

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
CHIPPEWAS OF MNJIKANING RAMA	)	
FIRST NATION and CHIPPEWAS OF	)	
RAMA FIRST NATION	)	
	)	
Plaintiffs/Responding Parties	)	A. Grant and S. Biglou, for the Plaintiffs
– and –	)	
	)	
SEXTON’S MECHANICAL LIMITED,	)	
W.S. MORGAN CONSTRUCTION	)	
LIMITED, NORTHSTAR ENGINEERING	)	J. Cormier and M. Klassan, for the
& TECHNOLOGIES LTD. and JOHN DOE	)	Defendant, Sexton’s Mechanical Ltd.
CONTRACTOR(S)	)	
	)	P. Rollo and C. Prins, for the Defendant,
Defendants/Moving Parties	)	W.S. Morgan Construction
	)	
	)	
	)	HEARD: April 17, 2026

REASONS ON MOTION FOR SUMMARY JUDGMENT

J.R. MCCARTHY J.

I. THE MOTION

[1] The Defendant, Sexton’s Mechanical Limited (“Sexton”), moves for summary judgment to dismiss the subrogated claim (the “claim”) of the Plaintiffs, the Chippewas of Mnjikaning Rama First Nation and the Chippewas of Rama First Nation. The Defendant’s motion is supported by the co-defendant, W.S. Morgan Construction Limited (“W.S. Morgan”).

II. THE CLAIM

[2] The claim is brought by the Plaintiffs’ insurer to recover the sum of \$356,981 which represents damages to a cooling unit that occurred during the construction of a new three-story office building located at 6036 Rama Road, Rama (respectively the “the Premises” and “the Project”).

III. THE PROJECT

- [3] W.S. Morgan was the general contractor on the Project. Construction was scheduled to commence on October 15, 2019. On October 21, 2019, Sexton was hired by W.S. Morgan to perform HVAC work on the Project (the “sub-contract”).

IV. THE BUILDERS’ RISK POLICY AND BROAD FORM ENDORSEMENT

- [4] The Project contract required the Plaintiffs to obtain a Builder’s Risk Policy (a “BRP”) in the names of the Plaintiffs, W.S. Morgan and the consulting engineer, Steenhoff Building Services Group (“Steenhoff”). Similarly, the sub-contract required W.S. Morgan to provide, maintain and pay for a BRP and include Sexton as an insured. On August 13, 2019, the Plaintiffs and W.S. Morgan transferred responsibility for obtaining and maintaining the BRP to the Plaintiffs. The Plaintiffs obtained the BRP by adding a builder’s risk broad form endorsement (the “endorsement”) to its own property policy. The endorsement was valid from April 1, 2021 to April 1, 2022.
- [5] The BRP applied to the Project as evidenced by the endorsement’s declarations page, and included the additional terms excerpted below. I have used bold font to emphasize the relevant sections:

PROPERTY INSURED

2. This “form(s)”, except as provided in this “form(s)”, insures the following property at the “project site” for the amount of insurance specified on the “declarations” for the “Project Site”:

- (a) **Property in course of construction, installation, reconstruction or repair** other than property described in 2 (b):
 - (1) owned by the “Named Insured”;
 - (2) owned by others, provided the value of such property is included in the amount of insurance;all to enter into and form part of the completed project including expendable materials and supplies, not otherwise excluded, necessary to complete the project;
- (b) landscaping, growing trees, plants, shrubs or flowers all to enter into and form part of the project provided that the value of such property is included in the amount of insurance;
- (c) temporary buildings, scaffolding, falsework, forms, hoardings, excavations, site preparation and similar work, provided that the value thereof is included in the amount of insurance and then only to the extent that

“replacement” or restoration is necessary to complete the project.

...

PERILS INSURED

4. This “form(s)”, except as herein provided, insures against all risks of direct physical loss of or damage to the property insured.

- [6] The BRP also included amendments so that it aligned with the Project’s main contract. These amendments included the following terms:

CESSATION OF COVERAGE

Clause 8. of the Builders Risk Broad Form is deleted and replaced by the following:

- 8. This “form(s)” ceases to insure the project:**
- (a) 10 days after the commencement of, use or occupancy of any part or section of the project unless such use or occupancy is for:**
 - (1) construction purposes;**
 - (2) office or habitation purposes;**
 - (3) installing, testing or storing equipment or machinery;**
 - (b) when left unattended for more than 30 consecutive days or when construction activity has ceased for more than 30 consecutive days;**
 - (c) the expiration of this insurance;**
 - (d) one year after the date of the Substantial Performance of the work**
- whichever first occurs.

...

OTHER INSURANCE

Additional Condition 9. **OTHER INSURANCE** is deleted and replaced with the following:

If, on the happening of any loss or damage to property insured by this “form(s)” there is in force any other insurance covering the same interest, this “form” shall be Primary Insurance.

PERMISSIONS

Additional Condition 12. **PERMISSION** is deleted and replaced with the following:

- (a) The “Insurer(s)” hereby grants permission to the “Named Insured” to immediately carry out necessary and reasonable repairs for damage to the insured property where the damage does not exceed \$50,000. If such damage is insured by this “form(s)”, the “Insurer(s)” will reimburse the “Named Insured” for their proportion of the actual cost of such repairs, subject to the Deductible and any applicable Amount of Insurance stated in the “declarations”. Nothing in this clause shall be deemed to have waived the requirement that notice of loss be given as soon as practicable to the “Insurer(s)” as provided for elsewhere in this “form”.
- (b) **The “Insurer(s)” hereby grants permission for occupancy of the insured project, provided such occupancy is habitational, office, banking, convenience store under 465 square metres in area, or parking purposes, or for the installation, testing and commissioning of equipment forming part of the project.**

SUBROGATION

Additional Condition 14. **SUBROGATION** is deleted and replaced with the following:

The “Insurer”, upon making any payment or assuming liability therefor under this policy, shall be subrogated to all rights of recovery of the “Insured” against any person, and may bring action in the name of the “Insured” to enforce such rights. Where the net amount recovered after deducting the costs of recovery is not sufficient to provide a complete indemnity for the loss or damage suffered, that amount shall be divided between the “Insurer” and the “Insured” in the proportion in which the loss or damage has been borne by them respectively.

Any release from liability entered into by the “Insured” prior to loss shall not affect the right of the Insured to recover.

At the option of the “Insured”, the “Insurer” shall waive all rights of subrogation against employees of the “Insured” or against any other “Insured” named herein.

With respect to coverage provided for “resultant damage” from a fault or defect in design, the “Insurer(s)” hereby retains its full rights of subrogation against any architect, engineer or other consultant if insured by this “form(s)” who is responsible for such fault or defect.

...

**ADDITIONAL NAMED INSUREDS – ADDITIONAL
CONDITION ADDED**

The following Additional Condition is added.

All contractors and/or all subcontractors are added as Additional “Named Insured’s”, but only with respect to the “project site” specifically described on the Builders Risk Declaration Form. This Additional Condition does not include suppliers who perform no work at the construction site, consulting engineers or consulting architects unless expressly added via endorsement.

V. CANCELLATION OF THE BRP

- [7] The Plaintiffs cancelled the BRP on January 31, 2022 without giving written notice to either Sexton or W.S. Morgan.

VI. THE LOSS

- [8] On either February 23 or 24, 2022, an employee of Sexton was commissioning and testing the cooling unit on the Premises. The cooling unit was mistakenly filled with water, causing it to freeze, resulting in critical damage to the unit. The damage was discovered by a Sexton employee on February 28, 2022.

VII. THE SUBROGATED CLAIM

- [9] Because the Plaintiffs’ cancelled the BRP on January 31, 2022, it was not in force on the date of the loss. The Plaintiffs’ insurers covered the costs of repairs, remediation and the installation of the new cooling unit and then exercised their rights of subrogation by claiming those costs from Sexton in the present action.

VIII. THE PRINCIPAL ISSUE

- [10] I must decide whether the Plaintiffs’ decision to cancel the BRP is a genuine issue that requires a trial. If the Plaintiffs were within their rights to cancel the BRP, then the subrogated action may proceed on its merits. If they were not, then they are in breach of their covenant to insure Sexton. The parties agree that if that latter finding is made, then there is no right of action against the defendants and the Plaintiffs’ claim would be dismissed.

IX. SUMMARY JUDGMENT

- [11] Summary judgment motions are governed by r. 20 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. Rules 20.04(2)–(2.2) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, provide as follows:

Disposition of Motion

General

20.04 (2) The court shall grant summary judgment if,

- (a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or
- (b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment.

Powers

(2.1) In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:

1. Weighing the evidence.
2. Evaluating the credibility of a deponent.
3. Drawing any reasonable inference from the evidence.

Oral Evidence (Mini-Trial)

(2.2) A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation.

- [12] The leading case on the interpretation of r. 20 is the Supreme Court of Canada's decision in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87. In *Hryniak*, the Supreme Court held that a motion for summary judgment cannot be granted if there is a genuine issue that requires a trial. Writing on behalf of the court, Karakatsanis J. stated, at para. 49, that:

There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

- [13] The principles in the three-step test above are interconnected and speak to whether summary judgment will provide a fair and just adjudication of the matters at issue between the parties. Simply, "a process that does not give a judge confidence in her conclusions can never be the proportionate way to resolve a dispute": see *Hryniak*, at para. 50. Furthermore,

Karakatsanis J., at para. 66, created the following roadmap to assist judges in deciding summary judgment motions:

On a motion for summary judgment under Rule 20.04, the judge should first determine if there is a genuine issue requiring trial based only on the evidence before her, *without* using the new fact-finding powers. There will be no genuine issue requiring a trial if the summary judgment process provides her with the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportionate procedure, under Rule 20.04(2)(a). If there appears to be a genuine issue requiring a trial, she should then determine if the need for a trial can be avoided by using the new powers under Rules 20.04(2.1) and (2.2). She may, at her discretion, use those powers, provided that their use is not against the interest of justice. Their use will not be against the interest of justice if they will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

- [14] The interests of justice analysis is comparative. Proportionality is assessed in relation to a full trial and “may also involve a comparison of the evidence that will be available at trial and on the motion as well as the opportunity to fairly evaluate it”: see *Hryniak*, at para. 58.
- [15] Ultimately, the court in a summary judgment must ask whether, on the basis of the evidentiary record alone, there are genuine issues that require a trial and whether the evidentiary record provides the evidence needed “to fairly and justly adjudicate the dispute”: see *Hryniak*, at para. 66.

X. SEXTON’S POSITION

- [16] The nub of Sexton’s position is that the Plaintiffs had covenanted to insure it under the BRP. The stipulated coverage period was April 1, 2021 to April 1, 2022. The Plaintiffs were required to maintain the BRP until 10 days after the commencement of use or occupancy (the other triggering events are not applicable). The Plaintiffs unilaterally, prematurely, and without any foundation or notice, cancelled the BRP on January 31, 2022. The loss to the cooling unit occurred at some point between February 24 and 28, 2022. The premises had not been inspected by the Rama Building Department (the “Building Department”) for occupancy prior to the cancellation of the BRP. Partial occupancy was first approved by the Building Department on March 11, 2022. Given that the Plaintiffs breached their covenant to insure Sexton, neither they nor their insurer can maintain this action.

XI. THE PLAINTIFFS’ POSITION

- [17] The Plaintiffs assert that there is a genuine issue requiring a trial as to whether they were entitled to cancel the BRP because the Premises were being used or occupied at the time

of the BRP's cancellation. In turn, they claim that their obligation to provide, maintain and pay for the BRP had ceased by the time of its cancellation. There is compelling evidence from the Plaintiffs on the twin issues of the use or occupancy of the Premises and whether the Plaintiffs were within their rights to cancel the BRP. These are live issues that cannot be summarily determined. The BRP requires interpretation in consideration of the entirety of the circumstances, the governing by-laws and the contract documents. Therefore, the Plaintiffs assert that this matter is one that requires a trial.

XII. ANALYSIS

- [18] I am persuaded that there is no genuine issue requiring a trial in this matter.
- [19] I am in as good a position as any trial judge would be to determine the dispositive issue in this case. Summary judgment is undoubtedly the most efficient, least expensive and fairest method of determining the essence of the dispute between the parties.
- [20] The coverage under the BRP was contractually agreed to "cease" 10 days after the commencement of, use or occupancy of any part or section of the Project, unless such use or occupancy was for: construction purposes; office or habitational purposes; or installing, testing or storing equipment or machinery.
- [21] The by-laws governing the project contain, *inter alia*, the following stipulations:

10.6.3 Following the issuance of a building permit, and before issuance of an occupancy permit by the Building Department, the Building Department shall be entitled to attend at the premises and conduct one or more inspections, as required by the Chief Building Official, to ensure that the construction complies with the requirements of this By-Law, including any technical requirements under Section 10.3 hereof.

...

- 3.1.4.(1) An occupancy permit is required
 - (a) To allow the occupancy of a building or part thereof, or
 - (b) when the occupancy of a building or part thereof is changed.

...

- 4.1.4. No person shall occupy or allow the occupancy of any building, or part thereof, unless the owner has obtained an occupancy permit from the authority having jurisdiction.

- [22] Thus, the by-laws applicable to the Project forbade the occupancy of any building absent an occupancy permit, which was to be obtained following a successful mandatory inspection by the Building Department.
- [23] The Plaintiffs suggestion that there is a genuine issue requiring a trial is primarily based on the affidavit evidence of Denis Paccagnella. There are, however, six key admissions made by Paccagnella on behalf of the Plaintiffs which, in my view, are dispositive of the issue before the court.
- [24] At his cross-examination on January 20, 2026, Paccagnella admitted the following:
- (1) when the Plaintiffs made the decision to cancel the BRP, they were aware of Steenhof's opinion from January 7, 2022 that the building was still under construction and restricted until confirmation of an interim or final occupancy was granted;
 - (2) between January 7 and January 31, 2022 (when the BRP was cancelled) the Plaintiffs did not receive any confirmation of interim or final occupancy being granted;
 - (3) at the time of the cancellation of the BRP, the Building Department had not yet inspected the premises for occupancy;
 - (4) the February 11, 2022 inspection report from the Building Department indicated that the premises were not suitable for occupancy;
 - (5) the Plaintiffs were advised by the architect on or about February 18, 2022 that occupancy was conditional upon approval from the Building Department; and
 - (6) the first inspection report from the Building Department stating that occupancy was acceptable was provided on March 11, 2022.
- [25] These six admissions completely undermine the Plaintiffs' position. On both the date of the cancellation of the BRP and the date of loss, occupancy and use of the premises -- (use and occupancy are clearly synonymous) -- were legally impermissible because there had been no occupancy permit issued. The evidence makes it clear that the Plaintiffs understood, from both the architect and the project engineer, that occupation required a permit which could only be obtained after an inspection had taken place.
- [26] The facts set out below are firmly established by the evidentiary record (documentary and witness evidence) and are uncontradicted. No assessment of credibility or weighing of evidence is required.
- [27] Those facts as set out in para. 62 of Sexton's factum are:
- a) the contract documents required the Plaintiffs to maintain a BRP for the Project;

- b) the Plaintiffs were required to maintain the BRP until 10 days after the commencement of use or occupancy (there are other triggering events, but they are not relevant to this motion);
- c) the contract documents and the BRP included “permission to occupy” language that contemplated office and habitational use prior to completion, while maintaining BRP coverage;
- d) Sexton enjoyed a contractual right pursuant to the Subcontract Agreement to be insured under the BRP;
- e) the Plaintiffs obtained a BRP with Sexton as a named insured;
- f) the subject loss was an insured risk under the BRP;
- g) the BRP was primary to any other policy;
- h) the loss took place during the commissioning and testing of the cooling unit between February 24 and 28, 2022;
- i) the Plaintiffs cancelled the BRP on January 31, 2022;
- j) the premises had not been inspected by the Building Department for occupancy prior to cancellation of the BRP;
- k) partial occupancy was first approved by the Building Department on March 11, 2022; and
- l) substantial performance occurred on April 25, 2022.

[28] When considered alongside the admissions made by Paccagnella, there is simply no basis upon which a court could find that the Plaintiffs were contractually entitled to cancel the BRP prior to March 11, 2022. In doing so on January 31, 2022, the Plaintiffs breached the covenant to insure.

XIII. INTENTION OF THE PARTIES

[29] Finally, the intention of the parties that the BRP coverage was to remain in place for the stipulated period is clearly indicated by the contract documentation. This documentation included “permission to occupy” language that specifically contemplated BRP coverage during occupancy. This special “permission to occupy” language was also inserted as an amendment in the BRP to align it with the contract documents. The amended clause 12 of the BRP reads as follows:

PERMISSIONS

Additional Condition 12. **PERMISSION** is deleted and replaced with the following:

...

- (b) The “Insurer(s)” hereby grants permission for occupancy of the insured project, provided such occupancy is habitational, office, banking, convenience store under 465 square metres in area, or

parking purposes, or for the installation, testing and commissioning of equipment forming part of the project.

- [30] While the intention of the parties is not the primary consideration before the court, and this is by no means a case of contractual interpretation, the pre-eminent place occupied by the BRP in the contract documentation simply reinforces the importance of the BRP coverage to both Sexton and the Project.

XIV. SUMMARY

- [31] There is no genuine issue requiring a trial. I am able to conclude on the evidentiary record before me that the unilateral cancellation of the BRP by the Plaintiffs on January 31, 2022 was both premature and unjustified in the circumstances. The Plaintiffs had a contractual covenant to insure Sexton until one of the triggering events for the cessation of the insurance coverage occurred. The premises could not be and were not occupied on either the date of the cancellation of the BRP or the date of loss. The triggering event allowing for the cancellation of the BRP post-dated the date of loss. The result is that neither the Plaintiffs nor their insurers are entitled to bring this action.

XV. DISPOSITION

- [32] For the foregoing reasons, Sexton's motion is allowed. Summary judgment is granted dismissing the Plaintiffs' claim in its entirety.
- [33] The parties have agreed on a costs disposition. In accordance with that agreement, the Plaintiffs shall pay the following costs of the motion and the action: i) to the Defendant, Sexton, the sum of \$30,000 inclusive of HST and disbursements; and ii) to the Defendant, W.S. Morgan, the sum of \$10,000 inclusive of HST and disbursements.

J.R. MCCARTHY J.

Released: June 2, 2026