

# SUPREME COURT OF YUKON

Citation: *Westerlaken v Yukon Residential Tenancies Office*,  
2026 YKSC 86

Date: 20260917  
S.C. No. 23-AP008  
Registry: Whitehorse

BETWEEN

SCOTT WILLIAM WESTERLAKEN

APPLICANT

AND

THE DIRECTOR OF YUKON'S RESIDENTIAL TENANCIES OFFICE  
and BYRON HOLBEIN

RESPONDENTS

Before Justice E.M. Campbell

Appearing on his own behalf

Scott Westerlaken

Counsel for the Director of Yukon's  
Residential Tenancies Office

Lenore Morris

No one appearing

Byron Holbein

## REASONS FOR DECISION

### OVERVIEW

[1] On February 4, 2025, I granted Scott William Westerlaken's application for judicial review and quashed the Director of Residential Tenancies' (the "Director") decision and resulting order that he pay compensation to his roommate, Byron Holbein, in the amount of \$1,349.39, on the basis the Director had erred in interpreting their enabling legislation and did not have jurisdiction over the dispute (*Westerlaken v Yukon Residential Tenancies Office*, 2025 YKSC 7 ("Judicial Review Decision")).

[2] The matter is back before me on the issue of costs. Mr. Westerlaken seeks costs of all related proceedings before this Court and the Residential Tenancies Office (the “RTO”) against the Director. Mr. Westerlaken explained he does not seek costs against Mr. Holbein because he likely has no means to pay.

[3] The issue of costs raises the following questions:

- (i) Does the statutory immunity conferred upon the Director, the deputy director, RTO’s staff and others involved in the application of the *Residential Landlord and Tenant Act*, SY 2012, c 20 (the “Act”), by s. 98 of the *Act*, shield the Director from an order of costs in this judicial review proceeding?
- (ii) If not, is Mr. Westerlaken entitled to costs of the proceedings?

## **POSITIONS OF THE PARTIES**

### **A. Mr. Westerlaken**

[4] Mr. Westerlaken submits that, as the successful party in this judicial review, he is entitled to costs. He submits that an order of special costs is appropriate because:

- (i) the respondent acted capriciously and without jurisdiction, and
- (ii) the time and inherent difficulties associated with arguing a precedent-setting case.

[5] Mr. Westerlaken seeks not only costs of this judicial review proceeding, but costs associated with the entire administrative proceedings, including the originating proceedings before the RTO and the related garnishment file commenced by Mr. Holbein in the Supreme Court of Yukon in June 2024, to enforce the Director’s Order. Mr. Westerlaken submits that costs of all proceedings, including the administrative proceedings, should be awarded to him because the Director chose to

ignore the scope of their jurisdiction at every step of the administrative process, up to the issuance of an order that Mr. Holbein registered in the Supreme Court of Yukon for execution, which resulted in funds being seized from his bank account and his account being frozen, in breach of his *Charter* rights (*Charter of Rights and Freedoms*, s 7, Part 1 of the Constitution Act, 1982, (“*Charter*”)). Mr. Westerlaken submits the Director’s conduct justifies that they be ordered to cover all his costs and fees.

[6] Mr. Westerlaken submits the statutory immunity granted to the Director and RTO staff by the *Act* is limited to circumstances when they act within their jurisdiction and in good faith. As the Court found the Director exceeded their jurisdiction, the conduct is not immune from liability for costs under the *Act*.

[7] In addition, Mr. Westerlaken submits that the caselaw regarding an award of costs against an administrative decision-maker on judicial review supports his position. He submits that the Director never had any statutory authority nor duty to act at any point in this matter. Nonetheless, the Director seized themselves of the dispute between him and his roommate, Mr. Holbein, when it has always been clear the Director does not have jurisdiction over disputes between roommates. As a result, costs should be awarded against the Director on the basis of “misconduct or perversity in the proceedings before the Director” or because the Director “argued the merits of a judicial review application rather than its own jurisdiction”, which are two situations where costs may be awarded against an administrative decision-maker.

[8] Mr. Westerlaken submits that, when a government authority acts beyond their legislated authority, powers, or jurisdiction, they are liable for costs, unless there is a clear indication in the legislation that they benefit from absolute immunity for all their actions.

[9] Mr. Westerlaken submits the expression “under the *Act*” found in s. 98 is crucial because it constitutes a limitation to the statutory immunity granted to the Director and RTO staff. Mr. Westerlaken adds that, when the Director and/or RTO staff act outside their authority or jurisdiction, they are no longer acting “under the *Act*” and, therefore, can no longer benefit from the statutory immunity. As the Court found the Director exceeded their authority in this case, the Director cannot benefit from the immunity afforded by the *Act* and is not immune from a costs order.

[10] Mr. Westerlaken also submits that, when the legislation was enacted, it clearly excluded roommates from the dispute resolution process established under the *Act*. Mr. Westerlaken adds that, initially, the RTO’s communications materials reflected this position. Nevertheless, on multiple occasions, the Director interpreted the *Act* in a way that extended the rental rules applicable to landlord-tenants’ relationships to roommates. Mr. Westerlaken submits that, in this context, the Director’s interpretation amounts to changing the legislation without having the proper authority to do so.

[11] Mr. Westerlaken adds that he not only requested a review of the deputy director’s decision against him by the Director, but requested the RTO seek a legal opinion from the Department of Justice on this issue because, in his view, their position was clearly wrong. However, the RTO refused. In that regard, Mr. Westerlaken adds that he even provided to the RTO their own published help sheets that clearly communicated that their dispute resolution process could not be used in disputes between roommates. Mr. Westerlaken further submits that, in refusing to seek legal advice, the RTO, which is composed of government employees not independent and arm’s length adjudicators, and its Director, showed a lack of diligence and proceeded with wilful blindness.

[12] Mr. Westerlaken argues the fact that counsel for the Director conceded at the judicial review that the Director's statutory interpretation was wrong, supports his view that this was not just a mere error of interpretation, but evidence of the Director and the RTO's staff clear lack of knowledge of their own enabling statute as well as the RTO's systemic failure to implement the *Act* properly. Mr. Westerlaken submits he would not have had to initiate this judicial review had the RTO sought a legal opinion as requested.

[13] Mr. Westerlaken submits the matter before the Court is unique and unprecedented in that the Director never had any statutory authority nor duty to act at any point in this matter. Mr. Westerlaken submits that an award of costs in this case is supported by the Director's misconduct in changing the meaning of the legislation without following the proper process; and by the fact that the Director acted capriciously and demonstrated perversity in the proceeding by:

- a) not having any legal authority in the matter, but nonetheless seizing themselves of the matter and wrongly applying the rental rules applicable to landlord-tenants' relationships to roommates;
- b) neglecting to properly consider a serious issue of jurisdiction, which he raised multiple times, by finding that he met the definition of a landlord under the *Act*, when he and Mr. Holbein were clearly roommates;
- c) being obstinate, wrong and defying reasonable expectations in respect to the Director's interpretation of their legislation;
- d) breaching the rules of procedural fairness by ignoring and defying their own published information materials that stated the dispute resolution

process under the *Act* could not be used for disputes between roommates;

- e) not obtaining an unbiased external review of their new interpretation of the legislation when he requested such; and
- f) issuing an order without having the authority nor jurisdiction to do so in matters between roommates.

[14] Mr. Westerlaken submits he should be awarded costs as sought because the Director and RTO staff acting outside their legislated authority caused him two years of work fighting a decision that was not valid. In addition, their conduct caused him unnecessary difficulty and expenses to challenge an order wrongly issued that led to funds being seized from him and his bank account being frozen. He adds the time and money he spent would have been mitigated if the RTO had taken the time to properly consider the issue of jurisdiction and to obtain a legal opinion as he requested.

[15] Finally, Mr. Westerlaken submits that an order of costs must be serious enough to deter any other tribunal to act without authority or jurisdiction.

## **B. The Director**

[16] Counsel for the Director submits that costs cannot be ordered against the Director because their enabling statute provides broad immunity to the Director and RTO staff that shields them from an order of costs in this matter. Counsel maintained this position in the additional written and oral submissions the parties were permitted to provide after the Court brought to their attention decisions from other jurisdictions dealing specifically with the principles governing awards of costs for or against administrative decision-makers in judicial review proceedings.

[17] Counsel argues s. 128 of the *Residential Tenancies Act*, SY 2025, c 7, previously s. 98, does not limit immunity to acts within the RTO's jurisdiction. Instead, the provision extends the immunity to anything done or omitted, in good faith, in the performance or "intended" performance of any duty under the statute or in the exercise or "intended" exercise of any power under the statute. Counsel submits that the clear and plain language of the statutory provision reveals the immunity covers more than acts performed under the statute, it covers acts that are intended to be performed under the statute.

[18] Counsel submits that, part of the RTO's statutory duties, is to adjudicate disputes between residential landlords and tenants. Counsel adds that, with narrow exceptions, caselaw holds that a quasi-judicial or administrative decision-maker's immunity is not lost, even if they mistakenly act outside their jurisdiction. Counsel submits there is no reason to believe that the Director or RTO staff did not intend to follow their legislation. To the contrary, the Director and RTO staff were fulfilling their statutory duties when assessing and dealing with the application for dispute resolution that Mr. Holbein filed with the RTO with respect to his residential dispute with Mr. Westerlaken. Counsel also submits that the deputy director and the Director assessed the facts and interpreted the legislation in adjudicating the dispute, as intended and permitted by the legislation. Counsel further submits that, while the Director incorrectly interpreted the law in finding that the parties were in a landlord-tenant relationship rather than being roommates, they did not change the legislation, as argued by Mr. Westerlaken.

[19] Counsel for the Director acknowledges that the statutory immunity enjoyed by the Director and RTO staff only extends to acts or omissions "done or omitted in good faith". Counsel submits that good faith is presumed, and Mr. Westerlaken has not

rebutted that presumption. Counsel also submits there is no evidence to suggest that the Director did not act in good faith in this case. In addition, counsel submits that, while the Court found the Director exceeded their authority because of an error of interpretation, it did not make any finding of bad faith or of any other type of wrongdoing against the Director or RTO staff.

[20] Counsel adds the RTO provides timely decision-making in residential tenancies matters, and the statute contemplates the possibility that errors may be made in providing for judicial review. Counsel argues it would be very unfortunate if the RTO were held liable for costs every time it is found they made an error.

[21] In the alternative, counsel for the Director submits the Director and RTO staff should not be punished with a costs order when all they did was carry out their statutory duties during the dispute resolution proceedings before the RTO and follow the directions of the Supreme Court of Yukon in this judicial review proceeding.

[22] Counsel further submits that, because of the limited scope of the Director's participation in this proceeding, the Court has only heard Mr. Westerlaken's version of the facts of this case. The fact the RTO's decision in this case was consistent with previous RTO decisions suggests it was a mistake of law, not bad faith. In addition, Counsel submits Mr. Westerlaken's allegations of bad faith, which encompass events that allegedly took place after the Director's decision, are better left to be dealt with in the civil action he filed against the Director and the Government of Yukon, Department of Community Services.

[23] Counsel for the Director acknowledges the general rule is that costs of a proceeding are awarded to the successful party. However, counsel submits that the

Court may order costs of this proceeding only; not of other related proceedings, such as the administrative proceedings before the Director, as sought by Mr. Westerlaken.

[24] Counsel for the Director further submits that the Court should not award costs against the Director, because the Director did not initiate any of the proceedings before the Supreme Court of Yukon; the Director only remained a respondent and participated in this proceeding because the Court ordered them to do so; they did not oppose the judicial review; and they acted within the limits of their court-ordered participation in this judicial review proceeding.

[25] Finally, counsel submits that the amount sought by Mr. Westerlaken is excessive and akin to damages rather than costs. Counsel argues the dispute between Mr. Holbein and Mr. Westerlaken involved a very small amount of money and was not complex. Counsel adds that much of the complication and expenses in this proceeding come from Mr. Westerlaken himself.

## **ANALYSIS**

### **A. *Preliminary issue: the scope of the statutory immunity and legislative change***

[26] The statutory immunity provided by s. 98 of the *Act* was in effect throughout the proceedings before the RTO. Section 98 was still in force at the time I issued my decision on the judicial review on February 4, 2025. However, on September 1, 2025, the *Act* was replaced by the new *Residential Tenancies Act*, SY 2025, c 7. The *Residential Tenancies Act* also contains an immunity provision, s. 128.

[27] Section 98 of the *Act* and s. 128 of the *Residential Tenancies Act* read as follows:

**98 Immunity**

(1) No legal proceeding for damages lies or may be commenced or maintained against the director, a deputy director, a person exercising delegated power under section 92, a sheriff or any other person employed in the administration of this Act or exercising powers under this Act because of anything done or omitted in good faith

- (a) in the performance or intended performance of any duty under this Act; or
- (b) in the exercise or intended exercise of any power under this Act.

**128 Immunity**

No legal proceeding for damages lies or may be commenced or maintained against the director, a deputy director, a person exercising delegated power, a sheriff or any other person employed in the administration of this Act or exercising powers under this Act because of anything done or omitted in good faith

- (a) in the performance or intended performance of any duty under this Act; or
- (b) in the exercise or intended exercise of any power under this Act.

(emphasis added)

[28] While s. 98 of the *Act* and s. 128 of the *Residential Tenancies Act* are not identical, the difference between them is minimal and relate to the description of a category of individuals covered by the immunity: “a person exercising delegated power under this Act”, while previously that category was described as: “a person exercising delegated powers under section 92”. This difference is not material to the determination of the question before me. What is material, is that, at all relevant times, the same statutory immunity was in place for the Director and the deputy director who were the administrative decision-makers in this case.

**B. Does the statutory immunity shield the Director from an order of costs in this judicial review?**

[29] Determining the scope of the statutory immunity afforded to the Director involves the application of statutory interpretation principles.

[30] The modern approach to statutory interpretation is well-established. As I stated in my Judicial Review Decision, at paras. 14-15:

[14] ... [i]t provides that: “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament” E.A. Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at 87, *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII837 (SCC), [1998] 1 SCR 27 at para. 21, and *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at para. 26.

[15] In *La Presse inc v Quebec*, 2023 SCC 22 at paras. 23 and 24, the Supreme Court of Canada clarified two principles flowing from the application of the modern approach:

[23] First, the plain meaning of the text is not in itself determinative and must be tested against the other indicators of legislative meaning — context, purpose, and relevant legal norms (*R v Alex*, 2017 SCC 37, [2017] 1 SCR 967, at para. 31). The apparent clarity of the words taken separately does not suffice because they “may in fact prove to be ambiguous once placed in their context. The possibility of the context revealing a latent ambiguity such as this is a logical result of the modern approach to interpretation” (*Montréal (City) v 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 SCR 141, at para. 10).

[24] Second, a provision is only “ambiguous” in the sense contemplated in *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 SCR 559, if its words can reasonably be interpreted in more than one way after due consideration of the context in which they appear and of the purpose of the provision (paras. 29-30). This is to say that there is a “real” ambiguity — one that calls for the use of external interpretive aids like the principle of strict construction

of penal laws or the presumption of conformity with the *Canadian Charter of Rights and Freedoms* — only if differing readings of the same provision cannot be decisively resolved through the contextual and purposive approach set out by Driedger (ibid.). [italics in original]

[31] Also, in accordance with s. 10 of the *Interpretation Act*, RSY 2002, c 125, the provisions of an act must be given the fair, large, and liberal interpretation that best ensures the attainment of its object.

[32] In addition, s. 8 of the *Interpretation Act* provides that:

The title and preamble of an enactment shall be read as a part thereof intended to assist in explaining its purpose and object.

[33] Finally, s. 4 of the *Languages Act*, RSY 2002, c 133, provides that the English and French versions of Yukon's legislation and regulations are equally authoritative.

[34] The purpose(s) and object(s) of the *Act*, or of the *Residential Tenancies Act*, are not specifically set out by the legislator. However, they can be inferred from their respective titles and provisions. They include: clarifying the respective rights and responsibility of landlords and tenants of residential properties; establishing clear rules for residential tenancy agreements, including a number of specific legal protections, in particular for tenants; providing for the legislation's mandatory application (the statute cannot be avoided or contracted out and binds the government of Yukon); and providing a mechanism for dispute resolution of residential tenancies matters. These provisions promote, among other things, fairness and better predictability in the residential rental market.

[35] More specifically, the dispute resolution process provides for a simplified and timely process for resolving disputes under \$25,000 between residential landlords and

tenants that may not necessarily revolve around money but tenure, thereby promoting access to justice. I note that prior to the dispute resolution process coming into effect, the only recourse for residential landlords and tenants were the courts of civil jurisdiction, including the Small Claims Court.

[36] The statutory immunity provided to the Director is broad. However, the wording of the English version of the provision differs from the French version. In the English version, the nature of the proceedings covered by the statutory immunity are identified by the opening words of the provision: “No proceeding for damages lies or may be commenced or maintained against the Director, deputy director [...] because of anything done or omitted in good faith in the performance or intended performance of their duties or powers”. The French version appears broader because it is silent on the nature of the proceedings covered by the immunity. The provision only states that immunity is granted to the Director for anything done or omitted in good faith in the performance or intended performance of their duties or powers: “Le directeur, un directeur-adjoint (...), bénéficient de l’immunité pour toute action prise ou omise de bonne foi (...)”. I note the French wording is the same under the current and the former statutes.

[37] In my view, there is a discordance between the two versions due to the presence of a qualifier to the grant of immunity in the English version (confining the scope of the immunity to certain types of proceedings) that is absent from the French version. As a result, the scope of the immunity provided in the English version is narrower than in the French version. In *R v Daoust*, 2004 SCC 6, at paras 26-31, the Supreme Court of Canada confirmed that statutory interpretation of bilingual enactments begins with a search for the shared meaning between the two versions. Where one version has a

broader meaning than the other, the shared meaning is the narrower of the two, as the narrower version is included in broader version. Therefore, in this case, the narrower meaning of the English version is the shared meaning.

[38] Also, in my view, the words “No proceeding for damages lies or may be commenced or maintained against the Director, deputy director [...]” refer specifically to a lawsuit, action, petition or other proceeding commenced or maintained to seek damages against the Director. This interpretation aligns with the fact that the immunity conferred by statute does not preclude a party to a proceeding before the RTO from challenging the Director’s decisions on judicial review. This, in my view, reflects the ordinary meaning of the expression “No proceedings for damages lies or may be commenced or maintained against the Director, deputy director [...]” read in the context of the scheme and the object and purpose of the statutes, as it promotes efficiency by protecting and allowing the Director and other RTO staff to fulfill their duties and mandate without fear of being sued in damages by someone unhappy with their decisions or other things done in good faith in the performance or intended performance of their duty or power under the *Act* or *Residential Tenancies Act*; all the while confirming access to a judicial review of their administrative decision or action by a Superior court. More specifically, this conclusion aligns with the objectives of the dispute resolution process, which was put in place as an access to justice measure to provide for a simplified and timely process to resolve residential tenancies disputes outside formal court proceedings, in ensuring the RTO’s human and financial resources remain focused on delivering the service(s) established under the residential tenancy legislation.

[39] As judicial review proceedings are not captured by the scope of the immunity provision, it follows that the Director, as a party to this proceeding, is not statutorily immune from an order of costs because it is an ancillary or incidental relief that can be sought in the judicial review proceeding itself.

**C. The legal principles guiding an award of costs for or against an administrative decision-maker in judicial review proceedings.**

[40] The general rule is that costs are not awarded for or against administrative decision-makers in judicial review proceedings except in case of misconduct, or perversity, or where the decision-maker improperly argues the merits of their decision at the judicial review, or other exceptional circumstances. This general rule reflects the institutional role of administrative decision-makers and the supervisory nature of judicial review proceedings.

[41] As stated by the Alberta Court of Appeal in *Sihota v Edmonton (City)*, 2013 ABCA 125, at para 4: “The general rule is that (absent misconduct or extraordinary circumstances) an administrative tribunal that is involved in proceedings to review its decisions neither receives nor pays costs...”.

[42] The Alberta Court of Appeal explained that:

[5] This general costs rule is premised on the assumption that the tribunal is a necessary and unavoidable party to the proceedings, and that the tribunal generally does not take a position on the outcome of the appeal. Generally speaking, the tribunal will only speak to its jurisdiction, to the standard of review, or to explain the record and the proceedings before it: ***Leon’s Furniture Ltd. v Alberta (Information and Privacy Commissioner)***, 2011 ABCA 94 at paras. 16-29, 502 AR 110, 45 Alta LR (5th) 1.

[6] The involvement of the tribunal in a review of its own decisions is limited in order to maintain the neutrality of the tribunal. A qualification to the rule has developed where it is necessary to provide the reviewing court with the proper adversarial context. As noted in ***Leon’s Furniture*** at para. 23:

23 On many judicial review applications it is quite obvious to the chambers judge that if the tribunal does not make submissions in support of the decision under review, no submissions will be made. The applicant's arguments and authorities on the merits will essentially be unanswered. Some tribunals will justify their appearances on the basis that otherwise "no one shows up": *Skyline Roofing Ltd. v. Alberta (Workers' Compensation Board)*, 2001 ABQB 624, 95 Alta. L.R. (3d) 126, 292 A.R. 86 at para. 29. The adversarial system requires the presentation and consideration of competing arguments and ideas on the reasonableness or correctness of the decision under review. Rather than essentially proceeding to decide the application *ex parte*, many judicial review judges will receive submissions from the tribunal for "forensic" reasons: *Beier v Vermilion River (County)*, 2009 ABCA 151, 457 AR 191 at para. 8.

Where there is no other party speaking to the issues, the tribunal is allowed to expand the scope of its submissions, although it should still ensure that the tone of its submissions is consistent with its role.  
(Emphasis in original)

[43] In *Lang v British Columbia (Superintendent of Motor Vehicles)*, 2005 BCCA 244 ("*Lang*"), the Court of Appeal for British Columbia reached essentially the same conclusion. In that case, the Court of Appeal was seized with a number of questions, including whether administrative decision-makers were exposed to costs in judicial review proceedings. In the four cases before the Court of Appeal, the respondents were issued a driving prohibition after being pulled over by a police officer while driving and after providing a breath sample with a blood alcohol level above the legal limit. The respondents all applied to have the driving prohibition reviewed by an adjudicator appointed under the *Motor Vehicle Act*, RSBC 1996, c 318. The reviews were dismissed. The respondents then each commenced a petition for judicial review of the adjudicator's decision in the Supreme Court of British Columbia. Each respondent was successful and awarded costs of their judicial review proceeding. The Superintendent of

Motor Vehicles and the Attorney General of British Columbia appealed all four awards of costs.

[44] The Court of Appeal accepted that the traditional immunity protecting quasi-judicial tribunals extends to costs, subject only to certain exceptions (at paras. 45 and 46). The Court then identified two exceptions to the general rule. The first exception is misconduct or perversity in the proceedings before the tribunal. The second exception is when the tribunal argues the merits of a judicial review application rather than its own jurisdiction (at para. 48). Nevertheless, the Court of Appeal noted that the traditional restrictions against administrative tribunals arguing the merits of their own decisions had been somewhat relaxed.

[45] Further, in two of the four appeals, the Court of Appeal set aside the costs order made by the reviewing judge on the basis there was “no contest of any kind at the judicial review hearing” because the Crown had conceded that an error had been made and had consented to an order sending the matter back to the adjudicator for a hearing (at para. 55).

[46] In *18320 Holdings Inc v Thibeau*, 2014 BCCA 494, the Court of Appeal reiterated that, traditionally, quasi-judicial tribunals are immune from costs awards, subject only to certain exceptions. The Court of Appeal endorsed the two exceptions identified in *Lang* but clarified that costs could be ordered against an administrative tribunal only where the tribunal has improperly argued the merits of the judicial review application. The Court of Appeal further stated that an award of costs remains discretionary and that a finding of a breach of natural justice or procedural fairness will not automatically result in an award of costs against the responding tribunal (at para. 69). The Court added that the closer the case is to one of a significant breach of the rules of procedural fairness,

in a case where those rules clearly apply, the stronger will be the case for a costs award.

[47] In *AAAM v Director of Adoption*, 2017 BCSC 87, Justice Young concluded that the general rule that administrative tribunals are immune from an award of costs is not restricted to quasi-judicial tribunals but extends to administrative actors, such as the Director of Adoptions. In so deciding, Justice Young noted, at para. 13:

If the rationale for costs immunity is to protect government agencies that have a statutory duty from being punished for carrying out their duties absent unreasonable actions or exceptional circumstances then there is no justification for the rule to be restricted only to quasi-judicial tribunals.

[48] In that case, Justice Young had found that the Director of Adoptions had exceeded her authority in placing the petitioner's child for adoption with a family outside the province of British Columbia. However, Justice Young concluded the Director did not expose herself to a costs award because her submissions were focussed on statutory interpretation, the standard of review and an acceptable explanation of the factors she considered in arriving at the opinion that the placement was in the best interest of the child. On this last point, Justice Young concluded that the Director was drawing the court's attention to those considerations rooted in her specialized expertise rather than arguing the merits of her decision.

[49] Additionally, Justice Young noted that examples of "misconduct or perversity" included situations where the tribunal has acted capriciously in ignoring a clear legal duty, made a questionable exercise of power, generated unnecessary litigation, or where bias [or conduct that gives rise to a reasonable apprehension of bias] among the administrative tribunal members or by the administrative decision-maker necessitated a new hearing (at para. 15).

[50] Also, she described the second exception as cases where an administrative tribunal or decision-maker has crossed the line and improperly argued the merits of the case. She further noted that a tribunal or decision-maker's involvement in the review of their own decision is properly limited in order to maintain their neutrality. However, in certain cases, the court may determine it is necessary for the tribunal or decision-maker to make submissions in that regard, when appropriate, such as when it is necessary to provide the reviewing court with the proper adversarial context. (at para. 16)

[51] Finally, in *Health PEI v Privacy Commissioner*, 2019 PECA 7, the Court of Appeal of Prince Edward Island also stated that, in a judicial review proceeding, costs for or against an administrative tribunal may only be awarded in unusual or exceptional circumstances, and then only with caution. The Court of Appeal added, citing its decision in *M & M Resources Inc v Prince Edward Islands (Workers Compensation Board)*, 2018 PECA 9, at para. 61:

.... contrary to normal practice, where a tribunal is concerned costs do not as a general rule follow the event on a judicial review or statutory appeal. A tribunal bears a statutory responsibility to act, and should not be burdened with costs for fulfilling this duty. As such, the appeal tribunal would not expect to either pay or receive costs on an appeal to the Court of Appeal. On the other hand, where a tribunal misconduct itself by neglecting to properly consider a serious issue of jurisdiction, conducts itself capriciously, or makes a clear breach of procedural fairness or similar egregious conduct, then costs could be awarded against the tribunal; but even then, a court would exercise caution before making such an award. In the results an award of costs against a tribunal, including the Appeal Tribunal on a statutory appeal, would be rare and unusual occurrence.

**D. Should a costs order be made against the Director in this judicial review proceeding?**

[52] The applicant was successful on this judicial review and, consequently, the decision of the Director against him was quashed on the basis the Director did not have jurisdiction over the applicant and Mr. Holbein's residential dispute.

[53] However, I am of the view that neither the conduct of the Director or the deputy director nor the circumstances of this case warrant an award of costs against the Director.

**i) There was no perversity or misconduct on the part of the Director**

[54] The Director carried several responsibilities under the *Act*, and continues to do so under the *Residential Tenancies Act*, including the adjudication of disputes between residential landlords and tenants (*Boles v Yukon Residential Tenancies Office*, 2025 YKSC 46, at paras. 19-21):

[19]... Pursuant to ss. 65 and 73 of the *Act*, it is the director of residential tenancies that has the authority to determine dispute between residential landlords and tenants over rights, obligations, and prohibitions under the *Act* or a tenancy agreement (*Westerlaken v Yukon Residential Tenancies Office*, 2025 YKSC 7 at para. 23). The deputy director may exercise any of the director's powers or fulfill any of the director's duties under the *Act*, other than the power to establish rules (s. 91(2) of the *Act*).

[20] An application for dispute resolution under the *Act* is made to the director. Once it is accepted, the director must set the matter for an oral hearing or a hearing in writing (s. 68); if the hearing is in writing the director establishes a timeline for written submissions (s. 68); the director may assist the parties or offer the parties an opportunity to settle their dispute (s. 69); the director may deal with any procedural issues that arise of the conduct of a proceeding (s. 78); the director may make any finding of fact or law based on the evidence, information, and submissions properly received that is necessary or incidental to making a decision or order under the *Act* (s. 73); the director can

make a range of orders (s. 76); the director's decision or order must be in writing and include the reasons for the decision or order (s. 82); and a party may apply to the director for a review of the director's decision or order (s. 84). I note that a decision or order of the director may be filed in the Supreme Court of Yukon and enforced as a judgment of the court after the period of time set out in the *Act* (s. 88).

[55] As pointed out by counsel for the Director, it is Mr. Holbein who initiated the proceedings before the RTO by filing an application for dispute resolution. Once seized with the residential dispute by Mr. Holbein, the RTO had to process his application. As part of the “adjudicative or decision-making” process established by the *Act*, the deputy director therefore considered Mr. Holbein's application for compensation for lack of proper notice to end what Mr. Holbein described as a tenancy and for the return of his security deposit. The deputy director also considered Mr. Westerlaken's counterclaim for unpaid rent, a veterinary invoice, damage to a rug and a duvet, as well as for labour for patching, painting, and cleaning after Mr. Holbein's departure. The matter proceeded in writing as provided in the *Act*. Mr. Holbein and Mr. Westerlaken filed documents and provided written submissions in support of their respective positions. After considering the parties' submissions, the deputy director made a decision, as provided under the dispute resolution process, and found in favour of Mr. Holbein. I acknowledge the deputy director did not raise or consider the issue of jurisdiction either outright or after receiving the evidence and submissions from the parties. However, the applicant did not question or challenge the jurisdiction of the RTO over his residential dispute with Mr. Holbein before the deputy director.

[56] It is also as part of that “adjudicative or decision-making” process that the Director considered the applicant's request for a review under s. 84 of the *Act*, on

several grounds, including the Director's lack of jurisdiction over the dispute, which the applicant raised for the first time on review. In order to come to a determination, the Director made a finding of law, which they were entitled to do, under s. 73 of the *Act*. Section 73 of the *Act* (s. 103 of the *Residential Tenancies Act*) provides that the Director may make any finding of fact or law based on the evidence, information, and submissions properly received that is necessary or incidental to making a decision or order under the *Act*. Therefore, the statute specifically authorizes the Director to determine questions of law that arise in matters that come before the RTO. This includes questions of interpretation of the *Act*.

[57] The Director dismissed the applicant's review under the *Act* on the basis, among other things, that the applicant met the definition of landlord under the *Act* and the parties were in a landlord-tenant relationship. Following that decision, the applicant filed an application for judicial review in this Court.

[58] As stated earlier, I found the Director had erred in law in interpreting its enabling statute and did not have jurisdiction over the applicant and Mr. Holbein's residential dispute because they were not in a landlord-tenant relationship as defined by the *Act*. As a result, I quashed the Director's Order. However, in so doing, I did not make any finding of bad faith against the Director, the deputy director or any RTO staff.

[59] Also, at the judicial review, the Director did not oppose Mr. Westerlaken's application. Counsel for Yukon, who appeared for the Director, conceded the error of interpretation and the ensuing lack of jurisdiction over the dispute. The applicant argues this concession, among other things, reveals the Director was obstinate and lacked diligence in refusing to seek legal advice from counsel for the Department of Justice on this important question of interpretation, as he had requested, the outcome of which

was obvious according to Mr. Westerlaken. In addition, he argues the negative impact of that decision on him and this judicial review proceeding could have been avoided altogether had the Director exercised due diligence.

[60] In my view, based on the record before me, the Director's concession at the judicial review cannot lead, in and of itself, to a finding of bad faith or lack of diligence on the part of the Director with respect to the proceedings before the RTO. I would add that it is the Director who is tasked with making a decision under the statute. Further, I am of the view that any claim related to alleged communications between Mr. Westerlaken and the Director, or RTO staff or officials of the Government of Yukon after the Director issued their decision are better left addressed in the civil claim Mr. Westerlaken filed against the Director, the Government of Yukon and Mr. Holbein rather than in this judicial review proceeding.

[61] The Director was seized with a dispute, which required that they determine whether the relationship between the appellant and Mr. Holbein was one of landlord-tenant (over which the Director has jurisdiction) as opposed to roommates (over which the Director does not have jurisdiction). The Director's decision that the applicant met the definition of a landlord under the *Act* was consistent with prior RTO's decisions. In my view, the information sheet the applicant states was initially published by the government of Yukon on the RTO's website indicating that "the dispute resolution process cannot be used when a dispute is between tenants or between occupants sharing a rental unit (i.e. roommates)" did not prevent or preclude the Director from engaging in a statutory interpretation exercise to determine the specific meaning and scope of the word landlord under their enabling statute (which definition under s. 1 of the *Act* includes "a person who, on behalf of the landlord, permits occupation of the

rental unit under a tenancy agreement”), in light of the meaning of the expression “sublet a rental unit” included in s. 34 of the *Act*, and whether it applied in the context of the applicant and Mr. Holbein’s residential relationship. In that context, the fact the Director acknowledged, at the judicial review, making a mistake in their interpretation, even when considered with the information the applicant states initially appeared on the RTO’s website, does not lead to the conclusion that the Director acted with impropriety in trying to do indirectly what only the Legislative Assembly is empowered to do, i.e. to modify the legislation to expand the scope of the Director’s jurisdiction, as argued by Mr. Westerlaken.

[62] The RTO followed the process established by its enabling statute to come to a decision, which was reversed on judicial review. While, ultimately, I found the Director did not have jurisdiction over the dispute, the circumstances of this case do not lead to the conclusion that the Director acted with impropriety by making a questionable exercise of power, neglecting to properly consider a serious issue of jurisdiction, being obstinate and/or breaching the rules of procedural fairness in processing the application Mr. Holbein filed with the RTO through the statutory dispute resolution process provided under the *Act*.

[63] As for the allegations of bad faith and lack of procedural fairness related to the circumstances surrounding the registration of the Director’s decision in the Supreme Court of Yukon, as formulated by the applicant, I am of the view that they are better left addressed in the civil claim Mr. Westerlaken filed against the Director, the government of Yukon and Mr. Holbein rather than in this judicial review proceeding.

**ii) *The Director did not improperly argue the merits of the judicial review and their conduct before the Supreme Court of Yukon, as a party to this proceeding, does not warrant an order of costs***

[64] The Court specifically ordered the Director to remain a respondent in this judicial review proceeding to address process issues and to make submissions on jurisdiction and interpretation of their enabling statute.

[65] As a result, the Director took an active part in the judicial review proceeding. However, the Director's participation conformed with the directions of the Court. Indeed, as noted in my decision on the judicial review itself, the Director adhered to the Court's directions and "filed written submissions within the limits of their participation" (at para. 8). The oral submissions of counsel for the Director also remained within the confines of the Director's court-ordered participation and were responsive to the Court's questions.

[66] In addition, the Director did not oppose the Court ordering that the amount garnished from the applicant's bank account and paid into court, after Mr. Holbein registered the Director's decision in his favour in the amount of \$1,349.99 with the Supreme Court of Yukon, be returned to the applicant after I quashed the Director's decision for lack of jurisdiction.

[67] Therefore, it would not be appropriate to award costs against the Director when their participation in this judicial review was, in all respects, appropriate and in accordance with the Court's directions.

[68] I acknowledge that Mr. Westerlaken was the successful party on this judicial review and that he spent a lot of time researching and preparing his written and oral submissions on this file. I also acknowledge his frustration with the administrative

process. However, in the absence of special circumstances, the rule is that costs are not awarded against administrative decision-makers.

[69] Finally, as I am of the view that the circumstances of this case do not warrant an order of costs being made against the Director, it is not necessary to weigh in on whether this Court may also award costs of the proceedings before the RTO.

## **CONCLUSION**

[70] Mr. Westerlaken succeeded in having the Director's decision quashed on judicial review. While I have concluded that the statutory immunity provision does not bar the Court from making a costs order against the Director in a judicial review proceeding, the general rule, subject to exceptions, is that no costs will be ordered for or against an administrative decision-maker on judicial review. In this case, I concluded that neither the conduct of the Director or the deputy director nor the circumstances of this case warrant an award of costs against the Director.

[71] Therefore, the applicant's request for costs is dismissed.

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CAMPBELL J.