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Thomas Heintzman specializes in arbitration, mediation and litigation relating to corporate disputes, shareholder's rights, securities law, construction law, broadcasting/telecommunications, class actions, construction and environmental law.

He has been counsel in many important actions, arbitrations, and appeals before all levels of courts in many Canadian provinces as well as making numerous appearances in the Supreme Court of Canada.

Thomas Heintzman is the author of *Heintzman & Goldsmith on Canadian Building Contracts*, 4th Edition which provides an analysis of the law of contracts as it applies to building contracts in Canada.

Heintzman & Goldsmith on Canadian Building Contracts has been cited in over 183 judicial decisions including the two leading Supreme Court of Canada decisions on the law of tendering:

When is the Main Building Contract Incorporated by Reference into the Subcontract?

Most standard form building contracts provide for the incorporation of the main contract into the subcontract. For instance, GC 3.7.1 of the CCDC 2 Stipulated Price Contract requires the contractor to incorporate the terms of that contract into all agreements with subcontractors and suppliers. But what effect does an Incorporation by Reference clause in the subcontract have? In ***1510610 Ontario Inc. v. Man-Shield (NOW) Construction Inc.***, the Ontario Superior Court recently held that it does not mean that an obligation to post security for lien claims contained in the main contract is incorporated into the subcontract.

The Background

The main contract between the owner and Man-Shield required Man-Shield to post security for and discharge any liens that were registered. Man-Shield entered into a subcontract with 1510610. The subcontract referred to the main contract as “forming or by reference made a part of this Subcontract, insofar as applicable, generally or specifically, to the labour and materials to be furnished and work to be performed under this Subcontract.” The subcontract stated that, in the event of any discrepancy between the subcontract and the main contract, the terms and conditions of the subcontract were to apply.

Man-Shield had asked 1510610 to sign a subcontract which contained an express provision requiring 1510610 to post security if its sub-trades liened the project, and 1510610 had refused to execute that contract.

When liens were filed by, among others, a sub-trade of 1510610, the owner demanded that Man-Shield provide security and discharge those liens, and Man-Shield did so. Man-Shield then applied to the court for an order requiring 1510610 to take over this responsibility and post security to replace the security provided by Man-Shield with respect to the lien filed by the sub-trade of 1510610. The Ontario court dismissed that application.

The Ontario court held that “the extent to which the terms of a principal contract are incorporated by reference into a subcontract is a question of construction of the subcontract. The mere existence of an incorporation by reference clause in the subcontract did not automatically incorporate everything in the main contract.”

The court held that, for such a significant obligation as providing security for liens to be incorporated into the subcontract, more precise language was necessary. In arriving at this conclusion, the court particularly relied upon the fact that 1510610 had been requested, and had refused, to execute a contract containing just such an obligation; and the fact that the incorporation by reference provision was prefaced with the words “insofar as applicable, generally or specifically to the labour and materials to be furnished and work to be performed under this Subcontract.” In light of these facts, the court was not satisfied that the parties intended the lien security obligation in the main contract to be incorporated into the subcontract.

This decision highlights the need for parties to building contracts to carefully consider what they intend by an Incorporation by Reference clause. These clauses are dangerous for subcontractors because they may impose unforeseen obligations arising from the main contract which they had no part in negotiating. Courts have been sensitive to this issue and have been reluctant to apply these clauses, *holus bolus*. This reluctance is clearest when the subject matter is not directly related to the physical prosecution of the work. In other circumstances, the courts may insist upon objective proof that the parties really intended such incorporation. The *Man-Shield* decision is just a recent example of that reluctance.

See ***Heintzman and Goldsmith on Canadian Building Contracts***, 4th ed., Chapter 7, Part 1

Construction Contracts - Subcontracts - Interpretation - Incorporation by Reference

1510610 Ontario Inc. v. Man-Shield (NOW) Construction Inc, 2012 ONSC 302

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