

**IN THE MATTER OF PART 3 OF THE
LEGAL PROFESSION ACT, RSA 2000, c. L-8**

AND

**IN THE MATTER OF AN APPEAL
REGARDING NAVDEEP VIRK
A MEMBER OF THE LAW SOCIETY OF ALBERTA**

Appeal to the Benchers Panel

Ken Warren, QC – Chair
Ryan Anderson, QC – Bencher
Bill Hendsbee, QC – Bencher
Jim Lutz, QC – Bencher
Walter Pavlic, QC – Bencher
Lou Pesta, QC – Bencher
Cora Voyageur – Public Bencher

Appearances

Karen Hansen – Counsel for the Law Society of Alberta (LSA)
Navdeep Virk – Self-represented

Hearing Dates

July 22, 2020 and November 23, 2020

Hearing Location

Virtual Hearing

**APPEAL PANEL DECISION –
APPLICATION FOR LEAVE TO REARGUE AND TO INTRODUCE FRESH EVIDENCE**

Overview

1. This decision uses the terms as defined in the Appeal Panel Decision dated June 1, 2021.
2. Mr. Virk submitted an application on August 12, 2021, supported by an affidavit sworn by him on that same date, claiming the following relief:
 - (a) an Order allowing for leave to reargue.
 - (b) an Order permitting fresh evidence to be adduced before the Appeal Panel.
3. Mr. Virk's Application sets out the following grounds:
 - (i) A final decision has not been rendered as of the date of the application by the Appeal Panel, namely an award of costs. The Appeal Panel is not *functus officio*.

- (ii) Fresh evidence determinative of the matters on Appeal is now available.
- (iii) Such further grounds as may be expanded upon by the Applicant in submissions before the Appeal Panel.

Relevant Procedural History

4. The relevant procedural history is:

- (a) The Merits Hearing proceeded on June 17, 18, 19, 25, 26, 27 and 28, 2019;
- (b) The Committee issued its Merits Decision on September 9, 2019;
- (c) The Sanction Hearing proceeded on December 17, 2019;
- (d) The Committee issued its Sanction Decision, ordering that Mr. Virk be disbarred, on January 31, 2020;
- (e) Mr. Virk filed a Notice of Appeal dated February 3, 2020 that was superseded by an Amended Notice of Appeal dated September 14, 2020;
- (f) Mr. Virk brought an Application on June 12, 2020 to introduce fresh evidence and to quash the Merits Decision and Sanction Decision of the Committee. The Application was heard by the Appeal Panel on July 22, 2020 and was dismissed on that date, with reasons to follow;
- (g) The Appeal Panel conducted a hearing on the Appeal of Mr. Virk on November 23, 2020;
- (h) The Appeal Panel issued its decision on June 1, 2021. The Majority decision, in paragraph 136, confirmed the Committee's findings of conduct deserving of sanction, with the exception of one citation, and confirmed the Committee's Order for disbarment. The Appeal Panel dismissed the appeal. The Majority decision then dealt with costs as follows:

137. Given the dismissal of Mr. Virk's Appeal, the LSA is entitled to its costs in this Appeal, payable within three months of this written decision. LSA counsel will prepare a Statement of Costs and will send it to the Chair for review and approval within one week of this written decision. The parties may make brief submissions regarding costs within one month of this written decision.
- (i) Mr. Virk filed a Civil Notice of Appeal to the Court of Appeal of Alberta, appealing the decision of the Appeal Panel, on June 2, 2021;
- (j) Mr. Virk submitted the application under consideration on August 12, 2021 and an amended version on August 16, 2021; and
- (k) The Appeal Panel issued its brief decision on costs, which again included Majority and dissenting decisions, on August 17, 2021.

Preliminary Issue

5. Before undertaking any consideration of the application for leave to reargue and to introduce fresh evidence on its merits, the Appeal Panel considered whether it was *functus officio*, in whole or in part, as a result of issuing its June 1, 2021 decision. If the Appeal Panel is *functus officio* with respect to assessing conduct deserving of sanction and sanction, it has no authority to consider Mr. Virk's application on its merits.
6. The Appeal Panel has concluded that on August 12, 2021, it was *functus officio* other than with respect to costs.

Analysis and Decision

7. The term *functus officio* means that a decision maker has discharged its duty and exhausted its authority.¹
8. The doctrine of *functus officio* is designed to provide finality in regard to decisions. Final decisions provide litigants with certainty and a stable basis for appeal. The Supreme Court of Canada in *Chandler v. Alberta Association of Architects* held that a final decision cannot be revisited "because the tribunal has changed its mind, made an error within its jurisdiction or because there has been a change of circumstances".²
9. In *Chandler*, the Supreme Court of Canada confirmed that the doctrine of *functus officio* applies not only to decisions of courts but also to those of administrative tribunals. The Court identified six exceptions to the application of the doctrine in the case of administrative tribunals:
 - (a) where authorized by statute;
 - (b) where there has been a slip in drawing up the final judgment, in the nature of a clerical error;
 - (c) where there has been an error in expressing the manifest intention of the decision maker;
 - (d) where the decision of an administrative tribunal is subject to appeal only on a point of law;
 - (e) where a tribunal's enabling statute permits the tribunal to reopen a decision in discharging its function; and
 - (f) where a tribunal has failed to dispose of an issue raised in the proceedings and of which its enabling legislation calls for it to dispose.³

¹ *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 (CanLii) at paragraphs 77-79.

² *Chandler v. Alberta Association of Architects*, [1989] 2 SCR 848 at page 14.

³ *Chandler*, at pages 13-15.

10. Subsequent authority supports the view that an administrative body may also rehear a matter where its original proceeding violated principles of natural justice or where notice of the proceedings were not given to all interested parties.⁴
11. Mr. Virk does not in his application rely upon an exception to the doctrine of *functus officio* and it is the Panel's view in any event that none of the exceptions apply in the circumstances. Rather, Mr. Virk submits that the doctrine does not operate at all because of the outstanding decision regarding costs at the time that his application was submitted.
12. The Appeal Panel finds that its June 1, 2021 decision, providing reasons for the fresh evidence application affirming with one exception the Committee's findings of conduct deserving of sanction and affirming the Committee's Order of Disbarment, was a final decision. The Appeal Panel's granting of permission to the parties to make brief submissions regarding costs within one month of its decision and retaining jurisdiction to make a further order regarding costs did not affect that characterization.
13. In *Fecteau v. the College of Psychologists of New Brunswick*⁵, the New Brunswick Court of Appeal addressed the doctrine of *functus officio* in circumstances in which the College advised its Discipline Committee that it was *functus officio* and unable to deal with an issue of costs. The Discipline Committee had already issued a decision that held that Dr. Fecteau was not guilty of professional misconduct and that no sanction was warranted. After that decision was rendered, Dr. Fecteau's counsel requested an opportunity to make representations with respect to costs, which was denied by the discipline committee.
14. The Court allowed the appeal, holding that the discipline committee was not *functus officio* on the issue of costs until such time as it had addressed them and made an order. The Court interpreted the language of the enabling legislation as contemplating a two-step process. The legislation contemplated making an order for costs after making a decision that a proceeding was unwarranted. It was unnecessary for the Court to state whether the discipline committee was *functus officio* with respect to the decision dismissing the professional misconduct allegations against Dr. Fecteau. It did however conclude that because the discipline committee did not turn its mind to the question of costs when it rendered its initial decision, there had been no final decision with respect to costs that would invoke the doctrine of *functus officio*.
15. In *Bavelas v. Copley*⁶, the British Columbia Supreme Court addressed the doctrine of *functus officio* following reasons for judgment that awarded damages to the plaintiff. The Court also granted the parties leave to make written submissions with respect to costs once judgment had been rendered. In their submissions respecting costs, one of the defendant groups made arguments that went to their liability to the plaintiff for damages. The Court rejected those arguments, holding that its entered order reflecting the findings of liability and awards of damages made the Court *functus officio* except with respect to the issue of costs.
16. In *GC Parking Ltd. v. New West Ventures Ltd.*⁷, the British Columbia Supreme Court granted judgment to the plaintiff that awarded damages and dealt with costs with some particularity. Subsequently, the plaintiff's counsel sought to make submissions with respect to a claim for

⁴ *Nurani v. Alberta (Environmental Appeal Board)*, [1998] 3 WWR 679 at paragraphs 48 and 52.

⁵ *Fecteau v. the College of Psychologists of New Brunswick*, 2014 NBCA 74.

⁶ *Bavelas v. Copley*, 2000 BSCC 0450.

⁷ *GC Parking Ltd. v. New West Ventures Ltd.*, 2004 BCSC 1700.

enhanced costs based upon a settlement offer. The Court held that notwithstanding the entered order, it was not *functus officio* with respect to the question of enhanced costs as the issue had not been dealt with in the reasons for judgment. Citing *Bavelas*, the Court stated at paragraph 17:

The court can be *functus officio* where the entered order accurately deals with matters which were dealt with in the Reasons for Judgment but retain jurisdiction to deal with matters which were not set out in the entered order but which were dealt with in the Reasons for Judgment.

17. The *Legal Profession Act (Act)* contemplates a two-stage process in conduct proceedings. Section 72(1) authorizes a Hearing Committee that finds a member is guilty of conduct deserving of sanction to order one of three sanctions: that the member be disbarred, that the membership of the member be suspended or that the member be reprimanded. Section 72(2) then provides that "In addition to an order under subsection (1), the Hearing Committee may make one or more of the following orders:...". Among the three orders that may be made is an order requiring the payment to the LSA of all or part of the costs of the proceedings. The findings of a Hearing Committee regarding whether the member is guilty of conduct deserving sanction (section 71(1)) and the order respecting sanction (section 72(1)) are distinct from the possible order respecting the payment to the LSA of costs of the proceedings (section 72(2)).
18. Section 77 of the *Act* deals with the orders that may be made by an appeal panel following an appeal hearing under section 76. Section 77(1) similarly draws a distinction between confirming the Hearing Committee's findings of guilt in respect of the member's conduct and any order made as a result of that finding under section 72.
19. In this case, the Appeal Panel's decision of June 1, 2021 upheld the Committee's findings of conduct deserving of sanction by Mr. Virk, with one exception. The decision further confirmed the Hearing Committee's order of disbarment. Those decisions were final. The Appeal Panel was at that point *functus officio* other than with respect to the issue of costs, that was dealt with after receiving further submissions of the parties. Further, the filing by Mr. Virk on June 2, 2021 of a Notice of Appeal to the Court of Appeal of Alberta demonstrates that he considered the June 1, 2021 decision to be a final decision that would support an appeal.
20. The Appeal Panel dismisses the application of Mr. Virk on the grounds that it is *functus officio* with respect to the matters raised by that application.

Dated at Calgary, Alberta, September 24, 2021.

Ken Warren, QC

Ryan Anderson, QC

Bill Hendsbee, QC

Walter Pavlic, QC

Lou Pesta, QC

Jim Lutz, QC

Cora Voyageur