

**IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES**

**IN THE MATTER OF:**

**RYFAN INC.**

**Plaintiff**

**-v-**

**PLAN GROUP INC.**

**Respondent**

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**Transcript of the Decision held before the Honourable Justice  
A.M. Mahar, sitting in Yellowknife, in the Northwest Territories, on  
the 11<sup>th</sup> day of October, 2019**

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**APPEARANCES:**

M. Coombs:

Counsel for the Plaintiff

M. Round:

Counsel for the Respondent

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Order re appointing

10

1 THE CLERK: Court is now in session before the  
2 Honourable Justice Mahar.

3 THE COURT: Be seated. Good afternoon and  
4 morning, counsel.

5 **(TELECONFERENCE COMMENCES)**

6 M. COOMBS: Morning.

7 M. ROUND: Afternoon.

8 THE COURT: I am ordering a transcript of today's decision.

9 I will be doing this on the basis of notes, not a written  
10 script, so the transcript that I order may well end up  
11 being somewhat substantially edited for clarity. In any  
12 event, it will not change the reasons I am doing what I  
13 am doing. So let's begin.

14 A bit of background: this dispute  
15 between Ryfan and Plan Group stems from the  
16 construction of the New Stanton Hospital here in  
17 Yellowknife. This is, by northern standards, a  
18 megaproject and probably cost in the range of 400  
19 million dollars. The construction project involved many  
20 layers of contractor and subcontractor in what I came to  
21 learn during the course of these proceedings is a pay-  
22 as-paid basis. What that means is that as work is done  
23 by the lowest link in the chain, invoices are submitted  
24 up the chain for approval and eventual payment. When  
25 approval is given payment is given; that then ends up  
26 working its way back down the chain until, as in this  
27 case, Ryfan ends up finally being paid for the work they

1                   have done.

2                                   The dispute in this case is between Ryfan  
3                   and Plan Group, both of which are electrical  
4                   contractors. Ryfan is an electrical contractor located in  
5                   the north, I believe, and Plan Group is located in  
6                   Ontario. Plan Group is a far more substantial entity  
7                   than Ryfan, but Ryfan has boots on the ground herein  
8                   Yellowknife. Plan Group was contracted by Siemens  
9                   which is another link in the chain, to look after the  
10                  electrical contracting work on the hospital.

11                                  They subcontracted that contract out to  
12                  Ryfan and it is that contract that forms the basis for the  
13                  action here today. This action is an action for the  
14                  appointment of an arbitrator by Ryfan to settle a dispute  
15                  that has arisen between Ryfan and Plan Group. The  
16                  dispute actually involves not only Ryfan and Plan  
17                  Group but also Siemens and other entities further up  
18                  the chain and it involves either reductions or  
19                  nonpayment on a number of invoices that were  
20                  submitted by Ryfan. Ryfan is also claiming that there  
21                  was some misleading information given to them about  
22                  some conduit versus cable installation work that was  
23                  done at the hospital; but basically, it is a dispute about  
24                  payment.

25                                  They claim they have been quite  
26                  dramatically underpaid for the work that they have  
27                  done. Plan Group is not necessarily disputing all of

1 Ryfan's claims because, as was pointed out to me  
2 during the hearing, Plan Group is simply a conduit.  
3 Plan Group has an interest in Ryfan being paid  
4 because if Ryfan does not get paid for work, Plan  
5 Group does not receive the percentage that they would  
6 otherwise receive for that work.

7 That said, Plan Group does have an  
8 oversight commitment to the project as a whole and  
9 only approves work that they deem is appropriately  
10 approved to send up the link. There is a certain  
11 amount of trust that has to exist between each layer of  
12 this sort of project in order for the project to even move  
13 forward and get done.

14 That was my understanding of the  
15 background of the dispute and the project.

16 The dispute centers around a specific  
17 contract between Ryfan and Plan Group. When I refer  
18 to provisions and sub-provisions and other texts, I am  
19 referring to the contract that exists between Ryfan and  
20 Plan Group, which forms the basis of this action.

21 There are two provisions in the contract  
22 that both of the parties are alternately relying on. There  
23 is a term that provides for the appointment of an  
24 arbitrator, and there is a term that provides that  
25 substantially all matters will be dealt with under the  
26 jurisdiction of the courts of Ontario.

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I am going to now read for the record these particular provisions. There are a number of subcategories in the contract within category F or index F in the articles section. I am going to read now verbatim what F8 says:

Subject to article 20B of the general conditions, the courts of Ontario shall have jurisdiction to hear and determine any action, suit, proceeding or dispute in connection with this subcontract and the parties hereby irrevocably attorn to the jurisdiction of those courts.

Ryfan is attempting to rely on provision 20G, which is further along in the general conditions to the contract. It reads:

Any subcontract dispute that:

1. is not resolved pursuant to article 20A;
2. has not been referred to a dispute resolution procedure pursuant to an election made by Plan Group in accordance with article 2C, or
3. has not been resolved through or as a

1 result of mediation,  
2  
3 Shall be referred to and finally resolved  
4 by arbitration conducted by a single  
5 arbitrator in accordance with the  
6 applicable commercial arbitration statute  
7 in force in the jurisdiction of the  
8 subcontract work, unless the parties  
9 mutually agree otherwise in writing.

10  
11 Both of the parties suggested creative and, with  
12 respect, somewhat tortured ways in which meaning  
13 could be given to both provisions in the contract. The  
14 provisions of a contract should be interpreted in a  
15 harmonious way on the assumption the parties to  
16 contracts intend the entirety of the contract to have  
17 meaning.

18 I am not convinced that this is possible in  
19 this case; not without first engaging in an exercise of  
20 forcing words to mean other than what they actually  
21 mean. These provisions are simply irreconcilable.  
22 They conflict in the most basic way, and I do not  
23 believe that they can both be enforceable, not without,  
24 as I said, making a leap to what are virtually  
25 nonsensical interpretations of the two sections.

26 So that is a starting point for my analysis.  
27 The contract also contains a provision dealing with

1 conflicts that could arise in the contract. This is found  
2 in under heading F in the general provisions,  
3 subparagraph (1):

4  
5 Except to the extent otherwise expressly  
6 provided in the subcontract, if there is a  
7 conflict between provisions of the  
8 subcontract or provisions incorporated  
9 into the subcontract, the order of priority  
10 from highest to lowest shall be:

- 11  
12 A) the agreement of this subcontract  
13 being articles A through F inclusive;  
14 B) the special conditions of this  
15 subcontract;  
16 C) the general conditions of this  
17 subcontract;  
18 D) the specifications incorporated into  
19 the subcontract, and  
20 E) the drawings incorporated into the  
21 subcontract drawings

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23 ... of a larger scale shall govern over  
24 those of a smaller scale of the same  
25 date dimensions shown on drawings  
26 shall govern over dimensions scaled  
27 from drawings.



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The plain meaning of this provision is that provision F8 ought to prevail over provision 20G, given that F8 appears in the general agreement of the subcontract, which was referred to in subparagraph (a) of provision F1. Whereas paragraph 20G appears in the general provisions.

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Argument was made with reference to subparagraph 20B of the general conditions by the applicant, suggesting that because 20B was referenced, I should find that a provision with respect to the laws of Ontario should also extend to 20G. 20B is a provision that refers to the need to allow work to continue if there despite any action that arises. 20B requires that in spite of an action being brought through any of the other provisions in the contract, work shall continue as though the action had not been brought.

In my view, this does not necessitate the incorporation of any of the other terms of provision 20 in that all it does is simply say that if there is an action brought, the work has to continue. This makes perfect sense, given the nature of the contracts involved. I do not find the argument that 20B being incorporated into F8 in any way makes me give greater priority to 20G than I would otherwise give to it.

There were a number of other arguments that were brought by the applicant, and one was the

1 competence-incompetence argument. This argument  
2 is basically that, given the special knowledge of  
3 commercial tribunals and commercial arbitrators, the  
4 Court ought to allow the arbitrator to determine their  
5 own jurisdiction. In my view, this basically puts the cart  
6 before the horse because if I come to a decision that  
7 the arbitration clause simply has no force because of  
8 the priority clause as well as the clause requiring that  
9 the courts of Ontario hear these matters, then the  
10 arbitrator would not have any initial jurisdiction in order  
11 to determine their own competence or their own  
12 jurisdiction. I find that that argument does not convince  
13 me.

14 Another argument that caused me some  
15 thought was the argument that when interpreting  
16 contracts, care should be given to find that specific  
17 terms are given more force than otherwise general or  
18 boiler plate terms.

19 This may have been something I needed  
20 to rely on if I was not given a clear provision in the  
21 contract establishing a chain of priority with respect to  
22 the terms of the contract.

23 Another argument that was raised was  
24 with respect to the sufficiency of the claim, and this was  
25 actually an argument that was raised by the  
26 respondent, but I do not believe that I need to rule on  
27 this issue because it connects more to the conditions

1 precedent for the application for the arbitrator as  
2 opposed to conditions that would apply to the bringing  
3 of an action in tort or in breach of contract.

4 This same comment then applies to the  
5 separate claim for misrepresentation. This, again, is an  
6 issue that relates to the dual operation of these  
7 provisions, and it was one that the applicant was  
8 making to encourage me to find that even though the  
9 more regular invoice issues could be dealt with by way  
10 of the courts of Ontario, that perhaps it was necessary  
11 to appoint the arbitrator to deal with the specific claim.  
12 Again, I would have to find that both terms in the  
13 contract were supportable, and I do not find that they  
14 are.

15 My decision is that these provisions are  
16 clearly in conflict. The priority or conflict provision is  
17 clear. The provision with respect to the courts of  
18 Ontario should have precedence, and I give it  
19 precedence.

20 This also simply makes sense in the  
21 context of this particular litigation, because it may well  
22 be, given the layered nature of the contracts in  
23 question, that other parties are going to have to be  
24 joined in the dispute. If the problem arises that  
25 Siemens or somebody further up the chain is refusing  
26 to pay Ryfan through Plan Group, then it only makes  
27 sense that Ryfan and Plan Group would not be able to

1 substantially settle the matter without the involvement  
2 of the other parties; and those other parties would not  
3 be party to any of the arbitration that took place.

4 This was not the reason for my decision; I  
5 simply comment that even though the reason for the  
6 decision is somewhat black letter in terms of the strict  
7 interpretation of the contract between the parties, this  
8 interpretation also makes sense in a more principled  
9 way because of the nature of these contracts.

10 Costs will be at a party and party basis as  
11 per the regulations. Do counsel believe that an order is  
12 necessary in this case?

13 M. COOMBS: Ah, we can prepare a form of order, ah,  
14 Your Honour, and circulate it back to my friend to  
15 approve.

16 THE COURT: Very good. And again, I want to thank  
17 you both for your excellent submissions; it made for a  
18 very interesting piece of work. So if there is nothing  
19 further, then we will sign off.

20 M. ROUND: Thank you very much, Your Honour.

21 THE COURT: Thank you.

22 M. COOMBS: Thank you.

23 THE COURT: Goodbye.

24 **(TELECONFERENCE CONCLUDES)**

25 THE COURT: Thanks. So that will obviously be for my  
26 review, not to just go out; right?

27 THE CLERK: Yes. Yes.

1 THE COURT: Thank you.

2 **(PROCEEDINGS CONCLUDED)**

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5 **CERTIFICATE OF TRANSCRIPT**

6 Neesons, the undersigned, hereby certify that the foregoing  
7 pages are a complete and accurate transcript of the  
8 proceedings transcribed from the audio recording to the best  
9 of our skill and ability. Judicial amendments have been  
10 applied to this transcript.

11

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13 Dated at the City of Toronto, in the Province of Ontario, this  
14 5<sup>th</sup> day of December, 2019.

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Kim Neeson

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Principal