

CITATION: Optech Inc. v. Sharma, 2011 ONSC 680
COURT FILE NO.: CV-08-362642
DATE: 20110131

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Optech Incorporated, Plaintiff

AND:

Rajive Sharma, Seema Sharma, Adele Fogle, Aviation International (Canada) inc., 1510032 Ontario Inc., and 2025915 Ontario Inc., Defendants

BEFORE: D. M. Brown J.

COUNSEL: L. Caylor and A. Pelletier, for the Plaintiff

Y.D. Payne, for the Defendants, Rajive Sharma, Seema Sharma and 2025915 Ontario Inc.

A.P. Gribilas, for the Defendants, Adele Fogle, Aviation International (Canada) Inc. and 1510032 Ontario Inc.

HEARD: October 12 and 13, 2010

REASONS FOR DECISION

I. Overview

[1] Optech Incorporated ("Optech") manufactures laser-based survey systems. Until 2008 Optech utilized the aircraft of Aviation International (Canada) Inc. ("Aviation") for much of the testing of its survey systems. Adele Fogle was the President and owner of Aviation.

[2] In this action Optech alleges that its former employee, Rajive Sharma, and Ms. Fogle hatched up a kickback scheme which used the defendant, 1510032 Ontario Ltd. ("151 Ontario"), to hold or receive monies billed to Optech for aircraft services provided by Aviation over the course of about 6½ years. Optech contends that Mr. Sharma reaped secret commissions totaling \$800,737.49 under the scheme, some of which went to his personal corporation, 2025915 Ontario Inc. ("202 Ontario"), and some of which were paid to his wife, Seema Sharma.

[3] Optech sues to recover what it alleges were secret commissions because (i) its supplier, Fogle/Aviation, made payments to Optech's agent, Mr. Sharma, (ii) knowing that Mr. Sharma was Optech's agent; and (iii) the payments were kept secret from Optech.

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[4] So clear does Optech think its case to be that it has moved for summary judgment in several different respects:

- (i) As against the defendants, Fogle, Aviation, 151 Ontario, Mr. Sharma, and 202 Ontario, judgment for: (a) the sum of \$800,737.49 in respect of secret commissions paid by Fogle and Aviation through 151 Ontario to Mr. Sharma and to Mr. Sharma through 202 Ontario; (b) the sum of \$55,675.85 arising out of the detection, investigation and quantification of the losses and consequential losses suffered by the plaintiff; (c) punitive and exemplary damages in the amount of \$100,000; and (d) a declaration that they are jointly and severally liable to Optech for all amounts owing;
- (ii) As against Mr. Sharma and 202 Ontario, judgment for: (a) the sum of \$752,137.49 for breach of constructive trust (being the \$752,137.49 of the \$800,737.49 in secret commissions received by Mr. Sharma and 202 Ontario); (b) a declaration that they are jointly and severally liable to Optech for all amounts owing; and (c) an order entitling the plaintiff to trace the monies that Mr. Sharma and 202 Ontario fraudulently obtained from the plaintiff into and through any financial institution accounts or deposit facilities in the name of Mr. Sharma and 202 Ontario and into or through any assets purchased by Mr. Sharma and 202 Ontario with the plaintiff's monies; and,
- (iii) As against Mrs. Sharma, a judgment requiring her to disgorge the sum of \$48,600.00 (being the \$48,600.00 of the \$800,737.49 in secret commissions received by her).

Further, Optech seeks an order against Mr. Sharma dismissing his counterclaim for wrongful dismissal and an order against Aviation dismissing its counterclaim for breach of contract.

[5] In response, Mr. Sharma, Mrs. Sharma, and 202 Ontario seek the dismissal of Optech's motion for summary judgment.

[6] Fogle, Aviation and 151 Ontario also seek the dismissal of Optech's motion for summary judgment, but Aviation and 151 Ontario request summary judgment in the amount of \$64,270.02 in their favour (or either of them) as against the Optech with respect to unpaid invoices.

[7] For the reasons set out below, I refuse the motions for summary judgment and call on the parties to make submissions for directions regarding the trial of this proceeding.

II. Structure of these Reasons

[8] I will consider first Optech's claims against the defendants by examining the allegations pleaded, then the applicable law, following which I will consider the evidence to ascertain whether Optech has demonstrated that no genuine issue requiring trial exists in respect of its claims. I will then subject the counter-claim of Aviation to a similar analysis.

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III. Optech's Claims

A. The pleaded claim

[9] Optech pleads that prior to September 10, 2008, it employed Mr. Sharma as its Team Leader, Terrestrial Flight Services, in which capacity Mr. Sharma from time to time would authorize the payment of invoices to various suppliers, including Aviation. Ms. Fogle owned and operated Aviation which Optech hired on a regular basis to provide the flying platforms on which to test the laser-based survey systems it manufactured. Optech alleges that Aviation acted as one of its key suppliers from 1999 on.

[10] In early 2002 Mr. Sharma and Ms. Fogle incorporated 151 Ontario. Therein lay the genesis of what Optech alleges was the kickback scheme. According to Optech, 151 Ontario registered the business name of Aviation International (Canada) and, beginning in late 2004, 151 Ontario began to deposit into its own account cheques paid by Optech to Aviation for flight services provided. Optech alleges that in early 2008 Aviation directed it to pay 151 Ontario directly for services Aviation rendered. Optech contends that it had no idea Mr. Sharma was involved with 151 Ontario.

[11] Optech alleges that starting in 2003 151 Ontario began to make payments to Mr. Sharma's personal company, 202 Ontario, and later to his wife, Mrs. Sharma, in circumstances about which Optech pleads it had no knowledge.

[12] According to the Statement of Claim, in July, 2008, a whistleblower put Optech onto the scheme which resulted in Optech firing Mr. Sharma in September, 2008 and at the same time terminating its dealings with Aviation.

[13] Optech characterized the amounts received by Mr. Sharma and his wife from 151 Ontario as kickbacks and an overpayment by Optech for the services of Aviation.

[14] Optech claims that Mr. Sharma breached the contractual and fiduciary duties he owed it by accepting the kickbacks, and it seeks judgment against him for their return. Optech also pleads that Fogle, Aviation and 151 Ontario knew Mr. Sharma worked for Optech and knowingly assisted him in defrauding Optech through the secret commission scheme. In those circumstances Optech contends that Fogle, Aviation and 151 Ontario are jointly and severally liable with Mr. Sharma for the amounts of the secret commissions.

B. Mr. Sharma's defence

[15] Mr. Sharma denies that any monies he received from 151 Ontario constituted kickbacks. He contends that his position at Optech was not one of a fiduciary, did not involve the authorization of payments to suppliers, and he did not perform duties that would have led Optech to rely on him for any pricing decisions regarding Aviation.

[16] Mr. Sharma states that all orders Optech placed with Aviation were initiated and approved by his senior management and that Optech received services from Aviation at prices at or better than prevailing market rates. Consequently, Optech paid competitive, reasonable prices for the services it received from Aviation.

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[17] As to 151 Ontario, Mr. Sharma pleads that it was “incorporated for purposes other than servicing the Optech contract”. Although his Statement of Defence was somewhat vague about what those purposes were, it suggested that one purpose was to secure international students for flight training services. Mr. Sharma stated that his wife was employed by 151 Ontario in a clerical and administrative capacity, and that the payments from 151 Ontario to 202 Ontario were compensation for services he and his wife provided to 151 Ontario. Mr. Sharma pleaded that he had no duty to disclose to Optech the existence of 151 or 202 Ontario.

[18] Mr. Sharma counterclaims for damages for wrongful dismissal, contending that the reason Optech fired him was because of information he possessed about Optech’s poor safety record and practices.

C. The defence of the Fogle Defendants

[19] In their defence, Ms. Fogle, Aviation and 151 Ontario (collectively the “Fogle Defendants”), vigorously rejected Optech’s claims that they had participated in a kickback scheme with Mr. Sharma. The Fogle Defendants contended that the prices charged by Aviation to Optech were negotiated without any involvement of Mr. Sharma and were set at or below fair market value for comparable services. Notwithstanding Optech’s knowledge of the flight services market because of its use of other aircraft suppliers, the Fogle Defendants stated that Optech never made any complaint about the prices charged by Aviation and that an Optech manager, not Mr. Sharma, approved all payments to Aviation.

[20] The Fogle Defendants pleaded that 151 Ontario was set up after Mr. Sharma had approached Ms. Fogle suggesting that she expand Aviation’s flight school by bringing in more students, especially from India where Mr. Sharma had contacts. The Fogle Defendants stressed that 151 Ontario was incorporated for business purposes unrelated to Optech and had nothing to do with the services agreement between Aviation and Optech. They acknowledged that in April, 2008, Aviation informed Optech that all future invoices for its services would be rendered by 151 Ontario, but pleaded that change was done “for accounting purposes only”.

[21] Aviation has counterclaimed against Optech for the payment of \$64,000.00 in unpaid 2008 invoices, as well as for substantial damages for the wrongful termination of its services agreement with Optech.

D. Key issues emerging from the pleadings

[22] As can be seen from this survey of the pleadings in this action, Optech’s claim will require an inquiry into several factual issues:

- (i) What role did Mr. Sharma play at Optech – did he have any control or influence over the selection of aircraft suppliers and, more specifically, the prices Optech paid for the services purchased from Aviation?
- (ii) Between 2002 and 2008 were the prices paid by Optech to Aviation in line with, or in excess of, fair market prices for comparable services?

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- (iii) What services did 151 Ontario perform and what was the source of the revenue it earned?
- (iv) Did 151 Ontario receive monies paid by Optech to Aviation for the services provided to Optech and, if it did, for what reason?
- (v) Did Mr. Sharma perform any services of value to 151 Ontario that were unrelated to the business between Optech and Aviation?
- (vi) Did Mrs. Sharma perform any services of value to 151 Ontario that were unrelated to the business between Optech and Aviation?

I will return to these areas of factual inquiry later in these Reasons, but first let me consider the law applicable to the causes of action pleaded by Optech against the defendants.

IV. Applicable law on secret commissions

[23] The law regarding secret commissions or bribes is well-established. The Court of Appeal, drawing on the English King's Bench decision in *Industries & General Mortgage Co., Ltd. v. Lewis*,¹ set out those principles in two decisions: *Oshawa Group Ltd. v. Great American Insurance Co.*² and *Ruiter Engineering & Construction Ltd. v. 430216 Ontario Ltd.*³ Perell J., in *Remedies for the Victims of a Bribe*,⁴ an article written before his appointment to this court, provided a nice summary of the relevant law. From those sources I draw the following principles:

- (i) A bribe, or secret commission, occurs when (a) the person making the payment makes it to the agent of the other person with whom he is dealing; (b) he makes it to that person knowing that that person is acting as the agent of the other person with whom he is dealing; and (c) he fails to disclose to the other person with whom he is dealing that he has made that payment to the person whom he knows to be the other person's agent;
- (ii) Once the bribe has been established the donor's motive is irrelevant and there arises an irrebuttable presumption that the agent was influenced by the bribe;
- (iii) Where the agent is a buyer of goods for his principal, the court will assume, as against the briber, that the true price of the goods as between him and the purchaser must be taken to be less than the price paid to, or charged by, the vendor, by the amount or value of the bribe; and,

¹ [194] 2 All E.R. 574.

² (1982), 36 O.R. (2d) 424 (C.A.).

³ (1989), 67 O.R. (2d) 587 (C.A.).

⁴ (1999), 22 Advocates' Quarterly 198.

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- (iv) The loss suffered by the victim of the secret commission usually is measured by the value of the secret commission fraudulently and secretly obtained by the agent.⁵

[24] The policy underpinning these principles is a simple one: one contracting party should not be allowed to put the agent of the other in a position which gives the agent an interest against his duty, otherwise the principal would be deprived of the services of its agent free from the bias of an influence conflicting with his duty, for which he had contracted and to which he was entitled.⁶ In his article Perell J. wrote:

The rationale for the law's focusing on secrecy is that if a person with a duty of loyalty is *entrusted with authority or with the property of the beneficiary* then the person with the duty of loyalty ought not to use or be tempted to use his position to obtain a benefit without the fully informed consent of the beneficiary whose interest is to be served. To keep the benefit, the onus is on the person with the duty of loyalty to prove that there was no secrecy and that his gain was permitted after full and fair disclosure of all matters likely to influence the conduct of the employer, principal, partner or beneficiary.⁷

V. The practical scope of the new Rule 20

A. State of the jurisprudence

[25] Last year significant changes were made to Rule 20, the summary judgment rule. The history of these changes was described by Perell J. in *Healey v. Lakeridge Health Corporation*,⁸ and many judges of this court have offered their views about the meaning and effect of those changes. I have expressed my views in several decisions, including last May's decision in *Lawless v. Anderson*.⁹

[26] Judges of this court have yet to receive guidance from the Court of Appeal on the practical scope of the new Rule 20. The comments made by Perell J. in the *Lakeridge Health* case have been widely quoted by others of this Court, but in its recent decision upholding his decision in that case the Court of Appeal declined to comment on the import of the changes to Rule 20.¹⁰

[27] In a more recent decision granting an extension in the time to perfect an appeal from an order granting partial summary judgment, Weiler J.A. reviewed, without deciding, some of the differences which have emerged in the jurisprudence of this Court, chiefly turning on the issue of whether, or to what extent, a judge on a summary judgment motion can make findings of fact for

⁵ *Oshawa Group, supra.*, paras. 28 to 30; *Ruiter Engineering, supra.*, para. 16 to 20.

⁶ *Ruiter Engineering*, para. 18.

⁷ Perell, *supra.*, p. 201 (emphasis added).

⁸ 2010 ONSC 725.

⁹ 2010 ONSC 2723 (under appeal).

¹⁰ *Healey v. Lakeridge Health Corporation*, 2011 ONCA 55.

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the purpose of deciding the action on the basis of the evidence presented on the motion for summary judgment.¹¹

[28] Pending guidance from the Court of Appeal on this issue, let me offer a few observations on the practical scope of the new Rule 20 drawing on my experience since the *Lawless* case.

B. “Summary” trial or “regular” trial?

[29] In a certain sense it is true that the language of Rule 20 does not signal the substitution of “summary trials” for “regular trials”. After all, the task of the summary judgment motions judge remains to determine whether a “regular trial” is necessary – i.e. is the court satisfied that there is no genuine issue requiring a trial with respect to a claim or defence: Rule 20.04(2)(a). How, one might ask, can a motion for summary judgment be tantamount to a trial if the whole purpose of the rule is to ascertain whether a trial is required?

[30] A legitimate question, flowing as it does from the amended language of Rule 20, but perhaps one that is put a bit too abstractly. The reason this question may be too abstract lies in the effect of the enhanced powers granted to summary judgment motions judges under Rule 20.04(2.1) – i.e. the powers to weigh the evidence, evaluate the credibility of a deponent and draw any reasonable inference from the evidence. These are all “fact finding” powers typically exercised by a trial judge, as recognized by Rule 20.04(2.1) which cautions that those powers should not be exercised if “it is in the interest of justice *for such powers to be exercised only at a trial*”.

C. What is a “regular” trial?

[31] Why would one defer the exercise of those fact-finding powers to a regular trial? To answer that question, one must ask another – what is a “regular” trial? A “regular” trial presents the parties with an opportunity to adduce evidence in support of their cases through *viva voce* evidence and documentary, or real, evidence, and affords opposing parties the opportunity to test the other’s evidence by cross-examination in the presence of the trier of fact. The evidence adduced is framed by the book-ends of an opening statement, which provides a roadmap linking the anticipated evidence to the issues in dispute, and a closing statement in which parties make submissions on the findings of fact they wish the judge or jury to make, as well as the results which they contend should flow from the application of the law to those facts.

D. How does a “regular” trial differ from a motion for summary judgment?

[32] What opportunity does a regular trial afford a party not found on a motion for summary judgment? Well, it is not the lack of opportunity to adduce evidence – the requirement of putting

¹¹ *Mauldin v. Cassels Brock & Blackwell LLP*, 2011 ONCA 67, commenting on the more restrictive interpretation of Rule 20 expressed by Karakatsanis J. (as she then was) in *Cuthbert v. TD Canada Trust*, 2010 ONSC 830 and on the more expansive interpretation taken by Pepall J. in *Canadian Premier Life Insurance Co. v. Sears Canada Inc.*, 2010 ONSC 3834.

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one's best foot forward or "leading trump, or risk losing all", still holds true under the new Rule 20. A court expects that on a motion for summary judgment it will have before it, in written and transcribed form, all the relevant evidence that could be placed before the trial judge. So, on a motion for summary judgment a party does not lose the opportunity to place evidence before the court; on the contrary, the court requires it to do so.

[33] Nor does the party lose the opportunity to make legal argument on the material issues in the action – indeed, factums are mandatory on a Rule 20 motion: Rule 20.03.

[34] With the enhanced powers given to a summary judgment motions judge under Rule 20.04(2.1) the parties do not lose the opportunity to request a judge to make findings of fact. Those enhanced powers mark a pronounced change from what a judge could do on an old Rule 20 summary judgment motion, as Weiler J.A. noted in the *Maudlin* case:

The former rule was, however, interpreted by the Court of Appeal as not allowing a judge to assess credibility, weigh evidence, or draw factual inferences in determining whether there was a genuine issue for trial.¹²

Those jurisprudential restrictions have been removed by the clear language of Rule 20.04(2.1).

[35] A motion for summary judgment also does not deprive a party of the opportunity to test the evidence proffered by the other. Affiants can be cross-examined, as can witnesses examined on a pending motion. Transcripts are generated and placed before the motions judge.

[36] But it is at this point that some of the differences between a "regular trial" and a summary judgment motion begin to emerge. An out-of-court cross-examination of a witness is not identical to an in-court one, for two reasons. First, it is an unfortunate reality of contemporary civil litigation that some counsel engage in conduct in an examiner's office – undue interjections, unreasonable refusals and improper interference with questioning – that they would not dare engage in at trial for fear of sanction by the trial judge. This improper conduct can limit the fullness of an opposite party's right to challenge and test evidence through out-of-court cross-examination.

[37] Second, the examination takes place in the absence of the motions judge who therefore lacks the opportunity to observe the witness and consider all those subtle factors which go into assessing the credibility of a witness.

E. The option of a "mini-trial"

[38] Well, one might respond, Rule 20.04(2.2) has taken care of that problem by authorizing the summary motions judge to "order that oral evidence be presented by one or more parties, with or without time limits on its presentation." That is true, but mini-trials are not a mandatory element of a summary judgment motion. Mini-trials result from the exercise of judicial

¹² *Maudlin*, supra., para. 13.

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discretion, not the election of the parties. So whether a *viva voce* challenge to opposing evidence takes place is not a function of a party's forensic right, but the decision of the motions judge that seeing and hearing live witnesses would assist in performing the fact-finding exercise now available under Rule 20.04(2.1).

[39] This limitation has been mitigated to some extent in the Toronto Region where parties are required as part of the scheduling process for summary judgment motions to indicate whether they anticipate it might be necessary for the court to hear *viva voce* evidence on the return of the motion. If they do, the court ensures those arrangements are in place at the time of the hearing.

[40] What purpose does the mini-trial serve? According to the language of Rule 20.04(2.1), to determine whether there exists a genuine issue requiring a "regular trial". Frankly, by the time a judge decides to go down the route of a mini-trial, it becomes difficult to see how, in any practical sense, the mini-trial operates other than as a surrogate for the "regular trial". Why go to the time, trouble and expense of hearing *viva voce* evidence unless there exists a realistic prospect that by the end of the mini-trial a final decision on the merits of a claim or defence can be made? If the mini-trial simply operates as a screening device, a kind of "look-see" before the real "regular" trial, without finally disposing of an action, then Rule 20.04(2.2) would have the perverse effect of saddling litigants with an extra layer of costs in an already expensive contemporary litigation process. Hardly what was intended by the recommendations of the Osborne Report. The mini-trial must have the potential to serve as the "regular trial" if its expense is to be justified.

[41] Yet, whereas in a "regular trial" both parties will receive a final adjudication of their claim or defence, a mini-trial does not necessarily possess the same adjudicative symmetry. Suppose a defendant moves for summary judgment to dismiss the plaintiff's claim, but the plaintiff does not bring a cross-motion for summary judgment granting judgment on its claim against the defendant. If the court orders a mini-trial, only two results are possible: either the defendant obtains summary judgment dismissing the action – a final result – or the defendant's motion is dismissed and a "regular trial" ensues (perhaps shaped a bit pursuant to the powers in Rule 20.05). Under this scenario, if the plaintiff wins the summary judgment motion, it does not obtain final judgment; it only lives to fight another day. This potential lack of symmetry in the finality of the outcome for the parties represents another difference between a summary judgment motion and a "regular" trial.

F. A suggested question for motions judges to ask: How much more would I need to decide this case?

[42] How, then, does a court approach a summary judgment motion? Stepping back, as a practical matter it strikes me that on any motion for summary judgment a motions judge must pose, at certain points of his or her decision-making process, the following question – how much more would I need to decide this case? Consider the judge hearing a motion for summary judgment to dismiss a claim. When looking at the filed written evidence the judge typically considers whether the evidence enables the making of findings of fact which, when viewed in the light of the applicable law, would allow the judge to conclude that the claim is so doubtful that the case does not deserve consideration by a trier of fact at a future trial or has no chance of

success.¹³ If no material facts are in dispute and the law is reasonably clear, then summary judgment could well be granted assuming the facts fall in favour of the moving party.

[43] If conflicts of material fact are present in the record, the enhanced powers of Rule 20.04(2.1) now authorize the judge to engage in a standard fact-finding exercise but, in my view, at this stage a judge needs to ask, yet again, “how much more do I need to determine that conflicting evidence and thereby decide this case?” The nature of the factual dispute may be such that the written evidence affords the judge a sufficient basis to engage his or her fact-finding powers without the need for *viva voce* evidence. For example, the documentary evidence may be overwhelmingly in favour of one side, rendering any explanation advanced by the other completely implausible. If the judge concludes that the nature of the factual dispute, assessed in light of the quality of the written evidentiary record, would enable the judge to make findings of fact with the same degree of certainty, and subject to the same requirements of the law of evidence, as could be done at a “regular” trial, then, in my view, Rule 20.04(2.1) authorizes the judge to do so. The nature of the issues and the quality of the record combine so that it is not “in the interest of justice for such [fact-finding] powers to be exercised only at a trial”.

[44] If, however, the judge determines that he or she “needs more” to resolve the factual dispute, in particular the ability to see and hear witnesses give evidence on key points and have their evidence challenged, the mini-trial now stands as an option.

G. The limits of a “mini-trial”

[45] It is important to stress that a mini-trial is only an option. Several factors influence its attractiveness as one:

- (i) First, for a mini-trial to make any sense in terms of the proportionality of the additional litigation costs associated with it, I suspect that judges will want to be confident that the factual disputes can be adjudicated from hearing *viva voce* evidence from a small number of key witnesses. After all, Rule 20.04(2.2) talks about a “mini” trial, not a lengthy trial. If the resolution of the material factual disputes will require *viva voce* evidence from a significant number of witnesses, it would make more sense to hold a “regular” trial, taking advantage of the work product from the summary judgment motion, coupled with other trial-shaping directions under Rule 20.05(2);
- (ii) Second, a mini-trial only makes practical sense if a likelihood exists that the adjudication of the factual dispute on the mini-trial will result in the granting of the motion for summary judgment. If it does not, but only determines that a “regular trial” is required, then the mini-trial exercise would be a costly one without any meaningful forensic benefit – having a “mini-trial” only to figure out one needs a “regular trial” would be a waste of money;

¹³ *Aronowicz v. Emtwo Properties*, 2010 ONCA 96, paras. 17 and 18.

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- (iii) In order to minimize costs to the litigants and to make the best use of stretched judicial resources, courts should strive to schedule mini-trials for the initial hearing of the summary judgment motion, and not schedule them as a "Phase Two" of the motion. For a judge first to hear a summary judgment motion on a written record, only then to decide that *viva voce* evidence should be called, likely will result in delay and additional expense. When scheduling the hearing of a summary judgment motion consideration should be given to whether *viva voce* evidence will be required at the hearing of the motion. The summary judgment screening process currently employed in the Toronto Region Motions Scheduling Court seeks to determine at the time of scheduling a summary judgment motion whether *viva voce* evidence will be called;
- (iv) Finally, the complexity and sheer volume of the evidence to be adduced on a summary judgment motion must factor into the determination about whether to hold a mini-trial or, indeed, whether a summary judgment motion is appropriate given the nature of the case. That is not to say that summary judgment cannot be used to deal with large-record cases: at the end of the day, nine boxes of no cogent evidence in support of a claim or defence still add up to nothing. But one must be realistic about bringing summary judgment motions and directing mini-trials. If Rule 20 is to fulfill its purpose of offering a "summary" disposition of a case, the court must be able to render its decision on the motion in a relatively short period of time. To start moving towards a regime in which a typical summary judgment motion takes two days or more to argue essentially means one is reducing to paper the evidence that likely would take a week or more to lead at trial. Inevitably such a practice will result in longer delays in the court releasing judgments in what is supposed to be a summary proceeding.

[46] All of which is to say that the new Rule 20 is still in its infancy, and both the Bench and the Bar have to feel their way towards identifying the sorts of cases which make good candidates for summary judgment and for mini-trials.

H. A suggested practical approach

[47] In sum, I offer for consideration in the judicial debate over the practical scope of the new Rule 20 an approach driven by the motions judge asking, at certain stages of the inquiry, "how much more would I need to decide this case?" I have set out above some examples of how to apply such an approach. I acknowledge that by posing such a question a motions judge might appear to be engaging in the thought-process used by a trial judge. But that, in my view, is precisely what is entailed by the inquiry into ascertaining whether a "genuine issue requiring a trial" exists. How else can a judge figure out whether a trial is required unless the judge views the motion record from the perspective of a trial judge? And, when looking at the quality of the record from that perspective, if the judge concludes that the nature of the factual dispute, assessed in light of the quality of the written evidentiary record, would enable the judge to make findings of fact with the same degree of certainty, and subject to the same requirements of the law of evidence, as could be done at a "regular trial", then it strikes me that the case would be ripe for determination and final disposition on the basis of a summary judgment motion.

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[48] That is the approach I intend to take to my analysis of the evidentiary record on these motions.

VI. The record

[49] The record filed before me consists of the following materials filed by the parties:

- (i) Optech's 4-volume motion record containing affidavits sworn by Elizabeth Carswell and Glenn Farrington;
- (ii) Optech's Reply motion record containing two further affidavits from those affiants;
- (iii) The Sharma Defendants' responding motion record containing affidavits sworn by Rajiv Sharma and Seema Sharma;
- (iv) The Fogle Defendants' responding motion record containing an affidavit sworn by Adele Fogle;
- (v) The affidavit and expert report of Mr. Ron Forster filed on behalf of the Fogle Defendants;
- (vi) A brief of transcripts from the cross-examinations of the affiants and briefs of undertaking responses; and,
- (vii) Optech's brief of selected exhibits marked on those cross-examinations.

VII. Optech's secret commissions claim: an examination of the evidence

[50] I propose now to examine the evidence in the record before me grouped under each element of the claim Optech asserts for recovery of secret commissions.

A. Was Mr. Sharma entrusted with the authority or with the property of Optech in respect of its dealings with Aviation?

[51] No dispute exists on the record before me that Aviation contracted with Optech to provide it with aircraft for Optech to use to test its survey equipment. A dispute does exist on the record about what role Mr. Sharma played in Optech's decision to contract with Aviation, eventually as its exclusive supplier of airtime – was Mr. Sharma entrusted with authority to make or strongly influence the purchasing decisions made by Optech in respect to Aviation, or was his role in that relationship administrative in nature without any impact on how much airtime Optech purchased from Aviation? The factual dispute can be seen clearly from the statements of facts counsel have set out in their very helpful facts.

A.1 Findings of fact sought by Optech

[52] In its Factum Optech submitted that the record supported making the following findings of fact:

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[9] Aviation Intl's business relationship with Optech began in 1999 when Optech hired it for aerial survey flights on a limited basis. Prior to 1999, Optech primarily hired an aircraft supplier called Marc Inc., which operated as SkyDawg, to fly its ALTM systems for testing and other purposes.

[10] In 2000, Fogle formally offered Aviation Intl's services on a more frequent basis to Optech by sending a letter to Sharma as Optech's representative. According to Fogle, Sharma was the appropriate Optech contact to send Aviation Intl's first written offer to.

[11] Until July 2002, Optech purchased airtime from both SkyDawg and Aviation Intl. SkyDawg and Aviation Intl each had only one plane and, consequently, neither was able to fly all of the missions that Optech required.

[12] In November 2001, Optech reorganized its Terrestrial Survey Division. This division was responsible for testing ALTM systems and purchasing airtime from SkyDawg and Aviation Intl. Sharma worked in this division and, by this time, Optech had promoted him to ALTM Flight Operations Team Leader.

[13] As part of the November 2001 reorganization, Richard Neville ("Neville") became Operations Manager of the Terrestrial Survey Division (*i.e.*, Sharma's manager). Neville had no aircraft experience. Although Neville understood that a review of the aircraft parameters was necessary for the proper testing of Optech's ALTM systems, he did not have the knowledge or expertise to determine the correct aircraft to fly the ALTM systems. Sharma had the knowledge and expertise to make the determinations that Neville could not. Consequently, it was Sharma's responsibility to make the correct determinations regarding aircraft requirements and to select which aircraft provider to use.

[14] Following the reorganization of Optech's Terrestrial Survey Division, Aviation Intl increased its rates to Optech twice in two months. Its hourly rate rose from \$615/hour to \$650/hour on December 1, 2001 and then to \$700/hour on January 1, 2002. The extra \$85/hour represents an increase of approximately 13.8% in one month's time. Fogle addressed her letter advising Optech of the December 2001 price increase to Sharma because, as she admits, he was the appropriate contact to send Aviation Intl's first written offer to.

[53] In its Factum Optech noted that this increase in rates by Aviation occurred just shortly before Mr. Sharma and Fogle incorporated 151 Ontario. It continued:

[16] Shortly after its incorporation, 151 Ontario purchased Aviation Intl's aircraft (a Navajo) and immediately started leasing it back to Aviation Intl. The Navajo was the aircraft that Aviation Intl used to fly missions for Optech. Fogle and Sharma did not tell Optech that Sharma now had an ownership stake in the aircraft that was being used to fly missions for Optech, and Optech did not know.

[17] On January 29, 2002, 151 Ontario purchased a second aircraft, a Cessna Skymaster. It immediately started leasing the Skymaster to Aviation Intl so that it too could sell airtime to Optech. Aviation Intl offered to make the Skymaster available to

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Optech if Optech paid for the modifications necessary for it to be used to test Optech's equipment.

[18] Between March and May 2002, Optech paid \$10,900 to modify the Skymaster so that it could be used to carry its ALTM systems. Aviation Intl sent the invoices billing Optech for these costs to Sharma. Neither he nor Fogle told Optech that it was paying to modify an aircraft partially owned by its employee.

[19] On April 8, 2002, Sharma and Fogle opened bank account number 01762-1011634 for 151 Ontario with the Royal Bank of Canada. Sharma and Fogle had joint signing authority.

[20] In July 2002, Sharma caused Optech to stop purchasing airtime from SkyDawg. Optech never again purchased airtime from SkyDawg.

[21] In August 2002, Sharma caused Optech to start purchasing airtime from Aviation Intl instead of SkyDawg, namely in Aviation Intl's Skymaster. The switch from SkyDawg occurred even though SkyDawg's average hourly charge to Optech from April 2002 to July 2002 was \$541.37 and Aviation Intl's average hourly charge during the same period was \$1,064.04.

[22] At this time, Sharma's performance review indicate that Optech relied on him to purchase the services of its aircraft suppliers. According to his 2003 review, which he himself signed, Sharma's responsibilities included "[e]nsur[ing] that Optech is receiving [its] contractual agreement; both man power and dollar value from our aircraft supplier." Aviation Intl was Optech's primary supplier at this time. One of his goals for the following year was to, "[n]egotiate an improved contract with current supplier [Aviation Intl] and backup aviation plan with another supplier."

[23] Following August 2002, whenever it needed to fly its ALTM systems, Sharma caused Optech to purchase airtime from Aviation Intl almost exclusively. Until his suspension on September 9, 2008, Sharma consistently represented to his superiors at Optech that Aviation Intl's prices were the best available. He did this even though Aviation Intl's prices were substantially higher than SkyDawg's.

[24] Sharma would, from time to time, prepare price comparison charts, which he admits he knew his superiors would rely upon. The charts compared Aviation Intl's prices to its competitors. However, he never told his superiors that Aviation Intl charged for flight time (*i.e.*, from when the pilot turns the engine on to when he or she turns it off) whereas other suppliers charged for airtime (*i.e.*, when the aircraft is in the air). Flight time can be 1.5 times greater than airtime. Sharma has admitted that he knew the distinction, although he failed to draw it to the attention of his superiors. He says that he thought Aviation Intl's prices were still cheaper. They were not.

[25] Although Aviation Intl's aircraft were not always available for Optech's missions when requested, Sharma would delay sourcing alternate providers unless directly required to do so by Optech's management. Sometimes Sharma would delay long enough

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so that Aviation Intl's aircraft were once again available to Optech. Sharma's actions continued and enhanced the amount of business that flowed from Optech to Aviation Intl.

A.2 Findings of fact sought by Mr. Sharma

[54] In his Factum Mr. Sharma submitted that the evidence in the record to which he referred supported the following findings of fact:

[7] The relationship between Optech and Aviation International began in 1999 at Buttonville Airport, when Optech's employees, Bill Gutelias ("Gutelias") and Glenn Farrington ("Farrington"), approached Aviation International's chief pilot, Phil Brasher ("Brasher"), identified themselves as Optech employees, and inquired whether Aviation was able to fly equipment to Washington, D.C. for testing, which Aviation eventually did.

[8] The chief financial officer of Optech, Elizabeth Carswell ("Carswell"), admits that despite swearing in her affidavit that Sharma introduced Optech to Aviation International, she in fact does not know who introduced Aviation International to Optech. Fogle's evidence is that Brasher advised her that Gutelias and Farrington approached him on behalf of Optech and that Sharma was not at this meeting. Sharma has confirmed that he was introduced to Aviation International after 1999, and thus could not have been present at this meeting. The evidence of these three aforementioned witnesses directly contradicts Farrington's assertion that Sharma referred him to Aviation International.

[9] At that time of the initial meeting between Optech and Aviation International, Farrington was already aware of Aviation International, as he had worked for ISTS at York University when Aviation International was providing flight services for ISTS.

[10] Gutelias advised Aviation International that Optech was interested in using Aviation International's aircraft to test its ATLM systems, and that this could become a permanent opportunity if things went well.

[11] Fogle subsequently met with Farrington to discuss an arrangement whereby Aviation International would supply Optech with an airplane for the purposes of carrying out ATLM testing. At that time, Gutelias advised Fogle that Farrington was responsible for choosing Optech's flight service providers. Farrington and Fogle negotiated the cost of supplying Optech with an aircraft, after which Farrington agreed to retain the services of Aviation International.

[12] The agreement between Optech and Aviation International that resulted was the product of negotiations between Fogle and Farrington; Sharma had no involvement with negotiating said agreement.

[13] After Optech's initial flights with Aviation International were successful, Aviation International eventually became one of Optech's primary flight service providers.

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[14] Gutelias initially flew all of these test missions with Aviation International's aircraft. Sharma only began flying some of these flights when Gutelias was unavailable. Fogle estimates that Sharma flew about 20% of these flights for Optech between 2002 and 2006 and less than 5% of these flights thereafter. Sharma confirms that in his later years of employment with Optech, he flew about 5% of said flights.

[15] From 1999-2002, Optech's flight service needs were being met by Aviation International and an American company, SkyDawg ("SkyDawg"). During that time, Farrington admits that there were no complaints with Aviation International, nor did he ask Sharma or anyone else to find another flight service provider.

[16] After Optech's ALTM operators, including but not limited to Sharma, voiced their concerns about the safety of SkyDawg's planes, Optech ceased using SkyDawg as a flight service provider and replaced SkyDawg's services by using Aviation International's second plane instead.

[17] Sharma had no influence over Optech's decision to use Aviation International's second plane or to cease using SkyDawg's services. Nor was Sharma an executive of Optech at that time.

[18] Farrington acknowledges that he ultimately made the decision for Optech to cease using SkyDawg's plane. It was Sharma's supervisor at the time, Richard Neville ("Neville"), who made the decision to use Aviation International's second plane.

[19] According to Farrington, there was no reason to doubt the decision to go with Aviation International or to believe that Aviation International was a bad choice.

[20] Further, Optech did not have any complaints with Aviation International from 1999-2002. At the time that Optech ceased using SkyDawg's services, Aviation International's second plane looked like a good opportunity to Optech, as it was a local plane, which would be serviced locally, which would make Optech's ALTM operator's much more confident.

[21] Additionally, Farrington admits that there was no reason to look for another service provider when Aviation International's second plane was made available to Optech and, in fact, Optech did not look for another service provider at that time.

[22] Throughout Sharma's employment with Optech, he acted in an administrative role, with little or no influence over strategic decisions.

[23] At no point during his employment with Optech was Sharma an agent for Optech with respect to any flight service providers, including Aviation. As indicated by Sharma's job description for his position of Flight Operations Team Leader, Sharma did not have the authority to select aircraft service providers for Optech.

[24] To Fogle's understanding, it was never Sharma's responsibility to determine proper aircraft requirements or to select which aircraft provider Optech would use.

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[25] At all times during his employment, Sharma reported to and was directly supervised by others; specifically, Sharma first reported to Gutelias, then to Farrington, then to Neville from November 2001-2003, then to Farrington, then to Mike Sitar ("Sitar"), and finally to Troy Lane.

[26] Throughout Sharma's employment, all orders made by Optech to Aviation were initiated and approved by the management at Optech.

[27] Throughout Sharma's employment, from 1996-2008, Sharma was never an executive of Optech and had no controlling interest in Optech. Further, Sharma did not even have signing authority for Optech.

[28] At no point in time did Sharma ever negotiate with Aviation International on behalf of Optech. Despite Optech's allegation that Sharma did perform such negotiations, Carswell has conceded that there is simply no evidence to show that such negotiations took place and that there may not have been negotiations between Sharma and Fogle/Aviation International.

[29] Importantly, as alluded to above, Farrington admits that Optech's decision to cease using SkyDawg's aircraft and to use Aviation International's second plane instead, was made by Farrington and Neville respectively.

[30] At no time did Fogle/Aviation International believe that Sharma was an agent of Optech, or that Sharma had sufficient authority to choose its flight service provider.

[31] When Fogle first met with Optech to discuss a possible business relationship between it and Aviation International, Gutelias advised Fogle that Farrington was responsible for choosing flight service providers for Optech. Indeed, it was Farrington who negotiated with Aviation International and agreed to retain Aviation International in the first place.

[32] Because Farrington always asked Sharma to deal with Aviation, and never asked any other Optech employee to do so, Fogle considered Sharma to be one of Aviation's contacts at Optech. However, Fogle did not consider Sharma as being Aviation's only contact at Optech, and believed that Gutelias and Farrington were also its contacts.

[33] At one point, Sharma was asked to prepare a comparison of rates for aircraft suppliers. In making such a comparison, Sharma merely put together information regarding the rates of aircraft suppliers, which rates were already known to Optech. At no time did Sharma encourage Optech to use Aviation's services.

[34] The result of Sharma's aforementioned comparison was a detailed chart, listing out aircraft suppliers and the rates that they charged.

[35] Farrington has admitted that there is no evidence showing that the figures contained in said chart were anything but accurate.

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[36] As Sharma was creating the chart, he discovered that some suppliers bill based on air time (i.e. the amount of time that the plane is actually in the air), while others bill based on flight time (i.e. the amount of time during which the engine of the plane is turned on). Those suppliers that billed based on airtime also billed a separate invoice for fuel, which, when combined with the invoice for airtime, would exceed Aviation International's rates.

[37] Carswell alleges that Sharma misrepresented the cost for Optech to purchase Aviation International's services in said chart because he did not fully explain the chart to her; yet she acknowledges that upon receiving the chart, she could have asked Sharma or Farrington to explain it to her, but did not do so.

[38] Sharma was not the only employee of Optech with requisite knowledge regarding the requirements of the specific types of planes needed to test ALTM.

[39] Additionally, when he first commenced his employment with Optech, Optech trained Sharma on the installation of ALTM systems, demonstrating that there must have been other Optech employees with technical knowledge of the ALTM system and the aircraft requirements needed to install same.

[40] Sitar, Gutelius, and Farrington each had experience installing ATLM and camera systems in aircraft and would have the necessary knowledge to select aircraft for ALTM testing. All of these aforementioned individuals had directly supervised Sharma at some point during his employment with Optech.

[41] Between 1999-2008, Optech had 18 ALTM operators (other than Sharma), which again demonstrates that there were other employees with requisite knowledge of ALTM systems and aircraft requirements for the installation of same.

[42] Carswell also notes that Optech had compiled a list demonstrating which aircraft were appropriate to use for ALTM testing, and that quite a few people at Optech would have known this list.

A.3 Findings of fact sought by the Fogle Defendants

[55] For their part, Ms. Fogle and the other Fogle Defendants pointed to the record as supporting the following findings of fact:

[4] The first contact between Aviation and the Plaintiff occurred in or about 1999. At the time, Aviation was providing certain flight services for ISTS at York University ("ISTS"). The first meeting was between Bill Gutelius ("Gutelius") and Glenn Farrington ("Farrington"), employees of the Plaintiff, and Phil Brasher ("Brasher"), Aviation's chief pilot at that time. This first meeting occurred at Buttonville Airport in Markham, Ontario. Farrington was familiar with Aviation from his own work with ISTS. Gutelius and Farrington approached Brasher and proposed to him that Aviation fly a piece of equipment to Washington, D.C. for testing. It was suggested by Gutelius after this first flight that Aviation begin providing remote sensing flight services to the Plaintiff. Farrington's recollection that the Defendant, Rajive Sharma ("Sharma"), was at

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this meeting is incorrect. Adele has spoken with Brasher, who has confirmed Sharma was not at this meeting. Gutelius has provided no evidence in this matter. Sharma has also stated that he was not introduced to Aviation until much later. Elizabeth Carswell ("Carswell") does not know exactly who introduced Aviation to the Plaintiff, despite so swearing in her affidavit.

[5] Adele was advised by Gutelius at the time that Farrington was the person at the Plaintiff responsible for making the choice of flight service providers. Thereafter, Adele met directly with Farrington and negotiated Aviation's services directly with him. Neither Gutelius nor Sharma had any involvement in these, or any such, negotiations.

[6] Over time, Aviation began receiving more and more of the Plaintiff's work. Throughout the first few years of the relationship, Gutelius was Aviation's primary contact with the Plaintiff and flew the majority of the Plaintiff's missions with Aviation, until he left the employ of the Plaintiff. A review of the Aviation invoices reveals that they were addressed to the attention of Gutelius until approximately December 2001. Sharma only flew the occasional test mission, when Gutelius was unavailable, although Adele had no personal interaction with Sharma until approximately September 2001. Sharma had no involvement with the pricing of the services rendered.

[7] Between 1999 and 2001, Aviation began flying more testing missions for the Plaintiff, such that it eventually became one of the Plaintiff's chief aviation suppliers, together with an American company known as "SkyDawg", which had flown for the Plaintiff since approximately 1994.

[8] By in or about 2002, SkyDawg had fallen out of favour with the Plaintiff, and was ultimately dismissed. The dismissal arose because of complaints as to the safety and reliability of SkyDawg's plane, as well as serious maintenance issues, made by all the systems operators who flew on the SkyDawg missions (not just Sharma). The Plaintiff now alleges that Sharma "orchestrated" this dismissal, but the evidence does not support this whatsoever. The decision was made by Farrington or others at Optech, but not Sharma.

[9] Following the dismissal of SkyDawg, Aviation inherited all of SkyDawg's workload, as the only other provider of flight services then used by the Plaintiff. Again, this decision was not made by Sharma, but by Farrington. Although Farrington states it was based on the recommendation of Sharma, he agrees it was ultimately his decision. Farrington agrees that all options were presented to him before his decision was made.

[10] Until the safety issues arose with SkyDawg, the Plaintiff's needs were being met by each of SkyDawg and Aviation. Farrington never asked Sharma or anyone else to get information on another service provider. There were no complaints regarding Aviation's services between 1999 and 2002, other than a minor issue which was addressed.

[11] The switch was made to Aviation exclusively because it was already one of the Plaintiff's service providers (together with SkyDawg), it provided a better plan, and a

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better price. Aviation provided a good opportunity to the Plaintiff because it was local, the planes would be serviced locally, and the operators were happier and more confident because of the servicing of the aircraft in Canada. There was no need to conduct a search for an alternate flight service provider when SkyDawg was terminated, as the relationship with Aviation and its flight services provided were satisfactory. The Plaintiff simply started using more Aviation services.

[12] Despite Farrington's claimed reliance on Sharma to select the aircraft and suppliers, he agreed it was a fact that the decision as to acceptable flight service providers (ie Aviation and/or SkyDawg) had already been made by the Plaintiff.

[13] The decision to use Aviation's second plane was made by Richard Neville ("Neville") (at that time Sharma's supervisor), likely because Aviation was a proven service provider. Farrington had no reason to doubt the decision to extend all of the flights to Aviation.

[14] In 2003, after receiving research from Sharma as to comparative pricing, Farrington decided to continue using Aviation as the Plaintiff's primary service provider. Farrington does not dispute the accuracy of Sharma's research, nor is there any evidence to suggest the research was inaccurate.

[15] In 2006, the only agreement actually signed between Aviation and the Plaintiff was executed, not by Sharma but by Mike Sitar ("Sitar") on behalf of the Plaintiff. At that time Sitar was the Field Operations Supervisor, and was senior to Sharma. Sitar has a Master of Science degree, and no particular aviation experience. Sitar has provided no evidence in this matter. There is no evidence as to any involvement of Sharma in this decision whatsoever.

[16] While Adele has no direct knowledge of the inner workings of the Plaintiff, she was advised by Sharma on numerous occasions that he was not in charge of sourcing aircraft and had no authority in this regard. Sharma advised that the decision to use Aviation (or not to use Aviation) was not his. To the best of Adele's knowledge, Sharma simply did not have the authority that the Plaintiff now suggests he did, and that at all times such authority rested with Farrington and/or Neville and/or others within the Plaintiff's organization (ie Sitar).

[17] Sharma was at no time the only systems operator involved in testing the Plaintiff's ALTMs. Initially, Gutelius almost exclusively flew these missions. Later, Sharma began flying some missions when Gutelius was not available. Still later, as Aviation began flying more of the Plaintiff's test missions, Sharma was less-frequently the systems operator who flew with Aviation. From 2002 to approximately in or about 2006, Adele calculates that Sharma flew approximately 20% of the test missions for the Plaintiff. By in or about 2006 and thereafter, Sharma flew on less than 5% of the test missions. The rest of the test missions were flown by other systems operators on behalf of the Plaintiff. With the exception of the 20% estimate, these facts are not disputed by the Plaintiff.

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[18] At no time during his employment with the Plaintiff was Sharma ever an executive or a member of the board of directors of the Plaintiff. At no time during his employment with the Plaintiff did Sharma ever have a controlling interest in the Plaintiff, nor was he a shareholder.

[19] Contrary to the allegations made by the Plaintiff, Sharma's employment did not include the authority to select aircraft service providers, as evidenced by the Job Description prepared by the Plaintiff for Sharma in his role as Flight Operations Team Leader. The closest itemized responsibility is: "planning availability of aircraft and pilots to accomplish required missions". Sharma was promoted to this position in 2001. Sharma's sworn evidence is that at no time was he given discretion over the supplier relationships, including that with Aviation. At all times his supervisor, Farrington (or Neville), held that discretion and authority.

[20] During the period of 2001 to 2003 when Neville was Sharma's direct supervisor, Neville was responsible for sourcing the planes, like Aviation, to test the units. He was responsible for all of the activity. Neville previously worked for Boeing.

[21] Sharma did not authorize payment of invoices, and was only responsible to properly code the invoices (an administrative function), for submission to Farrington for approval. Sharma's duties were "as more of an organizer of logistical issues and ordering issues as between the Plaintiff and its suppliers, including Aviation".

[22] At no time was Sharma ever the "buying agent" for the Plaintiff with respect to Aviation or any other supplier. The term "buying agent" is not to be found in any job description or performance review. Sharma was not a fiduciary of the Plaintiff. His role was purely administrative and he had little or no influence or discretion over strategic decisions.

[23] Sharma never had any control over payments to suppliers, including Aviation, nor did he have signing authority or cheque approval authority. This authority rested solely with others.

[24] The Plaintiff has alleged and restated in its factum that Sharma expedited payment of Aviation invoices. This is not accurate and is misleading to the Court. As thoroughly fleshed out in the cross-examinations, each Aviation invoice was admittedly due on receipt. In each of the limited cases of Sharma requesting payment of certain invoices, those particular invoices were overdue, and in some cases more than 45-60 days overdue. There was nothing untoward or improper for Aviation to be asking for payment of invoices that were overdue.

[25] After Sharma was terminated in 2008, no inconsistencies regarding Aviation invoices came to Farrington's attention. None of the coding that Sharma administratively attended to is incorrect. There was no complaint about recorded aircraft flight time or any record of inappropriate billings.

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[26] Farrington does not dispute the accuracy of Aviation's invoices as to flight times, as verified by Sharma.

[27] After 14 years of flight tests, the flight requirements necessary for testing the ALTM system were known to many people within the Plaintiff's organization, not just Sharma. In fact, over time the Plaintiff had compiled a list of appropriate planes for testing purposes.

[28] Sharma did not source aircraft from Dynamic, or other aircraft suppliers, unless Farrington insisted he do so. Carswell is aware of no instance when Farrington so insisted.

[29] Adele was not told by the Plaintiff that they had rules against employees being paid by suppliers.

[30] Despite the Plaintiff having alleged that Sharma was responsible for negotiating with Aviation, it was later admitted by Carswell that perhaps there were no such negotiations between Aviation and Sharma. Carswell could not point to one letter evidencing negotiations as to rate changes between Aviation and Sharma.

A.4 Examination of the evidence

[56] I have used this unduly lengthy and cumbersome method of setting out the different versions of facts advanced by the parties in support of their respective positions about Mr. Sharma's role at Optech in its relationship with Aviation – a key, threshold issue – in order to make the point that on its face the record before me gives rise to the following disputed material facts:

- (i) What was Mr. Sharma's role in introducing Optech to Aviation? Optech suggested Mr. Sharma made the introduction; the defendants point to evidence, including admissions by Optech employees such as Ms. Carswell, that he did not;
- (ii) Did Mr. Sharma's duties include acting as on-going buying agent of airtime services from suppliers such as Aviation? Mr. Sharma points to his job description and his position subordinate to several managers to say it did not; Optech relies on a 2003 performance review for Mr. Sharma and several emails to him from Ms. Fogle to say it did;
- (iii) A related issue is whether purchasing decisions, such as the termination of the contract with SkyDawg and the hiring of Aviation's Skymaster airplane, were really made or influenced by Mr. Sharma or by his superiors. Mr. Sharma contends the latter was the case; Optech admits the decisions were made by supervisors, but contends Mr. Sharma influenced those decisions;

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- (iv) Optech contends that a comparative pricing chart prepared by Mr. Sharma, which the plaintiff states influenced its purchasing decisions, was flawed and deliberately misleading. The defendants point to admissions in the record by Optech's Mr. Farrington that he does not dispute the accuracy of the information presented;
- (v) Optech paints Mr. Sharma as its purchasing agent, but Aviation states that the only contract it ever signed with Optech was in 2006 and that was signed by a Mr. Sitar on behalf of Optech. Mr. Sitar did not file an affidavit on this motion.

[57] Clearly the issue of Mr. Sharma's role in the purchasing relationship between Optech and Aviation is a contested one. On a review of the written record I cannot say that the position advanced by the defendants on this issue stands no chance or hope of success. How much more would I need to decide this issue? I would not be prepared to decide this issue without hearing some *viva voce* evidence from the key witnesses: Mr. Sharma, Ms. Fogle, Mr. Farrington and Ms. Carswell. As well, evidence from Mr. Neville and Mr. Sitar (neither of whom filed affidavits) would seem relevant to ascertaining the precise scope of Mr. Sharma's role in the relationship between Optech and Aviation. An assessment of the credibility of the evidence given by those witnesses would be necessary, in my view, to weigh the evidence and make findings of fact with the degree of certainty required by the law. I conclude that such fact-finding cannot properly be done only by a review of the written record filed before me.

B. Did Aviation make a payment to Mr. Sharma when the latter stood in the position of Optech's agent?

[58] There appears to be no dispute on the evidence before me about the following facts concerning 151 Ontario:

- (i) Mr. Sharma and Ms. Fogle incorporated 151 Ontario in January, 2002;
- (ii) Mr. Sharma was employed by Optech at that time;
- (iii) Aviation transferred ownership of its Navajo aircraft to 151 Ontario and 151 Ontario also purchased a Skymaster in January, 2002;
- (iv) Both aircraft were used by Aviation to provide services to Optech;
- (v) Starting in 2004 Aviation began to give 151 Ontario cheques it received from Optech for deposit in the bank account of 151 Ontario. In April, 2008, Aviation directed Optech to pay all further invoices by making payments directly to 151 Ontario;

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- (vi) The sources of 151 Ontario's revenues for the period 2003 until 2008 are set out in the table below:

YEAR	TOTAL DEPOSITS	PAYMENT FROM AVIATION	DEPOSIT/RECEIPT OF OPTECH CHEQUE	OTHER SOURCES
2003	169,301.01	169,301.01	Nil	Nil
2004	190,782.91	165,800.00	24,982.91 (13%)	Nil
2005	761,329.35	14,900.00	694,587.94 (91%)	51,841.41
2006	875,637.12	44,200.00	670,034.91 (76%)	161,402.21
2007	656,416.39	27,803.05	454,272.54 (69%)	174,340.80
2008	469,139.59	10,518.25	404,521.34 (86%)	54,100.00
TOTAL	\$3,122,606.37	\$432,522.31	\$2,248,399.64 (72%)	\$441,684.42

[59] There also appears to be no dispute on the record that during the period May 1, 2003 until July 1, 2008 151 Ontario made the following payments to Mr. Sharma, Ms. Sharma or 202 Ontario:

PAYEE	AMOUNT
202 Ontario, Mr. Sharma's personal corporation	\$616,179.00
Payments against AMEX debt incurred by Mr. Sharma	\$135,958.49
Ms. Sharma	\$48,600.00

The payments made by 151 Ontario to 202 Ontario represented 20% of the total amounts deposited in the bank accounts of 151 Ontario and exceeded the amount of money 151 Ontario generated from sources other than Aviation and the deposited Optech cheques.

[60] A memorandum prepared by the accountants for 151 Ontario in August, 2003, entitled, "Notice of understanding between both partners forming 1510032 Ontario Ltd.", contemplated that cheques sent by Optech to Aviation in payment of invoices for services Aviation rendered would be deposited into the bank account for 151 Ontario and that management fees of \$5,000.00 were to be paid by 151 Ontario to each director – i.e. to Mr. Sharma and Ms. Fogle. The memorandum specifically linked the deposit of Optech cheques by 151 Ontario to the ability of that corporation to pay management fees to Mr. Sharma and Ms. Fogle:

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“Management fees of \$5,000.00 can only be issued on the 1st if cash flows permit (c.g. if Optech is slow to pay, there may not be cash to pay the operating expenses and the \$5,000 on the first of each month.)”

[61] In the face of this evidence Mr. Sharma and Ms. Fogle offered three explanations for the activity of 151 Ontario. First, they stated that their purpose in incorporating 151 Ontario was to develop two business opportunities: (i) the recruitment of flight students from India for the flight school operated by Aviation and (ii) the provision of after-market services to companies that had purchased survey equipment from Optech. Ms. Fogle regarded both activities as non-competitive with Optech. While the evidence does indicate that 151 Ontario developed some sources of revenue from those activities, the fact remains, as shown on the table above, that the overwhelming proportion of the revenue of 151 Ontario came from Optech – either from cheques payable to Aviation made over to 151 Ontario or, in the final months, from direct payments by Optech. That said, the Fogle Defendants have filed an expert’s report from Mr. Ron Forster, an accountant, who opined that “significant revenue was generated by the [Aviation] flight school...and that there is a basis for management fees to be paid [to 151 Ontario’s principals] for sourcing and getting the students for the flight school.”

[62] Second, Ms. Fogle deposed that by using 151 Ontario to lease aircraft, which it in turned made available to Aviation, the latter company would have more cash with which to expand its own services, including purchasing additional training aircraft for its flight school.

[63] Finally, Mr. Sharma and Ms. Fogle deposed that by involving 151 Ontario indirectly in the provision of Aviation’s services to Optech, the plaintiff was not prejudiced because Aviation’s prices to Optech remained very competitive. This issue is hotly contested in two respects:

- (i) In his expert report Mr. Forster opined that the “rates charged by Aviation/151 Ont when all additional costs are considered (fuel, crew costs, positioning etc.) were very significantly lower than the total cost to Optech offered by Aviation’s competitors capable of providing such services to Optech. Thus Optech derived a significant benefit in terms of its total costs when using Aviation/151 Ont during the period under review”. Optech challenged the accuracy of Mr. Forster’s findings and led evidence that after it terminated the contract with Aviation its airtime costs dropped significantly;
- (ii) Optech further submitted that in any event the case law states that where a secret commission has been established it is irrelevant whether the plaintiff can establish a loss; the claim is restitutionary in nature and the appropriate measure of the loss is the amount of the bribe.

[64] I am not able to decide these issues on the written record before me. First, Optech makes very serious allegations of wrong-doing against Mr. Sharma and Ms. Fogle, essentially allegations of fraudulent misconduct. Both Mr. Sharma and Ms. Fogle vigorously deny those accusations and they have adduced considerable evidence seeking to provide innocent explanations for their conduct. Optech contends that their explanations are contradictory and inconsistent, and it included with its factum a detailed schedule setting out what it argued were

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numerous inconsistencies in the explanations provided by Mr. Sharma and Ms. Fogle. An assessment of their explanations will require, in part, findings about their credibility. I would need more than a written record to make such findings; I would require the opportunity to see and hear Mr. Sharma and Ms. Fogle offer and defend their explanations.

[65] Second, the defendants' explanations rest, in part, on the expert opinion filed by Mr. Forster. As the Acknowledgement of Expert's Duty signed by Mr. Forster makes clear, his duty is to assist the court in respect of an issue in dispute. Often when experts testify at trial the presiding judge will ask questions of the expert in order to clarify his or her understanding of the technical matters in dispute. On this motion for summary judgment I have no opportunity to ask any questions of Mr. Forster, whereas if he testified at trial I would certainly have some for him.

[66] Finally, although I understand Optech's position that the competitiveness of the pricing of Aviation's services is not, as a matter of law, relevant to the determination of whether Aviation paid secret commissions to Mr. Sharma, Optech has joined issue on that matter by leading evidence that its airtime costs fell after it terminated Aviation's contract. As well, the competitiveness of Aviation's pricing plays an essential role in the innocent explanations tendered by Mr. Sharma and Ms. Fogle. As stated, *viva voce* evidence is required to assess their explanations.

C. Did Aviation make the payment knowing that Mr. Sharma was acting as the agent of Optech?

[67] As mentioned in section VII.A.4 above, Mr. Sharma's role in Optech's purchasing of services from Aviation is a contested issue, and Ms. Fogle deposed that she did not understand that Mr. Sharma played any material role in the contractual relationship between Aviation and Optech.

D. Did Aviation fail to disclose to Optech that it made payments to Mr. Sharma, the person whom it knew to be Optech's agent?

[68] Both Mr. Sharma and Ms. Fogle admit that they did not inform Optech directly about Mr. Sharma's role in 151 Ontario.

[69] They contend, however, that Optech knew, or should have known, about the breadth of 151 Ontario's operations, especially its pursuit of after-market services business. Mr. Sharma and Ms. Fogle pointed to an event held on April 7, 2004 at the Buttonville Airport and suggested that 151 Ontario's operations became known to Optech at that conference. The March 31, 2004 and April 11, 2004 emails relied on by the defendants as evidence of Optech's knowledge of the activities of 151 Ontario contained no reference to the latter corporation; only Aviation was mentioned in them. Whether more can be taken from the participation of Optech in that April, 2004 conference will require an assessment of *viva voce* evidence.

[70] As to the notice Aviation gave Optech in April, 2008 that all future invoices for Aviation's services would come from 151 Ontario, Ms. Fogle's email to Optech dated April 8, 2008, simply stated: "Due to some internal operating changes, all future invoices from Aviation International will be billed by a numbered company - 1510032 Ontario Ltd." Hardly notice of who 151 Ontario was, what it did, or what role Mr. Sharma played in that company.

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E. Conclusion with respect to Optech's motion for summary judgment

[71] Having examined the elements of Optech's claim and the evidence filed by the parties, I conclude that I would "need more" in order to be able to adjudicate Optech's claim with the degree of certainty required by the law. Specifically, as I have detailed in this section of my Reasons, *viva voce* evidence would be required in order to determine whether Mr. Sharma played an influential or decision-making role in Optech's purchase of services from Aviation, to evaluate the innocent explanations advanced by the defendants for why Optech payments to Aviation found their way into 151 Ontario, and to consider why Mr. and Ms. Sharma received the benefit of some of those payments for the work they did for 151 Ontario.

[72] I am not prepared to order a "mini-trial" under Rule 20.04(2.2) to assist me in assessing the credibility of the witnesses and exercising my fact-finding powers under Rule 20.04(2.1). Optech had the opportunity to request a mini-trial at the April 20, 2010 Motions Scheduling Court before Himel J. The endorsement of that attendance noted that no *viva voce* evidence would be required. While, notwithstanding that endorsement, I retain the discretion to order a mini-trial, the failure of Optech to request that *viva voce* evidence be heard on the return of the motion weighs heavily in my decision not to order a mini-trial. For our system of scheduling summary judgment motions in the Toronto Region to work, requests for the use of *viva voce* evidence on a summary judgment motion must be made in advance of the hearing, either at the initial Motions Scheduling Court or thereafter well in advance of the hearing once the need for *viva voce* evidence becomes apparent. If parties do not make their requests in advance, our scheduling system will collapse under its own weight and unacceptable delays will attach to the adjudication of summary judgment motions.

[73] For these reasons I am not satisfied that there is no genuine issue requiring a trial with respect to Optech's claim against the defendants (or the defendants' defence thereto). I refuse Optech's motion for summary judgment in respect of its secret commissions claim, but I will make certain directions below about the trial pursuant to Rule 20.05. I am not seized of this proceeding.

VIII. Mr. Sharma's wrongful dismissal claim

[74] Mr. Sharma has counter-claimed for damages for wrongful dismissal. Optech takes the position that it had cause to fire Mr. Sharma because of his participation in the kickback scheme. Given the centrality of the allegations regarding a kickback scheme to any determination of Mr. Sharma's wrongful dismissal claim, in light of the reasons given above I refuse to grant summary judgment dismissing the wrongful dismissal claim.

IX. Aviation's Counter-claim

[75] Aviation has countered-claimed for, and seeks summary judgment in respect of, 22 invoices totaling \$64,270.02 which Aviation and 151 Ontario rendered to Optech in 2008 for services rendered. In its Statement of Claim and Reply Optech pleaded that any amount it owed to Aviation should be set-off against the damages Optech seeks against the defendants for the alleged kick-back scheme. Given the close relationship between the parties' claims, it is

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appropriate that Aviation's counter-claim be dealt with at the same time as Optech's claim. I therefore refuse Aviation's request for summary judgment.

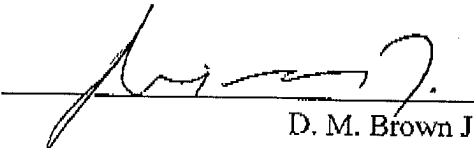
X. Directions regarding the trial of this proceeding

[76] For the reasons given above, I refuse to grant Optech summary judgment in respect of its secret commissions claim and its request to dismiss Mr. Sharma's wrongful dismissal counter-claim. I also refuse to grant Aviation summary judgment on its claim for unpaid invoices. I direct the claim and counter-claims to proceed expeditiously to trial.

[77] A lot of time and money obviously has gone into the preparation of the record before me. The benefit of that work-product should not be lost. Accordingly, I think it appropriate to make directions about the trial pursuant to Rule 20.05(2). Specifically, I think that the affidavits filed on this motion should act as *part* of the evidence-in-chief of the witnesses at trial, and I think that the transcripts of their cross-examinations not only should be treated as if transcripts of their examination of discovery, but should also form *part* of their cross-examinations at trial. Also, the parties must include a copy of these Reasons in the Trial Record and in the materials placed before the pre-trial conference judge. I am reluctant to make any further directions without submissions from counsel because I am not aware of all the pre-trial steps the parties have taken to date. Consequently, I invite the parties to serve and file with my office written submissions on further directions for the trial by Wednesday, February 9, 2011, and to serve and file any responding submissions thereon by Friday, February 18, 2011. Once I have reviewed the submissions, I will issue further directions. Of course the parties are encouraged to work out a consent order on directions for my consideration.

XI. Costs

[78] I would encourage the parties to try to settle the costs of this motion. If they cannot, the parties may serve and file with my office written cost submissions, together with Bills of Costs, by Wednesday, February 9, 2011, and they may serve and file with my office responding written cost submissions by February 18, 2011. The costs submissions shall not exceed three pages in length, excluding the Bill of Costs.


D. M. Brown J.

Date: January 31, 2011