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The Functus Officio Doctrine: Food for Regulatory Fodder

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Consider the following hypothetical: The "Vetting Committee"[1] of a professional regulator refers specified allegations of professional misconduct against a member to the Discipline Committee. After the Notice of Hearing is signed, new information arises which would have likely influenced the referral itself. Is the Vetting Committee entitled to reconsider its own decision in light of the new information? Does the answer change if the new information is received after the referral is made but before the Notice of Hearing is signed? What if the new information would not have influenced the referral itself but rather would have impacted the Vetting Committee's decision to impose interim conditions?

The answer to these questions requires a consideration of the *functus officio* doctrine. Translated to mean "having performed his or her office", *functus officio* is a jurisdiction limiting doctrine, delineating when a decision maker has exercised its statutory function and preventing the decision maker from revisiting its own decision on the merits once it is made. The principle promotes certainty and finality for litigants, enabling parties to assuredly consider their next steps, including the possibility of an appeal or judicial review. In the context of courts and some adjudicative bodies, determining when a final decision has been made is relatively straightforward the final decision is made when the judgment is rendered. On the other hand, the analysis in the context of Vetting Committees is significantly more complex for two principal reasons. First, Vetting Committees fulfill a broader mandate and function than a court or purely adjudicative body. Most Vetting Committees could be characterized primarily as investigative committees who additionally serve as gatekeepers, considering which matters ought to be heard and adjudicated by the Discipline Committee and which are frivolous, without merit, or can be dealt with in a remedial manner. Second, the decisions made by a Vetting Committee do not bear the hallmarks of a final decision. A Vetting Committee is typically not entitled to make findings of fact, nor is it usually entitled to make an order that could be perceived to be punitive.

Reconsidering a Referral Decision

Legislation tends to be silent on whether a Vetting Committee is entitled to reconsider its own decision. Several cases have, however, provided some guidance for analyzing this issue. In *Chandler v. Association of Architects (Alberta)*[2], Justice Sopinka, writing for a majority of the Supreme Court of Canada, held that the doctrine of *functus officio* should be applied flexibly to decisions of administrative bodies and not strictly or formalistically. The Supreme Court recognized that the unique functions of administrative bodies require a more flexible approach to the question of when a final decision has been made.Lower courts have subsequently adopted a contextual approach to the application of the *functus officio* doctrine to administrative decision makers[3]. The case law tends to emphasize the distinction between adjudicative decisions and investigative decisions, the latter of which tend not to be subject to the *functus officio* doctrine. In some cases, courts have held that the continuing authority of an administrative decision maker may be implicit. In others, courts have found that principles of equity may give rise to continuing authority in particular circumstances where fairness and justice require it.The contextual approach balances the principles of flexibility and finality for the parties and process. In many cases, the contextual analysis leans heavily towards a decision maker becoming *functus*, particularly where another body becomes seized of the matter. For example, where the Inquiries, Complaints and Reports Committee ("**ICRC**") of a body governed by the *Regulated Health Professions Act* issues a final decision to caution a member with a right of appeal to the Health Professions Appeals and Review Board, it is unlikely that the ICRC would be entitled to reconsider its decision of its own

accord once the matter is under review. Similarly, once a Discipline Committee has seized authority over a referral, the ICRC likely cannot wrestle it back.However, in numerous other contexts, courts have favoured flexibility over finality in the context of Vetting Committees. For example, the Divisional Court in *Greer v. Ontario Provincial Police[4]* held that *functus officio* was not applicable where the Superintendent acting under the *Police Services Act* reconsidered his own decision not to proceed with a complaint and ultimately issued a Notice of Hearing alleging neglect of duty against the same police officer.Similarly, courts have found it permissible for Vetting Committees to reconsider their own decisions in the following contexts:

- A Vetting Committee may reconsider a preliminary decision to not conduct a full investigation and close a matter, based on new information that arises subsequent to that decision.[5]
- A Vetting Committee may reconsider a decision that was rendered a nullity due to a failure to follow proper procedures or a breach of procedural fairness.[6]
- A Vetting Committee is not *functus* where it makes a *conditional* decision to take no further action provided the member completes educational coursework and the member refuses to agree to complete the coursework.[7]
- Where there is an obligation for a Vetting Committee to give written reasons, it is likely not *functus* until the issuance of the written reasons even if a decision has been communicated to the member.[8]

These cases recognize and support the need for flexibility at the Vetting Committee stage.

Reconsidering Interim Order Decisions

Many, if not most Vetting Committees have authority to issue interim orders such as to suspend or impose terms, conditions and limitations on a member's certificate of registration. These measures are devised to protect the public until such time as the matter can be considered by a Discipline Committee. The continuing authority of a Vetting Committee to reconsider a decision with respect to interim orders is, in general, more clear. Most statutes provide that an interim order continues in force until the matter has been disposed of by the Discipline Committee. Where an order is ongoing, the body charged with the administration of the order must have ongoing authority over it. As the court held in *Kunynetz v. College of Physicians and Surgeons of Ontario*, the purpose of interim orders is to protect public safety, and this statutory purpose would be undermined if the ICRC did not have the continuing authority to impose a new interim order at any time or to vary or remove an existing interim order.[9] If the ICRC receives new information that a member poses a risk to public safety, it must be able to act accordingly. In order to fulfill its statutory purpose, the ICRC must have the ongoing authority over interim orders until the matter has been disposed of by the Discipline Committee.

Concluding Thoughts

As Vetting Committees are responsible for performing diverse roles, it will invariably be difficult to define the moment at which a Vetting Committee becomes *functus*. From a doctrinal perspective, it is additionally worth asking whether a Vetting Committee ought ever be considered *functus officio*. Take, for example, the case of the Vetting Committee that referred a member to the Discipline Committee and then subsequently learned of new information that would have impacted the referral decision. If one were to conclude that the Vetting Committee was *functus officio* upon the referral, the referring decision could not be reconsidered and the matter would have to go to the Discipline Committee. This would increase the cost to the parties and would force a public hearing of the matter even had the governing body agreed that the matter did not merit a hearing in light of the new information. This would be the case even where there was a clear breach of procedural fairness by the Vetting Committee.For the foregoing reasons, it is beneficial for regulators to consider a flexible approach that enables Vetting Committees to nimbly respond to new information in evolving matters. These situations can and will arise from time to time, and may present new and novel issues. For example:

- Does a panel have to have the same constitution to reconsider a prior decision?
- Where a referral is made and an interim order is imposed, can a freshly constituted panel consider a request to vary an interim order based on new information where the former panel was comprised of members who no longer sit on the Vetting

Committee?

- Can a regulatory body and its members agree to remit a matter to the Vetting Committee for further consideration even after the Notice of Hearing has been issued and the Discipline Committee has been empanelled?

Until such time as the courts provide further clarity, the application and scope of the *functus officio* doctrine to Vetting Committees will continue to be food for regulatory fodder.***Thank you to Kelsey Gordon, Summer Student at WeirFoulds LLP, for her contributions to this client alert.***[1]For the purposes of this article, "Vetting Committees" include committees that do not make ultimate determinations of professional misconduct but rather decide whether specified allegations ought to be referred to their own Discipline Committees. Under the *Regulated Health Professions Act*, this would mean the Inquiries, Complaints and Reports Committee. For other regulators, the "Vetting Committees" may include the Executive Committee and Complaints Committee.[2]*Chandler v. Association of Architects (Alberta)*, [1989] 2 SCR 848[3]*Jacobs Catalytic Ltd v. IBEW Local 353* 2009 ONCA 79; *Kleysen Transport Ltd v. Hunter* 2004 FC 1413.[4]2006 CanLII 40230 (Ont Div Ct.)[5]*Holder v. College of Physicians & Surgeons (Manitoba)* 2002 MBCA 135, leave to appeal to SCC refused, 29518 (17 April 2003).[6]*Chandler supra* note 2 at para. 80; *Kupeyan v. Royal College of Dental Surgeons Ontario* [1982] 137 DLR (3d) 446, OJ No 3376 (Ont Supreme Ct).[7]*Ferrari v. College of Physicians & Surgeons (Alberta)* 2008 ABQB 158.[8]*Mast v. College of Nurses of Ontario* 2015 ONSC 5854 (Div Ct).[9]*Kunynetz v. College of Physicians and Surgeons of Ontario* 2015 ONSC 6830 (Div Ct).

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