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Functus Officio: No Second Kick at the Can for Judges

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It is often said that litigants only get one kick at the can and cannot try again later with a better pair of boots. The doctrine of *functus officio* operates to effectively impose the same restraint on judges.

As a general rule, once a judge has rendered a final decision, she is barred from reopening, varying or retracting her decision. She cannot do so because, having pronounced judgment – provided that there is no reservation of any kind in the judgment – the judge is said to be *functus officio* (Latin for "having performed one's office") and is divested of jurisdiction over the matter. If the decision is wrong or otherwise unsatisfactory, the recourse is for the aggrieved party to appeal it.

As with many rules, there are exceptions. A judge can draw on the court's inherent jurisdiction over its own records to amend a judgment where it contains an accidental slip or an error in expressing the manifest intention of the court: *Paper Machinery Ltd. et al. v. Ross (J.O.) Engineering Corporation et al.*, [1934] S.C.R. 186. Such power is also codified in Rule 59.06(1) of the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, allowing for rectification of inadvertent errors that would not prejudice any party's rights. As a case in point, in *Saikely v. 519579 Ontario Ltd.*, [2002] O.J. No. 2863 (S.C.J.), the trial judge's reasons for judgment made it known that she intended for a set-off to apply between the parties, yet her formal judgment made no mention of such set-off. At the request of the defendants, the court amended the formal judgment to provide for a set-off.

In addition to the slip and manifest error exceptions, Rule 59.06(2)(a) provides that a court may, on a motion, vary or set aside a judgment procured by fraud or on the basis of facts arising or discovered after judgment was pronounced. To have a judgment undone under Rule 59.06(2)(a) is no easy feat. For example, before a court would set aside a judgment for fraud:

(a) the fraud must be proved on a reasonable balance of probability;

(b) the fraud must be material;

(c) the evidence of fraud must not have been known to the moving party, acting with reasonable diligence at the time of the original proceeding;

(d) the motion to set aside must be brought without delay; and

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(e) above all else, the newly discovered facts must, either by themselves or in combination with previously known facts, provide a reason to set aside the judgment.

See *International Corona Resources Ltd. v. LAC Minerals Ltd.* (1988), 66 O.R. (2d) 610 (H.C.); *JV Mechanical Ltd. v. Steelcase Construction Inc.*, [2010] O.J. No. 1073 (S.C.J.).

While the doctrine of *functus officio* has been firmly in place for well over a century, uncertainty remains as to when a decision is considered final so as to trigger the doctrine. Traditionally, formal entry of a judgment, as a clear sign of finality, is necessary, such that a judge is not *functus officio* before judgment is entered. Justice Sopinka put it crisply in *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848: “The rule applied only after the formal judgment had been drawn up, issued and entered.”

Notwithstanding *Chandler*, some lower courts have embraced a more flexible and less formalistic approach, doing away with the requirement that judgment be entered: *Giorgio's Ltd. v. Wong*, [1999] N.W.T.J. No 97 at para. 22 (S.C.). Grappling with the requirement in the context of the related doctrine of *res judicata*, Rice J.A. stated in *Comeau v. Breau* (1994), 145 N.B.R. (2d) 329 (C.A.): “a principle as fundamental as that expressed in the doctrine of *res judicata* ought not to be denied application solely on the lack of formality of an entry of a judgment.”

Most recently, in *He v. Furney*, [2018] O.J. No. 1618 (S.C.J.), Justice Monahan declared himself *functus officio* even though his order had yet to be entered. He reasoned:

> I do not attach any particular significance, for purposes of the *functus officio* doctrine, to the requirement that court orders be "entered". The entering of a court order is a purely administrative matter performed by the Registrar. As Cromwell J.A. (as he then was) explained in *Nova Scotia Government and General Employees Union v. Capital District Health Authority*, "once a tribunal has completed its job, it has no further power to deal with the matter." Here, I have issued an endorsement and signed the Order dismissing the appeal. There is nothing further for me to do and thus I am *functus*. The timing of the entering of the Order by the Registrar does not require my involvement and, in my view, cannot determine or define my jurisdiction.

Jettisoning the requirement of formal judgment entry makes for sound policy. The fundamental objective of *functus officio* doctrine is to give expression to the principle of finality. Finality of a decision means that the decision is fixed and binding on the parties, who can, for better or for worse, rely and act on it. Finality lends credence to the validity of judicial decisions. A decision that is at the mercy of the judge's change of heart after it is made is uncertain and unreliable, and by extension, lacks validity. Moreover, the doctrine of *functus officio* enables effective administration of justice by ensuring a stable case for appellate review. If a court could continually entertain applications to amend its decisions, then the appellate record would be subject to change, as would the litigants' relative legal positions, making for breeding grounds for chaos.