

Federal Court



Cour fédérale

**Date: 20240612**

**Docket: T-1263-23**

**Citation: 2024 FC 901**

**Ottawa, Ontario, June 12, 2024**

**PRESENT: The Honourable Justice Fuhrer**

**BETWEEN:**

**NEVILLE HEWAGE**

**Applicant  
(Responding Party)**

**and**

**CANADA (PRIME MINISTER) AND THE  
ATTORNEY GENERAL OF CANADA**

**Respondents  
(Moving Party)**

**ORDER AND REASONS**

I. Overview

[1] The Respondents move in writing for an order striking the Applicant's Notice of Application filed on June 18, 2023, in its entirety, without leave to amend. They say it is bereft of any chance of success because it does not disclose a cognizable or justiciable administrative law claim.

[2] The Applicant Neville Hewage challenges Prime Minister Justin Trudeau’s public statement dated May 18, 2023 [Statement] which refers to Tamil Genocide Remembrance Day. The Statement is reproduced in Annex “A” below.

[3] Mr. Hewage objects to the Statement’s characterization of the conflict in Sri Lanka as a “genocide,” and he seeks a declaration that the Statement is unreasonable and contrary to his rights under the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, Schedule B to the *Canada Act 1982 (UK), 1982, c 11 [Charter]*. See Annex “B” for applicable legislative provisions.

[4] The present motion raises the sole issue of whether the Court should strike the Notice of Application in its entirety, without leave to amend.

[5] Having read the parties’ motion materials carefully and considered the applicable jurisprudence, I find that the Application has no prospect of success because it raises no cognizable or justiciable administrative law claim. For the reasons below, the motion thus will be granted.

## II. Background

[6] Mr. Hewage is an adjunct professor at the International Centre for Interdisciplinary Studies at Laurentian University. He identifies as Sri Lankan and Sinhalese, and he states in his Notice of Application that he suffered deeply because of terrorism perpetrated by the Liberation Tigers of Tamil Eelam.

[7] Mr. Hewage describes the Statement as an unreasonable exercise of the royal prerogative that breached constitutional norms by recognizing the conflict as a Tamil genocide when no competent international authority has done so.

[8] The Notice of Application further alleges that the Prime Minister violated sections 7 and 15 of the *Charter* by listening only to stories from the Tamil people and disregarding other ethnic communities involved in the conflict. Mr. Hewage asserts a breach of his right to “express and teach fundamental principles of genocides,” contrary to section 2(b) of the *Charter*.

### III. Analysis

#### A. *Applicable Legal Principles*

[9] The Federal Court’s ability to strike an application is grounded in the Court’s plenary jurisdiction to restrain misuse of its processes: *JP Morgan Asset Management (Canada) Inc v Canada (National Revenue)*, 2013 FCA 250 [*JP Morgan*] at para 48.

[10] A notice of application must set out a precise statement of the relief sought and a complete and concise statement of the grounds to be argued: paragraphs 301(d) and (e) of the *Federal Courts Rules*, SOR/98-106. The statement of grounds must include the material facts needed to establish an applicant’s claim which, taken as true, form the basis of a motion to strike: *JP Morgan*, above at paras 40, 42; *Mitchell v Academy of Learning Mississauga*, 2022 FC 607 at para 24.

[11] On a motion to strike, the Court looks holistically at the grounds and supporting facts, the relief sought, and the words used to describe them, to determine whether the proceeding is an attempt to obtain an otherwise unattainable result before the Court: *Davis v Canada (Royal Mounted Police)*, 2023 FC 280 at para 92, citing *Canada v Roitman*, 2006 FCA 266 at para 16. The focus is the essence and character of the application, rather than the words used: *JP Morgan*, above at paras 49-50; *Wenham v Canada*, 2018 FCA 199 [*Wenham*] at para 34.

[12] The threshold for succeeding on a motion to strike a notice of application is high. The party seeking to have it struck must demonstrate “a ‘show stopper’ or a ‘knockout punch’—an obvious, fatal flaw striking at the root of this Court’s power to entertain the application”: *JP Morgan*, above at para 47; *Oleynik v Canada (Attorney General)*, 2023 FC 303 at para 5; *Kostic v Canada*, 2023 FC 1077 at para 21.

[13] Further, striking a hopeless judicial review application is a valuable measure to ensure effective and fair litigation because it unclutters proceedings and permits the reallocation of scarce judicial resources to matters that, having some chance of success, can progress expeditiously to a hearing: *Uyghur Rights Advocacy Project v Canada (Attorney General)*, 2023 FC 126 [*Uyghur Rights*] at para 9, citing *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 19.

[14] An application is doomed to fail and can be struck in whole or in part if, for example, it does not contain a cognizable administrative law claim under sections 18 and 18.1 of the *Federal*

*Courts Act*, RSC 1985, c F-7, or the relief sought cannot be granted by the Court: *JP Morgan*, above at paras 66-70; *Wenham*, above at para 36.

B. *No Cognizable or Justiciable Administrative Law Claim*

[15] I deal with each of these objections to the Application in turn.

(1) The Application Raises No Cognizable Claim

[16] Mr. Hewage asserts that the Statement “was Canada’s ‘decision’ on the armed conflict in Sri Lanka as a Tamil Genocide.” As I understand it, Mr. Hewage avers that the Statement represents an exercise of Crown prerogative power over foreign affairs that falls within the definition of a “federal board, commission or other tribunal” for the purpose of grounding the Court’s jurisdiction under section 18 of the *Federal Courts Act*. I disagree.

[17] I find that the Statement clearly references and is based on the House of Commons motion. Members of the House of Commons are excluded specifically from the definition of a federal board, commission or other tribunal under subsection 2(2) of the *Federal Courts Act*. See also *Olumide v Canada*, 2016 FC 558 at para 12.

[18] In my view, the Application represents an effort to do indirectly what cannot be done directly, that is, to challenge the House of Commons motion. Even if this Application were granted, it would not change the matter targeted by the Application: *Air Canada v Toronto Port Authority*, 2011 FCA 347 [*Air Canada*] at paras 36, 40.

[19] Further, contrary to Mr. Hewage's position, the Statement is not a decision or an order that gives rise to a binding obligation; nor is it conduct that affects legal rights, imposes legal obligations or causes prejudicial effects: *Air Canada*, above at paras 24-30. At its core, the Statement, with reference to the House of Commons motion, encourages Canadians to reflect on the conflict in Sri Lanka in the broader context of human rights, peace, and democracy generally.

[20] That the Sri Lankan government may have reacted negatively to the Statement, does not buttress, in my view, Mr. Hewage's assertion that the Statement is an exercise of Crown prerogative over foreign affairs. The Statement's character does not lie in the reaction of foreign governments. Mr. Hewage has cited no supporting Canadian law or jurisprudence to the contrary.

[21] I also agree with the Respondents that, in any event, the two articles attached to Mr. Hewage's written representations as Tabs 2 and 3, about the Sri Lankan government's reaction to the Statement and another unknown statement allegedly made by the Prime Minister in July 2023, are inadmissible on the motion to strike.

[22] The articles have not been referred to and incorporated by reference in the Notice of Application and introduced by way of affidavit, nor has Mr. Hewage offered any argument or authority on this motion for the proposition that the Court can take judicial notice of them or that the interests of justice justify their admission: *JP Morgan*, above at paras 53-54. Including the articles in a "book of authorities," as was done here, does not cloak them with admissibility absent anything else.

[23] For the above reasons, I am satisfied that the Application does not contain a cognizable administrative law claim.

(2) The Application Raises No Justiciable Claim

[24] I find that the Statement, in essence, is suffused with concerns that are not amenable to judicial review: *Hupacasath First Nation v Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 4 at para 66.

[25] Assessing justiciability engages a contextual and flexible approach to the question of whether there is a sufficient legal component to the challenged conduct to warrant the Court's intervention; the question must be capable of resolution by the application of law: *La Rose v Canada*, 2020 FC 1008 [*La Rose*] at paras 30, 34.

[26] Factors that the Court should consider in the justiciability analysis include whether: it would be an economical and efficient investment of judicial resources to resolve the issue; there is a sufficient factual and evidentiary basis for the claim; there would be an adequate adversarial presentation of the parties' positions; and there is no other administrative or political body that has been given prior jurisdiction of the matter by statute: *La Rose*, above at para 31.

[27] Taking these considerations into account, I am not persuaded that it would be an economical and efficient use of judicial resources to hear the merits of the Application.

[28] Mr. Hewage's request for a declaration that the Statement is unreasonable and violates certain rights under the *Charter* is tantamount to an invocation for the Court to consider the legality of a foreign state's actions (here, Sri Lanka) and whether they constitute genocide. The latter is beyond the purview of this Court; the legality of the Statement is incidental to the legality of the actions of Sri Lanka, a determination that lies in the bailiwick of the Federal Government, not this Court: *Uyghur Rights*, above at paras 63, 65.

[29] Further, the Application is bereft of a material factual foundation for the alleged *Charter* violations.

[30] Finally, absent express amendment, Mr. Hewage's allegation that the Statement amends the *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24, similarly is without foundation.

[31] For the above reasons, I also am satisfied that the Application does not contain a justiciable administrative law claim.

#### IV. Conclusion

[32] For the above reasons, I conclude that it is plain and obvious that the Application cannot succeed and that the Respondents, thus, succeed on their motion.

[33] The Respondents have not requested costs. No costs will be awarded in the circumstances.



**ORDER in T-1263-23**

**THIS COURT'S JUDGMENT is that:**

1. The Respondents' motion to strike the Notice of Application is granted.
2. The Notice of Application is struck in its entirety, without leave to amend.
3. No costs are awarded.

"Janet M. Fuhrer"

Judge

**Annex “A”: Prime Minister Justin Trudeau’s public statement dated May 18, 2023**

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. Our thoughts are with the victims, survivors, and their loved ones, who continue to live with the pain caused by this senseless violence.

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 of the victims and survivors of this conflict, as well as for all in Sri Lanka who continue to face hardship.

In October 2022, we joined our international partners in adopting an United Nations Human Rights Council (UNHRC) resolution that calls on the Sri Lankan government to address the human rights, economic, and political crises in the country. Canada has been a global leader in the adoption of other UNHRC resolutions calling for freedom of religion, belief, and pluralism in Sri Lanka – essential elements to secure peace and reconciliation in the years to come – and we will continue our work to safeguard human rights across the world. And in January 2023, our government imposed sanctions against four Sri Lankan government officials in response to human rights violations on the island.

On behalf of the Government of Canada, I invite all Canadians to recognize the many contributions that Tamil-Canadians have made – and continue to make – to our country. I also encourage everyone to learn more about the impact of the armed conflict in Sri Lanka, and express solidarity to all those who suffered or lost loved ones.

**Annex “B”: Relevant Provisions**

*Federal Courts Rules, SOR/98-106.  
Règles des Cours fédérales, DORS/98-106.*

<p><b>Contents of application</b></p> <p><b>301</b> An application shall be commenced by a notice of application in Form 301, setting out</p> <p>...</p> <p>(d) a precise statement of the relief sought;</p> <p>(e) a complete and concise statement of the grounds intended to be argued, including a reference to any statutory provision or rule to be relied on; and</p> <p>...</p>	<p><b>Avis de demande — forme et contenu</b></p> <p><b>301</b> La demande est introduite par un avis de demande, établi selon la formule 301, qui contient les renseignements suivants :</p> <p>...</p> <p>d) un énoncé précis de la réparation demandée;</p> <p>e) un énoncé complet et concis des motifs invoqués, avec mention de toute disposition législative ou règle applicable;</p> <p>...</p>
<p><b>Motions in writing</b></p> <p><b>369 (1)</b> A party may, in a notice of motion, request that the motion be decided on the basis of written representations.</p>	<p><b>Procédure de requête écrite</b></p> <p><b>369 (1)</b> Le requérant peut, dans l’avis de requête, demander que la décision à l’égard de la requête soit prise uniquement sur la base de ses prétentions écrites.</p>

*Federal Courts Act, RSC 1985, c F-7.  
Loi sur les Cours fédérales, LRC 1985, ch F-7.*

<p><b>Definitions</b></p> <p><b>2 (1)</b> In this Act,</p> <p>...</p> <p><i>federal board, commission or other tribunal</i> means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made under a prerogative of the Crown, other than the Tax Court of Canada or any of its judges or associate judges, any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law</p>	<p><b>Définitions</b></p> <p><b>2 (1)</b> Les définitions qui suivent s’appliquent à la présente loi.</p> <p>...</p> <p><i>office fédéral</i> Conseil, bureau, commission ou autre organisme, ou personne ou groupe de personnes, ayant, exerçant ou censé exercer une compétence ou des pouvoirs prévus par une loi fédérale ou par une ordonnance prise en vertu d’une prérogative royale, à l’exclusion de la Cour canadienne de l’impôt et ses juges et juges adjoints, d’un organisme constitué sous le régime d’une loi provinciale ou d’une personne ou d’un groupe de personnes nommées aux termes d’une loi provinciale ou de l’article 96 de la Loi</p>
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<p>of a province or under section 96 of the <i>Constitution Act, 1867</i>; (<i>office fédéral</i>) ...</p>	<p>constitutionnelle de 1867. (<i>federal board, commission or other tribunal</i>) ...</p>
<p><b>Senate and House of Commons</b></p> <p>(2) For greater certainty, the expression <i>federal board, commission or other tribunal</i>, as defined in subsection (1), does not include the Senate, the House of Commons, any committee or member of either House, the Senate Ethics Officer, the Conflict of Interest and Ethics Commissioner with respect to the exercise of the jurisdiction or powers referred to in sections 41.1 to 41.5 and 86 of the <i>Parliament of Canada Act</i>, the Parliamentary Protective Service or the Parliamentary Budget Officer.</p>	<p><b>Sénat et Chambre des communes</b></p> <p>(2) Il est entendu que sont également exclus de la définition de office fédéral le Sénat, la Chambre des communes, tout comité de l'une ou l'autre chambre, tout sénateur ou député, le conseiller sénatorial en éthique, le commissaire aux conflits d'intérêts et à l'éthique à l'égard de l'exercice de sa compétence et de ses attributions visées aux articles 41.1 à 41.5 et 86 de la Loi sur le Parlement du Canada, le Service de protection parlementaire et le directeur parlementaire du budget.</p>
<p><b>Extraordinary remedies, federal tribunals</b></p> <p><b>18 (1)</b> Subject to section 28, the Federal Court has exclusive original jurisdiction</p> <p>(a) to issue an injunction, writ of <i>certiorari</i>, writ of prohibition, writ of <i>mandamus</i> or writ of <i>quo warranto</i>, or grant declaratory relief, against any federal board, commission or other tribunal; and</p> <p>(b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.</p> <p><b>Application for judicial review</b></p> <p><b>18.1 (1)</b> An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.</p>	<p><b>Recours extraordinaires : offices fédéraux</b></p> <p><b>18 (1)</b> Sous réserve de l'article 28, la Cour fédérale a compétence exclusive, en première instance, pour :</p> <p>a) décerner une injonction, un bref de <i>certiorari</i>, de <i>mandamus</i>, de prohibition ou de <i>quo warranto</i>, ou pour rendre un jugement déclaratoire contre tout office fédéral;</p> <p>b) connaître de toute demande de réparation de la nature visée par l'alinéa a), et notamment de toute procédure engagée contre le procureur général du Canada afin d'obtenir réparation de la part d'un office fédéral.</p> <p><b>Demande de contrôle judiciaire</b></p> <p><b>18.1 (1)</b> Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.</p>

***Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11.***

***Charte canadienne des droits et libertés, partie I de la Loi constitutionnelle de 1982, constituant l'annexe B de la Loi de 1982 sur le Canada (R-U), 1982, c 11.***

<p><b>Fundamental freedoms</b></p> <p><b>2</b> Everyone has the following fundamental freedoms:</p> <p>...</p> <p><b>(b)</b> freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;</p> <p>...</p>	<p><b>Libertés fondamentales</b></p> <p><b>2</b> Chacun a les libertés fondamentales suivantes :</p> <p>...</p> <p><b>b)</b> liberté de pensée, de croyance, d'opinion et d'expression, y compris la liberté de la presse et des autres moyens de communication;</p> <p>...</p>
<p><b>Life, liberty and security of person</b></p> <p><b>7</b> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.</p>	<p><b>Vie, liberté et sécurité</b></p> <p><b>7</b> Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.</p>
<p><b>Equality before and under law and equal protection and benefit of law</b></p> <p><b>15 (1)</b> 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.</p>	<p><b>Égalité devant la loi, égalité de bénéfice et protection égale de la loi</b></p> <p><b>15 (1)</b> La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.</p>

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** T-1263-23

**STYLE OF CAUSE:** NEVILLE HEWAGE v CANADA (PRIME MINISTER)  
AND THE ATTORNEY GENERAL OF CANADA

**MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT  
TO RULE 369 OF THE *FEDERAL COURTS RULES***

**ORDER AND REASONS:** FUHRER J.

**DATED:** XXXX

**APPEARANCES:**

Neville Hewage

FOR THE APPLICANT  
(RESPONDING PARTY)  
ON THEIR OWN BEHALF

Vanessa Wynn-Williams

FOR THE RESPONDENTS  
(MOVING PARTY)

**SOLICITORS OF RECORD:**

Attorney General of Canada  
Ottawa, Ontario

FOR THE RESPONDENTS  
(MOVING PARTY)