COURT OF APPEAL OF YUKON

Citation: *Mercer v. Yukon (Government of),* 2025 YKCA 5

Date: 20250516
Docket: 23-YU906

Between:

Ross Mercer

Appellant
(Plaintiff)

And

**The Government of Yukon,
Minister of Community Services of the Yukon Territory, and the
Attorney General of the Yukon Territory**

Respondents
(Defendants)

And

**Trent Andrew Jamieson, Douglas Craig Walker, Allan Patrick Mytrash,
Martin Gregory Loos, Jan Erik Martensson, and
Clayton Robert Thomas**

(Plaintiffs)

Before: The Honourable Chief Justice Marchand
The Honourable Mr. Justice Butler
The Honourable Justice MacPherson

On appeal from: An order of the Supreme Court of Yukon, dated November 3, 2023 (*Mercer v. Yukon (Government of)*, 2023 YKSC 59, Whitehorse Docket 20-A0032).

Counsel for the Appellant:	V. Larochelle A. Tomkins
Counsel for the Respondents, the Government of Yukon, Minister of Community Services of the Yukon Territory, and the Attorney General of the Yukon Territory:	C.J. Boies Parker, K.C. E. Ronsley
Place and Date of Hearing:	Whitehorse, Yukon November 19, 2024
Place and Date of Judgment:	Whitehorse, Yukon May 16, 2025

Written Reasons by:
The Honourable Mr. Justice Butler

Concurred in by:
The Honourable Chief Justice Marchand
The Honourable Justice MacPherson

Summary:

The appellant appeals the dismissal of his constitutional challenge to the Civil Emergency Measures Act [CEMA]. He argues the summary trial judge: (1) misunderstood the role played by unwritten constitutional principles in considering the validity of legislation; (2) failed to give effect to the principle of 'responsible government' as it applies to the Yukon Act; and (3) failed to identify the relevant limits of delegation. Held: Appeal dismissed substantially for the reasons of the trial judge. The judge properly set out the role of unwritten constitutional principles in determining the validity of legislation, while the appellant's argument is based on a misreading of binding authority. The appellant's position that the reference to 'responsible government' in the Yukon Act creates unique limits on delegation is ungrounded in authority and meritless. Finally, the judge's review of jurisprudence and commentary regarding the limits of delegated authority was thorough and without error. In contrast, the appellant's argument that CEMA's broad delegation is impermissible is not supported by the case law, nor by the text and operation of CEMA.

Reasons for Judgment of the Honourable Mr. Justice Butler:

[1] Ross Mercer appeals an order dismissing his challenge to the constitutionality of the *Civil Emergency Measures Act*, R.S.Y. 2002, c. 34 [*CEMA*]. The challenge was brought following the declaration, under *CEMA*, of a state of civil emergency in the Yukon during the COVID-19 pandemic between March 2020 and March 2022. Mr. Mercer and six others (the "plaintiffs") sought orders declaring *CEMA* to be inconsistent with the unwritten constitutional principles of Canada and, to the extent of that inconsistency, declaring *CEMA* to be of no force and effect. They also sought a declaration that s. 10 of *CEMA* is of no force and effect as it ousts the jurisdiction of the court. Following a summary trial, Chief Justice Duncan dismissed the plaintiffs' claims in reasons indexed at 2023 YKSC 59 ("Reasons").

[2] On appeal, Mr. Mercer argues the trial judge failed to appreciate the import of the arguments made at trial and the nature of the issue raised by his challenge. More precisely, he argues the judge fundamentally misunderstood his arguments by failing to appreciate that *CEMA* not only permits the delegation of legislative power to the executive branch, but also creates a shift in the structure of government that is inconsistent with constitutional norms. Mr. Mercer identifies three distinct errors: 1) the judge misunderstood the role played by unwritten constitutional principles in

considering the validity of the legislation; 2) she failed to give effect to the principle of "responsible government" as it applies to the *Yukon Act*, S.C. 2002, c. 7 [*Yukon Act*]; and 3) she failed to identify the limits of delegation as they relate to the issues raised by the constitutional challenge.

[3] In her Reasons, the judge set out the background to Mr. Mercer's challenge, detailed the arguments made before her, and canvassed the relevant jurisprudence. Contrary to Mr. Mercer's submissions on appeal, the Reasons are comprehensive, thoughtful, and responsive to the arguments made by the plaintiffs. In my view, the judge did not err as alleged, or at all.

[4] As I would dismiss the appeal substantially for the reasons of the trial judge, I will summarize the Reasons in some detail in order to set out the background, reasoning, and conclusions of the judge. I will then consider the errors alleged and explain why I see no merit in the arguments advanced on appeal.

The Trial Judge's Reasons

Background

[5] The development and spread of COVID-19 and its impact on Canadian lives is well known. As the trial judge noted in her Reasons, by December of 2022, more than 48,000 people had died from the infection in Canada and over 4.4 million people had been infected. COVID-19 was declared a global pandemic by the World Health Organization on March 11, 2020. The Yukon government, like most governments around the world, imposed public health measures and provided financial and other relief from the pandemic. The Yukon government's response was informed by the territory's particular characteristics: it is geographically isolated, the health care system has limited capacity and depends on visiting specialists and the frequent evacuation of patients, and there are many vulnerable people throughout the Yukon, including First Nations people. On March 18, 2020, the Yukon Chief Medical Officer of Health declared a public health emergency. The next day, the Legislative Assembly (the "Legislature") unanimously adopted a special Order to adjourn until October 1, 2020. On March 27, 2020, the Yukon Executive Council

("Executive Council") declared a state of emergency under s. 6(1) of *CEMA*: Reasons at paras. 8–13.

[6] Pursuant to s. 6(4) of *CEMA*, a state of emergency remains in effect for a maximum of 90 days, unless extended. The state of emergency was extended several times by the Executive Council so that it remained in effect until March 17, 2022, except for a brief break between August 25, 2021 and November 8, 2021. After the Legislature began sitting again in October 2020, and following considerable debate, it unanimously approved a motion on November 18, 2020, supporting "the current state of emergency in Yukon": Reasons at para. 15. On December 4, 2020, the Legislature unanimously passed a motion to extend the current state of emergency that was set to expire on December 8, 2020. Between November 2020 and the end of the state of emergency, the Legislature also considered legislation introduced to amend *CEMA* which would increase legislative oversight of executive decisions made under the *Act*. Following debate, the proposed amendments were defeated. The same amendments were defeated again in 2021, and very similar amendments were defeated in 2022. The Yukon government has continued to consider possible amendments to *CEMA*, but to date the legislation has not been amended: Reasons at paras. 14–23.

[7] The Minister of Community Services was charged as the Minister responsible for the exercise of powers under *CEMA* (the "Minister"). During the states of emergency, the Minister "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": Reasons at para. 24. The orders all lapsed when the state of emergency ended.

[8] After outlining this factual background, the judge set out the legislative context. She noted that the Constitution of Canada is partly written and partly unwritten, and highlighted the importance of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, and the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 as parts of the written

Constitution. The judge then explained the existence of unwritten constitutional principles ("UCP"), which are the foundation for Mr. Mercer's action and this appeal:

> [45] The unwritten part of the Constitution exists in part because the *Constitution Act, 1867* is based on the Constitution … 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).

[9] The *Constitution Act, 1867*, established the three branches of government: the legislature, the executive, and the judiciary. It also established the federal system of government, with a division of powers between the federal government and the provinces. The three northern territories, which are not included in the constitutional division of powers, were established by Acts of Parliament and have powers similar to those given to the provinces by s. 92. The relevant Act in this case is the *Yukon Act*, which the judge outlined as follows:

> [48] 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*.

[10] The judge observed that the constitutional status of the *Yukon Act* had not been judicially considered but was not raised directly by the plaintiffs' claims. She noted the Yukon had "evolved to having a fully representative, responsible public government, functioning like a province" such that "there is a strong argument that the *Yukon Act* operates like the Constitution in the Yukon": Reasons at para. 49. As she did not have to consider the issue, the judge 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": at para. 52. Mr. Mercer takes no issue with the judge's approach in this regard.

[11] The judge identified two issues raised by the plaintiffs' arguments:

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

(2) Does s. 10 of *CEMA* oust the core jurisdiction of the courts and eliminate judicial review?

Issue 1: Does *CEMA* infringe the Yukon's constitutional structure?

[12] The judge began her analysis of the first issue by setting out the five UCP relied on by the plaintiffs and providing a succinct overview of their arguments. It is worth setting out her statement of Mr. Mercer's argument in full as, in my view, it is an accurate distillation of his position both at trial and on appeal:

> [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.

[13] The judge further delineated the plaintiffs' principal arguments for the proposition *CEMA* was unconstitutional as follows: 1) it allows the executive, rather than the legislature, to decide policy; 2) it is a broad, unconstrained, and arbitrary delegation of power to the executive that amounts to an impermissible shift of legislative authority; 3) s. 9 of *CEMA* grants the entire legislative competence of the Legislature to the Minister; and 4) it fails to ensure a sufficient degree of supervision by the Legislature over the delegation of powers such that the executive is effectively unchecked: Reasons at paras. 58–62.

[14] The judge also noted the plaintiffs' emphasis on the inclusion of "responsible government" in the preamble to the *Yukon Act*, which they argued creates the textual basis for a declaration of unconstitutionality that is consistent with their interpretation of the decision in *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34 [*City of Toronto*].

[15] The judge then set out the respondents' position, which they repeat on appeal. As the judge accepted much of the respondents' position, I need not describe it except to say that the respondents argued *CEMA* does not represent an abdication of legislative authority and does not delegate powers arbitrarily or without limits.

[16] After setting out the parties' positions, the judge turned to consider the question of whether UCP can "independently invalidate legislation": Reasons at para. 71. She began by examining the parties' differing positions on the effect of the decision in *City of Toronto*. The judge observed that the Supreme Court of Canada has determined that UCP are foundational, and "dictate major elements of the architecture of the Constitution itself and are as such its lifeblood": Reasons at para. 74, quoting *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, 1998 CanLII 793 at para. 51, and citing *City of Toronto* at para. 167. However, she also noted, referring to *City of Toronto*, that the force of UCP is context dependent and "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": Reasons at para. 74, quoting *City of Toronto* at para. 54 (emphasis in original).

[17] The judge then turned to consider the use of UCP when considering challenges to legislation. She outlined the two ways UCP can be used to assist courts in considering the validity of legislation, as identified in *City of Toronto*:

a) By providing an interpretive aid to the text of the Constitution where it is "not itself sufficiently definitive or comprehensive" to answer a question; and

b) By assisting the development of structural doctrines that can be used to fill important gaps in areas where the Constitution is silent.

See Reasons at paras. 75–76, quoting *City of Toronto* at para. 65.

[18] The judge observed that the plaintiffs' reliance on UCP to invalidate *CEMA* did not fit within either of the uses of UCP identified in *City of Toronto*. The plaintiffs argued, as Mr. Mercer does here, that the decision in *City of Toronto* could be distinguished on the basis that it dealt with municipalities, which are not written in to the structure of the Constitution, and therefore there was no textual grounding to which UCP could apply. In this case, the plaintiffs' arguments concerned the legislative, executive, and judicial branch, all of which are clearly part of the structure created by the *Yukon Act*. On this basis, the plaintiffs argued there was a sufficient contextual anchor for the use of UCP to render *CEMA* unconstitutional.

[19] The judge characterized the plaintiffs' argument as a "misreading" of *City of Toronto*: Reasons at para. 79. She observed that in *City of Toronto*, the Court concluded that legislative competence cannot be narrowed or limited by the courts on the basis of unwritten principles, such as democracy. In doing so, the Court "reviewed all of the authorities that could be relied on to argue that unwritten constitutional principles can be used to invalidate legislation": Reasons at para. 79. The Court found that as s. 92(8) of the *Constitution Act, 1867* gives a province "absolute and unfettered legal power" to legislate with respect to municipalities, UCP could not be used to limit that authority: Reasons at para. 79.

[20] The judge also found the omission of municipalities in the structure of the Constitution was not a fact that makes *City of Toronto* distinguishable. The judge referred to the Supreme Court of Canada's conclusion on the role the principle of democracy could play in invalidating legislation, noting that while democracy was "relevant as a guide to the interpretation of the constitutional text", "it cannot be used as an independent basis to invalidate legislation": Reasons at para. 81, citing *City of Toronto* at paras. 63, 78.

[21] The judge then referred to two of the reasons why the Court in *City of Toronto* determined that UCP could not be relied on to invalidate legislation, as well as their particular relevance to the plaintiffs' challenge to *CEMA*. She noted:

> [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.
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> [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.
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> [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.
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> [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.
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> [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.

[22] At paras. 88 to 94 of her Reasons, the judge contrasted the plaintiffs' arguments on how certain UCP (democracy, rule of law, and parliamentary sovereignty) could be used to invalidate legislation with the defendants' arguments as to why those principles supported the constitutionality of *CEMA*. The judge concluded:

> [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.
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> [Emphasis added.]

[23] The judge then rejected the plaintiffs' contention that the application of UCP to the interpretation of the *Yukon Act* should lead to the conclusion that *CEMA* is unconstitutional because it delegates too much power or authority to the executive. She observed that *CEMA* was democratically enacted and "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": Reasons at para. 96. To hold otherwise would mean the court was writing "limits into the legislation that the Legislature did not intend": Reasons at para. 97.

[24] The judge then turned to analyze specific arguments advanced by the plaintiffs: 1) *CEMA* is unconstitutional because it forces extensive delegation, including of policy-making power, to the executive; 2) *CEMA* confers arbitrary or limitless powers on the Minister or the executive; 3) *CEMA* improperly delegates the full panoply of powers possessed by the Legislature to the executive; and 4) the failure to grant the Legislature a supervisory role renders *CEMA* unconstitutional.

i) Is CEMA unconstitutional because it allows extensive delegation, including of policy-making power, to the executive?

[25] The judge reviewed relevant jurisprudence and academic commentary to conclude that the delegation of authority in *CEMA* is constitutional and does not represent an abdication of legislative authority.

[26] First, the judge considered the formative cases on delegation—including *Hodge v. The Queen (Canada)*, [1883] UKPC 59; *In Re George Edwin Gray*, [1918] 57 S.C.R. 150, 1918 CanLII 533 [*Re Gray*]; and *Shannon v. Lower Mainland Dairy*

Products Board, [1938] 4 D.L.R. 81, 1938 CanLII 250 (P.C.)—which dismissed challenges to the delegation of powers from Parliament or provincial legislatures to municipalities and the executive branch, as well as from the executive to marketing boards. She then referred to more recent decisions from the Supreme Court of Canada affirming the ability of Parliament and provincial legislatures to delegate "subordinate law-making power" to other persons or bodies: Reasons at para. 105, citing *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48. She noted that the ability to entrust "a broad array of complex social and economic challenges to administrative actors" was essential to the functioning of the modern state, without which the "government would be paralyzed, and so would the courts": Reasons at para. 106, citing *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 202. The judge also quoted *Sga'nism Sim'augit (Chief Mountain) v. Canada (Attorney General)*, 2013 BCCA 49 at para. 90, leave to appeal to SCC ref'd, 35301 (22 August 2013) [*Sga'nism Sim'augit*] for the proposition 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": Reasons at para. 107. Finally, the judge turned to *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 [*Greenhouse Gas*], where the Court "affirmed all of the above authorities on the issue of the legislature's ability to delegate" (Reasons at para. 108) and upheld the delegation of legislative power to the executive, even of broad and important powers, "so long as the legislature does not abdicate its legislative role" (Reasons at para. 109, quoting *Greenhouse Gas* at para. 85).

[27] The judge next turned to academic commentators who have explained and confirmed the findings in the jurisprudence. She cited Peter Hogg's *Constitutional Law of Canada*, 5th ed. (Toronto: Carswell, 2011) (loose-leaf) for the observation that the delegation of the power to make laws is most commonly granted to the Governor in Council or the Lieutenant Governor in Council—bodies which are in practice the cabinet of the government concerned: Reasons at para. 110. She also quoted John Mark Keyes in *Executive Legislation, Delegated Law Making by the Executive Branch* (Toronto: Butterworths, 1992) at 42, who wrote: "the overwhelming

weight of case law indicat[es] that there are few, if any, restrictions on delegating to the executive": Reasons at para. 111.

[28] The judge concluded:

> [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.
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> [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*.
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> [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.

[29] The judge rejected the significance the plaintiffs sought to ascribe to comparisons between *CEMA* and emergency legislation in other jurisdictions because the fact other legislatures have made different choices is not a reason to find that the choices made democratically by the Legislature in the Yukon are constitutionally invalid. The judge also rejected the plaintiffs' submission the seven-month adjournment of the Legislature in 2020 was relevant to the constitutionality of *CEMA*, as the *Yukon Act* and the *Canadian Charter of Rights and Freedoms* provide for a maximum period of one year between sittings of the Legislature. Finally, the judge observed that most of the executive orders made under *CEMA* occurred when the Legislature was sitting, such that it had the opportunity to supervise and challenge orders if it wished to do so.

ii) Does CEMA confer arbitrary or limitless powers on the Minister or the executive?

[30] The judge rejected the plaintiffs' argument that *CEMA* is unconstitutional because it fails to limit the scope or content of powers—what the plaintiffs describe as the grant of arbitrary and limitless powers—that can be used by the executive when a state of emergency has been declared.

[31] She noted that in both *Re Gray* and *Greenhouse Gas*, the Court found it was up to the legislature to determine the breadth, scope, and limits of delegated powers. In *Re Gray*, the Court upheld Parliament's delegation of authority to the Governor in Council to make any orders or regulations "deemed necessary or advisable", including the ability to override other legislation: at 178. The judge noted *CEMA* does the same thing, but does so with some limitations on the exercise of power. Pursuant to ss. 1 and 6(1), the powers can only be exercised during a state of emergency that meets the statutory definition. Even after a state of emergency is declared, pursuant to s. 9(1) the Executive Council may only use powers considered advisable for dealing with the emergency.

[32] The fact these legislative constraints are limited does not make them unconstitutional. In noting this, the judge observed that the *War Measures Act* considered in *Re Gray* has since been replaced by the federal *Emergencies Act*, R.S.C. 1985, c. 22 (4th Supp.) which contains new supervisory and oversight provisions. However, the fact it has been replaced "does not make the principles in *Re Gray* inoperable or irrelevant": Reasons at para. 122.

[33] In rejecting the submission that *CEMA* confers unlimited or arbitrary powers, the judge noted that the existence of a peacetime disaster necessitating the state of emergency justifies the ability of the Minister to suspend or alter primary legislation. The contextual circumstances in which legislation was originally developed can differ from the circumstances during an emergency, and the ability to respond to that emergency by suspending the operation of other legislation can be necessary. Further, the authority granted by *CEMA* is temporary, as it can only be used to

suspend primary legislation so long as the state of emergency exists. As the judge stated, the fact *CEMA* delegates broad powers "does not mean they are unlimited or unreviewable": Reasons at para. 127.

[34] Any orders made must be in accord with the purpose and objects of *CEMA*, which can only be altered, revoked, or repealed by the Legislature. Further, the Minister remains accountable to the executive and the Legislature in the exercise of authority under *CEMA*: Reasons at para. 128.

iii) Does CEMA improperly delegate the full panoply of powers possessed by the Legislature (and some powers beyond s. 18 of the Yukon Act) to the executive?

[35] The judge found *CEMA* does not authorize the executive to exercise powers beyond those provided to the Legislature, contrary to the plaintiffs' argument. Further, while the powers permitted under *CEMA* are broad, they are circumscribed by the constitutional constraints on the entity that exercises those powers. Finally, if the executive purported to exercise powers beyond the authority set out in *CEMA*, it would not render the legislation constitutionally invalid. Rather, it would mean the particular exercise of that power could be challenged through judicial review: Reasons at paras. 129–132.

iv) Does the failure to grant the Legislature a supervisory role render CEMA unconstitutional?

[36] The judge also rejected the plaintiffs' argument that the lack of a provision in *CEMA* granting an active supervisory role to the Legislature made it unconstitutional. The judge found no merit to the argument as the Legislature retained the ability to "amend, repeal, revoke, expand, or constrain the powers it has chosen to delegate at any time": Reasons at para. 134. Its ability to do so was evident, as the Legislature debated and chose to continue the state of emergency in November and December of 2020. It also debated, but ultimately defeated, proposed amendments to *CEMA* "several times" during the ongoing state of emergency: Reasons at para. 135.

[37] With reference to *Re Gray*, the judge noted the Legislature could have passed emergency legislation with greater limitations on the power conferred on the executive, but had chosen not to do so. In that sense, the plaintiffs' challenge to the legislation and its application during the COVID-19 pandemic was political. She concluded:

> [136] …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.

Issue 2: Does s. 10 of *CEMA* oust the core jurisdiction of the courts?

[38] As Mr. Mercer does not allege any error in the judge's treatment of this issue, it is unnecessary to summarize it in detail. In brief, the judge found that while the plaintiffs had public interest standing to argue this issue, s. 10 of *CEMA*—which limits the liability of certain government entities—did not oust the jurisdiction of the superior court to decide legal issues and enforce the law, but rather "change[d] the content of the law within its jurisdiction": Reasons at para. 169. While s. 10 removed the ability to obtain remedies of damages, injunctions, or *mandamus*, parties could still obtain other remedies on judicial review such as *certiorari*, declarations, and *habeas corpus*.

On Appeal

[39] Mr. Mercer's submissions on appeal are directed at three principal errors, all of which relate to the first issue considered by the judge. He alleges the judge erred:

(1) In her understanding of the role played by UCP both generally and in this case;

(2) In failing to properly interpret and give effect to the principle of "responsible government" as enshrined in the *Yukon Act*; and

(3) In failing to identify and give effect to constitutional limitations on the ability of the Yukon legislature to delegate powers or create emergency powers.

[40] Mr. Mercer also alleges the trial judge wrongly excluded and failed to consider evidence regarding Yukoners' perception of the functioning of their government during the pandemic. He does not articulate this as an independent ground of appeal, but rather says it is "subsumed" in the other grounds of appeal listed above. As Mr. Mercer did not pursue this point in his oral submission to the Court, and does not raise it as a stand-alone issue, I will not address it further except to say that I can see no reviewable error in the judge's consideration of the evidence as alleged.

Analysis

[41] It should be evident from my lengthy review of the Reasons that the plaintiffs' arguments at trial directly raised the same issues Mr. Mercer now seeks to argue on appeal, and that the judge thoroughly considered the plaintiffs' submissions on these points. Mr. Mercer's attempt to argue these issues anew on appeal is based on the proposition the judge somehow misunderstood the plaintiffs' submissions and failed to grapple with the import of his arguments. There is no merit to that suggestion. I would endorse the judge's reasoning and conclusions. While this alone is sufficient to dispose of the appeal, I will nevertheless touch on some of the points Mr. Mercer has continued to pursue on appeal.

The role of unwritten constitutional principles

[42] First, there is no merit to the suggestion the judge misunderstood the role played by UCP when considering the validity of *CEMA*. In advancing this submission, Mr. Mercer makes a number of related arguments. He says *City of Toronto* is distinguishable because it was concerned with the position of municipalities within the constitutional structure. As creations of provincial legislation, municipalities have "no constitutional status". Relying on this distinction, he suggests the Court's statements in *City of Toronto* about the use that can be made of UCP do not have direct application when considering the constitutionality of *CEMA*. As I

understand his argument, this is because *CEMA* directly affects the relationship between and functioning of the Legislature, the executive, and the courts—what Mr. Mercer calls "the structure of government mandated by the text of the *Yukon Act* and the Constitution"—such that UCP can properly inform consideration of the constitutionality of *CEMA*. Mr. Mercer argues his use of UCP in challenging the constitutionality of *CEMA* is thus "tethered" to the text of the Constitution. From this, he argues the judge made an obvious legal error in concluding that UCP cannot serve "on their own" as a basis for invalidating laws: Reasons at para. 71.

[43] Mr. Mercer's suggestion that the crux of the reasoning in *City of Toronto* "is that it is impossible to call upon UCP to constrain the ability of a legislature to enact laws that affect municipalities" is, as the judge stated, a misreading of that decision. Contrary to Mr. Mercer's submission, in *City of Toronto*, the Court engaged in a detailed consideration of the proper role played by UCP in challenges to the validity of legislation generally.

[44] In *City of Toronto*, the majority rejected the dissent's reliance on certain authorities for the proposition that "unwritten constitutional principles have full legal force and can serve as substantive limitations on all branches of government", finding instead that the referenced authorities "do not support the proposition that unwritten constitutional principles can be applied to invalidate legislation": at para. 51. The majority also criticized the dissent's suggestion that UCP could be used to invalidate legislation where it is "fundamentally at odds with our Constitution's 'internal architecture' or 'basic constitutional structure'": at para. 52. This is because, "once 'constitutional structure' is properly understood, it becomes clear that, when our colleague [in dissent] invokes "constitutional structure", she is in substance inviting judicial invalidation of legislation in a manner that is wholly untethered from that structure": at para. 53.

[45] Having rejected the dissent's approach to UCP, the Court in *City of Toronto* explained that UCP "<u>may assist courts in only two distinct but related ways</u>": at para. 54, emphasis added. These two ways are: 1) to aid in the interpretation of

constitutional provisions; and 2) to assist in developing unstated structural doctrines that can fill gaps regarding questions on which the text of the Constitution is silent.

[46] I note that Mr. Mercer does not rely on either of these permissible uses here. He does not seek to interpret particular provisions of the *Yukon Act* or Constitution, nor does he rely on UCP to fill gaps in the constitutional structure. Rather, he asks this Court to conclude that *CEMA* is invalid because it does not respect UCP. This is directly contrary to the majority's holding in *City of Toronto* that "[a]ttempts to apply unwritten constitutional principles…as an independent basis to invalidate legislation" suffer from two "fatal" deficiencies: at para. 57. First, there is the possibility of an unwarranted intrusion by the court into the legislative authority to amend the Constitution. Second, the "highly abstract" nature of UCP, if used in this way, could serve to decrease legal certainty and predictability: at para. 59. As the Court noted, "protection from legislation that some might view as unjust or unfair properly lies not in the amorphous underlying principles of our Constitution, but in its text and the ballot box": *City of Toronto* at para. 59, quoting *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49 at para. 66.

[47] The judge was alive to these principles and explained at paras. 82 to 97 of her Reasons why the plaintiffs' proposed use of UCP suffered from the same "fatal" deficiencies the Supreme Court of Canada identified in *City of Toronto*. Mr. Mercer argues the judge erroneously asked herself whether some UCP could be used to support the validity of *CEMA*, which is "precisely the use to which UCP cannot be put". Leaving aside the fact that Mr. Mercer has attempted to use UCP in the same way he says is impermissible, he is missing the judge's point. Her reference to using UCP to support the validity of *CEMA* was meant to illustrate the problem with Mr. Mercer's position. By describing how arguments based on the "nebulous, abstract" content of UCP could be used both to invalidate and support legislation, the judge effectively highlighted the fallacy of Mr. Mercer's arguments: Reasons at para. 86.

[48] Mr. Mercer's argument on appeal that a proper consideration of UCP leads to a conclusion that *CEMA* upsets the important constitutional norm of "discussion and debate in the Legislature", which he says is essential for the government's law-making authority, is similarly flawed. The suggestion UCP can be used to delineate a "core competence" of the Legislature, which in turn becomes a basis for finding legislation invalid, is still attempting to use the vague, abstract content of UCP to invalidate legislation—it merely adds an extra step. The "fatal" deficiencies identified in *City of Toronto* therefore apply with equal force to this argument as well.

[49] In sum, Mr. Mercer's position is similar to that rejected by the majority in *City of Toronto*: he is inviting judicial invalidation of *CEMA* in a manner that is wholly untethered from basic constitutional structure. The structure of the Constitution is to be addressed via purposive textual interpretation: *City of Toronto* at para. 53. Here, Mr. Mercer argues *CEMA* interferes with ss. 10**–**16 of the *Yukon Act*, but offers no explanation as to how that occurs. With the exception of the reference to "responsible government" in the preamble of the *Yukon Act*, which I address in the next section, Mr. Mercer's arguments do not point to any text, with or without the support of UCP, to support his assertion of constitutional invalidity.

[50] I am therefore of the view that there is no merit to Mr. Mercer's assertion the judge erred in her understanding of the role played by UCP generally or in this case.

The principle of "responsible government" in the *Yukon Act*

[51] Mr. Mercer argues, as he did below, that the reference to "responsible government" in the preamble to the *Yukon Act* creates a unique constitutional landscape in which the Legislature's power to delegate to the executive is subject to limitations that do not apply to Parliament or other provincial legislatures. His argument is fanciful and entirely lacking in merit. By way of example, counsel stated that "responsible government" is a powerful textual anchor (a nod to *City of Toronto*), but also submitted, without explanation, that its inclusion in the preamble takes Mr. Mercer's argument well beyond UCP. He argues that responsible government requires accountability of the executive to the Legislature, and baldly states that

CEMA overrides this. However, in doing so he relies on statements from authorities taken out of context, and is unable to present an argument based on principle or authority that supports his position.

[52] The respondents' factum accurately describes and characterizes Mr. Mercer's argument:

> [91] First, the appellant states, without authority, that Parliament's inclusion of the term "responsible government" was intended to recognize that since the Yukon is a small jurisdiction, one party will often have a "majority or quasi-majority" of the seats in the Legislature, meaning there is the "capacity for the executive to dispense entirely with the legislative assembly". In fact, it has long been recognized that in the system of Canadian governance, the separation of powers between the Legislative and Executive branches is not absolute, and "except in certain rare cases, the executive frequently and de facto controls the legislature". To the extent that one party often holds a majority or "quasi majority" of seats in the Yukon Legislature, that would not amount to a unique or distinguishing feature of the Yukon government as compared to other Canadian jurisdictions.
>
> [92] Nothing in the legislative history or provisions of the *Yukon Act* supports a theory that Parliament intended, through the Act's preamble, to impose unique limits on the Yukon Legislature's authority to delegate to the Executive. Rather, the inclusion of the term "responsible government" in the preamble of the *Yukon Act* is consistent with Parliament's intention to—through the modernized provisions of the Act—continue the devolution of federal responsibilities to the Territory, and codify an increased degree of independence for the territorial government…

[53] Mr. Mercer also argues the judge failed to consider whether the "derogation of the Assembly's legislative powers through almost wholesale delegation to the executive" that is permitted by *CEMA* constitutes an amendment to the *Yukon Act*. He makes this argument based on the assertion that the delegation permitted under *CEMA* amounts to a change to the constitutional architecture of the Yukon. This argument adds nothing to Mr. Mercer's primary position, which is that the delegation authorized by *CEMA* is not permitted, such that the legislation is invalid. I consider this argument below.

[54] I would not give effect to this ground of appeal.

The delegation of powers under *CEMA*

[55] As I have indicated, the judge provided detailed reasons responding to Mr. Mercer's argument that *CEMA*'s broad delegation of powers renders it invalid. In my view, he has failed to identify any error in the judge's reasoning, and I would dismiss this ground of appeal substantially for the reasons of the trial judge. I will however emphasize a few points in response to the appeal submissions.

[56] Mr. Mercer argues the judge failed to correctly identify and apply the legal framework from *Greenhouse Gas*. As a result, he says the judge failed to understand the import of his argument—that *Greenhouse Gas* represents "an important evolutionary step in the case law on delegated legislation". He says the new approach to permissible delegation assigns the role of deciding and enunciating policy to Parliament or the legislature, and limits the role of the executive to administering and implementing that policy.

[57] To construct his argument, Mr. Mercer, as with his other submissions, relies on statements from various authorities taken out of context. For example, he refers at length to *Canada (Attorney General) v. Power*, 2024 SCC 26, for the proposition that "the legislative branch requires an independent space for elected representatives to carry out their parliamentary duties, to freely debate and decide what laws should govern, and to exercise the unfettered ability to hold the executive branch of the state to account": at para. 77. However, that statement was made in relation to the question of whether Parliament had absolute immunity from a claim for *Charter* damages arising out of legislation that was later found to be unconstitutional. It adds nothing to the jurisprudence on delegation and was not intended to do so.

[58] Contrary to Mr. Mercer's submission, the judge's review of the jurisprudence and legal commentary concerning the ability of a legislature to delegate authority to the executive was thorough and without error. Mr. Mercer has not directed us to any authority that provides support for his position. As the judge noted, "there are few, if

any, restrictions on delegating to the executive": Reasons at para. 111, quoting Keyes at 42.

[59] The suggestion that *CEMA* results in an abdication of the role of the Legislature ignores its provisions and the practical effect of its operation during the pandemic. Section 9 permits the Minister to act only for the purpose of dealing with the emergency. It does not allow the Legislature to be "dispensed with" as Mr. Mercer suggests. As the respondents note, during the pandemic "the Legislature continued to debate and pass legislation on a myriad of matters, and indeed, could have passed laws respecting emergencies or COVID-19 specifically if it chose to do so".

[60] As the Court of Appeal for British Columbia has stated, the jurisprudence "admits of few, if any restrictions, on the scope or content of what powers may constitutionally be delegated": *Sga'nism Sim'augit* at para. 89.

[61] The suggestion that *CEMA* results in or facilitates an abdication of the Legislature's role is without merit. There are no provisions that purport to affect such an abdication and there is nothing in the legislation that interferes with the Legislature's ability to amend, expand, constrain or repeal any power granted under it. Indeed, amendments to the legislation were proposed, debated and defeated in the Legislature more than once during the state of emergency. As the judge observed, the fact that attempts to amend *CEMA* did not succeed "is a reflection of the democratic process at work, and not of the unconstitutionality of *CEMA*": Reasons at para. 135.

[62] Mr. Mercer also argues the definition of "peacetime disaster" is devoid of substance and thus practically meaningless. He suggests the definition is so imprecise that "we live in a constant state of peacetime disaster as defined by *CEMA*". He asks this Court to conclude from these observations that *CEMA* does not institute any form of policy concerning what powers can be validly exercised during an emergency.

[63] His arguments are not based on principle or authority. The judge rejected these submissions because she found, correctly in my view, that *CEMA* does indeed make a policy choice in the way it broadly defines "peacetime disaster". I accept the respondents' characterization of Mr. Mercer's submissions in this regard:

> … the fact is that *CEMA* does indeed express a clear legislative policy choice—just not the policy choice the appellant would like. In a situation like the COVID-19 pandemic, which is highly fluid and uncertain, *CEMA* allows the responsible Minister to make decisions quickly, often on the basis of incomplete information, and to continually revisit those decisions as more information becomes available and the emergency evolves. The alternative policy choice favoured by the appellant—that is, prioritizing dissension, debate, and consensus-building during emergencies by ensuring decisions are made through primary legislation rather than delegated authority—may not necessarily lead to better outcomes during a crisis. In any event, that is a policy choice for the Legislature, not the courts, to make.

[64] In short, I would not give affect to this ground of appeal.

Disposition

[65] I would dismiss the appeal.

"The Honourable Mr. Justice Butler"

I AGREE:

"The Honourable Chief Justice Marchand"

I AGREE:

"The Honourable Justice MacPherson"