

COURT OF APPEAL OF YUKON

Citation: *Rogers v. Director of Maintenance Enforcement Program*,
2026 YKCA 4

Date: 20260312
Docket: 24-YU913

Between:

Carl Eugene (Gene) Rogers

Appellant
(Petitioner)

And

Director of Maintenance Enforcement Program and Minister of Justice

Respondents
(Respondents)

Before: The Honourable Chief Justice Marchand
The Honourable Madam Justice Smallwood
The Honourable Justice Voith*

Supplementary Reasons to *Rogers v. Director of Maintenance Enforcement Program*, 2025 YKCA 12, Whitehorse Docket: 24-YU913.

Counsel for the Appellant: V. Larochelle

Counsel for the Respondent: I.H. Fraser

Place and Date of Hearing: Whitehorse, Yukon
June 19, 2024

Supplemental Written Submissions Received: July 25 and August 20, 2025

Place and Date of Judgment: Whitehorse, Yukon
September 5, 2025

Written Submissions on Costs Received: January 30, 2026,
February 6 and 16, 2026

Place and Date of Supplementary Judgment: Whitehorse, Yukon
March 12, 2026

Supplementary Reasons of the Court

Summary:

The appellant, who was successful on appeal, seeks an order for special costs, or in the alternative, increased costs. The appellant submits the respondent has not complied with this Court’s order, has not informed him of steps taken to comply with the order and has dragged its feet on resolving costs, among other things. The appellant submits his case was complex and raised an important and novel issue. Further, he argues access to justice issues in Yukon support a special costs order.

Held: The appellant is entitled to costs at Scale 2 because his appeal was “of more than ordinary difficulty or importance”. The appellant has not shown reprehensible conduct or an injustice. None of the issues raised support an order for special or increased costs.

Background

[1] In reasons indexed as 2023 YKSC 69, a judge of the Supreme Court of Yukon dismissed a petition commenced by the appellant, Carl Eugene Rogers, challenging certain inaction by the Commissioner in Executive Council (the “Commissioner”) under the *Maintenance Enforcement Act*, R.S.Y. 2002, c. 145 [MEA]. Section 22(1) of the MEA contemplates the Yukon Maintenance Enforcement Program (“MEP”) allowing payors to retain a minimum income “prescribed by the Commissioner in Executive Council”. However, no regulation establishing a prescribed minimum had been enacted, exposing Mr. Rogers to enforcement proceedings despite his limited income.

[2] In reasons indexed as 2025 YKCA 12, this Court allowed Mr. Rogers’ appeal finding s. 22(1) of the MEA compelled the Commissioner to prescribe a minimum income to be retained by payors. The Court declared the Commissioner’s failure to enact regulations under s. 22(1) of the MEA to be unlawful. The Court concluded, “As the Commissioner is obliged to act lawfully, the Court—and more importantly Mr. Rogers—can expect the Commissioner to promptly remedy the unlawfulness”: at para. 114.

[3] There is no dispute that, as the successful party, Mr. Rogers is entitled to costs. Unfortunately, the parties have been unable to agree on the amount.

[4] Mr. Rogers has returned to the Court seeking special costs or, in the alternative, increased costs. He says he brought the petition as an unsophisticated self-represented party seeking to right an injustice having a profoundly negative impact on individuals living in poverty. He submits he is entitled to an award of special or increased costs because he says the respondent:

- has not complied with the Court's declaration;
- has refused to provide information on what steps it is taking to comply with the declaration;
- has "dragged its heels" despite the efforts of his counsel to promptly resolve the issue of costs; and
- misrepresented an important fact to this Court at the hearing of the appeal, namely that it had not garnished Mr. Rogers since "well before the trial decision".

[5] Mr. Rogers emphasizes the complexity and national importance of his appeal. He says it "gave an appellate court the opportunity to squarely consider, for the first time, whether the executive can be compelled to make delegated legislation."

[6] Mr. Rogers submits the Yukon is a small jurisdiction with an access to justice issue caused, at least in part, by the small size of the private bar in relation to the public bar. In his own case, he notes his counsel took his appeal on a *pro bono* basis. He submits this provides a further compelling reason to order special costs.

The Law on Costs

[7] For the present circumstances, the law on costs is straightforward.

[8] Section 59(1) of the *Court of Appeal Rules, 2005 [Rules]* provides that costs must be assessed under Appendix B of the *Rules*. Under s. 2 of Appendix B, costs may be assessed at Scale 1, 2 or 3 depending on whether the matter is "of ordinary

difficulty”, “of more than ordinary difficulty or importance” or “of unusual difficulty or importance” respectively.

[9] Section 60 of the *Rules* provides that costs may be assessed as increased costs if “the court or a justice determines there would be an unjust result if costs were assessed under Scales 1 to 3... of Appendix B.” In *Cowichan Valley (Regional District) v. Cobble Hill Holdings Ltd.*, 2017 BCCA 176, the Court summarized the factors to consider when deciding whether to order increased costs under the similarly worded test then applicable in British Columbia:

[10] ... The threshold issue for awarding increased costs is whether ordinary costs ... would be unjust in the circumstances. Relevant considerations include substantive and procedural complexity ... They do not include a consideration of reprehensible conduct, but rather, are grounded in indemnity ...

[11] Increased costs have been awarded where the issues raised in the appeal were complex; the issues extended beyond the immediate interests of the parties; the conduct of the parties unnecessarily lengthened the proceeding by, for example, raising spurious issues; where there was significant disparity between actual costs and recoverable costs, although this alone is not determinative; and any other factor that, together with these factors, would have resulted in an injustice to the successful parties.

[Citations omitted.]

[10] Awards of increased costs “arise from the nature and conduct of the litigation” not the difficult financial circumstances of a litigant: *Brown v. Black Top Cabs* (1997), 43 B.C.L.R. (3d) 76 at paras. 3, 17 (C.A.).

[11] Section 61(1) of the *Rules* empowers the court or a justice to order that costs be assessed as special costs. Special costs are generally punitive, not compensatory: *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2017 BCCA 177 at para. 56. Courts use special costs to censure and rebuke the behaviour of a party: *West Van Holdings Ltd. v. Economical Mutual Insurance Company*, 2019 BCCA 110 at paras. 68, leave to appeal to SCC ref’d, 38711 (16 January 2020); *Chhina v. Rebecca L. Darnell Law Corporation*, 2021 BCCA 430 at paras. 50–51, 55.

[12] Although the decision to award special costs is discretionary, courts should usually only make such an award where the conduct in question is “reprehensible”.

This encompasses not only “scandalous or outrageous conduct”, but also “milder forms of misconduct deserving of reproof or rebuke”: *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 at para. 17 (C.A.).

[13] Special costs awards are concerned with the conduct of the litigation, not the personal circumstances and characteristics of the litigants: *York v. York*, 2012 BCCA 347 at para. 15. Outside of exceptional circumstances, which do not arise here, this Court considers only the conduct of a party within the appellate proceedings: *Kellogg v. Rouches*, 2019 BCCA 90 at para. 15.

Analysis

[14] Respectfully, none of the issues raised by Mr. Rogers support his request for special or increased costs.

[15] First, based on the authorities set out above, neither the terms of Mr. Rogers’ retainer with counsel nor his personal financial circumstances establish reprehensible conduct within the appeal proceedings or an injustice.

[16] Second, while a failure on the Commissioner’s part to comply with the Court’s order would be a serious matter, Mr. Rogers has not properly placed that question before the Court. If he did and established wilful non-compliance, special costs may well be awarded against the Commissioner in relation to those proceedings.

[17] Third, resolving costs is a two-way street. Any party who is dissatisfied with the pace or outcome of negotiations should do what Mr. Rogers has done, namely bring the matter before the Court. There is nothing reprehensible or unjust about that.

[18] Finally, an immaterial misstatement to the Court that was subsequently corrected also does not amount to reprehensible conduct or an injustice.

[19] The Court agrees and appreciates that Mr. Rogers successfully advanced a novel legal issue with implications that extend beyond the confines of his case. At the same time, the issue was narrow and the reach of this Court’s decision is

unknown. Further, the appeal was advanced in a straightforward way with no apparent procedural complexity. In our view, these circumstances justify an award of costs at Scale 2, but not special or increased costs.

Disposition

[20] Mr. Rogers' appeal was "of more than ordinary difficulty or importance" and he is entitled to costs at Scale 2.

"The Honourable Chief Justice Marchand"

"The Honourable Madam Justice Smallwood"

*Voith J.A. did not participate in the final disposition of the judgment. The judgment is pronounced pursuant to s. 1 of the *Yukon Court of Appeal Act* and s. 21(5) of the 1971 *British Columbia Court of Appeal Act*.