KING'S BENCH FOR SASKATCHEWAN

Citation: **2025 SKKB 83**

Date: **2025 06 18**
File No.: QBG-SA-00276-2022
Judicial Centre: Saskatoon

BETWEEN:

RUSSELL KUSHNIRUK

PLAINTIFF/APPLICANT

- and -

O'REILLY INSURANCE LTD.

DEFENDANT/RESPONDENT

Counsel:

Scott D. Giroux	for the plaintiff/applicant
Brendan J. Campbell	for the defendant/respondent

FIAT — WEMPE J.
June 18, 2025

I. Introduction

[1] The applicant/plaintiff [Kushniruk] applies to this Court for summary judgment against O'Reilly Insurance Ltd. [O'Reilly], the respondent/defendant in these proceedings.

[2] Mr. Kushniruk is a farmer and a teacher. He has an apiary in the RM of Cana, Saskatchewan where he has raised bees for approximately seven years.

[3] Kushniruk raises leafcutter bees which are hired by farmers to pollinate their alfalfa, and sweet clover fields. Kushniruk has approximately 190 huts which he puts out every June. Blocks/nests are hung inside the huts for the bees to lay their larvae.

When the flowers are ready in June, the bees are put into the huts in the field. The bees fly out of the huts, pollinate and eat the nectar. The female bees lay eggs in the blocks/nests and then fly out to cut a portion of leaf which they bring back to wrap the larvae in. The female bees use approximately 6 to 12 pieces of leaf to wrap one larva. In approximately 8 weeks the larvae hatch, and Kushniruk collects the blocks which should be full of larvae. The larvae are stored for a period of time and then sold to buyers in Western Canada and the United States.

[4] Kushniruk obtained Co-operators insurance for his bees through O'Reilly in 2017 which he maintained until May 23, 2019. He did not renew his insurance for the 2020-2021 year but for the 2021-2022 year he obtained the same insurance through O'Reilly.

[5] In 2017 Kushniruk contacted O'Reilly and was referred to Mr. Gordon Ross [Ross]. Kushniruk obtained a Farm Guard policy of insurance for the bees he put out in the field and the larvae/bees he expected to produce over the season against loss due to fire, wind, theft, transportation accidents and ravaging animals.

[6] In 2017 he made an insurance claim relating to a windstorm which caused a lack of flowers and impacted his apiary. Kushniruk filed a claim for the loss of bees and larvae due to wind gusts/windstorm. After the wording of the claim was changed from "lack of red flowers on clover" to "windstorm", the claim was accepted by the Co-operators and they paid out $50,690.00 to Kushniruk.

[7] In May of 2021, after not renewing the policy for the previous year, Kushniruk again contacted O'Reilly about obtaining the same policy. Kushniruk understood that again the policy covered bees put out in the field at the beginning of the season and bees/larvae above those put out including those which would be produced over the season. In other words, Kushniruk understood that the premiums

covered not only the bees put out at the beginning of the season but also the bees that would have been gained but were lost due to adverse weather.

[8] Later in 2021 Kushniruk made an insurance claim for bees lost in another windstorm. The Co-operators denied the claim based on the Loss Adjustment Clause in the policy. The Co-operators advised Kushniruk they would not cover the loss because the number of adult bees and/or cocoons recovered at the end of the season was equal to or greater than the number of adult bees and/or cocoons released at the beginning of the season. The Co-operators also advised Kushniruk that in the similar claim from 2017 the coverage was applied incorrectly, therefore the prior claim had no bearing on the 2021 insurance claim.

[9] Kushniruk now claims against O'Reilly for breach of contract and negligence. He argues that O'Reilly, as either an insurance agent or broker, negotiated the procurement of an insurance policy. Kushniruk believed that he had the same policy and same coverage as 2017. By selling Kushniruk a policy which did not cover what he specified, he argues O'Reilly breached their contract with him and failed to meet the duty of care they owed to him.

[10] Kushniruk claims damages in the amount of $118,100.00.

II. Issues

[11] The issues in this matter are as follows:

(i) Is summary judgment appropriate?

(ii) Can the Court resolve the conflicts in the evidence and come to a fair and just determination on the issues?

a. Breach of contract;

b. Negligence; and

c. Damages

III. Analysis

(i) Is summary judgment appropriate?

[12] Both parties in this matter take the position that the action can and should be determined by way of summary judgment. Kushniruk argues this Court can make the necessary findings regarding breach of contract, negligence and damages against O'Reilly. O'Reilly argues this Court can make the necessary findings leading to the conclusion that the action cannot succeed and therefore must be dismissed. O'Reilly also takes the position that in the alternative, if this Court determines a trial is necessary, then I should make an order as to the appropriate quantum of damages (partial summary judgment).

[13] To find that summary judgment is appropriate the Court, must be satisfied that:

1. The Court can make the necessary findings of fact;

2. That it can apply the law to those facts;

3. That summary judgment is a proportionate, expeditious and economical means to achieve a just result between the parties; and

4. That there appears to be no genuine issue requiring a trial.

See: *Hryniak v Mauldin*, 2014 SCC 7, [2014] 1 SCR 87 [*Hryniak*]; *Tchozewski v Lamontagne*, 2014 SKQB 71, 440 Sask R 34; *Auchstaetter v Evolution Homes Ltd*., 2016 SKQB 360; and *G and I Construction Group Inc. v Ace Burger Ltd*., 2023 SKKB 214.

[14] As explained by Tochor J. (as he then was) in *Wessing v Kunitz*, 2020 SKQB 153 at para 27, 2 MPLR (6th) 88 [*Kunitz*], in a summary judgment application a judge must employ a shifting burden between the applicants and respondents (which can be challenging if both parties seek summary judgment) and must consider whether a trial is required to determine the issues. If it is determined a trial is required, the chambers judge must then consider whether a full trial can be avoided by resorting to some of the options in Rule 7-5(2) of *The Queen's Bench Rules* (as they then were) which permits something less than a full *viva voce* hearing.

[15] In *Peter Ballantyne Cree Nation v Canada (Attorney General)*, 2016 SKCA 124 at para 30, 485 Sask R 162, the Saskatchewan Court of Appeal discussed the burden of proof as follows:

> [30] Simply put, the onus and shifting burden of proof can be gleaned from the Rules. The applicant(s) for summary judgment (in this case all of the defendants) bear the evidentiary burden of showing there is no "genuine issue requiring a trial" (see Rule 7-2). The applicant must do so with supporting material or other evidence. In essence, an applicant for summary judgment must put its best foot forward. Failure to do so may result in the dismissal of the application since the court will assume that the record contains all the evidence the parties would present if there was a trial: see *Canadian Broadcasting Corporation v Whatcott*, 2016 SKCA 17 at paras 17 and 27, 395 DLR (4th) 278.
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> [Emphasis added]

[16] Many cases have emphasized the paramount consideration on a summary judgment application is whether there can be a "fair and just determination on the merits". See *Kunitz* at paras 28 and 29; *McCorriston v Hunter*, 2019 SKCA 106 at paras 23 – 24, 33 RFL (8th) 310.

[17] At para. 50 of *Hryniak* the Supreme Court explained:

> [50] These principles are interconnected and all speak to whether summary judgment will provide a fair and just adjudication. When a summary judgment motion allows the

> judge to find the necessary facts and resolve the dispute, proceeding to trial would generally not be proportionate, timely or cost effective. Similarly, a process that does not give a judge confidence in her conclusions can never be the proportionate way to resolve a dispute. It bears reiterating that the standard for fairness is not whether the procedure is as exhaustive as a trial, but whether it gives the judge confidence that she can find the necessary facts and apply the relevant legal principles so as to resolve the dispute.

[18] In *Lane Realty Corp. v Rey and Miner Creek Farms Ltd.*, 2019 SKQB 286 [*Lane Realty*], Layh J. discussed the importance of an appropriate factual basis and different types of evidence:

> [26] Given these statements, I must first determine whether there exists a conflict in the affidavit evidence …If I find no conflict in the evidence, chances are I will be comfortable to make a "fair and just" determination and grant a summary judgment. On the other hand, if I find conflict, I must explain to the litigants whether I can resolve the conflict using the powers under Rule 7-5(2) by weighing evidence, evaluating the credibility of the deponents, and by drawing reasonable inferences. If I can resolve the conflict or explain that the matters in controversy are not material to a fair and just determination of the issues, I will likely be comfortable to make a "fair and just" determination and grant a summary judgment. If I cannot resolve the conflict using the powers under Rule 7-5(2), I must decline granting summary relief.
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> [27] … The real question in summary judgment applications is whether the issue can be resolved without a trial, essentially a question of the judge's comfort with the status of the evidence. In face of conflicting facts, the presiding judge must explain how he or she resolved the conflict or whether the conflict was inconsequential to the issues. Failing to do either, the judge must decline a summary adjudication.

[19] In *Kunitz* after reviewing the authorities Tochor J. stated,

> [34] … it is apparent the list of governing principles in a summary judgment application is evolving into something more complex and nuanced. A shifting burden of proof between

> the parties must be employed and there is a need for careful navigation through conflicts in the evidence. Any conflicts must be explicitly addressed to determine if their existence presents an insurmountable barrier to summary judgment.
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> [35] Nonetheless, what remains constant is the overarching goal of a "just and fair determination on the merits"; this has always been the foundation of such applications and this goal has been consistently recognized throughout the evolution of the case law, from *Hryniak* and *Tchozewski* to *McCorriston* and *Lane Realty.*

[20] O'Reilly is asking in the alternative that if I order the matter to proceed to trial, that I grant summary judgment on the issue of damages.

[21] Although Rules 7-2 and 7-5(6) of *The King's Bench Rules* permit a court to grant partial summary judgment, as held by the Court of Appeal recently in *A.C. Forestry Ltd. v Big River First Nation,* 2023 SKCA 96, [2023] 10 WWR 563 [*A.C. Forestry*], this may only be done in certain circumstances. At para. 36 of *A.C. Forestry* Jackson J. quoted *Butera v Chown, Cairns LLP*, 2017 ONCA 783, 418 DLR (4th) 657 [*Butera*], for the considerations and problems in granting partial summary judgment.

> [36] In *Butera*, the Court reviewed its prior jurisprudence and indicated what it perceived to be the problems with granting partial summary judgment:
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> > [30] First, such motions cause the resolution of the main action to be delayed. Typically, an action does not progress in the face of a motion for partial summary judgment. A delay tactic, dressed as a request for partial summary judgment, may be used, albeit improperly, to cause an opposing party to expend time and legal fees on a motion that will not finally determine the action and, at best, will only resolve one element of the action. At worst, the result is only increased fees and delay. There is also always the possibility of an appeal.
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> > [31] Second, a motion for partial summary judgment may be very expensive. The provision for a presumptive cost award for an unsuccessful summary judgment motion that

> existed under the former summary judgment rule has been repealed, thereby removing a disincentive for bringing partial summary judgment motions.
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> [32] Third, judges, who already face a significant responsibility addressing the increase in summary judgment motions that have flowed since *Hryniak*, are required to spend time hearing partial summary judgment motions and writing comprehensive reasons on an issue that does not dispose of the action.
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> [33] Fourth, the record available at the hearing of a partial summary judgment motion will likely not be as expansive as the record at trial, therefore increasing the danger of inconsistent findings.
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> [34] When bringing a motion for partial summary judgment, the moving party should consider these factors in assessing whether the motion is advisable in the context of the litigation as a whole. A motion for partial summary judgment should be considered to be a rare procedure that is reserved for an issue or issues that may be readily bifurcated from those in the main action and that may be dealt with expeditiously and in a cost-effective manner. Such an approach is consistent with the objectives described by the Supreme Court in *Hryniak* and with the direction that the Rules [of Civil Procedure, RRO 1990, Reg 194] be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.
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> [35] Lastly, I would observe the obvious, namely, that a motion for partial summary judgment differs from a motion for summary judgment. If the latter is granted, subject to appeals, it results in the disposal of the entire action. In addition, to the extent the motion judge considers it advisable, if the motion for summary judgment is not granted but is successful in part, partial summary judgment may be ordered in that context.

[22] Partial summary judgment is not appropriate in this matter for a number of reasons. Firstly, this is Kushniruk's application for summary judgment. O'Reilly has not brought an application for either summary judgment or partial summary judgment.

Secondly, this is not one of the rare circumstances outlined in *A.C. Forestry* and *Butera*. It is therefore my view that it would not be appropriate to grant partial summary judgment on the issue of damages as requested by O'Reilly.

[23] I do, however, find that full summary judgment is appropriate in the circumstances. Despite the conflicts in the evidence, I am able to come to a fair and just determination of the issues. It is not necessary to have a trial to resolve the conflicts in the evidence.

(ii) Can the Court resolve the conflicts in the evidence and come to a fair and just determination on the issues?

a. Breach of contract

[24] The interplay between contract and negligence in the context of an insurer, an insurance agent and an insured are complex. Whether liability can be found in contract or negligence depends on the factual circumstances of the case. Much of the case law has held that liability between an insurance agent and an insured is based in negligence rather than contract. This is likely due to the unique position of an insurance agent as an intermediary between the insured and the insurer.

[25] In *Piggott Const. v Sask. Government Insurance Office* (1985), [1986] 2 WWR 530 (CanLII) (Sask CA), the Saskatchewan Court of Appeal described the unique role of an insurance agent who may be required to wear more than one hat as:

> 20 In the course of a single transaction an Insurance Agency will perform a number of acts. Some may be done at the instance of, and as agent for the insured. Others will be performed on behalf of, and as agent for the insurer. The agency's role may be a dual one: it may at once be both agent for the insured, in relation to one or more of its acts, and for the insurer, in relation to others. …

[26] In *Saskatchewan Government Insurance v Sebastian*, 2009 SKCA 44,

324 Sask R 269 [*Sebastian*], the Court of Appeal citing the text Craig Brown & Julio Menezes, *Insurance Law in Canada*, looseleaf (Toronto: Thomson-Carswell, 2002) further describes the role of insurance agents/brokers as,

> [25] In *Insurance Law in Canada*, there is a discussion about the use of intermediaries, *i.e.*, agents and/or brokers, in the insurance industry as customers often deal with an agent or broker when purchasing insurance. Generally, the terms agent and broker may be used interchangeably. In the instant case, whether Sebastian or TWC are described as a broker or agent is of no import as Sebastian and TWC are intermediaries. The Agency contract does not bind TWC to deal exclusively with SGI. In fact, it is evident, both from the contract and the evidence, that TWC and its employees are at liberty to place insurance for their customers with insurers other than SGI.
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> [26] In describing the personal liability of an intermediary, Brown notes that the intermediary may become liable to either the insured or the insurer, depending on the nature of the error. He states at page 3-17:
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> > Should a customer be denied a claim because an agent … has failed to transmit information properly to the insurer, s/he may be able to turn instead to the intermediary for redress. On the other hand, an insurer might find itself bound to pay a claim made by a customer it would not have insured in the first place had it known facts that were not passed on by an intermediary acting with the requisite authority. Here the insurer may seek redress from the intermediary.
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> > In this section we shall examine the legal bases on which insurance intermediaries may be found liable to insurers or customers and the nature of the duty that liability implies. The possible legal bases are warrant of authority, contract, tort or equity.

[27] In *Fine's Flowers Ltd. v General Accident Assurance Co. of Canada* (1977), 17 OR (2d) 529 (WL) (Ont CA) [*Fine's Flowers*], the Court held that an insurance broker was liable to an insured in both contract and negligence. In that case the Court upheld the trial judge's finding that there was an ongoing contractual

agreement binding on the broker which required him to keep the plaintiff covered for all foreseeable, insurable and normal risks associated with its horticultural business.

[28] O'Reilly agues the circumstances of this matter are different and there was no contract between itself and Kushniruk. O'Reilly asserts there is a distinction between an insurance broker and an insurance agent. In this case O'Reilly was an insurance agent who only sold Co-operator insurance. O'Reilly argues that this is distinctly different than where a member of the public comes to an insurance broker asking for full coverage and the insurance broker goes to the market to find the insurance sought. They argue the only contract O'Reilly had was with the Co-operators as its exclusive agent to facilitate contracts of insurance between the Co-operators and its insureds.

[29] O'Reilly further argues there was no meeting of minds between itself and Kushniruk, therefore no contract ever existed, and accordingly no action for breach of contract can ever succeed.

[30] O'Reilly cites the cases of *Adams-Eden Furniture Ltd. v Kansa General Insurance Co.* (1996), [1997] 2 WWR 65 (WL) (Man CA) [*Adams-Eden*], and *Miller v Guardian Insurance Co. of Canada* (1995), [1996] 1 WWR 228 (WL) (Alta QB) [*Miller*], as supporting its position that no contract between Kushniruk as the insured and O'Reilly as the insurance agent existed.

[31] Although the *Adams–Eden* case assists in explaining the difference between an insurance broker and an insurance agent and in analyzing the duty of care in negligence, it does not assist on the issue of whether a contract exists between O'Reilly and Kushniruk.

[32] The *Adams–Eden* case involved a claim where the insurer paid out the claim and sought indemnification from the broker who negotiated the coverage for the

insured on the grounds of negligence, failure to disclose material information and misrepresentation. The issue in *Adams-Eden* was whether the insurance broker owed the insurer a duty of care as well. In that context the Court discussed the distinction between an insurance broker and an insurance agent as follows:

> [19] The distinction between an insurance broker and an insurance agent is explained in Couch on Insurance, 2nd ed. (rev.) (1984), para. 25:93:
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> > An "insurance broker" is one who acts as middleman between the insured and the insurer, and who solicits insurance from the public under no employment from any special company, and who, upon securing an order, places it with a company selected by the insured, or, in the absence of such a selection, with a company selected by himself; whereas an "insurance agent" is one who represents an insurer under an employment by it. Whether a person acts as a broker or an agent is not determined by what he is called but is to be determined from what he does. In other words, his acts determine whether he is an agent or a broker.
> >
> > [Emphasis added]

[33] Notably, at paragraph 21 the Court recognized the authorities are clear that generally the broker, as the professional expert, owes to the insured a duty of care: (1) to arrange the appropriate coverage, and (2) to disclose accurately to the insurer all the information material to the risk which the broker acquires from the insured or which he may acquire independently.

[34] The *Miller* case is more on point where the Court again relied on a duty of care between the insurance agent and the insured rather than a contract. The plaintiff in *Miller* brought an action against his insurer, claiming underinsured motorist coverage, and against the insurance agency and insurance agent for failing to include the appropriate endorsement in his insurance coverage. The claim was for breach of contract, misrepresentation, negligence and rectification.

[35] The Alberta Court of Queen's Bench considered the issue of whether there was an implied contract between the insured and the insurance agency and whether the insurance agency and individual agent were liable in tort (at paras. 7-8). At para. 48 the Court provided four helpful categories of insurance agents and/or brokers as follows:

> [48] In "Actions Against Agents and Brokers" (see *Claims Under Insurance Policies*, Special Lectures of the Law Society of Upper Canada, 1962), R.E. Shibley classifies insurance agents into four groups (pp. 253-54). This is of some assistance in the present case, and I take the liberty of reproducing here the four categories (emphasis added):
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> 1. General or managing agents being persons or corporations directly representing the company in the sense of a breach office of the insurer and who can issue policies, interim receipts and give oral coverage;
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> 2. Recording agents who are independent of the company but have the power to bind the company by the issue of policies, interim receipts and even oral coverage;
>
> 3. Soliciting agents who submit applications to the insurer for acceptance or rejection but who have no power to bind the company; and
>
> 4. Brokers in the strict sense of that term being the agent of the insured alone for the purpose of procuring a policy of insurance.

[36] The Court noted that to accurately characterize the relationship between the insurer and the insurance agency, the context within which the parties do business must be taken into account. Based on the evidence the Court held the agency was a recording agent which, despite being an entity separate and distinguishable from the insurer, had the power to bind the company. The agency was authorized to collect premiums on behalf of the company, receive and transmit applications for insurance to the company and provide the usual and customary services of an insurance agent with respect to all policies placed with the company (para. 53).

[37] The Court concluded the insurance agency was the insurer's agent at all material times. The insurer and insurance agency had a principal/agent relationship in which the agency was explicitly permitted to bind the insurer in accordance with an agreement (at para. 55). On that basis the Court found there was no contract between the insured and the insurance agent (at para. 61).

[38] Although the plaintiff requested "full coverage" in discussions with the individual agent, there was no meeting of the minds to create a contract in which the insurance agent was acting on the plaintiff's behalf. The Court held the insurance agency was not liable for breach of contract, therefore the only remedy available was breach of a duty in tort (at para. 62). The Court concluded that the agent was liable to the plaintiff for negligence and because the agent was acting as agent for the insurer, therefore the insurer was liable for the agent's negligence (at para. 63).

[39] In this matter the insurance contract is between Kushniruk and the Co-operators. O'Reilly also had a contract with the Co-operators to act as their exclusive insurance agent. The more difficult question is whether there was an oral or implied contract between Kushniruk and O'Reilly.

[40] The evidence relating to the relationship between Kushniruk and O'Reilly is that in 2021 Kushniruk spoke with Ross indicating he required the same coverage he had in 2017 which included coverage against the loss of bees and produced larvae and cocoons due to perils including adverse weather conditions. Kushniruk attests he specified he required coverage for all bees put out in the field and all larvae and bees expected to be produced over and above the bees put out. This was the same coverage Kushniruk had obtained from the Co-operators in 2017, and he states this was made clear to Ross. Kushniruk states that Ross confirmed he could buy insurance for the bees put out in the field and the larvae that were produced over the season.

[41] Kushniruk argues that Ross took his instructions, acted as his agent and negotiated a policy from the Co-operators, namely the Farm Guard Insurance Policy Number 4001433128 which was in effect from June 16, 2021 to June 16, 2022. The policy is attached to Kushniruk's affidavit and is the same as the policy purchased in 2017 with one exception – the 2021 version did not have coverage against loss due to ravaging bears.

[42] The insurance policy provided coverage under two endorsements as follows:

a. Bees, includes dormant (wintered) bees, larvae, cocoons, INCLUDING those in boxes, shelters or hives in fields – Leafcutter Bees – Adult Bees in Open Field Endorsement.

b. Bees, includes dormant (wintered) bees, larvae, cocoons INCLUDING those in boxes, shelters or hives in fields – leafcutter bees – Adult Bees in Open Field Endorsement.

The two different coverages had separate premiums, separate deductibles and separate limits. Kushniruk attests he was told the first premium of $504.00 was for the bees put out in the field to pollinate the crop and the second premium of $924.00 was for the bees/larvae that were produced or gained over the season above those put out in the field. Kushniruk attests that the coverage was calculated based on 710 gallons of bees being put out in the field times $65.00 per gallon equalling $46,150.00 of coverage for the first premium. The second premium was calculated based on 1300 gallons of bee larvae being produced over the season times $65.00 per gallon equalling $84,500.00

[43] Mr. James Declan O'Reilly, President of O'Reilly [James], swore an affidavit outlining O'Reilly's role as an insurance agent for the Co-operators and their procedures. He attests that O'Reilly receives information from the proposed policy holder which it then includes in an online application for Co-operators' insurance. The

online application form details the information provided by the policy holder and the requested coverage. O'Reilly then advises the proposed policy holder on the appropriate type and availability of insurance for their needs based on insurance products offered by Co-operators.

[44] O'Reilly relies on the information provided by the proposed policy holder in preparing an application for Co-operators' insurance and does not otherwise independently verify that information. After O'Reilly has completed and submitted the application form, they no longer have access to the application online, nor can they obtain a hardcopy of the application once it has been submitted.

[45] James states that the Co-operators will review the application, determine the premium to be charged, any changes to coverage, and advise O'Reilly of the offer of insurance to be made to the proposed policy holder. O'Reilly in turn will advise the proposed policy holder of the Co-operators' offer of insurance. If the proposed policy holder accepts the Co-operators' offer, O'Reilly will bind the policy through the Co-operators' online system causing coverage to be in place and will facilitate deposit of the initial premium payment with the Co-operators' bank. O'Reilly does not receive premium funds itself. The actual contract between O'Reilly and the Co-operators is not in evidence, and there is no evidence what financial benefit O'Reilly obtains from facilitating insurance contracts for the Co-operators.

[46] The Co-operators' head office then issues a policy of insurance and mails a paper copy of the policy to the policy holder directly. The policy of insurance is also stored electronically in the Co-operators' online system. Once O'Reilly is aware the policy has issued, they advise the policy holder that the insurance policy will be mailed directly to them and that they should review it to advise O'Reilly of any questions or concerns.

[47] Ross is employed as a farm and commercial advisor with O'Reilly. He swore an affidavit which attests to his dealings with Kushniruk. Ross was the advisor at O'Reilly who arranged Kushniruk's insurance with the Co-operators in both 2017 and 2021. Although Ross was aware in December 2017 that Kushniruk had made an insurance claim, he was not involved in any decisions made by the Co-operators with respect to the 2017 claim and was not involved in any discussions between the Co-operators and Kushniruk. Ross attests that Kushniruk contacted him by telephone in or around May of 2021 to request insurance coverage for 710 gallons of adult bees at $65.00 per gallon. Ross states that he prepared the Co-operators' online application for insurance at the requested coverage and submitted it on behalf of Kushniruk. Ross states after a request from Co-operators as to why Kushniruk had not renewed the 2017 policy in the previous year, Kushniruk's application was approved by the Co-operators on May 7, 2021.

[48] Ross attests on May 11, 2021 Kushniruk advised him that he wanted to add coverage for 1,300 gallons of production bees at $65.00 per gallon to his application. Kushniruk told Ross he wanted the same coverage as contained in the 2017 policy excluding three endorsements, namely the ravaging bears endorsement, theft endorsement, and transportation endorsement. I note that Kushniruk denies there was ever a call that he wanted to add coverage in 2021, rather he attests that all the coverage was done at once.

[49] On May 14, 2021 the Co-operators approved the amended application for insurance with the requested coverage and the removed endorsements. On May 20, 2021 Kushniruk advised he wanted to change the amount of his deductible to $5,000. The Co-operators approved the change on May 31, 2021 and provided an estimate of insurance premiums. On June 16, 2021 Kushniruk approved the estimate provided by Co-operators and requested a policy of insurance be bound with Co-operators. On

June 17, 2021 the Co-operators drafted and issued the policy, namely Farm Guard Insurance Policy No. 4001433128 effective from June 16, 2021 to June 16, 2022.

[50] Ross states the 2021 policy would have been mailed to Kushniruk by the Co-operators shortly thereafter. He would have reviewed the declaration page of the policy to confirm the amount of coverage was correct and would have advised Kushniruk to review the policy and relay any questions or concerns. Ross states that during this time the O'Reilly office was closed due to COVID-19, therefore he believes that all exchanges between himself and Kushniruk were by phone or email. Kushniruk did not contact him with any questions or concerns regarding the 2021 policy.

[51] As the Saskatchewan Court of appeal pointed out in the *Sebastian* case, the terms insurance agent and broker are used interchangeably. It is not the name which is determinative of whether there is a contract but the specifics of the business relationships between the agent, the insurer and the insured. At one end of the continuum there are what many refer to as insurance brokers who search the market for a specific type of insurance requested by the insured. In these circumstances, there is likely to be a contract between the broker and the insured. At the other end of the continuum, are managing agents of the insurance company who directly represent the insurance company, can issue policies, receipts and give oral coverage. In these circumstances the only contract is between the insurer and the insured. In the middle are the other two scenarios outlined in the *Miller* case – a soliciting agent who submits applications to the insurer but has no power to bind the company and a recording agent who is independent of the company but has the power to bind the company.

[52] In looking at the business relationship between O'Reilly and the Co-operators, the circumstances of this case lie near the middle of the continuum. Similar to the facts in the *Miller* case, O'Reilly acted as a recording agent but had the power to bind the Co-operators. The evidence shows that O'Reilly acted as the Co-operators'

agent at all times. O'Reilly met with Kushniruk, submitted the application, and had the power to bind the Co-operators. The relationships between O'Reilly, the Co-operators and Kushniruk are similar to the circumstances in the *Miller* case. Similarly, I find that liability is more appropriately grounded in negligence, not contract.

[53] Looking at all the evidence, I find that no contract existed between Kushniruk and O'Reilly for a number of reasons. O'Reilly acted as the exclusive agent for the Co-operators. They were not able to sell any other insurance. They did not have any decision-making authority with respect to the insurance contract, rather they were only acting as the Co-operators' agent. It was the Co-operators who ultimately approved the insurance contract. O'Reilly entered the information provided from Kushniruk into the online form. Once the online form was submitted, they could no longer access it or even print it off. O'Reilly did not have decision-making authority regarding the level of coverage, premiums, or ultimately whether the claim would be paid. O'Reilly was only acting as agent for the Co-operators. The insurance contract was between Kushniruk and the Co-operators. These circumstances are different than if O'Reilly had been retained by Kushniruk to search the market for the insurance requested by Kushniruk. Rather O'Reilly was acting as an agent for Co-operators' insurance.

[54] I also find there was no meeting of the minds between O'Reilly and Kushniruk to support a finding that there was a contract. Kushniruk was of the view that O'Reilly was acting as his agent in finding him the specific insurance he requested, however, O'Reilly was of the view that they were acting as the Co-operators' agent. Despite Kushniruk's belief that O'Reilly was his agent, the evidence shows otherwise, and I have found that O'Reilly was the Co-operators' agent not Kushniruk's.

[55] Finally, I note that while there are some differences in the evidence between Kushniruk and Ross regarding their communication and whether Ross apologized and/or acknowledged he made a mistake after the claim was denied, it is not

necessary to resolve these conflicts in finding that there was no contract between Kushniruk and O'Reilly. This finding can be made regardless of that evidence based on the uncontroverted evidence before the Court on the nature of the relationship.

b. Negligence

[56] In order to prove negligence Kushniruk must demonstrate that O'Reilly owed him a duty of care, that O'Reilly breached the standard of care required, that Kushniruk sustained damage, and that the damage was caused, in fact and in law, by O'Reilly's breach.

[57] O'Reilly does not dispute that they owed Kushniruk a duty of care, however, they argue there is no evidence as to what the standard of care from a reasonable and prudent agent in the circumstances would be. They argue therefore, Kushniruk has failed to prove that O'Reilly breached the standard of care. O'Reilly further argues even if Kushniruk can overcome the standard of care issues, he cannot establish causation of the damages. Kushniruk's claim alleges that but for O'Reilly's alleged breaches he would not have purchased the policy and would have purchased a policy elsewhere with full coverage for the loss he is claiming. O'Reilly, however, argues that Kushniruk has not established that the desired insurance could have been obtained elsewhere.

[58] The Supreme Court of Canada in *Fletcher v Manitoba Public Insurance Co.*, [1990] 3 SCR 191 at para 57 (QL) [*Fletcher*], confirmed the duty of a private insurance agent as follows:

> 57 In my view, it is entirely appropriate to hold private insurance agents and brokers to a stringent duty to provide both information and advice to their customers. They are, after all, licensed professionals who specialize in helping clients with risk assessment and in tailoring insurance policies to fit the particular needs of their customers. Their service is highly personalized,

> concentrating on the specific circumstances of each client. Subtle differences in the forms of coverage available are frequently difficult for the average person to understand. Agents and brokers are trained to understand these differences and to provide individualized insurance advice. It is both reasonable and appropriate to impose upon them a duty not only to convey information but also to provide counsel and advice.

[59] In *Miller* at para 29 Mason J. citing *Fletcher* held that private insurance agents are subject to the exacting duty of providing complete information to their clients about the insurance coverage available to meet the risks associated with an endeavour.

[60] I agree with both parties' assertions that there was a duty owed by O'Reilly to Kushniruk to convey accurate information, counsel and advice. The first step in proving negligence is satisfied.

[61] On the issue of the standard of care, while I agree Kushniruk has not put forward evidence on the standard of care owed by a reasonable insurance agent in the circumstances, I am of the view that at the very least the standard included providing accurate information and if the policy sought was not available to inform Kushniruk of the same. Numerous cases including *Fine's Flowers, Fletcher, Sebastian* and *Miller* (all previously cited) are clear that an insurance agent's duty when asked to obtain a specific type of coverage is to use a reasonable degree of skill and care in doing so and to inform the principal promptly if such coverage is not available.

[62] The evidence was that Kushniruk made it clear to Ross he wanted coverage for both the bees put out in the field and the larvae which would be produced over the season. It is also clear that Kushniruk believed he had that coverage. Ross himself admits that Kushniruk requested the same coverage as contained in the 2017 policy and that he requested the coverage for bees (and presumably larvae) produced above those put in the field. Most importantly O'Reilly does not deny that Kushniruk was never told the insurance he wanted was not available through the Co-operators. It

is uncontroverted that Kushniruk was not informed that the insurance coverage he wanted was not available.

[63] If the insurance Kushniruk wanted was not available through the Co-operators, O'Reilly had a duty to notify Kushniruk of the same. I find that Kushniruk has established that O'Reilly breached the standard of care by failing to inform him that the coverage he wanted was not available. In misrepresenting the coverage and failing to inform him that the coverage he wanted was not available, O'Reilly failed to meet the standard of care of a reasonable and prudent insurance agent in the circumstances.

c. Damages

[64] Kushniruk attests that in 2021 he put 190 huts containing approximately 5 gallons of bees each in the field. He states that he usually has 3 times more bees at the end of the season and in 2022 the production was approximately 3.3 times the bees that were put out. Kushniruk attests that there were heavy wind gusts on July 2 to 5, 2021 and on July 11 and 12, 2021 when it was prime time for leafcutter bees to pollinate and reproduce. When Kushniruk collected the huts in August of 2021, he recovered only 7.3 gallons per hut when he anticipated he would normally recover approximately 15 gallons per hut. Kushniruk attests that his losses therefore are as follows:

Bees:	$46,150.00
Larvae:	$76,950.00
Total:	$123,100.00

[65] Although there is no corroborating evidence attached to his affidavit Kushniruk attests that on the dates of July 2, 2021 to July 5, 2021 and July 11 and 12, 2021 wind gusts of 40 to 55 kilometers an hour were recorded in the area where his bee huts are located. He states the six days of winds weakened the bees. The winds reduced production of the leafcutter bee larvae due to excessive turbulence created in the huts causing the leafcutter bees to drop the leaves they cut and carry to wrap their larvae.

Kushniruk states that there was video and research which validated his claim to the insurer in 2017, however, that evidence was not attached to his affidavit.

[66] Kushniruk's claim for damages must fail in two respects:

i) He has failed to prove on a balance of probabilities that O'Reilly's negligence caused his damages; and

ii) He has failed to prove on a balance of probabilities the quantum of damages.

[67] Firstly, the only evidence on the quantum of damages is Kushniruk's opinions. I agree with O'Reilly that Kushniruk must have expert evidence or at the very least corroborating evidence to establish the value of the leafcutter bees lost. Although he attests to what his production was in 2022, there is no evidence on what his production was in 2020 (the year prior) or another other year for that matter. I agree that the evidence is insufficient to establish the quantum of damages.

[68] O'Reilly also argues that because the coverage Kushniruk was seeking does not exist in Saskatchewan, they cannot prove any damages above the premiums paid. Kushniruk's claim is for the lost insurance proceeds he would have obtained had he had the insurance coverage he believed. The claim states that Kushniruk would not have purchased the policy but instead would have purchased a policy with the full coverage or he would have made other appropriate provisions in the circumstances. However, as O'Reilly points out Kushniruk has not provided any evidence that the desired insurance could have been obtained elsewhere on the market.

[69] The cases of *Markal Investments Ltd. v Morley Shafron Agencies Ltd.* (1990), 67 DLR (4th) 422 (BCCA), and *Blais v Royal Bank*, [1997] OJ No 2288 (QL) (Ont Ct J) [*Blais*] are instructive on this issue. Both cases held there was an evidentiary

burden on the plaintiffs to establish that had they known they were not insured they could have on a balance of probabilities obtained the insurance elsewhere. The Court found in *Blais* the plaintiffs failed to meet that evidentiary burden and failed to establish on a balance of probabilities that the plaintiffs were an insurable risk.

[70] In *National Crane Services Inc. v AON Reed Stenhouse*, 2007 SKQB 31, 291 Sask R 281 [*Stenhouse*], the plaintiff brought an action for recovery of funds paid in settlement of a claim in a subrogation action arising as a result of AON's failure to place adequate and appropriate insurance for the plaintiff. Hunter J. (as she then was) found AON and the agent were negligent but accepted evidence from the agent that through discussion with others in the insurance industry, the agent learned no insurer offered coverage for the desired loss of profit or business interruption insurance of a crane owner.

[71] Similarly, here Kushniruk has not put forward any evidence to establish that he could have obtained the insurance he sought elsewhere. O'Reilly, however, has provided evidence that two other insurers – SGI Canada and SMI do not provide the coverage Kushniruk sought. Both the SGI Agro Pak and the SMI Farm Policy for bees contain the same loss adjustment clause as the Co-operators' loss adjustment clause, namely, there is no loss where the number of adult bees or cocoons recovered during the season is equal to or greater than the number of adult bees and/or cocoons released at the beginning of the season.

[72] In *Blais* the Court ordered nominal damages in the sum of $500 despite finding that the plaintiffs had failed to establish the desired insurance could be obtained elsewhere on the market. In *Stenhouse* the Court ordered damages for the amounts expended by the plaintiff due to the defendant's negligence, placing them in the position they would have been absent the negligence.

[73] Similarly, in this matter I am prepared to order that Kushniruk be restored to the position that he would have occupied before the negligence by returning the premiums he paid. Kushniruk paid $963.00 in premiums for the coverage he thought he had relating to the larvae and bees he would have produced over the season. It is the second premium of $963.00 which Kushniruk would not have purchased from the Co-operators. Accordingly, I order damages in the amount of $963.00.

IV. Costs

[74] Although success in this summary judgment application is somewhat divided, because I have found O'Reilly liable in negligence for breaching their duty as the insurance agent, I am prepared to order costs payable by O'Reilly to Kushniruk under Column 2 of the King's Bench Tariff of Costs in the amount of $4,400.

J.
R.C. WEMPE