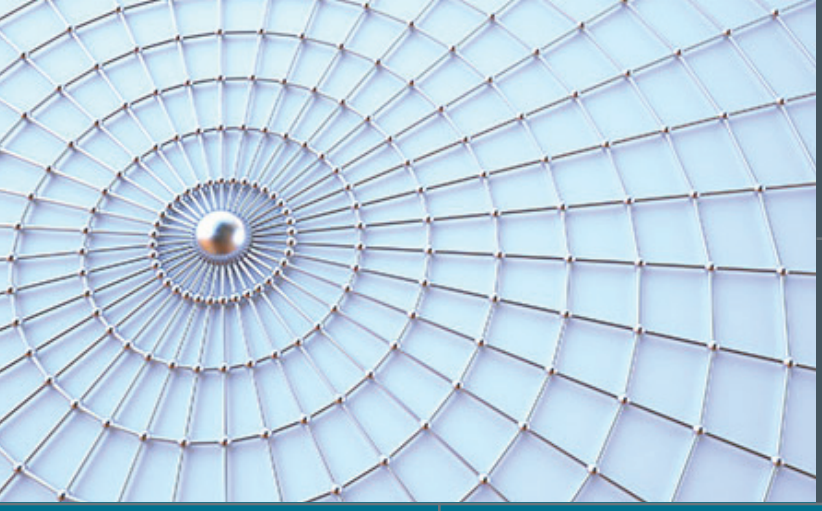

WeirFoulds LLP

INTERPRETING A REGULATOR'S JURISDICTION TO AWARD COSTS — CLIENT ALERT

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Lessons from *Registrar REBBA v. Jolly*

WeirFoulds recently acted as *Amicus Curiae* in a judicial review involving the interpretation of a regulator's jurisdiction to award costs. Although the case focused on the particular statutory framework applicable to the Appeals Committee of the Real Estate Council of Ontario (**"RECO"**), the case contains important lessons for other regulators.

Background

In *Registrar REBBA v. Jolly*, 2016 ONSC 2338 (***"Jolly"***), the question was whether RECO's Appeals Committee was constrained by the requirement in the *Statutory Powers Procedure Act* (***"SPPA"***) that before an order for costs can be made, there must be a finding that the conduct of a party has been unreasonable, frivolous, vexatious or in bad faith. Neither the *Real Estate and Business Brokers Act, 2002* (***"REBBA"***) nor the tribunal's own Rules of Practice imposed such a condition. In this case, RECO's Appeals Committee declined to order costs and ruled that the *SPPA*'s rules regarding costs governed. RECO subsequently applied for judicial review.

The Divisional Court upheld the decision of RECO's Appeals Committee and concluded that the tribunal could only award costs in the situation contemplated by the *SPPA* – that is, when a party's conduct is unreasonable, frivolous, vexatious, or in bad faith. The court went on to note that s. 32 of the *SPPA* provides that the *SPPA*'s provisions govern in the event of a conflict, unless the tribunal's enabling Act contains express language to the contrary. As *REBBA* did not expressly exempt RECO's Appeals Committee from the requirements under the *SPPA*, the *SPPA*'s costs provisions prevailed.

Consequently, although *REBBA* and RECO's own Rules of Practice explicitly address the issue of costs, the Divisional Court's decision confirms that the Appeals Committee may only award costs in the circumstances captured by the *SPPA*.

Lessons for Regulators

The *Jolly* decision is a reminder to regulators that there are often layers of legislation that must be considered when formulating Rules of Practice. Occasionally there is conflict between a regulator's governing statute and the *SPPA*, which may be by mistake or by design. Either way, the conflict must be managed carefully to ensure that the regulator acts in a manner that is consistent with its own jurisdiction.

In respect of costs orders, many regulators are exempted from the provisions of the *SPPA* in one of two ways. First, some regulators have legislation that stipulates that where there is conflict with the *SPPA*, their own legislation prevails. Second, regulators whose committees are entitled to award costs in accordance with the provisions of an Act that were in force on February 14, 2000 are exempted from the *SPPA*'s costs regime (by virtue of a grandfathering provision).

For regulators who are not exempt, a legislative change is necessary. This was the conclusion of the court in *Jolly* and the decision of the Divisional Court in *Barrington v. The Institute of Chartered Accountants of Ontario,* 2010 ONSC 338, 260 O.A.C. 199, a decision that considered a similar issue and that ultimately led to legislative reform for the regulator in issue.

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