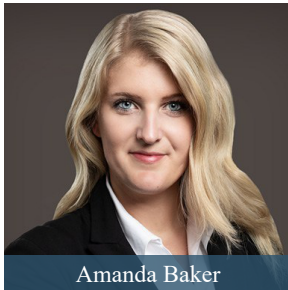




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Interlocutory Consent Orders and the Court's Discretion to Vary or Set Aside Terms



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By Amanda Baker

In a recent case from the Alberta Court of Appeal, the Court considered the application of rule 9.15(4) of the *Alberta Rules of Court* and whether an interlocutory Consent Order is a type of contract that can only be set aside for the same reasons as a contract can be set aside. The Court of Appeal found that it is not.

In *Custom Metal Installations Ltd. v Winspia Windows (Canada) Inc.*, 2020 ABCA 333, a subcontractor, Winspia Windows (Canada) Inc., filed a Builder's Lien and a Statement of Claim to enforce the Builder's Lien against a contractor, Custom Metal Installations Ltd., claiming unpaid amounts in the sum of \$950,000 in respect of a residential condominium project. In response, the contractor, Custom Metal Installations Ltd., filed a Counterclaim for damages in the sum of \$3,000,000.

On an Application by the contractor, the Builder's Lien claim was struck for being invalid and, due to the failure by the subcontractor to comply with a Court Order to register extra-provincially in Alberta, the subcontractor's Statement of Claim was also struck. Later in the litigation, the parties entered into a Consent Order providing that the subcontractor's Statement of Defence to Counterclaim would also be struck if the subcontractor's corporate representative did not attend for Questioning on specified dates. When the subcontractor's corporate representative failed to attend Questioning, the Statement of Defence to Counterclaim was also struck. The subcontractor filed an Application before a Master to vary the terms of the Consent Order and restore the subcontractor's Statement of Defence to Counterclaim. The Master dismissed the Application leaving the subcontractor exposed to the contractor's \$3,000,000 Counterclaim.

The subcontractor then appealed the Master's Order to a Justice. In the Justice's reasons, he held that the Consent Order was interlocutory which allowed the Court to exercise its discretion to vary or set aside the terms of the Consent Order pursuant to rule 9.15(4) of the *Alberta Rules of Court*. From a review of the evidentiary record, the Justice held that it was reasonable to conclude that the failure of the subcontractor's corporate representative to appear at Questioning was not the fault of the subcontractor nor a deliberate act of contempt or indifferent non-compliance. The prejudice the subcontractor would suffer if its appeal was dismissed was extreme since it would lose its ability to defend the Counterclaim, while the prejudice that the contractor would suffer would be compensable in costs. As a result, the Justice allowed the subcontractor's appeal and restored its Statement of Defence to Counterclaim.

The contractor appealed the Justice's decision which was dismissed by the Court of Appeal. The Court of Appeal agreed with the Justice and held that there is a marked distinction between a Consent Order that implements a settlement on the merits and creates *res judicata* and an interlocutory Consent Order that is procedural in nature. The Court further held that the contract analogy is more applicable to the former and that when a Consent Order is interlocutory, and not of a final determination on a matter of substance, the Court may determine what is just in the circumstances.

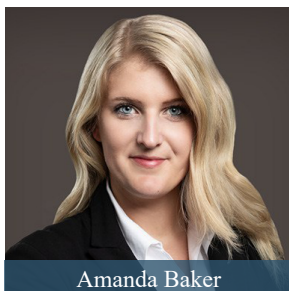
In Alberta, we can expect reliance on *Custom Metal* to find that when an interlocutory Consent Order is not followed, the Court will exercise its discretion to determine what is just in the circumstances and can exercise its discretion to vary or set aside the terms of the Consent Order accordingly.



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Questions?

Should you have any questions with respect to this bulletin, or if you would like more detailed information related to interlocutory Consent Orders, please contact:



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