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Thomas Heintzman specializes in commercial litigation and is counsel at McCarthy Tétrault in Toronto. His practice focuses on litigation, arbitration and mediation relating to corporate disputes, shareholder's rights, securities law, broadcasting/telecommunications and class actions.

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

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

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

M.J.B. Enterprises Ltd. v. Defence Construction (1951), [1999] 1 S.C.R. 619 and

Double N Earthmovers Ltd. v. Edmonton (City), 2007 SCC3, [2007] 1 S.C.R. 116-2007-01-25 Supreme Court of Canada

Is A Subcontractor Bound By The Arbitration Clause in the Main Contract?

In a judgment delivered on May 6, 2011, Chief Justice Joseph P. Kennedy of the Nova Scotia Supreme Court dealt with a contentious issue relating to arbitration clauses in construction contracts.

Is an arbitration clause in the main contract between the owner and the contractor incorporated into a subcontract between the contractor and subcontractor? If that incorporation occurs, then the subcontractor's court claim must be stayed and the subcontractor must assert its claim by way of arbitration.

In *Sunny Corner Enterprises Inc v. Dustex Corporation*, the main contract contained an arbitration clause requiring that any dispute between the owner and contractor be arbitrated. The subcontract was contained in a purchase order that stated that the scope of the work was

to be as defined in the main contract. The contractor argued that the purchase order sufficiently incorporated the terms of the main contract, and therefore the arbitration clause, into the subcontract. The subcontractor acknowledged that the main contract was integral to the purchase order, but asserted that the purchase order did not specifically incorporate the arbitration clause from the main contract into the subcontract.

The Chief Justice held that the later is the proper statement of the law. Referring to Goldsmith and Heintzman on *Canadian Building Contracts* (4thed), he held that an arbitration clause in the main contract will only be incorporated in the subcontract if it is specifically incorporated. It was not sufficient to merely say in the subcontract that the main contract was an “integral” part of the subcontract. As he pointed out, there may be many terms in the main contract which are irrelevant to the subcontractor. He referred to an Alberta decision [*Q.Q.R. Mechanical Contracting Ltd. v. Panther Controls Ltd.*, 2005 ABQB 58] in which a two year guarantee provision in the main contract was held not to have been incorporated into the subcontract. Accordingly, Chief Justice Kennedy dismissed the motion to stay the action and permitted it to proceed.

There is logic and a lesson to be learned from this case. The parties to a subcontract may well intend to be bound by the conditions in the main contract relating to the actual nature and performance of the work. After all, they need a common road map to get the project built that is consistent with the main contract. But it is quite another thing for them to agree to be bound by consequential, remedial and procedural matters found in the main contract. There is no inherent reason why the parties to the subcontract cannot agree to a different regime for those matters. For a court to find that they made an agreement to be bound by the main contract about those matters, there should be specific provisions in the subcontract to that effect.

See Goldsmith and Heintzman: *Canadian Building Contracts* (4thed) at Chapter 7, section 1 and Chapter 10, section 1.

Arbitration - Construction Agreement - Subcontract:

Sunny Corner Enterprises Inc v. Dustex Corporation 2011 NSSC 172

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