



## Did I Sign Up For That? The Incorporation of a Prime Contract into a Subcontract

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Many construction contracts provide for the incorporation of a prime contract into the subcontract to varying degrees. For example, Article 2A of the Canadian Association of Construction's Stipulated Price Contract between a contractor and subcontractor (CCA 1 2008) says,

The requirements, terms and conditions of the *Prime Contract* as far as they are applicable to this *Subcontract*, shall be binding upon the *Contractor* and the *Subcontractor* as if the word "owner" appearing therein had been changed to "*Contractor*" and the word "contractor" appearing therein has been changed to "*Subcontractor*". In the event of any conflict between the terms of this *Subcontract* and the *Prime Contract*, the *Prime Contract* shall govern.

Further, GC 3.7.1.2 of the Canadian Construction Documents Committee's stipulated price contract between an owner and a contractor (CCDC 2 2008) requires the Contractor to, "...incorporate the terms and conditions of the *Contract Documents* into all contracts or written agreements with *Subcontractors* and *Suppliers*".

The general rule regarding the incorporation of a prime contract into a subcontract comes from *Dynatec Mining Ltd. v. PCL Civil Constructors (Canada) Inc.* ([1996] O.J. No. 29), "The extent to which the terms of prime contract have been incorporated by reference into a subcontract is, in every case, a question of construction of the subcontract."

Depending on the terms of the subcontract, disputes can arise over what portions of a prime contract have been incorporated by reference into it. Two recent cases have addressed such disputes.

In *1510610 Ontario Inc. o/a Central Welding & Iron Works v. Man-Shield (NWO) Construction Inc. and Rainy River District School Board* (2011 ONSC 302) ("*1510610 Ontario*") the general contractor, Man-Shield (NWO) Construction Inc. ("Man-Shield"), argued a term of the prime contract requiring it to post security for liens was incorporated into its subcontract with 1510610 Ontario Inc. o/a Central Welding & Iron Works ("Central"). According to the terms of the prime contract Man-Shield posted \$123,751.89 in respect of a lien filed by a sub-trade to Central then brought a motion to require Central to replace the security posted.

Man-Shield relied on a contractual clause which required Central to perform all its work, "...in accordance with the terms and conditions of this subcontract and between the Owner and Man-Shield Construction Inc..., dated June 3, 2009 including all the General and Special Conditions, Drawings, Specifications, schedules, addenda and other documents forming or by reference made a part by this Subcontract..."

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Justice Fitzpatrick of the Ontario Superior Court of Justice decided that the requirement to post security for liens was not incorporated into the subcontract because distinct and specific words are required to incorporate such a significant obligation. Justice Fitzpatrick also relied on the fact that Central had been requested to and had refused to execute a contract containing more precise language requiring it to post security for liens filed by its subcontractors.

In *Sunny Corner Enterprises Inc. v. Dustex Corporation and Nova Scotia Power Incorporated* (2011 NSSC 172) (“*Sunny Corner*”) Dustex Corporation (“Dustex”) subcontracted with Sunny Corner Enterprises Inc. (“Sunny Corner Inc.”) to supply and install a filter on a coal fired power plant belonging to Nova Scotia Power Incorporated (“NSPI”). Dustex refused to pay Sunny Corner Inc. for allegedly deficient work and Sunny Corner liened the project and started an action to enforce the lien. Dustex applied for an order staying the action because the subcontract incorporated the arbitral provisions in the prime contract. Dustex relied on the language of a purchase order which said the “[s]cope of this work will be as defined in the contract between NSPI and Dustex effective November 14<sup>th</sup>, 2007 (main contract)” to incorporate the arbitral provisions.

Chief Justice Kennedy of the Nova Scotia Supreme Court found a general incorporation of the prime contract into the subcontract will not normally include the arbitration clause and that it appears something more than a declaration that the prime contract is “an integral part” of the subcontract is required to incorporate an arbitral provision. Dustex’s application for a stay was not allowed because the language of the purchase order was not specific enough to incorporate the arbitral provision.

The lesson to be learned from *1510610 Ontario and Sunny Corner* is that parties attempting to incorporate prime contracts, or portions of them, into subcontracts need to be clear about what they are incorporating. It is particularly important to be clear when attempting to incorporate a “significant obligation” or an arbitration clause from a prime contract to a subcontract. Subcontractors being asked to sign contracts should be aware of attempts to incorporate the prime contract into the subcontract or they may find themselves asking, “Did I sign up for that?”

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