Forest Practices Code

Compliance and Enforcement Branch Advice to Statutory Decision Makers and their Staff

Number 11 **October XX, 2001**

Functus Officio

The Need for Finality in Determinations

Introduction

Functus officio is a common law rule that prohibits a statutory decision-maker (SDM) from changing a determination once it has been rendered.

This bulletin explains the functus rule and illustrates how it can apply in different situations. The statements made in this bulletin are accurate, however, different conclusions about how the rule applies can be reached depending on the particular facts of each situation. Accordingly, legal advice should be sought from Ministry of Attorney General solicitors if the issue arises to ensure that all of the particular factual circumstances are considered.

How the Rule Works

Once a validly-made final determination has been issued (either orally or in writing), the SDM is powerless to change it, other than to correct obvious technical or clerical errors, or unless specifically authorised to do so by statute or regulation.

Technical and Clerical Errors

A technical or clerical correction is one that does not change the substance or outcome of the decision. Correcting technical or clerical errors does not include situations where the SDM has changed his or her mind about an issue, made an error within his or her jurisdiction, or where there has been a change in circumstances that would seem to justify a new decision.

Jurisdictional Errors

Jurisdictional errors are errors that relate to an SDM's authority to make a decision, such as where the SDM incorrectly interprets the law and consequently oversteps his or her authority. An error made within the SDM's jurisdiction cannot be reopened. However, a decision that is based on a jurisdictional error (i.e. made outside the boundaries of the SDM's authority) can be revisited by the SDM and should be considered a nullity. In that instance, a determination has not really been made, because the SDM has acted beyond his or her authority, i.e. there has not been a validly made decision.

Finality in Decision-making

The functus rule exists to provide finality to quasi-judicial decisions so that people and businesses are afforded the certainty they require to operate effectively. The ability to revisit and change determinations could easily disrupt the lives and businesses of those affected by the determinations, and cause them hardship and loss. The rule is premised on the idea that, overall, the advantages of avoiding uncertainty (and its consequences) outweigh the reasons a SDM might have for wanting to change a determination in a particular case.

This point was made by Mr. Justice Thackray in Doyle v. HMTQ and Bell Pole Company Ltd., [1993] (BCSC), where the petitioner (Doyle) sought to overturn a ministerial consent decision involving a tenure transfer under s.54 of the Forest Act.

Under s. 56 of the Forest Act, a minister's consent obtained under s.54 results in an automatic five percent reduction in the licence's allowable annual cut. Bell Pole had sought and obtained the ministerial consent decision on behalf of Mr. Doyle in anticipation of its purchase of Mr. Doyle's licence. When the sale to Bell Pole fell through, Mr. Doyle discovered, to his dismay, that his licence was still subject to the five percent reduction, despite the fact that the transfer had not occurred.

Mr. Doyle asked the Minister to revisit and rescind his s.54 decision. However, because the Minister's decision was a valid, final decision, the Minister did not have the authority to re-open it. He was functus. Mr. Doyle then petitioned the court to have the s.54 decision changed.

In his oral reasons for judgment on judicial review, Mr. Justice Thackray said:

> *I think the Minister was correct. People in the position of Mr. Doyle or Bell Pole would be ill served if there was a general pronouncement here that a Minister could come along, after the consent [decision], and change his mind and declare the consent a nullity. In the long run that is the last thing that Doyle and Bell Pole would want.*

When is a decision "final"?

Functus officio only comes into play after a final decision has been rendered. It does not preclude a decision-maker from re-opening a hearing to hear more evidence or submissions, or from seeking further written submissions from parties prior to making a decision. However, in order to ensure that a determination can, in fact, be considered final, a SDM cannot reserve the right to clarify or revise the determination at a later date. To do so would raise doubts as to whether or not a determination was, in fact, made.

Two Examples

Security for Forest Practice Liabilities Regulation

Section 1 of the Security for Forest Practice Liabilities Regulation (SFPLR) allows a district or regional manager to require a licence holder to provide security for the performance of the holder's duty to carry out silviculture obligations under a silviculture prescription or stand management prescription. The district or regional manager must determine when the security must be paid, the amount of the security, and the form of the security. Although it might appear convenient to make a single determination with a blanket rate for all silviculture prescriptions, reserving the right to revise the rate for individual prescriptions at a later date, such a determination would lack finality and could be challenged as being a non-determination. Accordingly, under the SFPLR, security requirements should be assessed individually on each silviculture prescription approved under the forest licence.

Ensuring that a determination is final is critical in situations where the SDM is required to have made a determination prior to taking further action. In this example, if the SDM has not made a final determination regarding security, he or she would be prevented from suspending the tenure holder's licence for failing to comply with the security requirements.

Forest Development Plans

The Forest Practices Code of BC Act (the Code) creates a mandatory requirement to approve an FDP if the district manager is satisfied that the terms of s.41 are met. The Code does not specifically provide for the refusal of approval of an FDP. This raises the question of whether or not a refusal to approve a plan can ever be considered a final determination, or if only the decision to approve can be considered the final decision. Although the courts have not ruled on this point, perhaps the better view is that the authority for an SDM to refuse approval of a plan is implicit in the legislation. Accordingly, where the SDM has formally notified the plan proponent that a decision has been taken to refuse approval of the proponent's plan, that decision should be regarded by the SDM as a final decision, in which case the SDM is functus officio as far as that plan is concerned. The consequence is that the proponent would be required to submit a new plan and to complete the comment and review process again.

Conclusion

Functus officio does not remove all uncertainty from determinations. Until all appeals are exhausted or the period to start a review or appeal has expired, a measure of uncertainty will surround a decision. The functus rule does, however, remove the possibility that an SDM could at some future time, for whatever reason, revisit and change his or her decision. In this way, the rule provides a greater level of certainty to people affected by administrative decisions by placing a limit on the power of SDMs. Licence holders or others affected by a decision should be able to depend on the fact that the decision, once made, favourable or not, will not be changed by the SDM. Again, you should seek legal advice from MAG solicitors if the issue arises to ensure that all of the relevant factual circumstances are considered.

Contacts

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