DOCTRINE OF *FUNCTUS OFFICIO*: THE CHANGING FACE OF FINALITY'S OLD GUARD

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The doctrine of functus officio has a very low profile in academic literature, especially juxtaposed with its doctrinal cousin, res judicata. The lack of attention belies the important role that it plays in the orderly administration of justice. This article chronicles the origins of the doctrine, its expansion into the administrative law context, and the cracks in the jurisprudence that have surfaced since Chandler v Alberta Association of Architects, a decision in which the Supreme Court of Canada called for flexible application of functus officio to administrative decision-makers. The article culminates with a proposed new framework of analysis for determining when to suspend operation of the doctrine in the administrative context.

Le principe du dessaisissement du juge est rarement évoqué dans les écrits universitaires. C'est particulièrement vrai au regard de la popularité de son « cousin » doctrinal qu'est le principe de la chose jugée. L'absence d'attention dément l'importance du rôle joué par ce principe dans la bonne administration de la justice. L'auteure retrace ici les origines du principe, son expansion dans le contexte du droit administratif et les failles qui lézardent la jurisprudence depuis l'arrêt Chandler c. Alberta Association of Architects, une décision dans laquelle la Cour suprême du Canada exhortait à une application souple, aux personnes rendant des décisions administratives, du principe du dessaisissement du juge. L'article culmine avec la proposition d'un nouveau cadre d'analyse pour déterminer le moment auquel suspendre le fonctionnement de la doctrine dans le contexte administratif.

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1. Introduction

We are taught from a tender age that when we make a mistake, we ought to admit it and correct it. Lyrics to the song "Mistake" from the popular children's cartoon *Shimmer and Shine* enlighten:

> When we make a big mistake
> Don't fret, let's celebrate
> 'Cause we'll get another try (Oh yeah)
> We'll do better next time.

Crossing swords with what we have been taught, the law of *functus officio* instructs otherwise. It dictates that decision-makers—be they judges, administrative officials, or arbitrators—cannot as a general rule reopen their decisions to correct a mistake. There is no opportunity for them to "do better next time" in the same case because there will be no next time. They must get it right the first time, for that will be their only time.

The doctrine of *functus officio* is a powerful one. Yet for all the power that it wields, little attention has been paid to it to date, especially compared

to all the light that has been shone on its doctrinal cousin, *res judicata*.[1] As the Supreme Court of Canada observed in *Chandler v Alberta Association of Architects*, a seminal decision on *functus officio*, "[t]reatise authors dealing with administrative law issues have been surprisingly frugal in their treatment of the *functus officio* doctrine."[2] The unbroken poverty of scholarship stirred Justices LeBel and Deschamps to point out a decade later, more plainly this time: "Canadian doctrinal and judicial writing on *functus officio* is sparse."[3]

Two decades have passed since the last remark and there remains little more than a smattering of comments on *functus officio*, much of it couched under other topics.[4] The lack of academic interest in the doctrine cannot be for a lack of jurisprudential development, as there has been a steady churn of cases involving the doctrine.

The purpose of this article is to heed the top Court's subtle call to give some attention to the functus doctrine. The attention is not only overdue but thoroughly deserved given the pivotal role that *functus officio* plays—and has played—in turning the wheels of justice. It brings finality, certainty and orderliness to the legal process by enforcing a cutoff point. As important as its role is, its application, particularly in the administrative

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1 Countless articles have been published in Canada and elsewhere about *res judicata*: see e.g. Timothy Pinos, "Res Judicata Redux" (1988) 26:4 Osgoode Hall LJ 713; Paul M Perell, "Res Judicata and Abuse of Process" (2001) 24:2 Adv Q 189; Richard HS Tur, "Res Judicata and Theories of Law" (2001) 1:2 OUCLJ 123; Edith Charbonneau, "Preclusion, Res Judicata et Preclusion Decoulant d'une Question Deja Tranchee: Des Eclaircissements S'Imposent" (2015) 93:2 Can Bar Rev 371; Robert von Moschzisker, "Res Judicata" (1929) 38:3 Yale LJ 299; Yuval Sinai, "Reconsidering Res Judicata: A Comparative Perspective" (2011) 21:2 Duke J Comp & Intl L 353; Kevin M Clermont, "Res Judicata as Requisite for Justice" (2016) 68:3 Rutgers U L Rev 1067 [Clermont]. There are even books dedicated to the subject: see e.g. Donald J Lange, *The Doctrine of Res Judicata in Canada,* 4th ed (Markham, Ont.: LexisNexis Canada, 2015) [Lange]; Ken R Handley, *Spencer Bower and Handley: Res Judicata*, 5th ed (London: LexisNexis, 2019).

2 *Chandler v Alberta Association of Architects*, [1989] 2 SCR 848 at 867, 62 DLR (4th) 577 [*Chandler*].

3 *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 at para 113 [*Doucet-Boudreau*].

4 For e.g. *functus officio* was addressed in a subsection of Paul Daly's "Updating the Procedural Law of Judicial Review of Administrative Action" (2018) 51 UBC L Rev 705, and won a paragraph in Lorne Neudorf's "Inadequate Reasons: The Need for Tribunal Participation in Judicial Review Litigation" (2016) 54:1 Alta L Rev 219 [Neudorf]. It is discussed as part of a large chapter on review and reconsideration of decisions in Donald JM Brown & John M Evans, *Judicial Review of Administration Action in Canada* (Toronto: Canvasback Publishing, 1998) (loose-leaf) at ss. 12:6211, 12:12:6221–12:6230. In Lange's treatise on *res judicata*, *supra* note 1, he provides a concise discussion of *functus officio* in the last, heterogeneous chapter entitled "Related Doctrines".

context, has not been without difficulty. The existence of conflicting jurisprudence furnishes evidence of trouble.

This article has three main parts. Part I provides an overview of the doctrine of *functus officio*. The doctrine's role in the administrative of justice, its policy underpinning, as well as the prerequisites for its operation and exceptions to it, are canvassed. Part II of the article delves into the extension of the doctrine's reach into the administrative justice system. Given the kaleidoscope of administrative bodies, with differing mandates and processes, strict application of the doctrine is not always appropriate. Consequently, the Supreme Court called for flexibility in its application, but it stopped short of providing concrete guidance on how it should be done. Fractures in the case law ensued. And that brings us to Part III, where I propose a three-step analysis for a principled and measured application of flexibility to help seal the fractures. The proposed analytical framework seeks to strike a balance between the need for finality and doing practical justice in the individual case.

2. Part I: Overview of the Doctrine of *Functus Officio*

A) Role in the Administration of Justice

Functus officio is a Latin expression that translates to "having performed his or her office." The concept of *functus officio* has existed for many centuries. The Roman jurist Ulpian (c. 170–228 AD) had written about it. His edict was later transposed into Justinian's Digest, the largest compilation of doctrinal commentaries in the Western world from which all later Western legal systems borrowed.[5] According to Ulpian, after a

[5] The Digest of Justinian is a compilation of juristic writings on Roman law commissioned by the Byzantine Emperor Justinian (c. 482–565 AD). Divided into 50 long books, the Digest comprises commentaries by revered Roman jurists from the first century BC to the end of the first-third of the third century AD, covering the full range of public and private law. Ulpian was perhaps the most important contributor, as his writings made up a third of the Digest. The Digest, together with Justinian's later enactments (the Code, the Institutes, and the Novels), came to form the *Corpus Juris Civilis*. While no direct citation of Ulpian on *functus officio* by a common-law court can be made out from the records, it would not be hard to imagine that it was the source from which the common-law doctrine was drawn, given how authoritative Roman law had been, especially during common law's formative years. Even though Roman law was never officially received in England, Roman law authorities "were habitually cited in the common law courts, and relied upon by legal writers, not as illustrative and secondary testimonies as at present, but as primary and as practically conclusive": Sheldon Amos, *The History and Principles of the Civil Law of Rome: An Aid to the Study of Scientific and Comparative Jurisprudence* (London, UK: Kegan Paul, Trench & Co., 1883) at 450. On the influence of Roman law on the common law, see also A Rives Hall, "The Common Law – Its Debt to Rome" (1927) 5:9 Can Bar Rev 639; TFT Plucknett, "The Relations between Roman Law and English Common Law down to the

judge has delivered his judgment, he immediately ceases to be the judge: "*hoc jure utimur ut judex qui semel vel pluris vel minoris condemnavit, amplius corrigere sententiam suam non posset; semel enim male vel bene officio functus est.*"[6] The gist of Ulpian's words is: "[A] judge who has given judgment, either in a greater or a smaller amount, no longer has the capacity to correct the judgment because, for better or for worse, he will have discharged his duty once and for all."[7]

The functus doctrine's deep and aged roots have inspired at best shallow interest in the subject. As noted earlier, legal minds and commentators have given little thought to *functus officio*. It usually comes up, if it does at all, as an afterthought or an aside when other finality doctrines—abuse of process by re-litigation, rule against collateral attack, and the powerhouse, *res judicata*—are discussed. Beside the efforts of some encyclopedias and textbooks to define the doctrine and capture the key precedents, *functus officio* has received scant attention, and hardly any theorizing. The scant attention it has drawn understates the significant role that it plays in the administration of justice. The significance of *functus officio* is threefold.

First, *functus officio* lends finality to the conduct of proceedings by marking a definitive endpoint to it. A valid and final decision, as defined by law of *functus officio*, is the summit of all judicial, arbitral, and tribunal proceedings. It is essential to the administration of justice to have a clear stopping place, a point of no turning back; otherwise, there would no end to the case, nor any beginning of enforcement. The law of *functus officio*, together with the law of *res judicata* (Latin for "a thing adjudged"), defines what constitutes a valid and final decision, from which point the parties

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Sixteenth Century: A General Survey" (1939) 3:1 UTLJ 24; Edward D Re, "The Roman Contribution to the Common Law" (1961) 29 Fordham L Rev 447; William L Burdick, *The Principles of Roman Law and Their Relation to Modern Law* (New Jersey: The Lawbook Exchange Ltd, 2004) at 71–74; Edward Jenks, *A Short History of English Law: From the Earliest of Times to the End of the Year 1911*, 2nd ed (Boston: Little, Brown and Company, 1922) at 20. For a brief history of the Digest, see Alan Watson, translated, *The Digest of Justinian* (Philadelphia: University of Pennsylvania Press, 1985), Preface to the Original Edition; David Johnston, ed, *The Cambridge Companion to Roman Law* (New York: Cambridge University Press, 2015) at 3–4, 119–148; Martine Valois, "Judicial Independence: Keeping Law at a Distance from Politics Chapter 10—Roman Law" (2013), 60 SCLR (2d) 97 at paras 6–8; John Matthews, "Roman Law and Roman History" in David S Potter, ed, *A Companion to the Roman Empire* (Malden, MA: Blackwell Publishing, 2010) at 480–82.

[6] Alexandr Koptev, "Digestae Justinian" *The Latin Library* at Book 42, Title 1, Note 55, online: <www.thelatinlibrary.com/justinian/digest42.shtml>.

[7] Translation in Daniel Malan Pretorius, "The Origins of the Functus Officio Doctrine, with Specific Reference to Its Application in Administrative Law" (2005) 122:4 SALJ 832 at 836.

and the decision-maker are bound and enforcement may be had, lest the decision be struck on appeal or judicial review.

Second, *functus officio* enables effective appeal and judicial review. Preclusion from changing a decision is necessary to ensure a stable basis for appeal and judicial review.[8] But for a rule like *functus officio* that dictates finality and forbids decisions from being easily undone, decision-makers could change their decisions as they like, as many times as they like. With a record for appeal (or judicial review, as the case may be) that could shift like shifting sand, it is hard to imagine how there could be effective review. Indeed, the appeal process itself could drag on indefinitely. Every time that the decision under appeal is adjusted or supplemented, the appeal may need to be reconsidered, and the appeal decision revisited, assuming that appellate reconsideration is not itself barred by *functus officio*. The appellate process itself will become a never-closing door through which appellants have indefinite entry, coming through whenever the underlying decision is changed.

Third, out of the various common-law finality doctrines, *functus officio* is the only doctrine that is directed at the decision-maker, rather than the parties, or in the case of *res judicata*, the parties and their privities.[9] The doctrine operates like an injunction pointed at every judge, every arbitrator, and every tribunal. It kicks in when a final and valid decision is made. Upon the rendering of a final and valid decision, the decision-maker is enjoined from reconsidering the decided matter and rescinding or varying the decision in any manner. Put another way, the doctrine circumscribes the jurisdiction of a decision-maker by delineating when his jurisdiction is exhausted. Once the jurisdiction is spent, the decision is fixed. With no going back, finality is achieved. With finality comes legal

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8 *Doucet-Boudreau*, *supra* note 3 at para 114.

9 *Res judicata* has two branches, issue estoppel and cause of action estoppel. For either issue estoppel or cause of action estoppel to apply, the parties to the second proceeding must have been either parties or their privities to the first proceeding. See *Erschbamer v Wallster,* 2013 BCCA 76 at paras 13, 15; *Angle v Minister of National Revenue*, [1975] 2 SCR 248 at 254, 47 DLR (3d) 544; *Farwell v Canada (AG)* (1894), 22 SCR 553. The notion of privity requires a sufficient degree of connection or identification between two persons. It can be established by blood (heirs and successors), title (e.g. landlord and tenant), or community of interest: see *Machin v Tomlinson* (2000), 51 OR (3d) 566, 2000 CanLII 16945 at para 18 (CA); *Martin v Goldfarb*, 2006 CanLII 23152 at para 62, [2006] OJ No 2768 (QL) (Ont Sup Ct); *Glenko Enterprises Ltd v Keller*, 2008 MBCA 24 at para 42; *Carl-Zeiss-Stiftung v Rayner & Keeler Ltd (No 2)*, [1967] 1 AC 853 (HL) at 910; *Gleeson v J Wippell & Co Ltd*, [1977] 3 All ER 54 at 59–60, [1977] 1 WLR 510.

certainty, which is essential to a democratic society founded on the rule of law.[10]

B) Justification: Finality

Functus officio is commonly described as "a rule about finality."[11] The motivating rationale behind the functus doctrine is no different than that for *res judicata* and other finality doctrines:[12] the public interest in the finality of authoritative decisions.[13] It is a simple yet powerful justification. As Justice Southin of the British Columbia Court of Appeal put it, "When a question, be it legal or political, has been stirred and stirred again, there must come a time when all concerned must accept the decision of those with power to decide and move on to the next question. If that be not so, our society will come to a standstill."[14]

The public interest in finality is pragmatic. No society, nor the average litigant, could afford an adjudication process with a revolving door policy. At some fixed, discernable point, the process must draw to a close. Once that point is reached and the narrow window for appeal has elapsed, the parties would be able to heave a sigh of relief and move on, rest assured that the matter would not come back to haunt them in re-litigation. The decision-maker could likewise move on, knowing that a case is off her docket for good.

Justice Doherty of the Ontario Court of Appeal gave a vivid account of the importance of finality, and the toll that a system without finality would exact:

> Finality is an important feature of our justice system, both to the parties involved in any specific litigation and on an institutional level to the community at large. For the parties, it is an economic and psychological necessity. For the community, it places some limitation on the economic burden each legal dispute imposes on the system and it gives decisions produced by the system an authority which they could not hope to have if they were subject to constant reassessment and variation: J.I. Jacob, The Fabric of English Civil Justice, Hamlyn Lectures 1987, at pp. 23–24.

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10 See HWR Wade, "The Concept of Legal Certainty, A Preliminary Skirmish" (1941) 4:3 Modern L Rev 183 at 187; Luc B Tremblay, *The Rule of Law, Justice and Interpretation* (Montreal & Kingston: McGill-Queen's University Press, 1997) at 149–65.

11 *Capital District Health Authority v Nova Scotia Government and General Employees Union*, 2006 NSCA 85 at para 36. [*Capital District*].

12 *Corlac Inc v Weatherford Canada Ltd*, 2012 FCA 261 at para 16.

13 *Reekie v Messervey*, [1990] 1 SCR 219 at 222–23, 66 DLR (4th) 765 [*Reekie*].

14 *Mayer v Mayer Estate*, 83 BCLR (2d) 87, 1993 CanLII 6861 at para 33 (CA).

> The parties and the community require that there be a definite and discernible end to legal disputes. There must be a point at which the parties can proceed on the basis that the matter has been decided and their respective rights and obligations have been finally determined. Without a discernible end point, the parties cannot get on with the rest of their lives secure in the knowledge that the issue has finally been determined, but must suffer the considerable economic and psychological burden of indeterminate proceedings in which their respective rights and obligations are revisited and reviewed as circumstances change.[15]

Were it the case that a decision could be freely re-opened, changed or even reversed, respect for the decision—if not for the overall integrity of the justice system—would be weakened. The public would rightly lose respect for a system that does not respect the finality of proceedings, and that fails to place clear limits on judges and administrative decision-makers' ability to change their minds, unravel their own decisions and make new ones. Taken together, finality of decisions brings order, security, economy and peace of mind for all involved.

The need for finality, apart from being pragmatic, is universal. Every legal system around the world has rules that grant estoppel effect to its judgments, and forbid those judgments from being readily unraveled.[16] In Canada, those rules come in the form of *res judicata*, abuse of process,[17] and the rule against collateral attack, all of which restrict litigants to only one bite at the cherry,[18] and *functus officio*, which imposes the same restriction on decision-makers.

Functus officio is like no other among the common-law finality doctrines. Not only is it the only doctrine that aims the arrow at the decision-maker, but flowing from this, its preclusion effect is forum-specific. It only precludes reconsideration of a matter in the forum in which the decision

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15 *Tsaoussis (Litigation Guardian of) v Baetz* (1998), 41 OR (3d) 257 at 264, 165 DLR (4th) 268 (CA), leave to appeal to SCC refused, 26945 (28 January 1999) [*Tsaoussis*]. See also *Toronto (City of) v Canadian Union of Public Employees, Local 79* (2001), 55 OR (3d) 541, 2001 CanLII 24114 (per Justice Doherty) at paras 79, 80 (CA), aff'd 2003 SCC 63; *R v Hamilton*, 33 OR (3d) 202, 1997 CanLII 418 (CA), leave to appeal to SCC refused, 25321 (18 September 1997); *Re Indalex Limited*, 2011 ONCA 265 at para 166, varied but not on this point, 2013 SCC 6.

16 Stephen M Waddams, *Introduction to the Study of Law*, 3rd ed (Toronto: Carswell, 1987) at 101; AC Freeman, *A Treatise of the Law of Judgments*, 5th ed, revised by Edward W Tuttle (San Francisco: Bancroft-Whitney, 1925) at 1321.

17 In this article, the phrase "abuse of process" is used to refer to abuse of process by re-litigation. Note that the doctrine is not limited to precluding re-litigation. See e.g. *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 (unreasonable delay that causes serious prejudice could amount to an abuse of process).

18 *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44 at para 18 [*Danyluk*]; *Toronto (City of) v CUPE, Local 79*, 2003 SCC 63 [*Toronto v CUPE*].

sought to be reopened was made. Hence, for a decision pronounced by a particular administrative tribunal, for instance, the functus doctrine has no effect on courts, arbitrators and other administrative tribunals who want to consider the same matter and decide differently. It cannot tie their hands. In contrast, *res judicata*, collateral attack, and abuse of process are not forum-sensitive. These doctrines enjoin parties from raising, in any legal forum, a matter that they had already litigated, or had the opportunity to litigate, and resulted in a final decision. Virtually without exception, they are called into service in a forum unrelated to the forum in which the decision giving rise to estoppel was made.[19] They are often invoked in a civil proceeding on the basis of a prior administrative decision or *vice versa* (in an administrative proceeding on the basis of a prior court decision) to stop the proceeding in its tracks. Summoning the functus doctrine would be of no help there.

Notwithstanding the narrowness of its remit, *functus officio* is arguably the most elemental, and in this way, crucial, of all the finality doctrines. Without *functus officio* kicking in, the mighty *res judicata* cannot work its magic. The logic goes as follows:

> A judge's decision is final when the judge is *functus officio*. A final decision for the purposes of issue estoppel is a decision which conclusively determines the question between the parties … The test of finality for issue estoppel, therefore, is that a decision is final when the decision-making forum pronouncing it has no further jurisdiction to rehear the question or to vary or rescind the finding.[20]

In short, a final decision for the purposes of *res judicata* is one whose decision-maker is *functus officio*. The operation of *functus officio*,

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[19] With respect to abuse of process, see *Aba-Alkhail v University of Ottawa*, 2013 ONSC 2127 at para 34 ("it is an abuse of process to attempt to impeach a judicial finding by the impermissible route of re-litigation in a different forum") and *Toronto v CUPE*, *supra* note 18 at para 46 ("What is improper is to attempt to impeach a judicial finding by the impermissible route of relitigation in a different forum"). With respect to issue estoppel, see *Metropolitan Toronto Condominium Corp No 1352 v Newport Beach Development Inc*, 2012 ONCA 850 at para 32 ("Issue estoppel prevents a party from re-litigating in one forum an issue already decided in another forum") and *Booth v Christensen*, 2019 ABQB 878 at para 38 ("Issue estoppel commonly arises when a decision made by an administrative officer or tribunal is relied upon in another forum, including a court"). Regarding collateral attack, see *British Columbia (Workers' Compensation Board) v Figliola*, 2011 SCC 52 at para 28 [*Figliola*] ("[the rule against collateral attack] prevents a party from using an institutional detour to attack the validity of an order by seeking a different result from a different forum, rather than through the designated appellate or judicial review route").

[20] *Qiu v Canada (Minister of Citizenship and Immigration)*, 2019 FC 389 at para 39, citing Lange, *supra* note 1 at 92–93. See also *British Columbia (Director of Civil Forfeiture) v Sanghera*, 2017 BCSC 1519 at paras 49–50.

then, begets the operation of *res judicata*. Without *functus officio*, the powerhouse would be powerless.

C) Prerequisites and Exceptions to *Functus Officio*

To trigger the functus doctrine, the decision-maker must have made a decision that is both final and valid. Decisional finality and validity are prerequisites. Finality does not have the same meaning for *functus officio* as it does for *res judicata*. Finality in the context of *functus officio* has two aspects to it, a substantive one and a formal one. Substantively, a decision is final when the decision-maker has completely fulfilled her task in disposing of issues raised in the proceeding,[21] and has not reserved the right to exercise any of her powers at a later time.[22] Formality wise, final means there is nothing more to be done to perfect the decision so as to render it effective and capable of execution.[23] For court decisions, a decision becomes final when a formal judgment or order is drawn up, issued and entered.[24] In the administrative context, much turns on the tribunal's enabling legislation. For example, where the legislation requires

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[21] *Chandler*, *supra* note 2 at 862 ("if the tribunal has failed to dispose of an issue which is fairly raised by the proceedings and of which the tribunal is empowered by its enabling statute to dispose, it ought to be allowed to complete its statutory task").

[22] Reservation of power is only valid if the power being reserved is one that is conferred by statute: see *Huneault v Central Mortgage and Housing Corp* (1981), 41 NR 214, 1981 CarswellNat 566 (WL Can) (FCA) and *Chandler*, *supra* note 2 at 862. For more on reservation of power, see Donald JM Brown & John M Evans, *Judicial Review of Administration Action in Canada* (Toronto: Thomson Reuters, 1998) (loose-leaf) at s. 12:6230.

[23] G Spencer Bower & AK Turner, *The Doctrine of Res Judicata*, 2d ed (London, UK: Butterworths, 1969) at 132: "A judicial decision is deemed final, when it leaves nothing to be judicially determined or ascertained thereafter, in order to render it effective and capable of execution, and is absolute, complete and certain, and when it is not lawfully subject to subsequent rescission, review or modification by the tribunal which pronounced it". Bower and Turner's definition of a final decision was quoted and approved for use in the administrative context in *St-Amour v Canada (AG)*, 2014 FC 103 at para 44; *Lukacs v Natural Sciences and Engineering Research Council of Canada*, 2015 FC 267 at para 42; *Ali v Canada (Minister of Citizenship and Immigration)*, 2012 FC 710 at para 25 [*Ali v Canada*].

[24] *In re Suffield and Watts, Ex parte Brown* (1888), 20 QBD 693 at 697; *Re Dingman and Hall et al*, [1889] OJ No 332 (QL), 13 PR 232 (HC) at para 14; *Paper Machinery Ltd v JO Ross Engineering Corp*, [1934] SCR 186 at 188, [1934] 2 DLR 239 [*Paper Machinery*]. But see *He v Furney*, 2018 ONSC 1812 at para 11 (holding that the entering of an order is not necessary). As a corollary, procedural orders made during the course of a trial or proceeding do not constitute "final" decisions for the purposes of *functus officio*. These orders generally do not result in a formal order being drawn up. They may be varied or revoked if the circumstances that were present at the time the order was made have materially changed: *R v Adams*, [1995] 4 SCR 707 at 722–23, 131 DLR (4th) 1.

the tribunal to make its decision and order by completion of a prescribed form, the decision is not final until it is made in such form.[25]

A valid decision is one that disposes of the matter before a court of competent jurisdiction, and in the case of an administrative tribunal, in a manner permitted by the tribunal's enabling legislation. If the decision purports to dispose of a matter the tribunal is not empowered to dispose of, then it amounts to a nullity or no disposition at all in law.[26] Alternatively, if the proceeding that culminated in the decision was tainted by a breach of natural justice or procedural fairness, then the decision is not valid and the decision-maker ought to start afresh.[27] As only a final and valid decision attracts the preclusion rule, the parties and the decision-maker can escape *functus officio* by successfully disputing either the finality or validity of the decision.[28]

In the very early days of the doctrine, once the prerequisites were met, *functus officio* automatically and resolutely applied. The decision-maker could not reopen his decision, regardless of the circumstances or

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[25] *Brigham and Residential Premises Rent Review Board* (1979), 26 OR (2d) 31, 1979 CanLII 1876 at paras 4–5 (Div Ct). In the arbitration context, if the arbitration agreement provides that the award be in writing, then a final award is made once it is put in writing and agreed to by the arbitrators; there is no need that it be signed: *Zwirner v University of Calgary* (1977), 6 AR 271 at 278–79, 79 DLR (3d) 81(CA).

[26] See *Trizec Equities Ltd v British Columbia (Assessment Act, Burnaby-New Westminster Area Assessor)* (1983), 147 DLR (3d) 637 at 643, 45 BCLR 258 (SC) ("a tribunal which makes a decision in the purported exercise of its power which is a nullity, may thereafter enter upon a proper hearing and render a valid decision"), cited with approval in *Chandler*, *supra* note 2 at 862–63.

[27] *Chandler*, *supra* note 2 at 863; *Ridge v Baldwin*, [1964] AC 40 at 79, [1963] WLR 935 ("if an officer or body realizes that it has acted hastily and reconsiders the whole matter afresh, after affording to the person affected a proper opportunity to present his case, then its later decision will be valid"); *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643 at 661, 24 DLR (4th) 44 ("the denial of a right to a fair hearing must always render a decision invalid"); *821443 NWT Ltd v Northwest Territories (Labour Standards Officer)* (1988), 56 DLR (4th) 116, 1988 CanLII 5759 (NWT SC (TD)) (the Board's hearing, having been conducted in breach of procedural fairness and natural justice, was as if it had not occurred, and so, the Board is not functus).

[28] As an example, the finality of an administrative decision was successfully challenged in *Vatanabadi v Canada (Minister of Employment and Immigration)*, [1993] 2 FC 492, 1993 CanLII 2954 at para 16 (FCA), where the statute stipulated a decision-making process involving two officials making determinations that are then incorporated into a single decision; the Court held that a determination made during the process does not constitute a standalone "final" decision. See also *Ali v Canada*, *supra* note 23 at para 30 ("Intermediate decisions made in the course of the assessment process are not 'final decisions' for the purposes of the *functus officio* doctrine"). For an example of a successful challenge to the validity of the decision, see *Chandler*, *supra* note 2 as discussed below in Part II(b).

the reason for re-opening. [29] Modification of a date on the decision that would occasion no prejudice was treated no differently than a substantive change that would pull the rug out from under a party's feet. The rule was absolute. Once the decision-maker was *functus*, nothing more could be done by him. There was no latitude for error correction. If the decision was erroneous, the only way get it fixed would be to appeal it.[30] While appeal was a solution, it would be a limited one because, then as now, not all decisions are appealable and not all errors are correctible on appeal.

To the extent that the *functus* rule was absolute and applied in a blanket fashion across a range of different situations, it operated as a blunt instrument. Circumstances in life, variable as the shapes of clouds as they are, do not always square with the rigidity of an absolute rule. And so, an absolute rule can produce severe and unfair results in certain cases. One way to attenuate the severity and avoid some of the harshest outcomes occasioned by the rule was to carve out exceptions to it. Master of the Rolls Jessel left room for exceptions to be made in *In re St. Nazaire Co*, the decision to which the Supreme Court of Canada credited the genesis of the doctrine:

> I have refrained purposely from entering into the discussion of what might happen in some of the cases put at the bar of great hardship. I, on the one hand, am neither prepared to say that such cases of great hardship ought to be without a remedy, nor, on the other hand, am I prepared to say that the general good of the community requiring a final end to be put to litigation would not be better insured even if those exceptional cases of great hardship are not provided for. The matter may be looked at either way, and when a proper case is brought before the

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[29] Consider what transpired in *Benson v Love*, [1841-1842] OJ No 14 (QL), 1 UCR 398 (UCPC). After signing the award but before it was delivered to the parties, the arbitrators realized that they had made a mistake in their calculation, having double counted an expense. The arbitrators destroyed the original award and made a new one reflecting the correct calculation. Even though they did it before the deadline for making an award, it was still too late and of no avail. According to the Court, the arbitrators were *functus officio* after signing the first award. In *Irvine v Eldon* (1806), 8 ER 53, 8 East 54 (KB), involving similar facts, Chief Justice Lord Ellenborough observed: "the arbitrator's authority having been once completely exercised, pursuant to the terms of the reference, was at an end, and could not be revived, even for the purpose of correcting the mistaken calculation of figures … such mistakes might include the essential merits of the case". See also *Mordue v Palmer* (1870), LR 6 Ch App 22 [*Mordue*]. With respect to judicial decisions, see *In re St. Nazaire Co* (1879), 12 Ch D 88 [*In re St. Nazaire Co*]; *McNabb v Oppenheimer* (1885), 11 PR 214.

[30] *Mordue*, *supra* note 29 at 30; *Kidd v O'Connor* (1878), 43 UCR 193, [1878] OJ No 83 (QL) at para 21 (Ont QB); *Re VGM Hldg Ltd*, [1941] 3 All ER 417 at para 12 (Ch D); *Rohrer v Midland Doherty Ltd* (1985), 70 NSR (2d) 234, [1985] NSJ No 121 (QL) at para 5 (SC (AD)); *Rapp v Baumann*, 2019 SKQB 211 at para 6.

> Appeal Court for discussion as to whether any remedy exists or not, I think it will be sufficient time to consider and decide upon that question.[31]

Several exceptions have been created over the years, the two notable ones being the slip exception and the manifest intent exception. Justice Rinfret laid them out neatly in 1934's *Paper Machinery Ltd v JO Ross Engineering Corp*:

> [T]here is no power to amend a judgment which has been drawn up and entered, except in two cases: (1) Where there has been a slip in drawing it up, or (2) where there has been error in expressing the manifest intention of the Court.[32]

Both exceptions are restricted in scope. The slip exception is limited to fixing "minor"[33] or "non-substantive slips."[34] It is not, for example, available to correct an inadvertent error in the recording of a jury verdict if the error was discovered after the jury had been discharged, even if it was just a minute after the discharge.[35] The manifest intent exception, for its part, is reserved for instances where "it is obvious from a reading of the first decision that the court or board intended but failed to accomplish a

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31 *In re St. Nazaire Co*, *supra* note 29 at 100.

32 *Paper Machinery*, *supra* note 24 at 188. The slip rule has been codified in provincial and territorial rules of court. See for instance, *Alberta Rules of Court*, AR 124/2010, Rule 9.12: "On application, the Court may correct a mistake or error in a judgment or order arising from an accident, slip or omission". Similarly, Ontario's *Rules of Civil Procedure*, RRO 1990, Reg 194, Rule 59.06 provides: "An order that contains an error arising from an accidental slip or omission or requires amendment in any particular on which the court did not adjudicate may be amended on a motion in the proceeding". The *Rules of the Supreme Court of the Northwest Territories*, R-010-96, Rule 425 states: "A clerical mistake in a judgment or an order or an error in a judgment or an order arising from an accident, a slip or an omission, may at any time be corrected by the Court on application".

33 *R v Burke*, 2002 SCC 55 at para 54 [*Burke*].

34 *Fraser Health Authority v Workers' Compensation Appeal Tribunal*, 2014 BCCA 499 at para 141, rev'd on other grounds, 2016 SCC 25.

35 *Burke*, *supra* note 33. In *Burke*, at the end of a jury trial for attempted murder, the jury foreman announced a guilty verdict. He said it with a stammer, and it was recorded as "not guilty". The mistake was discovered minutes after the jury was discharged. The majority of the Supreme Court did not think the circumstances came under the slip exception. Nonetheless, the Court was not prepared to let the error go uncorrected, so it ushered in a new exception: although a judicial body is normally *functus officio* once a jury has been discharged, a correction to a recorded verdict could be made to the extent that the correction does not require the jury to reconsider its verdict or complete its deliberation with a view of handling down additional verdicts.

certain specific result."[36] It cannot be used to supplement the bases for decision or to bootstrap it.

While these exceptions have mitigated the harshness of what used to be an absolute rule of *functus officio*, they have not removed all the sting. By virtue of their specificity, they cannot capture all circumstances in which application of the functus doctrine would cause unfairness. All that the exceptions care about are surface errors. The question of fairness in the particular context is not asked, and need not be answered, in deciding whether the exceptions apply. The most that can be said of these exceptions is that they are a covert and clumsy way of policing the application of *functus officio* for unfairness.

3. Part II: Importation of the Doctrine to the Administrative Context

A) Administrative Tribunals: Diverse Functions, Common Need for Finality

Administrative tribunals,[37] which mushroomed after World War II,[38] are the core constituents of Canada's administrative justice system. They serve as the executive branch of the government's statutory enterprises,[39]

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[36] *Prince Edward Island (Department of Health and Wellness) v Canadian Union of Public Employees Local 805*, 2011 PESC 1 at para 52.

[37] The term "tribunals" is used in this article to refer broadly to administrative tribunals, boards, agencies, commissions, Cabinet ministers, and other administrative bodies and actors that carry out a variety of functions.

[38] For the historical context and an overview of administrative tribunals in Canada, see David J Mullan, "Administrative Tribunals: Their Evolution in Canada from 1945 to 1984" in Ivan Bernier & Andrée Lajoie, eds, *Regulations, Crown Corporations and Administrative Tribunals* (Toronto: University of Toronto Press, 1985) at 155–201; Robert W Macaulay & James LH Sprague, *Hearings Before Tribunals*, 5th ed (Toronto: Carswell, 2016) at 1-1; W A Bogart, "The Tools of Administrative State and the Regulatory Mix" in Colleen M Flood & Lorne Sossin, eds, *Administrative Law in Context* (Toronto: Emond Montgomery, 2008) at 31–35; Heather M MacNaughton, "Future Direction for Administrative Tribunals: Canadian Administrative Justice – Where Do We Go From Here?" in Robin Creyke, ed, *Tribunals in the Common Law World* (Sydney: The Federation Press, 2008) 203 at 203–04.

[39] See Ron Ellis, *Unjust by Design: Canada's Administrative Justice System* (Vancouver: UBC Press, 2013) at 3–4. Ellis divides the myriad of administrative bodies found in modern Canadian polity into four groups: (1) executive-branch administrative justice bodies e.g. Workers' Compensation Board, Cabinet Ministers and public servants in a government department or ministry who have been assigned rights-determining functions; (2) executive branch regulatory bodies e.g. energy boards, securities commissions, the Canadian Radio-television and Telecommunication Commission; (3) non-government regulatory bodies e.g. law society discipline tribunals, bodies dealing with

but are independent from the executive branch in that their decision-making is not subject to close executive control.[40] Their structures vary, ranging from multi-member bodies to a single cabinet minister, as do their procedures, which may be court-like, inquiry-style, or a blend of the two. The one feature they have in common is that they all owe their existence to and derive their powers from legislation.[41] Every day, tribunals across Canada hand down scores of decisions that find expression everywhere, from who can work at the hospitals where our children are born, what schools are to teach, how far apart our house and our neighbours' houses must be, and where we can lie down for our final rest. They dictate the contours of our lives—so much so that they "*are* a way of life."[42]

Unlike courts and arbitrators who are in the business of adjudication only, administrative bodies perform a plurality of functions,[43] from policy implementation to investigation to adjudication. Besides differences in function, there are great differences between tribunals in the degree of formality to be found in their proceedings.[44] Some make their decisions after a full hearing that adheres to strict rules of evidence and is uncompromisingly adversarial; others take a more informal approach with relaxed evidentiary rules and greater freedom of intervention permitted

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disciplinary issues within colleges and universities; and (4) non-government adjudicative bodies including grievance arbitrators appointed under collective bargaining agreements.

40 Note though that most administrative tribunals have a designated Cabinet Minister who is responsible for reporting on their activities to the legislature. See Laverne Jacobs, "A Wavering Commitment? Administrative Independence and Collaborative Governance in Ontario's Adjudicative Tribunals Accountability Legislation" (2010) 28 Windsor YB Access Just 285 [Jacobs]. The Supreme Court of Canada has emphasized that administrative tribunals must be sufficiently independent from the executive branch that established it and/or is responsible for it. Independence has three components: administrative control, security of tenure, and financial security. The degree of independence required depends on the nature of the tribunal and the interests at stake: see *Canadian Pacific Ltd v Matsqui Indian Band*, [1995] 1 SCR 3, 122 DLR (4th) 129 at 158, 171; Consolidated-Bathurst Packaging Ltd v International Woodworkers of Amer*ica, Local 2-69*, [1990] 1 SCR 282, 68 DLR (4th) 524 at 561; *Ocean Port Hotel Ltd v British Columbia (Gen. Manager Liquor Control)*, 2001 SCC 52 at paras 20–21 [*Ocean Port Hotel*]; *Bell Canada v Canadian Telephone Employees Association,* 2003 SCC 36 at paras 21, 24.

41 Non-statutory administrative bodies do exist, but they are uncommon. They are generally described as being created through Crown prerogative. See *McDonald v Anishinabek Police Service et al* (2006), 83 OR (3d) 132, 2006 CanLII 37598 (Div Ct); Jacobs, *supra* note 40 at footnote 32.

42 *Newfoundland Telephone Co v Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 SCR 623 at 635, 89 DLR (4th) 289 [emphasis added].

43 In *Ocean Port Hotel*, *supra* note 40 at para 24, Chief Justice McLachlin characterized tribunal functions as "spanning the constitutional divide between the executive and judicial branches of government".

44 See Jacobs, *supra* note 40 at 295.

to the decision-maker. The decisions produced differ in form and effect. Certain administrative bodies render formal orders and reasons for decision; others convey their decisions in letters and emails;[45] still others issue reports and recommendations. Some of the decisions are appealable, either broadly or on limited grounds; others are not appealable at all. Variety is the name of the game: "[a]dministrative tribunals vary widely in virtually every aspect—experience, expertise, structure, functions, resources and mandate."[46]

Notwithstanding the differences, the need for finality, for conclusive closure to cases, holds sway for all administrative tribunals. Trite to say, reconsideration requires resources, and resources are finite for tribunals. Accordingly, all could use a rule that precludes matters from being reopened after they have been decided on their merits. Such a rule aids in the pursuit of economic efficiency. It allows what resources are available to be channeled toward more productive ends, namely, toward matters awaiting first-time deliberation. As administrative tribunals are under chronic and arguably intensifying pressure to do more with less,[47] the pursuit of economic efficiency is not a matter of choice but a matter of survival.

The enormity of our administrative justice system arguably makes the need for finality more pressing. A small justice system with enormous resources may be poised to consider and reconsider every case, and may do so as long as it regards the benefits of more than one round of consideration to be greater than the costs to make it happen.[48] Yet as a system scales up, effective operation will need to specify when to let matters rest. Given that Canada's administrative justice system is a huge system with limited resources, it cannot afford to routinely revisit decisions. It needs matters that have been decided to be left alone.

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45 *See* e.g. *Global Marine Systems Ltd v Canada (Minister of Transport)*, 2020 FC 414 (a judicial review challenging a four-paragraph email from the Marine Policy Directorate of Transport Canada notifying the recipient of the conclusion of its assessment).

46 *R v 974649 Ontario Inc*, 2001 SCC 81 at para 65.

47 See Kendrick Lo, "When Efficiency Calls: Rethinking the Obligation to Provide Reasons for Administrative Decisions" (2018) 43:2 Queen's LJ 325 at para 2 & footnote 3. See also Paul Daly, "Best Practices in Administrative Decision-Making: Viewing the Copyright Board of Canada in a Comparative Light, A Report Prepared for Canadian Heritage and Innovation, Science and Economic Development Canada" (20 May 2016), online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=2782487>. Paul Daly notes that the Copyright Board has had to deal with increased workload without a concomitant increase in underlying financial resources. The Copyright Board is likely not alone in having to operate under resource constraints.

48 Clermont, *supra* note 1 at 1081.

As strong as the pull of finality is, finality is not, and has never been, the only goal sought by administrative tribunals. Fairness, efficiency and flexibility are also important imperatives. Virtually all tribunals were created with the intention that they be more flexible, efficient and cost-effective than the courts.[49] They have free rein, within the parameters set by statute, to establish their own procedures so that they can work out for themselves a system that is "flexible, adapted to their needs and fair."[50] As Justice Abella observed:

> Designed to be less cumbersome, less expensive, less formal and less delayed, these impartial decision-making bodies were to resolve disputes in their area of specialization more expeditiously and more accessibly, but no less effectively or credibly.[51]

Chief Justice McLachlin echoed the observation:

> Tribunals provide specialized and technical resolutions in different situations, ensure greater innovation, flexibility and efficiency in the delivery of governmental programs and strategies, and provide an informal and rapid forum for public hearings, thereby minimizing time and costs related to litigation before ordinary courts.[52]

The long and the short of it is that the provision of flexible, swift and relevant justice is the *raison d'être* of administrative tribunals.

In an ideal world, the interests of fairness, flexibility, efficiency and finality would be perfectly aligned such that they point to the same outcome in every scenario where it must be decided whether *functus officio* applies. It is not always so in reality. In reality, the demands of efficiency and fairness to the parties may pull in one direction while the system's need for finality of proceedings may pull the opposite way. Seeing as flexibility, efficiency, and fairness are equally hallmarks of administrative justice,

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49 Guy Régimbald, *Canadian Administrative Law* (Markham: LexisNexis Canada, 2008) at 3; Yves-Marie Morissette, "What is a 'Reasonable Decision'?" (2018) 31 CJALP 225 at 236; Katrina Miriam Wyman, "Appointments to Adjudicative Tribunals: Politics and the Courts" (1999) 57 UT Fac L Rev 101 at para 34.

50 *Knight v Indian Head School Division No 19*, [1990] 1 SCR 653 at 685, 69 DLR (4th) 489.

51 *Rasanen v Rosemount Instruments Ltd* (1994), 17 OR (3d) 267 at 279–80, 1994 CanLII 608 (CA).

52 Beverley McLachlin, "Administrative Tribunals and the Courts: An Evolutionary Relationship" (Remarks delivered at the Sixth Annual Conference of the Council of Canadian Administrative Tribunals, Toronto 27 May 2013), online: <www.scc-csc.ca/judges-juges/spe-dis/bm-2013-05-27-eng.aspx>.

firm insistence on finality, by way of applying *functus officio* strictly in every case, would not be appropriate.

B) *Chandler's* Call for Flexibility

It should come as no surprise then that the top Court, in 1989's *Chandler*, urged greater flexibility and less formalism when applying *functus officio* in the administrative context. It made known that too rigorous of an insistence on finality could inflict injustice. For tribunals whose decisions are only narrowly appealable, there may be no other way to avert the injustice except to let the tribunal reopen the matter. Justice Sopinka, writing for the majority, first confirmed the applicability of the functus doctrine, along with its exceptions, to administrative tribunals:

> [T[here is a sound policy reason for recognizing the finality of proceedings before administrative tribunals. As a general rule, once such a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. It can only do so if authorized by statute or if there has been a slip or error within the exceptions enunciated in *Paper Machinery Ltd. v. J. O. Ross Engineering Corp., supra*.[53]

He went on to assert that the doctrine must be applied more flexibly in the administrative context:

> To this extent, the principle of *functus officio* applies. It is based, however, on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal. For this reason I am of the opinion that *its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal.*[54]

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[53] *Chandler*, *supra* note 2 at 861. Prior to *Chandler*, lower courts had applied the functus doctrine to administrative tribunals: see e.g. *Regina v Development Appeal Board, Ex parte Canadian Industries Ltd* (1969), 9 DLR (3d) 727, 1969 CanLII 724 (Alta CA). In 1972, the Supreme Court of Canada handed down *Grillas v Minister of Manpower and Immigration*, [1972] SCR 577, 23 DLR (3d) 1, which created some confusion as to whether the doctrine has application in the administrative context. *Chandler* cleared up the confusion.

[54] *Chandler*, *supra* note 2 at 862 [emphasis added].

The Court's call for flexibility was a welcome development.[55] Flexibility is needed to make room for justice in the quest for finality. On the facts of the case, it was clear that the administrative tribunal, the Practice Review Board of the Alberta Association of Architects, had made a mistake. Owing to its erroneous belief that it had disciplinary powers, it rendered a decision that overreached. The practical implications of holding the Board *functus* would be to let the architects being audited exploit the mistake and get off scot-free when they had likely badly misbehaved, judging from the 21 findings of misconduct. Rigid adherence to the functus doctrine would impede the ascertainment of truth and justice, and undermine the public's confidence in the integrity of the architectural profession and the administration of justice more generally. It is small wonder then that the majority of the Court was moved to hold that *functus officio* was not engaged in the circumstances.

Looking beyond the facts of the case, flexibility is necessary to account for the diversity among administrative decision-makers, whose structures and functions are too multifaceted and varied to be straitjacketed by a doctrinaire approach. Unlike judicial proceedings, which seek to resolve private disputes stemming from concluded events, proceedings before administrative agencies often deal with evolving facts and policies. A decision that was aligned with government policy when it was made might no longer be so when circumstances change. Moreover, administrative agencies often make "in the public interest" decisions that affect a considerable fraction of the public. An erroneous tribunal decision may thus cause widespread harm, in contrast to an erroneous court decision, which may just be a thorn in one of the litigants' side. Taken together, applying *functus officio* strictly could thwart the effectiveness of tribunals as instruments of government policy and of justice.

As much as *Chandler* blazed a new trail, it also followed the pack. In the last decades of the twentieth century, during the period when *Chandler* was decided, the Supreme Court of Canada issued a series of decisions that brought about a purge of formalism in administrative

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[55] A year after *Chandler*, the Supreme Court of Canada indicated in *Reekie*, *supra* note 13 at 222–23, that strict application of *functus officio* may not be suitable for judicial decisions that are not subject to appeal either: "This rule was developed to achieve a finality of proceedings which were subject to a full appeal … Its narrow scope may be appropriate when applied to judgments which can be corrected on appeal, but is inappropriate to decisions of this Court which are not subject to appeal. Any error creating an injustice can only be cured by a reconsideration of the decision by this Court". Interestingly, subsequent case law has not made much of this dictum.

law, particularly in areas such as judicial review,[56] procedural fairness,[57] and collateral attack.[58] As part of the transformation, the Court shifted its focus, and its preferred analytical apparatus, from rigid classifications to broader discretion, from an all-or-nothing approach to a more fluid one. *Chandler* was one more pronouncement to add to the paradigm shift taking place at the time.

While *Chandler* is commendable in recognizing the need for flexibility when applying the functus doctrine to administrative tribunals, it fell short in that it failed to provide sufficient guidance on how to put that flexibility into practice. In fact, it raised more questions than it answered: How does one go about applying the functus doctrine more flexibly and less formalistically to administrative tribunals? How much more flexibly? When, precisely, does justice require putting a break on the operation of *functus officio*? Lower courts were left to their own devices in answering these questions.

C) The Divergent Streams of Post-*Chandler* Jurisprudence

Chandler left a positive legacy, but an ill-defined future for the application of *functus officio* in the administrative arena. In the aftermath of *Chandler,* lower courts struggled to grapple with how to apply the functus doctrine to administrative decision-makers under *Chandler*'s general counsel. Flexible application of a doctrine fixated on finality is not an intuitive exercise. Without clear parameters set for its exercise, much would be left to the presiding decision-maker's discretion. It would be all too easy for different decision-makers to reach different conclusions as to when flexibility ought to be exercised to provide relief from the preclusion rule. The lack of clear direction is an open invitation for differences of opinion.

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[56] See *UES Local 298 v Bibeault,* [1988] 2 SCR 1048 at 1088, 1988 CanLII 30 ("[t]he formalistic analysis of the preliminary or collateral question theory is giving way to a pragmatic and functional analysis"); H Wade MacLauchlan, "Transforming Administrative Law: The Didactic Role of the Supreme Court of Canada" (2001) 80 Can Bar Rev 291.

[57] *Nicholson v Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 SCR 311, 88 DLR (3d) 671 [*Nicholson* cited to SCR]; *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643, 24 DLR (4th) 44; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 174 DLR (4th) 193 [*Baker* cited to SCR]. These cases dispensed with the classification of public bodies as either administrative, judicial or quasi-judicial for the purposes of determining whether a duty of procedural fairness would be imposed. In lieu of the classification, the Supreme Court embraced a multi-factorial, impact-oriented approach for making the determination.

[58] *R v Consolidated Maybrun Mines Ltd*, [1998] 1 SCR 706, 158 DLR (4th) 193.

As anticipated, there has been no consensus. A survey of post-*Chandler* judicial opinions reveals three distinct streams of jurisprudence. Each spells a different fate for the application of *functus officio*; all have their own complications.

i) Stream A: Flexibility Squeezed into a Narrow Gorge

Perhaps unsure as to what to make of the flexibility afforded in *Chandler*, some courts chose to skirt it altogether. They read *Chandler* as merely confirming that the functus doctrine applies to administrative decision-makers. It lent no permission to not apply the doctrine unless the administrative decision-maker was expressly vested by statute with the jurisdiction to reconsider matters that have been decided. *Dumbrava v Canada (Minister of Citizenship and Immigration)*[59] serves to illustrate.

As with many legal wrangles about *functus officio*, *Dumbrava* started with a mistake by an administrative decision-maker—an immigration officer in this case. Mr. Dumbrava, an electronic engineer, applied for permanent residence in Canada. The immigration officer was satisfied that he was a qualified electronic engineer, but denied his application on the sole basis that he had never worked as one. After receiving the decision, Mr. Dumbrava pointed out to the officer that work experience was not required for qualified electronic engineers under the then immigration rules. The officer, upon realizing that she had made a mistake, issued a second opinion to justify her refusal. In her second opinion, she indicated that the application was denied because she was not satisfied that Mr. Dumbrava was an electronic engineer, which was an about-face from her

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[59] *Dumbrava v Canada (Minister of Citizenship and Immigration)*, [1995] FCJ No 1238 (QL), 1995 CarswellNat 1229 (WL Can) (TD) [*Dumbrava* cited to QL]. For cases that adopt a similarly restrictive reading of *Chandler*, *supra* note 2, see *Jimenez v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 7595, 1998 CarswellNat 488 (WL Can) (FC TD); *Duque v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1367 (TD); *Dimenene v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1101 (TD); *Phuti v Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 15907, 2000 CarswellNat 1619 (WL Can) (FC TD); *Brar v Canada (Minister of Citizenship and Immigration)*, 1997 CanLII 5685, 1997 CarswellNat 2142 (WL Can) (FC TD); *Canadian Museum of Civilization Corp v Public Service Alliance of Canada, Local 70396*, 2006 FC 703 at para 58 (TD). See also *Jacobs Catalytic Ltd v International Brotherhood of Electrical Workers, Local 353*, 2009 ONCA 749; *Canadian Association of Film Distributors and Exporters v Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC) Inc*, 2014 FCA 235 at para 71 (despite asserting that *Chandler* provides "greater flexibility" that "is significant", Justice Noël, writing for the Federal Court of Appeal as its Chief Justice this time, found that the administrative Board could not review its decision unless one of the recognized exceptions to the *functus officio* rule applied).

initial assessment and hence, its genuineness was suspect. Mr. Dumbrava, being none too pleased, sought judicial review of the second decision.

The preliminary question on judicial review was whether the immigration officer was *functus officio* when she made the second decision. If she was *functus officio*, then the decision was a nullity. It was no decision at all at law, and so, an empty target for judicial review.

To answer the question, Justice Noël of the Federal Court went straight to the officer's enabling legislation, the *Immigration Act*, in search for provisions that would allow the officer to reconsider an earlier decision. In his view, the express language of the statute reigned supreme. Absent an express grant of jurisdiction, and short of the circumstances falling into one of the traditional exceptions to the functus doctrine, the doctrine applies:

> The decision-making powers of a visa officer are statutory and, as such, they must be found in the statute. While I have no doubt that slips, typos and obvious errors can be corrected after a decision has been rendered, the discretion of a decision-maker is, in my view, fully exhausted once the discretionary authority to decide has been exercised in the manner contemplated by statute.[60]

The statute did not expressly provide for reconsideration. Accordingly, the only decision that was valid was the officer's initial one. Even though the initial decision was wrong on the law, and would likely have been set aside on judicial review, Mr. Dumbrava was stuck with it because the window for seeking judicial review of that decision had passed. Justice Noël acknowledged the injustice to Mr. Dumbrava flowing from an assertion of *functus officio*, but did not regard it as a relevant consideration for the purposes of the doctrine's application. As he saw it, *Chandler* signaled that "absent an express grant of jurisdiction, it is doubtful that a decision-maker has the power to reconsider a prior decision on new grounds and exercise his or her discretion anew."[61]

Without saying as much, Justice Noël construed the flexibility furnished in *Chandler* so narrowly that it was virtually meaningless. A flexible application of *functus officio* would only be warranted where the legislation has superseded the doctrine's injunctive effect by imbuing the administrative decision-maker with the authority to reopen decisions. Trite to say, no amount of flexibility is required to give effect to a legislative override of the common-law doctrine. As the Supreme Court of Canada

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60 *Dumbrava*, *supra* note 59 at para 19.

61 *Ibid* at para 19.

made clear elsewhere, "[i]t is not open to a court to apply a common law rule in the face of clear statutory direction."[62]

ii) Stream B: Flexibility Expands into an Open Channel

Dumbrava contrasts sharply with *Chan v Canada (Minister of Citizenship and Immigration)*,[63] a case involving the exact same legislation and similar facts. Ms. Chan applied for permanent residence for her and her son. An immigration officer made a decision approving the application. After immigrant visas were issued, the officer received new information about Ms. Chan. He reopened her file, and reversed his decision. Ms. Chan cried foul to the same court that heard *Dumbrava* just a year prior, claiming the officer was *functus officio* and could not retract the earlier decision in her favour.

A different judge of the Federal Court, Justice Cullen, heard *Chan*, and reached a conclusion opposite to the one in *Dumbrava*. Rather than to read the absence of any express grant of jurisdiction in the *Immigration Act* as forbidding reconsideration of matters decided, Justice Cullen regarded the legislative silence to be assent to reconsideration. He wrote:

> Does the Immigration Act contemplate that a visa officer can reconsider his decision? There is nothing in the statute that deals with whether a visa officer may review decisions already made. I would take this silence, however, not to be a prohibition against reconsideration of decisions. Rather, I think that the visa officer has jurisdiction to reconsider his decision, particularly when new information comes to light.[64]

As such, the immigration officer was not *functus officio*. He was at liberty to recall and rescind his earlier decision.

This outcome suited the plot points of the case. What came to light following the decision was no trivial matter: Ms. Chan was tangled up with a criminal syndicate. The information came from a credible source, the RCMP. In the interest of public safety, it was critical that the immigration officer be able to review the information and reconsider the propriety of approving her for permanent residence in a timely manner, unhobbled by the slow process of judicial review. Adherence to *functus officio* would get in the way. The flexibility afforded in *Chandler* was harnessed to take down the barricade.

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62 *Ocean Port Hotel*, *supra* note 40 at para 22.

63 *Chan v Canada (Minister of Citizenship and Immigration)*, 136 DLR (4th) 433, [1996] FCJ No. 838 (QL) (TD) [*Chan* cited to QL]

64 *Ibid* at para 28.

As much as the outcome suited the circumstances of the case, the extent to which *Chan* stretched the flexibility doled out in *Chandler* tested limits.[65] Not only was Justice Cullen prepared to exempt the officer in the circumstances of the case from the operation of *functus officio*, he was prepared to stretch the flexibility afforded in *Chandler* to exempt *all* immigration officers: "To squeeze the administrative decisions of visa officers into the same *functus officio* box that is imposed on judicial decision-makers would, in my view, not accord with the role and duties of visa officers."[66] For Justice Cullen, immigration officers, as a class, ought to be able to freely undo and redo their decisions. They are not to be hamstrung by the functus doctrine. Remarkably, there was no mention of finality as a consideration, nor any proposal tendered as to where the stopping point is to be set if officers have the discretion to rehear matters. Finality was sidelined in favour of flexibility.

The approaches to *functus officio* taken in *Chan* and *Dumbrava* are as different as night and day. The former held fast to the classic rendition of the functus doctrine, seeing no room to deviate from it lest the legislation says so, while the latter understood there to be wide latitude to not apply *functus officio*, limited only by express statutory language.

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65 For cases that adopt a similar reasoning as *Chan* in not applying *functus officio*, see: *Nouranidoust v Canada (Minister of Citizenship and Immigration)* (1999), [2000] 1 FC 123, 1999 CanLII 9361 (TD); *Soimu v Canada (Secretary of State)*, 83 FTR 285, [1994] FCJ No 1330 (QL) (FC TD); *Tchassovnikov v Canada (Minister of Citizenship and Immigration)*, 152 FTR 144, [1998] FCJ No 1111 (QL) (FC TD); *Kherei v Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 15933, [2000] FCJ No. 1383 (QL) (FC TD); *McLaren v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 373, [2001] FCJ No 618 (FC TD)*; Ali v Canada*, *supra* note 23; *Kleysen Transport Ltd v Hunter*, 2004 FC 1413 (human rights commission has implied statutory power to reconsider its decisions); *Merham v Royal Bank of Canada*, 2009 FC 1127 (Commission has the implied power to reconsider its decisions, but this is a discretionary power which must be used sparingly in exceptional and rare circumstances). For cases that took a generous approach to setting aside *functus officio*, see: *GFL Environmental Inc v Wheatland (County of)*, 2019 ABQB 976 (court found implied statutory power to vary order hence County not functus officio); *Zutter v British Columbia (Council of Human Rights)*, 122 DLR (4th) 665, 1995 CanLII 1234 (BC CA), leave to appeal to the SCC dismissed, 24742 (21 December 1995) (human rights council has "equitable jurisdiction" to reconsider, which is not subservient to functus doctrine); *Interpaving Ltd v Greater Sudbury (City of)*, 2018 ONSC 3005 (administrative decision-maker can reopen decision to cure procedural defect when there is no right of appeal); *Stenner v British Columbia (Superintendent of Motor Vehicles)*, 2016 BCSC 1690 at para 18 (read *Chandler* as confirming that "finality of administrative proceedings is not absolute"; "the lack of finality is a constitutional requirement for all administrative decision-makers"); *Berberi v Canada (AG)*, 2013 FC 921 (where tribunal's decision was premised on a transaction taking place and the transaction did not take place, tribunal can reopen decision).

66 *Chan, supra* note 63 at para 28.

Incredibly, both *Dumbrava* and *Chan* professed to find support for their positions in *Chandler*. The irreconcilability yet undeniable copresence of *Dumbrava* and *Chan*—and the cases in their respective company—attests to the vagueness of the guidance given in *Chandler*. It is vague enough to sustain two diametrically opposite interpretations and applications of *functus officio*. Indeed, it is vague enough to encompass a third approach to *functus officio*.

iii) Stream C: Flexibility Moored to Classification of Function

The third approach rests the application of *functus officio* on the classification of the administrative decision-maker's function. A distinction is made between decision-makers performing an adjudicative (sometimes described as judicial or quasi-judicial) function, and those fulfilling a non-adjudicative (or administrative) one. Only decision-makers acting in an adjudicative capacity are within the target range of the functus doctrine. Unless the legislature has spoken otherwise, they are barred from reconsidering their decisions. The logic behind confining the reach of *functus officio* to adjudicative decision-makers has been explained as follows: "[i]t does not enhance the efficiency or fairness of administrative decision-making by fettering the discretion to reconsider with the application of a rule designed to achieve finality in adjudicative contexts."[67]

Of the three approaches to *functus officio*, the distinction approach appears to have the highest profile. It has curried support from the Federal Court of Appeal and the Alberta Court of Appeal. The former blessed it in *Kurukkal v Canada (Minister of Citizenship and Immigration)*, stating without frills: "the principle of *functus officio* does not strictly apply in non-adjudicative administrative proceedings."[68] The latter sounded a similar note in *Canadian Centre for Bio-Ethical Reform v Grande Prairie (City of)*: "*Functus officio* is primarily applicable to administrative tribunals that perform an adjudicative function. They are those tribunals that were previously described as having to conduct their affairs 'in a judicial or quasi-judicial manner.'"[69]

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[67] *Arango v Canada (Minister of Citizenship and Immigration)*, 2014 FC 370 at para 17. Other cases where the distinction was espoused: *Cruickshank v Canada (AG)*, 2004 FC 470 at paras 22–23; *Hopewell Development (Leduc) Inc v Alberta (Municipal Government Board)*, 2011 ABCA 68 at para 34; *Phan v Canada (Citizenship and Immigration)*, 2014 FC 1203 at para 28; *Hechelaf v Canada (Minister of Citizenship and Immigration)*, [2019] IADD No 8, [2019] DSAI no 8 (IAD) at para 8; *KIK Custom Products Inc v Canada (Border Services Agency)*, 2020 FC 462 at para 67.

[68] *Kurukkal v Canada (Citizenship and Immigration)*, 2010 FCA 230 at para 3.

[69] *Canadian Centre for Bio-Ethical Reform v Grande Prairie (City of)*, 2018 ABCA 154 at para 33.

In making a bright-line distinction between adjudicative and non-adjudicative functions and using it to set the threshold for engagement of *functus officio*, the approach has all the allure of a bright-line test. As with other bright-line tests, it exudes certainty.[70] It is easy to explain what is required. Given that all administrative decision-makers have their mandates set by legislation, one needs only to take a look at a decision-maker's enabling legislation to determine whether he or she is exercising an adjudicative or non-adjudicative function. A straightforward ask.

A straightforward ask it may be, but it is no straightforward task to sort administrative decisions into distinct categories. It raises tough questions regarding what gives a decision an adjudicative character for the purposes of applying *functus officio*. Must a full, court-like hearing have taken place for a decision to be considered an exercise of adjudicative powers? Could a decision made after a series of written communication and meetings constitute an adjudicative decision? What about a decision that refers a matter to a hearing—would it be considered adjudicative since it is a necessary step to adjudication?[71] At what precise point does a decision cross the line from non-adjudicative to adjudicative, or from administrative to judicial? These are questions that admit to no ready answers. Given that the type and degree of formality of tribunal procedures vary greatly, it is difficult to cast administrative decision-making in binary terms, as a strictly either/or proposition. Much is open to interpretation, and disparate characterizations could be equally reasonable.

That the classification of administrative functions as either adjudicative or non-adjudicative is an uneasy one to make is not a new revelation. The Supreme Court of Canada noted the difficulty a decade before *Chandler*,

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70 See *R v Singh*, 2007 SCC 48 at para 42 ("a bright-line rule would undoubtedly have the advantage of certainty").

71 There are disparate authorities on whether decisions made on the road to final adjudication are subject to the doctrine of *functus officio*. Consider *Merck & Co v Brantford Chemicals Inc*, 2005 FCA 48 (functus doctrine does not apply to the screening decision in question because it is not a "final" decision); *Mossman v Assn of Professional Engineers*, 149 AR 148, [1994] AJ No 61 (QL) at paras 5–6 (CA) ("the work of the Committee is not like that of a Court. It is not the adversary system at work … The Disciplinary Committee under the statute is under an obligation to investigate … We do not see that any question of functus arises"); and *Greer v Ontario Provincial Police Commissioner*, 2006 CanLII 40230, [2006] OJ No 4771 (QL) (Div Ct) (police oversight agency's screening decision is not a final adjudicative decision so functus officio is not applicable). Contrast with *Fermaniuk v Edmonton (City of) Police Service*, 2017 ABCA 342 and *Stanley v Toronto (City of) Police Service*, 2020 ONCA 252 [*Stanley*], both holding that the functus doctrine applies to screening decisions by police oversight agency to refer matters to disciplinary hearings.

in 1979's *Nicholson*.[72] *Nicholson* dealt with the duty of procedural fairness in the administrative law context, which, at the time, hinged on how the decision-maker's function was classified. Chief Justice Laskin had this to say about the challenge of classification, and the perverse implications of relying on it:

> the classification of statutory functions as judicial, quasi-judicial or administrative is often very difficult, to say the least; and to endow some with procedural protection while denying others any at all would work injustice when the decisions raise the same serious consequences for those adversely affected, regardless of the classification of the function in question.[73]

Picking up where *Nicholson* left off, Justice Dickson explained a year later in *Martineau v Matsqui Institution Disciplinary Board* that in between black and white there are many shades of grey: "between the judicial decisions and those which are discretionary and policy-oriented will be found a myriad decision-making processes with a flexible gradation of procedural fairness through the administrative spectrum."[74] Simply stated, the functions of administrative decision-makers lie on a continuum. The adjudicative/non-adjudicative dichotomy is too stark and too simplistic; it does not do justice to the highly varied nature of administrative decision-making.

Admittedly, the adjudicative/non-adjudicative distinction has not been banished outright from other areas of administrative law, but it has no doubt been demoted to an inferior post. With respect to procedural fairness, for instance, it no longer gatekeeps the application of the duty of procedural fairness. Instead, as spelled out in *Baker v Canada (Minister of Citizenship and Immigration)*,[75] the nature of the decision, whether it is adjudicative or non-adjudicative, is just one of several factors to be considered in determining the degree of procedural fairness required in a given set of circumstances once it has been determined that procedural fairness applies.[76] The same supporting-cast role has been accorded to the distinction for the purposes of deciding whether and to what extent an administrative tribunal may be permitted to participate on an appeal from its decision.[77]

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72 *Nicholson*, *supra* note 57.

73 *Ibid* at 325.

74 *Martineau v Matsqui Institution Disciplinary Board*, [1980] 1 SCR 602 at 629, 106 DLR (3d) 385. See also *Ocean Port Hotel, supra* note 40 at para 24.

75 *Baker, supra* note 57.

76 *Ibid* at paras 20, 21, 23. See also Neudorf, *supra* note 4 at 225.

77 See *Ontario (Energy Board) v Ontario Power Generation Inc*, 2015 SCC 44 at para 59.

Taken together, this much is obvious: an approach to *functus officio* that is perched atop the precarious distinction is on shaky footing. On a practical level, the distinction between adjudicative and non-adjudicative decisions is hard to draw. Apart from that, the Court in *Chandler* made no mention of the distinction, much less approved of it. One might even argue that conceptualizing decisions in binary terms is antithetical to flexibility and evocative of the formalism that *Chandler* sought to douse. To further compound matters, the bright-line approach presents problems of over-inclusiveness and under-inclusiveness. It is over-inclusive as all non-adjudicative decisions are susceptible to reconsideration, even when justice does not require them to be undone. It is under-inclusive as it categorically excludes adjudicative decisions from reconsideration, including those that should be revisited in the interest of justice.

In light of its issues, it should come as no surprise that the distinction approach has not garnered universal acceptance. As a matter of fact, the latest word from an appellate court vouches for its retirement. In *Stanley*, Justice Trotter of the Ontario Court of Appeal explicitly scorned "the characterization of decisions as 'investigative', 'adjudicative', 'final adjudicative', and 'administrative'."[78] Blanket exemption from *functus officio* based on a classification of function would result in setting entire categories of administrative decision-makers free to unravel their own decisions. Such a result "would undermine the principle of finality that was at the heart of *Chandler*." [79] Instead of the distinction approach, the Court took a hardline view similar to the one taken in *Dumbrava* and held the administrative decision-maker to the one-kick-at-the-can rule.

While the distinction approach was clearly not followed in *Stanley*, it is dubious that it has been laid to rest for good, as the approach continues to have currency with federal courts and with courts in Alberta.

4. Part III: New Multifactorial Analysis

As the above sampling of post-*Chandler* cases makes manifest, the jurisprudence is in a state of disarray, with courts veering in different directions in their application of *functus officio*. The predicament that we have found ourselves in likely owes its rise to the meagre guidance provided in *Chandler* as to how the functus doctrine is to be flexibly applied to administrative decision-makers. Flexibility, coupled with sparsity of guidance on how to exercise it, is a recipe for unpredictable results.

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78 *Stanley*, *supra* note 71 at para 53.

79 *Ibid*.

Thankfully, we can move past the disarray towards a state of stability and predictability if the Supreme Court of Canada is prepared to lead the way. What is needed is for the top Court to provide what has been lacking to date: an analytical framework for assessing when flexibility ought to be exercised to grant reprieve from *functus officio*. A clear framework has the potential to promote uniform analysis, and in turn, more coherent results.

A) Lessons from Issue Estoppel

In developing a framework for *functus officio*, one can draw inspiration from the top Court's exposition on issue estoppel. *Functus officio* and issue estoppel are doctrinal cousins. With a shared history of strict observance of finality, both have been tempered in recent years by a realization that finality is not the be all and end all, particularly in the administrative law context. [80] Reconsideration may be warranted in certain circumstances to achieve the goals of effectiveness and fairness to the parties. It follows then that application of these doctrines must be approached with a measure of flexibility: "in the administrative law context, common law finality doctrines must be applied flexibly to maintain the necessary balance between finality and fairness." [81]

In a trilogy of decisions beginning with *Danyluk*, the top Court made clear that issue estoppel should not be applied if it would work an injustice.[82] The avoidance of injustice makes for a sound guidepost, a good mission statement, much like the one that the Court set in *Chandler* with respect to the functus doctrine.[83] But it did not end there. In addition to stating what the lodestar should be, the Court gave us an action plan by way of a two-step framework of analysis for assessing when issue estoppel should apply and when it should not.

The first step involves determining whether the preconditions to the operation of issue estoppel (the same issue has been decided; the decision

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80 With respect to issue estoppel, see *Danyluk*, *supra* note 18 at para 62 and *Figliola*, *supra* note 19 at paras 66, 74. With respect to *functus officio*, see *Chandler, supra* note 2 at 862.

81 *Figliola*, *supra* note 19 at para 65. See also *Capital District*, *supra* note 11 at para 1 per Justice Cromwell (as he then was): "This appeal illustrates the tension between two important goals of adjudication: finality and effectiveness. The goal of finality is served by the rule that once a tribunal has finally decided a matter, it has no further power to act. This rule is often identified by its Latin name, *functus officio*. Finality, however, is not an absolute value, and so the *functus officio* rule is mitigated in certain circumstances in order to serve the goal of effectiveness".

82 *Danyluk*, *supra* note 18 at para 1; *Figliola*, *supra* note 19 at para 61; *Penner v Niagara (Regional Police Services Board)*, 2013 SCC 19 at para 8 [*Penner*].

83 *Chandler*, *supra* note 2 at 862.

was final; and the parties/privies are the same) are met.[84] The second step, which occurs only if the first step is answered in the positive, is where flexibility finds its expression in a discretion to not apply issue estoppel. The exercise of discretion is guided by balancing a number of factors relating to fairness and which are sensitive to the particular administrative law context in which the case arises.[85] The factors are:

- the mandate of the administrative tribunal;
- the purpose of the legislative scheme;
- the availability of an appeal from the administrative decision;
- the stakes involved in the administrative proceeding;
- procedural safeguards available to the parties in the administrative proceeding;
- expertise of the administrative decision-maker;
- the circumstances giving rise to the administrative proceeding;
- "as a final and most important factor,"[86] the potential injustice that could result from applying the doctrine of issue estoppel.

In keeping with the spirit of flexibility, the list of factors remains open.[87] At the end of the day, "all relevant factors need to be considered and weighed in exercising the discretion [to not apply issue estoppel]."[88]

B) New Framework for Flexible Application of *Functus Officio*

A framework for the flexible application of *functus officio* can imitate the *Danyluk* framework for issue estoppel. It could have three steps.

The first two steps are relatively straightforward. They involve analyses already required under the existing jurisprudence, but are organized in a step fashion to guard against a requisite consideration slipping through the cracks. The third step is new; it calls for a contextual balancing of factors.

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84 *Danyluk*, *supra* note 18 at para 25.

85 *Ibid* at paras 67–80. See also *Figliola*, *supra* note 19 at para 65.

86 *Danyluk*, *supra* note 18 at para 80. See also *Figliola*, *supra* note 19 at para 95.

87 *Danyluk*, *supra* note 18 at para 67. See also *Penner*, *supra* note 82 at para 38.

88 *Figliola*, *supra* note 19 at para 78. Failure to address the factors for and against the exercise of the discretion constitutes an error of principle: *Danyluk*, *supra* note 18 at para 66.

A balancing of factors is useful for realizing justice based on the context. It provides the pliability needed to account for different fact situations—of which there will be many given the diversity of administrative decision-making processes—without sacrificing the benefits of a structured inquiry. It brings discipline to the exercise of flexibility.

Step One: Prerequisites

When faced with a situation that involves, or potentially involves, the functus doctrine, the first step should be to determine whether the prerequisites for doctrine's application are present. To trigger *functus officio*, there must be a final and valid decision.[89] If there is no final and valid decision, then there is no ground for *functus officio* to burrow and the inquiry ends here. If there is such a decision, then onto the second step we go.

Step Two: Existing Exceptions

The second step is concerned with whether any of the existing exceptions to *functus officio* apply. According to the majority in *Chandler*, there are three available exceptions:

a. the common-law exception permitting correction of clerical mistakes or errors arising from an accidental slip or omission;

b. the common law exception for errors in expressing the manifest intention;

c. the statutory exception to the functus doctrine enacted by way of statutory provisions that vest the administrative decision-maker with the jurisdiction to reconsider its decision.[90]

Functus officio will not apply should any of the exceptions be made out on the facts.

Step Three: Exercise Flexibility to Not Apply *Functus Officio*

The third step involves determining whether, despite the existence of a final and valid decision and the non-engagement of exceptions, operation of *functus officio* should nonetheless be suspended to enable reconsideration of the decision by the decision-maker.

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89 See above Part I(c) of this article on prerequisites.

90 *Chandler*, *supra* note 2 at 861–62.

This determination is to be made upon balancing an open-ended list of factors, including:

- whether the decision is amenable to appeal or judicial review;
- whether there are any errors in the decision, and the impact of the errors on the outcome;
- circumstances giving rise to the request for reconsideration, including fraud and newly discovered evidence that could have reasonably affected the outcome of the decision;
- whether there was any avoidable delay in the request for reconsideration;
- the extent to which any party has relied and acted on the decision;
- balancing between prejudice to the parties from reopening the decision and prejudice from not allowing reconsideration.

How the factors will be weighed in a given case will depend on the circumstances of the case, and so, remain an open question to be addressed in context. The objective of the weighing exercise is to see whether the needs of fairness outweigh the need for finality in a particular case. If so, then justice requires deviation from the usual operation of *functus officio*.

Let us take a closer look at each of the factors in order.

Availability of appeal or judicial review: The availability of a broad right to appeal, whereby a party disappointed with a decision of the first-order tribunal can seek to have it reviewed, varied or reversed by a higher-order tribunal or a court, leans strongly in favour of applying *functus officio*. Where an appeal mechanism is provided by statute, parties are expected to avail themselves of it "properly and in a timely manner." [91] Relief from *functus officio* is discretionary, and should generally not be available when the party requesting it has had an opportunity to get to the same place through a legislatively designated route.

That being said, it is important to bear in mind that not all errors can be fixed on appeal. Even where there is a general right of appeal, errors of fact can only be overturned if they clear the high hurdle of being overriding

[91] See *Boucher v Stelco Inc*, 2005 SCC 64 at para 35. See also *Danyluk, supra* note 18 at paras 74, 80 (existence of a potential administrative review and failure to make use of it militate against exercising the discretion to not apply issue estoppel, although this factor may be outweighed by potential injustice).

and palpable.[92] A decision containing errors of fact, however horrendous they may be, cannot be touched when appeal rights are confined to matters of law, unless of course there were also errors of law in the decision. The appeal process as a means of error correction is a limited one, reserved for addressing "egregious unlawfulness on the part of administrative and executive bodies."[93] By contrast, there is scope aplenty for error correction when a decision is revisited by the administrative decision-maker who made it, as the exercise is unconstrained by appellate standards of review.

The tides generally sway in favour of allowing reconsideration where the decision is shielded by a full privative clause that expressly precludes appeal and all forms of judicial review of the decision-maker's decision.[94] Individuals must have an effective means to challenge administrative orders,[95] and reconsideration may be the way to go in the face of a full privative clause. Nonetheless, even in the face of a full privative clause, judicial review may be had with respect to jurisdictional matters[96] and noncompliance with procedural fairness.[97] Where judicial review is available, the accessibility and timeliness of relief should be considered. On judicial review, courts may remit matters back to administrative decision-makers for reconsideration. Remittance back for reconsideration, while possible, is far from inevitable as courts by default must defer to front-line decision-makers. With limited exceptions, they will not interfere so

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92 *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 37 [*Vavilov*].

93 David Mullan, "The Supreme Court of Canada and Tribunals – Deference to the Administrative Process: A Recent Phenomenon or a Return to Basics?" (2001) 80 Can Bar Rev 399 at 402. See also Judge David Pearl, "Immigration and Asylum Appeals and Administrative Justice" in Michael Harris & Martin Partington, eds, *Administrative Justice in the 21st Century* (Oxford: Hart Publishing, 1999) at 58 ("It would be a mistake to suppose that if an administrative system is seriously flawed, a system of appeals against it will correct those defects"). Even Steven Shavell, a proponent of the appeals process as a means of error correction, acknowledges that "the grounds for reversal are limited": see Steven Shavell, "Reply to a Comment on the Appeals Process as a Means of Error Correction" (1996) 2:1 Leg Theory 83 at 84.

94 *Pasiechnyk v Saskatchewan (Workers' Compensation Board)*, [1997] 2 SCR 890 at 905, 149 DLR (4th) 577.

95 *R v Bird*, 2019 SCC 7 at paras 26, 29 [*Bird*].

96 *Dunsmuir v New Brunswick (AG)*, 2008 SCC 9 at para 52 [*Dunsmuir*]; *Crevier v Quebec (AG)*, [1981] 2 SCR 220 at 236, 127 DLR (3d) 1.

97 *Dunsmuir*, *supra* note 96 at para 129 ("a fair procedure is said to be the handmaiden of justice … On such matters, as well, the courts have the final say"); *Canadian Union of Public Employees (CUPE) v Ontario (Minister of Labour)*, 2003 SCC 29 at para 100 ("[i]t is for the courts, not the Minister, to provide the legal answer to procedural fairness questions"). Note that a denial of procedural fairness would render the decision an invalid one, and so, *functus officio* would not be engaged as the validity prerequisite is not met.

long as reasons for decision, if required, were provided, and the result falls within a range of possible outcomes.[98] It also bears remembering that reconsideration by way of judicial review is a long, time-consuming and costly process that can wear away the advantages that the administrative regime is supposed to offer in terms of flexibility, expeditiousness, and accessibility.[99]

Nature and materiality of any error: Are there errors of law or errors of fact in the decision? How significant are the errors? How significant is the impact of the errors on the outcome?

The presence of errors in a decision could signal a need to permit reconsideration so the errors could be promptly corrected. But errors are not all the same, nor should they be treated the same. Trivial errors bear less weight than major errors in terms of tilting the scale toward reconsideration. The nature of the error must also be considered. Compared to errors of fact, legal errors are more readily correctable on appeal and judicial review, in which case permitting the first-instance decision-maker to reopen the decision for error-correction purposes should not be necessary.

What matters more than the nature of the error is its impact on the outcome of the case. When the error in question is collateral to the main issues in the case, where it would not make a difference to the outcome, it would not lend a strong basis for reopening the matter. If a particular outcome is inevitable, then reconsideration would serve no useful purpose.[100] Justices Abella and Karakatsanis' comment, made in the context of judicial review, is apt here:

> an error is not necessarily sufficient to justify quashing a decision. Inevitably, the weight of an error will depend on the extent to which it affects the decision. An error that is peripheral to the administrative decision-maker's reasoning process,

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98 This is a sweeping statement about a very complex area of law, that being of standard of review. Administrative decisions are presumptively subject to review for reasonableness, which is a deferential standard. See *Vavilov*, *supra* note 92 at para 304.

99 See *Davis v WorkSafe BC*, 2013 BCSC 476 at para 40. In finding that the Workers' Compensation Appeal Tribunal ("WCAT") has authority under common law to reconsider its own decisions, the Court noted the following: WCAT reconsiderations are less expensive and speedier than judicial review; the complexities and cost of judicial review may result in some applicants being unable to avail themselves of the judicial review process; a WCAT decision being reconsidered by WCAT is not entitled to deference; and reconsideration by WCAT relieves the courts of the burden of the only other alternative for applicants i.e. judicial review. See also *Bird*, *supra* 95 at para 59, questioning whether judicial review is capable of affording "sufficiently swift and accessible relief".

100 *Vavilov*, *supra* note 92 at para 142.

> or overcome by more compelling points advanced in support of the result, does not provide fertile ground for judicial review.[101]

A margin of error, then, is to be tolerated. Living in an "imperfect world of scarce resources"[102] as we do, perfection is an impractical goal.[103] There is no advantage to putting the parties through reconsideration if it would not change the course of the case.

Circumstances giving rise to reconsideration request: Circumstances such as material information discovered after the decision was made or fraud in the decision-making process swing in favour of allowing the decision to be reopened by the administrative decision-maker. When facts that bear on the outcome were not considered or when the integrity of the decision-making process is called into account, the clamour of injustice would likely sound louder than the demand for finality.

The bar should be set high for circumstances to warrant departure from the usual operation of *functus officio*. In the context of court decisions, fraud and new material facts have been codified as bases for setting aside court decisions[104]—effectively, as exceptions to the functus doctrine. The case law applying these exceptions sheds light on where the bar should be set. With respect to new evidence, not only must the evidence in question be unavailable at the time of the decision, it must also be credible and practically conclusive of an issue in the case.[105] When it comes to fraud, the fraud must relate to the foundation of the decision, and the evidence of fraud must not be known at the time of the decision to the party seeking to undo the decision.[106]

Passage of time and delay: The longer the delay between the decision and a party's request to reopen the matter, the less inclined one should be to grant the request. The passage of time is likely to be accompanied by acts done, and rights vested, in reliance on the decision—or simply the parties having moved on—which would support letting the decision remain intact.

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101 *Ibid* at para 300.

102 *R v Morin*, [1992] 1 SCR 771 at 795, 1992 CanLII 89.

103 See e.g. *R v Wigman*, [1987] 1 SCR 246 at 257, 38 DLR (4th) 530 ("wholly impractical dream of providing perfect justice"); *R v Thomas*, [1990] 1 SCR 713 at 716,1990 CanLII 141 ("we cannot do perfect justice"); *Revane v Homersham*, 2006 BCCA 8 at para 17 ("perfection is an unattainable goal and finality is a practical necessity").

104 See e.g. *Rules of Civil Procedure*, RRO 1990, Reg 194, Rule 59.06(2).

105 *Tsaoussis, supra* note 15 at para 44.

106 See *International Corona Resources Ltd v LAC Minerals Ltd* (1988), 66 OR (2d) 610, 54 DLR (4th) 647 (HC).

Having said that, the time elapsed could mean that the window for appeal or judicial review has passed, in which case there would be no other way to vary or set aside a decision unless the first-order tribunal is permitted to revisit it. This would tend to favour assenting to reconsideration, provided of course that there was a very compelling reason that statutory appeal or judicial review was not pursued in a timely manner.

Reliance and action on the decision: Decisions made by public officials are meant to be relied upon. This is particularly so where the subject legislation states that the decision is "final and conclusive," or "final and binding."[107] Where such legislative declaration exists, it would be most reasonable for parties to expect the decision to be a done deal,[108] and to act on it once the window for appeal or judicial review has passed.

When parties have arranged their affairs pursuant to a decision, the decision should not be lightly undone. Put another way, the flexibility to not apply *functus officio* should not be used if it would infringe on reliance interests.

Still, much will depend on the extent of reliance and action taken based on the decision. It is actual reliance by the parties and other affected persons, not reliance in the abstract, that counts. Who acted in reliance also matters. For instance, if the party who has acted in reliance on the decision is also the one seeking to reopen it, there should not be any concern about prejudice to that party flowing from the matter being reopened.

Prejudice if reconsideration is allowed versus prejudice if reconsideration is not allowed: As a final consideration, any fairness concerns that have not been addressed under the earlier factors should be explored and assessed. This requires taking a panoramic view of the situation and asking: is there anything else that would make application of *functus officio* unfair to the parties?[109] For example, in *Danyluk*, the applicant's fragile state of mind during the administrative proceeding as well as the improper and unfair

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[107] Such language is sometimes part of a full privative clause, or standing on its own, constitutes a "quasi-privative clause": *Dayco (Canada) Ltd v National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada)*, [1993] 2 SCR 230 at 239, 102 DLR (4th) 609. See also *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982 at 1006,160 DLR (4th) 193.

[108] See *British Columbia (Minister of Forests) v Bugbusters Pest Management Inc*, 159 DLR (4th) 50, 1998 CanLII 6467 at para 31 (BC CA), where the Court said, in the context of issue estoppel: "statutory provisions touching on the nature and quality of decisions by administrative tribunals are in my view an indicium as to how the court should apply issue estoppel, because they may be considered as factors which would affect the parties' reasonable expectations".

[109] *Danyluk*, *supra* note 18 at para 63. See also at para 80.

procedure adopted by the administrative decision-maker in reaching the decision on her substantial claim ($300,000, to be exact) were identified as weighing in favour of permitting re-litigation.

In weighing all relevant factors, the balance may tip toward reopening the decision, or it may tilt toward precluding reconsideration. Whichever side the balance tilts is how the flexibility to apply or not apply the functus doctrine should be exercised. In some cases, relevant factors may lean in opposite directions, making the balancing task a difficult one. When in doubt, keep in mind that the objective is to ensure that operation of the doctrine promotes the orderly administration of justice, but not at the cost of real injustice in the particular case.[110]

C) Final Thoughts on Flexibility

There can be no flexibility without discretion, or as it has been said, "flexibility necessarily entails discretion."[111] By providing for flexibility in the application of *functus officio*, the Court in *Chandler* essentially created a general discretionary exception to the functus doctrine as it pertains to administrative decision-makers. It made space for context to be taken into account, enabling different situations to be treated differently, and gave the stiff doctrine some dynamic range.

The introduction of a general discretion offers vast potential for mitigating injustice. At the same time, it prompts concerns about its proper exercise. The multifactorial analysis proposed above aims to give some structure to the discretion, in hopes that its use will be more principled and predictable. In requiring that all relevant factors be canvassed and weighed, the factorial test compels a process of intelligible and transparent justification for any deviation from the operation of *functus officio*; in this way, it safeguards against discretion sliding into caprice.

One may ask whether the discretion that may be exercised under the proposed factorial analysis should swallow up the existing limited-scope exceptions to *functus officio*, namely, the exception for clerical slips and the manifest intent exception. The short answer is not just yet. While it is quite likely that a scenario that fits within one of the traditional exceptions to *functus officio* will also warrant declining application of the doctrine pursuant to the multifactorial analysis, that alone is not reason to sweep the exceptions aside. The slip and manifest intent exceptions have been

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110 *Ibid* at para 67. This was said in relation to issue estoppel but could just as well be said for *functus officio*.

111 *Canada (AG) v Mavi*, 2011 SCC 30 at para 54.

an important part of the general architecture of the functus doctrine.[112] Entrenched and time-tested,[113] they continue to have currency when the functus doctrine is applied in judicial and arbitral contexts. There is no pressing need to get rid of them, and they should remain available to address the very specific errors of inadvertence that they were created to address. Experience elsewhere in law has shown that limited exceptions can co-exist nicely alongside a general one.[114]

Moreover, *Chandler* only called for a more flexible and less formalistic application of the functus doctrine to administrative decision-makers; it

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[112] The slip and manifest intention exceptions are so entrenched that they have been folded into the definition of the functus doctrine: see *Chandler*, *supra* note 2 at 867 per dissent ("The doctrine of *functus officio* states that an adjudicator, be it an arbitrator, an administrative tribunal, or a court, once it has reached its decision cannot afterwards alter its award except to correct clerical mistakes or errors arising from an accidental slip or omission"). See also *Whalen v Whalen*, 2018 NSCA 37 at para 28 ("*Functus officio* means that an adjudicator—including an arbitrator, administrative tribunal or court—cannot alter its own award except to correct clerical mistakes or errors arising from an accidental slip or omission"); *Kurukkal v Canada (Minister of Citizenship and Immigration)*, 2009 FC 695 at para 24, rev'd on other grounds 2010 FCA 230 ("The doctrine of *functus officio* provides that once a decision-maker has done everything necessary to perfect his or her decision, he or she is then barred from revisiting that decision, other than to correct clerical or other minor errors").

[113] Note that while these exceptions have endured the test of time, they are not without their issues. As the top Court remarked in *Burke*, *supra* note 33 at para 54, with respect to the slip exception, terms like "clerical errors" and "accidental slips" have "vague meaning". Regarding the manifest intent exception, its application can sometimes be strained, as it is debatable how obvious the intent must be to constitute "manifest intent". By way of illustration, consider the arbitrator's decision in question in *Paramed Home Health Care-Oshawa/Lindsay v Ontario Nurses' Assn. (First Collective Agreement Grievance)*, [2019] OLAA No 458 at paras 3, 12. The decision required the employer to "continue to contribute four percent (4%) of an employee's gross wages" to the RRSP. At the time of the decision, the employer had been contributing to the RRSP at the rate of up to 3%. The language of the decision was open to two different interpretations of the rate at which the employer must contribute: the words "continue to contribute" could be taken as that the status quo (i.e. up to 3%) is to be maintained, but the words "four percent (4%)" suggests a different rate. It is not manifest from the decision what the arbitrator had intended. Nonetheless, the arbitrator availed himself of the manifest intention exception to issue a supplementary decision, holding that his original decision "clearly reflects that the manifest intention was to award the status quo".

[114] The modern approach to hearsay evidence is an illustration in point. Historically, hearsay evidence was inadmissible unless it fit one of the traditional exceptions to the exclusionary rule. The rigidity of these exceptions eventually led the Supreme Court of Canada to develop a flexible exception, which lets in a hearsay statement not falling within a traditional exception if it is necessary and sufficiently reliable. The traditional exceptions remain in place despite the introduction of the principle-based general exception. See *R v Khelawon*, 2006 SCC 57 at para 42.

did not call for a wholesale abandonment of the existing exceptions in favour of general flexibility. Any usurpation of the exceptions would therefore constitute an abrupt and major change to the current state of the law, which runs counter to the principle that changes to the common law should be "slow and incremental."[115] Be that as it may, it is certainly possible to imagine having a single unifying exception in lieu of multiple ones. *Functus officio* could go the way that issue estoppel has gone, where there is a general rule of preclusion, with one broad and flexible exception to it. When the time is ripe, with a ready legal mood, and a case with the right facts, we may come to realize that it makes sense to have a single discretionary residual exception to *functus officio*. Going one step further, we may find that such an exception should be made available to all decision-makers, be they administrative, judicial, or arbitral.

To those who are wary that a general discretionary exception will destabilize the functus doctrine too much and counteract the good that it sets out to defend, I suggest that the opposite is true. The discretion will not take over the rule. Instead, it enriches it, and supports its true objective. *Functus officio*, said to be a rule about finality,[116] works hard to enforce finality less as an end unto itself but as a means to a further and greater end: justice. Having a hard stop to the decision-making process is just. The justice lies in the protection it affords against the spectre of unbridled redetermination and of having one's life turned upside down each time a decision is wiped out and substituted with another.

Occasionally, when *functus officio* lays its grip too tightly, it can put a choke on substantive justice and bring about injustice instead. It is on these occasions that having a general discretionary exception to *functus officio*, to not apply it even when the prerequisites are met and none of the limited exceptions are engaged, is useful. It will make the difference between justice and injustice in a particular case. If we accept that *functus officio* is really a rule about justice, then it is on these occasions that the exception proves the rule.

5. Conclusion

The functus doctrine has had a long and venerable history. It has stood guard over the altar of finality, minding it and defending it over the years. What began as a rule that applies to judges has been stretched to encompass administrative bodies and officials in all their splendid diversity, whose collective decisions dwarfs those of the courts in volume

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115 *Watkins v Olafson*, [1989] 2 SCR 750 at 760, 61 DLR (4th) 577; *R v Salituro*, [1991] 3 SCR 654 at 670, 1991 CanLII 17.

116 *Capital District, supra* note 11 at para 36.

and impact, as measured by the number of lives directly touched.[117] Over the course of the doctrine's evolution, its hard edges have been filed down by the exceptions that have been created, and notably, by the flexibility introduced in *Chandler*.

The evolution of *functus officio* both reflects and highlights an age-old tension: the tension between finality and fairness. It is a tension that has simmered for as long as our legal system has stood. Ours is a system that strives to decide disputes finally and efficiently, while maintaining a high level of procedural fairness and decisional accuracy. Things get tricky when there is a problem with a decision, and the most efficient way to address the problem is to let the decision-maker have another go at getting it right. Should the decision be undone, and the administrative decision-maker be given another try? The functus doctrine, in its original formulation, would answer with a resounding 'no.' In its more elastic, modernized version, it would say 'maybe.' It would consider the particular circumstances of the case before answering the question. It would champion finality only when the justice in finality outweighs the justice in reopening the matter, because, as Lord Atkins shrewdly observed, "finality is a good thing, but justice is better."[118]

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[117] As Chief Justice McLachlin observed in *Cooper v Canada (Human Rights Commission)*, [1996] 3 SCR 854 at 899–90, 140 DLR (4th) 193: "Many more citizens have their rights determined by these tribunals than by the courts".

[118] *Ras Behari Lal v King Emperor*, [1933] All ER Rep 723 at 726, 50 TLR 1.