# The *Tamil Genocide Education Week Act, 2021* as a Cautionary Tale for Canadian Legislators: A Comment on *Sri Lankan Canadian Action Coalition v Ontario (Attorney General)*

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**ABSTRACT**

Most Canadian jurisdictions have an ever-growing assortment of statutes that commemorate or otherwise recognize genocides, diseases and health risks, ethnic or cultural communities, professions, or contributors to the economy – but do little if anything else. *Sri Lankan Canadian Action Coalition v Ontario (Attorney General)* is the first reported decision challenging the constitutionality of such an act, Ontario's *Tamil Genocide Education Week Act, 2021*. In this case comment, I canvass the reasons of the application judge and the Court of Appeal and draw out lessons for legislators and policymakers. While these kinds of statutes that lack any legal impact may be the subject of constitutional challenges, those challenges will face many legal barriers and will likely be unsuccessful. The legal risk is minimal but very real. Conversely, perhaps the most important lesson for lawmaking is that seemingly benign hortatory legislation, while having little legal impact, can provoke strong and motivated opposition. In other words, these meaningless bills are not as meaningless and certainly not as harmless as many lawyers and politicians may have rightly – or at least understandably – assumed.

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## INTRODUCTION

Most Canadian jurisdictions have an ever-growing assortment of statutes that commemorate or otherwise recognize genocides, diseases and health risks, ethnic and cultural communities, professions, or contributors to the economy – but do little if anything else.[1] These statutes are essentially legally meaningless, and thus it is no surprise that they rarely if ever have given rise to litigation or controversy. Indeed, it would seem Canadian legislators have been lulled into the perception and assumption that these bills are good for public awareness (and constituent relations) and essentially carry no downside risks. This assumption has been called into question by recent litigation over Ontario's *Tamil Genocide Education Week Act, 2021*.[2]

In this comment, I situate this litigation in the broader context of apparently meaningless legislation, consider the substantive law at issue, reflect on the implications for these sorts of statutes going forward, and draw out lessons for legislators and policymakers. I begin in Part 1 by giving a glimpse into the current slate of such laws and the concerns that have been raised about them in the legal literature. I then look at what was until recently the leading case on seemingly meaningless legislation: the decision of the Federal Court of Appeal in *Conacher v. Canada (Prime Minister)*.[3] Against this backdrop, in Part 2 I canvass the arguments and reasons in *Sri Lankan Canadian Action Coalition v Ontario (Attorney General)*,[4] the litigation over the *Tamil Genocide Education Week Act*. I then conclude in Part 3 by reflecting on the implications of my analysis.

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1 For a recent list from Ontario, see Andrew Flavelle Martin, "The Duty of Legislative Counsel as Guardians of the Statute Book: *Sui Generis* or a Professional Duty of Lawyers?" (2021) 44:3 Manitoba LJ 116 at 139 note 83 [Martin]. I exclude here statutes that adopt an emblem, flag, or tartan for the jurisdiction.

2 *Tamil Genocide Education Week Act, 2021*, SO 2021, c 11.

3 *Conacher v Canada (Prime Minister)*, 2010 FCA 131, leave to appeal to SCC refused, 33848 (20 January 2011) [*Conacher v Canada*].

4 *Sri Lankan Canadian Action Coalition v Ontario (Attorney General)*, 2024 ONCA 657 [*Sri Lankan Coalition (CA)*], aff'g on other grounds 2022 ONSC 3849 [*Sri Lankan Coalition (SC)*], leave to appeal to SCC refused, 41520 & 41524 (27 March 2025).

## I. THE STATUS QUO

Every Canadian jurisdiction has a growing assortment of commemorative/awareness statutes, with the exception of Northwest Territories and Nunavut.[5] As I have observed elsewhere, "[t]hese share a common format: a descriptive preamble, one substantive section that proclaims a day, week, or month as having a certain designation, and short title and coming-into-force sections."[6] Some go slightly further, such as the *Lupus Awareness Day Act, 2021*, which states that"[o]n Lupus Awareness Day, all Ontarians are encouraged to wear an item of the colour purple."[7] While it is more common in these statutes for the goals of awareness or education

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5 Note that *National Indigenous Peoples Day Act*, SNWT 2021, c 15, makes the day a public holiday. Note likewise *National Day for Truth and Reconciliation Act*, SY 2022, c 18 and *National Aboriginal Day Act*, SY 2017, c 1 (making each day a holiday). However, Yukon has two of these statutes: *Day of Mourning for Victims of Workplace Injuries Act*, RSY 2002, c 51, and the *Yukon Day Act*, RSY 2002, c 235. The *Yukon Day Act*, like the *Tamil Genocide Education Week Act*, is hortatory in that it encourages reflection and celebration (s 2: "Yukon Day shall be a day on which the citizens of the Yukon are encouraged to reflect on the history and heritage of their land and its peoples and to celebrate the lives, traditions, and cultures of all Yukoners past and present.").

6 Martin, *supra* note 1 at 138.

7 *Lupus Awareness Day Act, 2021*, SO 2021, c 12, s 1(2).

to be solely found in the preamble,[8] some statutes may include them in their substantive sections.[9]

The popularity or at least quantity of these statutes is not surprising.[10] These statutes commonly begin life as private members' bills, which makes sense given that such bills cannot spend new money and these bills cost nothing. Also, as a political matter, it would seem awkward to oppose any of these.

Prior to the litigation in *Sri Lankan Canadian Action Coalition v Ontario (Attorney General)*, little attention had been paid to these statutes in the Canadian legal literature. The leading commentary was a 2005 article by

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8 See e.g. *The Holocaust Memorial Day Act*, SM 2000, c 2, preamble: "the terrible destruction and pain of the Holocaust must never be forgotten; ... systematic violence, genocide, persecution, racism and hatred continue to occur throughout the world; ... the Legislative Assembly is committed to using legislation, education and example to protect Manitobans from violence, racism and hatred and to stopping those who foster or commit crimes of violence, racism and hatred; ... [and] Yom Hashoah or the Day of the Holocaust, as determined in each year by the Jewish lunar calendar, is an opportune day to reflect on and educate about the enduring lessons of the Holocaust and to reaffirm a commitment to uphold human rights and to value the diversity and multiculturalism of Manitoban society". See also *The Fetal Alcohol Spectrum Disorder Awareness Day Act*, SM 2018, c 39, preamble ("[I]t is important to bring attention to the risks of prenatal exposure to alcohol, raise awareness of the impact of FASD on individuals and communities, and encourage all Manitobans to learn more about the disorder and its effects"); *Brain Tumour Awareness Month Act, 2001*, SO 2001, c 19, preamble ("Early detection and treatment are vital for a person to survive brain tumours. Brain tumour research, patient and family support services and awareness among the general public are essential to promote early detection and treatment of brain tumours"); *Cyberbullying Awareness Day Act*, SPEI 2024, c 56, preamble ("Cyberbullying Awareness Day will increase awareness of the problem of cyberbullying and help lead to its prevention... [and] the day will help children and adults to protect themselves from cyberbullying by encouraging discussion in schools and workplaces").

9 See e.g. *Post-Traumatic Stress Disorder (PTSD) Awareness Day Act*, SA 2016, c P-19.7, s 1 [emphasis added]: "*In order to increase awareness about post-traumatic stress disorder in Alberta*, the 27th day of June of each year, commencing in 2016, shall be known as 'Post-traumatic Stress Disorder (PTSD) Awareness Day'."

10 I do not mean to say that some of these statutes are not ridiculous or indeed outright lazy. See especially *Christmas Tree Day Act, 2015*, SO 2015, c 12, the preamble to which not only recognizes that "The Christmas tree industry employs thousands of workers in the farming, transportation and retail sectors" but also repeats a bald assertion by the industry about "environmental benefits" – "In light of the assertion by the Christmas Tree Farmers of Ontario and the Canadian Christmas Tree Growers Association that Christmas tree farms and recycled Christmas trees provide environmental benefits".

Vaughan Black titled "Rights Gone Wild".[11] While his focus was on right-to-hunt legislation (see e.g. the *BC Hunting and Fishing Heritage Act*: "A person has the right to hunt and fish in accordance with the law"),[12] he also addressed Holocaust Memorial Day legislation:

> Perhaps all that is worthy of note is that provincial legislatures have started using the statute books for the rhetorical statements that used to be expressed merely as house resolutions.... However, the new style of symbolic legislative gesture appears to be to pass a statute, one with ... a parade of "whereas's" - e.g., whereas the Holocaust happened, whereas it was a terrible thing, whereas it should never be forgotten - followed by a single substantive section, which in the case of Holocaust Memorial Day legislation simply says that there shall be a Holocaust Memorial Day every year.[13]

As Black further notes, "Such statutes cost nothing; no moralizing could come more cheaply. Holocaust Memorial Day is not elevated into a public holiday and the statutes neither commit the government to spending a penny to celebrate it nor saddle any ministry or other official with any responsibility to do anything to assist in its observance."[14] Black suggests that such legislation, specifically right-to-hunt legislation, is merely "[a] feel-good statute: a group hug between the legislature and [those affected]".[15] Nonetheless, Black also asserts that "[s]ymbols count, and government action to take note - statutorily, even if non-justiciably - of one phenomenon but not another counts a fair bit."[16]

But *are* these statutes legally inert? While Black asserts that "[i]t is no easy chore to imagine circumstances in which such statutes would be

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11 Vaughan Black, "Rights Gone Wild" (2005) 54 UNB LJ 3, as discussed e.g. in Martin, *supra* note 1 at 140, 141-142. For other critiques, largely about these statutes being bad drafting and threats to the rule of law, see the sources discussed in Martin, *supra* note 1 at 140-141.

12 *Hunting and Fishing Heritage Act*, SBC 2002, c 79, s 1.

13 Black, *supra* note 11 at 6.

14 *Ibid* at 6.

15 *Ibid* at 6. With respect to Black, and while I take the point, I acknowledge that his tone may appear patronizing and dismissive. See also Black at 5: statutes such as the right-to-hunt statutes ate "intended to be wholly symbolic and, in a sense, transitory and paralegal".

16 *Ibid* at 7.

justiciable",[17] he notes in an intriguing footnote such a possibility, one that is presciently relevant for my purposes:

> Canadian Holocaust Memorial Day legislation has been remarkably specific in defining what the Holocaust was. It stipulates that the Nazis (not the Germans) killed 6 million Jews. An issue might arise, say in a prosecution for communicating hate propaganda, as to the number of Jews killed in the Holocaust. For instance someone might claim that the figure was 5 1/2 million. Is it now the case, thanks to Holocaust Memorial Day statutes, that the number has for legal purposes in Canada been irrebuttably set at an even 6 million?[18]

That is, a statute or proclamation intended and expected to be "merely symbolic" may "be accorded a more than merely symbolic effect.... it might compel a decision in a lawsuit which is different from the decision that would have been reached in the statute's absence."[19]

What though is the impact, political, legal, or otherwise, of recognizing some of these events or topics but not others? Black recognizes that short of such litigation, Holocaust Memorial Day legislation prompted calls to recognize other genocides: "[I]t is worth pausing to note which symbols the government elects to statutorily rejoice in and which it does not.... Symbols count, and government action to take note - statutorily, even if non-justiciably - of one phenomenon but not another counts a fair bit."[20] Consider here the adoption of legislation recognizing not only the Armenian genocide but also the Ukrainian genocide termed the Holodomor.[21]

Indeed, the apex culmination of these efforts would seem to be the Alberta *Genocide Remembrance, Condemnation and Prevention Month Act*.[22]

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17 *Ibid* at 6.

18 *Ibid* at 26, note 10.

19 *Ibid* at 26. See also 25: "A more significant concern, in my judgment, is that we cannot be confident that such statutes will in future be confined to the symbolic role that their progenitors and proponents claim for them."

20 *Ibid* at 7.

21 See e.g. *The Ukrainian Famine and Genocide (Holodomor) Memorial Day Act*, SM 2008, c 37; *Act to proclaim Armenian Genocide Memorial Day*, CQLR c J-0.2. Black, *supra* note 11 at 7, presciently notes the political factors at play: "To date, however, the wish for an Armenian Genocide Day has not been granted, and it will not be, not least because by doing so governments would alienate the ethnic Turkish vote."

22 *Genocide Remembrance, Condemnation and Prevention Month Act*, SA 2021, c G-5.4 [*GRCPM*].

That Act proclaims a Month to "recognize the impact of the atrocities of genocide on individuals who belong to the many different religious and ethnic communities of Alberta", "to remember those who were the victims of genocide", "to promote better understanding of the causes of genocide", and "to increase awareness of genocides recognized by the House of Commons of Canada".[23] It further requires the responsible Minister to develop, in consultation with the Minister of Education, and table "a report setting out the strategies and proposed actions that the Government commits to undertake to effect the purposes of this Act" within one year.[24] However, the Act does not, in itself or by creating a regulation-making power, purport to identify any specific genocide or create an authoritative list of genocides.

Do these statutes have any meaning or impact? In other words, if Parliament or a legislature adopts a *Prostate Cancer Awareness Month Act* but not a *Breast Cancer Awareness Month Act*, is there some implication about the greater value of people with prostates or the lesser economic impact or suffering of people with breast cancer?[25] Recall Black's assertion that "[s]ymbols count, and government action to take note - statutorily, even if non-justiciably - of one phenomenon but not another counts a fair bit."[26] What about people who wish to deny the existence of prostate cancer? Or the people who might be seen as blameworthy for causing prostate cancer? Does the existence or the harm of prostate cancer or breast cancer thus become justiciable?

Perhaps the best example of a court extracting meaning from meaninglessness is *Conacher v. Canada (Prime Minister)*,[27] an unsuccessful challenge to federal fixed-election-date legislation. This legislation provided as follows:

> 56.1 (1) Nothing in this section affects the powers of the Governor General, including the power to dissolve Parliament at the Governor General's discretion.

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23 *Ibid*, ss 2, 3.

24 *Ibid*, s 4.

25 See e.g. *The Prostate Cancer Awareness Month Act*, SS 2005, c P-29.1. Contrast the *Urgent Action on Breast Cancer Diagnosis and Treatment Regulations*, RRS c H-0.0001, Reg 2, which concerns government coverage for out-of-province treatment of breast cancer.

26 Black, *supra* note 11 at 7.

27 *Conacher v Canada*, *supra* note 2.

> (2) Subject to subsection (1), each general election must be held on the third Monday of October in the fourth calendar year following polling day for the last general election, with the first general election after this section comes into force being held on Monday, October 19, 2009.[28]

On its face, this provision would seem to be meaningless: elections must be held on certain dates, but this requirement does not change the powers of the Governor General (which powers include the writ). The Federal Court of Appeal, however, held that this provision had meaning insofar as it was "a clear expression of the will of Parliament"; indeed, while that expression "in no way binds the Governor General.... under our constitutional framework and as a matter of law, the Governor General may consider a wide variety of factors in deciding whether to dissolve Parliament and call an election."[29] In analyzing this holding, Kristen Morry notes that "[l]aws that, in their bindingness, are little more than campaign promises on Parliamentary letterhead, raise troubling implications for the rule of law."[30] Indeed, Morry ultimately concludes that "these laws, then, ought to be repealed: they manage, paradoxically, to be both ineffective and malign."[31]

Compare here the Ontario *Victims' Bill of Rights, 1995*. The *Victims' Bill of Rights* recognized, among other "principles", that "[v]ictims should be treated with courtesy, compassion and respect for their personal dignity and privacy by justice system officials".[32] The application judge in *Vanscoy v Ontario* held that "[t]he Act is a statement of principle and social policy,

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28 *Canada Elections Act*, SC 2000, c 9, s 56.1, as added by *An Act to amend the Canada Elections Act*, SC 2007, c 10, s 1.

29 *Conacher v Canada, supra* note 27 at para 6.

30 Kirsten Morry, "Meaningless, Momentous, or Malignant? An Analysis of Canada's Fixed Election Date Laws" (2016) 10 JPPL 431 at 442, citing Gregory Tardi, *Theory and Practice of Political Law* (Scarborough: Carswell, 2011) at 323.

31 Morry, *supra* note 30 at 451. See also Adam M Dodek, "The Past, Present and Future of Fixed Election Dates in Canada" (2010) 4 JPPL 215 at 238, though without explicit reference to meaningless legislation: "At the end of the day, the costs of fixed election date legislation are not worth its demonstrable benefits. Fixed election date laws are fundamentally flawed and should be repealed." But consider e.g. Doug Stolz, who argues that the legislation passed in *Conacher* can be read as lowering the constitutional five-year maximum duration of Parliament to four years: Doug Stoltz, "Fixed Date Elections, Parliamentary Dissolutions and the Court" (2010) 33:1 Can Parl Rev 15.

32 *Victims' Bill of Rights, 1995*, SO 1995, c 6, s 2(1), as discussed in *Vanscoy v Ontario*, 99 OTC 70 at para 22, [1999] OJ No 1661 (SC) [emphasis added] [*Vanscoy v Ontario*], cited in *Sri Lankan Coalition (SC), supra* note 4 at para 75.

beguilingly clothed in the language of legislation. It does not establish any statutory rights for the victims of crime."[33] Moreover, "the legislature did not *intend* for s. 2(1) of the *Victims Bill of Rights* to provide rights to the victims of crime."[34] Similarly to the legislation challenged in *Conacher v Canada*, the application judge noted that the *Victims' Bill of Rights* explicitly stated that it did not change the law: "No new cause of action, right of

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[33] *Vanscoy v Ontario*, *supra* note 32 at para 22. See also Joan Barrett, "Expanding Victims' Rights in the Charter Era and Beyond" (2008) 40 SCLR (2d) 627 at 632: "While the enactment of victims' rights legislation is significant as it recognizes the need to keep victims apprised of developments in the proceedings, it unrealistically heightened the expectations of some victims. This is likely due to the fact that the very title of most bills, "Victims' Bill of Rights", is misleading in that it suggests something that does not exist: rights." See also Kent Roach, "Crime Victims and Substantive Criminal Law", in RJ Deslisle, Allan Manson & Don Stuart, eds, *Towards A Clear and Just Criminal Law: A Criminal Reports Forum* (Toronto: Carswell, 1999) 219 at 224 [citation omitted] ("These bills of rights are generally unenforceable and can be criticized as symbolic legislation which proclaim false promises"), as cited by Barrett at 632, note 20 (Barrett at 632: "victims' rights legislation has been criticized as lacking teeth and giving rise to false expectations".) This vindicated Black's prediction that any rights in the *Victims Bill of Rights* would be "empty" (Black, *supra* note 11 at 7 [citations omitted, emphasis added]): "Thus, while legislatures might understandably be attracted to "right" because of the term's valorizing rhetorical cachet - one thinks here of such relatively recent legislation as Ontario's *Environmental Bill of Rights* [SO 1993, c 28] or *Victims' Bill of Rights*, which on inspection are substantively elusive (*and arguably empty*), but which have evocative titles - they should think twice before employing that term."

[34] *Vanscoy v Ontario*, *supra* note 32 at para 21 [emphasis added]. See also David M Paciocco, "Why the Constitutionalization of Victim Rights Should Not Occur" (2004) 49 CLQ 393 at 403, note 33 ("In truth, the rights are ineffective, but this has nothing to do with the fact that they are found in statutes. They are ineffective because… legislators wanted them to be ineffective."), cited in Barrett, *supra* note 33 at 633 (Barrett: "As noted by Professor David Paciocco, the purely symbolic nature of "victims' rights" is clearly deliberate on the part of legislatures.") See also Paciocco at 407, 409: "The decision not to provide remedies to victims was obviously inspired because of three realities. First, it is not feasible for prosecutors, in particular, to live up to the requirements of the statutes.... Second, the desire to confine victim rights to mere statements of principle is, in part, a function of budget.... Third, without in any way denigrating the good will or judgment of victims, litigation is highly likely to occur if victims are empowered to sue for failures by prosecutors and provinces to live up to their commitments. There is too much that can go wrong. Emotions run high, and both circumstances and expectations are variable. How much consultation and notice is enough? When has dignity been adequately respected? The reality is that creating enforceable victim rights is a recipe for litigation. That is why these statutes do not really create rights." (Now Justice Paciocco of the Court of Appeal for Ontario.)

appeal, claim or other remedy exists in law because of this section or anything done or omitted to be done under this section."[35] Here, then, this kind of meaningless legislation was, at most, "a statement of principle and social policy".[36] (Indeed, the application judge in the challenge to the *Tamil Genocide Education Week Act* used the *Victims' Bill of Rights* as an example of "a statement of principle and social policy that establishes no statutory rights".[37]) Nonetheless, recall Black's assertion that "symbols count".[38] The application judge in *Vanscoy v Ontario*, unlike the panel in *Conacher v Canada*, appeared to be unconcerned with legislation that lacked meaning.

In summary: even meaningless symbolic legislation is important because symbols are important; legislation purporting to be meaningless may in fact have meaning or legal impact; such meaning or legal impact may merely be "a clear expression of the will of Parliament" or of a legislature.[39]

Against this backdrop, I now turn to the *Tamil Genocide Education Week Act* and *Sri Lankan Canadian Action Coalition v Ontario (Attorney General)*.

## II. THE LEGISLATION AND THE LITIGATION

*Sri Lankan Canadian Action Coalition v Ontario (Attorney General)* is the first reported legal challenge to one of these commemorative statutes. The *Tamil Genocide Act Education Week Act* fits the pattern discussed above. The first subsection provides that "[t]he seven-day period in each year ending on May 18 is proclaimed as Tamil Genocide Education Week" and the second subsection states that "[d]uring 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."[40] The

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35 *Victims' Bill of Rights*, *supra* note 32, s 2(5), as discussed in *Vanscoy v Ontario*, *supra* note 32 at paras 13, 21.

36 *Ibid* at para 22. But see Barrett, *supra* note 33 at 634: "While most Canadian victims' bills of rights lack remedial provisions and are largely symbolic in nature, this does not strip them of value. Indeed, the enactment of victims' rights legislation has been significant in that the bills establish standards for the treatment of victims, which includes the provision of information. The very existence of such legislation also serves to increase the general awareness of victims in the criminal process."

37 *Sri Lankan Coalition (SC)*, *supra* note 4 at para 75.

38 Black, *supra* note 11 at 7.

39 *Conacher v Canada*, *supra* note 27 at para 6.

40 *Tamil Genocide Education Week Act*, *supra* note 2, ss 1(1), 1(2).

Act's long preamble recognizes the extent of the Ontario Tamil community and the harms done to Tamils in Sri Lanka, particularly during the Tamil genocide, and the importance of recognizing that event to (1) "honour the lives that were lost", (2) "giv[e] a sense of hope to those who have suffered since it represents the first step to healing and reconciliation", and (3) "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."[41] The preamble also identifies the "Sri Lankan state" as the perpetrator of the genocide and its use of "Sinhala-Buddhist centric government policies, pogroms, land grabs and ethnic cleansing" to do so.[42]

Two applications were heard together, one by an individual applicant and one by a corporate applicant. The applicants argued that the *Tamil Genocide Education Week Act* is unconstitutional because it violates the division of powers under the *Constitution Act, 1867* (by interfering in the federal prerogative power over foreign affairs) or sections 2(b) (expression) and 15 (equality) of the *Canadian Charter of Rights and Freedoms*.[43] In short, the applicants claimed that the Act purports to recognize a previously-unrecognized genocide, which they asserted that only the federal government can do;[44] that the Act prohibited or precluded disagreement over whether or not what occurred constituted a genocide, thus infringing freedom of expression; and that the Act discriminated against the community from whom the government was then drawn, thus violating equality.

Before turning to these arguments, it is worth emphasizing that the Court of Appeal in rejecting them was explicit that the law was legally meaningless, albeit in more restrained language: The Act does not "create or modify private interpersonal 'rights', with juridical effect....

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41 *Ibid*, preamble.

42 *Ibid*, preamble.

43 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5; *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

44 Recall here the Alberta *GRCPM*, *supra* note 19, s 2(b)(iv) [emphasis added]: "The purposes of this Act are ... during the month of April in each year ... to increase awareness of *genocides recognized by the House of Commons of Canada*."

The *TGEWA* has no such effect – it is purely hortatory";[45] "[T]he Act's preamble ... *creates no rights or liabilities*.... Further, *the Act's operative provisions are purely symbolic*. They merely encourage public reflection on a conflict."[46] Unlike the legislation in *Conacher v Canada* or *Vanscoy v Ontario*, the Act neither pretended to grant rights nor specified that it did not grant rights.

Similarly, both the application judge and the Court of Appeal panel were adamant about what issues they were and were *not* deciding. In particular, they were deciding whether the Act was constitutional, and not whether what occurred in Sri Lanka was a genocide,[47] nor whether the Ontario legislature was wise to adopt the Act.[48]

### A. *The Division of Powers Argument*

The applicants argued that the Act was *ultra vires* Ontario under the division of powers. The application judge held that the Act was *intra vires* because its pith and substance was education – its dominant characteristic being "to educate the public about what the Ontario Legislature has

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45 *Sri Lankan Coalition (CA)*, *supra* note 4 at para 93.

46 *Ibid* at para 164 [emphasis added].

47 *Sri Lankan Coalition (SC)*, *supra* note 4 at paras 9-11: "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. 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. 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." See also *Sri Lankan Coalition (CA)*, *supra* note 4 at para 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."

48 *Sri Lankan Coalition (SC)*, *supra* note 4 at para 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." See also *Sri Lankan Coalition (CA)*, *supra* note 4 at para 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."

concluded is a Tamil genocide" – and thus it was within the provincial head of power over education.[49] The Act did not intrude on criminal law, because it did not have a prohibition, penalty, and criminal law purpose, but also because it "does not claim to determine that genocide has taken place beyond a reasonable doubt, the standard of proof in criminal law".[50] Neither did it intrude on foreign affairs, as its purpose was "to advance the Legislature's educative goals".[51] Nor was there any federal law at risk of frustration so as to invoke paramountcy.[52] In summary, "[t]his is no different than provincial legislation that recognizes and commemorates the

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49 *Sri Lankan Coalition (SC)*, *supra* note 4 esp at paras 15-52 (quotation is from para 39). See *Constitution Act, 1867*, *supra* note 43, s 93. See also *Sri Lankan Coalition (CA)*, *supra* note 4 at para 75: "None of the [intrinsic and extrinsic] evidence suggests an intent to recognize a genocide for the purposes of attributing criminal or international legal liability".

50 *Sri Lankan Coalition (SC)*, *supra* note 4 at paras 43-44 (quotation is from para 44). For this reason, I do not address in this comment the constitutional law question of whether a province may recognize a genocide for purposes of international law. In fairness to the individual applicant, and with respect to the application judge and the Court of Appeal panel, it seems difficult to dispute that the Act explicitly recognizes, and it is one purpose of the Act to so recognize, the Tamil genocide as a genocide, insofar as the preamble recites the international definition of genocide and then uses several times the word genocide to characterize the event it is recognizing: Memorandum of argument of the applicant Neville Hewage at para 14, quoting *Tamil Genocide Education Week Act*, *supra* note 2, preamble: "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." Compare *Convention on the Prevention and Punishment of the Crime of Genocide*, General Assembly resolution 260 A (III) (9 December 1948, 12 January 1951), Art II: "In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (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". See also *Sri Lankan Coalition (CA)*, *supra* note 4 at paras 49-50: "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. 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 *Sri Lankan Coalition (SC)*, *supra* note 4 at para 47.

52 *Ibid* at paras 49-50.

Holocaust, or provincial education policy focusing on international aspects of world wars or any other international conflict."[53]

In contrast, the Court of Appeal panel upheld the legislation not on the basis of the provincial power over education, but instead on the provincial power over "[g]enerally all matters of a merely local or private Nature in the province."[54] The Panel held that the Act'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."[55] On this basis, the Panel held that the Act was *intra vires* the province not under the head of power of "education" but instead under the local matters power.[56] The Panel rejected the argument that the local matters power could not apply to genocide as "a topic informed by international law", as valid provincial public health powers are "also informed by international law".[57] The Panel also rejected the argument that the local matters power was unlawfully being used "to suppress dissent", since the Act "does not supress or compel expression".[58]

The Court of Appeal panel, like the application judge, held that there was no interference with federal powers.[59] In particular, the Panel noted that there was no incursion into the federal criminal law power because "[t]he preamble of the *TGEA* 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."[60] Likewise, there was no incursion on foreign affairs because "[w]hile the Act purports to recognize the Tamil genocide, it does not do so for the purpose of engaging in

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53 *Ibid* at para 48.

54 *Sri Lankan Coalition (CA)*, *supra* note 4 at paras 91-92; *Constitution Act, 1867*, *supra* note 43, s 92(16).

55 *Sri Lankan Coalition (CA)*, *supra* note 4 at para 74.

56 *Ibid* at paras 91-92.

57 *Ibid* at para 106.

58 *Ibid* at para 105, citing *Switzman v Elbling and AG of Quebec*, [1957] SCR 285, 7 DLR (2d) 337, and *Reference Re Alberta Statutes*, [1938] SCR 100, [1938] 2 DLR 81.

59 *Sri Lankan Coalition (CA)*, *supra* note 4 at paras 107-123.

60 *Ibid* at para 111. The reasons continue: "Nor does the preamble purport to satisfy any of the elements of s. 6(1) of the *Crimes Against Humanity and War Crimes Act* [SC 2000, c 24] for criminal law purposes against any person charged with the offence."

international relations or to give effect to any international obligation."[61] Moreover, any such incursion would be an acceptable indirect effect.[62] The Panel also noted that Parliament could pass parallel legislation on the basis that "[r]ecognizing that each level of government may validly commemorate the experiences of their different communities accords with the principle of cooperative federalism."[63]

In their application for leave to appeal to the SCC, the individual applicant framed the issues as (1) "enacting legislation by provinces based on unfounded genocides under the head of power of provinces s. 92(16) of the *Constitution Act, 1867*, implying or purporting genocide has occurred in the guise of the nature of commemorative" and (2) "the end of armed conflict with terrorist organizations: whether it can be declared or purported by enacting legislation as a genocide based on an unfounded allegation under the provincial head of power s 92(16) of the *Constitution Act, 1867*." The applicant elaborated in their written submissions on the application:

> If the provinces enact legislation merely based on alleged genocide under the guise of diversity and multiculturalism, … it would have a massive negative impact on Canada's multiculturalism, diversity, and democratic principles on an entire population.
>
> If this trend continues, it will open floodgates for the terrorist organization, their sympathizers, and political backers to enact legislation claiming armed conflicts as genocide under the guise of human rights, diversity, and multiculturalism… to get justification for their terrorist activities.[64]

The individual applicant noted that the group at war with the Sri Lankan state at this time was the Liberation Tigers of Tamil Eelam [LTTE] – recognized by the Canadian government as a terrorist organization – and accuses the legislator who introduced the bill that became the Act of being a terrorist "sympathizer".[65] They also asserted that, since a key LTTE leader and their associates were killed on May 18, that choice of date in the Act

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61 *Ibid* at para 122.

62 *Ibid* at para 122.

63 *Ibid* at para 104.

64 *Memorandum of Argument of the Applicant Neville Hewage* (24 October 2024) at paras 6-7 [*Hewage* MOA].

65 *Ibid* at paras 8-9.

supports the "[r]easonable inference" that the Act "is designed to commemorate the LTTE terrorist leader, senior cadre, and its members."[66]

The individual applicant also argued that there is no clear test for the local matters head of power under s 92(16) of the *Constitution Act, 1867*, and so this case provides an opportunity for the Supreme Court of Canada to establish such a test.[67] The corporate applicant made an equivalent point.[68] It also raised the issue of the role of "a law's practical effects, including the anticipated practical effects of a legislative declaration" as part of the pith and substance analysis under division of powers.[69]

As they did earlier in the litigation, the individual applicant also argued that the Act, in purporting to recognize a genocide, interferes with the federal prerogative power over foreign affairs.[70] The individual applicant specifically argued that a province's purported recognition of a genocide infringes on the federal prerogative power over foreign affairs unless that genocide has been recognized federally and internationally.[71]

In its response to the applications for leave to appeal, Ontario unsurprisingly stated that the federalism question had been correctly decided and that this matter lacked the factual and legal foundation to re-examine the test for the local matters head of power under 92(16) of the *Constitution Act, 1867*.[72] The individual applicant in their reply reasserted that the province lacks the power to recognize a genocide, because only the federal government and the international community can do so – and because other recognised genocides "are not related to armed conflicts with terrorist organizations".[73] The corporate applicant in its reply re-asserted that the questions raised were of national importance, including the ability of the province to recognize a previously unrecognized genocide.[74]

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66 *Ibid* at para 9.

67 *Ibid* at paras 29-30.

68 *Notice of Application for Leave to Appeal of the Applicant Sri Lanka Canada Association of Brampton* (1 November 2024) at 2. [*Association NOA*]

69 *Ibid* at 1.

70 *Hewage* MOA, *supra* note 64 at paras 22-28.

71 *Ibid* at paras 63-64.

72 *Response of Ontario to the applications for leave to appeal* (27 November 2024).

73 *Reply of the Applicant Neville Hewage* (14 December 2024).

74 *Reply of the Applicant Sri Lanka Canada Association of Brampton* (6 December 2024).

## B. *The Charter Arguments*

The applicants also argued that the Act constituted an unjustifiable infringement of sections 2(b) and 15 of the *Charter*.

On section 2(b), the applicants argued that the Act imposed two infringements on Sinhalese Ontarians: "(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".[75] The application judge explicitly held that this was a negative rights claim, not a positive rights claim.[76] She concluded that there was no such restriction on expression in the Act:

> 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.
>
> Nothing in the *TGEWA* restricts or limits the expression the applicants can engage with. Their expression is not suppressed in any way.[77]

Moreover, if anyone subject to the *Charter* misused the Act to suppress expression – such as bullying or exclusion by a school board or a politician – then a *Charter* claim lies against that actor and not against the legislation itself.[78]

Both the individual and corporate applicants challenged this holding on appeal. The individual applicant asserted 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"."[79] (The Panel noted that there was no evidence supporting this assertion.[80]) In contrast, the corporate applicant argued that the breach was in the Act's effect, i.e. that the Act "effectively shuts down

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75 *Sri Lankan Coalition (SC)*, *supra* note 4 at para 56.

76 *Ibid* at para 54.

77 *Ibid* at paras 61-62.

78 *Ibid* at para 63.

79 *Sri Lankan Coalition (CA)*, *supra* note 4 at para 130.

80 *Ibid* at para 130.

the marketplace of ideas to any dissent that Tamil genocide has occurred."[81] The Panel rejected the purpose argument on the basis that the Act "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."[82] The Panel rejected the effect argument because the Act did not affect their ability to express their views or decrease the effect of those views:

> 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.[83]

Like the application judge, the Panel held that "the government is entitled to enter the marketplace of ideas to counter expression with which it disagrees".[84] Moreover, the Act "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."[85]

The application judge characterized the section 15 argument as being that "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" and "support[ing] a one-sided marginalizing narrative":[86]

> 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.[87]

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81 *Ibid* at para 131.

82 *Ibid* at para 138.

83 *Ibid* at para 145.

84 *Ibid* at para 150; *Sri Lankan Coalition (SC)*, *supra* note 4 at paras 60-61.

85 *Sri Lankan Coalition (CA)*, *supra* note 4 at para 150.

86 *Sri Lankan Coalition (SC)*, *supra* note 4 at paras 71-72.

87 *Ibid* at para 74.

The application judge held that the Act is "a statement of principle and social policy.... [that] compels no one to do anything, nor does it confer any rights on anyone".[88] Perhaps the most important part of the analysis here was that even if there was such a benefit, i.e. to Tamil Ontarians, it is not at the expense of, or creating a distinction regarding, Sinhalese Ontarians:

> 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.[89]

Moreover, any bullying or discrimination against Sinhalese Canadians regarding a Tamil genocide was not caused – or legalized – by the Act.[90]

Before the Panel, the individual applicant repeated their argument that the purpose of the Act was discriminatory. The Panel held that insofar as the Act places the responsibility for the genocide on the state, it does not follow that the ethnic group that made up the government of the state is responsible for the genocide – and thus there is no distinction in the meaning of section 15(1).[91] Moreover, the Panel emphasized that there was no discriminatory impact for section 15(1) purposes because the preamble has no legal effect and the other parts of the Act "are purely symbolic".[92]

In their application for leave to appeal to the SCC, the individual applicant also repeated their arguments under sections 2(b) and 15 of the *Charter*.[93] On freedom of expression, they asserted that some of the facts in the Act and the decisions below constituted misinformation – "The Ontario government has no constitutional power to destroy an applicant's ability in Canada to promote the truth endorsed by the courts, community organizations, and the broader international community through statutory disinformation."[94] On equality, the individual applicant asserted in particular that the Act "creates a distinction based on the ethnic origin of

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88 *Ibid* at para 76.

89 *Ibid* at para 77.

90 *Ibid* at paras 79-84.

91 *Sri Lankan Coalition (CA)*, *supra* note 4 at para 163.

92 *Ibid* at para 164.

93 *Hewage* MOA, *supra* note 64 at paras 65-89.

94 *Ibid* at para 87.

Sinhalese and other ethnic groups to Tamils.... *TGEWA* is only for Tamils who suffer during armed conflict, not consider other ethnic groups who equally suffer during the conflict."[95] This distinction creates a "disadvantage for Sinhalese and non-Tamils, not allowing them to heal their suffering.... Sinhalese and non-Tamils will not have the opportunity to heal the trauma equally that they have experienced".[96]

While the corporate applicant did not make section 15 arguments in its application for leave to appeal to the SCC, the question they posed with respect to freedom of expression likewise referred to "statutory disinformation", i.e. "Does government have the constitutional power under s. 2(b) of the *Charter* to destroy through statutory disinformation a small Ontario minority's ability to express the truth as unanimously endorsed by experts and the broader international community?"[97]

In its response to the applications for leave to appeal, Ontario unsurprisingly stated that the constitutional questions had been correctly decided.[98] The individual applicant in their reply reasserted that "[t]he province of Ontario has now promoted ... misinformation through legislation", and that such misinformation infringes section 2(b).[99] They also again asserted that it is discriminatory to recognize the suffering of the Tamils but not that of other ethnic groups in the same conflict.[100] The corporate applicant in its reply re-asserted that the questions raised were of national importance, including "the constitutional power to legislate disinformation ".[101]

## III. ANALYSIS

In this part, I comment on the reasons of the application judge and the Panel and draw lessons for legislators from this litigation.

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95 *Ibid* at paras 70.

96 *Ibid* at paras 77-78.

97 *Association NOA*, *supra* note 68 at 2.

98 *Response of Ontario to the applications for leave to appeal* (27 November 2024).

99 *Reply of the Applicant Neville Hewage* (14 December 2024).

100 *Ibid*.

101 *Reply of the Applicant Sri Lanka Canada Association of Brampton* (6 December 2024).

The most important legal lesson from this litigation is that these kinds of statutes that lack any legal impact may be the subject of constitutional challenges, but those challenges will face many legal barriers and will likely be unsuccessful. Conversely, perhaps the most important lesson for lawmaking is that seemingly benign hortatory legislation, while having little legal impact, can provoke strong and motivated opposition.

## A. *Division of Powers*

The federalism arguments made by the applicants are reminiscent of the outdated "watertight compartments" approach to the division of powers in Canadian law.[102] The mere existence of the federal prerogative power over foreign affairs does not mean that the legislatures cannot pass legislation that might have diplomatic or foreign policy implications.

The most important conceptual difference between the analysis of the application judge and the analysis of the Panel was their approach to the separation-of-powers analysis. The application judge adopted a seemingly limitless conception of the provincial education head of power in section 93 of the *Constitution Act, 1867*. Ironically, the Panel replaced that seemingly limitless conception of the education head of power with its own seemingly limitless conception of the local matters head of provincial power under section 92(16).

Recall that the application judge invoked the education power because "the dominant characteristic of the law is to educate the public about what the Ontario Legislature has concluded is a Tamil genocide" and thus the relevant head of power was education.[103] The word "education" is in the name of the Act, and other than proclaiming an "Education Week" its only

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[102] See e.g. *Rogers Communications Inc v Châteauguay (City)*, 2016 SCC 23 at para 37, Wagner J (as he then as) and Côté J for the majority: "When conducting a pith and substance analysis, a court must avoid adopting the watertight compartments approach, which this Court has in fact rejected. The fact that a measure has what are merely incidental effects on an exclusive head of power of the other level of government does not suffice to justify declaring that measure to be *ultra vires*" See e.g. Asher Honickman, "Watertight Compartments: Getting Back to the Constitutional Division of Powers" (2017) 55:1 Alta Law Rev 225 at 250: "What distinguishes the textual approach embodied by the watertight compartments analogy, on the one hand, and flexible federalism, on the other, is not that the former prohibits overlap while the latter permits it, but rather that overlap is constrained under the former and facilitated under the latter."

[103] *Sri Lankan Coalition* (SC), *supra* note 4 at paras 39-40.

operative provision "encourage[s]" "all Ontarians … to *educate* themselves about, and to maintain their awareness of, the Tamil genocide and other genocides that have occurred in world history."[104] If encouraging self-education, both in the Act itself and in the corresponding legislative debates, was enough to invoke the provincial head of power over education, it would seem that almost any commemorative or awareness Act could easily do so in an honest and non-colourable way. As the Panel noted, the head of power over education has largely been interpreted as being about "routinized instruction in a school setting".[105] Similarly, the more general provincial power over education is often related to schools, colleges, and universities – that is, education as a service for classes or categories of students as opposed to education as a goal for the general public. Moreover, "the provisions stipulate no specific educational requirements" that might apply to the educational services provided in any of those educational service settings.[106]

Like the education power as applied by the application judge, the local matters power and its application by the Panel in this litigation suggest a very broad scope for these commemorative and awareness statutes. As the Panel noted, the local matters power has been interpreted very broadly and there is no accepted test for its applicability.[107] The Panel characterized the purpose of the Act in a remarkably specific way: "*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."[108] (With great

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104 *Tamil Genocide Education Week Act*, *supra* note 2, ss 1(1), 1(2) [emphasis added].

105 *Sri Lankan Coalition (CA)*, *supra* note 4 at para 94. See also Peter W Hogg & Wade Wright, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters, 2025) (looseleaf updated July 2025, release 1), ch 57 at § 57:1, online: Westlaw (Thomson Reuters Canada): "Section 93 of the *Constitution Act, 1867* confers on the provincial Legislatures the exclusive power to make 'laws in relation to education'. By virtue of this power, the establishment and administration of schools and universities is a provincial responsibility."

106 *Sri Lankan Coalition (CA)*, *supra* note 4 at para 65.

107 *Ibid* at paras 96-101.

108 *Ibid* at para 9. See also para 35: "[T]he *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."

respect to Fairburn ACJO and the other Panel members, it is unclear where the last part of that purpose – "to promote … the values of human rights, diversity and multiculturalism" came from.) However, this specific language opens the door to a huge swath of these commemorative and awareness statutes. Any historical or current event that affects an identified community in Ontario would seemingly fit within this head of power. Similarly, any disease or health-related condition that affects an identified community or group in Ontario would likewise be covered. It is not clear that a province with a more homogeneous population, or lacking a particular community, would be barred from recognizing the experiences of that community.

Moreover, while the Panel did not specify which heads of power could fit best for Parliament to adopt similar statutes, the Panel did acknowledge a large potential scope for them: "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".[109] Indeed, the Panel specifically related the shared provincial and federal abilities to pass such legislation to cooperative federalism.[110] Given this characterization of the *Tamil Genocide Education Week Act* as being a "local matter", and the reference by the Panel that Parliament and the legislatures may both "validly commemorate the experiences of their different communities",[111] it is difficult to imagine any event or disease that did *not* affect a provincial community and thus become a local matter. For example, it would seem that the Alberta legislature could validly adopt a *COVID Vaccination Crimes Against Humanity Education Act*, which could cite any figure at all for the numbers of deaths caused by the vaccine, and that medical professionals and others who were horrified

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109 *Ibid* at para 103.

110 *Ibid* at para 104: "Recognizing that each level of government may validly commemorate the experiences of their different communities accords with the principle of cooperative federalism." See e.g. Honickman, *supra* note 102 at 250-251: "The Supreme Court often describes its flexible approach to the division of powers as "cooperative federalism," which is meant to evoke a less political posture that facilitates inter-governmental cooperation. The unspoken — and unproven— assumption is that greater flexibility yields greater cooperation between the orders. But it is at least arguable that unfettered discretion serves as a disincentive for cooperation and is much more likely to produce federal domination by way of the paramountcy doctrine."

111 *Sri Lankan Coalition (CA), supra* note 4 at para 104.

would have no legal recourse. These may be bad laws, but they are not unconstitutional.

## B. *Charter*

The *Tamil Genocide Education Week Act* and the unsuccessful *Charter* arguments in the litigation are a reminder that although *Charter* rights should be interpreted broadly and purposively, those rights have content and limits. The Supreme Court of Canada has recently reaffirmed that "[i]t is well established that *Charter* rights must be given a large, liberal and purposive interpretation".[112] However, it has also re-affirmed that "while *Charter* rights are to be given a purposive interpretation, such interpretation must not overshoot (or, for that matter, undershoot) the actual purpose of the right".[113] In particular, freedom of expression does not bar a statute recognizing a set of historical events and their impact on one group merely because those events and their impact are disputed by another group. As the Panel put it, "[t]he 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."[114] Similarly, such a recognition will not offend the section 15 equality guarantee unless it treats a group or groups (or their members) differently, and imposes an adverse impact on one of those members or groups.[115]

Moreover, it would be a massive infringement of parliamentary supremacy to limit the ability of the legislatures (or Parliament) to recognize facts on which there may be disagreement or that some may consider 'disinformation'. As both courts explicitly recognized, the "wisdom" of such recognition is not justiciable.[116]

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112 *Conseil scolaire francophone de la Colombie-Britannique v British Columbia*, 2020 SCC 13 at para 4, Wagner CJ for the majority [citations omitted]

113 *Quebec (Attorney General) v 9147-0732 Québec inc*, 2020 SCC 32 at para 10, Browne & Rowe JJ for the majority [citations omitted].

114 *Sri Lankan Coalition (CA)*, *supra* note 4 at para 150.

115 *Ibid* at paras 163-164. I note that a human rights claim would not be available, as law-making is not a "service" for the purposes of human rights law: *Canada (CHRC) v Canada (Attorney General)*, 2018 SCC 31 at paras 57-64, Gascon J for the majority (the other reasons agreed on this point).

116 *Sri Lankan Coalition (SC)*, *supra* note 4 at para 12: "Nor am I deciding whether it was wise for the Ontario Legislature to pass the *TGEWA*. The wisdom of the legislation is a

An interesting section 15 argument could be made if a statute purported to recognize a complete list of genocides and that list excluded an alleged genocide. A legislative omission from a comprehensive statute can attract *Charter* scrutiny.[117] In contrast, it would be difficult to argue that the adoption of a statute recognizing one genocide breached section 15 because no statute was passed recognizing another genocide.[118] However, based on the litigation over the *Tamil Genocide Education Week Act*, both such claims would likely fail because that omission did not impose an adverse impact on the corresponding community.

### C. *Costs*

With great respect to the Panel, given the prospect for similar litigation in the future, it would have been helpful if they had elaborated on their cursory declaration that "[t]his is not a case for costs".[119] It seems likely that the Panel considered the issues in the application to be novel or important, or perhaps both.[120] Nonetheless, it would have been helpful to elaborate. Presumably a costs award will be more likely in future litigation over similar legislation.

### D. *Broader Lessons*

This litigation provides broader legal and policy lessons for legislators. The broader legal lesson for legislators is that these kinds of statutes that

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question that belongs solely to the Legislature, and more indirectly, to the voters of the province." See also *Sri Lankan Coalition (CA)*, *supra* note 4 at para 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."

117 *Vriend v Alberta*, 1998 CanLII 816 (SCC) at para 61.

118 *Ibid* at para 96: "The comprehensive nature of the Act must be taken into account in considering the effect of excluding one ground from its protection. It is not as if the Legislature had merely chosen to deal with one type of discrimination. In such a case it might be permissible to target only that specific type of discrimination and not another."

119 *Sri Lankan Coalition (CA)*, *supra* note 4 at para 167.

120 See e.g. *Keatley Surveying Ltd v Teranet Inc*, 2019 SCC 43, Abella J for the majority: "I would not order costs in light of the novel jurisprudential issues involved." See also *Canada (Attorney General) v Mavi*, 2011 SCC 30 at para 80, Binnie J for the Court: "As these proceedings can properly be characterized as test cases to resolve certain legal issues of public importance all parties will bear their own costs on the appeal and on the application for leave to appeal."

lack any legal impact may be the subject of constitutional challenges. Those challenges will have little legal basis and are unlikely to succeed. However, even if the constitutional arguments against these kinds of legislation are weak, those arguments must still be answered in litigation.

This litigation also demonstrates that seemingly benign hortatory legislation, while having little legal impact, can provoke strong and motivated opposition that ultimately cannot be adjudicated by the court system. They are thus not necessarily the good policy – and good politics – that they may appear to be. As I mentioned above, these laws seem generally difficult to oppose on their face, and politically risky to oppose, but the *Tamil Genocide Education Week Act* acutely demonstrates the converse risks of supporting them. The application judge recognized that "[a] new battle has emerged over who gets to write the history of the war" – and the litigation suggests that that battle is not one that will be settled within the court system.[121]

Indeed, another lesson is that political pressure, not legal challenges, may be the best way to oppose such statutes. Engagement with the legislative process itself may have little impact, given that there is no duty of fairness in the legislative process.[122] Legislators will remain free to pass bad laws. As the application judge noted, ultimately the rightness or wrongness of these statutes is for voters to decide: "The wisdom of the legislation is a question that belongs solely to the Legislature, and more indirectly, to the voters of the province."[123]

Black was prescient in 2005 when he noted that there may be disagreement or controversy over certain facts, giving the example of the precise number of people killed in the Holocaust. It remains to be seen what the legal force of these kinds of commemorative laws will be. While the Court of Appeal panel clearly and explicitly characterized all parts of the Act as "purely symbolic" and "hortatory", and specifically held that it does not create any rights or liabilities,[124] it would seem that those recognized facts

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121 *Sri Lankan Coalition (SC), supra* note 4 at para 4.

122 See e.g. *Wells v Newfoundland*, [1999] 3 SCR 199 at para 59, 177 DLR (4th) 73: "[L]egislative decision making is not subject to any known duty of fairness. Legislatures are subject to constitutional requirements for valid law-making, but within their constitutional boundaries, they can do as they see fit. The wisdom and value of legislative decisions are subject only to review by the electorate."

123 *Sri Lankan Coalition (SC), supra* note 4 at para 12.

124 *Sri Lankan Coalition (CA), supra* note 4 at paras 93, 164.

may be relevant in litigation. Recall, for example, that the individual applicant in their application for leave to appeal to the SCC accused a legislator (who introduced the bill that would become the Act) of being a terrorist sympathizer. If that allegation were made in an unprotected forum such as the media, could the legislator rely on the facts from the preamble of the Act? Can judges rely on those facts? The reasons of the Court of Appeal panel seem to preclude such reliance, but the answer remains unclear. Recall here the holding from *Conacher v Canada*, that apparently meaningless legislation can nonetheless be "a clear expression of the will of Parliament".[125] Does it follow that it can be a clear expression of the beliefs and knowledge of Parliament (or of a legislature)? I note that based on Sri Lankan Coalition, the Ontario Court of Appeal – unlike the Federal Court of Appeal in *Conacher v Canada* – seems to be unconcerned with legislation that has no, or virtually no, legal effect.

While the appeal did address whether Parliament, as opposed to the legislature, had the exclusive jurisdictional authority to recognize a genocide under the division of powers and the federal prerogative over foreign affairs, an important issue not raised in these appeals was the *separation* of powers.[126] Do Parliament and the legislatures – as opposed to courts or the executive – have the appropriate institutional capacity, expertise, and legitimacy in fact-finding and applying legal definitions to those facts, such as recognition of a genocide? [127] Even if legislatures determine that a genocide occurred, can they also determine the number of people who died?[128] Given the decisions regarding the *Tamil Genocide Education Week Act*, the separation of powers may be the most viable remaining argument against these kinds of statutes.

In future, for greater certainty and to reduce the likelihood of legal challenges, it would be wise for such commemorative Acts to include language similar to that in the Ontario *Victims' Bill of Rights*,[129] such as "for

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125 *Conacher v Canada, supra* note 27 at para 6.

126 Recall that both the application judge and the Panel were adamant about what questions were, and were not, properly before them. See above note 47.

127 See e.g. *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 SCR 199 at para 80, 127 DLR (4th) 1, discussing the difference between "adjudicative fact-finding" and "legislative or social fact-finding".

128 See above note 18 and accompanying text.

129 *Victims' Bill of Rights*, *supra* note 34, s 2(5) ("No new cause of action, right of appeal,

greater certainty, nothing in this statute creates any cause of action, right of appeal, claim or other remedy in law or establishes any fact as true for purposes of litigation." Where genocides are concerned, these commemorative acts would also be wise to state that "for greater certainty, nothing in this statute constitutes the recognition of a genocide in international law" or, adapting the language from the Court of Appeal panel, "[n]othing in this Act engag[es] in international relations or … give[s] effect to any international obligation."[130] Any argument that such provisions decrease the effectiveness of these laws suggests that these laws are a thinly disguised attempt to intervene in foreign affairs. Returning to the language of *Vanscoy v Ontario*, if meaningless legislation is "beguilin[g]",[131] or "proclaim[s] false promises",[132] it would seem likely that the public is being misled – whether intentionally or recklessly. Indeed, one would hope that candid advice from legislative counsel would fully inform legislators in this respect.

## CONCLUSION

The litigation over the *Tamil Genocide Education Week Act* suggests that commemorative Acts can give rise to litigation, although that litigation may well be unsuccessful. Parliament and the legislatures will be given wide latitude for commemorative and awareness statutes. Nonetheless, even if that litigation is unsuccessful, it may draw courts into questions that they lack the institutional capacity to decide. Moreover, the recognition of some genocides may be contested and controversial. In other words, these seemingly meaningless bills are not as meaningless and certainly not as harmless as many lawyers and politicians may have rightly – or at least understandably – assumed

In closing, however, I emphasize that although the promise of the *Charter* is not infinite, its incremental development alongside changing

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claim or other remedy exists in law because of this section or anything done or omitted to be done under this section."), as discussed in *Vanscoy v Ontario*, *supra* note 34 at paras 13, 21.

130 *Sri Lankan Coalition (CA)*, *supra* note 4 at para 122: "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."

131 *Vanscoy v Ontario*, *supra* note 32 at para 22.

132 Roach, *supra* note 132 at 224.

social circumstances depends largely on litigants willing to make novel claims and persist in the face of clearly unhelpful legal precedents. Indeed, the government of Ontario seemingly recognized the importance of this kind of novel litigation by not seeking its costs on the application.[133]

[133] *Sri Lankan Coalition (SC)*, *supra* note 4 at para 86.