submit the *TGEWA* may fall:

Provincial Powers

- i. **The Private Rights Power:** Section 92(13) of the *Constitution Act, 1867* gives the provinces the power to make laws in relation to “Property and Civil Rights in the Province.”
- ii. **The Local Matters Power:** Section 92(16) gives the provinces the power to enact laws in relation to “[g]enerally all Matters of a merely local or private Nature in the Province.”
- iii. **The Education Power:** Section 93 states that, “[i]n and for each Province the Legislature may exclusively make Laws in relation to Education”, subject to certain exceptions not in issue here.

Federal Powers

- iv. **The Criminal Law Power:** Section 91(27) gives Parliament the power to enact laws in relation to the “Criminal Law, except the Constitution of the Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.”
- v. **The POGG Power:** The preamble of s. 91 provides that “[i]t shall be lawful for the Queen, by and with the Advice and Consent of the Senate and the House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces”.
- vi. **The Foreign Affairs Powers:** While not an enumerated head of power, as explained below, the federal executive branch has certain powers to conduct foreign affairs by virtue of the Royal Prerogative.

Analysis

[92] For the following reasons, we conclude that the *TGEWA* constitutes a valid exercise of Ontario’s powers under s. 92(16). Supporting an Ontarian community by way of a commemorative week observed solely within Ontario is a matter “of a merely local or private Nature in the Province.”

Provincial Powers

[93] To begin, we reject Ontario’s submission that the *TGEWA* constitutes an exercise of the province’s powers over private rights in the province under s. 92(13). As the Coalition Appellants submit, for that power to apply, a province must create or modify private interpersonal “rights”, with juridical effect: *Murray-Hall*, at para. 72; *Reference re Validity of the Combines Investigation Act and of s. 498 of the Criminal Code*, [1929] S.C.R. 409, at p. 414. The *TGEWA* has no such effect – it is purely hortatory.

[94] We likewise reject Ontario’s submission that the *TGEWA* is properly classified under the province’s power over education in s. 93. The authorities interpreting s. 93 have almost uniformly addressed “education” in the sense of routinized instruction in a school setting: see e.g., *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13, [2020] 1 S.C.R. 678; *Ontario English Catholic Teachers’ Assn. v. Ontario (Attorney General)*, 2001 SCC 15, [2001] 1 S.C.R. 470; *Public School Boards’ Assn. of Alberta v. Alberta (Attorney General)*, 2000 SCC 45, [2000] 2 S.C.R. 409; *Adler v. Ontario*, [1996] 3 S.C.R. 609.⁷ This makes sense given that s. 93 represents a compromise on the rights of denominational schools: *Adler*, at paras. 29-35.

⁷ For one potential – but uncontested – exception, see *Reference re Authority to Perform Functions Vested by Adoption Act, The Children of Unmarried Parents Act, The Deserted Wives’ and Children’s Maintenance Act of Ontario*, [1938] S.C.R. 398.

[95] That leaves the local matters power under s. 92(16).

[96] There appears to be no established test for determining when s. 92(16) applies. Nevertheless, two principles arising from the s. 92(16) jurisprudence suggest that the power embraces legislation like the *TGEWA*.

[97] First, provincial legislation may be valid under s. 92(16) even if it addresses a topic that is of extra-provincial interest or if it has extra-provincial effects. For instance, the Supreme Court has long held that the provinces have “extensive” jurisdiction under s. 92(16) over the local dimensions of public health: see e.g., *Schneider v. The Queen*, [1982] 2 S.C.R. 112, at p. 136-37, 141; *Murray-Hall*, at para. 73; see also *Reference re Genetic Non-Discrimination Act*, at paras. 93-94; *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134, at para. 68; *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213, at para. 131. That is so even though disease crosses borders and, as a result, extra-provincial actors are clearly interested in the public health measures that the provinces choose to adopt.

[98] Second, the Supreme Court has expressed a preference for applying s. 92(16) to broaden provincial jurisdiction, carving out overlapping areas of legislative competence. In *Canadian Western Bank*, Binnie and Lebel JJ. noted, at para. 43:

While it is true that the enumerations of ss. 91 and 92 contain a number of powers that are precise and not

really open to discussion, other powers are far less precise, such as those relating to the criminal law, trade and commerce and matters of a local or private nature in a province. Since the time of Confederation, courts have refrained from trying to define the possible scope of such powers in advance and for all time. For example, while the courts have not eviscerated the federal trade and commerce power, they have, in interpreting it, sought to avoid draining of their content the provincial powers over civil law and matters of a local or private nature. [Internal citations omitted].

[99] To this end, the Supreme Court has often cited s. 92(16) when applying the double aspect doctrine, holding that Parliament and the provinces have independent jurisdiction over the national and local aspects, respectively, of the same general matters of regulation. In addition to public health, examples include environmental regulation (*Reference re Impact Assessment Act*, at paras. 114-24, 205) and Indigenous child welfare (*Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, at para. 98). This approach is consistent with the principle of cooperative federalism: *Reference re Impact Assessment Act*, at para. 122.

[100] In this vein, some jurists have also observed that the federal government's POGG powers and the provinces' s. 92(16) powers are really two sides of the same coin – they grant each level of government some role over unassigned matters. For instance, in *References re Greenhouse Gas Pollution Pricing Act*, Rowe J. – dissenting, but not on this point – noted the following at paras. 492-93:

The federal residual clause has typically been seen as the sole residual power, such that all matters not coming within those assigned to the federal and provincial legislatures come within the federal power. However, there is a strong case for viewing the opening words of ss. 91 and 92(16) as setting out a parallel structure of complementary federal and provincial residua.

There is much to be said for the theory that the two sections complement and modify each other, with the federal residuum dealing with matters of a general character and the provincial residuum encompassing matters of a merely local or private nature. [Internal citations and quotations omitted; emphasis in original.]

[101] With these principles in mind, we conclude that the *TGEWA* falls within Ontario's s. 92(16) powers.

[102] The Act's dominant purpose is to affirm and commemorate the experience of a local community: Tamil-Ontarians. It accomplishes this purpose by way of a commemorative week observed solely within the province. The experience of the local community and the topic of the commemorative week may be subjects of international debate. Members of the Tamil diaspora, as well as communities affected by other genocides, may reside in other parts of Canada. But that does not change the fact that the matter of this regulation is inherently "local". The commemorative week and the Tamil community to which it is addressed are both "local".

[103] We also note that the *TGEWA*'s commemorative purpose likely has a double aspect. In our view, Ontario may commemorate the experiences of its local

Tamil community – as well as other local communities – under s. 92(16), just as Alberta may commemorate a Ukrainian genocide and Québec may commemorate an Armenian genocide in recognition of their local communities: *Ukrainian Famine and Genocide (Holodomor) Memorial Day Act*, S.A. 2008, c. U-0.5; *Act to proclaim Armenian Genocide Memorial Day*, C.Q.L.R. c. J-0.2. Indeed, both British Columbia and Canada have enacted legislation recognizing and memorializing the Holocaust: *Holocaust Memorial Day Act*, S.B.C. 2000, c. 3; *Holocaust Memorial Day Act*, S.C. 2003, c. 24. As Ontario submits, the variance in commemorative periods recognized across Canada and enacted at various levels of government illustrates that valid constitutional underpinnings for them exist at both the provincial and federal levels.

[104] Recognizing that each level of government may validly commemorate the experiences of their different communities accords with the principle of cooperative federalism.

[105] The Coalition Appellants' reliance on the principle in *Switzman v. Elbling and A.G. of Quebec*, [1957] S.C.R. 285, and *Reference Re Alberta Statutes*, [1938] S.C.R. 100, that Ontario has no jurisdiction under s. 92(16) to suppress dissent is misplaced. As we discuss more thoroughly in the freedom of expression analysis below, the *TGEWA* does not suppress or compel expression. Accordingly, *Switzman* and *Reference re Alberta Statutes* – which concerned a law prohibiting the use of a house to “propagate communism” and a law requiring that a

newspaper publish certain materials at the instance of a political party, respectively – are distinguishable.

[106] Moreover, the fact that genocide is a topic informed by international law does not make the *TGEWA* inherently non-local. Public health is a matter informed by international law, and yet, as we have explained, the provinces retain extensive public health powers. The *TGEWA* is valid provincial law.

Federal Powers

[107] We turn now to explain why we reject the appellants' arguments that the *TGEWA* constitutes an exercise of or otherwise interferes with federal heads of power.

[108] First, the *TGEWA* does not fall under or interfere with the federal criminal law power.

[109] To fall within the criminal law power under s. 91(27), a law must have (i) a prohibition, (ii) a penalty backing that prohibition, and (iii) a criminal law purpose: *Reference re Genetic Non-Discrimination Act*, at para. 67. The application judge held that the *TGEWA* does not satisfy any of these elements. We agree.

[110] The *TGEWA* does not constitute criminal law. The operative provisions of the Act declare a commemorative week. They contain neither a prohibition nor a penalty. They have no legal effect in any criminal proceeding.

[111] The preamble of the *TGEWA* may indicate that the Sri Lankan state is responsible for a “genocide” while using the term’s criminal law definition, but the preamble creates no rights or liabilities. Nor does the preamble purport to satisfy any of the elements of s. 6(1) of the *Crimes Against Humanity and War Crimes Act* for criminal law purposes against any person charged with the offence. We thus reject Mr. Hewage’s submission that Ontario “has utilized areas of the criminal [l]aw” and “effectively applied” the criminal prohibition under s. 6(1) by designating the Sri Lankan Civil War a “genocide”.

[112] Additionally, absent any criminal law effect, we do not see how the *TGEWA* encroaches on the federal power over criminal law. The Act may reference a criminal law definition, but this reference does not interfere with the prosecution of genocide offences in accordance with federal law. There is no evidence that the Act has been or was intended to be used to impact criminal proceedings.

[113] We accordingly conclude that the *TGEWA* does not fall under or interfere with the federal criminal law power.

[114] Second, the *TGEWA* also does not trench upon the federal POGG power.

[115] To qualify as a “national concern”, a matter “must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the

Constitution”: *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401, at p. 432. See also *References re Greenhouse Gas Pollution Pricing Act*, at paras. 132-66. As Wagner C.J. stressed in *References re Greenhouse Gas Pollution Pricing Act*, at para. 142, the national concern branch is a residuary power to be exercised with “great caution.”

[116] In this case, the Coalition Appellants’ conclusory assertion that the “subject of genocide” is a matter of national concern for division of powers purposes fails to meet the stringent test articulated by the Supreme Court. The subject of a historical genocide and its present-day impacts in a current setting lacks the single, distinct and indivisible nature that is required for the matter to fall within the national concern branch. Indeed, a categorical federal jurisdiction over the subject of genocide would unnecessarily foreclose provincial jurisdiction on any issue that related to genocide, including, for example, provincial education on the Holocaust. That result would not be consistent with the proper division of powers and cooperative federalism, both of which animate the national concern doctrine.

[117] There is likewise no merit to the Coalition Appellant’s argument that because the prohibition against genocide is peremptory and universal, the subject of genocide is inherently a matter of national concern reserved exclusively to Parliament. While we accept that the prohibition against genocide is a peremptory norm of international law, it does not follow that Parliament has exclusive and

categorical authority to legislate on the subject of genocide such that Ontario has no authority to legislate on a premise that a genocide occurred.

[118] In any event, the *TGEWA* does not engage the peremptory norm prohibiting genocide. The Act prohibits nothing. It does not implement or enforce any prohibition. The Coalition Appellants' submission that a "false declaration of genocide" against a state may be justiciable under the *Genocide Convention* is a red herring.

[119] We therefore conclude that the *TGEWA* does not fall under or encroach on the federal POGG power.

[120] Finally, the *TGEWA* does not encroach on any federal jurisdiction over foreign affairs.

[121] While the *Constitution Act, 1867* does not expressly assign foreign affairs powers to any level of government, the federal executive has the power to enter into agreements with other states by virtue of the Royal Prerogative: *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, at paras. 33-35. In the exercise of such a power Canada became a signatory to the *Genocide Convention*. It is clear that the federal government does not have exclusive jurisdiction over all matters that might be understood in some sense as relating to foreign affairs.

[122] The *TGEWA* is not an exercise in the conduct of foreign affairs, nor can it be said to interfere with the federal government's jurisdiction over foreign affairs.

While the Act purports to recognize the Tamil genocide, it does not do so for the purpose of engaging in international relations or to give effect to any international obligation. Further, it does not bind Canada to a treaty with a foreign state or encroach on the federal power to enter into treaties with foreign states on behalf of Canada. In any event, even if the *TGEWA* could be said to interfere with the federal executive's treaty-making powers, that would not alone render the Act *ultra vires*. The provinces are entitled to incidentally affect matters of federal jurisdiction while exercising their own heads of power.

[123] We therefore conclude that the *TGEWA* is not an exercise of any federal head of power nor does the Act interfere with any such power. We turn now to the appellants' *Charter* arguments.

(2) Freedom of Expression

i. General Principles and the Reasons Below

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

[125] To establish a breach of s. 2(b), a claimant must demonstrate that:

- i. the activity in issue has expressive content;
- ii. the location and method of the expression are not of such a nature as to exclude it from s. 2(b) protection; and

iii. the purpose or effect of the impugned government action is to restrict freedom of expression.

Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927, at pp. 969, 971-72; *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34, 462 D.L.R. (4th) 1, at paras. 14-15 (“*Toronto (City) SCC*”); and *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2, [2011] 1 S.C.R. 19, at para. 38.

[126] The activity in this case is the appellants’ dissent concerning the occurrence of a Tamil genocide. There was no dispute – below and on appeal – that this activity has expressive content and that it is not excluded from s. 2(b) protection. The appellants’ s. 2(b) claims therefore hinge on the third step of the analysis.

[127] The application judge held that nothing in the *TGEWA* restricts or limits the appellants’ ability to dispute the occurrence of a Tamil genocide. She rejected the appellants’ argument that the Act made their expression less effective in any way that could breach s. 2(b). Citing this court’s decision in *Toronto (City) v. Ontario (Attorney General)*, 2019 ONCA 732, 146 O.R. (3d) 705, at para. 43, aff’d 2021 SCC 34, 462 D.L.R. (4th) 1 (“*Toronto (City) ONCA*”), she noted that the government has no “duty to promote, enhance, or even preserve the effectiveness of anyone’s political expression”.

[128] The application judge also rejected that there was a causal nexus between the *TGEWA* and the evidence of anti-Sinhalese bullying and “cancellation” that the appellants had adduced. The *TGEWA* does not authorize the exclusion of anyone from public discourse. If anyone relies on the Act for that purpose, they do so in error, and any recourse by the appellants in respect of such conduct would lie against those actors for their actions, not against Ontario for enacting the *TGEWA*: *Thomas Christian Zaugg v. Ontario (Attorney General)*, 2019 ONSC 2483, at para. 50.

ii. The Parties’ Submissions

The Appellants

[129] Different considerations arise depending on whether the claimant alleges that it is the purpose of the impugned government action to infringe their freedom of expression, or whether it is alleged to have that effect. The appellants each submit that the application judge erred in her s. 2(b) analysis, but they differ in terms of the type of infringement that they assert.

[130] Mr. Hewage asserts that the purpose of the *TGEWA* is to limit freedom of expression. He again challenges the application judge’s description of the *TGEWA*’s purpose as being educational. He argues that the Act’s purpose is to dictate how people understand the Sri Lankan Civil War and to limit dissent from the provincial government’s preferred characterization of the conflict as a

“genocide”. He cites no textual or contextual support for this argument, whether intrinsic or extrinsic to the *TGEWA*.

[131] The Coalition Appellants instead submit that the *TGEWA* has the effect of infringing s. 2(b). They argue *Toronto (City) ONCA* does not apply because it concerned a positive rights claim, whereas they are asserting a negative right to be free from government action that makes their expression less effective. They contend that the *TGEWA* effectively shuts down the marketplace of ideas to any dissent that Tamil genocide has occurred. Further, they argue that unwritten constitutional principles, including democracy, constitutionalism and the protection of minorities, support their s. 2(b) claim.

The Respondent and the Interveners

[132] In response to Mr. Hewage, Ontario submits that the purposes of the *TGEWA* are purely educational and commemorative in nature. The Act places no restrictions on the content or means of the appellants’ expression.

[133] In response to the Coalition Appellants, Ontario submits that the *TGEWA* does not make their expression less effective in any manner cognizable under s. 2(b). The *TGEWA* does not authorize or require the exclusion of dissenting voices or restrict the content and means of expression of such voices. Further, while unwritten constitutional principles can be useful interpretive tools, they cannot be used to bootstrap a s. 2(b) claim where there is no restriction on their expression.

[134] The Tamil Rights Group supports Ontario in these submissions.

iii. Analysis

[135] For the following reasons, we do not accept the appellants' s. 2(b) claims.

The purpose of the TGEWA is not to infringe the appellants' free expression

[136] We reject Mr. Hewage's submission that a purpose of the TGEWA is to limit or restrict his free expression.

[137] Government action restricts s. 2(b) in its purpose if its object is to "restrict the content of expression by singling out particular meanings that are not to be conveyed" or "if the government has aimed to control attempts to convey a meaning either by directly restricting the content of expression or by restricting a form of expression tied to content": *Irwin Toy*, at pp. 974, 976. See also *Greater Vancouver Transportation Authority v. Canadian Federation of Students – British Columbia Component*, 2009 SCC 31, [2009] 2 S.C.R. 295, at para. 38; *Figueiras v. Toronto (Police Services Board)*, 2015 ONCA 208, 124 O.R. (3d) 641, at para. 73.

[138] We have already determined that the dominant purpose of the TGEWA is to affirm and commemorate the Tamil-Ontarian community's experience of the Sri Lankan Civil War. Nor do we see any indication that any other purpose of the TGEWA is to inhibit the free expression of members of the Sinhalese Ontario community. The Act's text contains no provisions prohibiting or penalizing the form

or content of, or access to, the appellants' messaging. Nothing in the legislative debates suggests that the Legislature intended for the Act to be used to prohibit dissent.

The *TGEWA* does not impermissibly diminish the effectiveness of the appellants' expression

[139] We reject the Coalition Appellants' argument that the *TGEWA* diminishes the effectiveness of their expression in a manner that breaches s. 2(b).

[140] In *Toronto (City) SCC*, at para. 20, the Supreme Court explained that a s. 2(b) claim may have positive or negative dimensions. The distinction between positive and negative rights claims is important because “[i]n the context of a positive claim, only extreme government action that extinguishes the effectiveness of expression ... may rise to the level of a substantial interference with freedom of expression”; in contrast, “diminished effectiveness might be enough to amount to a limit of s. 2(b) in its traditional negative orientation”: *Toronto (City) SCC*, at para. 39.

[141] In this case, the application judge accepted, and no party challenges on appeal, that the appellant's s. 2(b) claims were negative – they wanted to be free from the alleged restrictions that the *TGEWA* had imposed on their expression. However, in our view, the fact that the appellants assert a negative rights claim

and that the *TGEWA* reflects a contradictory view to the one they express does not diminish the effectiveness of their expression.

[142] The Coalition Appellants' reliance on *Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827, is misplaced. In that case, the court held that legislation imposing spending caps on political advertising infringed s. 2(b). McLachlin C.J. and Major J. (dissenting, but not on this point) explained that the caps were set so low as to prevent the claimants from disseminating their messaging through national media: at paras. 4, 9. The claimants could still express themselves, but the government had diminished their effectiveness by limiting the means available to convey their message.

[143] Similarly, in *Bracken v. Niagara Parks Police*, 2018 ONCA 261, 141 O.R. (3d) 168, this court held that a regulation preventing the claimant from displaying a sign that contained inflammatory political messaging in a park infringed s. 2(b). Miller J.A. observed that, while there are often many ways of communicating a similar sentiment, some methods of delivery are more effective than others. One can declare a similar sense of opposition loudly and with profanities or quietly and politely, but the former carries a power that “does not translate, without significant loss of meaning,” to the latter: *Bracken*, at paras. 57-58. By depriving the claimant of the ability to express himself forcefully, the government had limited him to communicating a less effective message.

[144] In each of the foregoing cases, there was some deprivation on the claimant that hindered their ability to communicate effectively. In *Harper*, by depriving the claimant of access to a certain type of advertising, the government had limited the reach of his messaging. In *Bracken*, by depriving the claimant of offensive language, the government had diminished the force of his messaging. Diminished effectiveness, untied from a deprivation, was not a standalone basis from which to establish a s. 2(b) claim.

[145] Turning to this appeal, the *TGEWA* imposes no deprivation on the appellants that diminishes the reach or force – or any other metric of effectiveness – of their messaging. Ontario has enacted a statute “encourag[ing]” – but not requiring – Ontarians to maintain their awareness of what Ontario calls a Tamil genocide, as well as other historical genocides. The Act does not diminish the effectiveness of the appellants’ expression in the manner contemplated by the s. 2(b) authorities.

The alleged exclusion of dissenting voices does not establish that the *TGEWA* breaches s. 2(b)

[146] The application judge did not expressly reject the appellants’ evidence that certain government actors had cited the *TGEWA* to exclude dissenting voices from public discussions concerning the Sri Lankan Civil War. Nevertheless, she rejected that this evidence could establish an infringement of the appellants’ freedom of

expression. She held that the proper respondents to any *Charter* claims arising from these incidents were the impugned government actors, not Ontario.

[147] We agree. Where a government official applies legislation in breach of the *Charter*, the legislation is not the proper subject of challenge unless the *Charter* breach is an “inevitable” or “necessary” consequence of the legislation: *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at paras. 29-30; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120, at paras. 125-39. The marginalization of dissenting voices is not an inevitable or necessary consequence of the *TGEWA*. The Act does not authorize such conduct, and while the Act’s preamble expresses disapproval of the Sri Lankan state, it does not require that those who support or associate with that state be silenced. Any government actor who relies on the Act to support acts of marginalization does so in error, and the appellants’ remedy for such conduct does not lie against Ontario for enacting the *TGEWA*.

[148] The application judge also did not expressly reject the appellants’ evidence describing incidents of anti-Sinhalese bullying during which the perpetrators did not reference the *TGEWA*. She found, however, that because the perpetrators did not cite the *TGEWA* as their impetus, there was no causal nexus between the *TGEWA* and their actions. She thus concluded that these incidents could not establish that the *TGEWA* breached s. 2(b).

[149] We again agree. The Coalition Appellants' arguments about any alleged link between the *TGEWA* and the criticism of Sinhalese voices are speculative, tenuous and remote. The preamble to the *TGEWA* attributes responsibility for a Tamil genocide to the Sri Lankan state of the time. It does not attribute responsibility to Sinhalese generally, nor to Sinhalese Ontarians in particular.

[150] The government is entitled to enter the marketplace of ideas to counter expression with which it disagrees: *Toronto (City) ONCA*, at para. 43. That is so even though it is often reasonably foreseeable that the public will be less inclined to listen to the expression so countered. By enacting the *TGEWA*, Ontario has entered the marketplace of ideas. The Act expresses Ontario's view that the Sri Lankan state committed a genocide. It does not require that anyone adopt that view. The appellants remain free at law to dispute the occurrence of a Tamil genocide, even if members of the Ontario government and public would prefer not to listen to them.

Unwritten constitutional principles do not assist the appellants

[151] As this court observed in *Poorkid Investments Inc. v. Ontario (Solicitor General)*, 2023 ONCA 172, 479 D.L.R. (4th) 469, at para. 61, leave to appeal refused, [2023] S.C.C.A. No. 188, unwritten constitutional principles are interpretive tools that inform the scope of constitutional settlements. They cannot alone establish *Charter* breaches where the text of the relevant rights is not

engaged: *Toronto (City) SCC*, at paras. 57, 65. Since we have determined that the *TGEWA* imposes no legal limit or restriction on the appellants' freedom of expression, unwritten constitutional principles do not assist them.

[152] We turn now to the s. 15(1) claim.

(3) The Right to Equality

i. General Principles and the Reasons Below

[153] Section 15(1) of the *Charter* states:

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.

[154] To establish a breach of s. 15(1), a claimant must demonstrate that the impugned law or state action:

- i. Creates a distinction based on enumerated or analogous grounds, either on its face or in its impact; and
- ii. Imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating disadvantage.

R. v. Sharma, 2022 SCC 39, 165 O.R. (3d) 398, at para. 28.

[155] The application judge held that the appellants' s. 15(1) claims failed at both stages. She rejected the appellants' submission that the *TGEWA* drew a racial distinction against Sinhala-Buddhists by accusing them of having collectively

committed a genocide. At most, the Act lays blame on the Sri Lankan state by identifying it as the perpetrator of a genocide. A claim that a state is responsible for a genocide does not tar everyone who shares the same nationality, ethnicity or religious affiliation as those comprising the majority of the state.

[156] The application judge further found that the *TGEWA* had no discriminatory impact. The focus of the appellants' challenge was on the assertions in the preamble of the Act. But the preamble creates no rights or liabilities that could amount to legal benefits or detriments that disfavour Sinhala-Buddhists. Moreover, the operative provisions of the *TGEWA* declaring a commemorative week are purely symbolic.

ii. The Parties' Submissions

[157] Only Mr. Hewage presses his s. 15(1) claim on appeal. He asserts only facial discrimination – he neither alleges nor substantiates adverse impact discrimination. He submits that the application judge erred in finding that the *TGEWA* draws no express racial distinction against Sinhala-Buddhists.

[158] Mr. Hewage asserts that, by indicating that the Sri Lankan state's actions in furtherance of the alleged genocide were "Sinhala-Buddhist centric", the Act impliedly lays blame for the genocide at the feet of all Sinhala-Buddhists. He further argues that the French version of the Act refers to the Sri Lankan state as having

“orchestré” – i.e., “orchestrated” – the alleged genocide, which, he submits, implies that Sinhala-Buddhists were the genocide’s true “executors”.

[159] Ontario and the Tamil Canadian Coalition both submit that the *TGEWA* draws no distinction against Sinhala-Buddhists. They argue that the Act can only reasonably be read as indicating that the Sri Lankan state is responsible for a genocide. Sinhala-Buddhists are not complicit just because the Sri Lankan state was at the time of the civil war, or is currently, comprised of a Sinhala-Buddhist majority and favoured Sinhala-Buddhist interests.

[160] Ontario further submits that the *TGEWA* has no discriminatory impact against Sinhala-Buddhists. The Act does not foreseeably and inevitably invite anti-Sinhala-Buddhist opprobrium. If anyone has relied on the act to bully or exclude Sinhala-Buddhists, they have done so unreasonably and unforeseeably. The proper respondents to any discrimination claims are the impugned actors, not Ontario.

[161] Finally, the Tamil Canadian Coalition submits that the *TGEWA* is protected under s. 15(2). Section 15(2) saves laws that might otherwise breach s. 15(1) where such laws have as their “object the amelioration of conditions of disadvantaged individuals or groups”. The Tamil Canadian Coalition contends that the *TGEWA* has as its object the amelioration of the conditions of Tamil-Ontarians, who carry collective, intergenerational trauma from the Sri Lankan Civil War.

iii. Analysis

[162] We dismiss this ground of appeal.

[163] We reject Mr. Hewage's submission that the *TGEWA* draws an express racial distinction against Sinhala-Buddhists. The impugned portions of the *TGEWA*'s preamble state that the Sri Lankan government's allegedly genocidal policies were "Sinhala-Buddhist centric", not that Sinhala-Buddhists are, as a racial group, collectively responsible for them. Likewise, claiming that the Sri Lankan state "orchestrated" a genocide does not imply that Sinhala-Buddhists are collectively responsible for "executing" the alleged genocide.

[164] Additionally, we agree with the application judge that the *TGEWA* has no discriminatory impact. The focus of Mr. Hewage's claim – the Act's preamble – creates no rights or liabilities to the legal detriment of Sinhala-Buddhists. Further, the Act's operative provisions are purely symbolic. They merely encourage public reflection on a conflict for which the Act holds the Sri Lankan state – not Sinhala-Buddhists as a racial group – responsible.

[165] Having concluded that the *TGEWA* does not breach s. 15(1), we need not address the Tamil Canadian Coalition's submissions concerning s. 15(2).

E. CONCLUSION

[166] For these reasons, we dismiss the appeals.

[167] This is not a case for costs.

JMF

Released: September 5, 2024

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