SUPREME COURT OF YUKON

Citation: *Mercer v Yukon (Government of)*, 2023 YKSC 59

Date: 20231103
S.C. No. 20-A0032
Registry: Whitehorse

BETWEEN:

ROSS MERCER
TRENT ANDREW JAMIESON
DOUGLAS CRAIG WALKER
ALLAN PATRICK MYTRASH
MARTIN GREGORY LOOS
JAN ERIK MARTENSSON
CLAYTON ROBERT THOMAS

PLAINTIFFS

AND

THE GOVERNMENT OF YUKON
MINISTER OF COMMUNITY SERVICES OF THE YUKON TERRITORY
ATTORNEY GENERAL OF THE YUKON TERRITORY

DEFENDANTS

Before Chief Justice S.M. Duncan

Counsel for the Plaintiffs — Vincent Larochelle

Counsel for the Defendants — Catherine J. Boies Parker, KC, and Alexander Kirby

REASONS FOR DECISION

I. OVERVIEW

[1] The civil state of emergency declared in the Yukon in response to the COVID-19 pandemic between March 2020 and March 2022[1] was unprecedented. This summary trial application is about the constitutionality of the legislation (*Civil Emergency*

[1] (Except between August 25, 2021, and November 8, 2021).

Measures Act, RSY 2002, c 34 ("*CEMA*")) that authorized this declaration, and the exercise of certain powers by the Minister of Community Services and the Executive Council, also referred to as Cabinet. The plaintiffs say *CEMA* is unconstitutional because it allowed the Executive Council in the Yukon to govern during the state of emergency without any effective oversight by or accountability to the legislature, or review by the judiciary.

[2] Determining this question requires an understanding of legal principles that have developed over years of constitutional interpretation. The principles relate to the structure and inter-relationship of the three branches of government – legislative, executive, and judicial – and the nature of emergency circumstances, understood in the context of the *CEMA* legislation, and the facts of the pandemic in the Yukon.

[3] The plaintiffs seek a declaration that *CEMA* is inconsistent with constitutional principles and norms and as a result is of no force and effect, to the extent of the inconsistency. They further seek a declaration that s. 10 of *CEMA* is of no force and effect because it ousts the jurisdiction of this Court.

[4] The plaintiffs argue that *CEMA* represents an unconstitutional surrender of Yukon legislative authority. The plaintiffs say the *Yukon Act,* SC 2002, c 7 (the "*Yukon Act"*), including the preamble referring to responsible government, creates a legislature designed to make policy choices in the context of the rule of law, democracy, Parliamentary sovereignty, responsible government and the separation of powers, some of the unwritten principles emanating from the *Constitution Act, 1867*. The plaintiffs say these principles inform the structure set out in the *Yukon Act* establishing the three separate branches of government. The plaintiffs argue that *CEMA* is unconstitutional

because it allows the executive branch of the Yukon to decide policy and make law without any effective oversight by or accountability to the legislature or the judiciary.

[5] The defendants acknowledge that *CEMA* conveys extraordinary powers. But this is consistent with Canadian authority that upholds the ability of legislatures to delegate broad powers, particularly in emergency circumstances, and to limit the liability of the Crown. The defendants say that nothing in *CEMA* infringes the accountabilities of the responsible Minister, the Cabinet, and the legislature, nor does it remove the jurisdiction of the Court. *CEMA* is the product of the deliberations of a democratically elected body.

[6] The plaintiffs' application is dismissed. Authoritative jurisprudence supports the ability of the legislature to delegate a broad range of powers to the executive branch. Nothing in the text of the *Yukon Act* prevents the delegated powers set out in *CEMA*. That delegation of power is the result of the democratic process by which *CEMA* was enacted. The powers are constrained by the limits in *CEMA* itself – a temporally limited state of emergency and the authorization of only those orders or acts considered advisable for the purpose of the state of emergency. Judicial review is preserved and can be used to challenge executive orders that violate the *Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982* (the "*Charter*") or that exceed the parameters of *CEMA*. The elimination of certain causes of action for damages or certain judicial remedies is not sufficient to constitute an ousting of the jurisdiction of the court.

[7] The plaintiffs are asking this Court to intervene inappropriately into the democratically elected legislature's choices about how to govern the Yukon in the context of an emergency. There is nothing in the text of the *Yukon Act*, or in the unwritten constitutional principles, or in the jurisprudence interpreting delegation of

powers by the legislature, that authorizes this Court to invalidate *CEMA* for the reasons provided by the plaintiffs.

II. FACTUAL BACKGROUND AND CONTEXT

[8] Cases of COVID-19 were first reported in China in late 2019. COVID-19 is a virulent communicable air-borne respiratory disease that in some cases has caused severe illness and death. The first confirmed case appeared in Canada in January 2020. As of December 2022, over 48,000 people in Canada had died from COVID-19 and over 4.4 million people had been infected. The World Health Organization ("WHO") announced on March 11, 2020, that COVID-19 was a global pandemic, meaning it was an infectious disease spreading significantly in multiple countries around the world at the same time. It was not until May 2023 that the WHO stated COVID-19 no longer qualified as a global health emergency.

[9] In the beginning, little was known about the virus. Decisions to protect public health were made on the basis of incomplete and evolving information. Government responses in the Yukon, as elsewhere, included public health measures as well as financial and other relief from the economic consequences of the pandemic.

[10] The Yukon has particular characteristics that informed government responses to the COVID-19 pandemic. It is geographically isolated and has a small population; the health care system has limited capacity due to a restricted number of hospital beds and ventilators, and an insubstantial oxygen supply; it depends on visiting medical specialists and regular medical evacuations of patients with acute needs to larger centres in adjacent provinces; and there are vulnerable people throughout the Yukon

and particularly in the Yukon communities, including First Nation people, many of whom were at greater risk of negative outcomes from COVID-19.

[11] On March 18, 2020, the Yukon Chief Medical Officer of Health declared a public health emergency under the *Public Health and Safety Act*, RSY 2002, c 176 ("*Public Health and Safety Act*").

[12] On March 19, 2020, the Legislative Assembly (the "Legislature") unanimously adopted a special Order to adjourn until October 1, 2020. The standing committees of the Legislature continued to meet remotely over the summer of 2020.

[13] On March 27, 2020, the Yukon Executive Council declared a state of emergency under s. 6(1) of *CEMA*. The declaration of the state of emergency must occur before powers under *CEMA* can be exercised.

[14] On June 12, 2020, the state of emergency was extended by the Executive Council for 90 days. Further 90-day extensions occurred on September 9, 2020, December 7, 2020, March 3, 2021, and May 27, 2021. The state of emergency ended on August 25, 2021. Then on November 8, 2021, a new state of emergency was declared as a result of the increased spread of COVID-19 at that time. It was renewed on February 3, 2022, but ended before the 90 days had expired, on March 17, 2022.

[15] When the Legislature resumed sitting on October 1, 2020, the following motion was introduced: "[t]hat this House supports the current state of emergency in Yukon". The sixteen members of the Legislature unanimously passed the motion on November 18, 2020, after vigorous debate on the motion itself and various proposed amendments. Between October 14 and November 18, 2020, four amendments were made to the motion, and all were defeated after debate.

[16] On December 4, 2020, the Minister of Community Services moved another motion: “That it is the opinion of this House that the current state of emergency, established under the *Civil Emergency Measures Act* and expiring on December 8, [2020], should be extended.” A proposed amendment was debated and defeated and this main motion was carried unanimously.

[17] On December 8, 2020, a motion to create a Special Committee on Civil Emergency Legislation was passed unanimously. The committee was established by an Order of the Legislature to consider and identify options for modernizing *CEMA*, as well as to make recommendations on possible amendments. The Special Committee held public hearings to receive views and opinions of Yukoners and was authorized to call for persons, papers and records, and to sit during intersessional periods.

[18] Meanwhile, on November 30, 2020, Bill No. 302, an “*Act to Amend the Civil Emergency Measures Act*” was introduced. It proposed the following amendments to *CEMA*: increase legislative scrutiny over extending a state of emergency; require review of Ministerial Orders by the Legislature or a committee of the Legislature; and allow for more public input by having committees of the Legislature conduct public hearings on regulations and Ministerial Orders. This bill was defeated after first reading.

[19] On May 25, 2021, Bill No. 300 was introduced, proposing similar amendments to those that had been introduced in Bill No. 302 in November 2020 and defeated.

[20] Then on March 7, 2022, a new Bill No. 302 entitled “*Act to Amend the Civil Emergency Measures Act (2022)*” was introduced. It contained the same proposed amendments as the first Bill No. 302 introduced and defeated in November 2020, and the amendments in Bill No. 300 introduced on May 25, 2021. It added more language

about legislative oversight similar to the federal *Emergencies Act,* RCS 1985, c 22 (4th Supp.). This new Bill No. 302 was defeated at second reading, after significant debate.

[21] On March 10, 2022, Bill No. 300 introduced on May 25, 2021, was removed by the Speaker from the Order Paper because it was similar to Bill No. 302 which had just been defeated.

[22] On March 17, 2022, the Yukon government announced the end of its state of emergency.

[23] On March 18, 2022, the Yukon government announced it was reviewing *CEMA* and the *Public Health and Safety Act*, to identify gaps, capture best practices, and identify areas for improved coordination through engagement with First Nations governments, municipalities and stakeholders throughout the Yukon. This was after a mandate letter dated July 5, 2021, was sent by the Premier to the Minister of Community Services, requesting that the Minister along with the Department of Health and Social Services review *CEMA* and the *Public Health and Safety Act* to improve Yukon's ability to address future emergencies.

[24] During the two states of emergency, the Minister of Community Services enacted many different orders affecting a broad range of subject areas, including but not limited to border closures, quarantines, government contracts and leases, limitation periods, licensing, and social assistance. None of the orders remains in effect. They lapsed with the termination of the state of emergency in March 2022.

[25] The Yukon government prepared a Yukon Government Pandemic Co-ordination Plan providing a framework guiding the Yukon government preparedness for and response to a health pandemic in or affecting the Yukon. It is publicly available and

came into effect in March 2020. It is an accompaniment to another document, Yukon Government Emergency Co-ordination Plan dated December 2011, also publicly available. In addition, a plan entitled: “A Path Forward: Yukon’s plan for lifting COVID-19 restrictions” was released publicly in 2020 and updated in August 2021. It outlined the government’s response to COVID-19.

[26] The affidavit of Ross Mercer, relied on by the plaintiffs, describes the progress of COVID-19 in the Yukon; the effect of some of the executive orders made under *CEMA*, especially those related to travel and border restrictions, on him and his business; the inadequacy of the Legislature’s oversight and involvement in the executive’s repeated declarations of states of emergency and the making of orders; the positions taken by and the role of the opposition parties during the states of emergency; and a comparison of the Yukon with other jurisdictions in the timing and process of declaring states of emergency and timing of the closure of the legislature. His affidavit sets out his perspective as a member of the public, whose business was negatively affected by the imposition of executive orders during the states of emergency, on the content of the orders and the process followed in the making of the orders.

[27] The affidavit of Stephen Mills, relied on by the defendants, corrected some of the information in the Ross Mercer affidavit about the timing of adjournments of the legislatures in other jurisdictions and whether they declared civil emergencies or public health emergencies. I accept the defendants’ clarifications and corrections, based on Mr. Mills’ position as Deputy Minister of the Executive Council Office and Cabinet Secretary and independent verification through publicly available information.

[28] Contrary to the plaintiffs' statement that the Yukon Legislature was adjourned for a longer period of time than any other jurisdiction, the legislature of Nova Scotia was adjourned between March 10, 2020, and March 9, 2021, except for one day in December 2020.

[29] The following provinces and territories declared civil states of emergency over the following time periods:

- Nova Scotia – March 22, 2020-March 20, 2022;
- Saskatchewan – March 18, 2020-July 9, 2021; and September 13, 2021-March 14, 2022;
- New Brunswick – March 19, 2020-July 30, 2021; and September 24, 2021-March 14, 2022;
- Manitoba – March 20, 2020-October 21, 2021;
- British Columbia – March 18, 2020-June 30, 2021;
- Ontario – March 17, 2020-July 24, 2020; January 14, 2021-February 9, 2021, and April 7, 2021-June 9, 2021;
- Prince Edward Island – April 16, 2020-June 28, 2020;
- Northwest Territories – March 24, 2020-July 7, 2020, and in the City of Yellowknife, November 6, 2020-March 3, 2022;
- Nunavut – in the City of Iqaluit May 4, 2021-December 9, 2021.

[30] Other provinces declared public health emergencies that were generally in effect for approximately a two-year period between March 2020 and the spring of 2022.

III. PRELIMINARY MATTERS

A. Propriety of Parts of the Ross Mercer Affidavit

[31] The defendants object to many of the paragraphs in the affidavit of Ross Mercer because they contain hearsay, opinion, and argument. The defendants say these paragraphs contravene Rule 49(12) of the *Rules of Court* of the Supreme Court of Yukon and the law related to affidavits.

[32] Counsel for the plaintiffs conceded that several of the paragraphs contained opinion or argument and that they should be disregarded.

[33] Generally, affidavits are to set out facts without gloss or explanation.

> A basic rule for affidavit evidence is that a deponent should state relevant facts only, without gloss or explanation *(Duyvenbode v Canada (Attorney General)*, 2009 FCA 120). If opinion is to be given, the affiant should be qualified as an expert to give the opinion and its foundation should be provided (*Ross River Dena Council v The* Attorney General of Canada, 2008 YKSC 45 ("*Ross River Dena Council*") at para. 12, quoting from *Johnson v Couture*, 2002 BCSC 1804 at paras. 13-16). This Court at para. 11 of the *Ross River Dena Council* decision also adopted the finding in *Chamberlain v the School District No. 36 (Surrey)*, [1998] BCJ No. 29232 (SC) at para. 28: "Personal opinions or a deponent's reactions to events generally should not be included in affidavits". The court in that case further stated "argument on issues from deponents serves only to increase the depth of the court file and to confuse the fact-finding exercise." Argument should not be submitted in the "guise of evidence". [*Yukon Big Game Outfitters Ltd v Yukon (Government of)*, 2021 YKSC 51 at para .17].

[34] Only statements that would be permitted as evidence at trial should be included. Opinion is generally not acceptable unless it is in the form of expert opinion. Argument is not fact and should be reserved for written or oral submissions.

[35] Hearsay evidence is admissible in an affidavit, if it is on information and belief and submitted as part of a pre-trial record or admitted with leave of the Court (Rule 49(12)).

[36] In this case, I agree with the defendants that paras. 28, 29, 36, 37, 56, 67, 71, 75, 95, 96, 97, 98, 99, 109, 110, and 111 constitute argument. If this were evidence attempted to be given by Mr. Mercer at trial, it would be given no weight. I will not give these paragraphs weight as a result (*Ross River* at para. 16).

[37] Paragraphs 33, 60, and 64 are challenged on the basis of opinion. I will allow these paragraphs to remain and be considered. They contain factual information and also describe the impacts on Mr. Mercer of some of the orders made under *CEMA* and the events that occurred under *CEMA*. His description of events does not contravene the rule against opinion evidence.

[38] Paragraphs 11, 12, 59, 61, and 70 are challenged because they constitute hearsay evidence. Paragraphs 11 and 12 are on information and belief and describe the negative impact of the border closures and travel restrictions on the drilling business of one the other plaintiffs, Trent Jamieson. His business was forced to operate short-handed on a number of projects because they could not access workers in neighbouring jurisdictions. In Mr. Jamieson's view this restriction was unnecessary because of the business' remote work environment. It is not explained why Mr. Jamieson did not file his own affidavit, although perhaps it was for reasons of efficiency.

[39] This is not a pre-trial record and leave to admit was not sought under Rule 49(12). I am unable to give any weight to these paragraphs. However, I note that

Mr. Mercer stated clearly in other sections of his affidavit the negative effect of the border closures and travel restrictions on Yukon businesses, and I accept that evidence.

[40] Paragraphs 59, 61, and 70 describe the positions of the opposition parties and in one instance what they were told by the government. Although these three paragraphs are strictly hearsay, and no leave was sought under Rule 49(12), I will give them weight on the principled exception to the rule against hearsay of reliability and necessity. The attached newspaper articles as well as the Hansard excerpts in the record provide objective verification of the positions of the opposition parties. It would be onerous for the plaintiffs to provide affidavits from various members of the Legislature. The summaries set out in these paragraphs are helpful context.

B. Who is the Minister under CEMA?

[41] The plaintiffs argue that one of the many inadequacies of *CEMA* is that the Minister to whom the powers are delegated is not defined. The defendants note that the definition is found in s. 21 of the *Interpretation Act*, RSY 2002, c 125. It defines Minister as “the member of the Executive Council charged by order of the Commissioner in Executive Council with responsibility for the exercise of powers under the enactment”. In this case the *Government Organisation Act Schedule*, OIC 2014/174, assigned responsibility for the exercise of powers under *CEMA* to the Minister of Community Services.

IV. LEGISLATIVE CONTEXT

[42] The Constitution of Canada describes how Canada governs itself. It takes precedence over all other laws in the country. If a government passes a law that

controverts the Constitution, it may be challenged in court and the court can declare all or part of that law unconstitutional and that it has no effect.

[43] The Constitution of Canada is partly written and partly unwritten. An important part of the written Constitution is the *Constitution Act, 1867.* It created the Dominion of Canada and it describes the structure of Canada's government and how powers are divided between the federal and provincial governments.

[44] An other significant written part of the Constitution is the *Constitution Act, 1982*. It patriated the Constitution from the British Parliament, and contains the *Charter*, protection of Aboriginal rights, and an amending formula. While the 1982 Constitution as well as certain other laws form part of the Constitution of Canada, they are not relevant to this case.

[45] The unwritten part of the Constitution exists in part because the *Constitution Act, 1867* is based on the Constitution Act of the United Kingdom, which is completely unwritten and consists of principles and conventions. Courts are responsible for interpreting unwritten constitutional principles, which have been described as "assumptions upon which the text is based" (*Reference re Secession of Quebec*, [1998] 2 SCR 217 ("*Reference Secession*") at para. 49). These principles are described further below.

[46] The *Constitution Act, 1867* establishes three branches of government – the legislature, the executive and the judiciary.

> All three branches have distinct institutional capacities and play critical and complementary roles in our constitutional democracy. However, each branch will be unable to fulfill its role if it is unduly interfered with by the others. … [*Ontario v Criminal Lawyers' Association of Ontario,* 2013 SCC 43 at para. 29]

[47] The *Constitution Act, 1867* establishes a central federal government as well as ten provinces. As noted above, there is an exclusive division of powers between the federal government (s. 91) and the provincial governments (s. 92). The three northern territories do not have provincial status and are not included in this constitutional division of powers (Pamela Muir, "The Constitutional Status of Yukon – A Normative Analysis" (2020) 50 *The Northern Review* 7("Muir article")).

[48] The territories are established by Acts of Parliament. In the Yukon, the federal *Yukon Act* sets out the powers of the Yukon government. These powers are similar to the powers given to the provinces in s. 92 of the *Constitution Act, 1867*. Sections 17-23 of the *Yukon Act* describe the powers of the Legislature. Section 18 itemizes many of those powers. Section 20 connects the *Yukon Act* to the *Constitution Act, 1867* by saying that nothing in s. 18 shall be construed to give the Legislature greater powers than are given to the legislatures of the provinces by ss. 92, 92A, and 95 of the *Constitution Act, 1867*.

[49] The *Yukon Act* can be abolished or amended by Parliament. The Legislature cannot amend the *Yukon Act*, because it is federal legislation. The plaintiffs suggest the Legislature is not a plenary body like Parliament or the provincial legislatures, because the *Yukon Act* contains further restrictions. Specifically, the federal government can disallow any law or portion of any law within one year after it is made (s. 25(2)); federal laws prevail in the event of a conflict with territorial laws (s. 26) – a codification of the unwritten principle of paramountcy; and the Legislature's powers to appropriate funds authorized by Parliament to defray public service expenses and to pass any legislative instrument to appropriate public revenue or tax is constrained (ss. 29 and 30). The

Yukon Act also requires that the federal government consult with the Executive Council in the Yukon before any amendment or repeal of the *Yukon Act*, (s. 56(1)) and the Legislature may make recommendations to the federal minister about amendment or repeal (s. 56(2)). These statutory protections, along with the facts that 1) Parliament has never attempted to amend or repeal the *Yukon Act* unilaterally; 2) the *Yukon Act* is inextricably connected with the operation of the Yukon First Nation final agreements, which have constitutional protection; and 3) the Yukon has evolved to having a fully representative, responsible public government, functioning like a province, means there is a strong argument that the *Yukon Act* operates like the Constitution in the Yukon (Muir article, at 14, 16,18, and 20).

[50] However, the constitutional status of the *Yukon Act* has not been considered by the courts. This issue is not directly before me in this litigation and I do not decide it here. The plaintiffs did not fully develop or pursue their argument that the Legislature is not a plenary body under the *Yukon Act* or that the *Yukon Act* may offer less protection for the fundamental structure of the institutions of governance than the *Constitution Act, 1867*. Further, the plaintiffs relied in their oral argument on the text of the *Yukon Act* for their argument that *CEMA* is unconstitutional. The plaintiffs also rely on the unwritten principles emanating from the jurisprudence interpreting the Constitution.

[51] The defendants do not object to the plaintiffs' reliance on the *Yukon Act*, the *Constitution Act*, *1867* and the unwritten constitutional principles as well as the jurisprudence interpreting the Constitution and its principles for their argument that *CEMA* is unconstitutional.

[52] I have accepted for the purpose of this litigation that the constitutional challenge to *CEMA* can be made on the basis of the *Yukon Act,* the *Constitution Act, 1867* and the jurisprudence related to the Constitution including unwritten constitutional principles.

V. ISSUES

[53] The plaintiffs raise two main issues. The first is whether ss. 6-10 of *CEMA* create a constitutionally impermissible shift of legislative power and authority to the executive, insulated from judicial review. The second issue is whether s. 10 of *CEMA* ousts the core jurisdiction of the courts by immunizing certain persons and the Crown from legal challenge to actions taken under *CEMA* as well as by eliminating the remedies of injunction and *mandamus* on judicial review.

[54] Sections 6, 7, and 8 of *CEMA* provide the mechanism for and timing of a declaration of a state of emergency and the imposition of a plan. For the first issue, the plaintiffs focus on s. 9 of *CEMA*, which describes the powers of government in a state of emergency as follows:

> 9 Government may act in state of emergency
>
> (1) Despite any other Act, when a state of emergency has been declared to exist under section 6 or 7, the Minister may do all things considered advisable for the purpose of dealing with the emergency and, without restricting the generality of the foregoing, may
>
> (a) do those acts considered necessary for
>
> (i) the protection of persons and property,
>
> (ii) maintaining, clearing and controlling the use of roads and streets,
>
> (ii) requisitioning or otherwise obtaining and distributing accommodation, food and clothing and providing other welfare services,

> (iv) providing and maintaining water supplies, electrical power and sewage disposal,
>
> (v) assisting in the enforcement of the law,
>
> (vi) fighting or preventing fire, and
>
> (vii) protecting the health, safety and welfare of the inhabitants of the area;
>
> (b) make regulations considered proper to put into effect any civil emergency plan; and
>
> (c) require any municipality to provide assistance as considered necessary during the emergency and authorize the payment of the cost of that assistance out of the revenues of the Government of the Yukon.
>
> …
>
> (3) Despite any other Act, when a state of emergency has been declared to exist under section 6 or 7, every public servant and every member of the public service of the Yukon shall comply with the instructions and orders of the Minister in the exercise of any discretion or authority the public servant or public officer may have for and on behalf of the Government of the Yukon, whether statutory, delegated or otherwise, for responding to and dealing with the emergency.

[55] The second issue focuses on s. 10, which limits the liability of the Crown, municipalities, or other persons acting within the authority provided to them under *CEMA*, for acts done or not done in respect of the emergency. Section 10 provides:

> 10 Limitation of liability
>
> When a state of emergency has been declared to exist under section 6 or 7 the following persons are not liable for any damage caused by interference with the rights of others, and are not subject to proceedings by way of injunction or mandamus in respect of acts done or not done in respect of the emergency:

> (a) a municipality or any person acting under the authority or direction of the Commissioner in Executive Council, the Minister or the civil emergency planning officer;
>
> (b) a municipality or any person who does any act in carrying out a civil emergency plan under this Act;
>
> (c) any person acting under the authority or direction of the municipality, its council, its civil emergency planning committee or its civil emergency co-ordinator;
>
> (d) despite any other Act, the Crown;
>
> (e) any person acting under a regulation made under paragraph 9(1)(b) or a bylaw made under paragraph 9(2)(c).

VI. ANALYSIS

Issue #1 – Does *CEMA* infringe the constitutional structure in the *Yukon Act* by shifting legislative power to the executive and preventing judicial review?

A. Positions of the Parties

i) Plaintiffs

[56] The plaintiffs say that *CEMA* is inconsistent with the structure of the *Yukon Act* that provides for three branches of government – legislative, executive, and judicial – each operating within their own sphere of activity. This structure is informed not only by the text of the *Yukon Act* but also by unwritten constitutional principles, identified by the plaintiffs as democracy, rule of law, separation of powers, responsible government, and parliamentary sovereignty. These principles assist in interpreting the text of the *Yukon Act*, the delineation of spheres of jurisdiction, the scope of rights and obligations, and the role of political institutions (*Reference Secession* at para. 52). The plaintiffs say a consideration of *CEMA* in the context of these principles and the text of the *Yukon Act*, reveals it as legislation that improperly interferes with the legislative and judicial realms,

by giving powers or protections to the executive that intrude into those of the other two branches. The plaintiffs say there are limits on the delegation of powers by the Legislature, limits that come from the constitutional text (i.e. the *Yukon Act*) and unwritten constitutional principles. *CEMA* does not respect those limits and as such is unconstitutional. The plaintiffs refer to this as an improper delegation of the core competence of the Legislature.

[57] The plaintiffs say *CEMA* gives the executive subjective and unfettered discretion that shifts the relationships among the three branches of government in a way that is inconsistent with the constitutionally mandated structure and operation of government. The declaration by the executive of the state of emergency and the ability to order anything that is considered advisable in a state of emergency are decisions made by the executive on a subjective basis without any oversight by, input from, or accountability to the legislature. The executive also remains improperly insulated from judicial review under *CEMA*, according to the plaintiffs.

[58] More specifically, the plaintiffs describe the following four ways in which *CEMA* is unconstitutional.

[59] First, the plaintiffs say *CEMA* allows the executive to decide policy, thereby encroaching on power and responsibility that belongs exclusively to the legislature. *CEMA* causes the legislature to abdicate its legislative role.

[60] Second, the plaintiffs say *CEMA* contains no limit to the broad delegation of power to the executive. It states “[d]espite any other Act, … the Minister may do all things considered advisable for the purpose of dealing with the emergency …” (s. 9(1)). The plaintiffs say this unlimited ability to legislate and override any other statutory

instruments is not a transfer of limited discretionary authority or the implementation of a policy choice of the Legislature. It is unconstrained, arbitrary, and an impermissible shift of legislative authority to the executive.

[61] Third, the plaintiffs say s. 9 of *CEMA* grants the Minister the entire legislative competence of the Yukon Legislature and more: specifically, the power to do things and enact regulations beyond the powers contemplated in ss. 17-23 of the *Yukon Act*. Examples are imposing quarantine and border closures.

[62] Fourth, the plaintiffs say the failure of *CEMA* to ensure a degree of supervision by the Legislature over the delegation of its power results in an unconstrained and unchecked executive.

[63] The plaintiffs advanced another argument during the oral hearing related to the text of the *Yukon Act*. Counsel said that the unwritten constitutional principles can be used to interpret ss. 17-23 of the *Yukon Act*, provisions that give certain powers to the Legislature. Further, the *Yukon Act* states in its preamble that the "Yukon is a territory that has a system of responsible government that is similar in principle to that of Canada" thereby codifying one of the unwritten constitutional principles, according to the plaintiffs. The combination of this text of the *Yukon Act* and the unwritten constitutional principles forms the basis for a declaration of unconstitutionality of *CEMA* in a way that is consistent with the defendants' interpretation of the *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34 ("*City of Toronto*") decision.

ii) Defendants

[64] The Yukon government denies that *CEMA* is unconstitutional. *CEMA* is a product of the democratic process, and its validity is consistent with a long line of authority in

Canada that permits legislatures to delegate many of their powers to the executive with few restrictions. There is no support in the jurisprudence for the plaintiffs' theory that a "core competence" of legislatures acts as a limit on their ability to legislate. The defendants describe this legal challenge as consistent with these many other decisions that allow for the delegation of powers by legislatures; there is nothing unique here that renders those authorities inapplicable. Unwritten constitutional principles cannot be used on their own to invalidate legislation, as confirmed by the Supreme Court of Canada in the *City of Toronto* decision.

[65] The defendants address each of the plaintiffs' specific arguments as follows.

[66] First, *CEMA* does not represent an abdication of legislative authority by allowing the executive to decide policy. There are many examples in Canada of a statute's delegation of a breadth of legislative powers, including the ability to decide policy, to the executive or other independent entities, the constitutionality of which has been confirmed by the courts. Further, the democratically elected Legislature duly enacted *CEMA* and the Legislature retains its ability to limit, amend, repeal, revoke *CEMA* or any part of it.

[67] Second, the powers delegated under *CEMA* are not arbitrary or without limits. *CEMA* sets out certain limits, such as the definition of emergency and the delegation of powers only in the context of an emergency. The executive can suspend or alter primary legislation through secondary orders (i.e. "[d]espite any other Act") but only in an emergency and for the purpose of dealing with the emergency. The jurisprudence confirms there is no constitutional prohibition against the delegation of powers by the legislature to the executive or an independent authority, even where those powers allow

rules or laws to be made that prevail over inconsistent or conflicting existing legislation. Further, *CEMA* does not allow the executive to make changes to *CEMA* itself. The executive must act within the parameters of *CEMA*.

[68] Third, s. 9 of *CEMA* does not grant the entire legislative competence to the executive because they are subject to the parameters set out in *CEMA*. *CEMA* does not authorize unconstitutional exercises of power – i.e. powers beyond the scope of those given to the Legislature by the *Yukon Act*. Any such exercise would be subject to judicial review.

[69] Fourth, there is no authority for the proposition that the Legislature must carry out an active supervisory role over the entity to which its powers are delegated. The Legislature has an inherent supervisory authority over the exercise of delegated powers because it can alter or eliminate those delegated powers at any time.

[70] Addressing the plaintiffs' additional argument that the text of the *Yukon Act* combined with the unwritten constitutional principles can be used to challenge the constitutionality of *CEMA*, the defendants note for the above reasons, there is nothing in *CEMA* that offends the provisions of the *Yukon Act*, including the phrase "responsible government" in the preamble and the specific powers outlined in ss. 17-23.

B. Unwritten constitutional principles – can they independently invalidate legislation?

[71] The plaintiffs' written argument that *CEMA* is unconstitutional relies on the unwritten constitutional principles for this invalidation. However, the current state of the law does not allow unwritten constitutional principles on their own to invalidate legislation. The differing interpretations held by the plaintiffs and the defendants of the effect of the *City of Toronto* decision require further analysis here.

[72] In the *City of Toronto* case, the Ontario legislature introduced new legislation (*Better Local Government Act, 2018*) in the midst of a City of Toronto election campaign that reduced the number of members of City Council from 47 to 25 by reducing the number of wards. The City and two groups of individuals challenged the constitutionality of this legislation based on an infringement of s. 2(b) of the *Charter*, freedom of expression. They also argued the legislation infringed the right to vote set out in s. 3 of the *Charter*. Relevant to the case at bar was the further argument that the unwritten constitutional principle of democracy invalidated the legislation.

[73] In holding that unwritten constitutional principles could not be used on their own to invalidate the legislation, the Supreme Court of Canada first referenced its previous decisions where it has recognized that our Constitution describes "an architecture of the institutions of state and of their relationship to citizens that connotes certain underlying principles … such as democracy and the rule of law" (para. 49). The Court referenced their general description of the internal architecture of the Constitution in the *Reference Secession* case as a "'basic constitutional structure'. The individual elements of the Constitution are linked to the others and must be interpreted by reference to the structure of the Constitution as a whole" (at para. 50).

[74] The unwritten principles such as democracy and the rule of law are not written in the text of the Constitution, but they are foundational and "it would be impossible to conceive of our constitutional structure without them" (*Reference Secession* at para. 51 and *City of Toronto* at para. 49). "The principles dictate major elements of the architecture of the Constitution itself and are as such its lifeblood" (*Reference Secession* at para. 51; *City of Toronto* at para. 167). They have full legal force that is

context dependent. “Their legal force lies in their representation of general principles within which our constitutional order operates and, therefore, by which the Constitution’s written terms – its *provisions* – are to be given effect” (*City of Toronto* at para. 54). The Court in *City of Toronto* identified two ways in which the principles can assist courts.

[75] The first way is by providing an interpretive aid to the text of the Constitution where it is “not itself sufficiently definitive or comprehensive” to answer a question (*City of Toronto* at para. 65). For example, the principles of judicial independence and rule of law have helped to interpret ss. 96-100 of the Constitution in a way that safeguards the core jurisdiction of the courts.

[76] The second way unwritten principles can assist is by developing structural doctrines that are not articulated in the text of the Constitution, but are necessary to the coherence of, and flowing by implication from, the architecture of the Constitution (*City of Toronto* at para. 56). They can fill important gaps and address questions on which the Constitution is silent. Examples of such structural doctrines developed through unwritten principles are the doctrine of full faith and credit, the obligation of the federal government to negotiate with a province once it has seceded, the suspension of a declaration of invalidity of legislation, and the doctrine of paramountcy (*City of Toronto* at para. 56).

[77] Here, one of the plaintiffs’ arguments is that the unwritten principles of rule of law, democracy, separation of powers, responsible government, and parliamentary sovereignty are sufficient to constitutionally invalidate *CEMA*. They argue that these principles constitutionally prohibit the shift in power from the legislature to the executive that *CEMA* authorizes. Below in section C, I will analyze the specific arguments raised

by the plaintiffs. My comments in this section are limited to an explanation of why the use of unwritten principles as a foundation for the invalidity attack does not fit into the two ways described by the Supreme Court of Canada in the *City of Toronto* case that unwritten principles can assist courts.

[78] The plaintiffs argue that the finding in the *City of Toronto* decision that unwritten constitutional principles cannot on their own be used to invalidate legislation does not apply in this case. They say the deliberate omission of municipalities as part of the structure of governance in the Constitution is a distinguishing fact. There is therefore nothing in the text of the Constitution to which the unwritten principles can apply in the *City of Toronto* case. The plaintiffs say that if the unwritten principle of democracy were found to invalidate the *Better Local Government Act, 2018* (the provincial legislation at issue) this would in effect be an amendment to the Constitution because it would require that municipalities be included as part of its structure. This is distinguishable from the case at bar, where the structure of the *Yukon Act* includes the legislature, executive, and judicial branches, and the plaintiffs are challenging the shift of power among them. This textual anchor gives the unwritten principles a basis for the legal challenge. The unwritten principles can also be used as an interpretive aid to this text, one of the ways the Court states in *City of Toronto* that the unwritten principles can assist.

[79] I agree with the defendants' arguments in response that the plaintiffs' analysis is a misreading of the *City of Toronto* decision. First, the Court in that decision reviewed all of the authorities that could be relied on to argue that unwritten constitutional principles can be used to invalidate legislation and concluded after analysis that they cannot. Legislative competence cannot be narrowed or limited by the courts on the basis of

unwritten principles such as democracy. In the *City of Toronto*, the Court noted that s. 92(8) of the Constitution gives the province "absolute and unfettered legal power" to legislate with respect to municipalities (*Ontario English Catholic Teachers' Assn v Ontario (Attorney General*), 2001 SCC 15 at para. 58). The courts cannot limit by relying on unwritten principles this provincial law-making authority that is part of the structure set out in the Constitution.

[80] Second, the deliberate omission of municipalities in the structure of the Constitution is not a distinguishing fact that makes the *City of Toronto* decision inapplicable to the case at bar. The Supreme Court of Canada referred to this deliberate omission when addressing the argument that the legislation at issue violated s. 3 of the *Charter*, which guarantees citizens the right to vote and run for office in provincial and federal elections and includes a right to effective representation (*City of Toronto* at para. 45). Section 3 does not extend to municipal elections. The Supreme Court of Canada concluded "there is no textual basis for an underlying constitutional principle [such as democracy] that would confer constitutional status on municipalities, or municipal elections" (at para. 82). The Supreme Court of Canada stated that if the unwritten principle of democracy required all elections to conform to the requirements of s. 3, including municipal elections, "the text of s. 3 would be rendered substantially irrelevant and redundant" (at para. 82). To apply the unwritten democratic principle in this way would result in an amendment to the constitutional text.

[81] In *City of Toronto,* the Supreme Court of Canada's conclusion on the role of the unwritten principle of democracy in invalidating legislation was:

> [63] In sum, and contrary to the submissions of the City, unwritten constitutional principles cannot serve as bases for invalidating legislation. …

and

> [78] In this case, the democratic principle is relevant as a guide to the interpretation of the constitutional text. It supports an understanding of free expression as including political expression made in furtherance of a political campaign (*Reference re Prov. Electoral Boundaries (Sask.)*; *Reference re Alberta Statutes*, [1938] S.C.R. 100; *Switzman v. Elbling*, [1957] S.C.R. 285; *OPSEU*). But it cannot be used in a manner that goes beyond this interpretive role. **In particular, it cannot be used as an independent basis to invalidate legislation.** [emphasis added]

[82] The Supreme Court of Canada in the *City of Toronto* noted several reasons why unwritten principles cannot be relied on to invalidate legislation. I will address two of them here as they are most relevant to the case at bar.

[83] First, there is a risk that reliance on principles that are "wholly untethered from the text" of the Constitution is an unwarranted intrusion by the court into legislative authority to amend the Constitution, "thereby raising fundamental concerns about the legitimacy of judicial review and distorting the separation of powers" (*City of Toronto* at para. 58). It is an invitation to the court to give the Constitution additional meaning well beyond the text, rather than limiting the use of unwritten principles to flesh out the existing text or establish structural doctrines that flow coherently and implicitly from the existing text and architecture.

[84] In the case at bar, the plaintiffs suggest that this Court rely on unwritten principles such as democracy, rule of law, separation of powers, and parliamentary sovereignty to invalidate legislation authorizing the executive to make orders in an emergency.

[85] To do this would amount to an attempt to write into the *Yukon Act* a specific limit on the ability of the Legislature to legislate for the Executive Council (s. 18(c)). Not only is this a misuse of the unwritten principles, but the judicial imposition of such a limit is inconsistent with the developed jurisprudence about delegation of legislative powers.

[86] Second, the Supreme Court of Canada in *City of Toronto* highlights the risks of the abstract nature and nebulous content of the unwritten principles. They can serve to decrease legal certainty and predictability, they may make existing principles in the Constitution redundant, and they may undermine the boundaries or limits of the rights set out in existing text. The Supreme Court of Canada says it is preferable to contest legislation considered unfair or improper through the text of the Constitution or the ballot box.

[87] Because of their nebulous, abstract character, the unwritten principles can be used in arguments that either support or invalidate the legislation at issue, leading to the reduction in legal certainty. In this case I do not agree that the law supports the use of unwritten principles to invalidate legislation on their own. But even if they could be used in this way, or used to interpret the text of the *Yukon Act*, the unwritten principles support the position of the defendants in this case.

[88] For example, the meaning of the rule of law, one of the principles relied on by the plaintiffs in the case at bar, was described by the Supreme Court of Canada in *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49 (“*Imperial Tobacco*”), to have the following characteristics: 1) the same laws must apply to everyone, including government officials; 2) there is law that exists; 3) the state-individual relationship is regulated by law – that is, the relationship is legally founded. Under this definition, the

defendants can argue that *CEMA* does not offend the rule of law: it applies to everyone, its provisions are written, and the citizens' relationship with the state under *CEMA* is legally based.

[89] The plaintiffs argue that the state-individual relationship is not legally founded under *CEMA* because the statute's allocation of power to the executive offends the existing architecture in the *Yukon Act*. The defendants counter that the existing jurisprudence (reviewed below) supports the delegation of powers in *CEMA*. I agree with the defendants' analysis.

[90] The plaintiffs also rely on parliamentary sovereignty as an unwritten principle to invalidate *CEMA*. They say the unchecked, unconstrained power *CEMA* gives to the executive undermines parliamentary sovereignty. The defendants say that *CEMA* was duly passed by the Legislature. As noted in the case of *R (on the application of Miller) v The Prime Minister*, [2019] UKSC 41 ("*Miller*") at para. 41, the Supreme Court of the United Kingdom stated that the constitutional principle of parliamentary sovereignty means that legislation itself ("laws enacted by the Crown in Parliament"), under the Constitution of the United Kingdom, remains "the supreme form of law". Similarly, in the decision of *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48 ("*Pan-Canadian Securities*") at para. 73, the Supreme Court of Canada described parliamentary sovereignty as the legislature's authority to enact laws on its own and the authority to delegate, among other things, the power to make binding but subordinate rules and regulations, without restriction. In other words, "delegated power is rooted in and limited by the governing statute, which of course takes precedence over every

exercise of power" (at para. 74). The legislature must retain the authority to revoke the delegated power.

[91] In the case at bar, *CEMA* gives the executive the ability to make orders "despite any other Act", but this is circumscribed by *CEMA* itself. The executive must make orders within the parameters of *CEMA* and only the legislature retains the power to revoke or amend *CEMA*. The defendants' argument that *CEMA* is consistent with parliamentary sovereignty is supported by the content of CEMA.

[92] The plaintiffs further agree that *CEMA* offends the democratic principle because of the inability of the Legislature to debate, discuss, amend, or revoke any of the provisions or their effects.

[93] In fact, as the defendants note, proposed amendments to *CEMA* were introduced, debated, and ultimately defeated in the Legislature between October 14 and November 18, 2020. An all-party Special Committee on Civil Emergency Legislation was established to receive submissions and provide a report. The Yukon government announced in March 2022 it was reviewing *CEMA* to improve its ability to respond in an emergency. Further, the Legislature unanimously voted in favour of a declaration of a civil state of emergency on two occasions. All of this is consistent with democracy.

[94] Democracy guarantees parliamentary sovereignty (*Gateway Bible Baptist Church et al v Manitoba et al*, 2021 MBQB 218 ("*Gateway Bible*") at para. 32). Democracy has been described as "a political system of majority rule" (*Reference Secession* at para. 63). The Supreme Court of Canada has described it as "the process of representative and responsible government and the right of citizens to participate in the political process as voters" (*Reference Secession* at para. 65). Democratic legislatures

and an executive accountable to them require ongoing discussion, exchange of ideas, compromise and negotiation, and a consideration of all views and voices. I agree with the defendants that the principle of democracy was upheld in this context.

[95] These examples of the application of the unwritten principles to the facts in the case at bar show they can be used in arguments about invalidity of the legislation or in support of the legislation. In this case, the unwritten principles are more supportive of the defendants' position. In any event, the lack of legal certainty and predictability that arises is a significant and valid reason why they cannot be used on their own to support a constitutional challenge to the invalidity of legislation.

[96] The plaintiffs' oral argument that the unwritten principles aid in the interpretation of the text of the *Yukon Act*, especially ss. 17-23 and the preamble referring to responsible government, also suffers from its inconsistency with the prevailing jurisprudence (reviewed below). The jurisprudence shows that the delegation of powers in *CEMA* does not offend the structure of governance set out in *Yukon Act.* While responsible government does appear in the preamble of the *Yukon Act,* converting it from an unwritten principle to a part of the written text, *CEMA* was democratically passed into law by the Legislature, the Legislature has the constitutional authority to delegate to the executive as set out in *CEMA* and within its parameters, and the Legislature retains the ability to amend, repeal, revoke, expand, or constrain *CEMA* or any part of it.

[97] The logical extension of the plaintiffs' arguments that the delegation of power in *CEMA* is unconstitutional is that the Court writes limits into the legislation that the Legislature did not intend. The following review of jurisprudence in addressing the

plaintiffs' specific arguments explains why the plaintiffs' arguments are not supported by the law in Canada, as it has developed and currently exists.

C. Analysis of Plaintiffs' specific arguments

i) Delegation of powers including policy-making is not abdication of legislative responsibility

[98] The plaintiffs say that *CEMA* forces the Legislature to abandon its responsibility to decide policy to the executive. It does this by allowing the executive to make orders in multiple areas ranging from border controls and quarantine to licensing and access to information and privacy.

[99] Legal authority beginning in 1883, including authoritative academic commentary, supports the defendants' position that the delegation of authority in *CEMA* does not represent an abdication of legislative authority. The decision of the Court of Queen's Bench of Alberta (as it was then) in *R v Ingram*, 2021 ABQB 343 ("*Ingram*") at para. 31 (aff'd 2022 ABCA 97, leave denied [2022] SCCA No 145) comprehensively reviewed these authorities.

[100] In *Hodge v The Queen*, [1883] UKPC 59 at 11-12 ("*Hodge*"), the Judicial Committee of the Privy Council held that the provision of the *Constitution Act, 1867* giving provincial legislatures the exclusive authority to make laws for matters set out in s. 92 meant that they were not delegates of or mandated by the Imperial Parliament. The provincial legislatures had "authority as plenary and as ample within the limits prescribed by Sect. 92 as the Imperial Parliament … [w]ithin these limits of subjects and area the Local Legislature is supreme" (p. 12). In that case the Privy Council held that the provincial legislature had the power and competence under s. 92 to delegate power through statute to the municipality to issue tavern licences.

[101] Building on this established authority of the legislature to delegate, the Court in *In Re George Edwin Gray* (1918), 57 SCR 150 ("*Re Gray*") at 156-157, held that an order in council made by the Governor in Council (the executive branch of Government) under s. 6 of the *War Measures Act, 1914* removing Mr. Gray's exemption from military service was constitutionally valid. Section 6 of the *War Measures Act*, *1914* authorized the Governor in Council to make any orders or regulations he deemed advisable "by reason of the existence of real or apprehended war, invasion or insurrection" (*Re Gray* at 156). Mr. Gray, who had been exempted from military service by statute, was ordered to report for duty. When he refused, he was arrested and detained. He argued his detention was unlawful because the powers conferred by s. 6 of the *War Measures Act, 1914* "were not intended to authorize the Governor-in-Council to legislate inconsistently with any existing statute, and particularly not so as to take away a right (the right of exemption) acquired under a statute" (*Re Gray* at 158).

[102] In dismissing Mr. Gray's argument, the Supreme Court of Canada wrote at 166-7 that the words of s. 6 of the *War Measures Act, 1914* were:

> … comprehensive enough to confer authority, for the duration of the war, to "make orders and regulations" concerning any subject falling within the legislative jurisdiction of parliament – subject only to the condition that the Governor-in-council shall deem such "orders and regulations" to be by reason of the existence of real or apprehended war, etc. advisable.

[103] The Supreme Court noted that the authority was limited in two ways: first, it was exercisable only during war, and second, the measures passed must have been deemed advisable by reason of war by the Governor in Council. The Court wrote at 170 and 182:

> There is no attempt to substitute the executive for parliament in the sense of disturbing the existing balance of constitutional authority by aggrandizing the prerogative at the expense of the legislature. The powers granted could at any time be revoked and anything done under them nullified by parliament, which parliament did not, and for that matter could not, abandon any of its own legislative jurisdiction. The true view of the effect of this type of legislation is that the subordinate body in which the law-making authority is vested by it is intended to act as the agent or organ of the legislature and that the acts of the agent take effect by virtue of the antecedent legislative declaration (express or implied) that they shall have the force of law. …
>
> ….
>
> … At all events we, as a court of justice, are concerned with is to satisfy ourselves what powers Parliament intended to confer and that it possessed the legislative jurisdiction requisite to confer them. …

[104] The next authoritative decision on this issue was *Shannon v Lower Mainland Dairy Products Board*, [1938] 4 DLR 81 (PC). The Privy Council found it was within the powers of the provincial legislature to delegate legislative powers to the executive to set up a marketing board that would establish or approve schemes for the control and regulation within the province of transportation, packing, storage, and marketing of natural products and to vest in those boards any powers necessary or advisable to exercise those functions. This power gave to the boards a wide discretion to decide which products would be regulated and the scope and content of that regulation. The Privy Council wrote at p. 87:

> … Within its appointed sphere the Provincial Legislature is as supreme as any other Parliament: and it is unnecessary to try to enumerate the innumerable occasions in which Legislatures … have entrusted various persons and bodies with similar powers to those contained in this Act.

[105] Several more recent decisions from the Supreme Court of Canada have affirmed these principles. In *Pan-Canadian Securities Regulation* the Supreme Court of Canada held that a draft federal *Capital Markets Stability Act* did not exceed the trade and commerce power of the federal government under s. 91(2) of the *Constitution Act, 1867* because:

> [73] … Parliamentary sovereignty means that the legislature has the authority to enact laws on its own *and* the authority to delegate to some other person or body certain administrative or regulatory powers, including the power to make binding but subordinate rules and regulations. Accordingly, the power to make such rules and regulations is sometimes referred to as a "subordinate law-making power". This kind of delegation occurs quite frequently in the administrative state, where statutory schemes often merely "set out the legislature's basic objects", such that "most of the heavy lifting [gets] done by regulations, adopted by the executive branch of government under orders-in-council" (B. McLachlin, P.C., *Administrative Tribunals and the Courts: An Evolutionary Relationship*, May 27, 2013 (online), see also Hogg (5th ed.), at pp. 14-1 and 14-2).

[106] This observation of the development of the administrative state in Canada was echoed by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, where they wrote:

> [202] … Parliament and the provincial legislatures have entrusted a broad array of complex social and economic challenges to administrative actors, including regulation of labour relations, welfare programs, food and drug safety, agriculture, property assessments, liquor service and production, infrastructure, the financial markets, foreign investment, professional discipline, insurance, broadcasting, transportation and environmental protection, among many others. Without these administrative decision-makers, "government would be paralyzed and so would the courts" (Guy Regimbald, *Canadian Administrative Law* (2nd ed. 2015) at p. 3).

[107] Further, the Court of Appeal of British Columbia noted in *Sga'nism Sim'augit (Chief Mountain) v Canada (Attorney General)*, 2013 BCCA 49 ("*Sga'nism Sim'augit*") at para. 90 that "there is no constitutional prohibition against delegating powers to an independent authority, even where that authority is not functionally subordinate to Parliament or the Legislature".

[108] In *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 ("*Greenhouse Gas*"), the Supreme Court of Canada affirmed all of the above authorities on the issue of the legislature's ability to delegate, and referenced two additional authorities - *Reference As to the Validity of the Regulations in relation to Chemicals*, [1943] SCR 1, which affirmed *Re Gray*; and *R v Furtney*, [1991] 3 SCR 89, where the Court commented in *obiter* at 104:

> … The power of Parliament to delegate its legislative powers has been unquestioned, at least since the *Reference as to the Validity of the Regulations in Relation to Chemicals*. … The delegate is, of course, always subordinate in that the delegation can be circumscribed and withdrawn … [citations omitted].

[109] The Supreme Court of Canada in *Greenhouse Gas* upheld the delegation of legislative power to the executive. At issue was whether federal legislation that set minimum standards of greenhouse gas pricing was a matter of national concern, coming within Parliament's power to legislate for peace, order, and good government. The Court said:

> [85] This Court has consistently held that delegation such as the one at issue in this case is constitutional. Even broad or important powers may be delegated to the executive, so long as the legislature does not abdicate its legislative role. …

[110] Respected academic commentators have explained and confirmed these findings. Peter Hogg in, *Constitutional Law of Canada* (5th ed.) (Toronto: Carswell 2011), looseleaf, stated:

> It is impossible for the federal Parliament or any provincial Legislature to enact all of the laws that are needed in its jurisdiction for the purpose of government in any given year. When a legislative scheme is established, the Parliament or the Legislature will usually enact the scheme in outline only, and will delegate to a subordinate body the power to make laws on matters of detail. The subordinate body (or delegate) to which this law-making power is delegated is most commonly the Governor in Council or the Lieutenant Governor in Council; each of these bodies is in practice the cabinet of the government concerned. Sometimes a power of law-making is delegated to a single minister, or a public corporation, or a municipality, or a school board, or an administrative agency, or a court. The body of law enacted by these subordinate bodies vastly exceeds in bulk the body of law enacted by the primary legislative bodies. (at s. 14.1 (a)).

[111] John Mark Keyes, in his book *Executive Legislation, Delegated Law Making by the Executive Branch* (Toronto: Butterworths, 1992): wrote: "the overwhelming weight of case law indicat[es] that there are few, if any, restrictions on delegating to the executive" (at 42). He described the primary constraint as the legislature's retention of their power to amend or repeal delegating legislation, noting that "irrevocable delegation seems legally impossible given its conflict with parliamentary supremacy" (at 43).

[112] This unbroken line of authority, from *Hodge* to *Greenhouse Gas*, supported by authoritative academic commentary, shows that the legislature can delegate policy-making to the executive. In fact, in the modern administrative state, governments and the courts could not function without this kind of delegation. This delegation does not constitute abdication of the role of the legislature, as long as the delegated powers

are rooted in the governing statute. Abdication would occur if the legislature also delegated such powers permanently and irrevocably to the executive, including the ability to amend, repeal, expand, or constrain the delegating legislation itself.

[113] In this case, the plaintiffs do not dispute in general the delegation necessary for the modern administrative state. They dispute the breadth and scope of the delegation authorized by *CEMA*.

[114] The Legislature has chosen through *CEMA* to allow the Minister to decide policy in the context of a state of emergency. States of emergency necessitate quick and decisive action. The policy-making authority given to the executive by *CEMA* is no different from the many examples in the cases referred to above and it is especially similar to the situation in *Re Gray,* the decision under the *War Measures Act, 1914*. Significantly, *CEMA* does not remove the ability of the Legislature to amend, repeal, revoke, constrain, or expand the legislation. The facts of this case show that proposed amendments were in fact debated, albeit defeated, in the Legislature several times while the state of emergency was ongoing. This demonstrates the retention of necessary legislative supervisory authority by the Legislature over the executive.

[115] While other jurisdictions may contain different legislative provisions that allow for less delegation or additional supervision and oversight of their legislatures, these legislative choices do not support a finding of constitutional invalidity of *CEMA*. Each jurisdiction determines through the democratic process of legislative debate and approval what its emergency legislation will contain. The plaintiffs' disagreement with the political and democratic choices made by the Legislature in passing *CEMA* and defeating proposed amendments, does not constitutionally invalidate the statute.

[116] The adjournment of the Legislature between March 19 and October 1, 2020, is also not relevant to the determination of the constitutionality of *CEMA*. First, the adjournment for seven months was voted on and unanimously approved. The *Yukon Act* and the *Charter* provide for a constitutional maximum period of one year between sittings of the Legislature. Although the opposition parties requested later that the Legislature return on an earlier date, there was nothing unconstitutional in the Yukon government's decision to uphold the agreed upon adjournment.

[117] Second, the adjournment did not constitute an abdication of legislative powers. Legislatures in Canada are often adjourned for lengthy periods. For example, the Nova Scotia legislature was adjourned for one year during the pandemic.

[118] Finally, most of the executive orders were made under *CEMA* while the Legislature was sitting, thereby providing a form of supervision and a more expeditious process if challenges to any of the orders were necessary.

ii) CEMA does not confer arbitrary or limitless powers on Minister

[119] The plaintiffs say that *CEMA*'s authorization of the executive to make orders "despite any other Act" and without limit on scope and content makes it unconstitutional because its arbitrariness and limitlessness usurp legislative authority.

[120] As the Court noted in *Re Gray* (at 160) and confirmed in *Greenhouse Gas* (at para. 85), it is up to the legislature to determine the breadth, scope, and limits of the powers it decides to delegate. In *Re Gray*, the Supreme Court of Canada upheld the ability of the legislature to delegate making orders and regulations concerning any subject within the legislative jurisdiction of Parliament, as long as that power was circumscribed by the conditions in the governing statute. The Governor in Council was

authorized during war time to make any orders or regulation “deemed necessary or advisable” (at 178) by reason of the existence “of real or apprehended war” (at 178). This included overriding other legislation enacted by Parliament.

[121] *CEMA* does the same thing – the executive is authorized to make orders despite any other act, but that can only occur under certain conditions. The Legislature thus placed limits on the powers conferred on the executive. These limits include those set out in ss. 1 and 6(1), which circumscribe the situation in which a state of emergency can be declared. Section 1 defines peacetime disaster[2], under which pandemic falls, and s. 6(1) restricts the ability of the Executive Council to declare a state of emergency by a finding that it meets the definition in s. 1. Once a state of emergency is declared, s. 9(1) further limits the powers to be exercised by the executive branch by restricting them to those “considered advisable for the purpose of dealing with the emergency” (s. 9(1)).

[122] *Re Gray* is an older authority and the *War Measures Act, 1914* has now been replaced by the federal *Emergencies Act*, RSC 1985, c. 22 (4th Supp.), which contains new supervisory and oversight provisions. However, this legislative choice made through the democratic process, does not make the principles in *Re Gray* inoperable or irrelevant. The findings in that decision, emanating from the wording of the *War Measures Act*, *1914* have been upheld in the many subsequent authorities reviewed above. The principles in *Re Gray* have been confirmed as recently as 2021 (*Greenhouse Gas*). It remains valid and binding authority.

[2] "peacetime disaster" means a disaster, real or apprehended, resulting from fire, explosion, flood, earthquake, landslide, weather, epidemic, shipping accident, mine accident, transportation accident, electrical power failure, nuclear accident or any other disaster not attributable to enemy attack, sabotage or other hostile action whereby injury or loss is or may be caused to persons or property in the Yukon.

[123] The existence of the extraordinary context of a peacetime disaster and state of emergency as defined in *CEMA* justifies the ability of the Minister to suspend or alter primary legislation (other than the governing statute) through secondary orders. Those orders are subordinate, because they cannot exceed the limits of *CEMA* and are circumscribed by its provisions.

[124] A policy basis for this legislative choice is that the contextual circumstances in which the legislation was developed can change during a state of emergency, and consequently make that original legislation inadequate to address the emergency circumstances. The ability to suspend operation of other legislation can be necessary to meet the needs created by the emergency.

[125] Allowance for the ability of a statute to alter other primary legislation was endorsed by the Court of Appeal of British Columbia in *Sga'nism Sim'augit* in 2013:

> [90] … [T]here is no constitutional prohibition against delegating powers to an independent authority … That is so even where the delegate is authorized to make rules or laws which prevail over inconsistent or conflicting federal or provincial legislation as there is a presumption that the legislature did not intend "to make or empower the making of contradictory enactments" [citations omitted].

[126] *CEMA* authorizes the Minister to suspend primary legislation if necessary, only temporarily. Once the declaration of the state of emergency no longer exists, none of the powers exercised under *CEMA* by the executive is in force. Other statutory provisions that were overridden or altered regain their force and effect.

[127] While the delegated powers in *CEMA* have a subjective component and confer broad discretion, this breadth does not mean they are unlimited or unreviewable. The orders made under *CEMA* must accord "with the purposes and objects of the parent

enactment read as a whole" (*Katz Group Canada Inc v Ontario (Health and Long-Term Care*), 2013 SCC 64 ("*Katz Group"*) at para. 24) and must be consistent "within the literal (and often broad) terminology of the enabling provision" (at para. 24). As noted above, *CEMA* does not authorize the executive to alter the terms of *CEMA* itself. The phrase "despite any other Act" refers only to other legislation, not the enabling legislation of *CEMA*, which can only be altered, revoked, or repealed by the Legislature.

[128] The Minister remains accountable to the executive and the Legislature in the exercise of his authority under *CEMA*. The Executive Council must retain the confidence of the Legislative Assembly.

iii) CEMA does not delegate the full legislative competence or authorize powers outside of s. 18 of the Yukon Act

[129] The plaintiffs argue that the Legislature has delegated its full panoply of powers to the executive through *CEMA*. However, the Legislature has placed limits on the delegation of powers within *CEMA*: the orders are impermanent, and their operation is conditional upon an existing state of emergency and for the purpose of dealing with emergency. As well the Legislature's exclusive retention of the ability to amend, repeal, revoke, expand, or constrain *CEMA* means its full legislative powers have not been delegated through *CEMA*.

[130] The plaintiffs further argue that some of the powers exercised by the Minister or the executive under *CEMA* extend beyond those powers authorized by s. 18 of the *Yukon Act* (similar to s. 92 of the *Constitution Act, 1867*). Examples they provide are the quarantine for returning residents and border control. These excessive powers they say render *CEMA* unconstitutional. The plaintiffs did not elaborate on their arguments about

the exercise of powers beyond s. 18 of the *Yukon Act,* other than to identify these examples.

[131] The Supreme Court of Canada held in *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69 at para. 133, that any broad discretion conferred by a statute is subject to the constitutional constraints on the entity that conveys the discretion. Those constraints flow through to all regulations, by-laws, orders, decisions and any other legislative, administrative or judicial actions dependent on that statute for their validity.

[132] *CEMA* does not authorize the executive to exercise powers beyond those provided to the Legislature under the *Yukon Act*. While the powers permitted under *CEMA* are broad, they are circumscribed by those constitutional parameters. Moreover, even if the executive did exercise powers beyond the authority set out in *CEMA* this would not constitutionally invalidate *CEMA*. The remedy in that instance would be to challenge the exercise of that particular power through judicial review, not the enabling statute.

iv) CEMA is not unconstitutional for failing to give the Legislature an active supervisory role

[133] The plaintiffs argue that the absence in *CEMA* of an active supervisory role for the Legislature in the exercise of power by the executive makes it unconstitutional. They say the Legislature's failure to retain the power to end a declaration of a state of emergency, and the ability of a state of emergency to continue at the sole subjective discretion of the executive create invalidity.

[134] This argument overlooks the continued ability of the Legislature to amend, repeal, revoke, expand, or constrain the powers it has chosen to delegate at any time.

This ability to nullify any of the powers remains with the Legislature and provides a supervisory function.

[135] In fact, in this case, the Legislature unanimously agreed to the declaration and subsequent extension of a state of emergency in November and December 2020. Proposed amendments to *CEMA* were debated and defeated in the Legislature several times during the ongoing state of emergency. The ultimate supervisory control by the Legislature was maintained through its ability to amend or revoke the *CEMA* provisions. The fact that such attempts were unsuccessful is a reflection of the democratic process at work, and not of the unconstitutionality of *CEMA*. As stated in *Re Gray* at 160:

> There are obvious objections of a political character to the practice of executive legislation in this country because of local conditions. But these objections should have been urged when the regulations were submitted to parliament for its approval, or better still, when the "War Measures Act" was being discussed. Parliament was the delegating authority, and it was for that body to put any limitations on the power conferred on the executive. …

[136] Similarly, the plaintiffs' objections to *CEMA*'s delegation of authority to the executive appear to be based on their political disagreement with the nature and scope of the decisions of the executive. Such objections do not equate to a valid challenge of constitutionality. If the Legislature is unable to make amendments to *CEMA* due to the views and votes of its elected representatives, the remedy for those in disagreement is at the ballot box, not through a challenge to the constitutionality of the valid legislation.

v) Conclusion on Issue #1

[137] Unwritten constitutional principles cannot be used on their own to invalidate *CEMA.* Those principles in any event are consistent with the valid constitutional status of *CEMA.* The existing jurisprudence supports the ability of the Legislature to delegate

powers in the manner done by *CEMA.* The remedy of judicial review remains if the executive exercise powers outside of the parameters of *CEMA,* the *Yukon Act* or the *Charter.*

Issue #2 – Limitation of Liability and Ousting of Core Jurisdiction of Court

A. *Positions of Parties*

i) Plaintiffs

[138] The plaintiffs' challenge to s. 10 of *CEMA* is twofold: 1) the Crown is improperly immunized from liability for damages for actions taken during the state of emergency; and 2) proceedings in which coercive orders for the government to do or to refrain from doing something are inappropriately barred.

[139] The plaintiffs say that the grant of immunity from legal action to municipalities, government officials, and the Crown in s. 10 violates the doctrine of the core jurisdiction of the superior courts. This doctrine has its roots in the rule of law and has been expressed in authorities beginning with *MacMillan Bloedel Ltd v Simpson*, [1995] 4 SCR 725. It provides that certain inherent powers of the courts are core to their function, such as the ability to control their own processes and to review exercise of public power.

[140] The plaintiffs say s. 10 results in a denial of access to the courts and undermines s. 38 of the *Yukon Act* and the rule of law. Section 38 of the *Yukon Act* provides: "[t]he Governor in Council shall appoint the judges of any superior, district or county courts that are now or may be constituted in Yukon". This section mirrors s. 96 of the *Constitution Act, 1867*. The plaintiffs say that if people cannot challenge government actions in court, they cannot hold the state to account (*Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59 ("*Trial Lawyers*")

at para. 40). The plaintiffs say *CEMA*'s insulation of executive actions from the judicial review remedies of injunctions and *mandamus* is a breach of s. 38 of the *Yukon Act*.

ii) Defendants

[141] As a preliminary matter, the defendants argue the plaintiffs lack both private interest and public interest standing to bring this challenge to s. 10. They say the plaintiffs are not directly affected by this section because they are not seeking damages or injunctive or *mandamus* relief against the Crown or any other person referenced in s. 10. They do not meet the test for public interest standing because they do not have sufficient interest in the proceeding, and they have not shown that this proceeding is a reasonable and effective manner in which the issue may be brought before the court (*Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 ("*Downtown Eastside*") at paras. 43 and 44).

[142] If the standing argument fails, the defendants argue that *CEMA* does not prevent access to the courts as required by s. 38 of the *Yukon Act*. Nor does *CEMA* eliminate the Court's ability to decide legal issues and enforce the law. The inability to sue certain people or institutions for actions taken in an emergency situation is not an unconstitutional intrusion, because only certain substantive rights are affected by *CEMA*, not the jurisdiction of the courts.

[143] The defendants further say that although *CEMA* removes the availability of some judicial review remedies, it does not eliminate all of them. The Court retains its ability to review government action and hold the government to account.

B. *Standing of plaintiffs to challenge constitutionality of s. 10 of CEMA*

[144] Private interest standing requires the plaintiffs to be directly affected by the legislation they are challenging (*Campisi v Ontario*, 2017 ONSC 2884 at paras. 7-18; *District of Kitimat v Alcan Inc*, 2006 BCCA 75 at para. 92). Here, the plaintiffs are not directly affected by the operation of s. 10 of *CEMA*. They have not provided any facts to demonstrate their inability to have claims adjudicated or relief granted by this Court. They are not claiming damages against the Crown, nor are they seeking an injunction or *mandamus* against the Crown. Section 10 has not barred them from bringing this legal challenge. Part of the relief requested is for declarations of constitutional invalidity of ss. 6-9 of *CEMA* based on unauthorized delegation of powers, for which a factual connection was provided through affidavit evidence about the negative effects of some of the executive orders on the plaintiffs. However, no such facts are provided to connect the plaintiffs with the operation of s. 10. They have not established private interest standing.

[145] Public interest standing is a discretionary determination requiring consideration of three factors:

> (1) whether there is a serious justiciable issue raised;
>
> (2) whether the plaintiff has a real stake or a genuine interest in it; and
>
> (3) whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts … [*Downtown Eastside* at para. 37].

[146] The onus is on the plaintiffs to persuade the court to grant standing based on these factors, applied purposively and flexibly (*Downtown Eastside* at para. 37). The

determination of public interest standing is not to be done rigidly or in a formulaic way, but courts should take a generous and liberal approach in exercising their discretion.

[147] At the root of the law of standing is the need to strike a balance "between ensuring access to the courts and preserving judicial resources" (*Canadian Council of Churches v Canada (Minister of Employment and Immigration)*, [1992] 1 SCR 236 at 252 ("*Canadian Council of Churches*")). Courts have recognized that limitations on standing are necessary because not everyone who would like to litigate an issue, whether or not it affects them, should be entitled to do so (*Downtown Eastside* at para. 22).

[148] The Court in *Downtown Eastside* described three purposes of public interest standing (paras. 26-30). First, restrictions on standing are part of the gatekeeping function of the courts, to ensure they do not become overburdened with marginal or redundant cases, and to screen out "busybody" litigants – in other words, litigants who do not have a direct or special interest in the proceeding. Priority of scarce judicial resource allocation should be given to those with a personal stake in the outcome of a case.

[149] The second purpose of limiting standing was described as the courts needing the "benefit of contending points of view" of those most directly affected by the litigation to have the evidence and arguments presented thoroughly and carefully.

[150] The third purpose of limitations on standing is to ensure the courts play their proper role within our democratic system of government. The question to be litigated must be a justiciable one, that is, one that is appropriate for judicial determination.

[151] The principle of legality underlies the development of standing in public interest cases. Legality means ensuring that the state acts in conformity with the Constitution and the law and no law can be immunized from challenge.

[152] In this case, weighing the three factors cumulatively and applying a purposive and flexible approach, I will grant the plaintiffs public interest standing to argue the constitutional validity of s. 10.

[153] First, there is no question that whether or not s. 10 infringes s. 38 of the *Yukon Act* is a serious justiciable issue. The defendants concede this.

[154] Second, a primary consideration in the factor of determining the nature of the plaintiffs' interest is the need to conserve scarce judicial resources. Here the case is already before the Court on issues where the plaintiffs' standing was not challenged. This s. 10 argument of the plaintiffs is a secondary one and did not take significant time at the hearing or occupy a large portion of the written materials. The legitimate concern about economical use of scarce judicial resources is not a significant factor here, since the Court is already adjudicating the litigation.

[155] Further, although there is no clear factual connection between the plaintiffs' circumstances and s. 10, more generally, the argument that *CEMA* infringes the constitutionally mandated separation of powers is already before the Court, albeit in the context of the legislature and the executive, not the judiciary. The plaintiffs' similar argument about s. 10 is consistent with their interest in ensuring the statute is constitutionally valid and in accordance with the structure of the Constitution.

[156] Third, the Supreme Court of Canada in *Downtown Eastside* confirmed an applicant does not need to show there is no other or even any other reasonable and

effective means of bringing the matter before the court. Instead, the question to be asked is whether the proposed lawsuit is, in all of the circumstances, a reasonable and effective means of bringing the matter before the court (paras. 44 and 52).

[157] Examples of considerations for assessing this factor set out in *Downtown Eastside* include: 1) the applicant's resources, expertise, and ability to situate the issues in a concrete factual setting in bringing forth the claim; 2) whether the issues are of public interest and go beyond the interests of those most directly affected; 3) whether on a pragmatic approach there are realistic alternative means that provide a better context and more efficient use of judicial resources, such as parallel proceedings; and 4) whether the granting of public interest standing could prejudice challenges by others with more direct interest, or could affect those with direct interest who have deliberately refrained from suing (para. 51).

[158] In this case, the issues are clearly ones of public importance and public interest beyond the immediate interest of the plaintiffs. Determining the validity of a privative clause engages the concepts of access to justice and the proper role of the courts. There are no parallel proceedings on this issue, and a slim possibility at this time of other potential plaintiffs with more factual connections raising the same issues, because the state of emergency has not been in effect since March 2022. There is unlikely to be prejudice to others with a more direct interest. Although it would be preferable to determine this issue with a factual base, the facts that the parties are already before the Court making a constitutional validity argument about the same statute, the context is the same, the legal argument is related to the one already being made, and the issue is one of public interest, all favour the plaintiffs' public interest standing on this issue. This

is a result of the flexible, purposive approach to public interest standing, a consideration of the factors cumulatively, as well as the way in which this issue engages the principle of legality, that is, the need for the court to ensure the government acts lawfully.

C. *Section 10 of CEMA does not infringe s. 38 of the Yukon Act*

[159] Section 38 of the *Yukon Act* mirrors s. 96 of the *Constitution Act, 1867*. As noted in *Trial Lawyers*, although its words refer only to the appointment of judges:

> [29] … [I]ts broader import is to guarantee the core jurisdiction of provincial superior courts: Parliament and legislatures can create inferior courts and administrative tribunals, but [t]he jurisdiction which forms this core cannot be removed from the superior courts by either level of government, without amending the Constitution" (*MacMillan Bloedel* at para. 15). ...

[160] Further, as said by the Court in *MacMillan Bloedel* "[i]n this way, the Canadian Constitution confers a special and inalienable status on what have come to be called the 'section 96 courts'" (para. 52). Government cannot enact legislation that abolishes the superior courts or removes part of their core or inherent jurisdiction (*MacMillan Bloedel* at para. 37; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island,* [1997] 3 SCR 3 at para. 88).

[161] The core jurisdiction of s. 96 courts is well described by the Supreme Court of Canada in *Trial Lawyers*. In that case, the Court found that the provincial government's decision to legislate hearing fees was unconstitutional because it effectively prevented access to the courts. The Court agreed with the finding of fact of the trial judge on the evidence that the hearing fees were unaffordable and limited access for litigants who

did not come within the exemptions for those who were indigent or impoverished. In summarizing why this fact amounted to an infringement of s. 96, the Court wrote:

> [32] The historic task of the superior courts is to resolve disputes between individuals and decide questions of private and public law. Measures that prevent people from coming to the courts to have those issues resolved are at odds with this basic judicial function. The resolution of these disputes and resulting determination of issues of private and public law, viewed in the institutional context of the Canadian justice system, are central to what the superior courts do. Indeed, it is their very book of business. To prevent this business being done strikes at the core of the jurisdiction of the superior courts protected by s. 96 of the *Constitution Act, 1867*. As a result, hearing fees that deny people access to the courts infringe the core jurisdiction of the superior courts.

[162] The Supreme Court of Canada continued to describe the cases under s. 96 as either ones that transferred part of the core jurisdiction of the superior court to another decision-making body, or ones where privative clauses in legislation barred judicial review. These represented situations where laws denied "access to the powers traditionally exercised" (*Trial Lawyers* at para. 33) by superior courts, thereby impinging on their core jurisdiction.

[163] Examples of decisions where courts have struck down legislation for these reasons include:

- Legislation attempting to transfer jurisdiction of the superior courts to a statutory body (*Re Residential Tenancies Act, 1979*, [1981] 1 SCR 714).
- Legislation imposing barriers that denied litigants access to courts (*Trial Lawyers*).

- Legislation with privative clauses that completely excluded the supervisory jurisdiction of the courts (*Crevier v The Attorney General of the Province of Quebec and Robert Cofsky*, [1981] 2 SCR 220).

[164] *CEMA* does not fall into any of these categories. By protecting the Crown, municipalities, and persons employed by those institutions from liability for damages for actions taken during a state of emergency, the legislation is not denying access to the courts. Instead *CEMA* limits the bases for the causes of action and the remedies to be obtained from the Court.

[165] The legislature can validly and legally abolish or create causes of action (see *Imperial Tobacco*; *Wells v Newfoundland,* [1999] 3 SCR 199 at 217; *Authorson v Canada (Attorney General)*, 2003 SCC 39). For example, the court in *Flette et al v The Government of Manitoba et al*, 2022 MBQB 104 ("*Flette*"), relied on the decision in *Alberta v Kingsway General Insurance Co*, 2005 ABQB 662, where the court held that Alberta's retroactive legislation extinguishing Kingsway's cause of action and barring similar actions against the government did not infringe s. 96. "The province has the authority to enact legislation concerning a particular right or property affecting the ability to bring an action in the superior court" (*Flette* at para. 145).

[166] The court in *Flette* further held that a section of a statute that barred actions related to *Children's Special Allowances Act*, SC 1992, c. 48, benefits for certain children, did not infringe s. 96. The court wrote that s. 92(13) (equivalent to s. 18(1)(j) of the *Yukon Act*) gives jurisdiction to the legislative branch to bar civil causes of action. That bar must be express, unambiguous, and clear. In other words, the legislature has

the ability to determine the nature and content of laws, and what are legitimate issues to bring before the court.

[167] *CEMA* clearly, expressly, and unambiguously sets out the limitations on the ability of litigants to claim damages against the Crown, municipalities, and employees for actions taken in the state of emergency. This does not constitute an ousting of the Court's core jurisdiction as set out in s. 38. There is no constitutional right to damages or compensation.

[168] Judicial review is constitutionally guaranteed in Canada through the inherent power of superior courts to review administrative action and ensure it does not exceed its jurisdiction. The prohibition in s. 10 of the ability to seek relief by way of injunction or *mandamus* against the Crown and other government actors does not infringe s. 38 or the constitutional guarantee of judicial review as it does not preclude review of government action. Other remedies remain for judicial review. *Certiorari*, or a setting aside of the impugned legislation, is the most common judicial review remedy in public law. Also common are declarations, which although non-coercive, are required to be complied with by governments (*Newfoundland and Labrador (Attorney General) v Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4 at para. 248 per dissent on other points). Prohibition and *habeas corpus* also remain as remedies, as do remedies under s. 24(1) of the *Charter*, a general remedy of compensation where a *Charter* right has been infringed.

D. *Conclusion on Issue #2*

[169] The plaintiffs have public interest standing to argue this issue. Section 10 of *CEMA* does not oust the jurisdiction of the superior court to decide legal issues and

enforce the law but instead it changes the content of the law within its jurisdiction. The right to sue for damages is not constitutionally guaranteed. The Court also retains the ability to judicially review actions and decisions taken under *CEMA* and the remedies of *certiorari*, declaration, *prohibition*, and *habeas corpus* all remain available.

VII. CONCLUSION

[170] The plaintiffs have a fundamental disagreement with the powers granted to the executive by *CEMA*. The effect of many of the executive orders made during the pandemic had significant negative impacts on their businesses. The economic and logistical hardships they experienced as well as the feelings of frustration, disaffection and distrust directed towards government are undeniable.

[171] However, the plaintiffs are asking this Court to assume an inappropriate role by placing limits on a duly enacted piece of legislation that legitimately delegates powers to the executive. *CEMA* delegates powers in a way that is consistent with legal authority from *Hodge* to *Greenhouse Gas* permitting these types of powers to be delegated because they are within the governing statute and are consistent with the statute.

[172] The plaintiffs seek a declaration that *CEMA* as a whole is inconsistent with constitutional principles and is of no force and effect. In the alternative, they seek the same declarations for s. 10 of *CEMA*.

[173] The limits sought to be imposed by the plaintiffs on *CEMA* are undefined, and to grant a declaration of no force and effect of all or part of *CEMA* would represent an unlawful intrusion by the judiciary into the jurisdiction of the legislature. Judicial restraint in constitutional cases is a sound approach. There is no reason to depart from that approach in this case.

[174] The plaintiffs' application is dismissed. Costs may be spoken to in case management if the parties are unable to agree.

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DUNCAN C.J.