Federal Court  Cour fédérale

Date: 20230126

Docket: T-190-22

Citation: 2023 FC 126

Toronto, Ontario, January 26, 2023

PRESENT: Mr. Justice Diner

BETWEEN:

UYGHUR RIGHTS ADVOCACY PROJECT

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The Attorney General of Canada [AGC or Canada] has brought a Motion to strike an Application for judicial review from Uyghur Rights Advocacy Project [URAP] under Rule 359 of the *Federal Court Rules*, SOR /98-106 [*Rules*]. I agree that the Application should be struck, for the reasons that follow.

I. Background

[2] URAP was established in Canada in 2020 to promote the rights of the Uyghur population. URAP conducts research and documents the policies of the People's Republic of China [PRC] government targeting members of the Uyghur population. URAP also shares its research with parliamentarians, governments, local and global organizations and advocates for the protection of the Uyghur people.

[3] On February 3, 2022, URAP filed an Application for judicial review of the acts and omissions of the Government of Canada, in relation to the ongoing genocide against members of the Uyghur population in the PRC, the nature and extent of Canada's obligations in that respect, and their incidence on the commission of crimes against the Uyghur population, in Canada and abroad.

[4] URAP contends that Canada, by its acts and omissions, is not respecting its international obligations under Article I the *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 UNTS 277, Can TS 1949 No 27 [*Convention*] by failing to prevent – or take any steps to prevent – the ongoing genocide against the Uyghur population (see Article I and other relevant *Convention* provisions at Annex A to these Reasons). This lack of action, according to URAP, contributes to the crimes committed against the Uyghur people of China. As a remedy from this judicial review, URAP seeks at least one of five declarations from this Court, namely that:

1. The crime of genocide is currently being committed against the Uyghur population on the territory of the PRC, since at least 2014;

2. Canada is bound by the provisions of the *Convention*;

3. Canada knows, or should have known, that the crime of genocide is being committed against the Uyghur population since at least 2014, or alternatively;

4. Canada knows, or should have known, of the existence of a serious risk that genocide would be committed against the Uyghur population on PRC's territory; and;

5. Canada, by its acts and omissions, is in breach of article I of the *Convention*.

[5] On May 5, 2022, Canada filed a Motion to strike the Application without leave to amend.

II. General Overview: Motions to Strike in Judicial Review

[6] Section 18.4(1) of the *Federal Courts Act*, R.S.C., 1985, c. F-7 [*Act*] directs the parties and the Court to move judicial review applications along to the hearing stage as quickly as possible, i.e., "determined without delay and in a summary way". The Court should be reluctant to entertain motions to strike judicial review applications. Generally, the proper way for a respondent to contest an application, which it believes to be without merit, is to appear and argue at the hearing of the application itself. As recently confirmed by the Federal Court of Appeal [FCA] in *Alliance nationale de l'industrie musicale c Canada (Conseil de la radiodiffusion et des télécommunications canadiennes*, 2022 CAF 156 at para 4, the Court will strike a notice of

application for judicial review only where it is so clearly improper as to be bereft of any possibility of success, where the moving party can demonstrate a “showstopper” or a “knockout punch”, signifying an obvious fatal flaw striking at the root of the Court’s power to entertain the application (see also: *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250 at paras 47-48 [*JP Morgan*]).

[7] The FCA went on to note in *JP Morgan* that “the Court must read the notice of application with a view to understanding the real essence of the application,” which must be done “holistically and practically without fastening onto matters of form” (at paras 49-50).

[8] On a motion to strike, the onus of proof lies with the moving party, in this case Canada. It is a heavy onus because striking out a party’s application limits their access to justice. Canada must show that it is “plain and obvious” that the proceeding will fail because it contains a radical defect (*Deng v Canada*, 2019 FCA 312 at para 16, citing: *Hunt v Carey Canada Inc.*, 1990 CanLII 90 (SCC), [1990] 2 SCR 959 at page 972 [*Hunt*]).

[9] The dividing line in motions to strike on judicial review is clear. On one side of the line, section 18.4(1) of the *Act* directs the parties and the Court to move judicial review applications along the hearing stage as quickly as possible. On the other side of the divide, an application should not be maintained for the sake of holding a hearing. Striking out an unfounded claim can promote access to justice by allowing meritorious claims to be heard efficiently and ensure that the resources of this Court are not squandered on claims that are doomed to fail. As the Supreme Court held in *R v Imperial Tobacco Canada*, 2011 SCC 42 at para 19, “the power to strike out

claims that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial."

[10] The issue before this Court is thus to determine whether it is plain and obvious that the Application has no possibility of success, and must be struck. The FCA sets out in *JP Morgan* at para 66, three types of obvious fatal flaws:

> (1) the Notice of Application fails to state a cognizable administrative law claim which can be brought in the Federal Court;
>
> (2) the Federal Court is not able to deal with the administrative law claim by virtue of section 18.5 of the *Federal Courts Act*, RSC 1985, c F-7 [*Act*] or some other legal principle;
>
> (3) the Federal Court cannot grant the relief sought.

[11] These types of fatal flaws are not conjunctive, such that the AGC need only establish the existence of one of the three fatal flaws raised, to succeed in this motion to strike (*JP Morgan* at paras 66, 70, 80).

[12] After considering the arguments and evidence presented, the AGC has established the existence of two out of the three flaws outlined in *JP Morgan*, leading me to grant the remedy sought by the Respondent to strike this application without leave to amend.

III. Overview of the Parties' Positions

[13] Canada argues that the Application contains each of the three fatal flaws, which leave it bereft of any possibility of success: (i) the Application lacks a cognizable administrative law claim; (ii) it raises issues that are not justiciable due to their political nature, and (iii) the Court cannot grant the remedy sought given its lack of jurisdiction.

[14] Canada contends, relying on *JP Morgan*, that this Court must strike out the Application without leave to amend. The AGC points out that the Court need only agree with one of the three flaws raised for the AGC to meet his burden in demonstrating that the Application has no prospect of success.

[15] URAP counters that its Application, read holistically and practically, has a reasonable chance of success, and that Canada's arguments are focused on the irregularities and novelty of the Application. URAP contends that the Application does not have any plain and obvious flaws that would justify this Court striking it out at the preliminary stage. To the contrary, URAP asserts the complexity of the issues raised requires that the Application be heard on its merits.

[16] I agree that Canada has met its burden to demonstrate that the Application has no prospect of success. A holistic and practical reading of the Application shows that URAP cannot succeed, first for want of raising any cognizable administrative law claim, and second, on account of the political question doctrine. Consequently, the Court will exercise its gatekeeping function and strike out the Application. A detailed explanation for this conclusion follows.

IV. Parties' Arguments and Analysis

Issue 1: Is there a cognizable administrative law claim?

[17] Canada submits that contrary to the basic requisites of the *Act* and the *Rules*, the Application fails to identify (i) a federal, board, commission or other tribunal whose actions can properly be reviewed by this Court; (ii) reviewable conduct that would trigger a right to bring a judicial review application; or (iii) a proper ground of review known in administrative law.

[18] First, the AGC argues that URAP improperly seeks judicial review of the acts and omissions of the Government of Canada as a whole, which is not a federal board, commission or other tribunal within the meaning of section 18 of the *Act*, as previously recognized by this Court in *Olumide v Canada*, 2016 FC 558 [*Olumide*].

[19] Second, the AGC argues Rule 302 is clear that "unless the Court orders otherwise, an application for judicial review shall be limited to a single order in respect of which relief is sought", and that the Application fails to identify a single specific incidence of reviewable conduct. Canada asserts that in this Application, URAP improperly puts into question a multiplicity of courses of conduct by a plethora of federal departments and entities, from Global Affairs Canada to Public Safety Canada, Immigration, Refugees and Citizenship Canada, Canada Border Services Agency, the Department of Justice, and even Parliament.

[20] Third, Canada argues that the Application raises no ground of review known in administrative law, including any of the grounds of review set out in subsection 18.1(4) of the

Act. The AGC contends that as a result, URAP's arguments do not raise any accepted administrative law claims.

[21] URAP responds that the Application indeed involves a cognizable and important administrative law claim, which is Canada's refusal to take action against the genocide – including failing to implement the recommendations made by a Parliamentary Committee in a report (see below at paragraph 32 of these Reasons). URAP states that this failure to act constitutes a reviewable conduct, given Canada's obligation to prevent and punish the genocide against the Uyghur population in the PRC pursuant to article I of the *Convention*.

[22] Regarding the argument that there cannot be a cognizable claim against the Government of Canada as a whole, URAP retorts that this Court can review a line of conduct, involving multiple administrative actions, enacting a single federal government policy. In URAP's view, reviewable conduct does not have to be a decision or order made by a single federal board, commission or other tribunal. Indeed, URAP asserts that the converse is true, namely that Canada engages in reviewable conduct by abdicating its duty to act. Here, it argues that Canada has consistently failed to take any requisite action, contrary to its obligations under the *Convention*.

[23] In this regard, URAP cites *Canadian Association of the Deaf v Canada*, 2006 FC 971 [*Deaf*], on which it relies for the proposition that this Court may allow a judicial review despite many "alleged acts of discrimination on different occasions by various persons, some unidentified, employed by several departments" (*Deaf* at para 2).

[24] URAP further relies on *Deaf* to argue that the "matter" under judicial review does not have to be a decision or an order: the application of a policy by multiple government departments to different individuals of a same interested community constitutes a reviewable conduct for the purposes of subsection 18.1(2) of the *Act* (*Deaf* at para 66).

[25] URAP contends that since its Application raises valid grounds of review, Canada has focused strictly on technical irregularities in bringing this motion to strike, instead of reading the Application holistically and practically to understand its real essence. URAP submits that in any event, the appropriate remedy of any supposed breach of Rule 302, would not be striking out the Application. Rather, it would be an extension of time to allow URAP to file one or more applications for judicial review to replace this Application, on a *nunc pro tunc* basis, such that it would not lose any time or progress in the current stage of the proceedings.

[26] In the alternative, URAP asserts that should the Court agree that the Application does not give rise to a reviewable conduct, the Court should convert it into an action pursuant to the powers contained in subsection 18.4(2) of the *Act*.

(1) Analysis of Issue 1: The Application does not state a cognizable administrative law claim.

[27] I agree with URAP that the issues raised by the Application are novel, and that the fact that this Court has not dealt with these issues in the past – alone – cannot be sufficient reason to strike the Application. But as the Supreme Court stated recently in *Atlantic Lottery Corp Inc v Babstock*, 2020 SCC 19 at para 19:

> […] a claim will not survive an application to strike simply because it is novel. It is beneficial, and indeed critical to the viability of civil justice and public access thereto that claims, including novel claims, which are doomed to fail be disposed of at an early stage in the proceedings… If a court would not recognize a novel claim when the facts as pleaded are taken to be true, the claim is plainly doomed to fail and should be struck.

[28] Similarly here, I find that while the issues raised are novel and important, they do not raise a cognizable administrative law claim.

[29] The FCA held in *JP Morgan* at paras 67-70 that a cognizable administrative law claim must satisfy two requirements: (i) the application must meet the basic prerequisites imposed by sections 18 and 18.1 of the *Act*; and (ii) the application must state a ground of review known to administrative law or that could be recognized in administrative law. Sections 18 and 18.1 of the *Act* include the following basic prerequisites which are disputed by the Parties in this case (relevant provisions of the *Act* are reproduced at Annex B of these Reasons).

[30] Furthermore, subsection 18.1(3) explains that a "matter" is not limited to a decision or an order but can be an "'act or thing', a failure, refusal or delay to do an 'act or thing,' a 'decision,' an 'order' and a 'proceeding'" (*Air Canada v Toronto Port Authority et al*, 2011 FCA 347 at para 24). Subsection 18(1) gives this Court the exclusive jurisdiction over certain matters where relief is sought against any "federal board, commission or other tribunal".

[31] Despite URAP counsel's best efforts to establish that reviewable conduct has occurred, I am not persuaded that any exists in the current circumstances. This Court has emphasized that "in the context of government decisions and actions, the focus is on whether there is a 'closely

connected course of allegedly unlawful government action'" (*David Suzuki Foundation v Canada (Health)*, 2018 FC 380 at para 173 [*Suzuki Foundation*], citing *Fisher v Canada (Attorney General)*, 2013 FC 1108 at para 79). Here, through a plain reading of the Application detailing what has and has not transpired, I am unable to identify a "closely connected course of allegedly unlawful government action."

[32] On the second requirement, the assertion of Canada's generalized inaction in response to the genocide of the Uyghur population lacks the specificity needed to make it a reviewable conduct that gives rise to an administrative law claim. URAP points to Canada's response to a parliamentary report from March 2021 entitled *The Human Rights Situation of Uyghurs in Xinjiang China* [Report] as an example of inaction. This Report was compiled by the Standing Committee on Foreign and International Development and its Subcommittee on International Human Rights.

[33] I am not persuaded by this argument. For one, the House of Commons is expressly excluded from the definition of "federal board, commission or other tribunal" (*Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at paras 106-108).

[34] Canada's inaction against the genocide of the Uyghur population – and thus, the lack of specificity in naming a single government entity or a single reviewable decision – is not necessarily, in and of itself, a fatal flaw that renders the Application bereft of any possibility of success. Jurisprudence has made it clear that a "decision" under s. 18 of the *Act* may have a

broad ambit. For instance, in *Amnesty International v Canadian Forces*, 2007 FC 1147 at para 69, Justice Mactavish held:

> […] the absence of a 'decision' is not an absolute bar to an application for judicial review under the *Federal Courts Act*, and the role of this Court has been found to extend beyond the review of formal decisions, and to include the review of "a diverse range of administrative action that does not amount to a 'decision or order', such as subordinate legislation, reports or recommendations made pursuant to statutory powers, policy statements, guidelines and operating manuals, or any of the myriad forms that administrative action may take in the delivery by a statutory agency of a public programme." See *Markevich v Canada*, 1999 CanLII 7491 (FC), [1999] 3 FC 28 (TD) at para 11.

[35] In *Suzuki Foundation* at para 157, Justice Kane also makes it clear that there are many situations where a government policy can be properly challenged through judicial review. She enumerates several cases where such policies have been validly challenged:

> The jurisprudence provides guidance about what constitutes a "matter". A "matter" includes a policy or a course of conduct. For example, challenges to the lawfulness of ongoing governmental policies are matters which are not subject to the 30-day limitation period (see *Sweet v R*, [1999] FCJ No 1539 at para 11, 249 NR 17 (CA) [*Sweet*] involving a challenge to a double-bunking policy in prisons; *Moresby Explorers Ltd v Canada (Attorney General)*, 2007 FCA 273, [2008] 2 FCR 341 [*Moresby*], involving a challenge to a policy regarding a park reserve; *May v CBC/Radio Canada*, 2011 FCA 130, 420 NR 23, involving a challenge to a Canadian Radio-television Telecommunications Commission policy excluding a party leader from a televised debate). Such policies can be challenged at any time, even *before* they are applied specifically to an applicant (*Moresby* at para 24)

[36] Justice Kane also addressed where circumstances have justified exemptions to Rule 302 (see Annex C to these Reasons), which states that judicial review is limited to a single order (at paras 164-168 and 173 of *Suzuki Foundation*; see also *Lessard-Gauvin v Canada (Attorney*

General), 2016 FC 227 at paras 6-7). A "matter" under subsection 18.1(1), includes a policy or course of conduct. A "course of conduct" includes a general decision, the implementation steps, or a combination of the two, where they combine to result in unlawful government action, or an ongoing action (*Suzuki Foundation* at para 173).

[37] That said, the jurisprudence places certain bounds around the ambit of what this Court can judicially review when it comes to government decisions, under s. 18, and not everything that occurs – or does not occur – within government constitutes a matter.

[38] Here, URAP is challenging Canada's failure to act. However, Canada has not implemented any policy about whether to act or not. Rather, it has decided not to act. This type of inaction, or failure to act, is not captured by the various forms of reviewable conduct examined in *Suzuki Foundation*, and URAP was not able to point to cases where a lack of action resulted in reviewable conduct on the part of the government.

[39] With respect to the remedy sought, there are many cases where this Court has ordered *mandamus* requiring an agent or office or other representative of the government to act, but that must flow from a duty to act (*Apotex Inc v Canada (Attorney General)*, [1994] 1 FC 742 at page 19, affirmed in *Apotex Inc v Canada (Attorney General)*, [1994] 3 SCR 1100).

[40] Here, while there may be a duty for Canada to challenge the PRC's actions in an international forum, a duty to act in Canadian law can only be established by finding that this Court has jurisdiction to hear the matter (I briefly discuss this Court's jurisdiction in Issue 3

below). Ultimately, the executive branch may decide to act, but it is not the role of the Court to tell the Government of Canada what policy to adopt, including foreign policy (likewise, this concept is further discussed below in Issue 2).

[41] Justice LeBlanc, then of this Court, held in *Olumide* that the "Government of Canada, in the generic form used by the Applicant, is not a 'federal board, commission or other tribunal' within the meaning of the Act, and neither is Her Majesty the Queen in Right of Canada" (at para 11). He added at para 12:

> The Applicant further claims that government policy is subject to judicial review under section 18.1 of the Act and that legislation is such policy. Although legislation is introduced by government, it ultimately emanates from Parliament which, being a separate branch of our system of government, is not, and was never intended to be, a "federal board, commission or tribunal" within the meaning of the Act.

[42] Justice LeBlanc, in *Olumide*, relied on *Minister of National Revenue v Creative Shoes Ltd*, 1972 CanLII 2097 (FCA), [1972] FC 993 [*Creative Shoes*], in which the Court of Appeal found that "the Crown could not in any event properly be made a respondent in such a proceeding since section 18 confers the jurisdiction only in respect of the conduct of a 'federal board, commission, or tribunal' which as defined in section 2(g), does not include the Crown" (*Creative Shoes* at page 999; see also *Robertson v Canada*, [1986] FCJ No 210, 3 FTR 103).

[43] In summary, in the present circumstances, there is no cognizable administrative law matter to review for three reasons.

[44] First, while there may be reviewable decisions in the future involving the subject matter of this Application, no concrete decision has been rendered by a federal board, commission, or tribunal that allows this Court to intervene in the current circumstances.

[45] Second, the Government of Canada does not constitute a body that falls within the ambit of s. 18 (*Olumide* at paras 11-12; *Creative Shoes* at page 999).

[46] Third, to the extent that URAP cites the Canadian government's response to non-binding recommendations in the Report, this document does not constitute a government policy that outlines any reviewable conduct.

[47] I note that within the last year, the application in *Kilgour v Canada (Attorney General)*, 2022 FC 472 [*Kilgour*] challenged actions of the Canadian government, and specifically a Canada Border Services Agency officer, vis-à-vis goods imported from the Xinjiang region of China into Canada, as having an increased likelihood of being produced using Uyghur forced labour. The applicants in *Kilgour*, and URAP which acted as an intervener, took the position that those goods should be presumptively prohibited from import into Canada.

[48] Associate Chief Justice Gagné reviewed cases where government administrative action did not carry legal consequences, including *Democracy Watch v Conflict of Interest and Ethics Commissioner*, 2009 FCA 15. She found at para 19 of *Kilgour*:

> Here, I can see no element of the statutory framework—either in the *Customs Act* or in the *Tariff*—that imposes a duty on the CBSA to make a decision such as the one requested by the Applicants. In fact, if the Programs Manager had simply chosen not to respond to the

> initial email from the Applicants, there would have been no grounds for review on the basis that the CBSA failed to exercise a delegated duty.

[49] She concluded "Canada is free to choose how best to implement its treaty obligations" (*Kilgour* at para 48). Ultimately, like in *Kilgour*, URAP is attempting to construct an administrative law claim on a framework which simply does not support it.

[50] Concluding on this first issue, this Application fails to identify a cognizable administrative law claim. This is sufficient to strike the Application, given the disjunctive nature of the *JP Morgan* test (see above, at paragraph 10 of these Reasons). However, for the sake of completeness, I will review the other determinative issue raised by Canada that requires this Court to strike the application, namely its lack of justiciability.

Issue 2: Are the issues raised in the Application justiciable?

[51] Canada argues the declarations requested by URAP raise matters which are not justiciable before this Court. Canada explains that in determining whether a matter is justiciable, this Court's primary concern should be "its proper role within the constitutional framework of our democratic form of government" as held by the Supreme Court in *Reference Re Canada Assistance Plan (BC)*, 1991 CanLII 74 (SCC), [1991] 2 SCR 525 at page 545. In this regard, Canada highlights the constitutional principle of the separation of powers. It submits that the issues raised by URAP in the Application encroach on the role of the executive branch, and that this Court is precluded from trenching on the internal affairs of other branches of government.

[52] Canada submits that despite URAP's assertion to the contrary, the Application is asking this Court to make a determination on the legality of the acts of a foreign state. The AGC argues that the declaratory relief sought would require this Court to establish that there is a genocide of the Uyghur population being committed by the PRC, in breach of the provisions of the *Convention*. Canada urges the Court to exercise judicial restraint and refrain from ruling on the actions of a foreign state, which it contends is the central issue in the Application.

[53] Canada also asserts that in challenging foreign acts and affairs, the Application puts into question the institutional capacity of this Court to investigate another country's compliance with its treaty obligations. Canada argues that this Court does not have the power under Rule 64 to make a declaration as to facts, and therefore cannot grant the relief sought by URAP. Canada emphasizes that the judiciary is not the appropriate forum or proxy for conducting Canada's foreign policy.

[54] URAP replies that contrary to Canada's arguments, it is not asking this Court to review the actions of a foreign state, but rather to review the actions of Canada with regard to its obligations under the *Convention*.

[55] URAP argues that Canada's legal obligations under the *Convention* are triggered by the serious risk that the crime of genocide is being committed (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, 2007 ICJ 1077 at page 222 [*Bosnia and Herzegovina v Serbia and Montenegro*]), and that there is plenty of evidence – including Canada's own recognition of a human rights

situation in Xinjiang – to support the fact that there is a serious risk that the crime of genocide is being committed, and thus, that Canada's obligations under the *Convention* have been triggered.

[56] URAP emphasizes that in so finding, this Court does not have to state that the PRC is committing a genocide against the Uyghur population. Rather, in URAP's view, this Court has every right under the law to declare that Canada has failed its obligations under the *Convention*, because Canada has failed to recognize the Uyghur Genocide. As explained above, URAP contends that the *Convention* constitutes an existing body of federal law. It contends that the question of the legality of the actions of a foreign state is thus only incidental to the central question of the legality of the actions of Canada.

[57] Furthermore, URAP disagrees with Canada that the constitutional principle of the separation of powers precludes this Court from considering the issues raised in the Application. Conversely, it contends that this principle further highlights the responsibility of this Court to adjudicate issues about the *Convention*, an existing body of federal law: the principle of separation of powers cannot trump the principle of the rule of law, whereby this Court has the duty to ensure the accountability of Canada's executive branch to the authority of the law.

(2) Analysis of Issue 2: The Application raises issues that are not justiciable.

[58] Justiciability is a principle rooted in the separation of powers between the legislative, executive and judicial branches of the Canadian constitutional system (*Environnement Jeunesse c Procureur général du Canada*, 2021 QCCA 1871 at para 24 [*Environnement Jeunesse*]). Justiciability recognizes that the exercise of legislative powers or the conduct of state affairs –

including foreign affairs – by the executive branch requires weighing many considerations and making policy choices that should not be assessed by the courts (*Environnement Jeunesse* at para 30).

[59] Justiciability relates to a court's jurisdiction in the sense that a justiciable issue is one that does not exceed a court's jurisdiction by encroaching on the exclusive powers of the legislative or executive branches (*Ontario v Criminal Lawyers' Association of Ontario*, 2013 SCC 43 at para 30). Courts should not venture into domains that rest clearly with the other two branches of government (the executive and legislative branches) lest the Courts decide matters that are not justiciable, effectively acting outside of their jurisdiction. This excess of jurisdiction applies in a figurative rather than a formal sense. The latter, of course, relates to substantive jurisdiction as set out in the Court's statutory jurisdiction, which was raised by the AGC and is briefly discussed in Issue 3 below.

[60] This Court recently summarized the test for justiciability in *La Rose v Canada*, 2020 FC 1008 [*La Rose*], citing *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, 2018 SCC 26 [*Highwood*]; *Hupacasath First Nation v Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 4 [*Hupacasath*], and *Boundaries of Judicial Review: The Law of Justiciability in Canada* by Lorne M. Sossin [Sossin]. Justice Manson wrote:

> [29] The question to be decided is whether the Court has the institutional capacity and legitimacy to adjudicate the matter. Or, more generally, is the issue one that is appropriate for a Court to decide (*Highwood* at paras 32, 34). The terms "legitimacy" and "capacity" can also be understood as the "appropriateness" and "ability" of the Court to deal with a matter (*Hupacasath*, above at para 62).

> [30] There is no single set of rules delineating the scope of justiciability, the approach to which is flexible and to some degree contextual. Courts have often inquired whether there is a sufficient legal component to warrant judicial intervention, "[s]ince only a court can authoritatively resolve a legal question, its decision will serve to resolve a controversy or it will have some other practical significance" (*Highwood* at para 34; *Reference Re Canada Assistance Plan (BC)*, 1991 CanLII 74 (SCC), [1991] 2 SCR 525 at 546).
>
> [31] In determining whether it has the institutional capacity and legitimacy to adjudicate the matter, the Supreme Court in *Highwood* provides that a Court should consider that the matter before it "would be an economical and efficient investment of judicial resources to resolve, that there is a sufficient factual and evidentiary basis for the claim, that there would be an adequate adversarial presentation of the parties' positions and that no other administrative or political body has been given prior jurisdiction of the matter by statute" (*Sossin*, above at 294, cited in *Highwood* at para 34).

[61] After considering the factors set out by the Supreme Court in *Highwood*, and the other sources cited above, I find that the Application raises issues that are not justiciable. It would not be an economical and efficient investment of judicial resources for this Court to hear the Application on its merits when it is plain and obvious that it will eventually be dismissed.

[62] Here, I find that it is plain and obvious that this Court cannot grant the declaratory relief sought by URAP, because the declarations sought fall within the scope of the other branches of government, which this Court recognizes are better placed to make decisions on such matters.

[63] URAP maintains that this Court can issue a declaration that Canada has failed its obligations under the *Convention* without stating that the PRC is committing genocide against the Uyghur population. However, these two declarations are two sides of the same coin. A

declaration by this Court that Canada has failed to prevent genocide in a foreign country necessitates an analysis by this Court of the legality of the actions of that foreign state, which in this case is not appropriate for judicial review but falls within the sphere of international relations, under the exercise of executive powers. As summarized by the FCA at para 66 of *Hupacasath*:

> […] In rare cases, however, exercises of executive power are suffused with ideological, political, cultural, social, moral and historical concerns of a sort not at all amenable to the judicial process or suitable for judicial analysis. In those rare cases, assessing whether the executive has acted within a range of acceptability and defensibility is beyond the courts' ken or capability, taking courts beyond their proper role within the separation of powers.

[64] In *Nevsun Resources Ltd v Araya*, 2020 SCC 5 [*Nevsun*], the Supreme Court rejected the company's appeal of motions that had been refused by lower courts, to strike the pleadings of the affected workers. This is not a case such as *Nevsun*, where there were actions by the subsidiary of a Canadian company in its treatment of employees through a forced labour regime in Eritrea, which raised justiciable issues of international customary law and *jus cogens*, as they related to a civil tort law claim.

[65] While URAP posits that the legality of the actions of China is incidental to the central question of the legality of the actions of Canada, I find that the reverse applies: the legality of the actions of Canada is incidental to the legality of the actions of the PRC. And that determination lies in the bailiwick of the Federal Government to decide and react to, not this Court.

[66] Indeed, it is up to the Federal Government to decide whether a genocide has taken place or is ongoing against the Uyghur population in China. Once it has so declared, the *Convention* and customary international law would ground the legal consequences, and/or the ability of impacted groups, such as URAP, to seek declarations, or other relief properly available to it. However, absent that grounding, those requests of this Court are premature.

[67] The political question doctrine, like the lack of a cognizable claim, is a showstopper, or knockout punch, that fatally flaws the Application (*JP Morgan* at para 47). As the FCA wrote in *Hupacasath*:

> [62] Justiciability, sometimes called the "political questions objection," concerns the appropriateness and ability of a court to deal with an issue before it. Some questions are so political that courts are incapable or unsuited to deal with them, or should not deal with them in light of the time-honoured demarcation of powers between the courts and the other branches of government.

[68] Finally, I turn back to the one of the alternate grounds of relief requested by URAP, namely that this matter be converted into an action if this Application would be more appropriately cast as that type of proceeding. However, the fatal flaws apparent in the Application will not be cured by changing the type of proceeding under the *Rules* to an action.

Issue 3: Jurisdiction of the Court to determine this Application

[69] The AGC submits the Federal Court does not have jurisdiction to determine the Application as it fails to meet the requirements set out in *ITO-International Terminal of Operators v Miida Electronics*, 1986 CanLII 91 (SCC), [1986] 1 SCR 752 [*ITO*]. In *ITO*, the Supreme Court of Canada held that one of three requirements must be met for this Court to have

jurisdiction over a proceeding: (i) a statutory grant of jurisdiction by Parliament; (ii) an existing body of federal law, essential to the disposition of the case, which nourishes the statutory grant of jurisdiction; and (iii) law underlying the case falling within the scope of the term “a law of Canada” used in section 101 of the *Constitution Act*, 1867 [*Constitution*].

[70] The AGC asserts that URAP is asking this Court to directly interpret and apply an international instrument, the *Convention*. Canada contends that the question of determining foreign law is central to this Application, as opposed to being merely incidental, and thus must be distinguished from *Hunt v T&N plc*, [1993] 4 SCR 289 at p 309 [*T&N*], in which the Supreme Court of Canada held that Canadian courts could deal with foreign laws where “the question arises merely incidentally” (see also: *Nevsun* at para 49). Thus, the AGC submits this Court lacks the jurisdiction to consider this Application. Furthermore, as URAP is not seeking relief under an act of Parliament, Canada argues there is no statutory grant of jurisdiction.

[71] Canada further argues the role of the Federal Court is constitutionally limited to administering the “Laws of Canada” as set out in section 101 of the *Constitution*, which means federal law. The *Convention* – upon which URAP’s entire claim is based – is not an “existing body of federal law”, nor has it been incorporated into domestic legislation, and thus it cannot be used as the legal basis for initiating a proceeding of civil nature, such as an application for judicial review in the Federal Court.

[72] According to Canada, international law treaties, such as the *Convention*, have to be expressly incorporated into Canadian legislation to form part of the existing body of federal law, as was done for certain parts of the Convention relating to criminal prosecution and immigration.

[73] Conversely, Canada submits that article I of the *Convention* upon which URAP relies to argue that Canada has an obligation to prevent and to punish the genocide of the Uyghur population in the PRC, was not expressly incorporated into Canadian legislation, thus reflecting a specific legislative intent to exclude this provision from federal law.

[74] Canada submits that no case has incorporated the *Convention* into domestic law, and for a Court to do so would be to usurp the role of Parliament. Ultimately, Canada contends that the essential character of the Application is to ask this Court to make a determination about the legality of a foreign state's actions.

[75] URAP replies that it is not asking this Court to directly interpret and apply an instrument of international law, because the *Convention* is federal law. URAP disagrees that international law treaties such as the *Convention* must be expressly incorporated by legislation into domestic law. It argues that the *Convention* has been recognized by the International Court of Justice and the United Nations, as the codification of customary international law, as recognized in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)*, 2015 ICJ 921 at pages 87-88, 95; *Bosnia and Herzegovina v Serbia and Montenegro* at page 161; *United Nations Security Council, "Report of the Secretary-General pursuant to paragraph 2 of the Security Council Resolution 808"* (1993) S/25704 at para 35.

[76] From a domestic law standpoint, URAP notes that the Supreme Court of Canada held in *Nevsun* at para 94 that "as a result of the doctrine of adoption, norms of customary law – those that satisfy the twin requirements of general practice and *opinio juris* – are fully integrated into, and form part of, Canadian domestic common law, absent conflicting law." In accordance with this doctrine of adoption, URAP concludes that the *Convention* is federal law without needing to be expressly incorporated by legislation. It asserts this Court can make a determination of the legality of the acts of Canada with regard to its obligations under the *Convention*, an existing body of federal law, according to URAP, since customary international law can form the legal basis for the statutory grant of jurisdiction in this Application.

(3) Analysis of Issue 3

[77] The first two issues are determinative in this case. Given the disjunctive nature of *JP Morgan*, either of the first two flaws in the application are fatal to URAP's case, namely that it lacks (i) a cognizable administrative law claim, and (ii) justiciability.

[78] Thus, in light of my conclusions on the first two issues raised, I decline to comment on the issue of whether this Court has jurisdiction to determine the Application. After all, the Court may refuse to decide complex jurisdictional matters on interlocutory motions, particularly on motions to strike applications for judicial review (*Coffey v Canada (Minister of Justice)*, 2004 FC 1694 at para 23; *Suzuki Foundation* at para 36).

V. Costs

[79] Canada declined to ask for costs. Given the nature of the proceedings, and in light of Canada's position with respect to this issue, I will decline to award costs.

VI. Conclusion

[80] As Elie Wiesel said in his Nobel Peace Prize acceptance speech on December 10, 1986: "Silence encourages the tormentor, never the tormented. Sometimes we must interfere." And as Roméo Dallaire wrote in *Shake Hands with the Devil: The Failure of Humanity in Rwanda*, his book chronicling his time spent as Force Commander of the United Nations Assistance Mission for Rwanda in 1993-94:

> The international community, of which the UN is only a symbol, failed to move beyond self-interest for the sake of Rwanda. While most nations agreed that something should be done they all had an excuse why they should not be the ones to do it. As a result, the UN was denied the political will and material means to prevent the tragedy.

[81] The Canadian government has obligations under international law, including with respect to international treaties such as the *Convention*. A firm stance against genocide is an undeniable imperative for the world, as articulated by Elie Wiesel and Roméo Dallaire, who were witnesses to genocide. Yet, the mere potential existence of a genocide does not automatically ground proceedings before the Court.

[82] Notwithstanding the gravity of the issues raised by URAP in this Application, I find that these issues are not cognizable in administrative law, nor justiciable under the political question

doctrine. As this Court must respect the dividing lines between the three branches of Government, the matters raised in this Application should be left to the executive and legislative branches until such time as those bodies enact law or policy, or make otherwise reviewable decisions.

[83] For all the reasons above, Canada's Motion to strike the Application is granted, without leave to amend. There is no award as to costs.

JUDGMENT in T-190-22

THIS COURT'S JUDGMENT is that:

1. The Motion is granted.

2. The Application is struck without leave to amend.

3. No costs will issue.

"Alan S. Diner"

Judge

ANNEX A

Convention on the Prevention and Punishment of the Crime of Genocide
(9 December 1948, 78 UNTS 277, Can TS 1949 No 27)
Convention pour la prévention et la répression du crime de génocide
(9 décembre 1948, 78 RTNU 277, Can TS 1949 No 27)

Article I

The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

Article 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;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.

Article III

The following acts shall be punishable:

(a) Genocide;

(b) Conspiracy to commit genocide;

Article premier

Les Parties contractantes confirment que le génocide, qu'il soit commis en temps de paix ou en temps de guerre, est un crime du droit des gens, qu'elles s'engagent à prévenir et à punir.

Article II

Dans la présente Convention, le génocide s'entend de l'un quelconque des actes ci-après, commis dans l'intention de détruire, ou tout ou en partie, un groupe national, ethnique, racial ou religieux, comme tel :

a) Meurtre de membres du groupe;

b) Atteinte grave à l'intégrité physique ou mentale de membres du groupe;

c) Soumission intentionnelle du groupe à des conditions d'existence devant entraîner sa destruction physique totale ou partielle;

d) Mesures visant à entraver les naissances au sein du groupe;

e) Transfert forcé d'enfants du groupe à un autre groupe.

Article III

Seront punis les actes suivants :

a) Le génocide;

b) L'entente en vue de commettre le génocide;

(c) Direct and public incitement to commit genocide;

(d) Attempt to commit genocide;

(e) Complicity in genocide.

c) L'incitation directe et publique à commettre le génocide;

d) La tentative de génocide;

e) La complicité dans le génocide.

Article IV

Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals

Article IV

Les personnes ayant commis le génocide ou l'un quelconque des autres actes énumérés à l'article III seront punies, qu'elles soient des gouvernants, des fonctionnaires ou des particuliers.

Article V

The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.

Article V

Les Parties contractantes s'engagent à prendre, conformément à leurs constitutions respectives, les mesures législatives nécessaires pour assurer l'application des dispositions de la présente Convention, et notamment à prévoir des sanctions pénales efficaces frappant les personnes coupables de génocide ou de l'un quelconque des autres actes énumérés à l'article III.

Article VIII

Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III.

Article VIII

Toute Partie contractante peut saisir les organes compétents de l'Organisation des Nations Unies afin que ceux-ci prennent, conformément à la Charte des Nations Unies, les mesures qu'ils jugent appropriées pour la prévention et la répression des actes de génocide ou de l'un quelconque des autres actes énumérés à l'article III.

Article IX

Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be

Article IX

Les différends entre les Parties contractantes relatifs à l'interprétation, l'application ou l'exécution de la présente Convention, y compris ceux relatifs à la responsabilité d'un Etat en matière de génocide ou de l'un quelconque des autres actes énumérés à

submitted to the International Court of Justice at the request of any of the parties to the dispute.

l'article III, seront soumis à la Cour internationale de Justice, à la requête d'une partie au différend.

ANNEX B

Federal Courts Act (R.S.C., 1985, c. F-7)
Loi sur les Cours fédérales (L.R.C. (1985), ch. F-7)

Definitions

2 (1) In this Act,

federal board, commission or other tribunal 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 of a province or under section 96 of the *Constitution Act*, 1867; (*office fédéral*)

Définitions

2 (1) Les définitions qui suivent s'appliquent à la présente loi.

office fédéral 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 constitutionnelle de 1867*. (*federal board, commission or other tribunal*)

Senate and House of Commons

(2) For greater certainty, the expression federal board, commission or other tribunal, 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 *Parliament of Canada Act*, the Parliamentary Protective Service or the Parliamentary Budget Officer.

[…]

Sénat et Chambre des communes

(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.

[…]

Extraordinary remedies, federal tribunals

18 (1) Subject to section 28, the Federal Court has exclusive original jurisdiction

(a) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of mandamus or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and

(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.

Recours extraordinaires : offices fédéraux

18 (1) Sous réserve de l'article 28, la Cour fédérale a compétence exclusive, en première instance, pour :

a) décerner une injonction, un bref de *certiorari*, de mandamus, de prohibition ou de quo *warranto*, ou pour rendre un jugement déclaratoire contre tout office fédéral;

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.

Extraordinary remedies, members of Canadian Forces

(2) The Federal Court has exclusive original jurisdiction to hear and determine every application for a writ of *habeas corpus ad subjiciendum*, writ of *certiorari*, writ of prohibition or writ of *mandamus* in relation to any member of the Canadian Forces serving outside Canada.

Recours extraordinaires : Forces canadiennes

(2) Elle a compétence exclusive, en première instance, dans le cas des demandes suivantes visant un membre des Forces canadiennes en poste à l'étranger : bref d'*habeas corpus ad subjiciendum*, de *certiorari*, de prohibition ou de *mandamus*.

Remedies to be obtained on application

(3) The remedies provided for in subsections (1) and (2) may be obtained only on an application for judicial review made under section 18.1.

Exercice des recours

(3) Les recours prévus aux paragraphes (1) ou (2) sont exercés par présentation d'une demande de contrôle judiciaire.

Application for judicial review

18.1 (1) 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.
…

Demande de contrôle judiciaire

18.1 (1) 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.
…

Powers of Federal Court

(3) On an application for judicial review, the Federal Court may

(a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or

(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

Grounds of review

(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal

(a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;

(b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;

(c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;

(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;

(e) acted, or failed to act, by reason of fraud or perjured evidence; or

Pouvoirs de la Cour fédérale

(3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :

a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;

b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

Motifs

(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :

a) a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer;

b) n'a pas observé un principe de justice naturelle ou d'équité procédurale ou toute autre procédure qu'il était légalement tenu de respecter;

c) a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier;

d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;

e) a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;

(f) acted in any other way that was contrary to law.

f) a agi de toute autre façon contraire à la loi.

Defect in form or technical irregularity

(5) If the sole ground for relief established on an application for judicial review is a defect in form or a technical irregularity, the Federal Court may

Vice de forme

(5) La Cour fédérale peut rejeter toute demande de contrôle judiciaire fondée uniquement sur un vice de forme si elle estime qu'en l'occurrence le vice n'entraîne aucun dommage important ni déni de justice et, le cas échéant, valider la décision ou l'ordonnance entachée du vice et donner effet à celle-ci selon les modalités de temps et autres qu'elle estime indiquées.

(a) refuse the relief if it finds that no substantial wrong or miscarriage of justice has occurred; and

(b) in the case of a defect in form or a technical irregularity in a decision or an order, make an order validating the decision or order, to have effect from any time and on any terms that it considers appropriate.

Annex C

Federal Courts Rules (SOR/98-106)
Règles des Cours fédérales (DORS/98-106)

Declaratory relief available

64 No proceeding is subject to challenge on the ground that only a declaratory order is sought, and the Court may make a binding declaration of right in a proceeding whether or not any consequential relief is or can be claimed.

Jugement déclaratoire

64 Il ne peut être fait opposition à une instance au motif qu'elle ne vise que l'obtention d'un jugement déclaratoire, et la Cour peut faire des déclarations de droit qui lient les parties à l'instance, qu'une réparation soit ou puisse être demandée ou non en conséquence.

Limited to single order

302 Unless the Court orders otherwise, an application for judicial review shall be limited to a single order in respect of which relief is sought.

Limites

302 Sauf ordonnance contraire de la Cour, la demande de contrôle judiciaire ne peut porter que sur une seule ordonnance pour laquelle une réparation est demandée.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-190-22
STYLE OF CAUSE:	UYGHUR RIGHTS ADVOCACY PROJECT v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	MONTRÉAL, QUEBEC IN PERSON AND BY VIDEOCONFERENCE
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APPEARANCES:

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