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SCC decision means courts may reconsider ancillary matters after final judgment

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The Supreme Court of Canada's recent decision in *Canadian Broadcasting Company v. Manitoba* 2021 SCC 33 provides helpful judicial insight into the interplay between the doctrine of *functus officio* and the courts' inherent jurisdiction to control their own process. Among other things, the judgment articulates the guiding principles for Canadian courts which are asked to reconsider ancillary matters that arise following the final judgment in an underlying proceeding.

At issue before the Supreme Court was whether the Manitoba Court of Appeal was correct in holding that it lacked jurisdiction over a publication ban previously ordered in the context of a final judgment on the merits. The Supreme Court held that while the Court of Appeal lacked jurisdiction to rehear the matter on the merits and could not reconsider the substance of the appeal by virtue of the doctrine of functus officio, the Court of Appeal nonetheless had the inherent jurisdiction to supervise access to the record of its own proceedings. Accordingly, the Supreme Court ultimately remanded the matter to the Court of Appeal for reconsideration.

Background

The underlying case concerned a 1987 jury trial ending in the first-degree murder conviction of Stanley Ostrowski and a sentence of life imprisonment without parole. In 2014, Manitoba's minister of justice referred the matter to the Court of Appeal on the basis of a possible miscarriage of justice at Ostrowski's trial. During the subsequent proceedings in relation to this possible miscarriage of justice, the Court of Appeal ordered a publication ban on an affidavit that Ostrowski sought to tender as evidence. In 2018, the Court of Appeal concluded there had in fact been a miscarriage of justice in Ostrowski's 1987 trial, and his conviction was set aside.

In 2019, the Court of Appeal refused a motion by the Canadian Broadcasting Company (CBC) to set aside the 2014 publication ban on the basis that the court lacked the jurisdiction to do so. The Court of Appeal pointed to the doctrine of functus officio, as well as its rule of practice prohibiting rehearings, in concluding that it had exhausted its jurisdiction once the court had decided the merits of the case and entered the formal judgment disposing of the appeal.

Interplay between open court principle, functus officio

It is a fundamental tenet of the Canadian legal system that there is a strong presumption in favour of open and public proceedings, grounded in the constitutionally entrenched right of

freedom of expression. The Supreme Court very recently reiterated the importance of this foundational rule, which grants the public the right to attend hearings and consult court files, and generally permits the press to inquire and comment on the workings of the courts (*Sherman Estate v. Donovan* 2021 SCC 25).

However, certain limited exceptions apply to this presumption, giving the courts discretion to limit the open and public nature of proceedings. For discretionary orders such as publication bans to be issued, the applicant must generally demonstrate — as a threshold requirement — that openness presents a serious risk to a competing interest of public importance. This is acknowledged to be a high bar. Additionally, the applicant must show that the order is necessary to prevent the identified risk and demonstrate that, as a matter of proportionality, the benefits of any order restricting openness outweigh its negative effects.

Separate and apart from the open court principle is the doctrine of functus officio, which generally provides that once a court has decided a matter on its merits and entered a formal judgment, its authority is exhausted with respect to that matter. This doctrine is aimed at protecting the finality and stability of judicial decisions that may be subject to appeal.

The question that arose in the context of the recent CBC decision concerned the interplay between these two doctrines and, specifically, whether a court that has exercised its discretion to abridge the open court principle by means of a publication ban becomes functus officio of all aspects of that decision once a final judgment has been rendered, or whether the court's inherent jurisdiction to control its own process allows it to reconsider aspects of the publication ban ex post.

Supreme Court's ruling

Writing for the majority, Justice Nicholas Kasirer made a number of preliminary observations with respect to the open court principle and the doctrine of functus officio.

At the outset, the court distinguished between a court's jurisdiction over the merits of a case after a final judgment has been entered — which is lost by virtue of the doctrine of functus officio — and its jurisdiction over the supervision of its own court record. In this regard, the court noted that lower courts always retain the ability to control their own court record with respect to proceedings that are generally understood to be ancillary but independent. This residual jurisdiction over matters of process was deemed to be consistent with both the long-standing principle that courts maintain supervisory authority over the court record, as well as the principles of finality and stability of judgments associated with the doctrine of functus officio. In so ruling, the court noted that while exceptions to the doctrine of functus officio are "relatively restrictive," the doctrine itself is also narrow in scope.

However, Justice Kasirer was careful to note that while there exists scope for the possible reconsideration of final judgments in relation to matters of process (such as publication bans), this limited reconsideration is not an open door "at any time or for any reason." In this regard, the court acknowledged two narrow (albeit non-exhaustive) grounds upon which the issuing court may reconsider matters that have been subject to prior adjudication: (1) where an affected person with standing, such as the media, was not given notice of the order and proposes to make novel submissions that could affect the result, and (2) where the circumstances relating to the making of the order have materially changed. Justice Kasirer further noted that these two grounds for reconsideration can be displaced by legislation, such as applicable rules of court.

Ultimately, on the facts of the case before it, the majority of the court held that the CBC could not rely on a "material change in circumstances" to ground a reconsideration of the

publication ban, but directed the Court of Appeal to consider whether the CBC was nonetheless entitled to the proposed relief on the basis that the order was made without notice.

In her dissenting opinion, Justice Rosalie Silberman Abella agreed with the majority that there was no "material change in circumstances" present, but diverged in finding that the CBC was not entitled to reconsideration due to the CBC's "undue and unjustified" six-month delay before filing its motion on the publication ban.

Conclusion

The Supreme Court's decision in *CBC* provides a roadmap for the limited circumstances in which a court may reconsider a matter that is ancillary to a prior final judgment in furtherance of its jurisdiction to control its own process. While the particular order at issue in this case involved a publication ban, the court's commentary is not limited in scope to such discretionary orders and provides guidance with respect to the courts' ongoing jurisdiction over procedural matters that arise after final judgment.

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