

## Don't Like The Court's Order? Get It Entered Before Appealing

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When prosecuting a personal injury claim various orders can be made in the course of litigation. In Civil matters in the BC Supreme Court such orders have to be 'entered' before crystallizing. Until the order is entered the Court maintains jurisdiction to review, clarify or potentially vary the order. If you wish to appeal an order it is important to have it entered first. Reasons for judgement were released today by the BC Court of Appeal discussing this important practice point in the context of an ICBC Claim.

In today's case ([Chand v. ICBC](#)) counsel for ICBC appealed an order from a BC Supreme Court Master and later Judge. At the time the Appeal was filed the original order was unentered. In her reasons for judgement Madam Justice Kirkpatrick of the BCCA said the following regarding the importance of having an entered order before launching an appeal:

*[29] The salient feature that I wish to note at this point is that it appears the power described in Buschau is restricted to amending an entered order. The reason for restricting the application to entered orders is obvious. Until the order is entered, the judge or master may, on application, reconsider the order. Here, as I have noted, Master Baker's order was not entered until 27 May 2009. Accordingly, it was open to the parties to return before Master Baker at any time before that date to have him clarify the meaning of the stay order....*

*[41] In my opinion, on an application in which a party is seeking to determine the intention of an entered order, it is essential that the entered order be before the court. Similarly, on an appeal from a master's order, the appeal should not proceed until the court has before it the entered order appealed from. To proceed in the absence of the entered order gives rise to unnecessary uncertainty. The court hearing the application or the appeal must know that the order under consideration is not susceptible to review or variation by the master who made the order because, of course, until the order is entered, the master is not functus officio. The proper course in light of the unentered order would have been for the chambers judge to direct ICBC to immediately appear before Master Baker for the purposes of clarifying his order.*

*[42] Once the order is entered, the court is functus officio. In R. v. Roberts, 2004 BCCA 436, this Court said that "[i]t is well settled that the court remains seized of a matter and is not functus officio until the formal judgment of the court is entered and, until that time, the court has the power to reconsider, vary or revoke its judgment" (at para. 7).*

*[43] Variation is expressly authorized by the Rules of Court, under Rule 41(24):*

*The court may at any time correct a clerical mistake in an order or an error arising in an order from an accidental slip or omission, or may amend an order to provide for any matter which should have been but was not adjudicated upon.*

*[44] There are limits as to what can be corrected under Rule 41(24). McLachlin and Taylor, British Columbia Practice, 3rd ed. by Frederick Irvine (Markham, Ont.: Butterworths, 2006), summarize these limits at 41-38 to 39:*

*Notwithstanding that R. 41(24) is much wider than the old "slip rule", it cannot be used to amend or alter a substantive finding even though that finding might be demonstrated to be in error ... R. 41(24) does not permit changing a final order where a judge has second thoughts about his order, or to permit the parties to provide fresh details on matters already before the court .... Its proper use is (1) to rectify a slip in drawing the order which, if unamended, would produce a result contrary to the intention of the court or of the parties... or (2) to provide for a matter which should have been but was not adjudicated upon.... [citations omitted].*

[45] *It does not appear that ICBC considered making an application under Rule 41(24).*

[46] *In addition to Rule 41(24), the court has, through inherent jurisdiction, “the power to amend the entered order on the basis that it contained an error in expressing the manifest intention of the Court” (Buschau v. Rogers Communications Inc., 2004 BCCA 142, 237 D.L.R. (4th) 260 at para. 26, leave to appeal ref’d [2004] S.C.C.A. No. 221). In the absence of evidence of irrevocable steps in reliance or undue prejudice, the court should correct the order (para. 27). It is not in the interests of justice for an order to stand that does not reflect the parties’ true entitlements (para. 27).*

[47] *In the case at bar, no one seems to have addressed their mind to the fact that Master Baker’s order was unentered. Since then, of course, the order has been entered and I consider that this Court has jurisdiction under s. 9(1) of the Court of Appeal Act, R.S.B.C. 1996, c. 77, to amend the order and exercise the jurisdiction invested in the Supreme Court. Proceeding in this way avoids further litigation and expense, far too much of which has been wasted in this case to date.*