

**CASE NO.**

**VOL. NO.**

**PAGE**

JEFFREY BURKE

- and -

JOHN SITSER, THE  
MUNICIPALITY OF THE  
COUNTY OF COLCHESTER  
and BLAIKIES DODGE  
CHRYSLER LTD.

(Appellant)

(Respondents)

CA 178260

Halifax, N.S.

OLAND, J.A.

[Cite as: *Burke v. Sitsler*, 2002 NSCA 115]

**APPEAL HEARD:**

September 17, 2002

**JUDGMENT DELIVERED:**

October 2, 2002

**SUBJECT:**

***Functus officio - Civil Procedure Rule 23.13 - Dismissal for want of prosecution.***

**SUMMARY:**

The chambers judge gave an oral decision granting the respondents' application to strike for want of prosecution. In addition to finding inordinate and inexcusable delay giving rise to a presumption of prejudice, he found actual prejudice which he specified as including the missing records of two doctors, one of whom had died, and unavailable employment insurance records. The following day, counsel for the appellant sent the judge the records of both those doctors, which had arrived during the chambers hearing. The judge refused to reconsider his decision, on the basis that he was *functus*. His order issued some three weeks after the hearing.

**ISSUE:**

Whether the chambers judge erred in law in determining that he was *functus*.

**RESULT:**

Appeal allowed. In finding that he was *functus* and could not reopen the matter, the chambers judge erred in law. He had a discretion to reopen the matter and to change or amend his decision at any time prior to the issuance of the formal order. In the circumstances of this case it could not be said that this error of law was immaterial to the result he reached. Order dismissing the action set aside.

**This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 3 pages.**