CITATION: The Hearing Clinic (Niagara Falls) Inc. v. 866073 Ontario Limited, et al., 2014 ONSC 5831

St. Catharines Court File No.: 49278/07
DATE: 2014/10/07

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
THE HEARING CLINIC (NIAGARA FALLS) INC.	)	Malte von Anrep, Q.C. and Civita M. Gauley, for the plaintiff
	)	
Plaintiff	)	
	)	
– and –	)	
	)	
	)	
866073 ONTARIO LIMITED, TERRY LEWIS and DEE LEWIS	)	Nicholas F. Ferguson and Harry Korosis, for the defendants
	)	
Defendants	)	HEARD: on various dates between July 18, 2011 and June 21, 2013, at St. Catharines

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J.W. Quinn J.: –

I. INTRODUCTION

[1] Leave an untruthful man in the witness box long enough and he will reveal himself to the world. Here ends the lesson, but not the story.

[2] The story concerns the 2006 purchase and sale of a business – specifically, a hearing clinic. How difficult could that be? Two experienced multiple-clinic owners, each represented by a lawyer and with the almost-daily (sometimes hourly) assistance of chartered accountants, put together a transaction with more loose ends than a badly knit sweater.

[3] I have found it impossible to articulate a helpful overview of this trial. Sitting atop the evidence here is like scaling a very, very high mountain only to find that, when one reaches the summit, one is too far from everything to see anything. The best that I can do is say that the core of the case is the allegation that the individual defendants and their accountant knowingly made fraudulent misrepresentations and withheld information, such that the plaintiff overpaid for the hearing clinic. General damages are sought. It is further alleged that the defendants intentionally committed certain acts (said to be acts of bad faith and improper conduct bordering upon fraud) that impeded the transfer of assets,

constituting breach of contract, and thereby caused the plaintiff to suffer specific financial losses.

[4] E-mails, hundreds of them, along with letters and other documents, proved to be the most reliable evidence. Without them, the truth would have been unattainable, leaving me at the mercy of witnesses and desperately self-interested litigants attempting to recall events today that took place in 2006. There are inherent evidentiary problems in asking witnesses to tell of such events. Sincerely believed memories that are innocently incorrect become more problematic for the court than do intentional lies.

[5] The trial began, quite unremarkably, on a sunny summer day in July of 2011. Storm clouds were not long in arriving and we never saw the sun again. Counsel had estimated that the trial would take three weeks and so it was given a place on the docket with that in mind.[1]

[6] After four weeks, the *first* witness, Stefan Fridriksson ("Fridriksson"), was still testifying. Six additional days were needed to complete his evidence. In total, Fridriksson sub-let the witness box for 26 days. He entered the box as an articulate professional with impressive academic credentials, displaying what appeared to be a sound and comprehensive recollection of events. When he stepped down, after more than 14 days of withering cross-examination, he was noticeably dazed, his credibility was reduced to existential confetti and he even appeared to be physically shorter than when the trial began.[2] The case for the plaintiff was leaking oil (at one point, I thought that I saw smoke) and everyone who was paying attention realized that whatever damages were at issue in the trial would be swamped by the costs tsunami that was approaching.[3]

[7] After Fridriksson wobbled out of the witness box, the trial lasted another money-burning 46 days, for a total of 72 days, spread over three years (yes, three years).

[8] There were 125 exhibits at trial, which is not overly burdensome except when one considers that Exhibit No. 1 consists of nine volumes and 561 documents and Exhibit No. 90 is comprised of six volumes and 129 documents.

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[1] On the morning of the first day of trial, during the opening of Mr. von Anrep, lead counsel for the plaintiff, I asked for an estimate of the length of the trial. Mr. von Anrep, replied: "We tackled this problem a number of times and believe that we can do it within three weeks . . ." I interjected: "May I just say now that I do not think that you can . . . I am willing to take wagers from all counsel that you will not complete it in three weeks."

[2] A variation, perhaps, of the Pinocchio effect.

[3] In hindsight, Fridriksson should have returned to court the next day with the corporate chequebook and ended the debacle.

[9] Closing argument was in writing: an eye-glazing, bum-numbing, disc-herniating total of 662 pages (single-spaced, medium-sized font and heavily footnoted). Then there were the answers to dozens of written questions that I forwarded to counsel in the course of preparing these Reasons. It was a superb effort.

[10] The trial was like a physical deformity that one, eventually, accepts as a permanent condition. Yet, despite everything, I will recall the experience fondly because of the unrelenting civility of counsel[4] and their unceasing mastery of the evidence, all under difficult circumstances.

[11] The legal issues arising in the trial include the following, in no particular order (I have inserted the paragraphs numbers in these Reasons where the issues are addressed):

- Should adverse inferences be drawn because of the failure by both sides to call various persons as witnesses? Paragraphs [19], [779], [939], [1170]-[1179]
- Is the court in a position to make findings as to the accepted billing and administrative practices of such entities as the Assistive Devices Program and the Workplace Safety & Insurance Board, without expert evidence? Paragraphs [830], [864], [1432]-[1434], [1438]
- Should Terry Lewis, one of the individual defendants, be excused from attending court for health reasons? Paragraphs [14]-[19]
- What flows from the fact that Terry Lewis was physically unable to be examined for discovery or to testify at trial? Paragraph [19]
- What are the implications where an order is made excluding witnesses, pursuant to subrule 52.06(1) of the *Rules of Civil Procedure,* R.R.O 1990, Reg. 194, and an exempted witness does not testify first? Paragraphs [1131] and [1132]
- Is it permitted for the partner or associate of counsel for the plaintiff to testify? Paragraphs [774]-[778]
- What if counsel for the defendants decline their consent to that partner or associate testifying? Paragraph [777]

[4] Some counsel can fake civility for the first few days of a trial, but soon succumb to the strain of insincerity. The civility here was genuine.

- In the world of hearing clinics, what is a "referral"? Paragraphs [1187]-[1200]

- In that same world, what is the distinction between "customer" and "patient"? Paragraph [1146]

- What is the effect of an "entire agreement" clause in the Asset Purchase Agreement signed by the parties? Paragraphs [770]-[771]

- The hearing clinic was operated from leased premises. Under the Asset Purchase Agreement, the defendants were to obtain the consent of the landlord to the assignment of the lease. The timing of both the execution of the Asset Purchase Agreement and the closing (not to mention the date of incorporation of the plaintiff) made it impossible for the defendants to provide the landlord with the 30-days notice required by the lease for its assignment. Because of the lateness of the notice, there were "extra costs" claimed by the landlord, which the plaintiff says should be the responsibility of the defendants. As between the plaintiff and the defendants, do the common law doctrines of impossibility, mistake and frustration apply? Paragraphs [1411]-[1413]

- Does the *Limitations Act, 2002,* S.O. 2002, c. 24, apply in respect of amendments to the statement of claim made six years after the cause of action arose? Paragraphs [24] and [25].

- Apart from the *Limitation Act, 2002*, should the plaintiff be granted leave to amend its statement of claim in mid-trial to allege an additional instance of fraudulent misrepresentation? Paragraphs [1267]-[1273]

- Did the defendants, and their accountant, make fraudulent misrepresentations to the plaintiff? Paragraphs [1097]-[1296]

- If a fraudulent misrepresentation is found to have been made, is reliance presumed? Paragraph [368]

- Is there an onus on the plaintiff to investigate the truth of any representations? Paragraph [367]

- Are allegations of fraudulent misrepresentation to be strictly construed? Paragraph [1227]

- What does the court do with an allegation that a contractual provision, found to be vague and uncertain, has been breached? Paragraph [1341]

- Must punitive damages be pleaded to be awarded? Paragraph [1306] and [1307]
- Is certain language in the statement of claim mere surplusage? Paragraph [1308]
- What duty of disclosure arose from the fact that the defendants had reason to believe that a key former employee possessed a patient list? Paragraphs [1181]-[1185]
- What are the implications of the plaintiff suing the key former employee in a separate action and obtaining a recovery in that action? Paragraph [1186]
- Did the defendants have a legal obligation to advise the plaintiff why a business valuation for the hearing clinic was cancelled? Paragraph [472]
- Are earlier drafts of the Asset Purchase Agreement relevant to interpreting the final draft? Paragraph [699]
- What is the definition of "inventory"? Paragraph [1382]
- Should certain language be inferred in the statement of claim? Paragraphs [1310]-[1312]
- Is the substance of negotiations between the defendants and other prospective purchasers relevant in determining the substance of negotiations between the defendants and the plaintiff? Paragraph [287]
- Did a fiduciary relationship exist in this case? If so, was there a breach of that duty? Paragraphs [1300]-[1304]
- What was the obligation of the defendants regarding delivery of the keys to the hearing clinic on closing? Paragraphs [1321]-[1325]
- Is an accountant (who was actively involved with the plaintiff in negotiating the purchase of the hearing clinic) testifying as an expert when giving evidence of the effect certain post-closing information would have had on his pre-contract advice to the plaintiff concerning the purchase price of the hearing clinic? Paragraphs [1133]-[1137]

Other than that, the case was straightforward.

1. The parties

(a) *defendants*

[12] The corporate defendant owned The Hearing Clinic located in the City of Niagara Falls ("the Niagara Falls Clinic") and carried on the type of business that the name implies. The individual defendants, Terry Lewis and Dee Lewis, are husband and wife and the officers, directors and shareholders of the corporate defendant. In 2006, the defendants owned three hearing clinics.

[13] Terry Lewis is an audiologist. Dee Lewis, who assists him in many aspects of the business of the clinics, has a PhD in library science.

[14] An unusual feature of this case is that Terry Lewis was unable to participate in examinations for discovery because of his health. At the time, the defendants obtained a report from Dr. Lawrence Baker and, with the consent of the plaintiff, Andris "Andy" Gunarsons, the accountant for the defendants, was examined for discovery in place of Terry Lewis.

[15] In addition, Mr. Lewis did not testify at trial.

[16] Dr. Baker, who has treated Terry Lewis since 1990, gave evidence and provided an up-dated and thorough medical report, dated July 15, 2012. I found him to be a sincere and credible witness. Dr. Baker described his decision to provide a report when asked to do so by Dee Lewis. He testified:

> A. And I said, 'Let me think about it,' and I thought about it for about three weeks because I knew that it was a serious matter and I knew that I would probably be called on my report and I honestly felt that the request was both legitimate and appropriate, so I wrote it.

[17] Terry Lewis suffers from degenerative disc disease, diabetes mellitus (he is insulin dependent and prone to erratic glucose levels), hypertension and chronic pain syndrome (the result of his disc disease). He is on a medley of medications (at least nine), six of which are for pain control. Dr. Baker stated that stress "causes his levels of pain to be increased and this is associated with increased blood pressure readings." He added: "Stress causes his blood sugar readings to become erratic, thus endangering his life. These erratic blood sugars are associated with mental confusion."

[18] The conclusion reached by Dr. Baker was: "Mr. Lewis is not capable of providing testimony in the matters of the litigation."

[19] I have not gone into detail with respect to the testimony of Dr. Baker because I was not given any reason to doubt the accuracy of his opinion (and counsel for the plaintiff have not suggested that Terry Lewis is otherwise than as described by Dr. Baker). In the circumstances, with the failure of Terry Lewis to testify at this trial having been explained, and with the evidence of Dr. Baker being uncontroverted as to the life-endangering risk were Mr. Lewis to testify, his absence is excused. In addition, it would not be appropriate for me to draw an adverse inference from his non-participation. His inability to participate in these proceedings does not have legal implications except to the extent of the inevitable evidentiary gaps that his absence creates.

(b) *plaintiff*

[20] The plaintiff purchased the Niagara Falls Clinic from the defendants and was incorporated specifically for that purpose. Fridriksson, an audiologist, operates the Niagara Falls Clinic.

[21] His wife, Carol Klassen, is the sole officer, director and shareholder of the plaintiff. Ms. Klassen has a few years of education in general arts and sciences at various universities and she completed a medical laboratory technology course at an institute in Saskatchewan. Despite her position with the plaintiff, there can be no doubt that Fridriksson is its directing mind. This was evident throughout the trial. For example, we have the following testimony from Ms. Klassen:

> A. . . . like, I own the clinic . . . but that's something arranged with our accountant. It seemed to make sense that I owned the clinic but, really, Stefan owns it.

[22] Consistent with her low corporate profile, Carol Klassen did not have firsthand involvement in the negotiations leading up to the purchase. She testified:

> Q. Now, what involvement, if any, did you have in relation to the negotiations that took place between your husband and the Lewises pertaining to the purchase of the clinic in Niagara Falls?
>
> A. I didn't have any involvement other than hearing, overhearing conversations and I was Stefan's sounding board for some of it but, mainly, he talked to Karl Bowley [the accountant for the plaintiff].
>
> Q. So, the information that you gathered during the negotiation process came mainly from where?
>
> A. From Stefan.

[23] Ms. Klassen also did not display a keen interest in the technicalities of the purchase:

> Q. Are you familiar with the timeline? Do you have your own independent recollection of the timeline in regards to the negotiations, the Letter of Intent, the Letter of Commitment and the Agreement of Purchase and Sale? Are you familiar with that, do you have your own recollection of that timeline?
>
> A. Not really.
>
> Q. No? You're aware, though, that the Letter of Commitment was completed on October 12, 2006? Do you, are you aware of that or you, don't really know?
>
> A. I'm, I don't remember if, I, I don't remember those things.

2. The ever-changing statement of claim

[24] The initial statement of claim, issued in 2007, alleged "breach of contract, negligence and breach of fiduciary duty." In 2011, two months before trial, it was amended to allege "negligence and fraudulent misrepresentations" and particulars were ordered. In 2012, one year after the trial commenced, it was further amended to include other particulars of fraudulent misrepresentation. Following both sets of amendments, additional examinations for discovery were conducted.[5]

[25] The defendants argued that the 2012 amendments were made beyond the two-year period following the completion of the purchase and sale and, therefore, were barred by virtue of the *Limitations Act, 2002,* S.O. 2002, c. 24. Section 4 provides:

> 4.Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim discovered.

Section 5(1)(a) identifies the point in time when a claim is discovered and s. 5(2) says:

> 5(2)A person with a claim shall be presumed to have known of the matters referred to in clause (1)(a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

I think that counsel for the plaintiff correctly submit that the 2012 amendments merely particularized a claim already pled and, as such, are not objectionable. It is only amendments which set out a new cause of action, not found in the original

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[5] The 2011 order was silent as to costs. For the 2012 mid-trial amendments, I awarded, against the plaintiff, costs thrown away fixed at $30,000.

pleading, that are barred by an expired limitation period: see *Ascent Inc. v. Fox 40 International Inc.*, [2009] O.J. No. 2964 (S.C.J.) at para. 3.

[26] The ever-changing statement of claim was a challenge for opposing counsel, but a challenge that they adeptly met.

3. Terry Lewis and Dee Lewis as defendants

[27] Although this was a business transaction between corporations, the plaintiff has drawn the individual defendants into the action by boldly pleading, in the statement of claim:

> 11. The defendants Terry Lewis and Dee Lewis have deliberately conducted the affairs of the defendant corporation in such a manner as to cause the plaintiff financial harm, such that it would be flagrantly unjust not to pierce the corporate veil and impose personal liability.

II. FRIDRIKSSON: HIS NATURE, CHARACTER AND CREDIBILITY

[28] Because of the central role played by Fridriksson in the evidence of the plaintiff, he deserves his own section of these Reasons and his credibility warrants early and thorough attention. He was the maypole around which the case for the plaintiff was conducted. Most of the alleged fraudulent misrepresentations are said to have been made orally by others to Fridriksson. Unfortunately for the plaintiff, Fridriksson spent most of the trial on the wrong side of unbelievable.

[29] Fridriksson was born in 1956. He opened his first hearing clinic in 1988. By 1998, he owned four clinics and, according to his testimony, he was “the largest single provider of hearing aids in the Province of Ontario.” In 1998, after selling his clinics, he and his wife and children moved to Puerto Vallarta, Mexico, where they “opened a charity clinic.” During this time, Carol Klassen studied Spanish and painting. In 2002, they returned to Canada and, in 2003, Fridriksson started a hearing clinic in Fort Erie. Three years later he opened a second hearing clinic, this one in St. Catharines.

[30] Determining credibility can be a challenge for a trial judge. We have no special powers in that realm and, wherever possible, avoid reliance upon darts, dice and Ouija boards. However, rarely, has a witness generously offered up so many reasons to be disbelieved. Fridriksson was an evidentiary gift who kept on giving. He ignored rule number one in the Litigants’ Credo: “Know thyself, because others soon will.” Enough of this preamble. Come with me now on a visit to the phantasmagorical world of Fridriksson. Pack lightly.

1. Is there a Doctor in the house?

[31] The trial began with Fridriksson being addressed by his counsel as "Doctor" Fridriksson. I thought nothing of it, as he did have a doctorate in audiology. However, on Day 13 of the trial, I learned, from one of the exhibits, that, although a member of the College of Audiologists and Speech-Language Pathologists of Ontario ("CASLPO") may list that degree after his or her name, a self-reference to "Doctor" is prohibited. The exhibit states:

> Some members of [CASLPO] have successfully completed the requirements of university doctoral-degree programs that permit them to use the word 'Doctor' or an abbreviation thereof. For example, some members have obtained a 'Doctorate of Audiology' . . . [This title describes] their academic achievements and is not a designator of professional competence . . . members with a 'Doctorate of Audiology' may describe themselves as, for example, 'John Doe, Doctor of Audiology, Audiologist.'
>
> This description sets out the member's academic qualifications, without referring to themselves as 'Dr. Doe,' which is prohibited.

[32] More to the point, in correspondence and documents from CASLPO to Fridriksson, he is referred to as "Mister." Consequently, on Day 14 of the trial, I instructed Mr. von Anrep, lead counsel for the plaintiff, to address this witness henceforth as "Mister." Simply put, when your governing body refers to you as "Mister," you are "Mister" in my court.

[33] Such a little nicety is hardly determinative of anything in this case. Yet, it will be seen that allowing himself to be addressed repeatedly as "Doctor" is consistent with the nature and character of this man, as reflected in more serious credibility-based transgressions found in his evidence. Looking back, it was an evidentiary harbinger.

2. "Yes, I know, I'm guessing again"

[34] The witnesses in this case were being questioned about events that happened six to seven years earlier. Accuracy of recollection was on trial and Fridriksson admitted that he was guessing in some of his testimony.

[35] Fridriksson was cross-examined by Mr. Korosis (co-counsel for the defendants) on handwritten notes that he (Fridriksson) had prepared and provided to his counsel concerning a telephone conversation with Karl Bowley (the accountant for the plaintiff). The notes begin: "7 Sept. 07, 9:40 a.m. Discussion with Karl Bowley re: CBV [Certified Business Valuation] on Aug. 30."

[36] The cross-examination included the following:

> Q. . . . can you explain to me why you would send notes to [your counsel] that say 'Discussion with Karl Bowley re: CBV on August 30'?
>
> A. Because I'm trying to clarify, I'm trying to clarify what this, what the, what the contents, or how this came about, the call here.
>
> Q. Do you, do you know for certain?
>
> A. No, I don't know for certain.
>
> Q. Okay. So you really don't have an idea what these notes purport to be?
>
> A. I'm, I'm guessing.
>
> THE COURT: Did you just say you're guessing?
>
> A. I'm, yes, I know I'm guessing again.
>
> THE COURT: Why do you do that?
>
> A. I don't know why I do that. I don't know what these notes are. I don't know why I guess.
>
> THE COURT: How am I supposed to know when you're guessing and when you're telling the truth?
>
> A. You're right. I'm sorry. I sometimes do that . . . I don't actually know what these notes are.
>
> THE COURT: And if Mr. Korosis had not pressed you on the point we would never know that, would we?
>
> A. No, you're right. It was not intelligent of me, I'm sorry.

[37] Later that day (a mere six pages in the trial transcript thereafter), Fridriksson was cross-examined regarding other handwritten notes that he had made:

> A. No, there's a, a, I do understand what this is now, and I'm not guessing.
>
> Q. Okay. Sorry, what, what do you understand?
>
> A. What Tab 1 is, I know what Tab 1 [of Exhibit No. 26] is now.
>
> Q. Okay, what is it?
>
> A. It's the lead up to [a conversation with Terry Lewis about the non-existence of a certified business valuator report] . . . it's the preparation for the call at Tab 18 [of Exhibit No. 1].

[38] Fridriksson embarked upon a rambling explanation of these handwritten notes (describing them as "recollected notes" of what happened "before the call" to the defendant, Terry Lewis, on September 7, 2006), in the course of which Mr. Korosis raised a number of inconsistencies. The cross-examination continued:

> Q. So these are recollected notes . . . in preparation for your telephone call to Terry. Correct? Do I understand that correctly?
>
> A. I think, I think they are recollected notes.
>
> Q. I understand your evidence that they're recollected notes. What I don't understand is, are these recollected notes in respect of the call to Terry on September 7, 2006?
>
> A. I, okay. I am not sure exactly. I am not sure.
>
> Q. You're not sure of what, that they're recollected notes, that they're from September 7, 2006 . . . at 9:40 a.m., what are you not certain of?
>
> A. Actually, I'm not sure of, actually I'm not sure what the notes are. That's, that's what I'm not . . .
>
> THE COURT: So, have you just taken me through another guess?
>
> A. I'm sorry. Yes, I did. I did. I'm sorry, I'm guessing.

[39] Mr. Korosis continued:

> Q. Sir . . . you're here giving evidence in respect of the plaintiff's claim and allegations pertaining to fraud committed by the defendants. Correct?
>
> A. Yes.
>
> Q. This is a serious issue, is it not?
>
> A. It is very serious.
>
> Q. And you are giving guesses for your evidence?
>
> A. Yeah. I, I was giving guesses.
>
> Q. So, just to clear up, with respect to Tab 1 of Exhibit Number 26, you have no idea what this document is all about do you?
>
> A. I do not. You're right.

[40] The following exchange also occurred in cross-examination by Mr. Korosis:

> Q. . . . prior to this afternoon [April 24, 2012, Day 21 of the trial], was a lot of your earlier evidence guesses, or was it all truthful?

> A. I've told you when I guessed, I think. I'm guessing again. I, there may have been times when I guessed but I . . .
>
> Q. And you would have guessed not just on cross-examination, you may have guessed during your evidence in-chief as well, sir, correct?
>
> A. There's a possibility that I guessed.
>
> Q. Probability or possibility?
>
> A. There is, well, because I know I guessed at some because I was, I was taken to task for it by, by His Honour. So I know I guessed at some.
>
> Q. On, in your evidence in-chief?
>
> A. . . . yes . . .
>
> . . . . . .
>
> Q. Now you were sworn at the outset to tell the truth, the whole truth and nothing but the truth, right?
>
> A. Yes and I have guessed. I admit it and, and I was foolish to do so and I will endeavour not to guess again . . .
>
> Q. Your have a problem with that though, don't you?
>
> A. Well, clearly I have. I have guessed when I shouldn't have guessed.

[41] At the end of the day, I asked for clarification from Fridriksson:

> THE COURT: . . . before we go, I need clarification on one point and I'm not certain that you answered this. Are the only guesses you've made in this trial those in which you were confronted and to which you admitted?
>
> A. I cannot be certain of that. Sometimes I was asked to guess.[6]

[42] There is no reason for me to assume that Fridriksson was caught on every occasion that he guessed in his evidence. He is an incorrigible guesser, thereby contributing to his unreliability as a witness.

3. Gilding the academic lily

[43] On the first day of trial, Fridriksson tendered in evidence a document titled: "Details of Career Up to St. Catharines." It showed that, in 2002, he became a professor at Brock University, teaching in the Department of Communication Disorders and that, from 2004 to the present, he was an adjunct professor at the

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[6] He was never asked to guess.

University of Toronto, Faculty of Medicine, teaching in the Speech Language Pathology Department. It turns out that neither position was accurately described. This academic embellishment surfaced in cross-examination.

(a) *clinical instructor dressed up as an adjunct professor*

[44] Having proclaimed under oath that, since 2004, he has been an adjunct professor at the University of Toronto, Faculty of Medicine, Fridriksson was confronted, in cross-examination:

> Q. What I know to be true, sir, is that you are not an adjunct professor at the University of Toronto . . .
>
> A. I was unaware that that was going to be a problem and I didn't state it, it's not a status, it's not a thing where you go, 'Oh boy I'm an adjunct professor.' It's, it's a, it's a descriptor and I wasn't doing it to do anything other than describe what I did. I wasn't saying that, you know, like it's something you're, you're going around and brag about that you're a part-time unpaid professor or unpaid instructor. Why would somebody do that?[7]
>
> Q. I don't know, but you did it. You said you were an adjunct professor when you weren't.
>
> A. I didn't brag about it. I just tried to use it as a descriptor.

[45] The truth is that Fridriksson (along with several hundred others) is an unpaid, part-time clinical instructor at the University of Toronto.

[46] Fridriksson tried to explain his evidence:

> Q. Sir, you put it on a document that became an exhibit in a court proceeding where you swore to tell the truth.
>
> A. The exhibit was prepared on the way to court that morning as we were driving to court because Malte [von Anrep, lead counsel for the plaintiff] asked for it that morning and we typed it into the laptop as fast as we could, drove to the office, printed it off. I know there are, there are minor errors on it . . .

[47] Mr. von Anrep rose to clarify:

> . . . he's mistaken. He said that I instructed him to prepare a document on the way to court. What he meant was on the way to discovery. That's a document that was produced in 2008, not something [prepared] on the way to court.
>
> THE COURT: So that exhibit has been in existence for four years?

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7 I would consider this answer to be a good example of a witness in full-flustered flight.

MR. VON ANREP: Yes.

[48] The cross-examination continued:

> A. . . . Adjunct professor is not a brag, it's a, it's a statement of what I do . . .
>
> Q. But it wasn't true and it's not true.
>
> A. Well, I didn't intend it to be a statement of, I didn't intend it to be, I didn't intend to mislead anybody with it but unfortunately, you're correct. You are correct . . . I'm a part-time unpaid professor at the University of Toronto . . .
>
> Q. Well, you've elevated your status from adjunct to professor . . .
>
> A. . . . a part-time unpaid lecturer . . .

[49] While acknowledging that the University of Toronto does not use the designation "adjunct professor," counsel for the plaintiff take refuge in *The Canadian Oxford Dictionary*, which apparently defines "adjunct" as "an assistant, a subordinate person, especially one with a temporary appointment only." Counsel argue that Fridriksson was "simply saying the same thing in a different way and it is not a lie designed to deceive."

[50] I never viewed his evidence as a lie. I saw it as an attempt at academic ornamentation; a willingness to stretch the truth at the expense of accuracy.[8]

[51] In other cases and with other witnesses, this résumé-padding evidence might not be significant. However, here, it is consistent with the nature and character of Fridriksson and with his aversion to telling the *whole* truth.

(b) *adjunct professor dressed up as a professor*

[52] Fridriksson encountered a similar problem with his claim that, from 2002 to 2006, he was a professor at Brock University, in the Department of Communications Disorders:

> Q. . . . You acknowledge, sir, that you were not a professor at Brock University, right?
>
> A. I served as an adjunct there, which if you look up on, in the dictionary, I don't know if you had a chance to look it up in a dictionary about it, if you look up in the dictionary an adjunct professor is a part-time unpaid lecturer.
>
> Q. Sir, did you not say last week that you were not a professor at Brock University?

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8 For Fridriksson, truth is like a spandex undergarment: he can stretch it to fit anything.

A. I am not a professor at Brock University. I was an adjunct.

Q. But that's not what was on Exhibit No. 3 that you proffered as evidence to the court of your credentials, correct?

A. That is correct.

[53] Once more, counsel for the plaintiff retreat to the same dictionary where "professor" is defined as "a university teacher." They argue: "A professor is someone hired to teach at a university" and "that is what Fridriksson did."

[54] I will not brand someone a liar on a point such as this,[9] but I detect the start of a trend.

4. Fridriksson plays Lieutenant Columbo with Inspector Clouseau results

[55] During an overnight adjournment of the trial, and while still in the midst of his cross-examination (and no doubt stinging from the attack over his academic qualifications), Fridriksson embarked on an investigation to rehabilitate his résumé and I became a spectator to a remarkable incident. In an attempt to extricate himself from the cross-examination of Mr. Korosis on the issue of his academic pedigree, Fridriksson accused Mr. Korosis of contacting two Brock University officials and labelling him a charlatan: [Underlining added]

> A. . . . I know you were also told by, by people at Brock University that the difference, and I will quote one of, one of my friends, <u>I know you talked to lots of people trying to get somebody at Brock University to, to label me as a charlatan</u>, but you weren't successful . . . You tried to get people at Brock University to label me as something more than they actually were . . . You phone called, you called, you called them on the telephone . . . A charlatan is a person who puts their credentials higher than they actually are and you, you talked to . . . a bunch of people at Brock . . .

[56] Mr. Korosis, who was rendered slack-jawed by this accusation,[10] expressed his indignation (quite understandably). He then proceeded to carefully provide some important information to Fridriksson (who, it often will be seen, is prone to acting unencumbered by the nuisance of thinking), and put some questions to him. The matter continued for a few minutes, following which Fridriksson apologized:

> Q. Well, I'm not looking for an apology. Are you recanting, are you saying it was not true or are you saying what you said was true, that you believed it and you're simply apologizing?

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[9] Yet, really, would you buy a used car from this man?

[10] Actually, for a few moments, everyone in the courtroom became a mouth-breather.

A. I did believe it and I was wrong. I'm sorry.

Q. Do you now believe it?

A. No, I do not believe it now. I'm sorry.

Q. And on what basis did you believe it?

A. . . . I thought that you'd phoned them and made me look like a, a – it hurt my feelings – and that, that, and I'm sorry, I'm sorry. It was inappropriate for me to say that . . . I do withdraw it, and it was, it was wrong, I'm very sorry for that.

[57] Although Fridriksson professed to be sorry that he made what was demonstrated to be an utterly unfounded allegation against counsel,[11] I did not regret the incident. Why? The allegation revealed more layers to the true nature and character of Fridriksson: his quick temper; his penchant for jumping to conclusions without sufficient, or sometimes any, facts; and, his habit of imagining injustices.

[58] The Brock University issue was interesting in another respect which deserves at least brief attention. Fridriksson, in this trial, claimed to remember telephone conversations five to six years previously and, as well, he was one who purportedly made handwritten notes of important telephone calls. As I have said, while under cross-examination, he telephoned two Brock University personnel (Gabriella Doria, with Human Resources and one Professor Sivell). Fridriksson was asked when he made those calls. He said: "I think last week." Questioned as to what was said, he answered: "I asked [Professor Sivell] what he, what he'd, asked him what he'd said to you." Then, after I interjected seeking clarification, he changed his answer to: "No, just wait. No, he said he, I think he said he'd received an e-mail from you." When questioned further regarding the contents of his conversation with Professor Sivell, Fridriksson stated:

A. I, I don't remember exactly what I said. It was a short phone call and I didn't, I don't remember what was said . . . I'm not sure what I told him . . .

[59] Fridriksson placed the calls to Ms. Doria and Professor Sivell at their residences, from a desk in his house. He agreed that the calls were probably made on the day that the adjunct-professor issue arose.

[60] Fridriksson did not have notes of his conversations with Ms. Doria or with Professor Sivell:

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[11] Readers must never forget: This is the key witness for a plaintiff alleging oral fraudulent misrepresentations.

Q. And you are someone that takes notes of very important calls, aren't you?

A. Yes.

Q. Did you take a note of this very important call [to Professor Sivell]?

A. No.

Q. You're in the middle of a trial, you're in the witness stand . . . it would be the eleventh or twelfth day that you're in the witness stand?

A. Yes.

Q. And it's something that you've indicated is very important, right?

A. Yes. Yes.

Q. You didn't think to make a note?

A. It was a short conversation.

[61] Having excused the lack of handwritten notes because "it was a short conversation" ("a minute or two" he thought), Mr. Korosis pointed out that there were other telephone calls in this trial, of a similar length, for which Fridriksson had made notes.

[62] When questioned further about the lack of handwritten notes of the calls, Fridriksson spun his wheel of excuses and selected another one:

A. I didn't make a note because I didn't have a pen.

[63] Even the time of the telephone calls was foggy to Fridriksson:

Q. So, do you know when roughly it would have been that you called [Ms. Doria]?

A. No.

Q. Not a clue?

A. I don't know exactly what time.

Q. Can you give me a range of times that you might have called her, like, between this hour and this hour?

A. In the evening.

Q. You don't recall, sir, whether it was between five and six, or six and seven, or five and seven, seven and eight, you don't have any recollection of that?

A. I don't, I don't recall.

Q. And that would be the same for the call you placed to [Professor] Sivell?

A. Yes.

Q. You don't recall sir whether you made the calls before dinner or after dinner?

A. It was, no I don't recall . . . I don't recall what night it was, actually.

[64] So, to summarize: Fridriksson could not provide any meaningful detail in respect of two telephone calls that he made about matters of such importance to him that, in the midst of his cross-examination, he donned his investigator's hat and telephoned two Brock University personnel (with whom he was not acquainted), at their residences. Yet, he testified for days and days in this court about telephone calls that he made and received six and seven years previously.

5. Exaggerations and untruths

[65] At Tab 540 of Exhibit No. 1, there are three pages of undated handwritten notes made by Fridriksson. He was cross-examined on these notes in which he sets out sums of money he says are owed to the plaintiff by the defendants as "payment due for work done" by the plaintiff. When Fridriksson began to resile from his professed entitlement to the sums claimed, he was cross-examined by Mr. Korosis:

Q. Was the note made with the intention of being truthful?

A. It was made in anger and it's, it's, it's inflated and exaggerated.

Q. So, your, four, when you say 'four hours time chasing [hearing] aid,' you picked that out of thin air?

A. Probably.

[66] He was cross-examined on whether all of his handwritten notes at Tab 540 were exaggerated:

A. Not every single thing in the note is exaggerated. Some of the things in it are exaggerated . . . there are parts of this note that, mostly with the dollar figures, I, I wasn't expecting to be paid this. I was just angry and so I was writing down, I was writing down extreme dollar figures here.

Q. You didn't expect to be paid because they're exaggerated, correct?

A. Because they're, because they're exaggerated, yes.

[67] When Fridriksson initially testified about Tab 540 he said that he was not expecting to be paid for *any* items, but he ended his evidence by saying that he was entitled to be paid for *some* items:

> Q. . . . in the first instance, when we started talking about this document at Tab 540 of Volume 9 of Exhibit No. 1, you said that you weren't expecting to get paid for any of this because it was exaggerated. Did you not say that?
>
> A. I probably did.
>
> Q. And now you're saying something different?
>
> A. I didn't read the document carefully enough. I should have read it much more carefully. I'm looking at it more carefully now.[12]

[68] However much Fridriksson may wish to downplay the significance of the handwritten notes at Tab 540, he thought enough of them that they were transcribed for his counsel before examinations for discovery, they were part of the affidavit of documents of the plaintiff and they were tendered on behalf of the plaintiff as an exhibit at trial. That is a lot of effort to record and present evidence of amounts for which reimbursement is not sought.

[69] Later in his cross-examination, the following exchange occurred:

> Q. . . . are there any other documents put before the court that are exaggerated or that contain exaggerations in them?
>
> A. Yes.
>
> Q. So, had I been asking you, had I known that was the case earlier on and I had been asking you every time that I asked you about a document, if I said, 'Is there an exaggeration there?' would you have told me?
>
> A. Yes, I think so. If you would have asked the question I would have, I would have said 'Yes.'

[70] Catch me if you can.

[71] This flurry of fiction at Tab 540, in addition to exaggerations, contains untruths. I will mention two of them. Firstly, Fridriksson stated in his notes that he was entitled to payment of $1,675 in respect of a hearing aid for the patient, Leslie Stamp (I will have occasion, later in these Reasons, to mention this patient again). However, in cross-examination, Fridriksson stated:

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[12] Again, this is the key witness in a claim based on allegations of oral fraudulent misrepresentations.

> A. Okay and I don't expect to get paid for the hearing aid because the hearing aid ended up being free. Okay? So I don't expect to get paid for that.

[72] Secondly, in these handwritten notes Fridriksson wrote that a patient named Malcolm Currie was dissatisfied with his hearing aid and, when it was returned, the supplier (Siemens Hearing Instruments) credited the Lewis' account and not the account of the plaintiff. This was untrue, as seen in the following answer given in cross-examination:

> A. Regarding Malcolm Currie, I don't expect to get paid that money because I've since seen that when I sent the hearing aid back to Siemens, Siemens put that money, the return money, into our account.[13]

[73] Without the cross-examination of Fridriksson, this information, and much, much more, would never have been revealed. Not a word that he writes or speaks can be accepted at face value.

6. "All the madness that's in your head"

[74] Fridriksson was cross-examined by Mr. Korosis about his penchant for angry note-taking:

> Q. You get all worked up in a frenzy, correct?
>
> A. Yes, sometimes.
>
> Q. And then you put to paper all the madness that's in your head, correct?
>
> A. Sometimes.
>
> . . . . . .
>
> Q. . . . you're prone to do this [write notes or documents 'not fully true'], right?
>
> A. Yes.

[75] This angry temperament was visible throughout the documentary evidence.

7. Fridriksson and his selfie notes

[76] A unique evidentiary feature of this case is the presence of numerous handwritten notes made by Fridriksson (selfie notes?), allegedly memorializing telephone conversations that he had with Dee Lewis and Terry Lewis and with the two accountants. My initial impression was: "Goodness, gracious, this is an organized man whose fastidious attention to detail will make my task easier."

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[13] Siemens Hearing Instruments (usually referred to in the evidence as "Siemens") was a supplier of hearing aids to the defendants and their three clinics.

However, that impression faded as cross-examination revealed the self-serving fiction of the notes. There are so many instances of this fiction that it would be pointlessly redundant to deal with each one. Thus, I will select only a few representative examples.

[77] It cannot be overemphasized that these handwritten notes are the basis for the bulk of the allegations of fraudulent misrepresentation being made by the plaintiff. Their accuracy is crucial to the case for the plaintiff. It is the position of the defendants that most of the notes are pure fabrication, concocted long after the telephone calls occurred and that others simply are inaccurate, as they suffer from the exaggerations and other shortcomings prominently seen in all of the evidence from, or associated with, Fridriksson.

(a) *September 7, 2006 – a telephone call that was over before it began*

[78] Fridriksson produced two pages of handwritten notes purporting to be in respect of a call that he made on September 7, 2006 to Terry Lewis at his cellular telephone number. The notes contain 15 questions to be asked that Fridriksson maintains were prepared before the call and in consultation with his accountant "in response to the revelation by Andy Gunarsons that a Certified Business Valuation never existed" for the Niagara Falls Clinic. The notes show a start time for the telephone call of 10:20 a.m. and an end time of 9:51 a.m. Fridriksson was cross-examined on this curiosity and he replied:

> A. I have no explanation. I've tried to think about how that could happen. Obviously I've looked at this note before and I have no explanation.

[79] He was questioned further:

> Q. So you know that there was a discrepancy between the start time and the end time?
>
> A. Yes.
>
> Q. Something didn't match up?
>
> A. Yes.
>
> Q. For how long [did you know]?
>
> A. For a long time. For years.

[80] Fridriksson was asked why he had not mentioned this discrepancy when he testified in-chief:

Q. And when you discussed this note in your evidence in-chief you didn't think it important that you might want to bring it to the attention of the court?

A. It didn't occur to me.

Q. But you've just said that you've known about this for years?

A. It, it did not occur to me during the evidence in-chief to bring that to the notice of the court.

[81] Had the matter ended there, it would not be worth mentioning. However, Fridriksson, as he did so often and unsuccessfully during the trial, conjured up an ill-thought-out explanation:

A. This could be wrong, I'm going to guess and I shouldn't guess, but this could be a wrong clock somewhere.[14] I don't know.

THE COURT: Sir, I think you've learned so far in the trial that guessing doesn't help the court.

A. Sorry

[82] This was Day 16 of the trial and Fridriksson was still infusing his testimony with wild, random and uninformed guesses.[15]

[83] There is a Bell Canada telephone record in evidence showing the September 7th call. It began at 10:18 a.m. and lasted nine minutes. I do not think that the agenda of 15 questions listed in the handwritten notes could have been discussed in such a brief period of time.

[84] Karl Bowley, the accountant for the plaintiff, was questioned in-chief about September 7, 2006 and the testimony of Fridriksson that he (Fridriksson) had prepared the 15 questions in consultation with him (Bowley). Bowley stated that, around this time, Fridriksson "was calling daily" but he does not remember the conversation that Fridriksson says led to the notes of September 7, 2006.

[85] At the conclusion of the handwritten notes (following "End Call 9:51"), there is an addendum that reads:

10:10 a.m. [St. Catharines]

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[14] The start time was fairly accurate, based upon telephone records, which means that for the "wrong clock" explanation to work, it would be necessary for Fridriksson to have used a different clock when recording the end of the call than he used when he noted the start of the call. Does this make sense to anyone except Fridriksson?

[15] I point out that it is not the discrepancy in times that is important (anyone could make that mistake); rather, it is the willingness of Fridriksson to say whatever enters his head, as an explanation for the discrepancy, that attracts the attention of the court.

> Call to Karl [Bowley] – related contents of call told him I would ask Andy [Gunarsons] such questions
>
> Asked him to ask Andy if Donna [Bradley] has list

[86] Interestingly, later in the trial, the cross-examination of Fridriksson dealt with a telephone call to Karl Bowley at 9:40 a.m. on September 7, 2007 (the year is obviously an error) for which there are the ubiquitous handwritten notes. Fridriksson purported to have a eureka moment, declared that this call led to the above 10:10 a.m. call and then he launched into one of his more helium-infused explanations.

[87] Fridriksson testified that the 9:40 a.m. notes should have been included with the notes of the call at 10:20 a.m.:

> A. This should have been part of this tab, but it said September 7, 2007 (sic), so I think what happened is the secretary – I don't know, I'm – this is a guess. I think possibly what happened, that the secretary, and I don't have probability or anything, that this . . .
>
> THE COURT: Sir, excuse me. I'm not interested in your guesses.
>
> A. I don't know what happened. I do not know what happened with this piece of paper, but it got stuck away in a box . . .

[88] Fridriksson, thinking that he had solved the mystery of the three inconsistent times shown on the notes for September 7, 2006, pressed on:

> A. Okay, so, and then we have down at the bottom of the page, that says on the typewritten version, it says, '10:10 St. Catharines.' It's actually '10:40 St. Catharines.' It's not 10:10.
>
> MR. KOROSIS: What's 10:40?
>
> A. Down at the bottom of the second page. That's the phone call to Karl to relate the contents of this phone conversation. And I know, I know I guessed yesterday. That was really stupid of me . . . yesterday I was completely finished and exhausted and I made a stupid decision to guess and I'm not, I'm not gonna guess. I know what this is. I understand what this document is.

[89] The assertion by Fridriksson that the time of 10:10 is actually 10:40 is nonsense. The handwriting clearly says 10:10 and the typed version also says 10:10.

[90] I think that Fridriksson concocted this three-part set of notes long after September 7, 2006 to bolster the allegations against the defendants and, while

doing so, jumbled the times. Once again, it is not the error in times that is important; rather, it is the unabashed lengths to which Fridriksson goes to explain the error. If a lie is used to bolster an alleged truth, what does that do to the alleged truth?

(b) *September 27, 2006 – two almost-identical notes for two different calls*

[91] It is alleged by the plaintiff that, as part of the purchase and sale, the defendants were to mail 5,000 postcards to patients of the Niagara Falls Clinic. Fridriksson produced handwritten notes, two pages in length, dated September 27, 2006 and timed "12:02" (presumably p.m.). The notes are titled: "Phone Call to AG [Andy Gunarsons, the accountant for the defendants] re: postcards."

[92] Also produced was a different set of handwritten notes, also two pages in length and dated September 27, 2006, but timed "2:02 p.m." These are headed: "Wed. Sept. 27 Call to Andy Gunarsons."

[93] The two sets of notes are almost identical. I will give some side-by-side examples:

The notes of the 12:02 p.m. telephone call	The notes of the 2:02 p.m. telephone call
"SF [Stefan Fridriksson] – Both Terry and I agreed that they [the postcards] are vital to the success of the clinic. I don't care if they are Siemens.	"SF [Stefan Fridriksson] – Andy I told Karl [Bowley, the accountant for the plaintiff] to tell you this morning that these postcards are vital to my success and it does not matter that they are Siemens.
SF – What does not make sense to me is that he would spend the money to print 5000 cards and then only send out 3000 – Is he worried about postage?	SF – What does not make sense to me is that he would print 5000 postcards and then say he only wants to send 3000 – It sounds like he doesn't want to spend the money on postage and labor.
SF – Tell him I expect him to honour his agreement – Send out the p cards.	SF – Tell him I expect him to honour what he told me earlier – send out the postcards.
SF – Andy stated again that Terry intends to send just 3000 p cards because it will overwhelm the office if he sent 5000.[16]	SF – Andy states that Terry intends to send just 3000 postcards because it would overwhelm the office if he sent all 5000.
SF – I tell him to send all 5000 and we will contend with the flood.	SF – I tell him to send all 5000 and we will contend with the flood.
SF – I tell Andy I have hired a fulltime audiologist – they work there just 2 days a week.	SF – I tell Andy I have hired a fulltime audiologist – they are there just 2 days a week.

16 Andy Gunarsons, when questioned about this, testified that he does not recall discussing these figures (3,000 and 5,000) with Fridriksson.

AG [Andy Gunarsons] – Andy says if 5000 people get postcards you could get 500 people calling at once	AG [Andy Gunarsons] – Andy says if 5000 people get postcards you could get 500 people calling at once
SF – Just send the damn post cards as promised . . .”[17]	SF – Just send the damn postcards as promised . . .”

[94] The issue of the postcards took on surprising prominence in the trial. Fridriksson was cross-examined about the two telephone calls:

> Q. On that day [September 27, 2006] it was so important to you that you made a call at 12:02?
>
> A. Yes.
>
> Q. And you made another one at 2:02?
>
> A. That’s right.
>
> . . . . . .
>
> Q. Would you agree with me that your latest note production touches upon the same topic we reviewed yesterday, namely the mailing of the postcards?
>
> A. Yes.
>
> Q. Okay. Why would, why did you make two calls to Mr. Andy Gunarsons two hours apart about the same issue . . .?
>
> A. Because this was a very acrimonious issue . . .

[95] Fridriksson could not explain the two sets of almost identical handwritten notes:

> Q. How do you end up with the same chronicling, same noting of two different conversations at two different times, but it’s identical?
>
> A. I don’t know.

[96] After denying that these notes were “manufactured . . . for the purpose of supporting the plaintiff’s case and allegations of fraud,” Fridriksson stated, perplexingly:

> A. I will tell you that this stuff was passed on to [counsel] as we were, for months, we were trying to arrange arbitration . . . This was never intended to come anywhere near a courtroom. This is simply for [counsel] so [he] can see what had happened. So there’s no possibility that this was put forth to substantiate fraud . . .

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17 Mr. Gunarsons disputed most of the contents of the September 27th notes. He specifically denied this particular statement from Fridriksson, saying: “I would not have tolerated this and hung up.”

[97] The landline and cellular telephone records of Fridriksson were entered as exhibits at trial and nowhere is there a reference to either the 12:02 p.m. call or the 2:02 p.m. call.

[98] I sought clarification from Fridriksson in respect of his handwritten notes for the 2:02 p.m. call and whether the call was to or from Andy Gunarsons:

> THE COURT: My [bench] notes show back in July [of 2011 when Fridriksson was testifying in-chief] that you described this as a telephone call from Andy Gunarsons.
>
> A. I think it was a telephone call from Andy Gunarsons.
>
> THE COURT: But your notes say 'Call to Andy Gunarsons'?
>
> A. I know it does. I know it does. I think it was a call from Andy Gunarsons though.
>
> THE COURT: So, your notes are being made years before your testimony?
>
> A. Yes.
>
> THE COURT: And you are saying your notes are inaccurate but your testimony is correct?
>
> A. This could be a call from Andy Gunarsons or it could be a call to Andy Gunarsons.
>
> THE COURT: Yes, I can figure that out . . . But my point is, your notes were made years in advance of your testimony . . . years closer to the point in time when this [call] allegedly occurred . . . and I simply want to clarify that you are saying today that your testimony is more accurate than your notes?
>
> A. I am saying that, I am saying that I can only use possibility . . . It is possible that I wrote down 'Call to Andy Gunarsons' because I was making a call to him earlier and that I was preparing to make notes at that point and then I simply made the notes. But I don't, at this point, I don't truly know. I can't look back and say, 'But I know I had this conversation with Andy Gunarsons.'

(c) *September 28, 2006 – two telephone calls*

[99] For September 28, 2006, Fridriksson produced handwritten notes of two telephone calls, one at 9:13 a.m. from Andy Gunarsons (the accountant representing the defendants) and the second, at 3:50 p.m., to Andy Gunarsons.

(i) <u>9:13 a.m. telephone call from Andy Gunarsons</u>

[100] Fridriksson testified that, while in his automobile, he received a call on his cellular telephone from Andy Gunarsons at 9:13 a.m., on September 28, 2006.

[101] As with the other handwritten notes tendered in evidence by Fridriksson, a typed version was prepared by his secretary about, he said, "six months or more later." All of the typed versions of the handwritten notes bear the same product label which, in this instance, reads:

> These are exact word for word copies of handwritten notes from phone calls between Terry Lewis' accountant Andris [Andy] Gunarsons and Stefan Fridriksson. They are made in order to make it easier to read. All spelling mistakes and errors of grammar etc. have not been corrected.

[102] Despite this lofty promise, there are differences in the notes. They are not word for word. On the typed version, we see: "Written down at my office in Ft. Erie approx 9:45." This phrase is not in the handwritten notes. Fridriksson was questioned about the discrepancy:

> Q. So, are you then suggesting that what really happened was your secretary would have typed up the actual notes, word for word?
>
> A. Yes.
>
> Q. And you then would make additional entries on those typewritten notes?
>
> A. On, I guess, on a rare occasion, I did.

[103] There are two problems with the addition of this particular information. Firstly, after being taken through his telephone records for the morning of September 28th, Fridriksson was forced to agree that the notes had not been made in Fort Erie:

> Q. You previously gave evidence that you made these notes in Fort Erie?
>
> A. Yes. I did.
>
> Q. You would agree with me that you couldn't have made these notes in Fort Erie?
>
> A. You're right.

[104] Secondly, the time of 9:45 a.m. is incorrect. The telephone records show that Fridriksson was in his automobile at that hour and so the notes could not have been "written down" at his office. Although Fridriksson would not admit to this inaccuracy, he conceded, in cross-examination, that it was a possibility and that he had guessed at the time when he inserted the information in the typed notes:

> Q. The other thing that's of interest to me on these notes is, you say that you made these notes in Fort Erie at approximately 9:45 a.m.

A. Yes.

Q. Would you agree with me, sir, that you were in all likelihood still travelling and in your car at 9:45 a.m. that day?

A. I can't be sure.

Q. You can't be sure, but there's a good probability of that?

A. There's a possibility, yes . . . it is possible . . . you're right, I shouldn't have guessed. I guessed.

Q. Why the need to guess? If these are notes taken contemporaneously at the time that you say the call was, was made or soon thereafter, why guess?

A. It was a, a bad idea to guess. I admit that.

[105] Another problem is that the handwritten notes bear a time of 9:13 a.m., whereas the typed notes say 9:15 a.m. The time of 9:13 a.m. corresponds with the telephone records and I agree with the suggestion made by Mr. Korosis, in his cross-examination, that it was added to the notes by Fridriksson after he had received and reviewed those records. Fridriksson denied this suggestion.

[106] As well, the telephone records indicate that the call at 9:13 a.m. lasted no longer than *two minutes*. It is improbable that this was sufficient time within which to discuss the matters in the handwritten notes,[18] which I will now set out:

Call from Andy Gunarsons 28 Sept 2006 at approx 9:13
On my cell in car 9054017594

Approx what was said:

SF [Stefan Fridriksson] – I spoke to Mike Mann, our lawyer and told him what was going on.

I told him you had failed to deliver the things that you promised to deliver. Specifically:

a) [patient] list
b) access to Ginette
c) proof of schedule and bookings
d) proof of [numbers] of [patients]
e) mailing of the postcards
f) proof of # of [hearing aids] fit per month

You and Terry have made statements and represented things to Karl [Bowley, the accountant for the plaintiff] and I. You promised to provide us with documents to

---

18 Bear in mind that this was a conversation, not a soliloquy.

> back up things you represented to be true. Instead you have made excuses and now you according to Karl you are claiming that to give these details would be a breach of the privacy act.
>
> You promised full disclosure. Deliver it.
>
> Andy once again promised we would have the details and Carol could meet Ginette but did not give a time or a date when this would happen.

[107] In his evidence, Andy Gunarsons stated that, although he had no recollection of this telephone call: (1) he never promised a patient list and does not have such a list; (2) as an accountant, he does not have access to the "schedule and bookings"; (3) he does not have the information relating to the number of patients or the number of hearing aids fit per month and so he cannot promise what he does not have; and, (4) the Letter of Intent provided that the mailing of the postcards "was not to be done." Therefore, Andy Gunarsons disputes the suggestion by Fridriksson that this telephone conversation occurred. I agree with Mr. Gunarsons.

[108] In addition, the telephone records indicate that the 9:13 a.m. call was to Burlington. Mr. Gunarsons testified that both his residence and office at that time were in Oakville. Fridriksson may have received a telephone call at 9:13 a.m., but it was not from Andy Gunarsons. For Fridriksson to be accurate, the telephone records should show the 9:13 a.m. call as outgoing from Oakville, which is not the case.

[109] Fridriksson was cross-examined on the purpose of the typed notes in this trial:

> Q. These are supposed to be the exact copies. You, you made these transcriptions for the sole purpose so that your notes could be read and understood. Correct?
>
> A. Yes.
>
> Q. And for the sole purpose that they could be relied upon in this legal proceeding. Correct?
>
> A. That's correct.

[110] And he was questioned on their reliability:

> Q. But sir, I say to you that they are completely unreliable.
>
> A. I agree that there are parts of it that are not exactly transcribed from the back to the front and I will agree with you that I did modify this part here and wrote that in there and I can see that I was wrong when I wrote it in there, and this was

transcribed months later and I wrote that down and it's, if you, the accurate one is going to be the initial notes.

Q. But sir, that's, that's just a matter of convenience. Every time we call you on some issue or error, or discrepancy between your notes you give evidence saying you should trust this one, or you should trust that one. The reality is we can't trust any of them. Is that correct?

A. That's not correct.

[111] Another curious aspect of the 9:13 a.m. call is that, in his handwritten notes, Fridriksson, in addition to inserting the fact that the call was made on his cell phone, also wrote in his cell phone number. He was asked why:

Q. Why did you write your cell phone number on your handwritten notes?

A. I don't know why.

Q. Was it important that you write it on there?

A. I guess so, I, I don't know why I wrote it in there.

[112] It is probable that Fridriksson inserted the cell phone number when he was inventing these notes and attempting to have them match up with the telephone records. It was a clumsy attempt to create continuity.

[113] I find that the handwritten notes of the September 28th call, at 9:13 a.m., are of a self-serving, fictional conversation.

(ii) <u>3:50 p.m. telephone call to Andy Gunarsons</u>

[114] The second set of handwritten notes for September 28, 2006, relates to a telephone call that Fridriksson placed to Andy Gunarsons at 3:50 p.m., from the lobby of the W Hotel in Manhattan.

[115] For his trip to Manhattan, Fridriksson testified that he departed from the airport in Buffalo, New York:

Q. And you indicated you flew from Buffalo to LaGuardia?

A. That's right.

[116] Yet, when Mr. Korosis took Fridriksson through his telephone records for that morning, in the course of reviewing other matters, it seemed that a Buffalo departure was improbable and Fridriksson became aware of that fact:

Q. You know what's interesting about September 28, 2006?

A. It's when I left for New York.

Q. From Buffalo, right?

A. That's right . . . I'm pretty sure we left from Buffalo.

Q. But it appears that your cell phone was travelling in the other direction at 10:56 a.m. Correct? [The telephone records showed a series of calls moving from Fort Erie to Toronto at about the time of departure.]

A. Yes.

Q. . . . it appears you were in Toronto at 10:56 a.m.

A. Yes.

Q. So, if you're in Toronto at 10:56 a.m. on the 28th day of September 2006, how much time do you think it would take you to go from Toronto all the way to Fort Erie, cross the border, and get to the Buffalo International Airport. How much time would it take you, sir?

A. We must have flown out of Toronto.

[117] Then we had this interesting exchange: [Underlining added]

A. Well, what it, what it does do is that it shows that I couldn't have been possibly looking at phone records, doesn't it, when I wrote the note.

Q. That, that doesn't show that at all, it shows that when you looked at the phone records you didn't cross-reference them very well with the other lies or, you know, misrepresentations you have made here.

A. Well, you're suggesting that I, that I should be able to look at this phone record and write down stuff. Obviously, I must not have looked at the phone record otherwise I would have realized that this was wrong.

Q. No sir, what I'm suggesting to you is you weren't tuned into it. You weren't bright enough to understand all the other issues around your telephone calls of that day.[19] You made the notes . . . to push and advance your agenda. Is that correct?

A. That is not correct.

[118] I might as well set out the entire contents of these handwritten notes:[20]

SF [Stefan Fridriksson] – got your message from Karl [Bowley]

– what is this about 3000 postcards

19 Bingo!

20 Length and tedium already are lost causes in these Reasons.

> – Terry and you said 5000 before – one for each [patient]
>
> AG [Andy Gunarsons]– he says it because he does not want to overwhelm you with the numbers of [patients] tried to say their (sic) Siemens cards and I don't use Siemens[21]
>
> SF – my concern is that he will send all 5000 postcards – not just 3000
>
> Tell him to stop fooling around and send all 5000 at once, I do not care if they are Siemens postcards just send them as promised

[119] When Andy Gunarsons was questioned on this 3:50 p.m. call, he agreed that he had spoken to Karl Bowley about one postcard being sent for each patient. However, he disputes any mention of 5,000 and he challenges the truthfulness of the statement, "Tell him to stop fooling around and send all 5000 at once . . .", as he would not have tolerated such a tone and he "would have hung up."

[120] Near the end of his cross-examination, in respect of the 3:50 p.m. call, Fridriksson was asked:

> Q But you expect us to rely on these notes in this proceeding, correct?
>
> A. Yes.
>
> Q. And you expect us to rely on your other notes of telephone calls in this proceeding, correct?
>
> A. Yes.
>
> Q. And in this proceeding the plaintiff is alleging misrepresentation and fraud, correct?
>
> A. Yes.
>
> Q. Well, I ask you sir, are you not misrepresenting things here by way of your notes? Yes or no?
>
> A. There are things that are not accurate there, you're correct.
>
> Q. So you are misrepresenting things by way of your notes?
>
> A. Yes.

(d) *October 4, 2006 – 3:10 p.m. and 11:06 p.m. telephone calls to Karl Bowley*

[21] As I mentioned some time ago, Siemens was a supplier of hearing aids for the defendants and their three clinics.

[121] Two other sets of handwritten notes tendered by Fridriksson were of telephone calls that he says he made to his accountant, Karl Bowley, on October 4, 2006 at 3:10 p.m. and at 11:06 p.m., respectively. The handwriting for the 3:10 p.m. call and the typed version of the 11:06 p.m. call state that the calls and the notes were made in St. Catharines. Fridriksson was cross-examined on these notes and, at the conclusion thereof, I was confused and sought clarification from him:[22]

> THE COURT: And the [3:10 p.m.] call was made by you in St. Catharines?
>
> A. No, it was not.
>
> THE COURT: Even though 'St. Catharines' appears there?
>
> A. Yes.
>
> THE COURT: We are to ignore that?
>
> A. Yes.
>
> THE COURT: And we are to ignore that because?
>
> A. Because it's not correct.
>
> THE COURT: When did you insert 'St. Catharines' there?
>
> A. I do not know.
>
> THE COURT: But it would be earlier than today.
>
> A. It would be earlier than today.
>
> THE COURT: And whatever you had in your mind 'earlier than today,' your memory today is more accurate than it was then?
>
> A. No, obviously not.

[122] The handwritten notes of the 11:06 p.m. telephone call also erroneously show that they were made in St. Catharines. Fridriksson testified that they were made when he was in New York.

[123] As for the contents of the two telephone calls, the one at 3:10 p.m. includes the following:

> Asked Karl [Bowley] to put a request to Andy [Gunarsons] in writing because he seems to be refusing to return my phone calls or messages left on his answering

[22] Usually, I wait until after re-examination to seek clarification from a witness. However, in this case, re-examination could be weeks later and the point would be forgotten in the fog of time.

> machine [In his testimony, Mr. Gunarsons disagrees that he was refusing to return the telephone calls.]
>
> Remind him that he promised Carol [Klassen] unfettered access – his words – to the books, schedules, the files, the billings etc. etc. etc. . . . Said Carol could go to the [Niagara Falls] Clinic this Friday and spend the day.

[124] In his evidence, Mr. Gunarsons denied ever making such statements. His instructions from the defendants were that there was to be no access to the Niagara Falls Clinic until there was money in hand. I accept his evidence as the more probable.

[125] The handwritten notes for the 11:06 p.m. telephone call, state:

> KB [Karl Bowley] met with Andy [Gunarsons] – good discussion – will be able to examine this more closely over next several days but the [numbers] look good.
>
> SF [Stefan Fridriksson] – when should we consult
>
> KB – next week I think
>
> SF – when can Carol go to [Niagara Falls] to complete due diligence re [number of patients], [number of hearing] aids, schedule etc.

[126] In his cross-examination, Karl Bowley stated that he did not specifically recall this conversation.

(e) *November 10, 2006 – two notes for the same telephone call*

[127] On November 10, 2006 (the day following the completion of the purchase and sale), Fridriksson (along with his wife, Carol Klassen) attended the Niagara Falls Clinic and met with Ginette Galati, the receptionist. While there, Fridriksson says that he had a telephone conversation with Terry Lewis at 12:32 p.m. during which he made handwritten notes. In fact, he produced two sets of notes for that conversation, explaining that he misplaced the first set and "recreated" the second set (following which he found the first set). I will set out both for comparison:

First set of handwritten notes	**Second/recreated set of handwritten notes**
"Nov 10 Phone Call to Terry Lewis 12:32 [p.m.]	"Nov 10 call to Terry Lewis re: HC 12:32 [p.m.]
Greetings etc.	Terry answered. Asks if I got the stuff in the back office.
SF – Did you mail the letter of intro and the postcards.	I ask him what stuff.
TL – No, there (sic) in the back office.	
SF – You were supposed to mail them	

according to the agreement.	
TL – You can mail them I did not have time to send them out. It will be no problem. They are in the back room with stamps envelopes and mailing labels already addressed You just have to send them out.	He says he did not have time to send out the postcards and letters of intro so instead he had them shipped to NF office. Says there are 5000 postcards, letters of intro, envelopes, postage and printed labels in the back storage room.
SF – That was not what we agreed to – it says you were supposed to mail them at your expense.	I told him that he was supposed to send them – that it says so in the agreement.
TL – Does not answer.	He does not answer.
SF – Said goodbye.”	I say goodbye.”

[128] His testimony regarding this telephone call and the two sets of handwritten notes is problematic in several respects.

(i) Who placed the call?

[129] At first, Fridriksson said that this was a telephone call *to* Terry Lewis:

Q. Okay, and this is a telephone call from you to Terry Lewis . . .?

A. That’s correct.

[130] But, he said otherwise later:

A. . . . Ginette, Carol and I were standing beside one another when he phoned, when Terry phoned us.

[131] And even later:

Q. Okay, but you got a call, you got a call?

A. Yes. No. I think I called him.

[132] And still later:

Q. And you called Terry . . .?

A. I think I, either I called Terry or Terry called me, but I think it’s I called Terry.

[133] Why he would not be certain as to who called whom is puzzling, as both sets of handwritten notes bear the heading, “Call to Terry Lewis”:

Q. Well, your notes say ‘Call to Terry Lewis’?

A. Well then, it’s I called him.

[134] However, there are other peculiarities regarding the November 10th telephone call.

(ii) Notes misplaced and recreated

[135] Fridriksson was cross-examined on the misplaced notes and their recreation:

> Q. . . . there are two separate notes of the same telephone call. Is that correct?
>
> A. That's correct.
>
> Q. . . . you lost the first set or misplaced the first set of notes. Is that correct?
>
> A. Yes.
>
> Q. The [second set] are the recreated notes?
>
> A. That's correct . . . the notes that I made afterwards because I couldn't find [the first set].

[136] Fridriksson testified that the second set of notes was made 10-15 minutes after the first set:

> Q. . . . do you recall when you wrote or recreated the second set of notes from that phone call?
>
> A. About fifteen minutes later.
>
> Q. Fifteen minutes later. So you had a telephone call at 12:32 [p.m.], you took notes contemporaneously while you were on the call?
>
> A. Yes.
>
> Q. You misplaced those notes?
>
> A. Yes.
>
> Q. And fifteen minutes later you decide to . . .
>
> A. Ten to 15 minutes later.

[137] To appreciate the likelihood that the first set of notes would be misplaced and recreated within such a short period of time, some additional information is helpful. Fridriksson testified that, when he made the telephone call, he was at the front counter or desk in the reception area of the Niagara Falls Clinic. He says that his wife and Ginette Galati "were right beside me". He made the first set of notes on his "own lined paper pad" and explained, "I must have ripped them off because they weren't on the [pad], because I couldn't find them":

> Q. So after you left the counter [following the telephone call] the three of you collectively walked to the back office?
>
> A. Yes.
>
> Q. And you went to the back office for what purpose?
>
> A. To find the things that Terry said were in there.
>
> Q. Okay and you spent between 10 and 15 minutes following the completion of the call in the back office?
>
> A. Yes.
>
> Q. And were Ginette and [your wife] with you at that time?
>
> A. Yes.
>
> Q. The whole time?
>
> A. I believe so. The whole time, yes.
>
> Q. Okay. So there's three of you milling around the back office looking for the things Terry mentioned to you during the phone call and that you took notes of, correct?
>
> A. Yes. Yes.

[138] Consequently, while looking for the items that, 10-15 minutes earlier, Terry Lewis allegedly said were in the back office, Fridriksson maintains that he misplaced his first set of handwritten notes. He was asked about his efforts to find these notes:

> Q. Did you make any effort the day, the time that you misplaced the notes to actually look in the back office to see where they might have been?
>
> A. I looked all over for them.
>
> Q. And you couldn't find them that day?
>
> A. Couldn't find them that day.
>
> Q. . . . at some point you gave up on looking for them at that point in time, right?
>
> A. Yes.
>
> Q. You decided to recreate the notes?
>
> A. That's right.

> Q. And how did you do that?
>
> A. I asked Carol and Ginette, 'Do you remember what he said?' . . . What was, what I had written on the notes . . . I [had] read them the notes and I asked them, 'Do you remember what he said?'
>
> Q. Okay. So you're saying now that, okay, when did you read the notes to them?
>
> A. After the phone call.
>
> Q. The original set of notes?
>
> A. Yes . . . I said, he said this, he said that this stuff was in the back office.
>
> Q. Okay and then you all went to the back office?
>
> A. Went to the back office and looked for the stuff.

[139] It may be useful to know that the back office is "three paces" from the reception area where this telephone call occurred and the soon-to-be-misplaced notes were made:

> Q. So this, it's a room that's eight feet by 12 feet according to what you said earlier, roughly?
>
> A. Approximately.
>
> Q. It's three paces behind the front reception area?
>
> A. Yes.
>
> Q. And the notes of this call which you conveyed the information of the call to Ginette and Carol, got misplaced in this little, tiny area?
>
> A. There's, it's a messy room. It's filled with junk.
>
> Q. And no more than 15 minutes later you decided, 'I'm not going to bother looking for these notes, I'm just going to recreate them'?
>
> A. I looked for the notes, I couldn't find them and so I recreated them.

[140] Fridriksson testified that "three or four days later," the first set of notes was found "on the shelf in the back office."

[141] What a story.[23]

(iii) <u>Attempt to distinguish recreated notes by use of the past tense</u>

---

[23] Is The Walt Disney Company hiring?

[142] Fridriksson was questioned about the apparent lack of any indentifying feature of the second set of notes to mark them as a recreation. He explained that the recreated notes were written in the past tense:

> Q. Sir, you agree with me that there's no notation on the recreated notes that they are in fact recreated notes?
>
> A. You're right. That's correct, but it's written in past tense, so it shows it is recreated.
>
> Q. So, you're telling me that within 15 minutes of taking the original notes, you couldn't find them . . . you decide to recreate the notes, you consciously turned your mind to write the notes in the past tense to show that they're recreated? Is that what your evidence is?
>
> A. My evidence is that I wrote it as, as it was past tense.

[143] Mr. Korosis took Fridriksson through the second or recreated set of handwritten notes looking for the past tense. Fridriksson was asked about each line of the notes:[24]

> Q. . . . Is that past tense?
>
> A. No, it's not. You're right.
>
> Q. . . . Is that past tense, yes or no?
>
> A. No, it's not.
>
> Q. . . . Is that past tense?
>
> A. No, it isn't. You're right.
>
> Q. So were you lying to us when you said it was past tense?
>
> A. I wasn't lying to you I just made a mistake.[25]

[144] Mr. Korosis continued with his line-by-line dining:

> Q. . . . Is that past tense?
>
> A. It's not past tense. I made a mistake.

---

[24] I do not know who enjoyed this cross-examination more, Mr. Korosis or me. The only thing missing was popcorn.

[25] This testimony is representative of a pattern seen throughout the evidence of Fridriksson. After giving an answer that may or may not be true, he attempts to justify the answer with an explanation that is demonstrably false, thereby removing all doubt that the initial answer is untrue. At all material times, Fridriksson's feet were a perfect fit for his mouth.

Q. . . . Is that past tense?

A. That's not past tense. Once again, I made a mistake.

Q. . . . Is that past tense?

A. It's not.[26]

[145] I do not recall that either Carol Klassen or Ginette Galati was questioned on the issue of the misplaced and recreated handwritten notes, leaving Fridriksson's silly saga uncorroborated.

(f) *"There are inaccuracies, I have no explanation"*

[146] The handwritten notes are the foundation for the allegations of fraudulent misrepresentation. Fridriksson was cross-examined on the inaccuracies in his handwritten notes and the suggestion was put to him that the "errors and inconsistencies and inaccuracies . . . are attributable to . . . manufacturing the notes after the fact":

> Q. Sir, I say to you that the great bulk of your notes, if not all of them, were manufactured after you reviewed the phone records and then you started looking at the e-mails putting together a story that would suit your purposes?
>
> A. That is not true.
>
> Q. So what is the explanation of all these inaccuracies in your notes?
>
> A. There are inaccuracies, I have no explanation.
>
> Q. Well, what is your explanation, sir, for all these additional notes after the fact, after you say you took the notes?
>
> A. I was trying to straighten it out so that when I passed it to [my counsel] he would understand the notes.

(g) *other handwritten notes of telephone calls*

[147] There were numerous other handwritten notes of telephone calls tendered in evidence by Fridriksson. However, most suffer from the same shortcomings (or variations thereof) that I have chronicled above. I do not see the benefit in my continuing with this line of analysis. I must move on before the passage of time has its way with me. If I have not made my point, there is no point to be made.

---

[26] The "past tense" testimony is one of a milky way of answers in this trial where Fridriksson offered explanations that were untrue and, in many instances, preposterously so.

8. . . . nor Hell a fury like an audiologist scorned

[148] On February 11, 2009, Fridriksson was the subject of a disciplinary hearing before CASLPO in which there was a finding of misconduct against him surrounding an advertisement that he had placed in a newspaper. He was cross-examined on the matter in this trial. When he attempted to explain away the misconduct, he was confronted with an agreed statement of facts that had been tendered at the disciplinary hearing (a proceeding wherein he was represented by a lawyer) and which arguably refuted his testimony before me. Throughout this phase of the trial, Fridriksson was noticeably defensive and agitated. Then the following exchange took place:

> Q. And try to tell the truth, it really would help us here. Excuse me, sir, did you just mouth an expletive to me?
>
> A. No.
>
> Q. I think you did.
>
> A. I did not.
>
> THE COURT: What did you see?
>
> MR. KOROSIS: He mouthed 'fuck off.'
>
> A. I did not.
>
> Q. You looked at me, you shook your head and you mouthed it.
>
> A. I did not.

[149] Everyone else in the courtroom was busy writing at that moment and did not witness the incident. Mr. Korosis added: "I'm an officer of the court and I'm not about to lie to the court."

[150] I declined to hold an expletive *voir dire,* as the outcome would only assuage my curiosity and not affect the result in this trial. Although I am unable to say whether Fridriksson mouthed the expletive alleged, doing so would not be inconsistent with his nature and character. The incident has the same DNA found at various points in his evidence. Fridriksson cannot help himself. He suffers from an utter lack of impulse control.

9. Evasiveness/stubbornness

[151] Fridriksson frequently jousted with Mr. Korosis in cross-examination. For example, the premises upon which the Niagara Falls Clinic carried on business

(6800 Morrison Street, Niagara Falls) were leased. This was the case when the business was run there by the defendants and it was so after the purchase by the plaintiff. The plaintiff was incorporated for the purpose of purchasing the Niagara Falls Clinic and the plaintiff was the tenant. The sole officer, director and shareholder of the plaintiff was, and is, Carol Klassen. All of this is known and acknowledged by everyone. However, Fridriksson had this exchange with Mr. Korosis:

> Q. But you're not the tenant though, sir, are you?
>
> A. My wife and I are.
>
> Q. No, you're not the tenant. Are you telling me, you're telling me right now that you are the tenant of those premises? You and your wife personally?
>
> A. We are the owners of the clinic, or my wife is the owner of that clinic.
>
> Q. But when you say 'We are,' you're an owner of that clinic?
>
> A. My, my, my wife is sorry.
>
> Q. You're not an owner, you're not a shareholder of the, of the corporation, right?
>
> A. That's right.
>
> Q. And you're not a tenant, right, right?
>
> A. We are a tenant.
>
> Q. Sir, why do you need to be so cute with your answers?
>
> A. I'm not trying to be cute.
>
> Q. Then are you out and out lying?
>
> A. No.
>
> Q. You are not a tenant, yes or no?
>
> A. We are the people who occupy the suite.

[152] He was stubbornly unwilling to concede such a simple uncontroverted fact. Such "cuteness" in his evidence is something else for which the court must be on guard.

10. The Fridriksson Formula

[153] When it was suggested to Fridriksson that the Niagara Falls Clinic performed financially as expected after the change in ownership and that he got what he paid for, he insisted that the good performance was due to his efforts. Fridriksson testified that his "great management brought [the Niagara Falls Clinic] from doom" and that he spent $300,000 on advertising for that clinic between the purchase in 2006 and 2011 (the year the trial commenced). He was cross-examined:

> Q. So, if we look at the financial statements for the [Niagara Falls Clinic] we're going to see that $300,000 in advertising was spent?
>
> A. Yes.

[154] Upon examining the financial statements, the advertising for the Niagara Falls Clinic proved to be $102,843, not $300,000. When confronted with this discrepancy, Fridriksson explained that his accountant, Karl Bowley, "distributed the advertising amounts throughout the companies" (Fridriksson owns a total of three hearing clinics) and described the matter as "an accounting issue." The explanation was put to Karl Bowley, in cross-examination:

> Q. [Fridriksson's] evidence was that there was more money spent in Niagara Falls and that you moved things around to even it through the companies . . . You've got the financial statements in front of you, do you agree with that statement?
>
> A. I certainly don't recall moving around advertising . . . expenditures.

[155] This testimony by Fridriksson followed the formula of so much of his evidence: he begins with a kernel of truth (that he had advertising expenses for the Niagara Falls Clinic); then he exaggerates that truth (here, by approximately 300%); he rationalizes the exaggeration to fit his view of reality (that his efforts saved the Niagara Falls Clinic from financial doom); and, finally, when caught in his lie, he concocts an explanation that shifts the blame to others (in this instance, his accountant, Karl Bowley).

11. Fridriksson the Fabricator

[156] Fridriksson wrote to Heather Winger, a WSIB adjudicator, on March 4, 2009, explaining that he had purchased the Niagara Falls Clinic and accusing the defendants of improper billings. The letter includes the following passage: [Underlining added]

> . . . This point is of interest to me, because the extra billing for those hearing aids influenced the net income of the Clinic I purchased. The purchase price of the Clinic was based on a multiple of that net income. If these billings were inappropriate, the purchase price of the Clinic would therefore be inflated by the amount of those extra billings. We have chosen to take this matter to court because, along with a number of other irregularities, this extra billing has significantly inflated the valuation of this Clinic . . .

[157] The underlined sentence contradicts the position taken by the plaintiff in this court that the purchase price of the Niagara Falls Clinic was based on the number of patients. Fridriksson was cross-examined on the point:

> Q. Okay and everything you write in [the letter] you truly believe is true and correct, right? You wouldn't put something on paper that wouldn't be true and correct, would you?
>
> A. I know there's something in here that's not correct.
>
> Q. What is that?
>
> A. The purchase of the Clinic was based on a multiple of an income.
>
> Q. That's not correct?
>
> A. That's not correct . . . that was never true or correct.

[158] It is more than "not correct"; it is a plain, unadorned lie.

12. Conclusion

[159] What can we safely conclude from all of this? Fridriksson is quick-tempered, bombastic, self-aggrandizing, quick-tempered, vindictive, precipitous, quick-tempered, prone to exaggeration, reckless with the truth, impulsive and, finally, did I mention that he was quick-tempered?

[160] However, for present purposes, what is important to observe is that he is an utterly unreliable historian.[27]

[161] Now comes the drudgery. One should not be in close proximity to sharp objects while reading what follows.

III. EVIDENCE ANALYSIS (up to signing of Asset Purchase Agreement)

[162] It is time to review some of the evidence. I have found that the most reliable evidence consists of the authenticated paper trail: letters, e-mails and other

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27 His testimony deserves a special descriptor, coined for the occasion: "incredibull."

documents. It is against such evidence (and the absence of such evidence) that I have frequently measured the probable truth of the oral testimony.

[163] My look at the evidence will be in monthly timeframes, simply as a matter of *faux* organizational convenience. Also, I have divided the evidence into three parts: (1) up to the date that the Asset Purchase Agreement was signed (October 30, 2006); (2) from after signing until the closing or completion of the purchase and sale (November 9, 2006); and, (3) thereafter.

1. <u>March 2006</u>

(a) March 31st

(i) *e-mail from Terry Lewis to Michael Moore*

[164] At 4:03 p.m., on March 31, 2006, Terry Lewis sent an e-mail to Michael Moore, a representative of ListenUp! Canada, a prospective purchaser of the three hearing clinics owned by the defendants:

> It was a pleasure meeting with you . . . I was impressed by your presentation and believe that we can work together. I had hoped that by this week-end we could have the formula that we discussed, so that we can better estimate your valuation of our clinics, and then proceed further in our negotiations . . .

2. <u>April 2006</u>

(a) April 3rd

(i) *e-mail from Michael Moore to Terry Lewis*

[165] At 2:30 p.m., on April 3, 2006, Michael Moore e-mailed Terry Lewis:

> I have attached a document that should be of help in getting the process started. It outlines possible methods for valuation . . .

[166] The document attached was titled "ListenUP! Canada, Acquisition Valuation & Process." It included this passage:

> If you wish to make an estimate [of the value] prior to providing us with confidential information, you may use the following [benchmark] – Multiple of Cash Flow: [ListenUP! Canada] is prepared to pay between 5 and 7 times sustainable cash flow at a minimum for your business. Sustainable cash flow is defined as EBITDA, less annual capital expenditures required to carry on the business.

("EBITDA," an acronym that was often mentioned in the trial, stands for – "earnings before interest, taxes, depreciation and amortization.")

[167] The document went on to say that a "much more favorable valuation" would result with the provision of "some very basic information on a confidential basis," consisting of, in part:

> ▪ Most recent annual unit volume of hearing aids sold and number of clients who purchased hearing aids . . .
>
> ▪ Annual occupancy costs and details of your lease(s) . . .
>
> ▪ Number of full and part-time hearing healthcare professionals on staff and who will be prepared to continue working in the business.

(This reflects some of the same information that the plaintiff was seeking from Terry Lewis in their negotiations.)

[168] The document described the process to be followed:

> The process whereby we would reach agreement on purchase terms and conditions is typically as follows: Seller and [ListenUP! Canada] negotiate a purchase and sale price and structure, subject only to final due diligence and confirmation of volumetric information provided by Seller . . .

(b) April 6th

(i) *e-mail from Gordon Lownds to Terry Lewis*

[169] At 9:35 a.m., on April 6th, Gordon Lownds (another representative of ListenUp! Canada) forwarded a confidentiality agreement to Terry Lewis on behalf of Michael Moore.

(ii) *Donna Bradley resigns from the Niagara Falls Clinic*

[170] On or about April 6, 2006, Donna Bradley submitted a letter of resignation to the defendants. She was a hearing instrument practitioner/specialist and had been a long-time, trusted and key employee at the Niagara Falls Clinic, where she was able to perform most duties under the supervision of an audiologist, except prescribe hearing aids.

[171] The plaintiff contends that, when she resigned, Donna Bradley took a list of patients of the Niagara Falls Clinic. It is further alleged by the plaintiff that the Lewises and Andy Gunarsons, their accountant, represented that "Donna Bradley did not have a patient list and was not contacting patients of the Niagara Falls Clinic to lure them away to her new clinic."

[172] Linda Fraser, a receptionist with clerical and other minor functions in the maintenance of the office at the Niagara Falls Clinic, resigned her employment along with Donna Bradley.

[173] Following the departure of Donna Bradley and Linda Fraser, the defendants rehired Ginette Galati as the receptionist for the Niagara Falls Clinic. Ms. Galati had been fired by Donna Bradley at some earlier time.

[174] Dee Lewis testified, in-chief, that James Naumovich (the lawyer representing the defendants on the sale) had written to Donna Bradley and Linda Fraser "before they left, saying that they were to return any materials that they had that belonged to the [Niagara Falls] Clinic." A copy of this letter was not produced in evidence (and I expect that it would have been very easy to do so). In its absence, I am not prepared to make any finding as to its contents.

(c) April 14th

(i) *e-mail from Terry Lewis to Andy Gunarsons*

[175] At 3:55 p.m., on April 14th, Terry Lewis sent an e-mail to Andy Gunarsons, enclosing the Acquisition Valuation & Process document from ListenUP! Canada and stating:

> We are giving them 2005 and 2004, because the numbers for 2005 are slightly lower than they would have been for the 4th quarter due to my being disabled and not working during that time.

[176] Due to his poor health, Terry Lewis (in or around September of 2005) ceased attending at the Niagara Falls Clinic to perform audiological services.

(d) April 17th

(i) *e-mail from Terry Lewis to Andy Gunarsons*

[177] At 4:11 p.m., on April 17th, Terry Lewis forwarded to Andy Gunarsons the confidentiality agreement that had been received from ListenUP! Canada.

(e) April 20th

(i) *e-mail form Dee Lewis to Andy Gunarsons*

[178] On April 20th, at 4:04 p.m., Dee Lewis sent an e-mail to Andy Gunarsons: [Underlining added]

> So, Gordon [Lownds] and Mike [Moore, both of ListenUp! Canada] are giving us an offer on Monday afternoon. Donna [Bradley] talked the receptionist [Linda Fraser] at the [Niagara Falls] office into quitting as well. Good thing. We were going to dismiss her because we knew she would let Donna in any time she wanted . . . The staff from Eglinton are going to fill in . . . <u>The interesting thing is Donna is being so vicious she has lost all credibility. It will be much easier to convince Mike that the sun does not rise and set on Donna, and that she is, in fact, someone he wants to avoid</u> . . .

[179] Dee Lewis was not asked to explain why she described Donna Bradley as "vicious." Nevertheless, it seems that Michael Moore attached importance to the departure of Ms. Bradley.

[180] In or about the spring of 2006, there were at least six parties who showed an interest in purchasing one or all of the three hearing clinics owned by the defendants. Negotiations with these parties reached various stages but, ultimately, no firm agreement was reached with anyone. What is clear, however, is that the Lewises were interested in selling their clinics.

[181] One might wonder why I am spending time canvassing attempts by others to purchase the Niagara Falls Clinic from the defendants. It is because the plaintiff argues that inferences should be drawn from those dealings to guide the court in concluding what the defendants and their accountant probably did or said in their negotiations with Fridriksson and Karl Bowley (the accountant for the plaintiff).

(ii) *e-mail from Terry Lewis to Andy Gunarsons*

[182] At 6:33 p.m., on April 20th, Terry Lewis e-mailed Andy Gunarsons:

> I haven't decided how vindictive, if at all, I want to be to the woman [Donna Bradley] who is making things so difficult for us at our Niagara Falls office. I recall that she had a mortgage with the Royal Bank and that I had to supply a letter to confirm her employment . . . Do I have an obligation to notify her bank that she is no longer employed?
>
> . . . We had an appointment with our lawyer, Jim Naumovich, yesterday to have him write a letter on our behalf, accepting Donna's resignation and instructing her on the confidentiality of the patient information. He also cautioned her that if the information was used we would prosecute her . . .

[183] It would seem that this e-mail was written before Donna Bradley obtained her new employment and before she was telephoning patients of the Niagara Falls Clinic. Consequently, the caution regarding prosecution seems slightly harsh (unless, perhaps, the Lewises knew or suspected that Ms. Bradley possessed a patient list).

[184] The e-mail refers to giving instructions to Mr. Naumovich to write to Donna Bradley. This is the second letter that the defendants contend was sent to Ms. Bradley. Like the first one, it was not produced in evidence although it would have been very easy to do so. I am not prepared to reach any conclusions about the contents of that letter.

[185] Dee Lewis was cross-examined on this e-mail, however, it was not helpful to me as she was not its author.

(f) April 24th

[186] On April 24th, Gordon Lownds of ListenUP! Canada met with the Lewises at their home in Toronto.

(g) April 25th

(i) *locks changed*

[187] On April 25th, Accu-Lock and Security attended at the Niagara Falls Clinic. According to the invoice rendered at the time, the attendance was "for service call and labour to rekey locks at Units 1 and 2" and twelve keys were supplied to the defendants. The installation of the new locks was thought to be necessary because Donna Bradley and Linda Fraser had ended their employment with the defendants.

[188] This invoice will become relevant when, after closing, the plaintiff alleges that the defendants did not turn over all of the keys to the Niagara Falls Clinic.

(ii) *security system reprogrammed*

[189] Also on April 25th, Brian Vernall, of Security & Alarms, made a service call to the Niagara Falls Clinic. His invoice reads: "Service call to reprogram user codes following staff changes." It seems obvious that the "staff changes" were the departures of the two employees, Donna Bradley and Linda Fraser.

(h) April 29th

(i) *e-mail from Terry Lewis to Jaffer Sunderji*

[190] At 10:16 a.m., on April 29th, Terry Lewis sent an e-mail to Jaffer Sunderji, proprietor of Canada Hearing Centre, another interested prospective purchaser of the Niagara Falls Clinic:

> Here is the agreement. I don't understand why you would base your valuation on the gross sales. A business which has gross sales of 1 million that produces a profit of

> $400,000 is certainly worth more than one that has the same gross sales and produces a profit of $200,000. A multiple of the earnings makes more sense. We can discuss that further.

(ii) *e-mail from Jaffer Sunderji to Terry Lewis*

[191] At 2:05 p.m., on April 29th, Jaffer Sunderji e-mailed Terry Lewis:

> You are correct. In general, one would normally base one's valuation on EBITDA not sales. A multiple of sales is a short cut to carrying out a full-blown due diligence.

(iii) *e-mail from Jaffer Sunderji to Terry Lewis*

[192] At 2:33 p.m., Jaffer Sunderji sent another e-mail to Terry Lewis:

> Thank you for sending me the confidentiality agreement . . . I am not sure I can sign it in its present form. Please allow me some time to think about it.

[193] Confidentiality was crucial to the defendants in their dealings with all prospective purchasers, including the plaintiff. The defendants were reluctant to release sensitive business information to any interested purchasers prior to execution of a confidentiality agreement.

3. May 2006

(a) May 7th

(i) *e-mail from Terry Lewis to Jaffer Sunderji*

[194] At 9:19 a.m., on May 7, 2006, Terry Lewis forwarded an e-mail to Jaffer Sunderji:

> Thank you for sending back the confidentiality agreement with your additions. I don't think that I can sign it in its present form . . . After further discussions with my lawyer and accountant we have decided that it would be better for both parties to sell the 'assets' of [the Niagara Falls Clinic], rather than break it off into a new company and sell the shares . . .

(ii) *e-mail from Jaffer Sunderji to Terry Lewis*

[195] Later that day, at 4:53 p.m., Jaffer Sunderji sent an e-mail to Terry Lewis in which he set about to "explain my position" in respect of the confidentiality agreement.

(b) May 9th

(i) *e-mail from Jaffer Sunderji to Terry Lewis*

[196] At 3:25 p.m., on May 9th, Jaffer Sunderji e-mailed Terry Lewis:

> Thanks for your e-mail. I can see your point of view and agree if I was the seller I would want the same guarantee of confidentiality . . . Have you already prepared materials for prospective buyers? . . .

(ii) *e-mail from Dee Lewis to Andy Gunarsons*

[197] Dee Lewis sent an e-mail to Andy Gunarsons at 11:42 p.m., on May 9, 2006: [Underlining added]

> . . . Jaffer, who is interested in buying the whole thing, but will settle for [Niagara Falls] first, has finally agreed to a confidentiality agreement that is clear and has no hidden games . . .
>
> So now we really need to prepare a financial statement for [Niagara Falls] alone, and I will need some help with that since I have never done one before. Up to this point, the financial statements have included all the clinics . . . I can get this info pretty easily by pulling together two [QuickBooks] files and the Quicken cheque book. What information do you need? . . . There is usually a $30K charge for examination of the financials for any prospective buyer, but I am not sure we are in a strong enough position to demand that . . .

[198] Andy Gunarsons was retained in May of 2006 to be the accountant for the defendants and for their three hearing clinics (the previous accountant was fired by the defendants). He was engaged to do the financial statements for 2005 and to assist in the sale of the Niagara Falls Clinic. He testified that he was not instructed to prepare, and did not prepare, separate financial statements for the Niagara Falls Clinic. The existence of such financial statements was the cause of much dispute in the trial.

[199] Based upon the underlined portion of the above e-mail, it seems that, at this point, Dee Lewis intended to prepare financial statements for the Niagara Falls Clinic using two computer programs.

(c) May 10th

(i) *e-mail from Gordon Lownds to Terry Lewis*

[200] At 4:10 p.m., on May 10th, Gordon Lownds sent an e-mail to Terry Lewis pointing out that he had not heard from the Lewises since the April 24th meeting. The e-mail said: [Underlining added]

> . . . I just wanted to send a quick note to confirm our continued interest in putting together a compelling and competitive offer on the table . . . it would be useful to know, sooner rather than later, if you are interested in continuing the dialogue and process. If not, we have other alternatives that we are interested in pursuing, particularly for the Niagara market . . . Please advise as soon as possible . . . <u>and provide some financial data</u> with which we can work as a starting point . . .

[201] In his testimony, Andy Gunarsons agreed that the reference to "some financial data" was a request for financial statements.

(ii) *e-mail from Dee Lewis to Andy Gunarsons*

[202] At 6:50 p.m., Dee Lewis forwarded the 4:10 p.m. e-mail to Andy Gunarsons, stating: "Is he threatening us? What a jerk." This was one of many instances of mistrust exhibited by Dee Lewis in this trial (and not the last time she called someone a "jerk").[28]

(d) May 11th

(i) *e-mail from Terry Lewis to Andy Gunarsons*

[203] At 2:18 p.m., on May 11th, Terry Lewis e-mailed Andy Gunarsons: [Underlining added]

> We have the company which holds the lease in Niagara Falls. Could we sell that company, as shares, then assign all of the assets of [Niagara Falls] to it? <u>Most of what we are selling is the good-will and patient list</u>, the actual physical equipment is negligible? I assume that if we sell shares, we will be charged only capital gains; whereas if we sell assets, we will be charged full tax . . .

("Goodwill" and "patient list" are terms frequently mentioned in this trial, with the plaintiff contending that it received too little of both.)

[204] On behalf of the plaintiff, it is argued that "the production of a patient list is obviously an important aspect of determining the value of the goodwill and that in

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28 Subtlety is not one of her enhancing attributes.

itself is corroborative of Fridriksson's evidence that it was requested on many occasions." I am not prepared to make that connection in the circumstances of this case.

(e) May 15th

(i) *e-mail from Terry Lewis to Jaffer Sunderji*

[205] On May 15th, at 3:42 p.m., Terry Lewis e-mailed Jaffer Sunderji:

> Here is the final version [of the confidentiality agreement] . . . The only substantive change was the time period . . . Please fax it back . . . and I will sign, scan it and send it back. Then we can begin completing this negotiation.

(ii) *e-mail from Jaffer Sunderji to Terry Lewis*

[206] At 6:32 p.m., on May 15th, Jaffer Sunderji sent an e-mail to Terry Lewis:

> . . . We first made contact with you some time last year and have a serious interest in acquiring well-established profitable clinics such as yours . . .
>
> I regret to say that our preliminary discussions with you and the redrafted confidentiality agreement lead us to believe that the probability of successfully negotiating a transaction with you is very small . . . considering your price expectations and confidentiality agreement . . .

(iii) *e-mail from Dee Lewis to Jaffer Sunderji*

[207] At 10:46 p.m., on May 15th, Dee Lewis sent a cutting e-mail to Jaffer Sunderji:

> . . . [certain factors] make it pretty clear that your intentions were to eat up time we could be using to sell the [Niagara Falls Clinic] to someone who is actually interested. It would also appear from your anger at not being able to use information we give you now in a year's time makes it appear you were after information only, with intentions to use it to your advantage as soon as possible. I also doubt that any deal between us can be completed, as I do not think completion is your intention . . .

[208] This e-mail shows a high level of mistrust by Dee Lewis, a characteristic that surfaced time after time in her dealings with the plaintiff and that was confirmed in her testimony. She was cross-examined:

> Q. So would it be fair to say that you didn't trust any prospective purchaser?
>
> A. Well, we were in a very vulnerable position and people are going to press the advantage that they have . . . we had to worry about what we could give them and what was safe for us.

THE COURT: So, is your answer 'yes'?

Q. Basically, I guess. We didn't trust every, anybody. We had mistrust.

(f) May 23rd

(i) *e-mail from Terry Lewis to Bob Liew*

[209] At 5:46 p.m., on May 23rd, Terry Lewis sent an e-mail to Bob Liew, Chief Financial Officer of Island Hearing,[29] another prospective purchaser:

> Attached is the confidentiality agreement, with two small changes as recommended by my lawyer.

[210] The confidentiality agreement (which was entered into on May 18, 2006) was signed by Terry Lewis, Marke Hambley (President and CEO of Island Hearing) and Bob Liew.

(g) May 30th

(i) *e-mail from Michael Moore to Terry Lewis and Dee Lewis*

[211] At 1:20 p.m., on May 30, 2006, Michael Moore, of ListenUp! Canada, sent an e-mail to Terry Lewis and Dee Lewis: [Underlining added]

> Thanks for spending some time on the phone last night. I think the best way to do this . . . (<u>since we already have some information on the clinic in Niagara Falls</u>) is to send us whatever information you are comfortable sending and what price you want for the office. If you can do that, we can strengthen our offer.

[212] It is not known what "some information" means.

(ii) *e-mail from Dee Lewis to Michael Moore*

[213] At 4:32 p.m., Dee Lewis e-mailed Michael Moore: [Underlining added]

> Our accountant says we give no more info than we have without a Letter of Intent to buy at a particular multiple. You already have enough info to make that decision . . .
>
> <u>Try to bring Donna back at your own peril</u>. We have nothing to say on that matter . . .

[214] Dee Lewis was cross-examined about what she meant by "bring Donna back at your own peril":

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[29] Island Hearing is a company affiliated with, and sometimes referred to in the evidence as, Island Acoustics Inc., and also connected to Island Hearing Services and National Hearing Services. For convenience, I will simply refer to all of these entities as "Island Hearing." Nothing turns on any distinctions amongst them. Island Hearing is also a wholly owned subsidiary of Phonak Canada Ltd.

> A. She had proved to be a bit untrustworthy in walking off like that and leaving the place dark, not informing patients. It was a cruel act and Terry [Lewis] had been very upset by that.
>
> Q. . . . were you referring to the fact that she was a detriment to the income producing aspect of the clinic?
>
> A. . . . you mean when she was working for us?
>
> Q. Yes.
>
> A. No, of course not.

[215] Based upon the 4:32 p.m. e-mail, a measure of the importance of Donna Bradley, in the eyes of Michael Moore, is that he was thinking of having her return to the Niagara Falls Clinic in the event his company was the successful purchaser.

(h) May 31st

(i) *Letter of Intent from ListenUP! Canada*

[216] On May 31, 2006, ListenUP! Canada forwarded a Letter of Intent to the Lewises. It provided:

> The purchase price shall be equal to 6 times sustainable EBITDA . . . The onus to provide the detailed operating and pro-forma financial statements and to prove their validity based upon actual activity levels, revenues and expenses shall rest with the [Niagara Falls Clinic] and shall be substantiated by [it's] chartered accountant . . .

[217] In cross-examination, Andy Gunarsons agreed that an express condition precedent to ListenUp! Canada proceeding further was the preparation or provision of separate financial statements for the Niagara Falls Clinic. He testified that he "never prepared them." There is no evidence that anyone prepared such statements. Relying upon the e-mail at 11:42 p.m., on May 9th, the plaintiff argues that Dee Lewis prepared the financial statements herself. If she did prepare something (and there is no evidence that she did) it was not sufficient for ListenUp! Canada because the May 31st Letter of Intent was seeking "financial statements" that were "substantiated" by the accountant for the Niagara Falls Clinic.

(i) end of May

[218] According to the testimony of Ginette Galati, the receptionist at the Niagara Falls Clinic when it was purchased by the plaintiff, in late May and early June of 2006, "a lot of the patients that we were calling had already been called by Donna [Bradley] also."

[219] Ms. Galati stated that, as she was telephoning patients to remind them of their eligibility for new hearing aids and to book appointments, Donna Bradley was doing likewise:

> A. I realized that [Donna Bradley and Linda Fraser] must have also had a list because they were calling the same patients that I was calling . . . I think I called like 25 to 30 people and I'm getting the same thing, that Donna had called and she told them that they had moved.

[220] The state of her knowledge on this matter was outlined in an e-mail that she sent to Fridriksson on April 11, 2008, at 3:07 p.m.:

> Around the end of May and the beginning of June 2006, there were a few people calling [the Niagara Falls Clinic] and telling us that Donna [Bradley] had called them. I then told Sarah Peverley (the audiologist) and Mumtaz Andani (the hearing specialist) that there was a list which Linda [Fraser] worked on while I was still here when Donna and Linda were both here. I was a receptionist at the time and Linda was going to look after WSIB patient files . . . When I told Sarah and Mumtaz they in turn told Terry and Dee Lewis . . .
>
> Also, I personally had a conversation with Dee and told Dee that Linda had made a list that included patients' names, date of birth and their eligibility for new aids and that it was now nowhere to be found . . . I saw Linda with a list, which was written on a standard 8½ by 11 inch note pad, white paper with blue lines . . . written in pencil . . . more than say, three or four [pages in length] . . .

[221] I have no reason to doubt the accuracy of this e-mail.

[222] The evidence contains many references to the Workplace Safety and Insurance Board patients. As I understand it, WSIB patients are the mother-lode in the world of hearing clinics. They are the most lucrative of all hearing-clinic patients because the WSIB will pay for the most expensive hearing aid and for annual assessments.[30] A WSIB patient, therefore, is more of an annuity for a hearing clinic than a patient. (One witness described a WSIB patient as being "worth twice the normal patient.") The next most valuable hearing-clinic patient is a General Motors employee.

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[30] Not that there is anything wrong with that.

4. June 2006

(a) June 1st

(i) *e-mail from Terry Lewis to Andy Gunarsons*

[223] At 10:08 a.m., on June 1, 2006, Terry Lewis sent an e-mail to Andy Gunarsons;

> We just received [at 9:04 a.m.] the Letter of Intent from Listen Up. It looks like they have come to their senses about the valuation.

(ii) *e-mail from Dee Lewis to James Naumovich*

[224] At 10:29 a.m., on June 1st, Dee Lewis sent an e-mail to James Naumovich (the lawyer representing the defendants on the sale of the Niagara Falls Clinic):

> . . . I sent the e-mail to Michael at ListenUp! and here is his reply. I am concerned about the true integrity of Gordon Lownds and do not like the way the sustainable earnings condition is phrased . . . This still is just a fishing expedition. What do you think? We are, of course, anxious to sell, but not if Gordon is going to be . . . a pain in the patootee.

[225] More mistrust.

[226] The e-mail continues: [Underlining added]

> What if we give him a flat price that is well below the figure he will get according to his formula, and that is that. Business is actually good . . . and <u>no one is missing Donna much</u>. In fact, she had not bothered to learn to set the new hearing aids, so they all have to be refit. And she was not entering billings to third parties if that would take her past 4:30. You know, the old I won’t work with anyone else and I will only do what I have time to do form of passive theft. No wonder she resigned.

[227] Arguably, this e-mail is some evidence that the defendants did not think that Donna Bradley was causing financial harm to the Niagara Falls Clinic.

(iii) *e-mail from Dee Lewis to Andy Gunarsons*

[228] At 10:33 a.m., on June 1st, Dee Lewis forwarded the 10:29 a.m. e-mail to Andy Gunarsons.

(iv) *e-mail from Andy Gunarsons to James Naumovich*

[229] At 5:12 p.m., on June 1st, Andy Gunarsons e-mailed James Naumovich about the Letter of Intent from ListenUP! Canada, saying that he found it to be "wholly inadequate for a plethora of reasons," which he proceeded to list.

(b) June 6th

(i) *e-mail from Dee Lewis to Andy Gunarsons*

[230] On June 6th, at 7:03 p.m., Dee Lewis e-mailed Andy Gunarsons:

> Well, here's another thing Louis [her former accountant], not Louis my dog who is smarter, although lies like a dog as well, did to us. We got a demand from RevCan or whatever they call themselves these days for back CPP payments (over $8,000K) . . .

[231] The e-mail went on to refer to her former accountant as "Louis the liar." So it is not just prospective purchasers whom she mistrusts.

(c) June 8th

(i) *e-mail from Terry Lewis to Michael Moore*

[232] At 4:22 p.m., on June 8th, Terry Lewis e-mailed Michael Moore of ListenUp! Canada:

> I am following up Dee's e-mail from a few days ago. Are you going to send a modified Letter of Intent so that we may proceed? We need something that sets out . . . and that offers a multiple of earnings as the basis for valuation. The Niagara Falls office has produced earnings that are a high percentage of gross sales for several years . . .

(ii) *e-mail from Michael Moore to Terry Lewis*

[233] At 4:56 p.m., Michael Moore replied to Terry Lewis:

> On Tuesday May 30th, Dee wrote me an e-mail saying we would get nothing more until there was a Letter of Intent. On June 1st, I sent the Letter of Intent. On Friday, June 2nd, I received a telephone call from someone claiming to be your accountant. He said that a revised Letter of Intent would be sent back . . . the multiple is listed in the requested Letter of Intent at 6X sustainable EBITDA.

(iii) *e-mail from Terry Lewis to Michael Moore*

[234] At 6:56 p.m., Terry Lewis e-mailed Michael Moore:

> . . . There are some terms of your Letter of Intent that are problematic . . . I would be satisfied with a 6x multiple of the earnings. Our gross sales and gross earnings data would demonstrate that we have achieved the same high level for the past four or five years. The term in question is 'sustainable' . . . I think that my accountant's plan was to send back a revised Letter of Intent that . . . would provide for mutually agreed upon financial information that would be disclosed and limit our liability for future performance . . .

(d) June 14th

(i) *Donna Bradley signs employment contract with competitor*

[235] On June 14th, Donna Bradley signed an employment contract with Ellesmere Hearing Centre Ltd, carrying on business in Niagara Falls as Canada Hearing Centre, a competitor of the Niagara Falls Clinic and owned by Jaffer Sunderji. Her position was that of hearing instrument practitioner/specialist. Her start date was July 14th.

5. <u>July 2006</u>

(a) July 12th

(i) *one lock and five keys supplied*

[236] An invoice from Accu-Lock and Security shows that, on July 12, 2006, there was a service call to the Niagara Falls Clinic "to supply and install 1 multi-lock . . . with 5 keys." (The issue of keys will surface many pages from now.) I do not know the reason for this installation.

(b) July 13th

(i) *telephone call from Fridriksson to Terry Lewis*

[237] July 13, 2006 is the date of the first of eight sets of handwritten notes which Fridriksson says he made in respect of eight telephone conversations with Terry Lewis.

[238] Although telephone records indicate that there was a 14-minute telephone call from Fridriksson to Terry Lewis on July 13th, commencing at 11:36 a.m., on the basis of what I said earlier I have no confidence in the reliability of these, and all other, such notes of which Fridriksson is the author, except where credible corroboration exists.

[239] I will also mention six points to bear in mind in respect of *each* set of handwritten notes tendered on behalf of Fridriksson in this trial concerning alleged telephone conversations with Terry Lewis: (1) The plaintiff argues that I should accept the accuracy and truthfulness of the notes absent “direct evidence by the defendants to contradict” their accuracy and truthfulness. Such an argument might apply if we were dealing with an inherently truthful witness, but it is not applicable to Fridriksson; (2) Merely because Fridriksson may have mentioned to someone else a piece of information that he allegedly learned in a telephone conversation, does not make the information true. In other words, Fridriksson cannot create facts simply by stating them to someone; (3) Many of the handwritten notes relate to dates and times when telephone conversations actually took place. However, that is not very helpful as such information is readily available in telephone records. What is important is the content of the call, not the fact that there was a call; (4) Just because the contents of the handwritten notes concern topics that were being canvassed in e-mails and letters at the time, does not render the contents accurate; (5) Occasionally, Dee Lewis testified that she was present with Terry Lewis during some of the conversations and she purported to confirm or deny what was said by her husband. I saw no evidence in this trial that Dee Lewis possesses the type of memory that would allow her, unaided by a written record, to support or deny what she heard someone say many years previously; (6) Unless I expressly say so in these Reasons, I do not accept the handwritten notes of Fridriksson as accurate and truthful.

[240] Counsel for the plaintiff made a valiant effort to salvage the handwritten notes of Fridriksson by embarking on a call-by-call multi-page written analysis. However, when it was over, I was still left with a sow’s ear and no silk purse.

[241] Returning to this 11:36 a.m. telephone call, Fridriksson was cross-examined on how a 14-minute conversation could produce only one page of handwritten notes. We were treated to a classic Fridrikssonion performance:

> Q. And I note, from a 14-minute call, and there are no more than a page of notes?
>
> A. That’s right.
>
> Q. What else did you talk about, sir?
>
> A. I don’t know. I can’t remember.

[242] A sensible response, I should think. But then, with the ink still drying from that answer, Fridriksson added:

> A. I do remember. We talked about what he's been doing, you know, stuff like that. We talked about, you know, kind of what he's done since, I hadn't seen him since Saskatchewan [21 years previously]. So I talked to him about what's been happening since Saskatchewan, stuff like that. And then we got into this part [the handwritten notes].

[243] However, the telephone records show that Fridriksson telephoned Terry Lewis twice the day before (a five-minute call and a one-minute call). One would have thought that any reminiscing would have occurred at that time. When confronted with this evidentiary dilemma, Fridriksson said, regarding the five-minute telephone call:

> A. I may have been leaving a message, but I don't know . . . I hadn't spoken to him for 21 years, so it might've been a five-minute message.

[244] Then he added:

> A. But probably not, it's a pretty long message, maybe I spoke to him.

[245] Finally, he said:

> A. I don't remember.[31]

[246] The handwritten notes indicate that Fridriksson asked Terry Lewis why he wanted to sell the Niagara Falls Clinic and the answer recorded by Fridriksson was – "hurt neck, can't do drive."

[247] The notes also say:

> ▪ [Audiologist] and [Dispenser] go 1 – 2 to 3 days per week
>
> ▪ Biggest clinic in [Niagara Falls] gets many referrals from [Drs.] Caetano and Makerewich [ENT specialists]
>
> ▪ ENTs WSIB referrals

[248] The notes further record that "about ¾" of the income of the Niagara Falls Clinic came from the WSIB patients.

[249] All of this becomes relevant later.

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[31] Does this not feel like an amusement park ride?

(c) July 18th

(i) *e-mail from Dee Lewis to Andy Gunarsons*

[250] At 2:52 p.m., on July 18th, Dee Lewis e-mailed Andy Gunarsons. She begins by describing the situation in respect of the Niagara Falls Clinic:

> . . . On the good side, we hired a dispenser for Eglinton . . . Niagara, on the other hand, is a very worrisome subject. It looks as if we will be lucky to get $1M for [the Niagara Falls Clinic]. The know-nothings who think they are high rollers and know high finance are looking only at gross sales . . . Phonak[32] now will only pay 75% of gross sales period, to an audiologist in St. Catharines who is desperate to buy but has no money . . . And, of course, no one is helping us find a dispenser, either – waiting for us to get really desperate . . .
>
> Sarah [Peverley], our audiologist, would prefer to work and live in Niagara, but we need her up here part-time, and she would still need at least a part-time dispenser to help her. She wants to buy, but . . . she does not have the means . . . So Julie is our best bet. She will be living in San Diego, but will fly up here for 10 days or so a month, so Sarah could come up here two days a week and the two of them could cover Niagara quite well.

[251] This second paragraph of the e-mail ends on an optimistic note:

> Plus, I think she and I can form an alliance that will enable us both to continue to prosper no matter what happens with Terry . . .

[252] The e-mail addresses the health of Terry Lewis and his limited ability to work:

> We really need time to work Eglinton. The good news is that Terry's doctor has found a pain dose that keeps the pain at a sort of manageable level, while leaving him alert and able to work. They have changed their minds about his condition and feel that, barring any incident, he may be stabilized for now. They were certain that it would be a cascading event, but he has improved a little, so that is very good news. He's not happy because now he needs to go in to work two afternoons a week. The patients are coming back now that he has been spotted in the office. Right now, Scarborough is not really worth what we are asking. Plus, it won't hurt us to make a little more money. Terry was going to have to help out even if we sold.

---

32 "Phonak" appears many times in the evidence. One never knows (and the good news is that it does not matter) whether the reference is to "Phonak Canada Ltd." or "Phonak Hearing Systems." Both are subsidiaries of a company called "Sonova." "Phonak Hearing Systems" is the overall brand name for the divisions of Sonova that sell Phonak hearing aids worldwide. "Phonak Canada Ltd." is the wholesale distributor for Sonova in Canada. "Phonak Canada Ltd." and "Unitron Hearing Ltd.," a company which will be mentioned later, are sister companies. "Phonak Canada Ltd." is the company that provided the loan that allowed the plaintiff to purchase the Niagara Falls Clinic. I will use "Phonak" for all of the Phonak entities.

> So this is our situation now. I need to get financials together for Julie and Island [Hearing] is still interested – at least Island pays based on earnings and the multiple goes up for more profitable businesses. Hopefully not for 2 to 3. So we need to sit down with you and Bruce [a financial advisor to the Lewises] as soon as possible because Julie is here until the middle of next week . . .

[253] The reference to "financials" means financial statements and Andy Gunarsons testified that he did not prepare financial statements for the Niagara Falls Clinic.

[254] Counsel for the plaintiff submit, with some merit, that this e-mail "portrays a much different view of Dee Lewis at this time" than is argued by the defendants and contradicts the suggestion that "Dee Lewis was paranoid given the caregiver role she was playing to Terry Lewis."

(d) July 20th

(i) *telephone call from Fridriksson to Terry Lewis*

[255] On this date, at 9:40 a.m., Fridriksson made the second telephone call to Terry Lewis for which he tendered a set of handwritten notes:

> Where is confidentiality agreement – is getting a better agreement drawn up by a lawyer – Accountant? Didn't like the one he had.
>
> Still interested in selling. Anyone else talking to him – says there are 4 other interested parties. Bullshit! Should send a new confidentiality agreement tonight by e-mail.

[256] When questioned about his "Bullshit!" note, Fridriksson stated:

> A. It's a common kind of thing that people say when they're selling something, like if somebody's selling their house they always say, 'Well, we've got all these other people that are interested,' so, you know, but I thought that was probably not true.

[257] As so often happens with Fridriksson, he jumps to a conclusion without supporting facts. The truth is that, in or about this timeframe, there were as many as six parties interested in purchasing the Niagara Falls Clinic.

(e) July 21st

[258] July 21, 2006, was a busy day.

(i) *Canada Hearing Centre welcomes Donna Bradley and Linda Fraser*

[259] Canada Hearing Centre commenced an extensive advertising campaign in the *Niagara Falls Review*, a local newspaper, welcoming its two new employees – Donna Bradley and Linda Fraser.

(ii) *e-mail from Terry Lewis to Marke Hambley*

[260] At 9:29 a.m., on July 21st, Terry Lewis e-mailed Marke Hambley of Island Hearing:

> We are also still very interested. I have been trying to get a reply to a request for your valuation formula . . . I am reluctant to ask my accountant to prepare the financial information that you want if your range of valuation would not be as much as we would find acceptable . . .

(iii) *e-mail from Marke Hambley to Terry Lewis*

[261] At 11:18 a.m., on July 21st, Marke Hambley sent an e-mail to Terry Lewis saying:

> . . . We continue to be keenly interested . . . please call me . . . if you are still interested in including Island Hearing in the sale of the clinic.

[262] Dee Lewis explained: "With Marke Hambley we always discussed the entire business" (meaning the three hearing clinics owned by the defendants). However, the subject line in this e-mail reads: "Re: Purchase of Niagara Falls Clinic"; and, "clinic", the last word in the e-mail, is singular, not plural.

(iv) *e-mail from Terry Lewis to Marke Hambley*

[263] At 2:56 p.m., on July 21st, Terry Lewis sent a lengthy e-mail to Marke Hambley in which he began by discussing the departure of Donna Bradley, the frequency with which the audiologist was on site at the Niagara Falls Clinic and staffing matters: [Underlining added]

> It is true that we lost our full-time dispenser [Donna Bradley] in the Niagara Falls Clinic. However, she was not the one who made the clinic so profitable, as we have seen since she left. Our staff from one of our Toronto offices has been servicing Niagara Falls on a part-time basis, two or three days per week, even with an audiologist one week and a dispenser the next, since the end of April. Our sales have recovered and we have found that our former dispenser was not as valuable as she thought that she was. The volume of sales was not her doing . . . but the result of my ability and that of one of our other audiologists from our Toronto offices. We are both capable of testing many many patients and of selling a lot of hearing aids in one

> day. We operated the Niagara Falls office on the model of having a full-time dispenser, with audiologist services one day per week for 21 years . . .

[264] This e-mail seems to downplay the importance of Donna Bradley in the operation of the Niagara Falls Clinic. However, contrary evidence exists. For example, Dee Lewis, in testifying that sales for the Niagara Falls Clinic were higher than normal in 2003, explained:

> A. . . . really, Donna, Donna was, Donna wanted to break a million in sales and so she was working really hard to get people in. It was her own little goal, we didn't know about it, she wanted to, to do that . . . it cut a little into the next year.

[265] The e-mail at 2:56 p.m. went on to discuss the WSIB patients:

> There are many WSIB patients in the Niagara office. Although it takes a long time to be paid under the new Program of Care. . . it is possible to make a lot of money on WSIB fittings and billing during and after the POC [Program of Care] year. The WSIB hearing aid sales seem to be concentrated more in one year out of a three year cycle, and that year is this year.

[266] The e-mail describes how the defendants have "two offices in Scarborough . . . one in the medical office building attached to the Scarborough General Hospital and the other in a shopping centre on Eglinton Avenue." It also states that each of the three clinics has "great potential" and is "far from working at full capacity" and each generates "a higher percentage of profit compared to gross sales."

[267] I pause here to mention that, at several points in her cross-examination, Dee Lewis seemed to be suggesting that her husband, Terry Lewis, did not know what he was talking about in some of his e-mails on matters such as the number of the WSIB patients. For example:

> Q. So, are you saying he's confused when he writes some e-mails to Andy [Gunarsons] but he's not confused when he makes statements to [Fridriksson] during these negotiations?
>
> A. No. That's why he was not allowed to give figures because he would, he was not allowed to give figures and I didn't give them to him because he, he was just told that he was not to do that.
>
> Q. When you say he was not allowed, who forbid him to say those things?
>
> A. Well, I did, 'not allowed' is my term. I did not give him that information because he didn't, he wouldn't remember and he didn't have it in front of him because I didn't, I never put it in front of him and I never gave it to him . . .

[268] I do not accept the evidence and the suggestion that I should, effectively, discount the accuracy of the e-mails from Terry Lewis to others. If this were so, I would have expected testimony from Andy Gunarsons that he was cautioned by Dee Lewis not to rely upon information received from Terry Lewis.

[269] The plaintiff argues that "it is reasonable to conclude that [Terry Lewis] made the same and/or similar representations to the plaintiff during their negotiations" as are found in the 2:56 p.m. e-mail to Marke Hambley of Island Hearing. This argument might be sufficient for me to take a point that has been proved by the plaintiff to a high possibility and bump it up to a probability. However, I did not see many high possibilities in this case.

(v) *e-mail from Marke Hambley to Terry Lewis*

[270] At 3:43 p.m., on July 21st, Marke Hambley replied by e-mail to Terry Lewis:

> . . . our purchase formula is based on a multiple of earnings and we pay up to five times earnings depending on the potential of the clinic. I understand that the Niagara Falls Clinic is very profitable and could have the potential of the higher multiple of earnings. Bob tells me that there is some issue regarding the loss of a dispenser [Donna Bradley] . . . We would need some assurances that the goodwill of the clinic remains intact with the new dispenser. I am happy to provide you with a Letter of Intent once we have the financial information of your clinic to value . . .

[271] The subject line of this e-mail reads: "Re: Purchase of Niagara Falls Clinic." Again, contrary to the testimony of Dee Lewis, it seems clear that Marke Hambley is speaking of the Niagara Falls Clinic, not the three clinics combined. Also, we see that Island Hearing has not been given financial statements for the Niagara Falls Clinic and that there is a concern regarding Donna Bradley.

[272] Andy Gunarsons was cross-examined:

> Q. Is this not again a specific request by a prospective purchaser for the financial statements of the [Niagara Falls] Clinic?
>
> A. It is a usual request.
>
> Q. All right, and yet you say you were never asked by the Lewises to prepare such statements?
>
> A. I have no recollection now, you know, from memory as to what was actually done. I'd have to actually refer to, to the documents. At that moment in time nothing had been prepared.

(vi) *e-mail from Terry Lewis to Andy Gunarsons*

[273] At 8:28 p.m., on July 21st, Terry Lewis sent an e-mail to Andy Gunarsons:

> Here is the multiple-statement that I have been trying to get from these guys before disclosing information. They sent an e-mail some time ago that I forwarded to you with their lengthy list of things that they wanted. What do you think about telling them we are having the business professionally evaluated and that they should be happy with that?

[274] I assume that "they" is Island Hearing. Again, the subject line reads: "Re: Purchase of Niagara Falls Clinic." I do not know whether the reference to "having the business professionally evaluated" means the Niagara Falls Clinic or the business of the corporate defendant (which would include all three clinics).

(vii) *e-mail from Terry Lewis to Andy Gunarsons*

[275] At 8:37 p.m., Terry Lewis sent another e-mail to Andy Gunarsons. It included the following:

> Here is my reply to their e-mail with an offer to let them [Island Hearing] buy the whole business . . . We have operated with a dispenser in Niagara Falls and one day per week, sometimes one day every other week, of audiology services for 21 years.

[276] The reference to how often an audiologist was in attendance at the Niagara Falls Clinic will become relevant later.

[277] The plaintiff correctly submits that this e-mail contradicts the representation by Terry Lewis to Marke Hambley, in the 2:56 p.m. e-mail, with respect to how often an audiologist was present at the Niagara Falls Clinic.

(f) July 23rd

(i) *e-mail from Fridriksson to Terry Lewis*

[278] At 10:52 a.m., on July 23rd, Fridriksson e-mailed Terry Lewis:

> My accountant [Karl Bowley] was wondering if the CBE (sic) could factor in the changes in Niagara Falls over the past weeks and months. Specifically the new relationship/clinic set up by the ENTs [Dr. Makerewich and Dr. Caetano] in association with ListenUP! and the addition of Canada Hearing [the clinic opened by Jaffer Sunderji]. He also wanted to know if you knew where your old dispenser [Donna Bradley] settled and if it was with one of your competitors and how the CBE (sic) felt this would impact the future of the clinic . . .

[279] This e-mail establishes that Fridriksson was aware of the following: (1) a pending business valuation by a Certified Business Valuator; (2) the "new relationship" between the ENTs in Niagara Falls and ListenUp! Canada;[33] (3) the market entry of Canada Hearing; and, (4) the fact that Donna Bradley *may* be employed with a competitor hearing clinic in Niagara Falls. More importantly, Fridriksson was aware that these matters could have an impact on the value of the Niagara Falls Clinic.

[280] Andy Gunarsons was cross-examined on the 10:52 a.m. e-mail:

> Q. . . . were you aware that Mr. Lewis had proposed providing Fridriksson with a business valuation?
>
> A. No.
>
> Q. And do you know whether you received a copy of this e-mail that Mr. Lewis received from Fridriksson?
>
> A. To the best of my knowledge, no.

(ii) *e-mail from Terry Lewis to Fridriksson*

[281] In an untimed e-mail, on July 23rd, Terry Lewis replied to the 10:52 a.m. e-mail:

> . . . My accountant had sent me a better non-disclosure agreement than the one we had used in the past . . . We are having our business evaluated by a Certified Business Valuator next week . . . He has suggested doing this for use with other interested parties, and it should be helpful to you. It is much better than trying to analyze raw data yourself.

[282] Andy Gunarsons testified, in cross-examination, that "he" in line three is a reference to Trevor Hood. (I will come to him later. He is the Certified Business Valuator who was retained by the defendants.) Mr. Gunarsons stated that he did recommend, however, that the defendants obtain a business valuation.

(iii) *e-mail from Marke Hambley to Terry Lewis*

[283] At 6:30 p.m., on July 23rd, Marke Hambley e-mailed Terry Lewis: [Underlining added]

> Thank you for clarifying the Niagara Falls dispensing circumstances and the impact on the performance of the clinic . . .

---

33 As for hearing aid referrals from Dr. Makerewich and Dr. Caetano, Fridriksson testified that Terry Lewis had told him, in August of 2006, that "he got nothing but a trickle."

> Yes, we are interested in the Scarborough clinics as part of the purchase and will need the financials over the last 4 to 5 years on all clinics you are offering for sale. I appreciate your concern about the amount of financial information that we have requested. Unfortunately, we cannot short circuit this process as the financial information we have requested will be critical in accurately valuing your clinics . . . If you are happy with my suggestion of the two accounting representatives working directly with one another, we should be able to obtain the financial information we require to value your clinics quickly and send a Letter of Intent (offer) . . .

[284] Although the subject line reads, "Purchase of Niagara Falls Clinic," this e-mail obviously speaks of all three clinics owned by the defendants. Perhaps one cannot always deduce the true subject of an e-mail from the wording of the subject line. Also, this e-mail suggests that financial statements for the Niagara Falls Clinic had not been provided to Mr. Hambley.

[285] Andy Gunarsons was cross-examined on the 6:30 p.m. e-mail:

> Q. I take it, it's clear from this e-mail that the negotiations cannot proceed further without financial information pertaining to the Niagara Falls Clinic?
>
> A. Yes.
>
> Q. Yes, and there is a suggestion that the accountants deal with one another directly to exchange this information and you're the accountant that's being referred to on behalf of the Lewises?
>
> A. Yes.
>
> Q. And did you in fact have contact with the accountant for Island Hearing?
>
> A. I don't recall. I think all, virtually all the conversation was directly with Mr. Hambley.
>
> Q. And how did – then did you respond to his request for financial information on the Niagara Falls Clinic?
>
> A. Uh, Niagara Falls Clinic, he never asked – to the best of my recollection he never asked me any information on the Niagara Falls Clinic. Mr. Hambley asked me for information on all the clinics.

[286] This testimony does not make sense. All of the earlier e-mails to and from Mr. Hambley refer to the purchase of the Niagara Falls Clinic, not the three clinics owned by the defendants (for example, see the e-mails from Marke Hambley to Terry Lewis on July 21, 2006 at 11:18 a.m. and 3:43 p.m.). However, the cross-examination continued and provided an explanation:

> Q. So, notwithstanding the wording of this e-mail, your evidence is he didn't ask for specific separate information for the Niagara Falls Clinic?
>
> A. Yes . . . there were no separate financials for the Niagara Falls Clinic. Mr. Hambley was made aware of the fact that there were only financial, you know, financial statements for all the clinics . . . I don't recall any separate break-out [for the Niagara Falls Clinic] . . . I don't recall [Mr. Hambley] ever asking me specific information on Niagara Falls after we informed him that there are no separate financials for Niagara Falls . . .

[287] I repeat what I said earlier, that I am spending time reviewing the attempts by others to purchase the Niagara Falls Clinic because the plaintiff submits that inferences may be drawn that shed light on the negotiations between the plaintiff and the defendants. I disagree with the submission but am committed to the process. There was no aspect of the negotiations between the plaintiff and the defendants requiring me to look to other negotiations for similarities or patterns.

(g) July 24th

(i) *e-mail from Terry Lewis to Andy Gunarsons*

[288] At 1:32 p.m., on July 24th, Terry Lewis sent an e-mail to Andy Gunarsons regarding the "Purchase of Niagara Falls Clinic":

> Here is a reply from Marke Hambley [referring to the e-mail of July 23, 2006 at 6:30 p.m.] . . . We need to send him the information that he requested so that he can move along with his Letter of Intent and, I would assume, set a multiple number as well . . .

(ii) *e-mail from Terry Lewis to Marke Hambley*

[289] At 7:33 p.m., on July 24th, Terry Lewis e-mailed Marke Hambley:

> . . . We met with our accountant today. He will be contacting Bob [Liew] and sending information as quickly as possible. He will confirm that we would like to move this along as quickly as possible.

(h) July 25th

(i) *e-mail from Marke Hambley to Terry Lewis*

[290] At 10:43 a.m., on July 25th, Marke Hambley e-mailed Terry Lewis:

> . . . I will alert Bob that the accounting information that we requested will be arriving from your accountants shortly. Please rest assured that we will respond . . . with a valuation of the clinics within days of receiving your accounting information . . .

[291] This e-mail makes it clear that Island Hearing is interested in all three clinics.

(ii) *e-mail from Terry Lewis to Andy Gunarsons*

[292] At 11:13 a.m., on July 25th, Terry Lewis e-mailed Andy Gunarsons:

> Another positive response from Marke Hambley at Island Hearing.

(i) July 26th

(i) *e-mail from Terry Lewis to Fridriksson regarding valuation*

[293] In an untimed e-mail to Fridriksson on July 26, 2006, Terry Lewis wrote:

> Sorry to be taking so long. My accountant had sent me a better non-disclosure agreement than the one we had used in the past and it is taking more time than I anticipated to modify it for our needs . . .
>
> We are having our business evaluated by a Certified Business Valuator next week . . . He [Trevor Hood] has suggested doing this for use with other interested parties and it should be helpful for you. It is much better than trying to analyze raw data yourself.

[294] Consequently, Fridriksson was aware that others were interested in purchasing one or more of the hearing clinics owned by the defendants (as I have mentioned, they owned two clinics in Scarborough, along with the Niagara Falls Clinic).

(ii) *e-mail from Fridriksson to Terry Lewis*

[295] At 3:58 p.m., on July 26th, Fridriksson e-mailed Terry Lewis (in what is probably a reply to the above untimed e-mail):

> I will be in BC to visit my mother for the next week . . . I will be back and ready to meet with my accountant after the long weekend (Aug. 7) Could you please also let me know as soon as you can if the other party has made a final decision that they will purchase your clinic so I can move forward with my plans.

(iii) *letter outlining terms of valuation engagement*

[296] SB Partners Corporate Finance Ltd. prepared a letter, dated July 26, 2006, outlining "the terms in connection with the valuation engagement for 866073 Ontario Limited" for which "an independent valuation report" was to be prepared for "three business units of [866073 Ontario Limited] as at June 30, 2006," including, importantly, the Niagara Falls Clinic as a separate business unit. The

principal of SB Partners Corporate Finance Ltd. carrying out the valuation was Trevor Hood.

[297] The issue of a separate valuation for the Niagara Falls Clinic, and whether it was ever prepared, repeatedly popped up during the trial.

[298] Dee Lewis testified that the information required by Trevor Hood was provided to him through Andy Gunarsons.

[299] It was the evidence of Andy Gunarsons that a separate valuation for the Niagara Falls Clinic was intended for a certain potential purchaser. However, those negotiations fell through and the separate valuation was never done.

(j) sometime in July

(i) *Fridriksson shows Maria Perez clinics in Niagara Falls*

[300] Maria Perez, a witness in the trial, is an audiologist who responded to an online advertisement placed by Fridriksson seeking to hire an audiologist for his hearing clinics. She met him in July of 2006. He interviewed her at a restaurant in Cobourg, Ontario. After the interview, she (and her husband) "followed him back to the Niagara Region." Ms. Perez understood that Fridriksson "was in the process of acquiring a third hearing clinic, I believe in Niagara Falls" to add to his existing clinics in Fort Erie and St. Catharines. She was asked:

> Q. Did [Fridriksson] indicate to you which clinic he was looking at in Niagara Falls?
>
> A. He did show us a couple of sites when we came down.
>
> Q. And were they already existing, operating clinics?
>
> A. I believe so . . .

[301] Based upon this testimony, it would appear that Fridriksson was generally interested in acquiring or opening a hearing clinic in the City of Niagara Falls, even if it was not the one owned by the defendants.

[302] Ms. Perez was hired by Fridriksson in October of 2006 and worked for him until 2009, primarily in the Niagara Falls Clinic and the hearing clinic in Fort Erie.

6. <u>August 2006</u>

(a) August 15th

(i) *telephone call from Fridriksson to Terry Lewis*

[303] At 12:24 p.m., on August 15, 2006, Fridriksson made his third set of handwritten notes of a telephone conversation with Terry Lewis:

> SF – Can you tell me when you are going to send the confidentiality agreement?
>
> TL – Still working on it.
>
> SF – How is the CBE (sic) report doing?
>
> TL – It will be ready in a week or two.
>
> SF – Will it be available to me immediately when it is out?
>
> TL – Yes.

(b) August 22nd

(i) *e-mail from Andy Gunarsons to Marke Hambley*

[304] At 3:24 p.m., on August 22nd, Andy Gunarsons sent an e-mail to Marke Hambley of Island Hearing:

> As discussed on the phone today and pursuant to (i) your company letter dated June 7, 2006 [from Bob Liew] requesting financial information (ii) the Confidentiality Agreement you have signed with Terry and Dee Lewis, and (iii) with the Lewis' approval to permit me to do so: here is the draft 2005 unaudited [financial statement] and unaudited Executive Management Summary of the 2001-2005 financial statement information for the last five years . . .
>
> The 2005 draft unaudited financial statement in PDF is attached. The actual PDFs of the 1999-2004 financial statements prepared (pre-2005 were prepared by another firm of CAs) will be sent under separate e-mail cover . . .

[305] The financial statements showed that profit for the three clinics owned by the defendants, in the period 2001-2005, ranged from $477,588 to $604,379.

(c) August 23rd

(i) *e-mail from Marke Hambley to Andy Gunarsons*

[306] At 1:29 p.m., on August 23rd, Marke Hambley e-mailed Andy Gunarsons:

> Thank you for the financial information . . . Please be assured that we will keep this information in strict confidence. Once we receive the balance of the information . . . we will value the acquisition and we will respond in short order with a [Letter of Intent] . . .

[307] Thus, Island Hearing had all of the pertinent financial information regarding the three hearing clinics owned by the defendants.

(d) August 24th

(i) *telephone call from Fridriksson to Terry Lewis*

[308] At 12:10 p.m., on August 24th, Fridriksson made a telephone call to Terry Lewis for which he tendered his fourth set of handwritten notes:

> SF [Stefan Fridriksson] – Where is the confidentiality agreement?
>
> TL [Terry Lewis] – It is coming tonight by e-mail.
>
> SF – Do you still want to sell the clinic? – Yes.
>
> SF – Have you heard Makerewich and Caetano are opening a ListenUp! franchise in Niagara Falls?
>
> TL – I don't get that many referrals from Makerewich and Caetano – you need not worry about Makerewich.
>
> SF – What happened to your old dispenser [Donna Bradley]? Luc Durand from Siemens told me she is working in Niagara Falls somewhere.
>
> TL – I do not know where she is working.
>
> TL – I will send you the confidentiality agreement tonight.
>
> SF – Any indication when the CBE (sic) report will be ready?
>
> TL – Should be ready in a week or two, just finishing.
>
> SF – Can you send it to me ASAP – I want to see it.
>
> SF – When can we look at the clinic etc.
>
> TL – Once the confidentiality agreement is signed.

(e) August 25th

(i) *e-mail from Terry Lewis to Fridriksson*

[309] On August 25th, at 3:56 p.m., Terry Lewis sent an e-mail to Fridriksson forwarding the confidentiality agreement and referring to the forthcoming release of "preliminary information":

> Here is the agreement, finally. Please sign and send it back by e-mail . . .
>
> Once I have the signed agreement I will sign it as well, scan it and send it back to you by e-mail. I will also give you some preliminary information regarding earnings and our expectations of pricing. You can decide if you want to proceed then. I think that you will like the figures.

(ii) *confidentiality agreement*

[310] On August 25th, Fridriksson and the defendants entered into a confidentiality agreement, the purpose of which is described in the preamble to the agreement:

> [The parties] intend to explore possible business arrangements involving [866073 Ontario Limited] and Stefan Fridriksson and any affiliates of the company or companies of either party (the 'Potential Agreements').
>
> Exploration of the Potential Agreements will necessitate disclosure of certain financial and other Proprietary Information (as defined below) of each party to the other party.
>
> Use of such Proprietary Information by the party receiving such information for purposes other than evaluation of the Potential Agreements would be seriously detrimental to the party furnishing such information.

[311] The confidentiality agreement contained this clause:

> Section 8 <u>No Party Communications</u> Each party agrees not to hold any discussions regarding the other party or any of its affiliates with any suppliers, customers and or any other person with whom the other party or any of its subsidiaries have a relationship regarding confidential information disclosed pursuant to the matters covered in this agreement or regarding the existence of negotiations or any proposed relationship between the parties.

[312] Dee Lewis, as part of her inherent mistrust of everyone and everything, interprets section 8 as not preventing the plaintiff or Fridriksson from disclosing patient information.[34]

[313] Neither Karl Bowley nor Andy Gunarsons was involved with the preparation or execution of this confidentiality agreement.

(f) August 28th

(i) *e-mail from Terry Lewis to Fridriksson*

[314] By e-mail dated August 28, 2006, at 4:19 p.m., Terry Lewis advised Fridriksson:

> I have attached the signed copy of the confidentiality agreement. Thank you for sending it back this morning.
>
> Our Niagara Falls Clinic has been generating $300,000 to $350,000 in earnings each year, for several years. We would expect a multiple of at least 5.
>
> Is that amount within your budget?

[315] The defendants properly argue that this e-mail is important because it shows that the purchase price for the Niagara Falls Clinic is being negotiated based upon a multiple of earnings (contrary to later assertions by Fridriksson).

[316] The numbers given by Andy Gunarsons to Marke Hambley on August 22nd (of which Terry Lewis would have been aware), were in the range of $477,588 to $604,379 for all three clinics. Therefore, if Terry Lewis is correct when he gives the earnings range for the Niagara Falls Clinic as $300,000-$350,000, this would mean that it was responsible for 49.6%-73.2% of the earnings of the three clinics owned by the defendants, depending on what year is used.

(ii) *e-mail from Fridriksson to Terry Lewis asking to see valuation report*

[317] On August 28, 2006, at 10:03 p.m., Fridriksson sent an e-mail to Terry Lewis:

> Thanks for the signed agreement. My accountant [Karl Bowley] would like to look at the report from the CBE (sic) [should read CBV – Certified Business Valuator] when it is completed. He suggests that we do not talk about price until we have an idea of

---

34 In fairness to Dee Lewis, section 8 is horribly worded and provides questionable protection. If one parses section 8 to uncover the key words, it reads: "Each party agrees not to hold any discussions . . . with . . . any person with whom the other party . . . [has] a relationship regarding confidential information disclosed pursuant to the matters covered in this agreement . . ."

> valuation and defined numbers. If you have decided to go without the CBE (sic) could you please let me know so I can discuss other options.

[318] At this point, Fridriksson must be taken to have acknowledged some uncertainty as to whether there will be a report from a CBV for the Niagara Falls Clinic and, in that event, it appears he has a Plan "B."

(g) August 29th

(i) *e-mail from Fridriksson to Terry Lewis*

[319] Fridriksson sent the following e-mail to Terry Lewis on August 29, 2006, at 11:33 a.m.:

> I spoke to my accountant today. We discussed the initial numbers you have given and he suggested it would be more appropriate to pay somewhere around 3 times earnings. He however would like to view the results from the Certified Business Valuator and have discussions with him/her to attempt to arrive at a number that is better suited to both our needs.

[320] Andy Gunarsons testified that the three-times-earnings multiple was first raised by Fridriksson.

[321] The defendants correctly contend that this e-mail further establishes the fact that the purchase price is being negotiated based upon a multiple of earnings and not upon other considerations (such as the number of patients or the number of WSIB patients, as Fridriksson now insists).[35]

[322] It is obvious that, at this point, Fridriksson was hoping to see a valuation report for the Niagara Falls Clinic.

(ii) *e-mail from Fridriksson to Terry Lewis*

[323] At 3:07 p.m., on August 29th, Fridriksson e-mailed Terry Lewis: [Underlining added]

> . . . My accountant's concern is how long it will take from this income level to pay back the initial purchase price . . . Using a 3 times multiple he arrived at a 5 to 6 year payback time which he says is still on the outside of normal but thought the earnings justified the gamble. He is still concerned with the climate changes within the Niagara Falls market and the issue that <u>one of the large competitors</u> has now entered

---

[35] This contention also is consistent with a letter written by Fridriksson to WSIB on March 4, 2009 (which I will come to many pages later in these Reasons) wherein he stated: ". . . the purchase price of the [Niagara Falls] Clinic was based on a multiple of . . . net income."

> into partnership with what may have been one of your main referral sources. He felt that discussing this before the report from the CBV was premature . . .

[324] The reference to "one of the large competitors" probably means ListenUp! Canada and "one of your main referral sources" probably means Dr. Makerewich. The "partnership" would be the "new relationship" mentioned in the e-mail from Fridriksson on July 23, 2006, at 10:52 a.m. Thus, Fridriksson is attuned to some of the market realities facing the Niagara Falls Clinic.

(iii) *e-mail from Andy Gunarsons to Terry Lewis*

[325] At 3:29 p.m., on August 29th, Andy Gunarsons sent an e-mail to Terry Lewis: [Upper case in original, Underlining added]

> Stefan's 3x earnings multiple is strictly a 'wet finger in the wind' and 'you pick `em' imputed multiple by his own admission: he eagerly wants to see what Trevor [Hood] says because he doesn't know . . .
>
> Stefan doesn't get any info sourced from Trevor unless you WANT him to have it: he has no rights to it unless you give it to him. Obviously if Trevor's [numbers] are favourable, you MIGHT consider it . . . maybe. If Trevor's numbers are not helpful to you, he doesn't get it – period. Let him get his own CBV . . .

[326] This e-mail suggests that Fridriksson had been told he could see the CBV report. However, it also shows the clear intention of the defendants not to make the CBV report available to Fridriksson if the "numbers are not helpful." In the end, a separate valuation for the Niagara Falls Clinic was cancelled.

[327] Dee Lewis denied the suggestion that she and her husband cancelled the Niagara Falls CBV because "the figures were not rosy."

[328] The CBV report ultimately was received by the defendants, but it dealt with all three of their hearing clinics as one enterprise.

(iv) *e-mail from Fridriksson to Terry Lewis*

[329] At 4:34 p.m., on August 29th, Fridriksson sent an e-mail to Terry Lewis in which he stated that his accountant, Karl Bowley, was concerned that a five-times multiple would "require a payback time of 9 years" and that a "3 times multiple. . . is still outside of normal, but [he] thought the earnings justified the gamble." The e-mail continued:

> . . . He is still concerned with the climate changes within the Niagara Falls market and the issue that one of the large competitors has now entered into partnership with

> what may have been one of your main referral sources.[36] He felt that discussing this before the report from the CBV was premature. Is it better for you and I to discuss this or is it better for the CBV and my accountant to arrive at a fair number? I feel it is better for both of us to rely on a number that reflects careful professional considerations. That was the way I sold my 5 clinics. I had my accountant talk directly with the purchasers' CA and for them to come up with a figure . . . If you have decided to go with a different buyer, I appreciate you have to go with the one who is going to give you the best offer . . .

[330] It is apparent, from this e-mail (which, by the way, is one of a small handful of communications that portrays Fridriksson as calm and rational) that Fridriksson is still expecting to see a CBV report for the Niagara Falls Clinic. The e-mail further shows that Fridriksson is aware of "the climate changes within the Niagara Falls market."

(h) August 30th

(i) *telephone call from Fridriksson to Terry Lewis*

[331] On August 30th, at 12:44 p.m., Fridriksson made his fifth telephone call to Terry Lewis for which he says he has handwritten notes:

> When can we look at CBV report – Still not ready.
>
> Can you let my accountant talk to your accountant? – I will talk to him and get phone number.
>
> Expressed concern again that Makerewich is in cahoots with ListenUp! and what that would do to business – Don't worry not that many people from Makerewich.
>
> Where is old dispenser – called Donna – don't know where she is – I heard she is working for Canada Hearing and that they have opened in Niagara Falls.
>
> TL – don't worry about her no one liked her anyway.

[332] Except for the reference to Donna Bradley, this telephone call is a curious rehash of the 4:34 p.m. e-mail on August 29th.

(ii) *e-mail from Terry Lewis to Fridriksson*

[333] At 2:34 p.m., on August 30th, Terry Lewis e-mailed Fridriksson:

> I failed to inform you that the sale would be a sale of assets, not shares . . . Dr. Makerewich has not been a source of any but a small trickle of referrals, no more than 4 hearing aids a month.

---

[36] This probably is a reference to Dr. Makerewich, the ENT specialist.

[334] In cross-examination, Dee Lewis pointed out that Dr. Makerewich was one of only two ENT specialists in Niagara Falls. Consequently, the fact that a patient of Dr. Makerewich became a patient of the Niagara Falls Clinic does not necessarily mean that the patient was a referral.

[335] Whatever Terry Lewis told Fridriksson previously concerning referrals from Dr. Makerewich, this e-mail replaces all such earlier information and Fridriksson should have viewed it as such. The referrals from Dr. Makerewich were "but a small trickle."

[336] Following the completion of the purchase and sale, Fridriksson said that he examined the records of the Niagara Falls Clinic and determined that 56% of the income in 2006 (the year of closing) "came from audiograms performed in Dr. Makerewich's office." The plaintiff argues that, if the "small-trickle" representation in the 2:34 p.m. e-mail from Terry Lewis were true:

> . . . then Fridriksson would not be concerned about the recent partnership between Dr. Makerewich and ListenUp!, as the Niagara Falls Clinic was generating its income from sources other than referrals from Dr. Makerewich. When it turned out that Terry's representation in this regard was false and that 56% of the income prior to closing came from such referrals, then Dr. Makerewich's partnership with ListenUp! becomes a significant factor in reducing the value of the goodwill of the clinic.

[337] I am not prepared to accept as accurate any analysis of records carried out by Fridriksson.

[338] The 2:34 p.m. e-mail went on to provide some information about Ginette Galati (who was held in high regard by the Lewises and about whom much more will be said in later pages):

> . . . The receptionist is Ginette Galati. I have known her for 20 years. She used to be the receptionist at The Old Stone Inn, where I stayed on Wednesday night before working on Thursday and Friday. We hired her away from there; and rehired her in April [she had been fired by Donna Bradley] . . . She is very good with the patients. On her own volition, she has started doing basic cleaning of hearing aids and trouble-shooting hearing aids and sending them out for repair. I promised her that if the business were to be sold that I would get the new owner to keep her employed . . . She knows many of the patients and they like her.

(iii) *e-mail from Terry Lewis to the Niagara Falls Clinic*

[339] At 2:41 p.m., on August 30th, Terry Lewis sent an e-mail to someone at the Niagara Falls Clinic:

> Attached is the complaint form for the Privacy Commissioner. Please make a few copies. Please ask Mrs. Smith to fill one out and send it to me. Please do the same with any other patients who report that she [Donna Bradley] has phoned them. She has violated the law by doing so.

[340] I gather that Mrs. Smith is a patient of the Niagara Falls Clinic who was solicited by Donna Bradley.

[341] This e-mail is unequivocal evidence that the defendants were aware that Donna Bradley was soliciting patients of the Niagara Falls Clinic.

(iv) *telephone call from Fridriksson to Andy Gunarsons*

[342] At approximately 3:00 p.m., on August 30th, Fridriksson made the first of approximately eleven telephone calls to Andy Gunarsons for which he tendered handwritten notes.

[343] My caveats regarding the handwritten notes pertaining to the telephone calls to Terry Lewis also generally apply to the calls to Andy Gunarsons: (1) The plaintiff argues that I should accept the accuracy and truthfulness of the handwritten notes absent "direct evidence by the defendants to contradict" their accuracy and truthfulness. Such an argument might apply if we were dealing with an inherently truthful witness, but it is not applicable in respect of Fridriksson; (2) Merely because Fridriksson may have mentioned a piece of information to someone else that he allegedly learned in a telephone conversation, does not make the information true. In other words, Fridriksson cannot create facts by simply stating them to someone; (3) Many of the handwritten notes relate to dates and times when telephone conversations actually took place. However, that is not very helpful as such information is readily available in telephone records. What is important is the content of the call, not the fact that there was a call; (4) Just because the contents of the handwritten notes concern topics that were being canvassed in e-mails and letters at the time, does not render the contents accurate; (5) Testimony by Andy Gunarsons that he does not remember what was said in some of the telephone calls does not automatically mean that the version noted by Fridriksson is accurate. In other words, Fridriksson does not win the credibility contest by evidentiary default. Put another way, the fact that Andy Gunarsons does not recall a particular conversation or statement is not corroborative of the truth of the conversation or statement: it is not sufficient to rehabilitate the credibility of Fridriksson; (6) Unless I expressly say so in these Reasons, I do not accept the handwritten notes of Fridriksson as accurate and truthful. Without confirmation from Andy Gunarsons in his testimony that some aspect of the handwritten notes

of the various telephone calls is accurate or absent other corroboration, the contrary may be assumed.

(v) *e-mail from Fridriksson to Andy Gunarsons*

[344] At 3:12 p.m., on August 30th, Fridriksson sent an e-mail to Andy Gunarsons authorizing the latter "to have direct contact [with him] in order to discuss and exchange information regarding the sale of [the Niagara Falls Clinic]." The e-mail also confirmed that Fridriksson had authorized his accountant, Karl Bowley, and his staff, "to discuss the matter."

(vi) *e-mail from Andy Gunarsons to Terry Lewis*

[345] At 3:20 p.m., on August 30th, Andy Gunarsons forwarded an e-mail to Terry Lewis:

> Two things that we need with [Fridriksson] and Karl Bowley:
>
> Non-disclosure agreement (NDA) that binds the parties, accountants, lawyers and third parties; and a similar e-mail direction to Karl Bowley and to me that permits us to exchange information on your behalf, including by e-mail.

[346] Both of the accountants played pivotal roles in the negotiations surrounding the purchase and sale.

(vii) *e-mail from Terry Lewis to Andy Gunarsons*

[347] Terry Lewis responded to the above e-mail at 3:30 p.m.:

> We already have a non-disclosure agreement with [Fridriksson]. Please see attached. Why not just add his lawyer's name wherever it would be appropriate?

(viii) *e-mail from Karl Bowley to Fridriksson*

[348] At 3:34 p.m., on August 30th, Karl Bowley sent an e-mail to Fridriksson, saying:

> Just spoke to Andy [Gunarsons] – he is getting things together – should be available to me by Tuesday. There is no report done by a CBV [Certified Business Valuator].

[349] This e-mail is significant because it establishes that Fridriksson was informed by his own accountant that (whatever the reason) there was no separate valuation being prepared for the Niagara Falls Clinic. This is the earliest evidence from which we may deduce that the separate valuation for the Niagara Falls Clinic had been cancelled.

[350] The engagement letter by which Trevor Hood was to prepare valuations for "three business units" (that is to say, the three hearing clinics owned by the defendants) is dated July 26, 2006. Sometime between July 26th and August 30th, the decision was made to cancel the valuation for the Niagara Falls Clinic.

[351] Andy Gunarsons testified, in-chief:

> A. The Lewises had engaged a CBV [Certified Business Valuator] to do a valuation of all the clinics and, initially, before Fridriksson was ever involved, there was contemplation of getting the [Niagara Falls Clinic] valued as a separate item for a previous purchaser that was stillborn and it was never done . . . and so at August 30th the only CBV report in process at the time was for all three clinics in total and it was still a work in process on the 30th of August, 2006.

[352] This is the only evidence as to why the separate valuation for the Niagara Falls Clinic was cancelled. Opposed to this evidence is the speculative submission on behalf of the plaintiff that the valuation was cancelled because "the figures were not rosy."

(i) August 31st

(i) *e-mail from Fridriksson to Andy Gunarsons*

[353] At 9:59 a.m., on August 31, 2006, Fridriksson e-mailed Andy Gunarsons, seeking a great deal of information:

> There are a couple of things I would like you to send. I do not know if Karl already asked for them.
>
> The number of hearing aids fit in the [Niagara Falls Clinic] in June 2003, July 2003 and August 2003; June 2004, July 2004 and August 2004; June 2005, July 2005 and August 2005; and June 2006, July 2006 and August 2006.
>
> The total number of hearing aids fit in 2003, 2004 and 2005.
>
> How much money was WSIB and DVA [Department of Veterans' Affairs] money compared to other payors [in other words, what proportion of the revenue of the Niagara Falls Clinic was attributable to WSIB and DVA patients].
>
> The number of employees and the status of their employment today.
>
> The state of the lease on the building . . .
>
> . . . How the arrangement for use of name in the Niagara peninsula will be handled.
>
> I think that is it for now . . .

[354] Andy Gunarsons, who agreed in his evidence that the above "is reasonable information for a purchaser to know," forwarded this e-mail to Terry Lewis at 10:14 a.m.

(ii) *e-mail from Terry Lewis to Andy Gunarsons*

[355] At 11:52 a.m., on August 31st, Terry Lewis replied by e-mail. The opening sentence reads:

> Dee is not available yet, so the numbers and the sales information will have to wait for her,[37] unless you already have it in the information that we were preparing for Island [Hearing, another interested purchaser].

[356] Does "the information we are preparing for Island [Hearing]" mean or include financial statements for the Niagara Falls Clinic? In his evidence, Andy Gunarsons stated that he did not have this information and "never had it."

[357] The e-mail continued:

> I can respond to the questions after the WSIB and DVA money.
>
> 1) The number of employees is one – Ginette Galati, receptionist. She is employed full-time. She is a very valuable employee . . . She should be retained . . . It is possible that [Fridriksson] could have one of our audiologists continue to come down to [Niagara Falls] one day per week to do testing and [hearing aid] prescriptions, as we have operated for 20 years . . .

[358] This e-mail (which suggests that an audiologist attended the Niagara Falls Clinic only one day per week for 20 years) also provided some general information regarding the lease under which the Niagara Falls Clinic occupied its premises.

(iii) *e-mail from Dee Lewis to Andy Gunarsons*

[359] At 12:58 p.m., on August 31st, Dee Lewis sent this e-mail to Andy Gunarsons in response to the 9:59 a.m. e-mail from Fridriksson to Andy Gunarsons which had been forwarded to Terry Lewis:

> Please understand, [Fridriksson] is going to open in [Niagara Falls] on his own anyway, with or without buying us out. We will not share this information with him [Dee Lewis testified that she was referring to the number of hearing aids] because he

---

[37] It seems that there are gaps in the knowledge that Terry Lewis has about the Niagara Falls Clinic. This e-mail would be consistent with the evidence of Dee Lewis who indicated that her husband did not have all of the information in respect of the business of that clinic. However, the e-mail also shows that he knows what he does not know. Thus, I do not accept the evidence of Dee Lewis that her husband sometimes passed on information with which he was unknowledgeable.

> could use it against us just as Gordon [Lounds, president of Listen Up! Canada] did. The breakdowns will be supplied only upon receipt of a binding offer – can be a range of multiples – and a significant, non-refundable payment. He has already agreed to a multiple of 4x. His accountant ought to know that we will not supply proprietary information on spec. Terry says he has had sufficient discussion with [Fridriksson] over the phone yesterday. Here we go again [Andy Gunarsons testified that he did not know what this meant].

[360] This e-mail reflects more mistrust of Fridriksson. It continues, and mentions Donna Bradley:

> And Donna [Bradley, who had recently quit her employment with the defendants at the Niagara Falls Clinic] is calling patients and Jim [Naumovich, the lawyer representing the defendants on the sale] has not returned our calls. Swell.

[361] Thus, as of this date, Andy Gunarsons is aware that Donna Bradley is contacting patients.

(iv) *telephone call from Fridriksson to Andy Gunarsons*

[362] On August 31st, at 3:20 p.m., Fridriksson made the second telephone call to Andy Gunarsons for which he tendered handwritten notes.

(v) *"I had questions about their honesty"*

[363] It is interesting to learn that, as early as August 30th and 31st, Fridriksson questioned the honesty of Terry Lewis and Andy Gunarsons. He was cross-examined:

> Q. Sir, you didn't believe either Terry or Andy as early as August 30th and 31st of 2006. [These dates precede the Letter of Intent which was signed by Fridriksson on September 21, 2006.]
>
> A. I had questions about their honesty.

[364] And then Fridriksson made an admission of great significance in this case:

> Q. And the fact is, even if they're lying to you, you didn't believe what they were saying, it didn't matter. You were going to do your, your own assessment of whether this [the purchase] was something that you were going to proceed on, right?
>
> A. That's right.

[365] Fridriksson also testified:

> A. . . . when you're doing due diligence you don't rely on, on the man's words, you rely on due diligence and the due diligence was going to prove what really the clinic had.

[366] If Fridriksson thought that Terry Lewis and Andy Gunarsons were not honest and if he, as a result, was going to do his own assessment of the viability of the purchase, how, I ask, is he able to suggest that he was misled by anything said or represented to him by those individuals?

[367] In some cases, it has been held that there is no onus "upon the plaintiff to investigate independently the truth of the representations, as *prima facie* the plaintiff is entitled to rely upon them": see *Opron Construction Co. v. Alberta*, [1994] A.J. No. 224 (Q.B.) at para. 557. This is not such a case. Fridriksson said as much.

[368] Customarily, if a statement, on its face, is such that it would induce a person to enter into a contract, the inference is that the plaintiff acted on the inducement, "unless it is shown that [the plaintiff] avowedly did not rely on the statement": see *Opron Construction Co., supra,* at para. 559, citing *Armison v. Smith* (1887), 41 Ch. 348 (C.A.) at p. 369. At bar, we have the "avowedly" exception.

7. <u>September 2006</u>

(a) September 3rd

(i) *e-mail from Terry Lewis to Andy Gunarsons*

[369] At 12:26 a.m., on September 3, 2006, Terry Lewis sent an e-mail to Andy Gunarsons. It began by addressing the need to complete the transaction soon and the matter of Thanksgiving advertising:

> We need to have a close (sic) before [Fridriksson] goes on vacation. If we wait until Oct. 8, we will miss the opportunity to get advertising out before Thanksgiving, and so will he. That is a crucial time, because families get together and if advertising is in their hands, the families will encourage the old folks to do something about their hearing problem[38] . . . So we must close before Oct. 1. I will send the envelopes to [Niagara Falls] and we can have Ginette working on stuffing them with hearing aid brochures and an announcement that [Fridriksson] is taking over, so that he can mail them as soon as he has ownership.

[38] Who would have thought that the Thanksgiving holiday was a trap for the hard of hearing?

[370] This is the first of several e-mails, from both sides, indicating that everyone is foolishly in a rush that, in the end, exacted a huge price, in dollars, time and reputation.

[371] The e-mail mentions "brochures and an announcement." The evidence subsequently speaks of "postcards," "fliers," "newsletter" and "letter of introduction," without much attention to their meaning.

[372] The e-mail then dealt with Donna Bradley:

> A second point is the pursuit of Donna for contacting our patients. Jim Naumovich [the lawyer acting for the defendants on the sale of the Niagara Falls Clinic] recommended that we contact the Niagara police and file a complaint with them, contact him after Labour day, and he would refer us to a litigation attorney to pursue the matter. I wonder if the lawyer who works with your firm is able to help us with this matter . . . If your lawyer is not terribly expensive, it would be very convenient and would get this underway as soon as possible to help block the efforts of Donna to do us harm.

[373] This passage indicates that Terry Lewis is attaching importance to the issue of Donna Bradley. The "harm" of which he speaks would have to be the solicitation of patients of the Niagara Falls Clinic. Andy Gunarsons was cross-examined on the e-mail and whether it reflected "an important matter":

> A. Yes, it is a point of concern.
>
> Q. And pretty serious if their lawyer recommends that they go to the police and file a complaint?
>
> A. Yes.
>
> Q. Now did you at any time disclose to Bowley or Fridriksson that the Lewises were aware that Donna was attempting to do their business harm?
>
> A. I don't recall passing this information on, to the best of my knowledge. I don't recall, no.

[374] And the e-mail referred to a box of envelopes:

> I have a box of envelopes with the Niagara Falls letterhead that we had planned to use to get out some advertising but there is no sense in our doing that with [Fridriksson] taking over. He could be ready to send it out as soon as the sale closes.

[375] Andy Gunarsons testified that, by this date, Fridriksson had been advised that there was no valuation report for the Niagara Falls Clinic. (In fact, Fridriksson was so informed in the 3:34 p.m. e-mail, on August 30th, from Karl Bowley.)

(b) September 6th

(i) *e-mail from Terry Lewis to the Information and Privacy Commissioner*

[376] On September 6th, at 3:19 p.m., Terry Lewis forwarded an e-mail to the Office of the Information and Privacy Commissioner regarding the conduct of Donna Bradley and Linda Fraser who were soliciting the patients of the Niagara Falls Clinic. It reads, in part:

> I am an audiologist. I have three offices, two in Toronto and one in Niagara Falls . . . At the end of April 2006, both the receptionist and the hearing instrument dispenser [at the Niagara Falls Clinic] resigned on very short notice and basically walked off the job. Recently they have opened up a new office with a competitor in Niagara Falls and have begun phoning my patients to solicit their business. Most of the patients are elderly and have become very upset and confused when contacted by my former employees.

[377] The e-mail went on to say that Donna Bradley and Linda Fraser must be using a patient list:

> The only source of the patients' names that they could be using would have been copies of lists of patients' names that they would have copied from our QuickBooks files or lists of names that they would have printed out or copied manually from my office's computer files . . .
>
> Can these two former employees continue to contact my patients? What can I do to protect my patients' privacy? Can an employee take patient information from my files?

[378] The fact that this e-mail was sent is an indication of the seriousness with which the Lewises viewed the issue of Donna Bradley.

[379] On behalf of the plaintiff, it is submitted that whether Donna Bradley actually had a patient list is not relevant. Instead, what is relevant is the fact that Terry Lewis believed that she had a list and he did not disclose this fact to the plaintiff. There is merit to this submission.

[380] It was the testimony of Dee Lewis that the only knowledge she and her husband had about the solicitation of patients was based upon information received from Ginette Galati. Further, she testified that they first learned that Donna Bradley was employed by a competitor from an advertisement seen in July of 2006 in the *Niagara Falls Review*, a local newspaper.

[381] Andy Gunarsons became aware of this e-mail "sometime in September" in a conversation with Terry Lewis and, although he does not recall "the actual details

being discussed," he knew that Terry Lewis thought that Donna Bradley was soliciting patients from a list. He was asked whether he passed this information on to Fridriksson or to Karl Bowley:

> A. No, I left it to the Lewises to discuss this with their lawyer.

[382] As a final comment on the September 6th e-mail, it seems to indicate that any list of patients for the Niagara Falls Clinic would be found in QuickBooks or in other computer files.

(c) September 7th

(i) *telephone call from Fridriksson to Terry Lewis*

[383] At 10:20 a.m., on September 7th, Fridriksson telephoned Terry Lewis for which, he says, he made his sixth set of handwritten notes. There is no dispute that the call took place; it is the accuracy of the notes that are in issue.

[384] The handwritten notes consist of 15 questions and answers. Fridriksson claims that the questions were written before he placed his telephone call and that the answers were inserted when given. Fridriksson seems to have precisely guessed the answers because each one snugly fits its allotted space. Quite a feat.

[385] The notes begin with gross and net income figures which, in accordance with the evidence at trial, seem to be reasonably accurate:

> 1. Average annual gross income $900 to $950K
>
> 2. Average annual net income $300 to $350K

[386] The notes contain the following references to the rate of hearing aid sales:

> 3. How many hearing aids per month? 50 no change since 2001.
>
> 4. Has there been any changes in the average number of hearing aids per month over the past 5 years? No change always about 50.

[387] There is a reference to staffing at the Niagara Falls Clinic:

> 6. How many days per week is there someone in the clinic: 1 – 3 days per week, 1 audiologist, 1 dispenser come from Toronto. Before Terry did it all, can't now because of neck.

[388] The plaintiff argues that this information is consistent with that which was contained in the e-mails at 2:56 p.m. and 8:37 p.m., on July 21st. I agree.

[389] The handwritten notes also mention the number of patients:

> 7. How many patients are regular patients in this clinic? Approx 5,000.

[390] The notes mention the rate of growth:

> 8. How has this number changed since 2000? Steady growth.

This seems to be the only reference, in any pre-closing document, to "steady growth." The plaintiff says that this note is consistent with the 2:56 p.m. e-mail on July 21st. I disagree.

[391] And the notes refer to WSIB patients:

> 10. How many of the patients are WSIB? 1/10 but generate ½ to ¾ of the income.

The reference to 1/10 is the origin of the later allegation by Fridriksson that there were 500 WSIB patients (that is, 1/10 of 5,000 "regular" patients).

[392] The handwritten notes go on to mention ListenUp! Canada:

> 11. How has ListenUp! affected you, do you still get WSIB referrals – just opened but don't get that many from ENTs.

[393] The notes also speak of Donna Bradley:

> 14. What happened to Donna? – She quit because she has a sore foot. Did she have a list of your patients? – No. Did you know she is working in [Niagara Falls]? – Yes (told me before that he did not know where she was).

[394] The mention of "sore foot" brings to mind the testimony of Ginette Galati who was being questioned, in-chief, about telephone calls from patients asking for Donna Bradley:

> A. . . . people like they would call and ask where Donna was and I said that she was sick and a lot of them did not want to come back until Donna came back.
>
> Q. Explain to me why you told those patients that Donna was sick?
>
> A. Well, we didn't want to scare anybody off . . .
>
> Q. Who's 'we.'?
>
> A. That was Terry and Dee. Basically it was Dee who said that, just to let the people know that Donna was sick and just to try and make appointments. We didn't want to lose any patients.

> Q. And were you told anything specifically as to what you were to say about her sickness?
>
> A. I think it was that she had a sore leg and she was in a wheelchair and she couldn't get around?
>
> Q. And who gave you those instructions?
>
> A. That was from Dee.

[395] Of course, neither sickness nor sore leg or foot was the truthful explanation as to why Donna Bradley was no longer employed at the Niagara Falls Clinic.

[396] These handwritten notes of September 7, 2006 are the first reference to the figure of 5,000 as the number of patients. Counsel for the defendants point out that this is the only time that Terry Lewis is alleged (as reported by Fridriksson) to have made such a representation. The 5,000 figure does not appear in any e-mail or other communications (or in the Asset Purchase Agreement).

[397] In what must be regarded as a very significant piece of testimony, Karl Bowley stated that he does not recall *ever* being told by anyone that the Niagara Falls Clinic had 5,000 patients. If Terry Lewis or Andy Gunarsons had told Fridriksson that the Niagara Falls Clinic had 5,000 patients, it is impossible (not merely improbable) that Fridriksson would not have mentioned this figure in one of his many e-mails and telephone conversations with Karl Bowley.

[398] The handwritten notes also say:

> 13. How many employees in [Niagara Falls] office:
>
> 1 [audiologist] 1 – 2 days per week
>
> 1 [dispenser] 1 – 2 days per week
>
> 1 secretary [Ginette] 5 days/wk – 60 years old

(d) September 8th

(i) *e-mail from Terry Lewis to Andy Gunarsons*

[399] On September 8th, 2006, at 8:09 a.m., Terry Lewis sent an e-mail to Andy Gunarsons. It began by addressing the Letter of Intent and an earlier completion date for the purchase and sale:

> I talked with [Fridriksson] on the phone on Thursday, yesterday. He is waiting for a Letter of Intent draft from you. So that gives us the opportunity to present him with a

> binding letter, so that we don't have to worry. He said that he has hired an audiologist who is just graduating from Boston U [Maria Perez] and who will start Oct.1. Thus, he is agreeable to an earlier close,[39] before he goes on vacation . . . So, if you will be so kind as to send him a binding Letter of Intent to buy the Clinic at a multiple of 4x earnings, the 'x' to be determined in discussions between you and his accountant. He will sign it and get it back to us quickly.

[400] The e-mail touched on Donna Bradley:

> We discussed his concerns over Donna, and he is less worried about that now.

The "concerns" are not identified. Did they include whether she had a patient list? How could Fridriksson have been "less worried" when Dee and Terry Lewis continue to be worried themselves, as can be seen by the e-mails that I have mentioned (August 31st at 12:58 p.m., September 3rd at 12:26 a.m. and September 6th at 3:19 p.m.).

[401] The e-mail spoke of advertising:

> I told him that the best thing that he could do is get some advertising out in the form of direct mail to the patients early enough so that they have it in their hands in time for Thanksgiving . . . I told him that we had 2500 envelopes ready for a mailing that we had planned to do, and that he is welcome to them.

[402] (Throughout this trial, Fridriksson repeatedly testified that it had been represented to him that the Niagara Falls Clinic had 5,000 patients. If this were so, why would the defendants have only 2,500 envelopes for the mailing that they had planned? It is probable that the defendants would mail to all of their non-deceased patients, meaning that it should have been apparent to Fridriksson that the patient base for the Niagara Falls Clinic was closer to 2,500 than to 5,000.)

[403] Presumably, the 2,500 envelopes are the ones referred to in the e-mail from Terry Lewis to Andy Gunarsons at 12:26 a.m., on September 3rd.

[404] Dee Lewis testified regarding the 2,500 envelopes:

> A. . . . we would have mailed to anybody we'd ever seen that we didn't know was deceased.

[405] And the e-mail mentioned the request by Fridriksson that Carol Klassen be permitted to attend at the Niagara Falls Clinic:

> He also would like his wife to be able to visit the office and to get acquainted with the accounting software. That would give her access to our patients' names etc. and

39 This sounds like it was the Lewises who were pushing for (or at least suggesting) an early completion date.

> would only be acceptable after we have money in hands. Unless you think that he would be unable to back out of the deal. Even so, once he has our patient names, he could do a lot of damage . . .
>
> If we have a Letter of Intent, with a closing date near the end of the month, a few days before he goes on vacation, there will be time for his wife to get started on learning QuickBooks.

[406] It is obvious that the Lewises were very concerned, and understandably so, about permitting access to the Niagara Falls Clinic and about the premature release of any sensitive business information.

[407] Finally, the e-mail spoke of a willingness to allow the defendants' audiologist and dispenser to help out:

> We would also be willing for Sarah [Peverley] and Mumtaz [Andani], our audiologist and dispenser who have been working in [the Niagara Falls Clinic] to go down a few more times after he has taken possession to help get his audiologist used to our system and to aid in the transition with patients.

(ii) *e-mail from Andy Gunarsons to Terry Lewis and Dee Lewis*

[408] At 9:05 a.m., on September 8th, Andy Gunarsons sent an e-mail to Terry Lewis and Dee Lewis which seems to repeat or pass on the request for information made by Fridriksson in his 9:59 a.m. e-mail of August 31st. It begins, "Here is the additional info they want . . ." and goes on to set out eight requests:

> 1. The number of hearing aids fit in the [Niagara Falls Clinic] in June 2003, July 2003 and August 2003; June 2004, July 2004 and August 2004; June 2005, July 2005 and August 2005; and June 2006, July 2006 and August 2006.
>
> 2. The total number of hearing aids fit in 2003, 2004 and 2005.
>
> 3. How much money was WSIB and DVA money compared to other payors.
>
> 4. The number of employees and the status of their employment today.
>
> 5. The state of the lease on the building . . .
>
> . . . . . .
>
> 8. . . . How the arrangement for use of name in the Niagara peninsula will be handled.

[409] The 9:05 a.m. e-mail continues:

> Karl Bowley (his accountant) suggested that a Letter of Intent now appears 'premature': a contradiction to [Fridriksson]. I will call Karl today and have a chat on the matter – keep you posted on that one.

> MY RECOMMENDATIONS:
>
> ▪ #4, #5 and #8 are easy to answer, the rest require a bit of thought and a lot of caution before any info release. Right now there is zero binding on [Fridriksson] to stop him from gleaning proprietary info and walking away.
>
> ▪ Let's talk over this info list, the [Letter of Intent] and the other info release relayed to you with Trevor Hood on Monday at 1:00 p.m. as agreed with Dee yesterday . . .

(iii) *e-mail to Terry Lewis from the Information and Privacy Commissioner*

[410] On September 8th, at 10:36 a.m., Karen Hale, from the Office of the Information and Privacy Commissioner, replied to Terry Lewis by e-mail and pointed out possible breaches of the *Personal Health Information Protection Act, 2004,* S.O. 2004, c. 3 and stated:

> . . . ss. 12(2) . . . places an obligation on you as a [health information] custodian to notify your patients where information is 'accessed by unauthorized persons.' . . . you may want to contact our tribunal department to report these possible breaches of *PHIP Act* and work out how to go about the notification process . . .

[411] The e-mail concluded:

> You may also wish to discuss the possibility of a complaint under *PHIP Act* against your former employees for contravening *PHIP Act* bearing in mind this may be quite a complex situation as a custodian is technically responsible for the acts of its agents.

(e) September 9th

(i) *e-mail from Terry Lewis to Andy Gunarsons*

[412] In an e-mail on September 9th, at 11:29 p.m., Terry Lewis responded to the 9:05 a.m. e-mail on September 8th, from Andy Gunarsons. He began by dealing with the issue surrounding the number of hearing aids sold by the Niagara Falls Clinic:

> I think that I have a couple of solutions for the number of hearing aids issue that is a problem for our coming to a final agreement . . . Since we are reluctant to give actual figures (given our past experience), I suggest that we let [Fridriksson] supply Trevor with the number of aids that he sells in his other locations and the number of aids that he needs to sell overall in order to receive the discount [from his suppliers] that he needs and let Trevor tell him whether or not our sales added to [Fridriksson]'s numbers will be enough.

[413] The e-mail continued:

> His info request items #1 and #2 would then be met without our giving him actual numbers. His request #1 asks for sales numbers for months that I believe are lower than other months and do not reflect the usual sales averages, although I need to check our QuickBooks records to be sure . . .

[414] The e-mail ended by dealing with the subject of Carol Klassen being given the opportunity to attend at the Niagara Falls Clinic:

> He also asked me on Thursday, on the phone, if his wife could go into the office and start getting trained on our QuickBooks system. I don't think that is possible until he has actually bought the office for two reasons. One is our security in case he is not actually going through with the purchase. And two, that we cannot allow access to the patient information if we are to remain in compliance with our obligations under the Ontario and Federal Patient Privacy Regulations. I would appreciate a response to him by you regarding that issue, with an opinion from your legal staff . . .

[415] This e-mail, like the one at 8:09 a.m. on September 8th, shows how concerned the Lewises were about Fridriksson prematurely obtaining information about the Niagara Falls Clinic.

(f) September 12th

(i) *handwritten notes of telephone call from Fridriksson to Karl Bowley*

[416] Fridriksson tendered handwritten notes of a telephone call to Karl Bowley at 8:45 a.m., on September 12th:

> SF – Andres Sirois (Helix) 72 hearing aids per month - $1.2 million anything less is a fraction of that – Can't pay 1.2 million for 50 hearing aids per month.
>
> KB – Andy says 45 – 50 aids/month
>
> SF – Calculate 45/72 x 1.2 - $750,000. We should offer $750,000.
>
> KB – We will offer 5 X $150,000 for 5 years. Starting October 6 or at closing.
>
> SF – Okay

[417] The notes appear to record a discussion in which Fridriksson is valuing the Niagara Falls Clinic based upon the monthly sales of hearing aids. This method of valuation is contrary to the e-mail from Terry Lewis to Fridriksson on August 28th, at 4:19 p.m. and the e-mails from Fridriksson to Terry Lewis on August 29th, at 11:33 a.m. and 4:34 p.m., wherein the purchase price was based upon earnings.

[418] Karl Bowley was not questioned on the September 12th telephone conversation. However, in cross-examination, Mr. Bowley generally was not

pressed about particular alleged telephone conversations with Fridriksson because he testified, in-chief, that he could not remember the details of specific conversations. Mr. Bowley explained:

> A. If there was a telephone conversation and there was something relevant, extremely important, I would send [Fridriksson] an e-mail . . .

[419] The explanation of Mr. Bowley is quite logical and accords with common sense. One can only wonder why Fridriksson did not follow the same approach in his dealings with Terry Lewis and Andy Gunarsons.

(ii) *e-mail from Karl Bowley to Andy Gunarsons*

[420] Karl Bowley sent an e-mail to Andy Gunarsons at 9:58 a.m., on September 12, 2006: [Underlining added]

> Did you <u>meet yesterday</u>?
>
> [Fridriksson] and I are running out of time. As you obviously know, due diligence takes time even in simple deals, and <u>for many reasons we need this deal to move along quickly</u>.[40]
>
> Please advise when the basic numbers – i.e. # of hearing aid fits (etc. etc. – as per [Fridriksson]'s earlier e-mail) will be available.

[421] Mr. Gunarsons forwarded this e-mail to the Lewises at 5:43 p.m.

[422] Karl Bowley testified that his reference to "meet yesterday" was to a meeting between Andy Gunarsons and Dee and Terry Lewis.

[423] Mr. Bowley was cross-examined on what he meant by "many reasons":

> Q. Can you tell me what were these 'many reasons'?
>
> A. As I sit here today I don't recall my thoughts back then what those reasons were . . . I don't recall specifically what I meant in this document . . .

This is the type of answer that I would expect from a witness being questioned on an e-mail sent seven years previously. I appreciate such candidness.

(iii) *telephone call from Fridriksson to Andy Gunarsons*

[424] Fridriksson tendered a set of handwritten notes for the third telephone conversation that he says he had with Andy Gunarsons, this one, at 2:20 p.m., on

---

40 Now it is Fridriksson who is creating a sense of urgency, not the defendants.

September 12th. These notes contain dozens of numbers, dollar figures and statements purportedly provided by Mr. Gunarsons on this occasion.

[425] Andy Gunarsons does not have an independent recollection of this telephone conversation, yet his testimony was helpful. Two dollar figures in the handwritten notes – being the annual gross income of the Niagara Falls Clinic ($900,000) and the annual net income ($300,000-$350,000) – were, he testified, consistent with what "had already been relayed to Fridriksson." However, beyond that, Mr. Gunarsons disagreed that he possessed, or would have possessed at that time, the information attributed to him. I will set out, in table format, the information in the handwritten notes and the testimony of Andy Gunarsons:

Information in handwritten notes	Testimony of Andy Gunarsons
the number of patients of the Niagara Falls Clinic	"It's not the information an accountant deals with."
the number of deceased patients	"I have no knowledge."
the number of WSIB patients	"I had no knowledge, never have."
there is a file room full of files that have not been recalled	"I don't have that information."
Carol Klassen could review QuickBooks, look at the billings, count the number of patients and look over the office to see "how it worked."	"I don't have the authority to grant this type of request."
There are "22 years of unrecalled files, a room full of files."	"That the clinic has been in business for 22 years, to say that 22 years of files have not been recalled is bizarre to me . . . I never said that."

[426] These handwritten notes appear to be the first mention, in writing, of a request by Fridriksson to have access to the Niagara Falls Clinic. The notes also seem to be the first occasion on which Fridriksson says he was allegedly informed that the Niagara Falls Clinic had a room full of unrecalled files. Both the access-to-the-clinic issue and the matter of the unrecalled files are repeated many times in the period before closing.

[427] Andy Gunarsons was questioned further, in-chief, on the unrecalled files;

> Q. Do you have any recollection of any reference in your e-mails to unrecalled patients?
>
> A. Definitely not.

[428] Karl Bowley was asked, in-chief:

> Q. And did [Fridriksson] telephone you after this conversation with Andy [Gunarsons] and summarize his conversation with Andy with you?
>
> A. I don't recall the exact phone conversation.

[429] Mr. Bowley went on to say that Fridriksson "called me on a regular basis and all the topics that are in here, I do recall."

(g) September 13th

(i) *telephone call from Fridriksson to Terry Lewis*

[430] At 9:12 a.m., on September 13th, Fridriksson made the seventh telephone call to Terry Lewis for which he maintains he has handwritten notes. The notes include the following:

> ▪ You told me that you sold 50 hearing aids per month – I need proof.
>
> ▪ You told me that the clinic has 5,000 patients – I need proof.
>
> ▪ Terry [Lewis] says he has 5,000 Siemens postcards ready to be mailed to his current patients . . . must be sent by Thanksgiving . . .
>
> ▪ Terry still wants 5x net . . .

(ii) *telephone call from Fridriksson to Andy Gunarsons*

[431] At 10:28 a.m., on September 13th, Fridriksson made his fourth telephone call to Andy Gunarsons for which he alleges that he has handwritten notes. In this telephone call, Fridriksson contends that Mr. Gunarsons answered questions about the number of hearing aids sold monthly by the Niagara Falls Clinic ("45 – 50"), the number of WSIB patients and the percentage of the gross revenue of the Niagara Falls Clinic represented by WSIB patients ("more than half maybe 2/3 of the gross"). Andy Gunarsons was asked about these matters and he testified: "I don't have that information."

[432] As with the handwritten notes of the other telephone calls, Fridriksson is attributing to Andy Gunarsons information that the latter, I find, did not possess and could not provide.

(iii) *telephone call from Fridriksson to Andy Gunarsons*

[433] At 4:45 p.m., on September 13th, we have the fifth telephone call from Fridriksson to Andy Gunarsons for which the former tendered handwritten notes. Mr. Gunarsons denies that he made the statements attributed to him and I accept

his denial. For example, one of the statements (a repetition of a theme first seen in the September 12th telephone call, at 2:20 p.m.), that "Carol [Klassen] will get to see the files . . ." and that she will have "full access," is in direct contradiction to the instructions Andy Gunarsons received in the 8:09 a.m. e-mail from Terry Lewis on September 8th. It is highly improbable that Andy Gunarsons would be offering something that he lacked the authority to offer. The Lewises (in particular, Dee Lewis) are not the type of clients whose instructions or wishes one ignores.

[434] In this telephone call, Fridriksson alleges that Andy Gunarsons also stated:

> This clinic is different. It has been in [Niagara Falls] for 22 years. It has thousands of satisfied patients who have been coming here for years. None of them have been recalled. It is a gold mine. All you have to do is start recalling those patients and you will be full five days a week. You could easily sell double the number of hearing aids. Like I said before, it is not going to be a problem getting enough patients, it is going to be a problem seeing them all. You don't even need to advertise.

This information essentially repeats what Fridriksson recorded in his notes for the telephone conversation he says he had with Mr. Gunarsons on September 12th, at 2:20 p.m.

[435] The 4:45 p.m. notes also state:

> You said the clinic sells 45 to 50 hearing aids per month . . .

[436] And they further state:

> Donna [Bradley] is not a threat. She does not have a list.

[437] Andy Gunarsons, in his evidence, denied making these statements and I accept his denial.

(iv) *". . . I thought he was a bullshitter"*

[438] Fridriksson admitted, in cross-examination, that, as of September 13, 2006, "I *thought* [Andy Gunarsons] was a bullshitter." He added: "But I *knew* he was a bullshitter in October, October the 11th or October the 10th."

[439] Fridriksson agreed that "bullshitter" is "equivalent to liar."

(h) September 14th

(i) *Comparative Year-Over-Year Summary*

[440] On September 14, 2006, at 1:09 p.m., a spreadsheet, titled "Comparative Year-Over-Year Summary," was prepared by Andy Gunarsons, he says, for Karl Bowley. He explained that these figures were "hard numbers . . . extracted from QuickBooks." The Summary covered the years 2001 – 2006 (with 2006 being incomplete because it was the year of closing). I will come back to this important Summary later. For now, I will set out the total sales that it reflects:

	2001	2002	2003	2004	2005	2006
Total Sales	$875,989	$834,517	$974,924	$917,788	$910,021	$516,945

[441] The plaintiff argues that the Comparative Year-Over-Year Summary is the only document disclosing the profitability of the Niagara Falls Clinic that was produced by the defendants prior to closing. I agree. It is further argued that the Summary was a deliberate attempt to substantiate the misrepresentation that the clinic had an annual profit between $300,000 and $350,000 for the years 2001-2005. I disagree. I will deal further with the Summary later.

(i) September 15th

(i) *e-mail from Andy Gunarsons to Dee Lewis*

[442] At 8:22 a.m., on September 15th, Andy Gunarsons e-mailed Dee Lewis, with the subject line – "Niagara Falls Clinic data":

> I will send the [spreadsheet] info as a PDF to Karl [Bowley]: he needs it to prepare cash-flow projections for [Fridriksson] (it is an elementary early part of the due diligence) . . . they will have a [spreadsheet] synopsis of the profitable operation, they will have the pertinent rent and suggested payroll details . . . we have done all that we can . . .

[443] As I understand the matter, in this e-mail, Andy Gunarsons is forwarding to Dee Lewis the September 14th Comparative Year-Over-Year Summary for her input. She testified, in-chief:

> Q. . . . what, if any, review did you undertake of [the Comparative Year-Over-Year Summary] before it was sent?
>
> A. I discussed it with Andy before it was sent. I had questions . . . I felt that it underrepresented the net profit of the [Niagara Falls] Clinic and it was, he told me it should be conservative, which was reasonable. I thought it was a little more than conservative . . .
>
> Q. Now, why is it you felt that it underrepresented the net profit of the clinic?

> A. Because there were operating expenses in there that did not represent the operating expenses of the [Niagara Falls] Clinic . . . He had spread the operating expenses equally across the three clinics and the Niagara Falls location, the operating expenses were lower.
>
> Q. Now, in what way were they lower?
>
> A. Well, for example, the salaries [in the Niagara Falls Clinic] were only about $70,000 and the operating expenses are $200,000, are over $200,000 . . .

(ii) *e-mail from Andy Gunarsons to Karl Bowley*

[444] At 8:45 a.m., on September 15th, Andy Gunarsons e-mailed the Comparative Year-Over-Year Summary (presumably containing the changes suggested by Dee Lewis) to Karl Bowley, saying: [Upper case in original]

> As discussed, here is the summary of the [Niagara Falls Clinic] attached as a PDF file. Sales to [Niagara Falls] are easily identified and sourced but because purchases are done on an entity basis for all 3 clinics, cost allocations needed to be done with the following assumptions:
>
> ▪ COGS [cost of goods sold] are reflected using yearly % rates from compiled [financial statements];
>
> ▪ The operating costs below COGS have been split 1/3 to [Niagara Falls] from actual gross numbers adjusted for the items following;
>
> ▪ Rent is actual [Niagara Falls] costs;
>
> ▪ Advertising is actual [Niagara Falls] costs;
>
> ▪ Overall, the [Niagara Falls] costs are closer to 25% instead of 1/3 share per Dee [Lewis], but in the absence of a detailed trail for now, I have used a more conservative 1/3 simple split (e.g. affected areas include telephone costs and payroll costs)
>
> As discussed this confidential information DOES NOT go to third parties including, inter alia, Phonak or any other similar entities.

(j) September 17th

(i) *attendance at Niagara Falls Clinic*

[445] On September 17th, Fridriksson and Carol Klassen attended at the Niagara Falls Clinic, accompanied by the real estate agent who represented the defendants. In his evidence, Fridriksson gave the impression that he and his wife were rushed in their inspection of the premises:

A. I had about 10 minutes to go around the clinic and then I was asked to leave.

Q. And why did you not have a more extensive look around?

A. Because I was in the file room and the real estate agent told me I couldn't be in there and so I left.

[446] The realtor, Stephen Fletcher, tells a different, and more credible, story:

Q. What, if any, recollection do you have of any specific instructions as to what you were to do at the visit?

A. Just allow them in, in the premises.

. . . . . .

Q. So, after you entered the premises, unlocked the door, disengaged the security system, what did you do?

A. Just waited at the front door.

Q. Did you go anywhere beyond?

A. No.

. . . . . .

Q. What if any recollection do you have of whether or not, what they were doing on the visit?

A. I didn't pay attention.

. . . . . .

Q. How was it that the visit came to an end? How did Mr. Fridriksson and Ms. Klassen end the visit or how did you end the visit?

A. They were fine, they just, just locked things up and it was over.

Q. So they had come back to the front?

A. Yeah, yes.

[447] This important exchange occurred in the questioning of the realtor:

Q. Do you have, what, if any, recollection do you have of you suggesting or demanding that Mr. Fridriksson and Ms. Klassen end their visit and leave?

A. I didn't, it wasn't my business to do that . . . I didn't suggest that they leave.

Q. Okay.

A. I just waited.

[448] I find that Mr. Fletcher is a believable witness and I unhesitatingly accept his testimony.

[449] Carol Klassen was cross-examined regarding her role during this attendance at the Niagara Falls Clinic:

> Q. And why is that you chose to go to the front of the clinic and stand at the reception area listening to his [the realtor's] stories rather than assisting Mr. Fridriksson in taking inventory?
>
> A. Because the clinics are basically Stefan's. I help to manage them but he's the audiologist, it's his, it's his work. I, I have assisted him but, you know, it's all his call.
>
> Q. So you didn't have much interest in what he was doing there that day?
>
> A. I was fine with whatever he decided. It, it wasn't something that I felt I could give that much to, like the decision, he was just looking at it, it was . . .
>
> Q. It was going to be ultimately his decision at the end of the day?
>
> A. It was his decision and he was the one who was, who was knowledgeable and knew what, what to look for.

(ii) *inventory of the contents of the Niagara Falls Clinic*

[450] Fridriksson prepared a two-page handwritten inventory of what he and Carol Klassen allege was located at the Niagara Falls Clinic on September 17th (for some reason, the inventory is dated September 19th – Fridriksson says this is an error and the date should be September 17th).[41] There are 44 items on the handwritten inventory, each with a separate total (ranging from one to 47).

[451] This detailed inventory was compiled during the rushed, 10-minute attendance at the Niagara Falls Clinic; an impressive feat. At trial, Fridriksson was cross-examined on the matter:

> Q. And sir, you would agree with me that your evidence here today, when you say you were given 10 to 20 minutes, isn't consistent with what you said at discovery, correct?
>
> A. Well, it's, it's close, 10 to 20 minutes.
>
> Q. It's 10 minutes.

---

[41] It is now official: Fridriksson is incapable of authoring a fully accurate note. The dating error here is what happens when one composes a written record after the fact.

A. It's 10 minutes, you're right . . . that's what I said at discovery.

Q. It's a pretty long list to make in 10 minutes, to go through 10 rooms plus common hallways and so on and so forth, right?

A. Yes.

Q. And your evidence is that this list was made at the time you were at the clinic?

A. Yes.

[452] Why, during this September 17th attendance, did Fridriksson not notice the absence of "thousands of unrecalled patient files in the back," which he says were an important part of his decision to purchase the Niagara Falls Clinic?

(k) September 18th

(i) *telephone call from Fridriksson to Andy Gunarsons*

[453] Fridriksson produced handwritten notes for the sixth telephone conversation that he insists he had with Andy Gunarsons, this one at 4:45 p.m., on September 18th, in which Fridriksson is supposed to have asked whether Carol Klassen will "have unfettered access to the patient schedule . . . and be able to look at all files" and it is alleged that Mr. Gunarsons answered, "Yes, she will have complete access after the Letter of Intent is signed." This is the third telephone call in which Fridriksson contends that the issue of access was raised.

[454] The notes also record:

> Karl tells me you sent the spreadsheet [the Comparative Year-Over-Year Summary] – we will need much more information than this before we want to commit to spending that kind of money. As I discussed with Terry we want verified [number of patients] and [number] of hearing aids [sold] per month.

[455] The notes further indicate: "Contrary to your assurances Donna's advertising lots in Niagara Falls." Mr. Gunarsons denied ever giving such assurances.

[456] The notes also have Andy Gunarsons saying: "Terry does not get that many [patients] from [Dr.] Makerewich." It was the testimony of Mr. Gunarsons that how patients are referred to the Niagara Falls Clinic was not known to him and is "not information relevant to an accountant."

[457] In his testimony, Andy Gunarsons variously denied or did not recall the contents of this conversation.

[458] As I will point out more than once, the matters contained in these handwritten notes, like the other notes, are not mentioned in the Asset Purchase Agreement.

(l) September 19th

(i) *e-mail from Trevor Hood to Andy Gunarsons*

[459] At 8:51 a.m., on September 19th, Trevor Hood e-mailed Andy Gunarsons:

> I was working on completing the draft valuation report . . . and thought it would be best if I received some written confirmation on the changes to the engagement from our original engagement letter dated July 26, 2006. I understand that the changes are to be as follows:
>
> 1. The separate and distinct valuations of the Niagara Falls location and the two Toronto locations are no longer required . . .

This means that, previous to September 19th, Trevor Hood had been given reason to think that a "separate and distinct" valuation for the Niagara Falls Clinic was "no longer required."

(ii) *e-mail from Andy Gunarsons to Trevor Hood*

[460] At 10:20 a.m., on September 19th, Andy Gunarsons e-mailed Trevor Hood confirming that point number 1, in the 8:51 a.m. e-mail, was correct and adding:

> Niagara Falls as a separate spin-off sale fell apart yesterday as the purchaser suddenly changed his mind (grrr). Hence additional SB negotiations/separate NF spin-off consulting work will be N/A . . . The overall valuation required for the . . . reorganizing . . . of the holding company . . . is the keystone point.

[461] Trevor Hood is being told on September 19th not to proceed with the separate valuation for the Niagara Falls Clinic. However, based upon the e-mail from Karl Bowley to Fridriksson on August 30, 2006, at 3:34 p.m., Andy Gunarsons knew at least as early as that date that there would be no separate valuation. Thus, it is unlikely that the cancellation was because the "sale fell apart yesterday" (as "yesterday" was September 18th).

[462] Who was the purchaser who "suddenly changed his mind"? Andy Gunarsons testified that, in or about September of 2006, there were two parties interested in purchasing the Niagara Falls Clinic, Island Hearing and "a lady [perhaps from the United States] that was considering buying down there so that she could be in the Niagara Peninsula." He was asked:

> Q. And if there were people interested in purchasing just Niagara Falls [and not all three of the hearing clinics owned by the defendants], why was the instruction not to proceed with that valuation made?
>
> A. 'Cause those two, Mr. Hambley [president and CEO of Island Hearing] wanted all three so it became a non-starter and the other lady dropped out.

[463] Yet, as of September of 2006, Fridriksson and the plaintiff were interested in the Niagara Falls Clinic. Was that interest insufficient to sustain the separate-valuation instructions?

[464] The plaintiff submits that Island Hearing is the purchaser who "suddenly changed his mind" and that it is reasonable to deduce that Andy Gunarsons had provided financial information to Island Hearing "which produced an unfavourable valuation," causing Island Hearing to lose interest, and that the defendants then cancelled the separate valuation of the Niagara Falls Clinic "as they knew it would produce an unfavourable figure." This submission is only speculation.

[465] It is further submitted by the plaintiff that "the preliminary valuation figures provided by Trevor Hood did not support the representation in writing that the clinic produced between $300,000 and $350,000 profit a year." There is no evidence that "preliminary valuation figures" were ever produced by Trevor Hood.

[466] Was some work done by Trevor Hood towards valuing the Niagara Falls Clinic before the separate-valuation instructions were rescinded? What information was provided to him regarding the Niagara Falls Clinic? The plaintiff argues that "an adverse inference should be drawn that the preliminary figures [for the Niagara Falls Clinic] were not favourable to the defendants." Based upon the e-mail from Andy Gunarsons to Terry Lewis on August 29, 2006, at 3:29 p.m., it does not appear that, as of that date, the defendants knew "Trevor's numbers" for the Niagara Falls Clinic. The e-mail reads: [Upper case in original]

> . . . [Fridriksson] doesn't get any info sourced from Trevor unless you WANT him to have it: he has no rights to it unless you give it to him. Obviously if Trevor's [numbers] are favourable, you MIGHT consider it . . . maybe. If Trevor's numbers are not helpful to you, he doesn't get it – period. Let him get his own CBV . . .

[467] Something happened between the e-mail of August 29th, at 3:29 p.m., and the e-mail from Trevor Hood of September 19th.

[468] In cross-examination, Andy Gunarsons stated:

> Q. So your evidence is that between July 26th, which is the date of the engagement letter, and September 19th, no work was done in relation – by Mr. Hood

> – in relation to obtaining separate financial working papers on the Niagara Falls Clinic?
>
> A. Correct . . . I believe that Mr. Hood was on vacation virtually most, if not all of August, and, and he was endeavouring to do the three-clinic report. He had to do them in sequence and he was focused strictly on the three-clinic report. He hadn't even contemplated starting Niagara Falls.

[469] This testimony is consistent with the fact that the final report from Mr. Hood was completed later the same day that he was told that a separate valuation was not needed for the Niagara Falls Clinic. In other words, it was the last of the three clinics "in sequence."

[470] Nevertheless, with Trevor Hood not being called as a witness (he could have been summonsed by either side) to explain *when* he was first alerted to the fact that a separate valuation was no longer needed for the Niagara Falls Clinic, his understanding of *why* it was not needed, whether he had prepared preliminary valuation calculations and whether he was in a position to opine on the value of the Niagara Falls Clinic, it is logical to infer that the separate valuation was cancelled because it would have produced a figure that, in the eyes of the defendants, was unattractively low. The e-mail of August 29th, at 3:29 p.m., makes it clear that if "Trevor's numbers" are unfavourable, they will not be provided to the plaintiff.

[471] To the extent that a separate valuation for the Niagara Falls Clinic was promised to the plaintiff, Fridriksson learned that it would not be forthcoming on August 30th, at 3:34 p.m., long before the Letter of Intent or before any legal obligation could be said to have arisen. Fridriksson was in as good a position as this court to infer the reason for the cancellation.

[472] If the defendants were never legally obligated to provide a separate valuation for the Niagara Falls Clinic, there can be no legal obligation upon them to provide the reason for its cancellation.

[473] Furthermore, it was always open to the plaintiff to obtain its own valuation.

(iii) *valuation of Trevor Hood*

[474] At 4:52 p.m., on September 19th, Trevor Hood, the certified business valuator with SB Partners Corporate Finance Ltd, e-mailed to Andy Gunarsons his final report valuing the three hearing clinics of the defendants at $3,500,000.[42]

[475] In his report, Mr. Hood states:

> . . . in arriving at normalized maintainable after-tax operating cash flows . . . management salaries and bonuses have been added back and the estimated compensation required to replace the roles of Terry and Dee Lewis has been deducted. The normalized compensation was based on our discussions with Mr. and Mrs. Lewis.

[476] The "normalized management salaries and bonuses" are shown as $50,000. This amount was to represent payment to Dee Lewis as manager of the three clinics and to Terry Lewis as audiologist of the three clinics, a figure which the plaintiff submits is unreasonably low.[43]

(m) September 20th

(i) *telephone call from Fridriksson to Karl Bowley*

[477] Fridriksson tendered handwritten notes of a telephone call with Karl Bowley at 9:35 (probably a.m.) on September 20th which include a request that Mr. Bowley "ask Andy when Carol can view the books and talk to the secretary."

[478] The testimony of Fridriksson regarding these notes was entirely confused and Karl Bowley was not questioned about the conversation.

(n) September 21st

(i) *e-mail from Karl Bowley to Andy Gunarsons*

[479] At 11:32 a.m., on September 21st, Karl Bowley sent an e-mail to Andy Gunarsons:

> Further to our discussions: Info requested: QuickBooks back up to verify sales volume. Further breakdown of operating costs. Suggested allocation of purchase price.

---

42 It is interesting (almost amusing) to see that the report neither relied upon nor mentioned the number of patients, the mix of patients, the number of WSIB patients, the thousands of unrecalled patient files in the back or the level of hearing aid sales, all of which, in this trial, had whipped Fridriksson into a frothy frenzy.

43 However, this is not helpful for my purposes because Trevor Hood did not testify and explain his report.

(ii) *Letter of Intent*

[480] On September 21st, Fridriksson and Carol Klassen signed a Letter of Intent (which had been prepared by Karl Bowley) regarding the purchase of the Niagara Falls Clinic. It was addressed to Terry Lewis and Andy Gunarsons and reads: [Upper case in original]

> LETTER OF INTENT
>
> This letter outlines my intent to purchase the assets of the Niagara Falls Hearing Clinic.
>
> Further to conversations between Mr. A. Gunarsons and Mr. K. Bowley:
>
> ▪ $1,000,000 payable on closing (subject to normal legal conditions)
>
> ▪ final due diligence still to be completed
>
> ▪ an asset purchase (equipment, leaseholds, goodwill)
>
> ▪ exclusive territory rights and non competition agreements
>
> ▪ will close AS SOON AS POSSIBLE
>
> ▪ Fridriksson lawyer will draft legal agreement
>
> ▪ the clinic fall mailing will be done ASAP
>
> ▪ negotiations with any other parties will be discontinued

[481] The following words were added in handwriting:

> ▪ a letter from Terry to all patients re sale

This addition was not initialled but Fridriksson testified that it was his handwriting.

[482] Fridriksson was questioned, in-chief, about the purchase price:

> Q. At this point in time on September 21st, had the purchase price been determined or agreed upon?
>
> A. The purchase price, we had agreed upon a million dollars.

[483] Karl Bowley was asked, in-chief: “Can you tell us how the million dollar purchase price was arrived at?” He answered:

> A. When the discussion began between Mr. Gunarsons and myself at the same time Stefan was speaking with Terry, etc., etc., various numbers were being thrown around, certain number of times profits . . . Our problem is we had no numbers. In

> the end, Mr. Gunarsons said one day, 'A million dollars, cash, no holdbacks, that will make this deal happen' . . . Stefan and myself we came to the decision that number . . . is something we could work with . . .

[484] The position of the defendants is that the purchase price was arrived at as a multiple of three times earnings, on the basis that "the earnings of the clinic were always between $300,000 and $350,000 annually."

[485] The theory of the plaintiff is that the earnings of the Niagara Falls Clinic:

> . . . were obviously an important factor, however, there were many other factors that were also important which are all components included in evaluating the goodwill of the clinic, including the number of active patients the clinic had, the composition of those patients, what percentage were WSIB patients (which are recognized as the most lucrative patients), and what the source of these WSIB patients were.

[486] On my review of the evidence (beginning with the early e-mail of August 28, 2006, at 4:19 p.m., from Terry Lewis to Fridriksson), I find that the purchase price was negotiated based upon expected earnings.

[487] Andy Gunarsons agreed in his evidence that, as of the signing of the Letter of Intent, "the financial information given to Karl Bowley at that time was basically limited to [the Comparative Year-Over-Year Summary prepared on September 14, 2006]."

(iii) *telephone call from Fridriksson to Andy Gunarsons*

[488] Fridriksson produced handwritten notes for a telephone call at 5:10 p.m., on September 21st, which he maintains was the seventh one that he placed to Andy Gunarsons.

[489] Like so many of these notes, Fridriksson attributes statements to Mr. Gunarsons for which the latter lacked the knowledge or the authority to make. As an example, Fridriksson alleges that he told Andy Gunarsons: "We need a time for Carol to go to the [Niagara Falls] office." Mr. Gunarsons repeatedly testified that he was in no position to authorize such an attendance. It was "not my call," he said.

[490] According to the handwritten notes, Fridriksson said to Andy Gunarsons:

- Terry told me there are 5,000 [patients] – prove it
- Terry said he has lots of unrecalled patients and a room full of files

[491] It was the testimony of Andy Gunarsons that he had no knowledge of the number of patients or of the unrecalled files.

(iv) *e-mail from Marke Hambley to Andy Gunarsons*

[492] By e-mail on September 21st, at 6:23 p.m., Marke Hambley, of Island Hearing, sent an e-mail to Andy Gunarsons enclosing a 13-paragraph, four-page Letter of Intent for the purchase of the three clinics owned by the defendants for $2.5 million. (The CBV report of Trevor Hood had valued the three hearing clinics at $3.5 million.)

[493] The plaintiff argues that, as Marke Hambley had previously indicated Island Hearing would pay up to five times earnings (see his e-mail to Terry Lewis at 3:43 pm., on July 21, 2006), "it would appear that the purchase price of $2.5 million reflects an analysis of earnings for all three of the defendants' clinics in the range of $500,000." This is speculation. Marke Hambley did not testify and explain the basis for his $2.5 million offer.

[494] The plaintiff submits:

> It is reasonable to conclude that Island Hearing received far more financial disclosure than that provided to Fridriksson and, as a result, came to the conclusion that all three clinics were worth only $2.5 million. As Niagara Falls produced less than one-third of the total sales of all three clinics, it stands to reason it would not produce EBITDA that reflects more than one-third of the EBITDA of all three clinics.

Again, more speculation.

(v) *e-mail from Terry Lewis to Andy Gunarsons*

[495] At 9:10 p.m., on September 21st, Terry Lewis sent an e-mail to Andy Gunarsons:

> Thanks for the information. I have a strong objection to sending out advertising for [Fridriksson]. I agreed to supply him with the envelopes that we had printed for our planned mailing, but I did not propose to send the mailings out for him. That would be more than 2000 items and obviously a considerable investment in time and mailing costs . . .

[496] This e-mail is consistent with the one from Terry Lewis to Andy Gunarsons on September 8th, at 8:09 a.m.

[497] The e-mail continues:

> Regardless, he agreed to pay 4 times earnings; and since he is not paying 4 times earnings, I do not intend to have my staff spend time stuffing envelopes for him; they will spend their time stuffing envelopes for our Scarborough clinics. How would I

> know what message to put in the mailing anyway? Does he want his car waxed as well?[44]

[498] With a purchase price of $1 million, the plaintiff, effectively, was paying a multiple of three times earnings.

(vi) *fax letter from Andy Gunarsons to James Naumovich*

[499] On September 21st, Andy Gunarsons forwarded the Letter of Intent to James Naumovich along with an explanatory covering letter saying:

> The purchaser has asked that [the Niagara Falls Clinic]'s annual fall advertising mailings be done. Terry and Dee prefer that they not do it now and defer it to the purchaser for two reasons:
>
> ▪ the proposed 2006 ad mailings involves hearing aid pamphlets from a supplier [Siemens] that is not used by the purchaser: and contemporaneous with that,
>
> ▪ Terry and Dee will likely be changing suppliers themselves that would be counterproductive to the current mailings.
>
> The assignment of the Niagara Falls lease involves the related numbered company as transferor/vendor: details to follow . . . Terry needs to review the Letter of Intent attached . . .

[500] The plaintiff argues that "at some point between September 8, 2006 and September 21, 2006, Terry Lewis changes his mind regarding his representation to Fridriksson that the defendants will complete this mailing." I disagree. I do not read the September 8th e-mail, at 8:09 a.m., as anything more than an offer of 2,500 envelopes to the plaintiff.

(o) September 22nd

(i) *e-mail from Andy Gunarsons to Dee Lewis and Terry Lewis*

[501] At 10:13 a.m., on September 22nd, Andy Gunarsons sent an e-mail to Dee and Terry Lewis enclosing the Letter of Intent from Island Hearing. The e-mail said:

> [Letter of Intent] from Island Hearing rec'd today is very much on the 'lean' side: $2.5 million for all 3 clinics. I suggest that we shelve it for now and simply deal with [Fridriksson] on [Niagara Falls].

---

44 Sometimes the e-mails from Terry Lewis sound like they are the sharp-tongued work of Dee Lewis.

(ii) *e-mail from Karl Bowley to Michael Mann*

[502] At 2:57 p.m., on September 22nd, Karl Bowley e-mailed Michael Mann (the lawyer representing the plaintiff on the purchase) providing "some details" on the purchase and sale. The "details" included the contents of the September 21st Letter of Intent from Fridriksson and Carol Klassen.

(p) September 25th

(i) *e-mail from Fridriksson to Andy Gunarsons*

[503] At 7:14 a.m., on Monday, September 25th, Fridriksson sent an e-mail to Andy Gunarsons:

> I have not received any paperwork from Terry and Dee regarding the sale of the Niagara Falls Clinic. I leave Thursday morning at 7:00 a.m. for New York and do not return until late Thursday night the following week . . .

(ii) *e-mail from Andy Gunarsons to the Lewises*

[504] At 9:44 a.m., on September 25th, Andy Gunarsons e-mailed Dee and Terry Lewis:

> Let's get [James Naumovich]'s approval on the [Letter of Intent] and let's reply to [Fridriksson] today by e-mail or fax if not already done so.

(iii) *e-mail from Andy Gunarsons to Karl Bowley*

[505] At 1:12 p.m., on September 25th, Andy Gunarsons e-mailed Karl Bowley:

> I discussed this [the e-mail from Karl Bowley of September 21, 2006 at 11:32 a.m.] with Dee and Terry and she has valid privacy concerns under Federal laws. The Privacy Act and PIPEDA [*Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5] precludes sending of any patient files electronically and also precludes sending of patient files to third parties without prior individual patient written approval.
>
> The workaround would be that I allow you to review everything in my office – we can permit you to look at whatever you want and whatever you require – we just cannot let it go (for now).

[506] The understanding of privacy laws expressed by Mr. Gunarsons is incorrect. This can be seen in the e-mail from CASLPO later, on November 28th, at 3:47 p.m., where the provisions of s. 42(1) and (2) of the *Personal Health Information Protection Act* are set out.

[507] The Federal *Personal Information Protection and Electronic Documents Act* is not applicable to the sale of the Niagara Falls Clinic. The governing statute is the Ontario *Personal Health Information Protection Act 2004*, S.O. 2004, c. 3.

(iv) *telephone call from Fridriksson to Andy Gunarsons*

[508] Fridriksson tendered in evidence his eighth set of handwritten notes of a telephone conversation that he says he had with Andy Gunarsons, this one at 1:30 p.m., on September 25th.

[509] Andy Gunarsons, in his testimony, denied the accuracy of the material contents of the notes and, in particular, this passage:

> . . . you promised my wife unfettered access to the files, the patient list, the secretary and would be free to ask questions. You promised me this two weeks ago, you promised me this last week. Now it is 'next week' again. What is going on? What are you trying to hide?

[510] Mr. Gunarsons testified that had he been spoken to in this fashion, he would have found it "offensive and hung up."

[511] These notes represent more fiction from Fridriksson.

[512] Fridriksson was cross-examined as to why all of the promises he alleges were made to him in telephone conversations were never set out in writing:

> Q. If you felt that strongly about the things that you were being told, that they are making excuses for things that they represented to you, why didn't you demand that provision for these things be specifically set out in correspondence from Mr. Mann to Mr. Naumovich [the lawyers] or from Mr. Bowley to Mr. Gunarsons [the accountants] and so on and so forth?
>
> A. Because they don't answer our e-mails so we did it on phone conversations.

[513] It is humbling to think that Fridriksson believes I will accept such an explanation because I have, in front of me, all of the e-mails in this trial, hundreds of them.[45] There is no evidence that the Lewises and their accountant failed to answer e-mails. And, Karl Bowley, in his testimony, did not say anything about unanswered e-mails.

(v) *e-mail from Karl Bowley to Andy Gunarsons*

[514] At 2:05 p.m., on September 25th, Karl Bowley e-mailed Andy Gunarsons:

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45 In the world of Monty Python, Fridriksson would be the Minister of Silly Explanations.

> Spoke with my 'privacy person.' Not sure how what is in QuickBooks (i.e. names and addresses) meets the definition of patient files. And if so, could it not be covered off by my privacy policy and if warranted copies of each staff member confidentiality agreement?
>
> I really don't want to make the trip if I don't have to.

(vi) *e-mail from Andy Gunarsons to Karl Bowley*

[515] At 4:21 p.m., on September 25th, Andy Gunarsons replied to Karl Bowley: [Upper case in original]

> The detailed [QuickBooks] file is apparently THE full patient info list database and not just the sales file so it falls under Privacy. It is a VERY sensitive issue at the moment. On site is the way to go . . .

[516] From this e-mail we learn that QuickBooks contains "full patient" information.

(q) September 26th

(i) *telephone call from Fridriksson to Karl Bowley*

[517] Fridriksson produced handwritten notes of a telephone conversation he says he had with Karl Bowley on September 26th, at 8:30 (whether it is a.m. or p.m. is not indicated, but it is probably a.m.):[46]

> [Fridriksson speaking] For the past month Andy has promised full disclosure and all I have got from him is bullshit! He has promised that Carol can go to the office, meet Ginette, see the number of files, check the bookings and every time its 'next week.' I am phoning a lawyer about this to see if there are privacy issues.

[518] In his testimony, Fridriksson stated that the lawyer he consulted was Michael Mann.

(ii) *telephone call from Fridriksson to Karl Bowley*

[519] Fridriksson produced handwritten notes for a telephone call to Karl Bowley at 9:30 a.m., on September 26th:

> SF – Spoke to Andy Monday – called when Carol could meet Ginette – been two weeks now that he keeps promising next week . . . I am having difficulty trusting Andy. I am going to call a lawyer in my friends' office and I'll talk to you later.

---

46 Bearing in mind the contents of the 9:30 a.m. e-mail below, it does not make sense to have sent the 8:30 e-mail, whether it is a.m. or p.m.

[520] Karl Bowley does not remember this telephone call. In particular, he does not recall "the concept of no trust with Andy."

(iii) *e-mail from Andy Gunarsons to Dee Lewis*

[521] At 10:06 a.m., on September 26th, Andy e-mailed Dee Lewis:

> Can you please burn on to a CD the 2000-2005 QuickBooks files for the Niagara Falls Clinic so I can pick it up later today? Karl Bowley and I will require them.

(iv) *e-mail from Andy Gunarsons to Dee Lewis*

[522] At 10:13 a.m., Andy Gunarsons sent another e-mail to Dee Lewis:

> Ditto for 2006 [year to date].

[523] Andy Gunarsons gave this evidence in respect of the e-mails at 10:06 a.m. and 10:13 a.m.:

> A. . . . Mr. Bowley . . . wanted to verify the sales volumes in the Niagara Falls Clinic to, to provide that to him I would actually need the QuickBooks files . . . So [these e-mails are] now a request for Mrs. Lewis to, to dig out the, the QuickBooks files and prepare them on disc . . . so that I can basically prepare the reports and Mr. Bowley can review them when he comes to my office [on October 4th].
>
> Q. Okay and what response, if any, did you receive from Mrs. Lewis?
>
> A. Mrs. Lewis provided all of those within a day or two after, I don't know the exact date.

(v) *e-mail from Fridriksson to Andy Gunarsons*

[524] At 12:49 p.m., on September 26th, Fridriksson e-mailed Andy Gunarsons:

> Just a reminder about the mailing. In order to meet the Thanksgiving holiday time that mailing will need to go out this week.

[525] Thus, at this point, Fridriksson still was anticipating that the mailing would be done prior to the Thanksgiving holiday but the defendants, it will be seen, had no intention of doing so.

(vi) *e-mail from Karl Bowley to Andy Gunarsons*

[526] At 2:07 p.m., on September 26th, Karl Bowley sent an e-mail to Andy Gunarsons:

> Can you suggest possible times for me to attend at your office? Also – has Terry mailed out the 'fall mailing'? This is critical to [Fridriksson]'s success.

[527] Based upon this e-mail, Mr. Bowley thought that the defendants were going to send out the fall mailing.

(vii) *e-mail from Andy Gunarsons to Terry Lewis and Dee Lewis*

[528] At 3:21 p.m., on September 26th, Andy Gunarsons forwarded the 12:49 p.m. e-mail (from Fridriksson) to the Lewises:

> Comments on how to delicately respond.

[529] In other words, Mr. Gunarsons is asking how he is supposed to advise Fridriksson and Mr. Bowley that the defendants are not doing the fall mailing. I observe that, at this point in the evidence, there is no clear indication what is contemplated by the words "fall mailing." On September 26th, 27th and 28th, there are five e-mails that mention a "fall mailing." Four of them do not say what is to be mailed; one refers to "brochures." Other e-mails speak of "postcards."

[530] I do not know why Andy Gunarsons would not have advised Karl Bowley previously that the defendants were not going to do a "fall mailing" (whatever that term means and, based upon evidence to come, the meaning does not matter).

(r) September 27th

(i) *e-mail from Fridriksson to Andy Gunarsons*

[531] At 8:22 a.m., on September 27th, Fridriksson e-mailed Andy Gunarsons:

> Karl has mentioned that Terry has chosen to not send the mailing. Based on experience the Fall mailing accounts for close to one-third to one-half of business in the last four months of a business year. As Terry well knows the Fall mailing is a very important part of any clinic's survival . . . I do not care if the brochures are Siemens . . . Send out the mailing!!

[532] This e-mail (which had a noticeably demanding tone, bearing in mind that, at this point, there was no Letter of Commitment or purchase agreement) was forwarded by Andy Gunarsons to Dee Lewis and Terry Lewis at 2:15 p.m.

(ii) *telephone calls from Fridriksson to Andy Gunarsons*

[533] Fridriksson tendered handwritten notes of alleged telephone calls to Andy Gunarsons at 12:02 p.m. and at 2:02 p.m., on September 27th. Amongst other

things, the notes say that Fridriksson instructed Terry Lewis to mail 5,000 postcards or brochures, not 3,000 as Mr. Lewis supposedly was suggesting.

[534] I dealt with these two telephone calls earlier when addressing the nature, character and credibility of Fridriksson, at paragraphs [91]-[98].

[535] The telephone records filed at trial do not show either call.

(iii) *e-mail from Karl Bowley to Andy Gunarsons*

[536] At 2:07 p.m., on September 27th, Karl Bowley e-mailed Andy Gunarsons:

> Can you suggest possible times for me to attend at your office?
>
> Also – has Terry mailed out the 'Fall mailing'? This is critical to [Fridriksson]'s success.

[537] This e-mail was forwarded by Andy Gunarsons to Dee and Terry Lewis at 2:10 p.m.

(iv) *e-mail from Karl Bowley to Andy Gunarsons*

[538] At 3:01 p.m., on September 27th, Karl Bowley sent an e-mail to Andy Gunarsons: [Upper case in original]

> Have you spoken to [Fridriksson] today? He is VERY CONCERNED re the 'mailing.'

(v) *e-mail from Andy Gunarsons to Karl Bowley*

[539] At 5:14 p.m., on September 27th, Andy Gunarsons replied to Karl Bowley:

> Yes, I spoke to him. I need to talk to you on the matter ASAP.

(vi) *e-mail from Terry Lewis to Andy Gunarsons*

[540] At 5:44 p.m., on September 27th, Terry Lewis e-mailed Andy Gunarsons:

> Thank you so much for your help. Sorry that you missed a trip to Paris with your wife. Enclosed is a newsletter for [Fridriksson]. It has been updated a little. It worked well for us in our Scarborough offices when we sent it out. I will send a letter of introduction in a minute.

[541] I believe that this is the first reference to a "newsletter." I understand that the newsletter is a different item from the brochures.

[542] The parties are quite imprecise in their terminology. During the trial I heard of brochures, postcards, fliers, newsletters and a letter of introduction (with the first three, at least, being difficult to distinguish).

(vii) *e-mail from Terry Lewis to Andy Gunarsons*

[543] At 6:13 p.m., on September 27th, Terry Lewis sent an e-mail to Andy Gunarsons:

> Here is a letter of introduction of [Fridriksson] to the patients of [the Niagara Falls] Clinic. It should be printed and mailed with the newsletter.

[544] The letter of introduction began: "As many of you know, I have been suffering with a severe neck injury for more than a year now, that has greatly limited my range of travel . . ." It continued: "I am pleased to introduce to you, Stefan Fridriksson, AuD, Doctor of Audiology . . . I have known Stefan for more than 20 years . . . I have confidence in his devotion to providing excellent service . . . Please come in to meet Stefan and his staff . . ."

(s) September 28th

[545] September 28th was a very busy day for the parties and their advisors.

(i) *e-mail from Terry Lewis to Andy Gunarsons*

[546] At 8:56 a.m., on September 28th, Terry Lewis sent a lengthy e-mail to Andy Gunarsons. It began by dealing with the fall mailing:

> . . . We still have the problem that the brochures are at the Scarborough clinic. You may recall that when we first told [Fridriksson] that we had only Siemens brochures [Siemens being the main supplier of hearing aids for the defendants], he said that he did not want them; and, in fact, said that he did not want a mailing . . . Anyway, I have contacted Purolator and they can pick up the brochures this morning and drive them directly to [Niagara Falls] for delivery by 1:00. So if the printing is completed and delivered there by mid-day, we could have the envelopes stuffed quickly and ready to mail as soon as we see $1 million in James Naumovich's trust account . . .

[547] The e-mail goes on to highlight, once again, the concern of the defendants in Fridriksson prematurely obtaining sensitive business information relating to the Niagara Falls Clinic:

> We are still faced with the issue of not having anything from [Fridriksson] but his tantrums about the mailings going out . . . Dee is right – we must have a closed deal with money in hand before we do anything that could be very damaging to us if he

> backs out at the last moment. Jim Naumovich feels that the [Letter of Intent] that we have is binding . . .

[548] The e-mail then returns to the subject of the brochures:

> What would you suggest? Should I go ahead and ship the brochures for delivery today, so that the envelopes can be prepared today and tomorrow, or should I send them by overnight delivery and have the envelopes stuffed tomorrow? . . . I do not want my [Niagara Falls] receptionist to know that a sale is imminent yet . . .
>
> This has really put me in a difficult position. What if my [Niagara Falls] receptionist gets spooked and decides to quit now? What if the rest of the staff finds out that a sale is imminent . . . [Fridriksson]'s lack of planning and his thoughtless reaction to the mailing delay is putting me in a position where I jeopardize my future with my staff if I have the mailing prepared now; and in a position where I endanger the sale if I do not.

[549] I gather that Terry Lewis was concerned about the timing of a pre-closing mailing because he did not want his staff to prematurely learn of the sale.

(ii) *telephone call from Fridriksson to Andy Gunarsons*

[550] The final set of handwritten notes produced by Fridriksson for a telephone call to Andy Gunarsons is for September 28th, at 9:13 a.m. I addressed this telephone call earlier in these Reasons, at paragraphs [99]-[113], when disparagingly discussing the nature, character and credibility of Fridriksson. These notes are more fiction.

[551] It was the evidence of Andy Gunarsons that he did not possess the information to have made the promises attributed to him in these notes. One item in the notes refers to Mr. Gunarsons having promised Fridriksson "the patient list." When questioned about this, in-chief, Mr. Gunarsons stated:

> A. . . . I dispute that. I don't have a patient list, I never promised, I don't have that information.

[552] However, on September 26th, Mr. Gunarsons had asked Dee Lewis for a CD of the 2001-2005 (and 2006 year-to-date) files from QuickBooks which, he testified, he received "within a day or two." Andy Gunarsons was aware (as of his e-mail to Karl Bowley at 4:21 p.m. on September 25th) that the complete patient list was in QuickBooks.

[553] There are no further telephone calls between Fridriksson and Andy Gunarsons until October 16th.

(iii) *e-mail from Terry Lewis to Andy Gunarsons*

[554] At 9:51 a.m., on September 28th, Terry Lewis again e-mailed Andy Gunarsons. He began by dealing with the issue of receivables: [Upper case in original]

> Dee reminded me that we must make Karl and [Fridriksson] aware that whatever receivables there are in [Niagara Falls] are OURS and we will collect them. We are NOT giving them up to [Fridriksson].

[555] In cross-examination, Andy Gunarsons defined "accounts receivable," in general, as "something billed and to be collected later." He agreed with the suggestion that, "even in laymen's terms, a receivable is payment . . . to the person who did the work." He did not recall why the concern over receivables was being raised on September 28th.

[556] The e-mail went on to say:

> Mickey [Tersigni], my bookkeeper, is in [Niagara Falls] today and tomorrow and has the envelopes. She will bring them back to be stuffed here or take care of that in [Niagara Falls] tomorrow with some temps; but we need to know what to do soon.

(iv) *e-mail from Terry Lewis to Andy Gunarsons*

[557] On September 28th, at 12:53 p.m., Terry Lewis e-mailed Andy Gunarsons:

> Remember that earlier, when we told Karl to pass on to [Fridriksson] that the brochures were Siemens, we received the reply that he did not want us sending out Siemens brochures. So, when I had the staff take the envelopes to [Niagara Falls], they did not take the brochures, as we could use them in Scarborough, since [Fridriksson] did not want them at that time. Now, all I can do is try to get them to [Niagara Falls] early Friday . . .
>
> Thus, we cannot finish stuffing the envelopes until Friday. So the earliest that they can be mailed, even if we get the cheque deposited into James Naumovich's trust account would be late Friday or Monday . . .
>
> I have attached another newsletter that probably looks better . . .

(v) *e-mail from Karl Bowley to Fridriksson*

[558] At 3:14 p.m., on September 28th, Karl Bowley e-mailed Fridriksson (who was vacationing in New York City):

> Info relayed from Terry thru Andy [to Karl Bowley]
>
> ▪ Terry never promised to do mailing

▪ Terry has never done one [a mailing] in [Niagara Falls]

▪ [Terry's] idea was do one and include a 'letter of introduction' about you

▪ thus [Terry] thought it made sense to do one mailing not two

▪ [Terry] thinks a 3000 piece mail-out is too big to do at once – i.e. if it is successful it brings too much business at once and if done now people may come before you are set up there

▪ [Terry] can't physically process it anyway until mid week next week

▪ [Terry] will do it, once deal is 'set' and will add his letter of introduction/reference. And would recommend doing in blocks of 750 or so.

▪ [Terry's] opinion that mid Oct will still be fine.

[Fridriksson] – your call – not what you wanted but there is some merit to his thoughts. I'm still planning to visit Andy's office next week to review numbers etc.

[559] This e-mail does not refer to the fall mailing as involving 5,000 items and Fridriksson did not correct the 3,000 figure that is mentioned. If the Niagara Falls Clinic had 5,000 patients, as Fridriksson repeatedly asserted in this trial, why would the mailing be for 3,000?

[560] In his testimony, Andy Gunarsons referred to the figure of 3,000 as being "a rounded up 2,500 with a cushion."

[561] In cross-examination, Karl Bowley agreed with the suggestion put to him that "there was never any reference or any mention to you by Mr. Gunarsons that there would be a mailing of anything more than 3,000 letters."

(vi) *handwritten notes of a telephone call from Fridriksson to Andy Gunarsons*

[562] Fridriksson produced handwritten notes of a telephone call to Andy Gunarsons at 3:50 p.m., on September 28th, which appear to be the last notes of this kind. Mr. Gunarsons disputes the accuracy of some of the notes and does not recall the balance of the notes.

(vii) *e-mail from Andy Gunarsons to Terry Lewis*

[563] At 5:30 p.m., on September 28th, Andy Gunarsons e-mailed Terry Lewis:

As discussed today, there is no panic about the mailings. Regular mail will do quite nicely.

(viii) *e-mail from Fridriksson to Karl Bowley*

[564] At 8:54 p.m., on September 28th, Fridriksson sent an e-mail to Karl Bowley. It dealt with the fall mailing:

> While certainly Terry never said 'I promise to do the mailing,' he did say he was going to do a mailing before Thanksgiving . . .

[565] This is truly remarkable. All of the huffing and puffing by Fridriksson about the fall mailing, and now we learn that it was never promised by Terry Lewis. And, the evidence does not clearly indicate whether the fall mailing involves brochures or postcards or something else.

[566] The e-mail then complained about a number of matters: [Underlining added]

> <u>I want a clear statement about what Terry is and is not going to do</u>. To this point we are dancing without a partner. Where is his Letter of Intent? What is he selling? How much is he going to do after the sale . . .
>
> <u>All of his words regarding this clinic need to be spelled out</u> . . . what will happen to the products on the shelves, what about the audiological equipment, access to Carol PDQ to the present and future schedule, the promise in writing that he has ceased negotiation with other parties, full and unfettered disclosure of everything to do with this $1,000,000 purchase. If there is not substantial movement in the direction of co-operation before I am back i.e. clearly stated principles from the other party, I do not know where this can lead but failure . . .

[567] At this stage of the negotiations (September 28th), very little has been agreed upon (perhaps only the purchase price). If representations have been made to Fridriksson, he is uncertain as to their nature and so he wants "a clear statement" and they "need to be spelled out." So far, on the basis of Fridriksson's own testimony, nothing actionable has occurred.

(ix) *e-mail from Fridriksson to Karl Bowley*

[568] At 9:02 p.m., on September 28, 2006, Fridriksson sent an e-mail to Karl Bowley. After asking him to read this e-mail "with the other one sent to you today" (presumably referring to the 8:54 p.m. e-mail), Fridriksson continued: [Underlining added]

> One last point, if he did not intend to do the mailing, why print the cards and why tell me about it. Karl, despite all of this nonsense, you and I have put a lot of effort into this agreement. I do think it has great potential to be a good thing if all that we have heard so far is true. Go look at the books. Tell Andy what I assume Michael Mann conveyed to you today and see what his response is. Michael did say something

> interesting. He said many deals falter at this point. I know I need to maintain a cool head and try not to let the small stuff get in the way of great possibilities . . .

[569] In cross-examination, Fridriksson denied that, by "small stuff," he was referring to the fall mailing. However, this e-mail and earlier ones contradict his testimony. For example, the e-mail at 8:54 p.m. bore the subject line "Re: mailing" and this e-mail, at 9:02 p.m., was to be read with that one.

[570] I observe that, in the communications between Fridriksson and Karl Bowley on September 28th, there is no reference to Fridriksson requiring 5,000 mailings, which is inconsistent with his "notes to self" in respect of the 12:02 p.m. and 2:02 p.m. telephone calls on September 27th.

(x) *e-mail from Dee Lewis to Andy Gunarsons*

[571] At 9:18 p.m., on September 28th, Dee Lewis e-mailed Andy Gunarsons:

> There is something we will tell you that we haven't told [Fridriksson] because he is too busy being an hysterical jerk[47] to listen anyway. If they send out 2500 letters at once, how can one audiologist and one receptionist handle all of the phone calls and walk-ins and questions from that many people? . . .

[572] This e-mail tends to suggest that the patients of the Niagara Falls Clinic must number approximately 2,500.

(t) September 29th

(i) *e-mail from Fridriksson to Andy Gunarsons*

[573] At 7:47 a.m., on September 29th, Fridriksson sent a lengthy e-mail to Andy Gunarsons which began: "Read this one before the other two written after thinking."[48] I will set out a few passages:

> . . . While certainly Terry never said 'I promise to do the mailing,' he did say he was going to 'do a mailing before Thanksgiving.' I would do a mailing, if it was me . . .
>
> . . . All of this [the mailing] aside, Andy, Terry and Dee's job over the next several (hopefully) days is to convince me that I want to send them $1,000,000 and encumber myself with debt for the next 6 years. So far, I have been the one trying to convince myself this is a good idea. They need to start helping me . . .

---

47 I do not think it was fair of Mrs. Lewis to characterize Fridriksson as "an hysterical jerk" merely because he was pressing for a pre-closing mailing (granted, he earned that label in many other instances during the trial and in the evidence).

48 This is a 24-carat example of Fridriksson acting precipitously, as is his natural inclination.

[574] The e-mail proceeded to raise a number of points:

> So that there is no confusion in the future, all of Terry and Andy's words regarding this clinic need to be spelled out: 1. The licensure of the name . . . 2. The 'substantial amount of hands on during the transition' needs to be spelled out. . . 3. What will happen to the products on the shelves? 4. Will my wife Carol be given unfettered access to study past and present booking schedules so we can plan and so we can feel that we have done our part of the due diligence. 5. Will I be given proof of the number of hearing aids sold . . . 6. Will we receive the promised signed Letter of Intent with the commitment that Terry and Dee are sincere in their desire to sell this clinic and have ceased negotiations with other parties . . .

[575] There is no mention in the e-mail of Fridriksson requiring "proof" of the number of patients, or the proportion of WSIB patients or the thousands of unrecalled patient files "in the back."

[576] The e-mail went on to say:

> I have transferred 5 clinics from one owner, me, to another. There are always difficulties.

[577] The e-mail concluded:

> Andy, I want to be convinced. I am a willing purchaser . . . If the seller is willing please show me that this is the case.

[578] Based upon the 7:47 a.m. e-mail, it may be inferred that, as of September 29th, there had been no agreement on anything to this point (apart, perhaps, from the purchase price).

(ii) *e-mail from Andy Gunarsons to Terry Lewis and Dee Lewis*

[579] At 9:10 a.m., on September 29, 2006, Andy Gunarsons sent an e-mail to Terry Lewis and Dee Lewis:

> It sounds like [Fridriksson] initially had a tantrum or a core meltdown ('read this before the other two written after thinking' in the subject line) . . . but he has now gathered himself. I am unimpressed by his tone and his content . . .
>
> As a sample discussion point #6, [Fridriksson] is emotionally now making accusations that we have not even replied to his Letter of Intent in writing. Of course we have and it was faxed to Karl Bowley just to make sure that . . . Karl got it before [Fridriksson] stepped on the plane . . . It's receipt of course was immediately acknowledged by Karl Bowley . . .
>
> In any case, his rants I can easily reply to and I will shortly in a proper calm professional manner; but after I have a short chat with Karl first . . .

[580] Andy Gunarsons testified that he did not make any effort to comply with the 7:47 a.m. e-mail. He did not have the authority to do so and the Lewises did not provide the authority.

8. <u>October 2006</u>

(a) October 2nd

(i) *e-mail from Andy Gunarsons to Karl Bowley*

[581] At 10:39 a.m., on Monday, October 2nd, Andy Gunarsons e-mailed Karl Bowley and confirmed their meeting at 10:00 a.m., on Wednesday, October 4th. I would categorize this as a disclosure meeting.

(ii) *Sales-by-Customer Summary*

[582] At 11:00 a.m., on October 2nd, Andy Gunarsons printed a "Sales-by-Customer Summary" from QuickBooks. He testified that he did so at the request of Karl Bowley for the October 4th meeting and, subsequently, on October 5th, a copy was couriered to Mr. Bowley.

[583] According to this Summary (which contained a total of 5,199 entries), the monthly hearing aid sales, from 2001-2006 were:

	2001	2002	2003	2004	2005	2006
Monthly Sales	42.0	unknown	43.5	41.6	35.8	44.0

[584] The total for 2005 is lower than the rest because, I assume, it was in or about September of that year that Terry Lewis became too ill to travel to Niagara Falls to render audiological services. The figure for 2006 covers the period from January up to and including August.

(b) October 4th

(i) *meeting between Karl Bowley and Andy Gunarsons*

[585] Karl Bowley travelled from St. Catharines to Oakville for a meeting with Andy Gunarsons at 10:00 a.m., on October 4th, Mr. Bowley described the meeting in his testimony:

> A. . . . He had prepared for me some excerpts of financial information including some lease documents and some sales summaries and he made those available to me in printed format in his boardroom. I did spend some time looking at these.

> . . . I sat across from him . . . when I was in his office. He did have a computer screen there on his desk. He did show me that . . . he had QuickBooks information . . . He said you know we have several years of this but again this is the privacy commission issue so I can't, couldn't let you have this for your perusal at your office. I went to the boardroom, looked at certain items, realized that it wasn't everything that I needed. I needed some detail in regards to the sales or again trying to determine number of hearing aids fit . . . That day he didn't provide that information. He indicated to me he would courier it to me in the next couple of days . . . I left there at two o'clock and was back in my office at three o'clock in St. Catharines . . .

[586] Mr. Bowley testified that he had expected to see financial statements for the Niagara Falls Clinic. He wanted "to get ideas of sales volumes . . . [and] specific costs." He added:

> A. I was only trying to see what Andy would give me. To this point, he had said, 'You can't have it, I'll give you information when you get here' . . . he did show me some . . . general sales volumes [for the Niagara Falls Clinic] . . . with no details and some information about some leasing costs, advertising costs . . . that kind of thing.

[587] Mr. Bowley was asked further about financial statements:

> Q. Did he provide you with financial statements of the clinic, the Niagara Falls Clinic alone?
>
> A. No.
>
> Q. Were you ever provided with financial statements for Niagara Falls as a separate clinic?
>
> A. Financial statements by definition, no. At some point in time he did provide a, what would seem to be an Excel spreadsheet that indicated . . . earnings before interest and appreciation etc. . . . not a financial statement . . . but certainly a representation of income.

[588] The "spreadsheet" probably was the Comparative Year-Over-Year Summary prepared by Andy Gunarsons on September 14th.

[589] At this meeting, Mr. Bowley did not make inquiries about a patient list, the number of patients or booking schedules. He stated:

> A. Only inquiry I made that day in regards to, like, booking schedules, again is the concept, when can Carol come? That was going to be her section of the due diligence. I was never looking for, when I was there, number of patients or booking schedules, that kind of thing.

[590] As for Carol Klassen attending the Niagara Falls Clinic:

> Q. And at this meeting what response, if any, did you get from Andy pertaining to when Carol would have an opportunity to do so?
>
> A. Yes, she can go, don't know when, check with the Lewises, that general kind of response.

[591] Fridriksson was cross-examined about the instructions that he had provided to Karl Bowley in advance of the meeting with Andy Gunarsons and those instructions are consistent with the testimony from Mr. Bowley:

> Q. What exactly were your instructions to Karl Bowley with respect to his October 4, 2006 meeting with Andy Gunarsons?
>
> A. To verify the financials.
>
> Q. That's it?
>
> A. That's it . . . [and] I was leaving it up to him to decide how he was going to verify the financials.
>
> Q. Did you specifically tell him, for example, 'I want you to look at the number of patients at that time'?
>
> A. No.
>
> Q. Is it fair to say that you left it up to him to determine what the scope of his due diligence would be at that meeting?
>
> A. At that meeting.

[592] Andy Gunarsons was cross-examined about whether, at the October 4th meeting, he showed the Trevor Hood CBV report to Karl Bowley:

> Q. What, if any, knowledge do you have on whether or not Mr. Bowley had an opportunity to either, to, to see this draft report or the final report?
>
> A. It was discussed with Mr. Bowley, I don't actually, six years later, I don't specifically remember whether he physically reviewed all the details in it, but he was definitely told that the value of all three companies was in the range of 3.5 million. I don't remember specifics . . .

[593] If Karl Bowley had seen the CBV report, I would have expected some mention of this fact in subsequent e-mails and other correspondence.

[594] The plaintiff submits that, on his examination for discovery (held August 26, 2008), when questioned about the October 4th meeting, Andy Gunarsons gave evidence that Karl Bowley was "there for the full day," whereas, at trial, he said

that Mr. Bowley was there "definitely not for the full day." This is a small point; very small; a quibble. It was a long meeting – four hours.

(ii) *e-mail from Terry Lewis to Andy Gunarsons*

[595] At 10:26 a.m., on October 4th, Terry Lewis sent an e-mail to Andy Gunarsons asking if they could continue negotiating with Island Hearing:

> I know that we are supposed to suspend negotiations with other parties . . . However, is there any reason that Marke Hambley [of Island Hearing] could not send us another offer for the whole business? . . . it would be nice to have a fallback position in case [Fridriksson] continues to come up with ridiculous conditions to add to his offer . . .
>
> . . . we have a very good relationship with Workers' Comp – WSIB, based on years of being very honest with them and returning money when they overpay us . . . I think that he [Marke Hambley] wants [Niagara Falls] so that he can slug it out with ListenUp! in very close proximity before they move into the West. It is also true that the business is probably worth more as a whole than broken up into [Niagara Falls] and Toronto to a major purchaser. So can Marke come up with a more acceptable figure while we wait for [Fridriksson]?

[596] The e-mail further stated:

> Obviously, our staff could teach Marke's staff a few things about producing more money in each office . . .

The plaintiff submits:

> This is a reference to the manner in which Terry conducted his clinics in having a hearing instrument practitioner prescribe hearing aids, signing verification certificates in blank, charging for programming of hearing aids not performed and billing insurers for hearing aids provided to WSIB patients.

[597] If Terry Lewis was routinely violating the accepted methods of running a hearing clinic, would he (even if he was not as paranoid as his wife) really want a competitor to know about his practices, thereby exposing himself to, perhaps, a CASLPO investigation or a WSIB audit? The validity of this submission is unlikely. The Lewises were intensely concerned about confidential information falling into the hands of a competitor, yet they were prepared to reveal criminal or quasi-criminal conduct to a competitor? I think not. Dee Lewis and Terry Lewis are many things. Stupid is not one of them.

[598] Perhaps I should point out that, in accordance with the WSIB documentation filed at trial (Exhibit #53), a hearing instrument practitioner (sometimes referred to

in the evidence as a hearing instrument specialist) cannot prescribe hearing aids, but is authorized to provide the following services: "selection, verification, validation, and counseling, that are related to the provision of a hearing aid and hearing aid follow-up activities . . ." Hearing instrument practitioners "are not a regulated health professional [and] are not accountable to a regulatory body defined in the legislation."

(iii) *e-mail from Andy Gunarsons to Terry Lewis and Dee Lewis*

[599] At 10:51 a.m., on October 4th, Andy Gunarsons e-mailed the Lewises:

> It is niggly but very important legal procedural thing that we are stopped from discussing a sale for [Niagara Falls] with other parties during the due diligence process – it is a condition in the [Letter of Intent] to grant them exclusivity – for now . . .
>
> As far as 'your price' to be galvanized as a bona fide counteroffer to Marke [Hambley], may I suggest that we first discuss a 'high-mid-low' range, preferable with combined input & comments from you, Bruce, Dee, Jim, Trevor and moi.

(iv) *telephone call from Fridriksson to Karl Bowley*

[600] Fridriksson produced handwritten notes for a telephone conversation with Karl Bowley at 3:10 p.m., on October 4th. The notes began:

> Asked Karl to put a request to Andy in writing because he seems to be refusing to return my phone calls or messages left on his answering machine . . .

[601] This is a curious comment[49] because there had been no telephone calls from Fridriksson to Andy Gunarsons since September 28th (and none thereafter until October 16th). Fridriksson was cross-examined:

> Q. So, from September 28, 2006, in reviewing your phone records, there did not appear to be any other calls therein until October 16, 2006, correct?
>
> A. Yes.
>
> Q. Then why is it, we have a phone call note [in this October 4th call] . . . wherein the first item . . . says, 'Asked Karl to put a request to Andy in writing because he seems to be refusing to return my phone calls or messages left on his answering machine'?
>
> A. I don't know.

[602] The notes continue:

---

49 Actually, it is more than curious; it is untruthful.

> Remind him that he promised Carol unfettered access – his own words – to the books. . .

[603] Andy Gunarsons denies ever using the word "unfettered" or making the promise alleged.

[604] The notes conclude:

> I want in writing and I want Andy to promise in writing. Karl said he would write to Andy. [Andy Gunarsons] said Carol could go this Friday and spend the day.

[605] Mr. Gunarsons disputes having made this promise. His instructions from the Lewises were "no access until money in hand."

[606] Carol Klassen was questioned on the issue of access. She stated that there were certain things that she wanted to verify about the Niagara Falls Clinic prior to closing – the number of patients, the number of patient files in the back, the booking schedules, the number of referrals from Dr. Makerewich and/or Dr. Caetano and she also wanted access to QuickBooks. She was cross-examined: [Underlining added]

> Q. When, in your mind, did you determine that those were all areas or things that you wanted to verify or to review and verify and satisfy yourself about?
>
> A. Those were things that Stefan asked me to, to verify or he, he would have given me a list. <u>It would have been something he decided was necessary</u> . . .

(v) *e-mail from Karl Bowley to Andy Gunarsons*

[607] At 3:16 p.m., on October 4th, after returning to his St. Catharines office following the four-hour meeting with Andy Gunarsons, Karl Bowley e-mailed Mr. Gunarsons:

> Thank you for your time and attention today. Nice to put a face to a voice after our many conversations to this point. As discussed I am putting in writing [Fridriksson]'s request (cut and paste here [from an e-mail sent by Fridriksson on September 29th at 7:47 a.m.]):
>
> 4. Will my wife Carol be given unfettered access to study past and present booking schedules so we can plan and so we can feel we have done our part of the due diligence.
>
> The earliest possible attention to this matter would help to move this thing along. [Fridriksson] had wondered if Friday of this week is possible.

[608] Karl Bowley does not recall whether he received a response to this e-mail.

[609] Although the plaintiff suggests that Mr. Bowley was unhappy with the meeting and with the level of disclosure provided, if that were true, I would have expected this e-mail to betray his unhappiness. It did not.

(vi) *telephone call from Fridriksson to Karl Bowley*

[610] Fridriksson tendered handwritten notes for a telephone call to Karl Bowley at 11:06 p.m., on October 4th:[50]

> Karl met with Andy – good discussion – will be able to examine this more closely over next several days but [numbers] look good.
>
> [Fridriksson speaking] When should we consult?
>
> [Bowley speaking] Next week I think.
>
> [Fridriksson speaking] When can Carol go to Niagara Falls to complete due diligence re number of patients, number of hearing aids, schedule, etc.
>
> [Bowley speaking] Will call Andy.

[611] Mr. Bowley does not remember this conversation, but, he stated: "The hour is not unusual."

[612] The handwritten notes of this telephone call further negate, I think, the suggestion that Karl Bowley and Fridriksson were unhappy with the disclosure provided during the meeting of October 4th.

(c) October 6th

(i) *e-mail from Terry Lewis to Andy Gunarsons*

[613] On October 6th, at 9:10 p.m., Terry Lewis sent an e-mail to Andy Gunarsons:

> Here is the Niagara Falls appt. schedule. We do not book appts. very far in advance because of difficulties of changing appointments if the staff has to change the days that they will be there. I hope that you have no difficulty opening the files.

[614] In cross-examination, Mr. Gunarsons said that he did not recall ever receiving the Niagara Falls schedule and the reason was not explained in the evidence. The plaintiff argues that the schedule was not produced because it would reveal that Sarah Peverley, the audiologist, was present at the Niagara Falls Clinic on far fewer occasions than would reasonably be expected. However, that schedule

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50 I dealt with this 11:06 p.m. call previously in these Reasons, when addressing the nature, character and credibility of Fridriksson, specifically at paragraphs [121]-[126].

was still "in the computer" after closing and could have been tendered at trial by the plaintiff.

(d) October 10th

(i) *Fridriksson believed Terry Lewis and Andy Gunarsons were bullshitters*

[615] Fridriksson was questioned about the credibility of Terry Lewis and Andy Gunarsons:

> Q. So, On October 10, 2006, did you believe that Andy and Terry were bullshitters?
>
> A. Yes.

It was established previously that Fridriksson agreed that a "bullshitter" is a "liar."

[616] Later in the trial, Fridriksson attempted to resile from his testimony by resorting to silly hairsplitting, saying that, as of October 10, 2006 he only *suspected* that Terry Lewis was a bullshitter, but it was not until after the purchase was completed that he was *sure* of that fact. His attempt was awkward, unconvincing and merely an effort to salvage a case that was unfolding disastrously for the plaintiff. Indeed, at his examination for discovery, Fridriksson said that, as of August 30th or 31st, "the conclusion I drew was that there was a problem with believing things that Terry said."

(ii) *telephone call from Fridriksson to Karl Bowley*

[617] Fridriksson tendered handwritten notes of a telephone conversation that he alleges having with Karl Bowley at 9:10 a.m., on October 10th, dealing with hearing aid sales, patient numbers, bookings and other matters.

[618] Mr. Bowley testified that he has notes dated October 10th but there is "no mention of any of this." I will set out three points for comparison:

Handwritten notes of Fridriksson	Testimony of Karl Bowley
"They [Andy Gunarsons and Terry Lewis] have been bullshitting us since day 1."	He does not "recall this statement of the thought and, therefore, could not have been in agreement with the concept."
"Does Andy belong to a college, is he responsible?"	This was asked of Mr. Bowley "post closing."
"Ask Andy why we were misled."	Mr. Bowley never put this question to Mr. Gunarsons. The only inquiry that he made of Andy Gunarsons was regarding the number of hearing aids sold by the Niagara Falls Clinic.

[619] I find that this purported recounting by Fridriksson of an October 10th telephone call to Karl Bowley is fabricated in all material respects.

[620] The final passage of the handwritten notes reads, in a rather dramatic tone: "Karl, I am sick to death of Andy's bullshit – what the hell is going on – this is really close to not happening."

(iii) *notes by Karl Bowley*

[621] Karl Bowley produced several pages of detailed handwritten notes that he made on October 10th (unrelated to the alleged telephone call from Fridriksson on this date). He described the notes as "a summary of where we were at." Mr. Bowley was cross-examined on the telling absence of any reference to patient numbers:

> Q. You'd agree with me there's no reference here to any specific number of patients, be it total patients, active patients or any other categorization of patients, correct?
>
> A. Correct.

[622] His notes, however, do refer to:

- hearing aid sales ("thought doing 40 [per month] hasn't and isn't");
- assessing the value of the Niagara Falls Clinic ("it's not just [Niagara Falls] it is 'big picture' " – referring to the additional "buying power" Fridriksson would have with a third hearing clinic);
- "Phonak deal makes it 'doable.' " (Phonak was lending the purchase money to the plaintiff and, among other contractual goodies, the loan was interest free.)

[623] The notes of Mr. Bowley set out the gross income for the Niagara Falls Clinic in the years 2001 – 2005, but there is no mention of net profit.

[624] The notes also contain the following:

True price	$1M	
	– 350	re discounts
	– 80	[loan] forgiveness
	570	

[625] When cross-examined, Mr. Bowley agreed that "350" refers to $350,000 in discounts and that it is "a straight deduction off the purchase price of a million." He also acknowledged that "80" is "a deduction of $80,000 for the loan forgiveness arrangement" under the Phonak agreement that Fridriksson had negotiated. Mr. Bowley, although he did not participate in the negotiations leading to the Phonak loan, was aware that "it was at zero percent" and that "there were significant discounts accruing to the Stefan Fridriksson Professional Corporation and to the [plaintiff]."

[626] In his cross-examination, Mr. Bowley was asked whether Fridriksson was happy with the Phonak loan:

> Q. And in discussions that you had with Stefan back in 2006, is it fair to say he was quite happy with the deal he had negotiated with Phonak?
>
> A. I honestly don't recall Stefan's state of mind about the deal.

[627] This cross-examination took place on August 3, 2012. Just a few days earlier, on Monday, July 30, 2012, Mr. Bowley had been examined for discovery (arising out of the mid-trial amendment to the statement of claim) and had answered differently:

> Q. And is it fair to say in the discussions that you had with Stefan he was quite happy with the deal he had negotiated with Phonak?
>
> A. Yes, at the time.

[628] Mr. Bowley was asked whether he remembered his Monday evidence:

> A. I don't recall saying that.
>
> Q. Well, this is only a few days ago, correct?
>
> A. Correct.
>
> Q. And you've given evidence in this trial on matters that pre-date your attendance by as much as five years and nine months or so, correct?
>
> A. Correct.[51]

[629] The fact that the purchase and Phonak financing of the Niagara Falls Clinic had some attractive financial features for the plaintiff is not relevant to the issue of whether misrepresentations were made to the plaintiff. However, they have some relevance when considering whether the plaintiff relied on those

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[51] Ahhhh, the frailty of the human memory; it is a corrosive presence in this trial.

misrepresentations (if made) when deciding to go through with the purchase. As Karl Bowley observed above, "Phonak deal makes it 'doable.' "

(e) October 11th

(i) *telephone call from Fridriksson to Karl Bowley*

[630] Fridriksson produced handwritten notes relating to a telephone conversation that he says he had with Karl Bowley at 9:26 a.m., on October 11th, in which these passages appear:

> [Fridriksson] – Does this deal make sense to you Karl?
>
> [Bowley] – The only reason this deal makes sense is that you got good financing otherwise it does not make sense.
>
> [Fridriksson] – Even with the financing it does not make sense. The only thing that makes it make sense is the fact that the clinic has 5,000 patients and 22 years of files.
>
> [Fridriksson] My concern is that we still do not have the promised access to Ginette . . . We have put our trust in Andy and now he has been shown to be full of sh**. Do you trust Andy, Karl?
>
> [Bowley] – I did check him out and he is supposed to be okay . . . See you tonight at 7:00 to discuss.
>
> [Fridriksson] – By then I will have to figure out whether this is worth it.

[631] Karl Bowley testified that he has no recollection of this telephone call or of ever being told the Niagara Falls Clinic had 5,000 patients. However, as for the "22 years of files," Mr. Bowley testified:

> A. I do recall [Fridriksson] telling me [but not necessarily in this call], you know, probably because I got the same answer, that thousands of the files in the back, recall at your whim.
>
> Q. Is your recollection that there were thousands and thousands of files in the back . . .?
>
> A. It was thousands and thousands of files . . . that's my recollection.

[632] Significantly, the representation as to "thousands and thousands of files" was never mentioned or confirmed in an e-mail. In all of the circumstances, it is not believable that this representation could have been made to Karl Bowley by Andy Gunarsons without it ever showing up in an e-mail and I think Mr. Bowley is confused and mistaken in saying so. It is more likely that the information came

from Fridriksson. If Mr. Bowley, on August 3rd, cannot recall an answer that he gave four days previously, he can be mistaken on this point.

[633] These pessimistic notes were written two days before the Letter of Commitment was signed and five days before Fridriksson delivered the $100,000 deposit.

(ii) *meeting between Fridriksson and Karl Bowley – the Forecast*

[634] At 7:00 p.m., on October 11th, Fridriksson met with Karl Bowley at which time they discussed a document that Mr. Bowley had prepared (there are no notes of this meeting). Mr. Bowley described it as “a forecast as to anticipated performance of the [Niagara Falls Clinic] for the year 2007” (which would be the first full year of ownership by the plaintiff). When asked why it had been prepared, he said it was “part of due diligence . . . to project the operation of the purchased business and how it might perform post closing . . .” Henceforth, I will refer to this document as the “Forecast.”

[635] Fridriksson, who assisted Karl Bowley “to put the Forecast together,” gave testimony on the matter that, in typical fashion, was confused, illogical and unbelievable.

[636] Fridriksson stated in his evidence that, “at this meeting, we determined, I determined it was not worth it to buy the clinic.” This is puzzling, because, approximately one hour later, at 8:12 p.m., we have what, at trial, was called the “FULL-STEAM-AHEAD” e-mail from Karl Bowley to Andy Gunarsons. Furthermore, two days later, Fridriksson signed a Letter of Commitment and three days after that he paid a $100,000 deposit.

[637] The Forecast showed projected sales for 2007 of $971,000. The actual sales for 2007 proved to be $930,687. Mr. Bowley was cross-examined on these figures:

> Q. Now, sir, I say to you that the, the variance between your projected, forecasted sales of $971,000 versus the actual sales of approximately $930,000 is roughly 4.1%. Would you agree with that?
>
> A. Sounds reasonable . . .
>
> Q. Okay and would you agree that this variance is relatively minor in the regular course of the business on that number of sales?
>
> A. It’s creeping up towards material . . .
>
> Q. It’s still below material?

A. Yes.

Q. So would you agree . . . the forecasted expectations were substantially met? Right?

A. The $930,000 compared to the $971,000 is in the ballpark.[52]

[638] Mr. Bowley went on to explain that the actual sales were achieved through "greater effort" by the plaintiff. However, this information came from Fridriksson, the fountain of fiction:

Q. And that's not based on your analysis or your direct knowledge, it's based on what you were told by Mr. Fridriksson, correct?

A. Correct . . . no separate due diligence by me to verify the amount of hard work.

[639] On behalf of the plaintiff, it is submitted that this "greater effort" evidence should be accepted because Fridriksson would not "deliberately lie to his own accountant as to how he generated his income." Oh yes he would (and a lie is not necessary – an exaggeration would do nicely).[53]

[640] The total sales for the Niagara Falls Clinic in 2005 (the last full year of operation by the defendants) were $910,021. In 2007, the first full year of operation by the plaintiff, the sales totalled $930,687. Does anyone see a winnable law suit in those numbers?

[641] The Forecast was not based on patient numbers. In cross-examination, Karl Bowley stated:

A. . . . So I'm not sure that [Fridriksson] ever valued [the Niagara Falls Clinic] as you're saying.

Q. You are not sure that he ever valued it by the number of patients . . .?

A. Yeah, I'm not sure.

Q. *You* certainly didn't value it by the number of patients?

A. Prior to closing, I don't recall ever doing a calculation saying number of patients times the number equals the value.

---

[52] Which raises an obvious question: If the post-closing performance of the Niagara Falls Clinic was "in the ballpark" of the pre-closing Forecast, why would the plaintiff commence an action complaining that it did not get what it paid for?

[53] And Fridriksson is the planetary prince of exaggeration.

[642] So, we have Fridriksson harping on patient numbers throughout the trial, yet, his accountant does not recall *ever* valuing the Niagara Falls Clinic "by the number of patients."

[643] Karl Bowley was cross-examined further:

> Q. And working on this Forecast, did you ever contemplate how many patients the clinic would have to have in order to sell 30 hearing aids per month?
>
> A. I don't recall doing that calculation nor considering it.

[644] I cannot leave this area of the evidence (although, as a concession to time, I should) without mentioning some vintage Fridriksson testimony. The Forecast is a document upon which Fridriksson was questioned on his examination for discovery (August 27, 2008). It shows projected sales from all sources. Yet, when examined for discovery, Fridriksson took the position that the Forecast related only to WSIB sales (presumably hoping to imply an inflated projection, if sales for 5,000 patients were the yardstick). When he was cross-examined at trial he said that, on his discovery, "I was confused":

> A. The gross amount is per hearing aid. I know it's not what I said, I was confused. I can see that it's, it's difficult and I know it's confusing because everybody has two ears and then, then we forget about how to, how to calculate it correctly but I can see now by looking at this that I was confused when I saw that.
>
> Q. So was your evidence at examinations for discovery wrong?
>
> A. My evidence at examinations for discovery was wrong, yes it was . . .
>
> Q. Did you ever try to correct the record, sir?
>
> A. I didn't read it carefully enough and so I didn't correct it, no but now I can see, when you read it back to me, I can see where I got all muddled up . . .

[645] And remember, the document about which Fridriksson purportedly was confused in 2008 was one that he had assisted in preparing in 2006.

[646] Despite his professed confusion surrounding the Forecast, it was important to his decision to purchase the Niagara Falls Clinic:

> Q. And this is a document that was an integral part of your analysis to your due diligence of determining whether or not the plaintiff ought to proceed with the purchase of the defendants' clinic?
>
> A. Correct.

(iii) *e-mail from Karl Bowley to Andy Gunarsons*

[647] On October 11th, at 8:12 p.m., Karl Bowley sent an e-mail to Andy Gunarsons: [Upper case in original]

> FULL STEAM AHEAD. Just met with [Fridriksson]. No Problems . . . Only thing we still want to do due diligence wise is to see the 'bookings' i.e. what kind of appointments (volume etc.) and how far out in time is the clinic booked. How do we get this info?

[648] Importantly, according to this e-mail, the only due diligence desired by the plaintiff is to see the "bookings." There is no suggestion of discontent with the financial disclosure provided in the meeting of October 4th. There is no mention of "5,000 patients" or "22 years of files," all of which, supposedly, were of great concern to Fridriksson in the 9:26 a.m. telephone call, earlier the same day, if his handwritten notes are to be believed.

[649] Karl Bowley was asked whether "at the point of this e-mail" he had received a response from Andy Gunarsons "pertaining to when Carol would have access to the clinic":

> A. I don't recall Andy ever saying certain days she could come, but I know that I was still told 'yes it can happen' and that's, and I'm still just asking here [in this e-mail] how, when?
>
> Q. All right.
>
> A. And I was never told 'no.'

[650] Again, if Mr. Bowley and Fridriksson were unhappy with the October 4th meeting and with the disclosure, why would this e-mail proclaim FULL STEAM AHEAD?

(f) October 12th

(i) *e-mail from Michael Mann to Karl Bowley*

[651] Michael Mann, the lawyer representing the plaintiff on the purchase, e-mailed Karl Bowley at 8:39 a.m., on October 12th. He asked for the allocation of the purchase price amongst goodwill, equipment, inventory and leaseholds. The e-mail continued:

> . . . date of last financial statements and fiscal year end of vendor n/a? Vendor [company] has 2 other clinics it owns. And we are just buying 'goodwill' etc. . . .

> List of assets and patients, is this required? Any list other than QuickBooks?
>
> As for timing, I can't even breathe until the XXXXXX deal is completed and I have been putting other files on the back burner to get that done . . . I cannot start due diligence searches or closing document preparation until we have a signed agreement . . . I would not suggest a closing anytime sooner than November 9th . . .

(ii) *e-mail from Karl Bowley to Andy Gunarsons*

[652] At 8:45 a.m., on October 12th, Karl Bowley e-mailed Andy Gunarsons: [Underlining added, upper case in original]

> As clarification, the reason for looking at the current appointment schedule is so critical is the hearing aid numbers have been dropping. <u>My notes from earlier conversations</u> said that they were 40-44/mth. The sales by item info shows sales avg was:
>
> 2003 = 40 2004 = 39 2005 = 35 2006 to Aug = 31
>
> But July was 23 and August was 28 THUS THE CONCERN AND NEED TO SEE BOOKINGS. Do you have the Sept #s? i.e. Sept sales by item report?
>
> Also – from QuickBooks can you print and send to me an example of an invoice to/for WSIB, DVA and just a regular patient invoice . . .

[653] Andy Gunarsons was cross-examined regarding the reference to "earlier conversations":

> Q. . . . That is a reference to his conversations with you earlier?
>
> A. I don't read it that way. I don't know what his notes were and my suggestion is that perhaps those are conversations [with] Mr. Fridriksson.
>
> Q. Are you able to say from your recollection whether you ever told Mr. Bowley that the numbers were between 40 and 44 per month in hearing aids?
>
> A. I have no recollection of telling that to Mr. Bowley.

[654] Also, Mr. Bowley did not produce notes of any conversations with Andy Gunarsons concerning hearing aid sales (or any subject-matter).

[655] In this 8:45 a.m. e-mail, Mr. Bowley did not mention the number of patients or the breakdown or proportion of WSIB patients and there is no reference to the inability to see QuickBooks because of patient-privacy concerns.

[656] This e-mail clearly shows that the information possessed by Karl Bowley (and, thus, by Fridriksson, as well) was that hearing aid sales were dropping.

[657] Although, in the e-mail, Mr. Bowley emphasizes the importance of seeing the bookings, they were never made available (it will be recalled that Terry Lewis purported to forward to Andy Gunarsons the "appointment schedule" for the Niagara Falls Clinic on October 6, 2006, at 9:10 p.m., but it was never received by Mr. Gunarsons).

(iii) *e-mail from Andy Gunarsons to Terry Lewis and Dee Lewis*

[658] At 11:05 a.m., on October 12th, Andy Gunarsons e-mailed the Lewises:

> Can we get him the [Niagara Falls] sales Sept. #s? The appt book review s/b no problem, as discussed. I do not understand what the [QuickBooks] sample invoice examination is all about. It looks benign at first blush . . .

[659] On the matter of "the appt book review," Mr. Gunarsons testified:

> A. . . . I'm unaware as to what format it [the appt book] is. I'm assuming it's in Niagara Falls and that can they [the defendants], you know, provide the information as requested . . . the discussion was can we provide the information which would have included, you know, can it be printed out. At that time I'm unaware as to the format. I'm assuming it's in electronic format and can a printout be prepared that they [the defendants] would be prepared to, to provide.

(iv) *e-mail from Terry Lewis to Andy Gunarsons*

[660] At 12:50 p.m., on October 12th, Terry Lewis e-mailed Andy Gunarsons:

> In regard to the [QuickBooks] invoice, I don't see any reason that they would want to see one. That would expose our billing information to them, and that is extremely sensitive. There is absolutely no reason for them to have that information . . .
>
> We were crazy not to have required a significant deposit before we gave him any information . . .
>
> As you can tell from Dee's response, we feel that we must have a demonstration of 'good faith' from them now, if they want to proceed. No more demands for more information. We want a sizeable deposit, rather than having Jim [Naumovich] go to extra effort and their still not being satisfied . . . I think that what [Fridriksson] needs now is a 2x4 upside the head.

[661] The e-mail continues: [Underlining added]

> It is my humble opinion that they have breached any right to further exclusivity; and that we should be on the phone to Marke Hambley with an offer that <u>if he comes in at a little above $1 million</u> with a very immediate closing and that he takes <u>Trevor [Hood]'s information</u> as his due diligence he can have it. If [Fridriksson] and Karl don't like that, let them sue us . . .

[662] The plaintiff submits that "this is the clearest evidence that a separate preliminary evaluation [for the Niagara Falls Clinic] was prepared by Trevor Hood." I disagree. The submission does not necessarily logically follow from the e-mail. It is more likely that "Trevor [Hood]'s information" consists of *some* financial particulars regarding the Niagara Falls Clinic, but not a separate valuation.

[663] The plaintiff further argues: "Obviously, Trevor Hood had either separate financial statements for the Niagara Falls Clinic or his appraisal in draft form for the Niagara Falls Clinic, as it is being offered as Marke Hambley's due diligence. This offer was not extended to the plaintiff." This submission also does not necessarily logically follow from the e-mail. And, if Trevor Hood had this information, and if it were unfavourable to the Niagara Falls Clinic, why would the defendants not mind it being seen by Marke Hambley from whom they hoped to get an offer "at a little over $1 million."?

[664] The e-mail concludes:

> The letter of introduction is finished and at the printer, waiting for me to pick it up. If they are serious, they will stop this nonsense.

(v) *e-mail from Karl Bowley to Andy Gunarsons*

[665] At 2:10 p.m., on October 12th, Karl Bowley e-mailed Andy Gunarsons, saying:

> Please see below info needed by lawyer [as found in the 8:39 a.m. e-mail from Michael Mann to Karl Bowley] . . . Just spoke with [Fridriksson] – he will call Terry.

(vi) *telephone call from Karl Bowley to Fridriksson*

[666] Fridriksson produced handwritten notes of a telephone call to him from Karl Bowley at 3:15 p.m., on October 12th:

> KB – phoned to say that Andy called him and told him Terry was really depressed because he was worried we no longer wanted to buy the clinic . . .
>
> SF – . . . I told Karl that I thought it was a little rich that he accused us of taking too much time to complete the deal . . . Carol still hasn't been to the clinic, they didn't mail out the postcards, we didn't meet Ginette, didn't see the schedule, didn't count the patients, didn't see the full books, didn't see the files.
>
> KB – . . . Andy thinks [Terry] could use a phone call.

SF – This is ridiculous but I'll call him.

[667] In his testimony, Mr. Bowley thought that these notes were accurate.

(vii) *telephone call from Fridriksson to Terry Lewis*

[668] At 3:25 p.m., on October 12th, Fridriksson telephoned Terry Lewis and alleges that this was the eighth occasion when he made handwritten notes of such a call. The notes include the following;

> Last time I spoke to you I told you what I needed. I am still very interested in buying the clinic but Andy still has not given us everything we asked for. My wife still has not met with Ginette [Galati] or seen the files and we need to know we are getting what you told us was there.

[669] This is the only telephone conversation (for which we have notes) between Fridriksson and Terry Lewis wherein there is a reference to the access-to-the-clinic issue.

[670] There is no mention of 5,000 patients in these handwritten notes.

[671] The notes record that Dee Lewis, "who apparently had been listening the whole time," burst in and said:

> 4x the net price, are you out of your mind . . . we are not going to give you anything. That's private information – you tell Karl he can just forget it – you better come back with a better price or don't call back.

[672] Fridriksson wrote, in his notes, that Dee Lewis embarked on a "rant for at least 10 minutes, some of it is incoherent," and he concluded with this passage:

> Dee breaks in again and says we can't have any more information because the PIPEDA [*Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5] and the Privacy Act prohibit her giving it to us.

[673] Dee Lewis testified that she remembers the call. She denied ranting, but agreed that she spoke emphatically. She also disagreed with the accuracy of the handwritten notes.

[674] In her evidence, Mrs. Lewis explained why Carol Klassen would not be permitted access to the Niagara Falls Clinic at that time:

> A. We had nothing from them. A Letter of Intent is nothing. An offer, basically, if it's terrible, is really nothing and we would not let his wife go in and mozy (sic) through the files, and we would not allow her to have access to our

> QuickBooks. It was a violation of patient privacy. There was nothing in place that would justify our allowing either of them in there.

[675] I observe here, what is now quite apparent: *all* of the conversations with Terry Lewis for which Fridriksson has made handwritten notes are telephone calls *from* him to Terry Lewis – never the other way around.

(g) October 13th

(i) *telephone call from Fridriksson to Karl Bowley*

[676] Fridriksson produced handwritten notes for a telephone call to Karl Bowley at 8:45 (probably a.m.), on October 13th. This is the final telephone call between Fridriksson and Karl Bowley (for which there is a record) before completion of the purchase:

> Told him about the conversation with Terry – told Karl that I told Terry we still want the deal but we have yet to get the information that proves the things he stated and that we cannot proceed without them . . .

[677] The "conversation with Terry" probably is the telephone call of October 12th, at 3:25 p.m.

(ii) *e-mail from Bowley to Fridriksson*

[678] At 10:25 a.m., on October 13th, Karl Bowley sent an e-mail to Fridriksson:

> I think it would be wise to send a commitment letter to Terry. See attached. Can you put on letterhead and sign etc. Also what about a deposit?

(iii) *e-mail from Fridriksson to Karl Bowley*

[679] At 11:32 a.m., Fridriksson e-mailed Karl Bowley inquiring: "How much would be appropriate?"

(iv) *e-mail from Karl Bowley to Fridriksson*

[680] At 11:53 a.m., Karl Bowley replied to Fridriksson, saying: "10% is typical. Sits in lawyer's trust account and pays interest to you."

[681] The e-mails of 10:25 a.m., 11:32 a.m. and 11:53 a.m. do not mention any of the matters with which Fridriksson had been concerned up to this point. Curious. He was cross-examined:

> Q. . . . would you agree with me, sir, that this e-mail trail . . . between 10:25 a.m. and 11:53 a.m. . . . doesn't seem to sit with . . . the . . . phone calls?

A. I agree with that.

Q. And, that's because you were content with what you were purchasing, correct?

A. No.

[682] Still curious.

(v) *e-mail from Terry Lewis to Andy Gunarsons*

[683] At 3:30 p.m., on October 13th, Terry Lewis sent an e-mail to Andy Gunarsons:

> The use of the name 'The Hearing Clinic' and [Fridriksson]'s keeping my name on the door is only approved and will only be licensed for the present location. He cannot open other offices anywhere using that name . . . potentially harming our reputation . . . If my name is on the door, patients can file a complaint against me with our College . . .

(vi) *Letter of Commitment*

[684] On October 13th, Fridriksson signed the Letter of Commitment which had been prepared by Karl Bowley and e-mailed to Fridriksson at 10:25 a.m. (and subsequently placed on the letterhead of Fridriksson). It provided: [Upper case in original]

> This letter outlines my commitment to purchase the assets of the Niagara Falls Hearing Clinic.
>
> ▪ $1,000,000 payable $100,000 refundable deposit (to be held in lawyer's trust account) $900,000 on closing
>
> ▪ an asset purchase (equipment, leaseholds, goodwill)
>
> ▪ exclusive territory rights and name licensing rights and non competition agreements
>
> ▪ will close AS SOON AS POSSIBLE
>
> ▪ our lawyer, Mike Mann, Lancaster Brooks & Welch is currently drafting the purchase agreement

[685] The Letter of Commitment states that the transaction "will close AS SOON AS POSSIBLE." Fridriksson was cross-examined on this point:

Q. You are obviously in a hurry to get this deal done, right?

A. I wanted it to be completed by the end of the month.

[686] Such haste seems strange when one considers that, on October 11th, Fridriksson purportedly said to Karl Bowley that the deal "does not make sense."

[687] Karl Bowley was cross-examined about the words – "will close AS SOON AS POSSIBLE":

> Q. . . . was that something that you were directed to put in the Letter of Commitment by Mr. Fridriksson?
>
> A. I do not remember.

[688] The Letter of Intent (September 21st) contained the words "final due diligence still to be completed." However, in the Letter of Commitment (October 13th), there is no reference to due diligence. Karl Bowley was questioned about the omission:

> Q. So you don't know why, you can't speak to why the 'final due diligence still to be completed' is not included in the Letter of Commitment, correct?
>
> A. That's correct.

[689] It will be remembered that, in the e-mail of October 11th, at 8:12 p.m., proclaiming "FULL STREAM AHEAD," Mr. Bowley said: "Only thing we still want to do due diligence wise is to see the 'bookings' . . ."

[690] It was also the evidence of Mr. Bowley that "due diligence wasn't completed" as of October 13, 2006.

[691] When Fridriksson was questioned on why the Letter of Commitment did not mention due diligence, he answered: "It wasn't the purpose of the letter."

[692] In cross-examination, Fridriksson denied that the October 4th meeting between the two accountants satisfied his due diligence concerns and that this was the reason for the omission:

> Q. I believe that this meeting took place after the execution of the Letter of Intent but before the Letter of Commitment being signed on October 13, 2006, correct?
>
> A. Yes.
>
> Q. And that's why you removed any reference to further due diligence in the Letter of Commitment, correct?
>
> A. No.

[693] The Letter of Commitment does not mention any of the matters about which the plaintiff alleges there were misrepresentations.

(vii) *Dee Lewis removes 2001-2005 QuickBooks file*

[694] Dee Lewis acknowledges removing the 2001-2005 QuickBooks file after the Letter of Commitment was received. She stated, in-chief:

> A. And the 2001 to 2005 [QuickBooks] file, I removed when it looked, after the Letter of Commitment, to protect the asset and the staff.
>
> Q. So, you had removed it in or about the middle of October of 2006?
>
> A. Yes.

(h) October 16th

(i) *deposit delivered*

[695] Fridriksson delivered his deposit cheque on October 16th, following which there were relatively few telephone calls between Fridriksson and either Terry Lewis or Andy Gunarsons.

[696] The defendants argue that it can be inferred, therefore, that the due diligence of the plaintiff was complete and satisfactory.

(ii) *first rough draft of Asset Purchase Agreement*

[697] By e-mail, at 9:58 a.m., on October 16th, Michael Mann sent a "first rough draft of an Asset Purchase Agreement" to Karl Bowley. At 4:47 p.m., a copy also was forwarded to Fridriksson who, thereafter, replied to Mr. Mann:

> I read the agreement. I notice the appendices are not complete yet and assume they are to be later included. Is there anything that I need to do?

[698] Fridriksson was actively involved with the preparation of this agreement and was familiar with the contents.

[699] The plaintiff attaches importance to the various drafts of the Asset Purchase Agreement "in light of the defendants' theory that the only thing important to Fridriksson was the earnings of the clinic and that all other misrepresentations which he alleges were of no importance to him." The plaintiff argues that "from the first draft prepared by Michael Mann an attempt was made to ensure that the oral representations by Terry were accurate . . ." I consider the various drafts to be irrelevant, particularly since Michael Mann did not testify and explain why certain

provisions (alleged by Fridriksson to be part of the purchase) were not present in the final draft. It is not enough to know *what* provisions were removed from earlier drafts; we must know *why* they were removed. The former, without the latter, is of no help.

[700] It is the position of the plaintiff that Terry Lewis and Andy Gunarsons were not truthful about certain matters during negotiations, including representations that the Niagara Falls Clinic had 5,000 patients, 500 WSIB patients, thousands of unrecalled patients "in the back" and that Drs. Makerewich and Caetano referred only a "trickle" of patients to the clinic. Fridriksson was cross-examined as follows:

> Q. Your evidence then was that you were going to protect yourselves, Mr. Mann was going to protect you through the purchase and sale agreement against the possibility that all of these things were lies?
>
> A. Yes.
>
> Q. So you weren't relying at that point in time on anything that you alleged Terry or Andy told you about the 5,000 patients, the 500 WSIBs, the thousands of patients in the back and Makerewich and Caetano. You were going to protect yourself through Mr. Mann's drafting of the purchase and sale agreement, correct?
>
> A. Yes.
>
> Q. . . . there's nothing in the agreement of purchase and sale that says there's going to be verification of 5,000 patients, 500 WSIBs, thousands of patients in the back, Makerewich and Caetano not referring patients, correct?
>
> A. There's nothing in the agreement of purchase and sale . . .
>
> Q. But Mr. Mann never provided for those things to happen in the agreement of purchase and sale . . . it didn't end up in the agreement of purchase and sale you signed on October 30, 2006, correct?
>
> A. That's correct.[54]
>
> Q. And it didn't happen after that, did it?
>
> A. It did not happen.

[701] I will repeat an important passage from the testimony of Fridriksson that I mentioned earlier in these Reasons:

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[54] On behalf of the defendants, it is submitted: "It is interesting that . . . the plaintiff has chosen not to call Mr. Mann as a witness to speak to Fridriksson's purported concerns and state of mind at the time of contract formation." I will come back to this submission.

> Q. And the fact is, even if [Terry Lewis and Andy Gunarsons] are lying to you, you didn't believe what they were saying, it didn't matter, you were going to do your, your own assessment of whether this was something that you were going to proceed on, right?
>
> A. That's right.

[702] In the face of this testimony, how does the plaintiff establish reliance on any misrepresentations found to have been made?

[703] Why did the plaintiff proceed with the purchase? That question was put to Fridriksson in cross-examination:

> A. . . . the clinic is not worth it . . . it's nowhere near worth a million dollars . . . but . . . what we were told by Andy, what I was told and what Karl was told is that . . . there was a significant number of patients that were waiting to be fitted, that there was a huge number of people, I was told 5,000 patients, Karl was told thousands upon thousands of files in the back of unrecalled patients . . . we were going to be shown that and so the reason that we went forward with the, with the million dollars was because there was a pent up demand . . . of patients who needed to be seen and fitted.

[704] Even if these representations were made to Fridriksson and to Karl Bowley (and I find otherwise), it is to be remembered that Fridriksson thought Terry Lewis and Andy Gunarsons were bullshitters, that is to say, liars.

(iii) *e-mail from Andy Gunarsons to Terry Lewis*

[705] At 10:02 a.m., on October 16th, Andy Gunarsons forwarded a copy of the Letter of Commitment to the Lewises.

[706] One would have expected, by this time, for a clear written demand from Michael Mann or Karl Bowley, the lawyer and accountant, respectively, for the plaintiff, requiring access to the Niagara Falls Clinic to inspect the records and to conduct whatever due diligence they felt necessary. From this point, up to the date of the completion of the purchase, there are no letters or e-mails addressing the issue of Fridriksson and his wife requesting access and completing their due diligence.

(i) October 17th

(i) *e-mail from Dee Lewis to James Naumovich*

[707] On October 17th, at 10:54 p.m., Dee Lewis sent an e-mail to James Naumovich (with a copy to Andy Gunarsons) following her review of the initial

draft of the Asset Purchase Agreement in which she identifies certain paragraphs in the draft with which she disagrees and spells out how they should read:

> There are some serious problems here:
>
> 2.01(a) Work in progress will be completed by the vendor, including sales made prior to the date of sale and all work for WSIB owed through the year for hearing aids purchased through WSIB, as required by WSIB.

[708] To this point, the parties had not turned their minds to the issue of how to handle work in progress of the defendants at the time the purchase and sale was completed. Dee Lewis testified, in chief, that Sarah Peverley was to attend at the Niagara Falls Clinic after closing and provide audiological services to patients who had been fitted with hearing aids until the Program of Care One, 30 days after fitting, was performed and Program of Care Two, six months after fitting, was performed. Her evidence continued:

> A. It was our understanding that we would be allowed to complete our fitting on these people and make sure that everything was all right with them and that we would then be paid for those services or if we did not do it that there would be some agreement and some procedure that had been agreed upon for these services and these billings.
>
> Q. What, if any, agreement was there for services not completed prior to the closing date?
>
> A. There was an apparent verbal understanding that this would be done because it was in the interest of the patient.
>
> Q. What would be done?
>
> A. That we would be allowed to finish seeing these people and making sure that the fittings were okay and, but we were not allowed to do that and there was no communication about it. It was just, we were just told that we were not going to do it and we were shut out.

[709] Michelina ("Mickey") Tersigni, the bookkeeper for the defendants, testified that she was at the Niagara Falls Clinic for three days during the week that the purchase and sale closed.[55] She was asked:

> Q. What were your primary functions that week, what were you doing?

---

[55] Mickey Tersigni testified, in-chief, that, in the week of the closing, she, Mumtaz Andani (the dispenser) and Sarah Peverley (the audiologist) "went down [to the Niagara Falls Clinic] because they had patients to still see . . . and I did whatever I had to do, and then we just, we, we packed up a few things and we left."

> A. Well, Dee and I discussed it and she asked me to, she, she was under, well, we were under the impression that Sarah [Peverley] was going to go back and finish off all work that she started. So she wanted me to input on QuickBooks invoices for work that Sarah was supposed to do when she went back . . . [and I spent] most of the time doing it.
>
> Q. Okay and so, who, who told you that, that Sarah was going to be going back?
>
> A. Dee.

[710] The invoices mentioned by Ms. Tersigni came to be known as the "pending" invoices.

[711] Andy Gunarsons was cross-examined:

> Q. Have you ever seen a purchase agreement whereby the vendor continues to work in the business after closing?
>
> A. Unless specifically laid out in the contract, no.

[712] The 10:54 p.m. e-mail continued with the critique of the draft Asset Purchase Agreement by Dee Lewis:

> 2.01(f) The patient list will be turned over to the purchaser on the completion of the sale and not before under any circumstances.

[713] As Andy Gunarsons received a copy of this e-mail, he was aware that the patient list would not be made available to the plaintiff before closing "under any circumstances."

[714] Dee Lewis was cross-examined on the patient list and her privacy concerns:

> Q. And were you in fact upset with Andy when you found out that he had given some information pertaining to the customer sales summary at the meeting with Karl?
>
> A. I was. I was worried when he had given them that information because a list of names was worrisome for me to a stranger who had indicated he might be opening up on his own independently, but Andy said of course he had to have that so I accepted that.

[715] Such information probably should not have been provided to Karl Bowley without a signed confidentiality agreement so as to comply with s. 42 of the *Personal Health Information Protection Act*.

[716] The 10:54 p.m. e-mail continued in sharp-tongued fashion:

> 2.01(g) Closing date must be before the end of the month. Next month's rent cheque has been stopped. The cheapskate can pay his own rent at only $1M.
>
> 2.01(h) The business records of [the corporate defendant] will not be turned over to the purchaser. He is buying assets only for Niagara location and has no right to this information. His lawyer obviously doesn't know the difference between an assets sale and a stock sale. Not surprising in St. Catharines. Taxes are of no concern. Get this man a law book . . .

[717] The e-mail went on to say:

> The brazen attempt to get us to turn over patient names illegally (we would be liable for the breach) has put us off entirely.

[718] Mrs. Lewis was cross-examined on her "brazen" comment:

> Q. . . . 'The brazen attempt to get us to turn over patient names illegally.' So, he's paying $950,000 for patients' names but they were not to be disclosed to him. Is that what you're referring to?
>
> A. . . . I was opposed to his having, yes, all of the patient names.
>
> Q. So basically he should not have an opportunity to see what he's buying before the deal closes?
>
> A. He saw what we felt was appropriate and he'd made his decision on that.
>
> Q. Patient names, however, is not appropriate for him to see?
>
> A. He had them in the Sales-by-Customer Summary. He had the patient names and they said that was what it was so I, that's what I accepted.

[719] The Sales-by-Customer Summary was generated from QuickBooks and it had 5,199 entries.

[720] The e-mail continued:

> They also know the long closing date is seen by us as a stall while [Fridriksson] gets his already established Niagara location going.

[721] Dee Lewis was cross-examined in respect of the reference to "his already established Niagara location":

> Q. . . . Is that a reference to the fact [Fridriksson] attended an old age home from time to time to provide services to residents?
>
> A. He was listed there, we didn't know what this, what it was.

> Q. When you say 'he was listed there,' he didn't have his name on the building?
>
> A. No, it was listed in the Yellow Pages as having an office there.
>
> Q. Having an office?
>
> A. Well, it had an address and phone number for him to be contacted there so we didn't know what the establishment was, whether it was an actual office attached to an old age home or what it was.

[722] The e-mail concluded: [Underlining added]

> This offer is rejected on all the grounds listed and we are no longer in negotiations only with [Fridriksson]. They were told exclusivity was going bye-bye Wednesday and so it shall. We will be contacting other buyers and we have a new source for staff. [Fridriksson] can clean up his act and close this week or it's off. <u>Under no circumstances will he get any more info than he has now</u>.

[723] The e-mails in this trial, authored by Dee Lewis, show her to be aggressive, combative, condescending, elitist, pompous, arrogant, conceited, rude, stubborn and, in the words of her counsel (the previous words are mine), "stressed beyond belief." I wish to quote from the submissions of counsel:

> Consider the situation in which she found herself: Terry, her husband, has a serious injury and is seriously ill . . . He needs constant care and is on serious narcotic pain relievers. Terry, at the time of trial, was unable anymore to go to work running the clinics, the business which she and Terry have built up over the years. In 2006, those businesses were worth in the region of $3,500,000 and even without recent unpleasantness in which she found herself for the last seven years, Dee had a 'full plate' by any meaning of the term.
>
> It was on her shoulders that the full responsibility of giving evidence to defend Terry and herself has rested. It should have been Terry giving evidence and only he could give evidence as to what he was thinking during the negotiations and on the ever-widening scope of the plaintiff's allegations, but she was left with the task.
>
> She has a PhD in library science and is not an audiologist and despite having been involved in running the clinics for many years, she was not in a position to be able to give evidence as an audiologist. She had to bear the full brunt of giving evidence in many areas for which she never had direct responsibility . . . the situation forced her into the position of trying to maintain control of the remaining two clinics and it is therefore no wonder that she may have seemed paranoid.

[724] The key question, therefore, is not whether Dee Lewis is a likeable person. It is this: Do any of the e-mails and testimony portray her as dishonest, untruthful or deceitful in general or as to a specific issue? Except where I expressly say

otherwise (and, from time to time, I do), I accept her evidence as accurate and truthful.

[725] On the issue of paranoia, counsel for the defendants submit that "her mistrust of Fridriksson was well-founded, if not prescient." I agree.[56]

(j) October 18th

(i) *e-mail from Terry Lewis to Andy Gunarsons*

[726] At 9:17 p.m., on Wednesday, October 18th, Terry Lewis e-mailed Andy Gunarsons: [Underlining added]

> Here is our response after our meeting with James Naumovich [mention is made of certain things omitted in the document they reviewed] . . . As you can see, the longer they take, the more the price goes up. If they do not respond by Friday, the cost goes up another $100,000. <u>We are losing business</u> while [Fridriksson] plays games; thus he will make it up.

[727] Is this reference to "losing business" the result of the solicitations by Donna Bradley? Without testimony from Terry Lewis we will never know the answer.

(ii) *fax letter from James Naumovich to Michael Mann*

[728] At 5:11 p.m., on October 18th, James Naumovich forwarded to Michael Mann a copy of the October 17th draft of the Asset Purchase Agreement with, on its face, some deletions and additions as a counter-proposal. There was no accompanying letter, just a fax cover page.

(k) October 20th

(i) *e-mail from Terry Lewis to Andy Gunarsons*

[729] At 1:03 p.m., on October 20th, Terry Lewis sent an e-mail to Andy Gunarsons confirming that "James Naumovich has the $100,000 cheque."

[730] Dee Lewis agreed, in cross-examination, that, with the payment of $100,000, there was a promise to allow Carol Klassen access to the Niagara Falls Clinic (although such access is not mentioned in the Letter of Commitment).

[56] But, she mistrusts everyone. If you discharge a shotgun into a large enough crowd, one pellet is bound to hit a bad person.

(l) October 23rd

(i) *e-mail from Karl Bowley to Andy Gunarsons*

[731] At 10:05 a.m., on October 23rd, Karl Bowley e-mailed Andy Gunarsons concerning the matter of the return of hearing aids after closing (for example, where a patient, after the change in ownership, wishes to return a hearing aid that had been sold by the defendants for which the plaintiff must provide reimbursement):

> Lawyer is reworking agreement as per our discussion . . .
>
> Your opinion please – patients can return hearing aid in 30 days . . . if [Fridriksson] refunds one of these he is out of pocket (as Lewises already got paid). Will a holdback be acceptable or Lewises simply agree to readjust? Please discuss with me first.

[732] Andy Gunarsons forwarded this e-mail to the Lewises, at 10:45 a.m.

(ii) *e-mail from Terry Lewis to Andy Gunarsons*

[733] At 10:53 a.m., on October 23rd, Terry Lewis e-mailed Andy Gunarsons. The e-mail began with an expression of mistrust of Fridriksson that reaches a new level: [Underlining added]

> I'm sure that we can work out something about this. Not a common problem, our return rate is extremely small relative to industry standards. <u>There is also the matter of [Fridriksson] deliberately advising patients to return recently picked hearing aids so that he can get a refund from us and re-sell them himself</u>.

[734] The e-mail concluded:

> There is also the matter of our work-in-progress or aids that we have ordered, but have not been delivered. We should get the money for those and they will appear as sales on our books . . . Is this their only outstanding concern, or are we going to be met with an avalanche of items once we reply to this?

[735] It is head-scratching to me that the parties are still wrestling with something as basic as work-in-progress.

(iii) *e-mail from Terry Lewis to Andy Gunarsons*

[736] At 11:09 a.m., Terry Lewis e-mailed Andy Gunarsons:

> I just talked to Dee about [hearing aid] returns in [Niagara Falls].[57] We have had one return since Donna left in April. So we don't expect there to be any. How about our audiologist, Sarah [Peverley], goes to [Niagara Falls] for one day per week to do follow up visits on the patients who have been fit, until the 30 day period has expired on all of our fittings? I guess in that case, we would have to have [Fridriksson] buy out our pending Compensation Board and Veterans fittings that have been tested and hearing aids prescribed, but have not yet been approved. These will be approved; it is just a matter of time; so the sales should be ours.

[737] In cross-examination, Andy Gunarsons was asked:

> Q. . . . So what is contemplated here is in fact four attendances over the next 30 days by Sarah [Peverley] to deal with people who have problems with hearing aids that have been fit . . . is that your understanding?
>
> A. Yes, sir.

[738] Later in his cross-examination, Mr. Gunarsons described the function of Sarah Peverley attending at the Niagara Falls Clinic after closing as one where she would "supervise returns."

(iv) *e-mail from Andy Gunarsons to Karl Bowley*

[739] At 11:36 a.m., on October 23rd, Andy Gunarsons e-mailed Karl Bowley:

> Suggestion: How about our audiologist, Sarah [Peverley], goes to [Niagara Falls] for one day per week to do follow-up visits on the patients who have been fit, until the 30 day period has expired on all of our fittings?

[740] This suggestion generally was reflected in the final draft of the Asset Purchase Agreement, at Article 2.03(b).

(v) *fax letter from Michael Mann to James Naumovich*

[741] At 1:47 p.m., Michael Mann faxed a letter to James Naumovich along with "a 'redlined' copy of the . . . Asset Purchase Agreement, showing a response to amendments which you had originally proposed . . . we await your further comments before getting the document executed by . . . Fridriksson."

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[57] As I understand it, patients have an absolute right to return hearing aids during the first 30 days after fitting and to request a refund if they are not happy with the hearing aid. This right exists regardless of whether the hearing aid is functioning as required or not (which, it seems to me, places hearing aid providers in the same consumer-protection category as door-to-door salesmen).

(m) October 25th

(i) *e-mail from Fridriksson to Karl Bowley*

[742] At 8:02 a.m., on October 25th, Fridriksson e-mailed Karl Bowley: [Underlining added]

> I have not had the chance to review all of the implications of the requested amendments. I am however concerned about the [goodwill] amendment . . . In normal circumstances, in order to facilitate transfer of goodwill, the vendor of a clinic would be physically present for a period of time in order to introduce the purchaser . . . leaving Donna as the normal successor to the 'continuity of care.' I realize Terry's health issues preclude this option . . . <u>what is he willing to sacrifice in return</u>?

[743] The evidence shows that, with one small exception, seen below, the defendants were not prepared to sacrifice anything in return.

[744] At 8:11 a.m., Fridriksson sent copies of the 8:02 a.m. e-mail to Andy Gunarsons, Terry Lewis and Michael Mann.

(ii) *e-mail from Terry Lewis to Andy Gunarsons*

[745] At 10:17 a.m., on October 25th, Terry Lewis forwarded an e-mail to Andy Gunarsons. It began:

> I have not been present at the [Niagara Falls Clinic] for a year now. It has been staffed by my audiologist and my dispenser from Toronto . . . I would be willing, as I have said all along, to have my name remain on the door and for me to be considered to be a consultant to the business . . .

[746] The last sentence is contrary to the sentiment expressed in the e-mail of October 13th, at 3:30 p.m., from Terry Lewis to Andy Gunarsons, in which Mr. Lewis does not want his "name on the door" because "patients can file a complaint against me with our College . . ." I take this to be a response to the 8:02 a.m. "continuity-of-care" e-mail from Fridriksson in which he asked what Terry Lewis was "willing to sacrifice in return" (which is the "one small exception" to which I alluded at paragraph [743]).

[747] The 10:17 a.m. e-mail continues:

> I think that I have already given up more than enough to make up for my not being there. [Fridriksson] verbally agreed to pay a multiple of 4x, the 'x' to be determined by discussions between you and Karl. As it is, we are settling for less than 3 times earnings at $1,000,000 . . .

> We have also been generous with our time and generous with our costs. We have not charged for every little adjustment or patient visit. We do a lot of service free . . .

(iii) *e-mail from Terry Lewis to Andy Gunarsons*

[748] At 3:40 p.m., on October 25th, Terry Lewis again e-mailed Andy Gunarsons:

> . . . I have found the letter [the letter of introduction that he had e-mailed to Andy Gunarsons on September 27th at 6:13 p.m.] . . . You already have a copy . . . Here it is again – I was worried that I would have to go to the printer to pick it up. Have not picked up yet because I can't carry the box and I don't want it delivered to the office and have the box opened accidentally at this point.

[749] It is obvious that the staff at the Niagara Falls Clinic still do not know of the pending sale.

(n) October 27th

(i) *e-mail from Terry Lewis to Andy Gunarsons*

[750] At 11:57 a.m., on October 27th, Terry Lewis e-mailed Andy Gunarsons advising : ". . . Our employee in [Niagara Falls] is Ginette Galati."

(ii) *e-mail from Andy Gunarsons to Karl Bowley*

[751] At 12:24 p.m., on October 27th, Andy Gunarsons e-mailed a list of employees to Karl Bowley "as discussed."

(o) October 30th

(i) *Asset Purchase Agreement signed*

[752] The Asset Purchase Agreement, prepared by Michael Mann, was signed on October 30, 2006. (It sometimes is referred to by the parties as "the purchase and sale agreement," "the agreement of purchase and sale" or simply "the agreement").

[753] Very few provisions of the Asset Purchase Agreement are helpful to the court. The parties are in litigation precisely because the Asset Purchase Agreement does not expressly or clearly cover the matters in dispute. For present purposes, I will address only the provisions relating to financial statements because I cannot find a good spot elsewhere in these Reasons for their insertion.

[754] Article 1.01(c) defines "financial statements":

> 1.01 DEFINED TERMS
> In this Agreement and in the schedules hereto, unless there is something in the subject matter or context inconsistent therewith, the following terms and expressions will have the following meanings:
>
> . . . . . .
>
> (c) "*Financial Statements*" means the unaudited consolidated financial statements of the Vendor as at and for the fiscal year December 31, 2005 consisting of a balance sheet, an income statement, a statement of changes in financial position together with the notes thereto and the opinion of the Vendor's accountants thereon, a copy of which has been provided to the Purchaser, all prepared in accordance with generally accepted accounting principles consistently applied;

[755] Article 3.01(6) also mentions financial statements:

> 6. FINANCIAL STATEMENTS
> The financial condition of the Business is now at least as good as the financial condition reflected in the Financial Statements.

[756] Andy Gunarsons provided certain financial information to the plaintiff in respect of the Niagara Falls Clinic. However, Fridriksson admitted that Karl Bowley "did caution me that we don't really know what, what the bottom line is because the stuff that Andy provided us was estimates."

[757] Fridriksson conceded that he knew "well before the agreement of purchase and sale" that financial statements would not be provided for the Niagara Falls Clinic (the defendants owned three hearing clinics and all financial statements customarily were for the entire business of the defendants):

> A. We were told that they would not be able to deliver that to us.

[758] Fridriksson admitted that there was no reliance by the plaintiff on the non-delivery of financial statements. He was cross-examined on this point:

> Q. . . . you understood this as well that there was no way to provide independent financial statements for the Niagara Falls Clinic because it was intermingled with all of the other clinics that [the defendants] operated, correct?
>
> A. That's what we were told.
>
> Q. Okay and you knew that well before the agreement of purchase and sale, correct?
>
> A. We were told that, yes.
>
> Q. Okay. So at the time you signed the agreement of purchase and sale on behalf of the plaintiff you knew that they wouldn't be able to deliver this to you, right?

A. We were told that they would not be able to deliver that to us.

Q. Okay. So there's no reliance then on the part of the plaintiff with respect to the non-delivery of the financial statements set out at [Article] 1.01(c), correct?

A. There's a reliance on the financial information that we were given, but there's no reliance on the financial statements.[58]

[759] Fridriksson testified that Karl Bowley looked over the financial information provided for the Niagara Falls Clinic, "the gross income appeared to be correct" and Mr. Bowley "was satisfied with the gross income."

(ii) *matters not mentioned in the Asset Purchase Agreement*

[760] Fridriksson was cross-examined on matters that were not mentioned in the Asset Purchase Agreement (or in the Letter of Intent or in the Letter of Commitment):

Q. Sir, the fact is that the Letter of Intent, the Letter of Commitment and the [Asset Purchase] Agreement do not make mention of the following: 5,000 patients. Is that correct, no mention of that?[59]

A. Yes.

Q. They don't have any mention of 500 WSIB patients, correct?

A. Yes.

Q. They don't make any mention of Donna Bradley and/or Linda Fraser, correct?

A. Yes.

Q. They make no mention of Doctors Makerewich and/or Caetano, correct?

A. Yes.

Q. They make no mention of any number of days *per* week that an audiologist was present at the Niagara Falls Clinic, correct?

A. Yes.

Q. And they make no mention of the number of unrecalled patients, correct?

---

[58] In the face of this admission, I do not understand why counsel for the plaintiff bother to argue, as they do, that the Asset Purchase Agreement placed an obligation on the defendants to have "prepared and produced" separate financial statements for the Niagara Falls Clinic.

[59] In fact, Fridriksson agreed that there was no reference "to the actual number of patients . . . in any draft of the [Asset Purchase] Agreement."

A. Yes.

[761] Fridriksson also agreed that, although he has claimed damages for depleted inventory, there is no mention in the Asset Purchase Agreement of a dollar figure for inventory:

> Q. You've claimed damages in the thousands of dollars for depleted inventory . . . in the plaintiff's claim before the court, correct?
>
> A. Yes.
>
> Q. Sir, do you agree with me that there's no mention, no mention of any specific dollar figure for inventory in this agreement?
>
> A. No specific dollar figure, I agree.

[762] The absence of these matters in the Asset Purchase Agreement is even more puzzling because, according to Fridriksson, they consisted of promises made by people whom he described as bullshitters. He was cross-examined on this point:

> Q. But beyond the normal course of business you had extra reason . . . to do something to protect yourself, correct?
>
> A. Yes.
>
> Q. Because Terry and Andy were bullshitters, right?
>
> A. It was our concern, yes.

[763] Yet, there was nothing in the Asset Purchase Agreement that provided protection for his bullshitter-concerns. The cross-examination continued:

> Q. And the fact is though, you signed the agreement of purchase and sale . . . and the deal closed . . . and there was nothing [in the way of protection], correct?
>
> A. Yes.

[764] There also is no mention of due diligence in the Asset Purchase Agreement (or in the Letter of Commitment).

[765] Fridriksson was cross-examined about all of the allegedly misrepresented, yet missing, matters:

> Q. Your evidence then [on discovery] was that you were going to protect yourself, Mr. Mann was going to protect you through the purchase and sale agreement against the possibility that all of these things were lies?
>
> A. Yes.

> Q. So you weren't relying at that point in time on anything that you alleged Terry or Andy told you about the 5,000 patients, the 500 WSIBs, the thousands of patients in the back and [Drs.] Makerewich and Caetano [referrals], you were going to protect yourself through Mr. Mann's drafting of the purchase and sale agreement, correct?
>
> A. Yes.

[766] However, the Asset Purchase Agreement is strangely silent on these things.

[767] Fridriksson also was cross-examined about the "thousands of patients in the back":

> Q. Did you ever think prior to the signing of the agreement of purchase and sale on October 20, 2006 that that representation that there were thousands of patients in the back was a lie?
>
> A. I wanted to have that verified. I didn't know whether it was the truth or not the truth.

[768] Despite there being no mention in the Asset Purchase Agreement of the many matters about which Fridriksson complains and that occupied this court for several seasons, he was content with the Asset Purchase Agreement:

> Q. Were you satisfied with the agreement and contents as drafted before signing it?
>
> A. Yes.

(iii) *"entire agreement" clause*

[769] The Asset Purchase Agreement contained a clause titled "entire agreement." It provides as follows:

> 9.10 ENTIRE AGREEMENT
> This Agreement and the schedules referred to herein constitute the entire agreement between the parties hereto and supersede all prior agreements, representations, warranties, statements, promises, information, arrangements and understandings, whether oral or written, express or implied, with respect to the subject matter hereof. None of the parties hereto shall be bound or charged with any oral or written agreements, representations, warranties, statements, promises, information, arrangements or understandings not specifically set forth in this Agreement or in the schedules, documents and instruments to be delivered on or before the Closing Date pursuant to this Agreement. The parties hereto further acknowledge and agree that, in entering into this Agreement and in delivering the schedules, documents and instruments to be delivered on or before the Closing Date, they have not in any way relied and will not in any way rely, upon any oral or written agreements,

> representations, warranties, statements, promises, information, arrangements or understandings, express or implied, not specifically set forth in this Agreement or in such schedules, documents or instruments.

[770] The defendants rely on this "entire agreement" clause in defence of the allegations by the plaintiff that certain matters were misrepresented. However, such a clause protects the defendants "from claims based on innocent pre-contractual misrepresentations or non-disclosure" but "it is no defence to a claim for fraudulent misrepresentation": see *1721789 Ontario Inc. v. 985091 Ontario Ltd.*, [2009] O.J. No. 3049 (S.C.J.), at para. 33, citing *1018429 Ontario Inc. v. Fea Investments Ltd*. (1999), 125 O.A.C. 88.

[771] "[E]xclusionary language contained in [a] purchase contract cannot protect the defendants from the result of fraud . . .": see *Vieira v. Prestige Auto Sales Inc.*, [2004] O.J. No. 4480 (S.C.J.) at para. 49.

(iv) *absence of Michael Mann as a witness*

[772] On behalf of the defendants, it is submitted that Michael Mann was a "critical corroborative witness as to what really happened after the deposit was paid." Counsel for the defendants catalogue eleven questions for which Michael Mann could have provided crucial answers:

- "Why did the due diligence of the plaintiff cease abruptly after the payment of the deposit on or about October 13, 2006?
- What were the actual negotiations between Mr. Mann and Mr. Naumovich?
- How did Mr. Bowley value the Niagara Falls Clinic?
- Did Fridriksson ever mention to Mr. Mann the 5,000 patients, the 500 WSIB patients, the referrals from Dr. Makerewich and Dr. Caetano, the thousands of patients in the back and all of the other alleged representations which he believed were lies and bullshit?
- Why was the Asset Purchase Agreement silent in respect of any further due diligence?
- Why were the financial disclosures not made a part of the Asset Purchase Agreement?
- Why was the Comparative Year-Over-Year Summary, at a minimum, not made a part of the agreement?
- Why, if Fridriksson thought that Andy Gunarsons and Terry Lewis were liars and bullshitters, was there no formal closing as contemplated in the agenda prepared by Mr. Mann?
- What arrangements were contemplated for the mailing after closing?

- What arrangements were contemplated for the handover of the financial information (including the client 'list')?
- Why was there virtually no corroboration of any of Fridriksson's various assertions in any of the documentation?"

[773] The answers to these questions could have transformed the evidentiary record in the trial (and, perhaps, even partially rehabilitated Fridriksson's credibility).

[774] The reason Mr. Mann was not called as a witness was because he practices law in the same firm as counsel for the plaintiff and this fact produces a conflict.

[775] Rule 5 of the *Code of Professional Conduct* of the Canadian Bar Association states, in part: [Underlining added]

> 5. The lawyer who appears as an advocate should not . . . testify before a tribunal save as permitted by local rule or practice, or as to purely formal or uncontroverted matters. <u>This also applies to the lawyer's partners and or associates</u>; generally speaking, <u>they should not testify in such proceedings except as to merely formal matters</u>.

[776] The *Rules of Professional Conduct* of the Law Society of Upper Canada do not to contain a similar provision (but I think that they should).

[777] The plaintiff would have been aware, from the beginning, of the high probability that Michael Mann might be required to testify, in which event a conflict would arise. By retaining the counsel it did, the plaintiff assumed the risk of that conflict and the consequences of being unable to call Mr. Mann. I understand that counsel for the defendants declined their consent to Michael Mann testifying. They were correct in doing so. To have consented, in my opinion, would have been professional negligence. It would have created impossible credibility problems in respect of matters that are at the heart of this case.

[778] The plaintiff should have retained other counsel to prosecute the action, leaving Michael Mann free to testify.

[779] Counsel for the defendants argue that I should draw an adverse inference "that the evidence of Mr. Mann would not in any way have helped the plaintiff's case." I decline to do so. It was because of considerations of professional conduct that Michael Mann was not called as a witness, not because of some tactical decision to keep him under wraps; and, it is not suggested that counsel for the plaintiff were retained in order to thwart the availability of Mr. Mann as a witness.

(v) *e-mail from Dee Lewis to Andy Gunarsons*

[780] At 7:12 p.m., on October 30th, Dee Lewis e-mailed Andy Gunarsons:

> So the acceptance of the offer has been signed and sent. Now we have to fill out the equipment and furnishings schedule and get the landlord consent and we're finished.

IV. EVIDENCE ANALYSIS (after signing to closing)

[781] I will now cover the evidence after the date that the Asset Purchase Agreement was signed up to the date of completion or closing of the transaction (November 9th).

[782] Mercifully, there were no telephone conversations, real, alleged or imagined, between Fridriksson and either Andy Gunarsons or Terry Lewis in the period from October 31st to November 9th.

(a) October 31st

(i) *e-mail from Terry Lewis to Andy Gunarsons*

[783] At 7:20 p.m., on October 31, 2006, Terry Lewis e-mailed to Andy Gunarsons "a scan of Ginette Galati's most recent pay stub for Karl and [Fridriksson]'s files."

(ii) *plaintiff incorporated*

[784] On October 31, 2006, the plaintiff was incorporated.

9. <u>November 2006</u>

(a) November 1st

(i) *e-mail from Karl Bowley to Andy Gunarsons*

[785] At 2:22 p.m., on November 1st, Karl Bowley sent an e-mail to Andy Gunarsons:

> Just floating a balloon here. The deal should be closing on 9th. Considering the transition – when will Ginette [Galati] be told? When can [Fridriksson] meet with her, have a look at the clinic, see what is booked on 10th etc. etc. etc. It would be nice to start some of this in advance of the 9th.

[786] The plaintiff was still hoping for access to the Niagara Falls Clinic prior to closing.

(b) November 2nd

(i) *e-mail from Andy Gunarsons to the Lewises*

[787] At 12:10 a.m., on November 2nd, Andy Gunarsons forwarded to the Lewises the e-mail that he had received from Karl Bowley on November 1st, at 2:22 p.m.

(ii) *e-mail from Dee Lewis to Andy Gunarsons*

[788] At 12:36 a.m., on Thursday, November 2nd (one week before closing), Dee Lewis e-mailed Andy Gunarsons advising that access to the Niagara falls Clinic would not be permitted until after closing: [Underlining added]

> . . . Ginette [Galati] has been told, as has Sarah [Peverley, the audiologist]. Mumtaz [Andani, the dispenser] will be told tomorrow. [Fridriksson] will have to wait until the 10th because both Sarah and Mumtaz are double-booked all day Mon, Tues, and Wed and have no time for outsiders. Sarah is double-booked tomorrow and Friday (sic). Mickey [Tersigni] will be cleaning up financial stuff as well. These bookings were made before we knew we had a sale . . . During these last days we simply cannot have any disruptions. It is unfair to the patients and the staff . . .
>
> There is also the matter of confidentiality of patient files and about the sale, so no weekend visits will be allowed either . . . <u>But he may enter the premises only after the 10th</u> [this probably should read "only after the 9th"]. Again, we will not book appointments before the completion of the sale, because we do not know if it will be completed until it is. Someone could be hit by a truck . . . Until then, we book only what we can handle . . .

[789] The e-mail references Donna Bradley: [Underlining added]

> Apparently, <u>Donna has found that it is not possible to merely snatch people away</u>. [Fridriksson] needs to settle down and be very calm and deliberate in his approach with us and with the patients for a successful transition.

[790] The plaintiff submits that "it is clear that Dee Lewis is aware of ongoing attempts of Donna to solicit patients during this interim period between the execution of the agreement and the closing of the sale." The e-mail, on its face, does not unequivocally support such a submission. It could be referring to earlier solicitations.

(iii) *e-mail from Dee Lewis to Andy Gunarsons*

[791] At 12:45 a.m., on November 2nd, Dee Lewis sent an e-mail to Andy Gunarsons:

> . . . The audiologist, Sarah, is especially distressed that her patients won't get what she would give them . . . She is worried about how she will be treated by the new owner . . .

[792] The e-mail speaks about some of the contents of the Niagara Falls Clinic: [Underlining added]

> . . . There is extra furniture down there that came from Kennedy Rd. when we moved. The staff want to take it for themselves, but I am uncomfortable with any appearance of a cleanout just before the turnover. It's just Ikea stuff for crying out loud. Plus there is some art. What are we to do under these circumstances? Sometimes I take the honesty thing further than is necessary or even good for me,[60] but the art came with the office, so I think it should stay. We didn't buy it after all . . .

[793] The e-mail concludes with a reference to QuickBooks:

> . . . could we please talk about how to present the QuickBooks files to them. Do I have to give them the same as we would use for Rev Can or some modified version or what. I feel a little naked giving them everything, especially from past years, but will do so if it seems more helpful . . .

(iv) *e-mail from Dee Lewis to Andy Gunarsons*

[794] At 1:27 a.m., on November 2nd, Dee Lewis e-mailed Andy Gunarsons: [Underlining added]

> OK, now we are suffering serious sellers' regret . . . Donna has told patients who were volunteering as spies that she has three more months and she's out if things don't improve. And I have had enough of King Stefan . . .
>
> He has no consideration for patients or staff . . . His immaturity is appalling in a professional – although not surprising in my experience with medical types[61] . . . and if he carries this kind of behaviour into . . . handling our receivables and the extended services we need to provide to some WSIB patients, we are in serious trouble. The receivables amount to more than 100K . . .

[795] What on earth happened between 12:45 a.m. and 1:27 a.m.? What prompted the panicky tone of this e-mail (apart from the general paranoia exhibited by Dee Lewis throughout the evidence)? Yet, it tends to support the submission of the plaintiff (which I rejected several pages ago) that Donna Bradley was continuing with her solicitation efforts.

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[60] I was not treated to any evidence of an altruistic streak in Dee Lewis.

[61] Okay, is there anyone she is unwilling to malign?

[796] The plaintiff argues that this e-mail "is a clear acknowledgement that [the WSIB] services are yet to be provided and will have to be provided after closing." However, I do not think that this fact was ever denied by the defendants. The receivables of "100K" are probably the "pending" invoices that Dee Lewis instructed Mickey Tersigni to prepare for submission to the WSIB and their preparation and existence have never been denied.

[797] The e-mail continues: [Upper case in original]

> 'Should be closing on the 9th.' Really Andy. This is not going to work. Tell Karl NOOOOOOOO on everything . . . I thought you said they weren't knuckle-draggers down there . . .

[798] Dee Lewis concluded by asking whether she should copy this e-mail to Karl Bowley. Andy Gunarsons replied: "I will deal with Karl myself. Please do not [copy] him . . ." In his testimony at trial, Mr. Gunarsons explained that he thought her e-mail, if copied, "would be inflammatory."

(v) *e-mail from Dee Lewis to Andy Gunarsons*

[799] At 4:46 a.m., on November 2nd, Dee Lewis e-mailed Andy Gunarsons:

> . . . I am very tired after an emotional day with my staff . . . [Fridriksson] is acting like he bought the candy store. Our staff are feeling that they are betraying family. The disconnect is not exaggerated . . . Foiling Donna was a part of it because of the betrayals of the patients but, as the time passed Donna became less important. Now they have made promises that they are afraid [Fridriksson] will not allow them to keep. . . . Ours is a spiritual practice,[62] and no one who works for us now ever deviates from that for money, convenience or because of impatience with infirmity or even bad behaviour by a patient . . . [Fridriksson] can sit down with Ginette respectfully on the 10th . . .

[800] Once again, Andy Gunarsons is being told that Fridriksson (and his wife) will not have access to the Niagara Falls Clinic until after the sale is completed.

(vi) *e-mail from Dee Lewis to Karl Bowley*

[801] At 12:08 p.m., on November 2nd, Dee Lewis sent an e-mail to Karl Bowley containing "Ginette's [employment] particulars," including her date of hiring, salary and vacation entitlement.

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[62] On behalf of the "knuckle-draggers down there," may I say that I have not seen a trace of anything spiritual in the operation of the defendants' hearing clinics. I will keep looking.

(vii) *e-mail from Karl Bowley to Andy Gunarsons*

[802] At 12:36 p.m., on November 2nd, Karl Bowley forwarded an e-mail to Andy Gunarsons asking: "Any word Andy?" I assume that this inquiry is in respect of the access issue.

(viii) *e-mail from Andy Gunarsons to Karl Bowley*

[803] At 2:02 p.m., on November 2nd, Andy Gunarsons e-mailed Karl Bowley: [Underlining added]

> Ginette has been told. She is OK and on-board with everything. Dee has asked Ginette herself to call [Fridriksson] and liaise directly herself with [Fridriksson] re booking appointments for the 10th on . . . I also talked it over with Dee and agreed that the easiest is to have Ginette talk to [Fridriksson] directly e.g. differences in style . . . let them sort things out [Fridriksson]'s way and let [Fridriksson] and Ginette discuss how they will handle things . . . and advising [Fridriksson] re changeover of local utilities . . . and any other matters that need to be addressed . . .

[804] This e-mail does not say that Fridriksson can have access to the Niagara Falls Clinic, only that Ginette Galati will talk to him.

(ix) *e-mail from Karl Bowley to Andy Gunarsons*

[805] At 2:10 p.m., on November 2nd, Karl Bowley e-mailed Andy Gunarsons:

> Perfect! So [Fridriksson] and Ginette can talk as soon as they both want – correct?

[806] Karl Bowley seems to be content with Fridriksson and Ginette Galati talking rather than meeting.

(x) *e-mail from Andy Gunarsons to Karl Bowley*

[807] At 3:43 p.m., Andy Gunarsons replied to the 2:10 p.m. e-mail, saying, "Yes." However, while Fridriksson and Ginette Galati are free to talk, the instructions from Dee Lewis are that Fridriksson is not to have access to the Niagara Falls Clinic until November 10th.

[808] Karl Bowley was asked, in-chief, whether "a week before closing, were you aware of any prohibition of an actual attendance by [Fridriksson] or Carol to the clinic" and he answered:

> A. I don't recall ever being told, 'No they can't go.'

(xi) *Unitron Hearing*

[809] According to a letter from Unitron Hearing[63] (a supplier of hearing aids and related products), shipments to the Niagara Falls Clinic were to be re-directed to Scarborough: [Underlining added]

> On November 2, 2006 Unitron Hearing Canada's Finance and Customer Service Departments were notified by Terry and Dee Lewis (sellers) . . . that they had sold their clinic in Niagara Falls. At that time, Unitron Hearing was instructed by Terry and Dee Lewis to re-direct all shipments from the Niagara Falls location to The Hearing Clinic, Eastown Centre, 2636 Eglinton Avenue East, Scarborough . . .
>
> At the time of notification of sale, we had not yet received a request to set up a new account from the buyer of the Niagara Falls location so it was our understanding that shipments were to be re-directed until such notification was received from the buyer.

[810] The e-mail went on to identify two specific shipments that were re-directed to Scarborough.

(c) November 3rd

(i) *e-mail from Dee Lewis to Andy Gunarsons*

[811] At 4:51 p.m., on November 3rd, Dee Lewis e-mailed Andy Gunarsons:

> So we told the staff that [Niagara Falls] is sold and all but Sarah [Peverley] are very happy . . . I suggested to Ginette [Galati] that she call [Fridriksson] and she loved the idea, so thanks for such a wise suggestion . . .

[812] The e-mail mentioned Donna Bradley:

> The latest from Mary Katherine (the audiologist we were trying to hire) . . . told our staff that ListenUp! is doing horribly and that Donna called her and told her she will be out in three months if things don't improve at her place. [Fridriksson] will be the only one standing in a few months. Hope he's up to it.

[813] Some indication of the stress under which Dee Lewis was acting around this time can be seen in the concluding passage of the e-mail:

> Terry's blood pressure is through the roof suddenly – the doctor says it is from pain – so he is now on an ACE inhibitor and things are going to continue to worsen according to his pain doctor. So now that we are shed of [Niagara Falls] and I can carry on with Scarborough, we need to get the company structure settled so if something happens with Terry, everything will be protected and easy for me to run or dispose of, depending. I really could use a rest.

---

63 Dated January 17, 2007.

(ii) *Ginette Galati telephoned Fridriksson*

[814] On Friday, November 3rd, Ginette Galati telephoned Fridriksson.

(d) November 6th

(i) "*Consent To Assignment Of Lease" sent to landlord*

[815] On November 6th, three days before closing, James Naumovich faxed a "Consent To Assignment Of Lease and Acknowledgement Re Assignment Of Lease" to the landlord of the Niagara Falls Clinic for signature.

(ii) *FedEx Tracking Update e-mails*

[816] Filed at trial were two FedEx Tracking Update e-mails, dated November 6th, at 10:53 a.m., showing that two "pieces" were delivered to the Niagara Falls Clinic on that date at 10:48 a.m. Both "pieces" are described as "2,500 Newsletters/Letter of Introduction." The defendants logically contend that this documentation means that there were 2,500 newsletters and 2,500 letters of introduction sent to the Niagara Falls Clinic.

[817] The invoice from the printer, Exhibit 110, seems to indicate that the letters of introduction were printed on October 20, 2006. The e-mail from Terry Lewis on October 12th, at 12:50 p.m., says that "the letter of introduction is finished and at the printer." Although the two are inconsistent, it is obvious that the letters of introduction were available prior to the date of closing. In any event, the invoice from the printer shows that 2,500 letters of introduction and 2,500 newsletters were printed and that they were shipped to the Niagara Falls Clinic in two boxes.

[818] It would have been better to have heard testimony from a representative of FedEx and one from the printer to interpret the above documents. However, in their absence, I think that my interpretation is logical.

[819] The documents certainly are more supportive of the suggestion that the Niagara Falls Clinic had patients numbering closer to 2,500 than to 5,000.

(iii) *e-mail from Dee Lewis to Andy Gunarsons*

[820] At 5:28 p.m., on Monday, November 6th, Dee Lewis e-mailed Andy Gunarsons: [Underlining added]

> Ginette called [Fridriksson] Friday afternoon and they got on very well . . . He said he felt like he was facing a black wall and didn't know what was going to happen . . . <u>She wouldn't let him come to the office until the 10th</u>. Told him she was working for

> us until the 9th and then would be happy to help him, but she needed to work with him a bit to find out how best to schedule his time etc. She's so good.

[821] Thus, Fridriksson is clearly informed that he will not have access to the Niagara Falls Clinic until after closing.

(iv) *letter from James Naumovich to Michael Mann*

[822] On November 6th, James Naumovich sent a letter to Michael Mann enclosing various draft documents "in consideration with the closing of this transaction." One passage in the letter reads:

> 2. Draft Consent to Assignment of Lease which must be signed by your client [the plaintiff] and forwarded to the Landlord's solicitor with your cheque for $371.00 representing their fees in the matter.

[823] There is no evidence as to how Mr. Naumovich came up with the sum of $371.00 and there is no persuasive evidence that it was ever paid by the plaintiff as requested.

[824] The legal costs associated with the assignment of the lease were not mentioned in the Asset Purchase Agreement.

[825] The letter concluded: "Please advise if you require any additional information or documents for the closing."

(e) November 7th

(i) *letter from Michael Mann to James Naumovich*

[826] On November 7th, two days before closing, Michael Mann sent a letter to James Naumovich setting out his comments "on your draft documents."

[827] There was a lengthy paragraph in the letter devoted to the Consent to Assignment of Lease:

> 2. It is disconcerting that this document, along with a request for landlord's legal costs, has been presented to us so close to the closing date. As you have stated yourself, it is absolutely essential that a Consent to the Assignment of the Lease from the Landlord be in place at the Time of Closing; and we are frankly running short on time to get the landlord to sign such consent in preparation for our exchange of documents and monies. Having said this, we will review the matter with our client and get him to sign the Acknowledgment and will get his instructions as to the provision of funds to the landlord's solicitor. You have, however, not indicated the name or contact information for the landlord's solicitor anywhere in your correspondence or draft documents and we will require this immediately.

[828] The letter concluded with the following: [Underlining added]

> We will also expect to receive on Thursday (by overnight courier where applicable) the following items to be held in escrow . . . pending satisfactory receipt of all closing documents and funds by your office and ours: . . . Patient Lists . . . Keys to premises.

(ii) *Terry Lewis signs ADP forms in blank*

[829] It came out in the cross-examination of Dee Lewis that, on November 7th, Terry Lewis signed some ADP forms in blank for use at the Niagara Falls Clinic:

> Q. Who signed Terry's name at the bottom [of this ADP form]?
>
> A. Terry did as the vendor.
>
> Q. And Terry did not see the patient?
>
> A. He doesn't have to see the patient, he's the owner of the clinic and he signed as the vendor . . . No, he did not see the patient.
>
> Q. And this document dated October 10, 2006 . . . it's signed by Terry Lewis on November 7, 2006, two days before closing?
>
> A. That's the date it was filled in, yes. It was signed by him, yes.
>
> Q. Now, would it be fair to say that he signed a number of these in blank and had them at the clinic?
>
> A. Yes.
>
> Q. So, when the document, above his signature says:
>
> 'I hereby certify that the information on this form is true, correct and complete to the best of my knowledge and that the equipment, supplies and tests have been provided to the person above per itemized invoice number . . .'
>
> is that not representing to WSIB that he saw the patient and is certifying that information?
>
> A. No, no, he's signing as the vendor. And he is certifying that to the, the information is true, yes. The information as supplied by his staff is true.
>
> Q. So you have no problem with him signing a certificate indicating the truth of a document where he hasn't seen the patient?
>
> A. The vendor is the owner. The owner does not always see the patient. I could've signed it as the vendor.

[830] The plaintiff submits that it is not credible to deny that signing these forms in blank is improper. It certainly strikes me as improper. However, I do not think that I am in a position to draw conclusions absent testimony from the ADP and the WSIB as to the accepted administrative practice or from other informed or expert sources. Dee Lewis appeared quite defensive in her evidence on this point, but that falls short of what I require in order to accept the submissions of the plaintiff. No one who testified in this trial is qualified to comment on what the ADP and the WSIB regard as accepted administrative practices.

(f) November 8th

(i) *letter from James Naumovich to Michael Mann*

[831] At 1:45 p.m., on Wednesday, November 8th, the day before closing, James Naumovich replied to the letter from Michael Mann dated November 7th, providing eight numbered answers to points raised by Mr. Mann. Answer #8 stated:

> 8. Keys to the premises will be delivered to you with the rest of the documents once we are in receipt of the closing.

[832] There was no mention of a patient list.

(ii) *letter from Michael Mann to James Naumovich*

[833] Sometime on November 8th, Michael Mann sent a letter to James Naumovich by fax and overnight courier. The letter contained six enclosures, one of which was a certified cheque in the amount of $909,102.09. The six enclosures were to be held in escrow pending receipt by Mr. Mann of 22 enumerated items, which included the following:

> Item #14 – "Patient Lists and Information";
>
> Item #17 – "Executed assignment of Lease and Landlord's Consent";
>
> Item #19 – "Keys";
>
> Item #20 – "Purchase Price Allocation."

(iii) *e-mail from Karl Bowley to Michael Mann*

[834] At 2:30 p.m., Karl Bowley sent an e-mail to Michael Mann, with a copy to Andy Gunarsons, outlining the allocation of the purchase price:

> As agreed between Andy and Karl –
>
> Sound booth $15,000

All other equipment	$5,000
Leaseholds	$25,000
Goodwill	$955K

(iv) *e-mail from Mickey Tersigni to Terry Lewis*

[835] At 3:18 p.m., Mickey Tersigni, the longtime bookkeeper for the defendants, sent an e-mail to Terry Lewis with "a list of the bigger electronic equipment in the Niagara Falls office." This detailed list was broken down from room to room: main office, reception area, booth, dispensing room, work room, kitchen and "other."

(v) *e-mail from Andy Gunarsons to Michael Mann and Karl Bowley*

[836] At 3:20 p.m., on November 8th, Andy Gunarsons e-mailed to Michael Mann and Karl Bowley, a "current inventory of assets – the furniture and computers and equipment and leaseholds in the offices" showing "the allocation of $45,000 ascribed to chattels and leaseholds." The computers, furniture, equipment (including audiometric equipment) were identified, described and given a value. The inventory was valued at $2,000.

(vi) *e-mail from Terry Lewis to Andy Gunarsons*

[837] At 9:39 p.m., Terry Lewis sent an e-mail to Andy Gunarsons providing "one correction to the equipment list" which was to vary the age of "the older audioscan" to eight years from the 4-5 years shown in the inventory.

(vii) *e-mail from Terry Lewis to Andy Gunarsons*

[838] At 10:15 p.m., Terry Lewis e-mailed Andy Gunarsons about the telephone service:

> The phone service in our name will be terminated on Monday. [Fridriksson] needs to have the service transferred to him so that the phone number stays the same . . . Given the competency that we have seen exhibited by his lawyer, I would not leave walking the dog to his lawyer – he had better do it himself.[64]

[839] When cross-examined, Dee Lewis could not recall what prompted such a harsh assessment of Michael Mann.

(viii) *Bill of Sale signed*

[840] On November 8th, the corporate defendant signed the Bill of Sale.

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[64] This sounds more like Dee Lewis, than it does Terry Lewis.

(ix) *Phonak loan*

[841] The plaintiff obtained financing for the purchase of the Niagara Falls Clinic from Phonak. The plaintiff was the borrower and Stefan Fridriksson, Audiologist Professional Corporation, was the guarantor of the indebtedness. The loan was for $750,000. It bore no interest. The Phonak loan documents were signed on November 8th and the loan transaction was completed on that date.

(g) November 9th

[842] Thursday, November 9th, was the date on which the purchase and sale was closed or completed. As I pointed out earlier, there were no telephone conversations between Fridriksson and either Andy Gunarsons or Terry Lewis in the period from October 31st to November 9th.

(i) *e-mail from Maria Snook to Fridriksson*

[843] At 10:10 a.m., on November 9th, Maria Snook, legal assistant to Michael Mann, sent an e-mail to Fridriksson saying: “Attached is a copy of a reply from Mr. Naumovich regarding the changeover of the utility accounts.”

(ii) *letter from James Naumovich to Michael Mann*

[844] Sometime on November 9th, James Naumovich forwarded a fax letter to Michael Mann regarding the utilities:

> We have had our clients contact the utilities and there will be a final read today and our client will obtain a final bill for the services which we undertake to pay from the proceeds of sale.
>
> Your client must now call and set up a new account in the name of the new company as of today’s date.
>
> Our client will notify Bell Canada and again the bill will be closed today in the name of our clients’ company.
>
> Your client must contact Bell and advise them of the change and transfer of the phone number and Bell will forward documents to your client or they could fax them to him so that the number will be changed to your client’s company.

(iii) *e-mail from Fridriksson to Maria Snook*

[845] At 1:28 p.m., on November 9th, Fridriksson sent an e-mail to Maria Snook:

> The issue is that Terry and Dee have to authorize me to assume the Bell phone numbers. They need to contact Bell and sign papers assigning the phone number to me.

(iv) *letter from Carol Klassen to James Naumovich*

[846] At 3:08 p.m., Carol Klassen faxed to James Naumovich a document titled, "Assumption of Contractual Obligations." This is a Bell Canada document pertaining to the telephone number for the Niagara Falls Clinic (905-354-2757). It was signed on November 9th by all of the parties.

(v) *letter from Michael Mann to James Naumovich*

[847] At approximately 3:00 p.m., on November 9th, Michael Mann (the lawyer for the plaintiff on the purchase) faxed a letter to James Naumovich (the lawyer representing the defendants on the sale): [Underlining added]

> Further to our previous correspondence, we are in the process of depositing to your trust account the balance due on closing. These funds are being delivered to you on an escrow basis pending confirmation that <u>escrow will be released upon mutual agreement</u> that all documents are satisfactory and <u>that all acts to be performed at closing have been satisfactorily performed</u>.

(vi) *letter from Michael Mann to James Naumovich*

[848] On November 9th, Michael Mann faxed a letter to James Naumovich concerning the utilities:

> Please have your client contact the telephone, hydro and gas companies to have the accounts transferred from your client to our client today. Please note that our client has contacted each of the utility companies, but they will not transfer the services until contacted by your client. Please confirm with us ASAP that this has been taken care of.

(vii) *Asset Purchase Closing Agenda*

[849] Tendered in evidence was a document titled "Asset Purchase Closing Agenda" which had been prepared by Michael Mann. It outlines 28 pre-closing documents and identifies who had the "drafting responsibility" for them and it gives the "Status/Comments" for each. Document #14 is "Patient Lists and Information." The drafting responsibility is shown as the vendor and the "Status/Comments" reads: "To be handled directly between the purchaser and the vendor." This wording is unhelpful.

[850] There were three post-closing items on the agenda, one of which named the purchaser as being responsible to "deliver notices and directions to contract parties advising of assignment of contracts." However, some of the "contract parties" (Bell Canada, ADP and Canada Post) also required the consent of the vendor/defendants. Why would this not be known beforehand?

(viii) *closing under duress?*

[851] In cross-examination, Fridriksson gave incredible testimony that the closing or completion of the purchase was under duress:

> Q. But the closing occurred, correct?
>
> A. The closing did occur.
>
> Q. There were no caveats in writing saying, 'This is outstanding, it has to be addressed right now or we're not closing'?
>
> A. There was never a threat that we're not closing if we don't have it. You're correct.
>
> Q. Okay.
>
> A. But, but we were given assurances by Mr. Naumovich of things and that, that helped me to make the decision, under duress at the time.
>
> Q. Under duress?
>
> A. Under duress, yes. I was concerned . . . so I had Mr. Mann talk to Mr. Naumovich but we were reassured there were 5,000 patients in the clinic.

[852] This evidence is sheer nonsense. On a day when Fridriksson professes to have been under duress, one would expect an e-mail or a telephone call evidencing that duress. However, all we have is the 1:28 p.m. e-mail from Fridriksson to Maria Snook regarding the assignment of "the Bell phone numbers."

[853] Cross-examination continued:

> Q. Who put you under duress, sir? You had a direct relationship with Mr. Mann, he's your lawyer, he's protecting your interests . . . Mr. Bowley is there doing due diligence . . . did they put you under duress?
>
> A. No, Mr. Naumovich did.[65]
>
> Q. Did you have any direct dealings, you, yourself, with Mr. Naumovich?

---

[65] More nonsense.

> A. No, but the indirect dealings that I had with him made things, he was a difficult person to deal with.

[854] Despite the professed duress, Fridriksson agreed that he was "fully satisfied with the actions of Mr. Mann in the course of this transaction."

[855] The blame-Mr.-Naumovich-gambit is familiar to Fridriksson. He used it when explaining why there were no assurances in the Asset Purchase Agreement that Donna Bradley was not a threat:

> A. That was, that was in the first [draft] and it was taken out because Mr. Naumovich guaranteed to Mike Mann that, that Donna definitely did not have a patient list and we didn't, needn't worry about her.

(ix) *Bell Canada Assumption of Contractual Obligations signed*

[856] On November 9th, Carol Klassen signed a document titled "Bell Canada Assumption of Contractual Obligations" on behalf of the plaintiff. It was executed on the same day by Terry Lewis and Dee Lewis, as officers of the corporate defendant.

(x) *fax from Carol Klassen to James Naumovich*

[857] On November 9th, Carol Klassen faxed the executed Bell Canada Assumption of Contractual Obligations to James Naumovich.

(xi) *fax from James Naumovich to Bell Canada*

[858] At 3:23 p.m., on November 9th, James Naumovich faxed the fully executed Bell Canada Assumption of Contractual Obligations to Bell Canada.

(xii) *pending invoices to the WSIB*

[859] One of a dizzying array of issues that exorcised Fridriksson in this trial was what were called "pending" invoices to the WSIB. They were explained by Mickey Tersigni, in-chief:

> Q. . . . when was the last time you visited the Niagara Falls Clinic?
>
> A. . . . it was November 7th, 8th and 9th [2006].
>
> Q. Okay . . . what were you doing?
>
> A. . . . we were under the impression that Sarah [Peverley, the audiologist] was going to go back [to the Niagara Falls Clinic] to finish off the work that she started.

So [Dee Lewis] wanted me to input, on QuickBooks, invoices for work that Sarah was supposed to do when she went back.

Q. And was it treated the same as all other information that had been input into QuickBooks?

A. I believe we . . . put 'pending' on the invoices . . . because we knew the work hadn't been done.

[860] The plaintiff submits that Dee Lewis attempted to artificially inflate the defendants' accounts receivables by issuing invoices marked "pending" for work done after closing and then instructed Mickey Tersigni to forward those invoices to the WSIB for payment even though Ms. Tersigni told her that such billing was improper. Mickey Tersigni gave this evidence, in cross-examination:

Q. And you saw nothing wrong in requesting payment from WSIB for work that you knew the Lewis' had not done?

A. No, because I knew that we wouldn't get paid for it until they got the paperwork.

Q. Did you think it was wrong to bill WSIB for work, not only that had not been done, but that wasn't going to be done by the Lewis', you were aware of that by November the 16^{th}, weren't you?

A. Yes.

Q. And you saw nothing wrong in trying to extract that money from WSIB for the Lewis' even though you knew they weren't going to do that work?

A. It was wrong.

Q. And did you discuss that with Mrs. Lewis?

A. Yes.

Q. And did you point out to her that that was wrong?

A. . . . I guess I did tell her it was wrong.

Q. But she instructed you to proceed nonetheless?

A. Yes.

[861] The plaintiff submits that the "pending" invoices were intended to inflate the receivables of the defendants and were improper.

[862] At trial, Andy Gunarsons confirmed that, at his examination for discovery, he stated that the "pending invoices" were "just internal memos." He "did not

realize that they were invoices to be actually, physically released." Thus, he did not think that they formed part of the receivables.

[863] The issue of accounts receivable is one of many that the parties did not adequately address in the Asset Purchase Agreement. The method chosen by the defendants to deal with receivables for WSIB patients was to create "pending" invoices. This was an awkward solution because the services performed by the defendants for WSIB patients before closing would not be paid by the WSIB until certain post-closing services were rendered and those would be carried out by the plaintiff. It is amazing to me, truly amazing, that two experienced hearing clinic owners, two lawyers and two chartered accountants struggled to find a way for the vendor and purchaser to receive, in a transparent and verifiable manner, a fair portion of work in progress.

[864] Without evidence from the WSIB on accepted invoicing methods, I am not prepared to find that the "pending" invoices were wrong or improper in the sense that they were illegal. Although Mickey Tersigni testified that they were "wrong," she is not in a position to speak for the WSIB.

[865] In response to the statement of claim, the defendants delivered a counterclaim, primarily in the amount of the "pending" invoices. Both the claim by the plaintiff against the defendants in relation to the "pending" invoices and other allegedly improper WSIB billings and the counterclaim by the defendants were withdrawn on consent, mid-trial, in recognition of the fact that the issues involved would require testimony from one or more representatives of the WSIB (or from an independent expert of some kind) and lead to a time-consuming tangential inquiry. As Mr. von Anrep, lead counsel for the plaintiff, put it, when advising the court of the withdrawals:

> There is a recognition by all concerned that to sort that out and come to an evidentiary point where a definitive answer can be obtained from the court is probably worth less than the claim and there's a recognition that we're all better off by simply withdrawing those two claims.

[866] Although those claims were withdrawn (with the associated costs being "in the cause"), the parties reserved the right to argue that the evidence concerning the claims was relevant to other issues in the case, such as credibility.

(xiii) *removal of inventory*

[867] In cross-examination, Mickey Tersigni testified that she, Sarah Peverley and Mumtaz Andani were at the Niagara Falls Clinic on Tuesday, November 7th,

Wednesday, November 8th and Thursday, November 9th. They stayed over in Niagara Falls and "did not go back each day." She was asked about assisting "one of the others to remove anything that was in the clinic":

> A. I think Sarah may have taken an artificial Christmas tree which had not been used for years . . . I believe we took a portable phone system . . . yeah, there were hand-held phones.

[868] She was questioned about the inventory:

> Q. Did you do an inventory of the contents?
>
> A. No.
>
> Q. Were you asked to?
>
> A. No.
>
> Q. Did you remove any portion of the inventory?
>
> A. I believe some of it was removed.
>
> Q. And removed by Sarah and Mumtaz?
>
> A. Yes.
>
> Q. All right and who decided what portions of the inventory to take and what to leave behind?
>
> A. We called the Lewises up to find out what they wanted us to take.
>
> Q. And who is we?
>
> A. Sarah, Sarah called Dee.

[869] In the e-mail from Dee Lewis to Andy Gunarsons at 12:45 a.m., on November 2nd, certain items at the Niagara Falls Clinic were identified for removal by the staff. However, inventory was not included.

[870] The testimony of Mickey Tersigni continued:

> Q. And in whose vehicle were whatever was removed, whose vehicle were they put?
>
> A. Probably mine . . . it's a minivan
>
> Q. Are you able to give an approximation of what percentage of the inventory that was in the clinic was taken as a result of the instructions received?
>
> A. No.

> Q. Are you able to say whether it's more or less than half?
>
> A. I couldn't say.

[871] Ms. Tersigni was shown the list of items prepared by Fridriksson on September 17, 2006 and asked to identify which of them were removed:

> A. I don't know because I, I never packed this up . . . I don't know what they packed up.
>
> Q. Just tell us what was taken in the last three days [November 7-9, 2016].
>
> A. I don't know. The last three days? I couldn't tell you.
>
> Q. Do you know what an audioscan is?
>
> A. Truthfully, no.
>
> Q. So can you tell us whether you saw any equipment being removed?
>
> A. No, I can't say.

[872] Ginette Galati testified, in-chief, that she went to the Niagara Falls Clinic on Thursday, November 9th:

> Q. Now, what if anything did you notice in relation to the removal of any contents of the clinic in the short period of time prior to November 9th?
>
> A. Well, when I went in on Thursday [November 9th] the girls came in around ten o'clock, 10:30, because they said they had been there really late . . . and they were tired and there was a lot of, there was a lot of stuff that, that wasn't there anymore and Mickey had a van and Sarah and Mumtaz had a car, so I don't know what transpired but there was a lot of missing inventory.
>
> Q. Can you tell us the types of things that you noticed that were missing?
>
> A. Well, there was the batteries, there was a huge T.V. that wasn't there anymore and there was some machinery from the back that wasn't there anymore.

[873] Based upon the testimony of Mickey Tersigni and Ginette Galati, I find that an unascertained quantity of inventory was improperly removed from the Niagara Falls Clinic, along with other items.

(h) early November

(i) *Phonak orders*

[874] According to Joyce Beaven,[66] of Phonak, Accounts Receivable:

> I received a call in early November from Mickey [Tersigni] at the Hearing Clinic in Scarborough. She advised that all repairs and new orders for the Niagara Falls office should be forwarded directly to them. On that date, I updated the customer's file and advised to use the new account for future orders.

[875] Mickey Tersigni, in cross-examination, stated that she "can't recall the conversation" but thought that the e-mail "doesn't sound right." She added:

> A. . . . I can't see her saying 'new orders' from the, I probably would have told her if they were our orders that we had started before we left, to have sent them to our office, but not the new ones after November the 9th.

[876] I accept the testimony of Ms. Tersigni in preference to a letter the author of which did not testify.

V. EVIDENCE ANALYSIS (after closing)

[877] One would think that, with the completion of the purchase and sale, the flow of letters and e-mails would abate. One would be wrong.

(a) November 10th

(i) *Fridriksson and wife attend Niagara Falls Clinic*

[878] On Friday, November 10th, Fridriksson and his wife attended the Niagara Falls Clinic for the first time since September 17th. Fridriksson was asked why they had not gone there on November 9th. His evidence was that Ginette Galati "didn't want to stay [on November 9th], she was tired." Ms. Galati testified differently, in cross-examination:

> Q. And you didn't tell him that you were . . . tired and that you weren't going to be around [on November 9th] to let him in?
>
> A. No.
>
> Q. You're definite about that?
>
> A. Yes. I am.

[879] I accept her evidence.[67]

---

[66] In an e-mail to Fridriksson February 23, 2007 at 12:59 p.m.

[67] I have given up counting how many times in this trial Fridriksson has given a demonstrably false explanation for something that he did or said.

(ii) *telephone call from Fridriksson to Terry Lewis*

[880] Fridriksson testified that, while he and his wife were at the Niagara Falls Clinic on November 10th, he had a telephone conversation with Terry Lewis at 12:32 p.m. In fact, Fridriksson produced two sets of handwritten notes for this call, which I dealt with at paragraphs [127]-[145] above, when discussing his nature, character and credibility. In the second or "recreated" set of notes, there is a reference to postcards and letters of introduction (the truthfulness of which I reject):

> He says he did not have time to send out the postcards and letters of intro so instead he had them shipped to [Niagara Falls] office. Says there are 5000 postcards, letters of intro, envelopes, postage and printed labels in the back storage room.

(iii) *rescheduling of patients*

[881] Carol Klassen testified that, while at the Niagara Falls Clinic on November 10th, she discovered that Sarah Peverley was scheduled to see income-generating patients on November 14th and not just follow-up warranty patients. As a result, Ms. Klassen rebooked those patients to be seen by the audiologist employed by the plaintiff.

(iv) *letter from Michael Mann to James Naumovich*

[882] At 4:36 p.m., on November 10th, Michael Mann wrote to James Naumovich about the "pending" invoices:

> Our client has just become aware of the fact that approximately $106,000 worth of invoices were rendered on the days leading up to closing, most of which are for work which has yet to be performed. It is apparently your client's intent to have the fittings related to these billings done by its employee audiologist at our client's premises.
>
> You will recall that the agreement was that your client would perform all follow up work on fittings that were complete prior to closing . . .
>
> Further deficiencies in your client's deliveries due on closing have also become apparent, which will be detailed in future correspondence . . .

(v) *attendance by locksmith*

[883] On November 10, 2006, Brian Vernall, of Security and Alarms, attended at the Niagara Falls Clinic to programme the new user codes into the alarm system.

(b) November 11th

(i) *locks replaced at Niagara Falls Clinic*

[884] On November 11th, Fridriksson had the locks changed at the Niagara Falls Clinic by Pinder's Security Products. According to the invoice, two "multi-locks" were installed and six keys were provided. The amount of the invoice was $212.66.

(ii) *e-mail from Fridriksson to Karl Bowley*

[885] At 5:19 a.m., on November 11th, Fridriksson e-mailed Karl Bowley with a copy going to Michael Mann:

> 1. Terry did not send out the postcards or letters of introduction. Instead he sent the boxes to the office. They are currently sitting in the back storeroom. 5,000 postcards times postage . . . plus 5,000 letters of introduction . . . plus envelopes plus labour . . . is at least $7,000 . . .

[886] This statement is contrary to the documentary evidence which indicates that 2,500 of each (not 5,000 of one) were delivered to the Niagara Falls Clinic.

[887] The e-mail went on to say:

> 2. The inventory was run to near nothing. I needed to order batteries immediately . . . very cheesy . . . probably several hundred dollars short on the inventory . . .

[888] Thus, Fridriksson has put an approximate figure on the missing inventory (which, later and true to form, he will exaggerate).

(iii) *telephone call from Fridriksson to Dee Lewis*

[889] At 10:20 a.m., on November 11th, Fridriksson made handwritten notes of a telephone conversation he says that he had with Dee Lewis about QuickBooks. The notes record that, at the end of the call, Carol Klassen telephoned Dee Lewis:

> Dee says she will send us a [patient] file from Excel not QuickBooks . . . Dee says she doesn't have to send QuickBooks . . . [The notes indicate that Fridriksson leaves the room because he is 'too pissed off'] . . . Carol [tells Fridriksson] Dee will send QuickBooks or Excel but not both.

[890] Carol Klassen, in cross-examination, did not think she was present when Fridriksson made these handwritten notes and, in fact, does not remember him making the notes. Nevertheless, she testified, in-chief, about her part in the

telephone conversation. Dee Lewis acknowledged, in cross-examination, that, on November 11th, she transferred the 2001-2005 QuickBooks file, and stated:

> A. . . . I was providing them with the file, they, that I intended to provide them all along that I had just been keeping safe from any intrusion in case something went wrong with the transfer of the business . . . the 2006 [file] was there [in the Niagara Falls Clinic] and in use.

[891] On behalf of the plaintiff it is argued that the "patient lists, files, data" had not been delivered, as Article 2.01(f) of the Asset Purchase Agreement states.

[892] Carol Klassen testified further regarding the 10:20 a.m. telephone conversation:

> Q. All right tell us what you recall of that conversation.
>
> A. Mrs. Lewis told me that we can have either the patient list or QuickBooks but not both and I wanted to keep it cordial and I wanted to get what I could so I asked her for QuickBooks because I thought there was more information there . . .

(iv) *e-mail from Fridriksson to Maria Snook*

[893] At 2:34 p.m., Fridriksson sent an e-mail to Maria Snook, the legal assistant to Michael Mann, outlining certain deficiencies that "have come to my attention":

> 1. They have not given us the QuickBooks. We have just 2006 [QuickBooks data file]. The fact is, the only thing of value that we purchased is in the QuickBooks records.
>
> 2. They have not turned over the keys . . .
>
> 3. Dee Lewis has been remote desk-topping into the clinic files after closing...
>
> 4. . . . the defendants have booked approximately $106,000 of fittings, evaluations and services . . . to be performed by their audiologist and dispenser . . .
>
> 5. The secretary told me . . . that Donna took a copy of the patient list when she left . . .

[894] Karl Bowley testified that this e-mail "was certainly the first time I've heard that Donna had a patient list."

(c) November 12th

(i) *e-mail from Fridriksson to Karl Bowley*

[895] At 3:50 p.m., on November 12th, Fridriksson sent an e-mail to Karl Bowley (with a copy to the office of Michael Mann):

> 1. Carol and I spent yesterday and today at the Niagara Falls office . . . [The e-mail went on to say that the defendants had improperly billed the WSIB $101,088.45 in the days leading up to closing] . . . I know these guys are crooked and dishonest, but can they make this stick? . . .
>
> 2. There are no postcards anywhere in that office. There are 5,000 copies of the introductory letter, no labels, postage or any other items.

[896] The number of copies of the introductory letter alleged by the defendants to have been sent to the Niagara Falls Clinic was disputed. Fridriksson insisted that there were two boxes of the letters, with 2,500 in each. The defendants contend that they only had 2,500 letters of introduction printed, but 2,500 newsletters also were printed, all of which were shipped to the Niagara Falls Clinic. The defendants submit that their version of events is corroborated by the FedEx Tracking Update e-mails of November 6, 2006. I dealt with this matter earlier and I agree with the submission of the defendants.

[897] The parties view this distinction (2,500 versus 5,000) as important: if 5,000 letters of introduction were printed by the defendants it would tend to support the suggestion that the Niagara Falls Clinic had 5,000 patients; if 2,500 letters of introduction were delivered, it would mean that there were closer to 2,500 patients.

[898] Fridriksson gave evidence that, although two boxes containing a total of 5,000 letters of introduction were delivered to the Niagara Falls Clinic, he only sent out approximately 3,800, leaving roughly 1,200 still at the clinic. We then embarked on a lengthy and time-devouring exploration of the issues of envelopes and letters.

[899] Fridriksson completed his testimony on May 31, 2012, after more than 20 days in the witness box (and with Carol Klassen seated in the body of the courtroom for all of his evidence). The trial began in July of 2011 and suffered a lengthy hiatus from the end of that month to April of 2012. Carol Klassen began her evidence on June 2, 2012, following which there was another break in the trial until July 3, 2012. When Ms. Klassen re-entered the witness box, after the break, she was questioned (still in-chief) about the letters of introduction:

Q. And were all of the letters sent out?

A. No.

Q. Now have you located the rest of the letters of introduction that were not sent out?

A. Yes, I have.

Q. And did you bring them to court today?

A. Yes, I did.

Q. And did you count those letters of introduction?

A. Yes, we did.

Q. How many are left?

A. I wrote the number down. I don't remember the exact number.[68]

[900] Her counsel suggested "2,251 is the figure you gave me, does that ring a bell?"

A. That could be right.

[901] Ms. Klassen was questioned about whether "there is anything in relation to the letters of introduction that you still have that distinguishes them between themselves":

> A. I noticed when counting them just recently that there were actually two different thicknesses of paper and they were folded differently, one was accordion style and one, I'm not sure exactly, but if you flip them over the backside looks different . . . like one is, is folded back and then back again . . .

[902] When asked by her counsel, "what does that indicate in relation to the boxes that you found when you took over the clinic . . .":

A. Well, one box had one kind and the other the other kind.

Q. And do you have knowledge . . . how those boxes got there?

A. No.

[903] Carol Klassen was cross-examined as follows:

---

[68] She could not remember a figure given to her counsel earlier that day, yet she was testifying in this trial about events that occurred more than five years previously. My theory? Carol Klassen did not locate or count "the rest of the letters." Instead, Fridriksson fed this information to her and, because of her lack of personal involvement, she would be less likely to recall the particulars.

Q. You confirmed earlier at trial that there were two boxes of 2,500 patient letters in each of them. That was your evidence?

A. Yes.

Q. Okay and earlier this morning you produced two letters of introduction for the [Niagara Falls Clinic]?

A. Yes.

Q. And where did you get these letters?

A. They were left over from the ones that, that we had sent out from those boxes that the Lewises had left for us to send to the patients.

Q. Where were they? Where were these leftover letters?

A. In one of the storage places. I, I don't know exactly.

Q. Who, did you retrieve the letters from the storage?

A. No, I didn't.

Q. Did [Fridriksson] retrieve the letters from storage?

A. Possibly, I don't know.

Q. Well, how did they get to you?

A. I don't remember.[69]

Q. Did you seek out to find these letters?

A. We had kept them, they, they were sitting in the back office, I remember them sitting there forever and we had counted them a long time ago. Who picked them up from there and brought them here, probably Stefan.

Q. So this is after when we adjourned on June 1st of this year you went back and you were able to locate these letters, somebody located these letters, correct?

A. Yes but, we knew they were there, they'd been sitting there.

Q. But those letters ended up in your possession. Somebody gave them to you?

A. Yeah. That would have been Stefan, yeah.[70]

---

[69] Shall we pause here to reflect on this answer? If this event occurred, it was in the preceding month and she does not remember?

[70] She has now answered a question that she was unable to answer one minute earlier.

Q. Did you ask [Fridriksson] to go and locate these letters? Did you ask somebody else to go and locate these letters?

A. I don't remember.

Q. Or did [Fridriksson] come to you and say, 'Look, I located these letters, they were in this storage room' or wherever, 'Here they are, you need to do something with them.' Is that what happened?

A. No, I think I was talking to [counsel] about them.

Q. I mean, this happened since June 1st, correct?

A. We counted them, we had them at home since June 1st and counted them – no, we brought them to, into the courtroom before the last break, whenever that was.

Q. And you arranged, you expressly wanted to bring them into the courtroom?

A. I think it was something that we had always thought would be part of the evidence.

Q. These letters were only produced today?

A. I don't know.

Q. Had you ever turned your mind or went and examined these letters prior to June 1st?

A. I didn't realize that there were two types of letters until just recently.

Q. And how did you realize that?

A. Taking another look at them – actually, it was here in the courtroom when I saw that there were two types of letter and I took them back home and I, and I counted how many were of each.

[904] Counsel for the defendants refer to this as "a fortuitous find" and submit that Carol Klassen seemed "willing to simply take Fridriksson's word for the fact that he'd found these letters." I agree. This entire issue is rank with suspicion.

[905] Ginette Galati was asked about what information she had "pertaining to the mailing of the letters of introduction":

A. I just know that there was two boxes that were delivered to our office and actually [Fridriksson] asked me about them but I really was not made aware of them, I just know that there was two boxes and they were in the side office and [Fridriksson] had asked me if I received anything for a mail-out and I told him I really didn't know and he started looking around and he found two boxes . . .

[906] I take her evidence to mean that Fridriksson found the boxes. I do not recall that she said anything about what the boxes contained. She was not involved in the "mail-out." Two boxes would be consistent with one box containing 2,500 letters of introduction and the second box containing 2,500 newsletters. Let us mercifully move on.

(d) November 13th

(i) *e-mail from Karl Bowley to Fridriksson*

[907] In an e-mail from Karl Bowley to Fridriksson at 9:50 a.m., on November 13th, Mr. Bowley set out a summary of "critical and outstanding issues" and "issues now settled." Included in the latter is the following:

> ▪ the QuickBooks data files were originally withheld.

[908] In his testimony, Fridriksson stated that Mr. Bowley was incorrect in this statement. I prefer the written statement of Mr. Bowley in 2006 than the oral testimony of Fridriksson in 2012. This means that the issue of the QuickBooks data files was, by November 13th, one of the "issues now settled."

[909] In any event, there is no loss to the plaintiff caused by the delay in receiving the QuickBooks files, as seen in this cross-examination of Fridriksson:

> Q. Sir, what expenses did you incur in relation to getting the QuickBooks access on November 13th instead of November 9th?
>
> A. No expenses.

[910] The e-mail also listed as "outstanding but of lesser concern . . . the inventory on site was depleted horribly." In his e-mail to Karl Bowley at 5:19 a.m., on November 11th, Fridriksson put a value on the depleted inventory of "several hundred dollars." Thus, "depleted horribly" is an exaggeration.

(ii) *e-mail from Andy Gunarsons to Terry Lewis*

[911] At 11:41 a.m., on November 13th, Andy Gunarsons e-mailed Terry Lewis about various items still to be resolved before the sale proceeds (still held in escrow) would be released:

> We need to discuss and resolve these items below to get your cash released and before we reply to them. Some are comparatively small, some are more serious in nature vis-à-vis getting the cash 'in trust' released to you (particularly if Donna has a copy of the list that she is using illegally and [Fridriksson] can prove it . . .)

> The issue of the Nov. billings for WSIB payments is another important thing to discuss before we reply to them . . .

[912] The reference to "billings for WSIB payments" means the "pending" invoices.

(iii) *e-mail from Terry Lewis to Andy Gunarsons*

[913] At 1:12 p.m., Terry Lewis e-mailed Andy Gunarsons:

> Here is the response from the Privacy Commission to my e-mail . . . We did not file a complaint at the time, because the patient who had been contacted was in a very agitated state, having just put her husband in a nursing home . . .
>
> There is also the matter that with the business being sold, I would have difficulty continuing with a complaint that lasted beyond the turn-over date, not having access to the files . . .

[914] On his examination for discovery (held August 26, 2008), Andy Gunarsons gave this evidence:

> Q. . . . right up to November 13th, when you're actually copied with this correspondence with the Privacy Commissioner . . . at any time prior to that, did the Lewises make you aware that Donna was contacting patients of the clinic and soliciting their business?
>
> A. No. What the Lewises told me was that Donna had secured employment in Niagara Falls, and . . . she was opening up in some . . . in close proximity to the Niagara Falls Clinic, and that she took out an ad in the newspaper . . . That is the sum total of what my understanding is of what Donna did in terms of contacting any patients.

[915] This discovery evidence is incorrect. Andy Gunarsons had received a copy of the September 6th e-mail from Terry Lewis to the Office of the Information and Privacy Commissioner which mentioned the belief that Donna Bradley had a patient list. Mr. Gunarsons admitted, at trial, that his discovery evidence was in error:

> Q. . . . So, in fact, at that point in time [November 13, 2006], you already had actual knowledge that [Donna] was contacting patients, correct?
>
> A. . . . Yes.
>
> Q. That answer [on your discovery] is incorrect?

> A. Yes, it should be – it should say that, yeah, Mrs. Lewis' e-mail[71] informed me she was contacting patients, yes.
>
> Q. . . . did you ever attempt to correct that answer?
>
> A. It was a mistake, no.

(e) November 14th

(i) *e-mail from Fridriksson to Karl Bowley and Maria Snook*

[916] At 8:35 a.m., on November 14th, Fridriksson sent an e-mail to Karl Bowley and Maria Snook. It was a long e-mail; very long. It dealt with: the locks; Bell Canada; internet security; the postcards; the letter of introduction; Donna Bradley; the landlord; the WSIB "pending" invoices; double-billing by the defendants; the low inventories; the removal of computer software; and, the security system for the premises.

(ii) *at the Niagara Falls Clinic in the morning*

[917] Carol Klassen testified that, on Tuesday, November 14th, she had a conversation with Sarah Peverley at the Niagara Falls Clinic. Ms. Klassen gave this evidence, in-chief:

> A. . . . and then I showed her the WSIB pending invoices and I asked her what that was and she said, something like she'd rather not say, and I said, it just looks really suspicious to me, something to that effect, what am I supposed to think? Is this something you normally do in the office? And she said, 'I really can't answer that, I have to work with these people' and so I said, 'That's okay, don't worry about it' and then . . . a little while later she said, 'I feel really uncomfortable here, do you mind if I leave?' I said, 'That's fine . . .'

(iii) *e-mail from Siemens to Dee Lewis*

[918] At 12:06 p.m., on November 14th, Nancy Smith, with the finance department of Siemens, headquartered in Cambridge, Ontario, e-mailed Dee Lewis:

> Could you please confirm if you have sold your Niagara Falls location. Also, how the accounting for this location is to be handled moving forward i.e. effective date, credit returns etc. . . .

(iv) *e-mail from Mark Haskins to Dee Lewis*

[919] At 12:38 p.m., Mark Haskins of Siemens e-mailed Dee Lewis:

---

[71] I do not know what e-mail Mr. Gunarsons is referring to in this answer.

> Just as a follow up to our conversation today. We have put all shipments to your Niagara Falls Clinic on hold until we receive further instructions from yourself or Terry.

(v) *e-mail from Karl Bowley to Andy Gunarsons*

[920] Karl Bowley e-mailed Andy Gunarsons at 1:08 p.m.:

> Terry needs to send today (by fax etc.) a form letter to all 'billing parties' (WSIB, DVA, ADP, etc. etc.) outlining that the business was sold effective November 9th. [Fridriksson] cannot . . . bill until this is done . . .

[921] The e-mail went on to "put in words" how the work-in-progress was to be handled.

(vi) *e-mail from Karl Bowley to Andy Gunarsons*

[922] Karl Bowley e-mailed Andy Gunarsons, at 1:14 p.m., adding to his previous e-mail regarding work-in-progress:

> Deposits received by Terry for fittings to be done by [Fridriksson] will be returned to [Fridriksson].

[923] The documentary evidence does not reveal any agreement between the plaintiff and the defendants on the handling of the work-in-progress issue (or, as it was sometimes referred to at trial, the "cut-off agreement").

[924] It was the testimony of Andy Gunarsons that he did not find anything "obviously objectionable" about what Mr. Bowley was proposing. He and Mr. Bowley "had discussions" about the proposed cut-off agreement before the e-mails of November 14th.

(vii) *e-mail from Andy Gunarsons to the Lewises*

[925] At 1:40 p.m., Andy Gunarsons e-mailed the Lewises (having forwarded to them the 1:14 p.m. e-mail) about the work-in-progress issue:[72]

> 'Components' approach:
>
> ▪ the person who did the work and did the actual unit fittings gets the dispensing fee and is entitled to the billing accounts receivable, and
>
> ▪ if you ordered a unit from the supplier for unfitted hearing aids, then you get reimbursed for your costs.

[72] Imagine: a million dollar transaction and this elementary and predictable issue is being debated *five days after* closing.

(viii) *letter from Fridriksson to the ADP*

[926] On November 14th, Fridriksson notified the ADP of the purchase and sale of the Niagara Falls Clinic and indicated that he would be making application for registered vendor status. The ADP requested a copy of the executed purchase and sale agreement, but, amazingly, Fridriksson responded that the agreement was a confidential document and that he would be unable to comply with such a request.

(f) November 15th

(i) *e-mail from Karl Bowley to Dee Lewis*

[927] At 3:06 p.m., on November 15th, Karl Bowley courageously e-mailed Dee Lewis directly, rather than go through Andy Gunarsons:

> I am e-mailing you directly as I have not been able to get hold of Andy today. Could you please confirm that you have sent by fax a 'cancellation notice' to WSIB, DVA, etc. etc. re 866073 operating as Niagara Falls. [Fridriksson]'s company cannot get 'registered' for that location until you are cancelled. This is the procedure that WSIB etc. has told us is required.

(ii) *Unitron Hearing*

[928] On November 15th, six days after closing, Unitron Hearing (a supplier of hearing aids) received a request from Fridriksson "to set up a new account for the Niagara Falls location." Unitron Hearing did so and notified the parties the next day.

(g) November 16th

(i) *locks removed and replaced*

[929] The landlord took issue with the locks that had been installed by Pinder's Security Products on November 11th. The undisputed evidence is that the landlord examined the locks and said they would not be acceptable because they were not compatible with the locks on the rest of the building. The landlord required that they be removed and new ones installed by Accu-Lock and Security. Pinder's Security Products removed the locks for $132.50 and Accu-Lock and Security installed the new locks for $120.20. This was carried out on or about November 16th.

(ii) *e-mail from Mickey Tersigni to Dee Lewis*

[930] At 4:06 p.m., on November 16th, Mickey Tersigni e-mailed Dee Lewis and provided a summary of the invoices "that were put through Nov. 6th, 7th and 8th." These are what have been described as the "pending" invoices. They total almost $90,000. (It will be seen that, on December 5th, at 11:01 a.m., the summary was sent by Dee Lewis to Andy Gunarsons.)

(h) November 19th

(i) *letter from Dee Lewis to Assistive Devices Program*

[931] On November 19th, Dee Lewis sent a "facsimile document" to the Assistive Devices Program (ADP) stating:

> Please cancel Account #90688 for The Hearing Clinic at Niagara Falls under the company 866073 Ontario Ltd. This location was sold to another vendor as of November 9, 2006.

[932] There is some controversy over this document (occasionally described in the trial as a "notice of sale") in that the transmission stamp reads "20 Dec 2006 10:50AM Hearing Clinic 4169442908." In cross-examination, Dee Lewis testified that the letter was faxed on November 19th or 20th, not December 20th. How she would have independent knowledge of such a fact is unknown.

[933] Mr. Korosis submits that the November 19th notice of sale "is a single page lifted from the December 20, 2006 letter [set out later] from James Naumovich to the ADP . . . responding to the December 18th letter [from the ADP, also set out later]. The [letter from James Naumovich to the ADP dated December 21, 2006, also set out below] includes a fax activity log at page 5 confirming that the [November 19th] notice of sale was sent out at 5:23 p.m. on November 20, 2006." The fax activity log does show a transmission to the ADP on November 20, 2006 at 5:23 p.m. Was it the November 19th notice of sale or something else? On a balance of probabilities, it was the notice of sale. I am assisted in this conclusion by the letter of December 21, 2006, from James Naumovich to a representative of the ADP (which I will come to) wherein Mr. Naumovich refers to the notice having been faxed to the ADP on November 20th.

[934] Dee Lewis was asked, in cross-examination, whether the "pending" invoices were sent to the WSIB before the defendants cancelled their vendor number on November 19, 2006:

> Q. I'm suggesting to you that your pending invoices were sent in to WSIB before you cancelled your vendor number.

A. No, they were not.

Q. Were they sent in by you or by Mickey [Tersigni]?

A. By Mickey.

[935] Mickey Tersigni, when cross-examined, did not know whether the "pending" invoices were sent to the WSIB before November 19, 2006. However, she remembers e-filing them "a couple of weeks after the closing." She was questioned further and gave evidence contradicting that of Dee Lewis:

> Q. If the vendor number was cancelled on November 19th is it fair to say no payments would be advanced?
>
> A. . . . if the vendor number was cancelled, I wouldn't have been able to e-file any more . . . I don't know [about their policy] about paying once the vendor number was cancelled.

[936] The term "vendor number" is one of several that were used somewhat carelessly at trial. There is an ADP vendor number, a WSIB vendor number and a vendor number for the DVA. In the above passage from the testimony of Mickey Tersigni, I assume that she is speaking of the WSIB vendor number.

(i) November 20th

(i) *letter from James Naumovich to Michael Mann*

[937] On November 20th, James Naumovich sent a letter to Michael Mann advising that "a number of new issues have arisen." He lists three such issues and writes, in respect of the first one:

> (1) On Tuesday last, November 14th, 2006, our clients sent their employee, Sarah Peverley to the Niagara Falls Clinic with the purpose of delivering hearing aids and to complete some of the vendors' work in progress. Ms. Peverley informed our clients that she was cross-examined by [Carol Klassen] who wanted to be informed of 'all illegal and fraudulent activity carried on by The Hearing Clinic.' She was also advised by [Carol Klassen] 'if you don't divulge the fraudulent practices we will not feel comfortable having you in our office.' Ms. Peverley [advises] that [Carol Klassen] accused Mr. and Mrs. Lewis of fraudulently billing the WSIB.

[938] When giving evidence, in-chief, Ms. Klassen was asked about the allegation that she had cross-examined Ms. Peverley:

> A. Well, it's not how I would describe it but I did ask her if they did other things like this . . . that's the extent of what I said to her, in about the same tone of

> voice . . . very similar to what I just said to you now . . . there was no anger, it was cordial. I did question her.

[939] On behalf of the plaintiff it is argued: "The defendants did not produce Sarah Peverley to give evidence at the trial to refute Carol Klassen's version of that meeting . . . the only evidence before the court is [that of Ms. Klassen]." Unfortunately, I have not found Carol Klassen to be a completely reliable witness. More often than not, she is merely a puppet for Fridriksson – doing and saying his bidding. But, on this issue, there really is no dispute because Ms. Klassen (like many laypersons) misunderstands the meaning of "cross" in the term "cross-examination"). It does not mean "angry" or "belligerent." Even on her own version of the event, Carol Klassen did, in fact, cross-examine Sarah Peverley.

[940] The second issue raised in the letter from Mr. Naumovich concerns "the mutual announcements": [Underlining added]

> (2) I now turn my attention to the mutual announcements. Under the regulations, our clients are required to notify all of the patients in the event of a sale. In order to comply with law it is imperative that these announcements be sent out in bulk immediately. It has been some time since the transaction closed and the announcements, as far as we understand, have not yet been delivered. <u>My clients insist that the envelopes together with the announcements be delivered to them in Toronto no later than 5:00 p.m. Wednesday November 22, 2006. My clients will then proceed to mail them out at their own expense as required by the agreement of purchase and sale</u>. In the event that the announcements have not been delivered then my clients will have no choice but to send out <u>a simple letter at their own expense</u> advising the patients simply of the change of ownership. I would think that it is in the best interest of your clients that the letter in the form as per the attached schedule in the agreement of purchase and sale be sent out. As I indicated, <u>my clients are more than pleased to send this out and in fact are very concerned about the timeframe so that they not breach any of the regulations</u>.

[941] The letter then dealt with a third issue – receivables:

> (3) As far as the receivables are concerned, I understand that the accountants of the respective parties are working this out and that does not appear to pose a problem at the moment . . .

[942] When questioned, in-chief, about this point, Andy Gunarsons stated:

> A. . . . We were attempting to find some common ground and a resolution but there was no, but we were not actively involved in negotiations . . .

(j) November 21st

(i) *e-mail from Karl Bowley to Andy Gunarsons*

[943] At 9:28 a.m., on November 21st, Karl Bowley forwarded an e-mail to Andy Gunarsons:

> Please see attachment [the cut-off/work-in-progress agreement]. This should do the trick. Please review and call to discuss if any questions.

[944] Andy Gunarsons testified that he "sent it on [to the Lewises] in its entirety and asked for direction" because there were references to "policies and . . . regulations" of which he was unaware. He did not have any objections to the points raised by Mr. Bowley. As for the Lewises, he stated, in cross-examination:

> Q. Do you know which of those points were objectionable [to the Lewises]?
>
> A. None that they ever relayed to me . . . sorry, objectionable, wouldn't say objectionable, but they wanted [some] clarified . . . Mr. Lewis and Mrs. Lewis had expressed to me that there were other considerations, rules and regulations that they thought should be incorporated in, you know, any cut-off and that was, and I relied on them to, you know, to identify.
>
> Q. So they wanted some clarification or addition but the points themselves under the cut-off category were not objectionable?
>
> A. They, they never actually came out, point by point . . . they never went to that . . .
>
> . . . . . .
>
> Q. So, they wouldn't give you instructions on how to resolve this particular issue, is that what you're saying?
>
> A. Correct.
>
> Q. So, by virtue of the fact that there was no feedback, there really weren't, wasn't any negotiations from that point on?
>
> A. None that I was involved in, no.

(ii) *e-mail from Karl Bowley to Andy Gunarsons*

[945] At 2:48 p.m., Karl Bowley sent an e-mail to Andy Gunarsons.

> . . . Please note. Naumovich letter had requested mailing returned by Wed noon – see our document now n/a as [Fridriksson] will mail . . .

[946] A copy of this e-mail was forwarded to Terry Lewis by Andy Gunarsons at 3:36 p.m.

(k) November 22nd

(i) *e-mail from Fridriksson to Karl Bowley*

[947] At 7:11 a.m., on November 22nd, Fridriksson e-mailed Karl Bowley:

> From the most recent letter from Naumovich, point 2, it is apparent that Terry and Dee have a complete patient mailing list readily available . . . Without that mailing list, I cannot assemble and mail 5,000+ letters to the Niagara Falls patients before Friday . . . The sensible and in fact the thing that complies with the agreement would be for the Lewises to belatedly turn over the patient list so I can run address labels for them and get these letters out ASAP.

(ii) *e-mail from Terry Lewis to Andy Gunarsons*

[948] At 9:15 p.m., Terry Lewis responded to Andy Gunarsons in respect of the e-mail from the day before:

> When will [Fridriksson] mail and will he mail the entire list? What confirmation will we have that this has been done so that I know that the requirements of the College have been met?

(l) November 23rd

(i) *e-mail from Karl Bowley to Fridriksson*

[949] At 8:52 a.m., on November 23rd, Karl Bowley e-mailed Fridriksson:

> Did you talk to the College about any requirement for a notification letter?

(ii) *e-mail from Fridriksson to Karl Bowley*

[950] At 11:42 a.m., Fridriksson sent an e-mail to Karl Bowley:

> Spoke to the College. Barbara Fishbein Meissner [sic] directed me to the Information and Privacy Commission of Ontario. *PHIP Act*, section 42, 'disclosure to successor" . . . According to Gayle Pruder, Information Officer . . . the act states that the vendor should have notified the patients with a letter prior to the sale that is mutually acceptable to both parties. If this was not done, the purchaser or vendor should notify the patients as soon as practical. I noted to Ms. Pruder the nature of the sale and the fact that letter was not sent by the vendor. She stated that then I should send the letter . . . I asked whether it was necessary for the vendor to also send a letter. She said, 'It is a bit late for that.'

(iii) *e-mail from Karl Bowley to Andy Gunarsons*

[951] At 11:50 a.m., Karl Bowley e-mailed Andy Gunarsons:

> Short story is – no worry for Terry – [Fridriksson] will get the letter out ASAP and both of Terry and [Fridriksson] will be in compliance. [Fridriksson]'s request is simple. Please forward cheque for the postage.

(iv) *e-mail from Andy Gunarsons to Terry Lewis*

[952] At 3:01 p.m., Andy Gunarsons e-mailed Terry Lewis:

> Looks like 2nd mailing by you may be unnecessary.

[953] The reference to "2nd mailing" is to the "simple letter" mentioned in the correspondence of November 2nd from James Naumovich to Michael Mann.

(v) *e-mail from Dee Lewis to Andy Gunarsons*

[954] At 10:03 p.m., Dee Lewis sent an e-mail to Andy Gunarsons about the request for a postage cheque: [Underlining added]

> Since we have no guarantee that [Fridriksson] will mail the announcements, we will give the cheque to Jim [James Naumovich] to transfer to [Fridriksson]'s lawyer, in trust, to be released <u>when we have proof that the letter has been sent</u>. A copy of the letter Jim will send to [Fridriksson]'s lawyer will be forwarded to the College. We have no guarantee that [Fridriksson] will send the mailing without involving lawyers, unfortunately, and we must inform the College about our efforts in order to counter [Fridriksson]'s nonsense.

[955] The requested "proof that the letter has been sent" was never provided and a cheque of the postage was not forwarded to Mr. Naumovich. (The amount allegedly required is seen in the e-mail below from Fridriksson to Karl Bowley on November 28th which, in turn, was forwarded to Andy Gunarsons at 8: 22 a.m. on that date.) Although "proof" was never defined, one method of proving that the mailing occurred was by means of postage receipts. Those receipts were not supplied. What Dee Lewis considered "proof" will soon be seen.

(m) November 24th

(i) *e-mail from Andy Gunarsons to Karl Bowley*

[956] At 9:58 a.m., on Friday, November 24th, Andy Gunarsons e-mailed Karl Bowley: [Underlining added]

> <u>Please advise when mailings are physically completed. Postage cheque ready to be released ASAP upon confirmation of same</u>. 'Seeking legal remedy from the vendor for not sending it' in the bottom e-mail? I assume that this questionable notion is a non-starter and non-issue? The mirror image is that the Lewises will document the fact that the vendor was in a position to send the letter and that they had made all

> reasonable attempts to meet this part of the Act in a timely manner and then they would be in compliance.

It would be naïve of Mr. Bowley to conclude, from this e-mail, that "confirmation" of the mailing would involve anything short of the provision of receipts. (In fact, it will be seen that more than postage receipts were demanded.)

[957] The e-mail continued:

> Regrettably the Lewises had the package available for mailing and sitting in [Niagara Falls] awaiting distribution since October and [Fridriksson] was aware of this. It is my understanding that the mailings would have been done prior to the sale except for [Fridriksson]'s directions in that no disclosures to 3rd parties and related notifications to be done until after the closing.

[958] It is not correct that the package was "sitting in [Niagara Falls] awaiting distribution since October." The FedEx Tracking Update e-mails show that the two boxes were delivered to the Niagara Falls Clinic on November 6th.

[959] Also, I do not think that the e-mail evidence supports the suggestion that the mailings would have been done before the sale "except for [Fridriksson]'s directions in that no disclosures to 3rd parties and related notifications to be done until after the closing." The e-mail evidence tends to establish that, at least in the early months, Fridriksson was requesting that the mailing occur before closing (see the e-mail of September 26th at 12:49 p.m., from Fridriksson to Andy Gunarsons, the e-mail on the same date at 2:07 p.m., from Karl Bowley to Andy Gunarsons and the e-mail of September 27th at 8:22 a.m., from Fridriksson to Andy Gunarsons).

(ii) *e-mail from Karl Bowley to Andy Gunarsons*

[960] At 10:09 a.m., Karl Bowley sent an e-mail to Andy Gunarsons with the subject line reading "[Niagara Falls] mailings":

> OK . . . all is good on this issue I believe.

(iii) *e-mail from Terry Lewis to Andy Gunarsons*

[961] At 12:07 p.m., Terry Lewis e-mailed Andy Gunarsons:

> Here is a copy of the delivery confirmation for the letters of introduction and I will forward another with delivery confirmation of the envelopes, for your information.

(iv) *e-mail from Dee Lewis to Andy Gunarsons*

[962] At 12:59 p.m., Dee Lewis e-mailed Andy Gunarsons:

> Please inform Karl [Bowley] that a simple receipt for stamps is not sufficient. We require official confirmation from Canada Post that 2,500 mailings were actually sent out.

[963] More mistrust and, in this instance, it was warranted.

(n) November 27th

(i) *letter from James Naumovich to Michael Mann*

[964] James Naumovich wrote to Michael Mann on November 27th as follows:

> Your clients have not complied with the deal line regarding the notices to be sent to the former patients of the clinic. Our clients are therefore required to issue their own notice and I am enclosing herewith a draft of the notice which will be sent out by the vendors prior to 6:00 p.m. Wednesday November 29th, 2006. Our clients have no choice as notice is required to be sent to the patients under the Governing Regulations. The lack of option on the part of your client puts my clients at risk of being in default under the Regulations.

(ii) *e-mail from Karl Bowley to Fridriksson*

[965] At 1:42 p.m., on November 27th, Karl Bowley e-mailed Fridriksson:

> Andy is supposed to be forwarding to me the signing memo and also a spreadsheet they created re details of cut-off items (deposits, invoices they paid, etc.) Can you forward to me the list you and Carol compiled re the 'early' invoicing they did for WSIB.

[966] Presumably, the "signing memo" is a reference to the cut-off agreement and the "early" invoicing means the "pending" invoices.

(iii) *e-mail from Karl Bowley to Andy Gunarsons and Dee Lewis*

[967] At 3:27 p.m., Karl Bowley e-mailed Andy Gunarsons and Dee Lewis:

> Please see attached. ADP contacted Carol today and said this letter is needed. I was sure already done but nonetheless someone at ADP is requesting it. Could you please sign and fax it to me.

[968] The item "attached" was a sheet of paper bearing no letterhead or government logo. It was set up similar to a direction. The "Re line" said: "Change in Ownership." It contained the name and address of the plaintiff and purported to

be addressed to the Ontario Ministry of Health, Vendor Registration Assistive Devices Program. It stated:

> Effective November 10th, 2006 there was a change in ownership for vendor #090688. The name has been changed from 'The Hearing Clinic' to 'The Hearing Clinic (Niagara Falls) Inc.'

[969] The form was to be signed by Carol Klassen for the purchaser and by Terry Lewis for the seller. Dee Lewis testified that she refused to sign this form because "there is no wording here to show it is the vendor number that is being transferred." She was typically blunt when testifying, in-chief:

> Q. . . . when the defendants sold the Niagara Falls Clinic, what happened to the defendants' ADP vendor number?
>
> A. Immediately, the plaintiffs tried to seize the ADP number, tried to get us to turn it over to them along with the receivables that were attached to it, claiming that it was now their number, that they had bought the business, it was their number and that wasn't true.

[970] Even with the low opinion that I have of Fridriksson, I do not think that he had the intention ascribed to him by Mrs. Lewis. However, I agree that the wording of the form is not sufficiently explicit. Her testimony continued:

> Q. Okay.
>
> A. We had purchased a business in the '90s, we actually purchased the business, not just the assets and we had to get a new ADP number. The ADP number is not transferrable. It stays with the original person.

[971] Carol Klassen gave evidence that this form was dictated to her by someone with the Ministry of Health. I am not prepared to accept this evidence without corroboration from a representative of the Ministry.

(iv) *e-mail from Dee Lewis to Andy Gunarsons*

[972] At 4:43 p.m., on November 27th, Dee Lewis e-mailed Andy Gunarsons with respect to the continuing ADP dilemma:

> Andy, I thought Karl was to be told not to contact me directly. Anyway, there is no way I am sending any document with Terry's or my signature to these people. ADP was informed. We will inform them again. [Fridriksson], of course, had not bothered to inform us of the name of the company under which he wished to register and so all we had in our letter was his name. We will send another letter to ADP ourselves.

[973] Regarding the statement, "all we had in our letter was his name," if the first contact with the ADP by the Lewises was the letter of November 19th, it did not contain the name of Fridriksson.

(v) *e-mail from Andy Gunarsons to Karl Bowley*

[974] At 5:09 p.m., Andy Gunarsons e-mailed Karl Bowley saying: "ADP was advised, Lewises will resend again."

(vi) *e-mail from Dee Lewis to Karl Bowley*

[975] At 7:05 p.m., Dee Lewis e-mailed Karl Bowley:

> Do not ever contact me again directly. I will not open any e-mail from you.

[976] Presumably, this pompous petulance was in response to the fact that Karl Bowley had the temerity to send an e-mail directly to Mrs. Lewis on November 15th, at 3:06 p.m.

(vii) *e-mail from Dee Lewis to Andy Gunarsons*

[977] At 8:14 p.m., Dee Lewis e-mailed Andy Gunarsons: [Underlining added]

> I no longer buy that Karl is the innocent you think. He knows the difference between the asset and share sale, and they are misrepresenting it to ADP. [Fridriksson] must obtain his own, new ADP number, which requires references and a lot of other stuff. He is trying to slide in with our number, but then he gets our receivables . . . We have talked to ADP and they say he requires a number of his own . . .

(viii) *communication from Fridriksson to the ADP*

[978] On November 27, 2006, Fridriksson belatedly forwarded to the ADP an application for registered vendor status.

(o) November 28th

[979] On November 28th, almost three weeks after closing, there were 15 e-mails and letters generated in this, the transaction that defies completion.

(i) *e-mail from Karl Bowley to Andy Gunarsons*

[980] At 8:22 a.m., on November 28th, Karl Bowley forwarded an e-mail to Andy Gunarsons that he (Bowley) had received from Fridriksson, setting out the amount said to be owing for "sending notification of change of ownership to patients," being the sum of $3,164.03. The e-mail from Fridriksson reads:

> Please find below the cost for sending the letter. As required by the PHIP Act, I am sending a copy of this letter and the receipts to the Ontario Privacy Commissioner . . . I have enclosed the letter [to the Commissioner] . . .

1.	Postage 4200 x $.51	$2,142.00
2.	GST on postage (6%)	$128.52
3.	Supplies: envelopes labels etc.	$293.51
4.	Labour to stuff, address, seal stamp and mail letters, 6.5 hours 4 adults and 5 teenagers. Adults $15/hr teenagers $8/hr.	$635.00
Total		$3,164.03

> Please send this amount as soon as possible . . . Please see the attached letter to Ms. Gayle Pruder . . .

[981] The only evidence in this trial that "the letter" actually was sent came from Fridriksson.

[982] No receipts were ever provided to the defendants. And, bearing in mind his penchant for exaggeration, I can understand why someone would not trust the accuracy of an invoice from Fridriksson without corroboration.

(ii) *e-mail from Andy Gunarsons to Karl Bowley*

[983] At 9:45 a.m., Andy Gunarsons sent an e-mail to Karl Bowley:

> Dee informs me that [Fridriksson] must obtain his own, new ADP number, which requires references and a lot of other stuff. Dee has talked to ADP and they say he requires a new number of his own. This has to be done whenever a hearing aid business is bought.

(iii) *e-mail from Karl Bowley to Andy Gunarsons*

[984] At 9:54 a.m., Karl Bowley e-mailed Andy Gunarsons:

> As discussed – this e-mail was prior to our conversation – you will fax to me what the Lewises sent already – so that it can be signed by both parties and thus enabling [Fridriksson] to get new number. (This has been mandated by Pat at ADP.)

[985] Andy Gunarsons was cross-examined:

> Q. . . . So it is clear from this e-mail that there wasn't an attempt to obtain the Lewises vending number, but their own new vending number from ADP?

A. That's my read, yes.

Q. Now, did you pass that on, that information on to Mrs. Lewis to say, 'You're wrong, he's not trying to get your number, he wants his own number.'

A. I don't have an e-mail to that effect . . .

[986] It will be recalled that the day before, at 8:14 p.m., Dee Lewis had e-mailed Andy Gunarsons and, effectively, accused Fridriksson of trying to steal the receivables of the defendants.

(iv) *e-mail from Andy Gunarsons to Dee Lewis*

[987] At 9:57 a.m., Andy Gunarsons e-mailed Dee Lewis:

> Re Karl – noted. Re ADP – I spoke to Karl today re ADP. Apparently ADP has messed things up again and now they are instructing [Fridriksson] – rather insisting – that a particular form needs to be signed by BOTH parties, vendor and purchaser. Do you know what that form is? If so, can you and Terry either send a signed copy to me or please sign a new one if required and then PDF it to me so I can send it to Karl and let's get ADP out of everybody's hair.[73]

(v) *e-mail from Karl Bowley to Andy Gunarsons*

[988] Karl Bowley e-mailed Andy Gunarsons at 10:05 a.m.:

> ADP lawyer just called [Fridriksson] – screaming and threatening[74] him and Terry and Mr. Naumovich. Sorry to be a nag – but we must get that notification signed by both ASAP.

(vi) *e-mail from Dee Lewis to Andy Gunarsons*

[989] At 10:42 a.m., Dee Lewis e-mailed Andy Gunarsons:

> We have received no such notification. We sent the information to ADP about the change of address and the end of our ownership of Niagara Falls. [Fridriksson] needs to get his own number. Our number will not be transferred to him. It's a receivables grab and there is another problem for [Fridriksson] which we will discuss. I don't believe ADP sent him any such form. They made it up.

[990] The mistrust not only continues, but escalates.

[73] So, it is 19 days after closing and the parties are still dancing in the dark over how to deal with the ADP following a change in ownership.

[74] There is something about this case that brings out the worst in everyone.

(vii) *e-mail from Terry Lewis to Andy Gunarsons*

[991] Terry Lewis e-mailed Andy Gunarsons at 10:58 a.m.:

> Have you read the letter that they want us to sign? It transfers the ownership of our ADP number. I am certain that [Fridriksson] has represented the sale as a sale of the 'business,' i.e. the company. The result of our signing to transfer our number would be that our ADP payments that are in process would be sent to them. Mickey already talked with ADP weeks ago and changed the address of our number to the Eglinton clinic so that payments would be delivered there. I think the only problem that there would be for [Fridriksson]'s getting his own number would be that ADP will not assign two numbers to the same address . . . The ADP number belongs to 866073 Ontario Ltd.

(viii) *letter from Michael Mann to James Naumovich*

[992] At 11:54 a.m., Michael Mann wrote to James Naumovich: [Underlining added]

> We acknowledge receipt of your correspondence dated November 27, 2006. <u>We are advised by our client that it has, in fact, sent out the form of notice to patients which was attached as a schedule</u> to the above noted agreement, as per the terms of the agreement. This was done with the knowledge of your client and we are further advised through our client's accountant that <u>assurances were given</u> by the vendor that our client would be reimbursed for the expense associated with delivering the notices, amounting to approximately $3,800 . . .

[993] Mr. Mann is in no position to confirm that the plaintiff "has, in fact, sent out the form of notice to patients." All he can do is pass on what he was told by Fridriksson; and, that is insufficient for my purposes. Also, any "assurances" that were given related only to reimbursement for postage once proof of mailing was provided.

(ix) *e-mail from Dee Lewis to Andy Gunarsons*

[994] Dee Lewis e-mailed Andy Gunarsons at 11:59 a.m.:

> I sent the required information to ADP a week ago. That phony form that Carol drew up is neither official nor required. They can get their own new number anytime. We will not, and cannot, transfer our number. Wait til you find out the mess he's gotten himself into.

(x) *e-mail from Karl Bowley to Andy Gunarsons*

[995] At 12:42 p.m., Karl Bowley e-mailed Andy Gunarsons:

> . . . Lawyer for ADP (Chris Young) (sic) has given till 5:00 today to submit the 'notice of change in ownership.' Must be signed by both Terry and [Fridriksson]. As discussed, please forward the letter to me and I'll get it to [Fridriksson] then off to Chris Young (sic) . . .

(xi) *letter from Terry Lewis to James Naumovich*

[996] On November 28th, Terry Lewis sent a letter to James Naumovich by facsimile transmission:

> The lawyer from ADP . . . asked that you send him a confirmation of the sale. He needs a statement worded 'This is confirmation that the business operating as The Hearing Clinic at 6800 Morrison Street, Unit 1 and 2, Niagara Falls . . . was sold as a sale of assets of the company as of November 9, 2006.'
>
> Andy spoke to him earlier today. His name is Christopher Young (sic) . . . It seems that [Fridriksson] was trying to apply for a vendor number for the Niagara Falls office and when asked to send Mr. Young (sic) a copy of the sale agreement, he refused.

(xii) *letter from Fridriksson to Information and Privacy Commissioner*

[997] On November 28th, Fridriksson sent a fax letter to Gayle Pruder, with the Officer of the Information and Privacy Commissioner of Ontario, in which he purported to recount his version of the saga surrounding the mailing of the letter of introduction. Included are these passages:

> Thank you for your phone call November 23, 2006. As per your request, I am forwarding to you: 1. An account of events leading up to me sending out notification to my patients of the change in ownership of The Hearing Clinic, Niagara Falls. 2. Receipts documenting that I sent out the notification. 3. A full accounting of the cost of notification.
>
> On November 9, 2006, the Niagara Falls office of The Hearing Clinic was sold by Terry Lewis to a corporation owned by my wife . . . Mr. Lewis was required by the agreement and section 42 of the PHIP Act to inform his patients of this change in ownership by sending the enclosed letter . . . we were unaware that Mr. Lewis had not sent this letter until we discovered a box containing several thousand copies in one of the storage rooms . . . I assembled 9 people this past Saturday, November 25, 2006 and stuffed, addressed, stamped and mailed 4,200 envelopes containing the original letter.

This was said to be a fax letter, but a fax confirmation sheet was never produced. Bearing in mind Fridriksson's demonstrated and unnerving habit of writing letters but not sending them, I am not prepared to find that this letter was sent.

(xiii) *e-mail from Terry Lewis to CASLPO*

[998] At 2:36 p.m., on November 28th, Terry Lewis e-mailed Barbara Meissner Fishbein, of CASLPO: [Underlining added]

> I have received notice that the purchaser's lawyer (sent to my lawyer) that the purchaser has sent out the notification letters informing the patients of the sale. The letter was an appendix to the sale agreement and was satisfactory to both parties, but the purchaser wanted to mail it himself. I realize that it is my responsibility to notify patients from our earlier conversation. However, it was part of the sale agreement that the purchaser would send out the notification and that I would pay the postage.
>
> Would the confirmation of the mailing from the purchaser's lawyer be sufficient to show that I have met my obligation to notify the patients?

[999] According to the argument of the plaintiff:

> It was the position of the defendants that they did not reimburse those funds to the plaintiff as they had insufficient proof that the mailing was done. In seeking clarification on this issue, Terry Lewis misrepresented very clear facts to Ms. Fishbein of CASLPO wherein he advised that 'the purchaser wanted to mail it himself' and that it was part of the sale agreement that 'the purchaser would send out the notification' and the defendant would pay the postage.

I think that the plaintiff is incorrect in saying that Terry Lewis "misrepresented very clear facts to Ms. Fishbein of CASLPO wherein he advised that 'the purchaser wanted to mail it himself.' " In fact, there is evidence that the plaintiff wanted to mail the notification letter. For example, see the e-mail from Fridriksson to Karl Bowley on November 22nd, at 7:11 a.m. and the e-mail from Karl Bowley to Andy Gunarsons on November 23rd, at 11:50 a.m.

(xiv) *e-mail from CASLPO to Terry Lewis*

[1000] At 3:47 p.m., on November 28th, Barbara Meissner Fishbein, Director of Professional Practice, College of Audiologists & Speech-Language Pathologists of Ontario (CASLPO) sent an e-mail to Terry Lewis setting out s. 42(1) and (2) of the *Personal Health Information Protection Act*: [Underlining added]

> 42(1) A health information custodian may disclose personal health information about an individual to a potential successor of the custodian, for the purpose of allowing the potential successor to assess and evaluate the operations of the custodian, if the potential successor first enters into an agreement with the custodian to keep the information confidential and secure and not to retain any of the information longer than is necessary for the purpose of the assessment or evaluation.

> (2) A health information custodian may transfer records of personal health information about an individual to the custodian's successor if the custodian makes reasonable efforts to give notice to the individual before transferring the records or, if that is not reasonably possible, as soon as possible after transferring the records.
>
> I cannot say for sure if you have met the condition. You would need to check with the Information and Privacy Commissioner of Ontario as that is their requirement.

[1001] Section 42(1) would not prohibit the defendants from disclosing patient information to the plaintiff (a potential purchaser) for the purpose of allowing the plaintiff "to evaluate the operations" of the Niagara Falls Clinic, provided the plaintiff "entered into an agreement" with the defendants "to keep the information confidential" and "not to retain any of the information longer than is necessary . . . for the evaluation."

[1002] According to s. 42(2), once a sale of the Niagara Falls Clinic occurred, the defendants were permitted to transfer the patient records to the plaintiff if the defendants gave advance notice to the patients or, "if that is not reasonably possible, as soon as possible after transferring the records."

[1003] The plaintiff contends that the Lewises "deliberately used the excuse of privacy of patient information to prevent [Fridriksson] having an opportunity to discover that the oral representations made by Terry Lewis were inflated and untrue." There is no credible evidence that this "excuse" was used deliberately. The defendants had genuine privacy concerns and, prior to closing, both sides had an imperfect understanding of how patient privacy was to be handled. I find it to be quite remarkable that these experienced hearing clinic owners had such a poor grasp of patient privacy protection legislation.

(xv) *letter from Michael Mann to the ADP*

[1004] On or around November 28, 2006, Michael Mann provided the ADP with a copy of the Asset Purchase Agreement (Fridriksson, initially, having refused to do so). The ADP unsuccessfully attempted to contact the Lewises by telephone and facsimile transmission.

10. <u>December 2006</u>

(a) December 4th

(i) "*Notes for meeting*"

[1005] Included in the documents filed in evidence at trial is something dated December 4, 2006, and titled "Notes for meeting." There was no evidence as to the author of these notes, the intended participants at the meeting and whether the meeting occurred. Also, none of the witnesses for the defendants was questioned about the notes except Andy Gunarsons who was asked about them, in cross-examination:

> Q. And I'm, we understand that these notes are notes pertaining to the meeting that was about to take place between the Lewises and Mr. Naumovich?
>
> A. I don't know, I've never, I don't remember ever seeing this. Does it say to whom?
>
> Q. Are you saying that you've never seen this document?
>
> A. To the best of my recollection, no.

[1006] In the circumstances, I will neither attach any weight to these notes nor give them further consideration.

(b) December 5th

(i) *e-mail from Dee Lewis to Andy Gunarsons*

[1007] At 9:53 a.m., on December 5th, Dee Lewis sent an e-mail to Andy Gunarsons: [Underlining added]

> Am trying desperately to get a hold of you before Jim [Naumovich] sends a letter to [Fridriksson]'s lawyer and <u>I try to save our bacon with WSIB</u> and probably DVA. Since we have received no notification of authorizations or orders for WSIB down there, it is obvious that, with the help of <u>that letter Karl had you have me fax to them</u>, [Fridriksson] has convinced them that he bought the business and he is supposed to get all of the receivables . . .

[1008] The statement, "I try to save our bacon with WSIB," probably is a reference to the "pending" invoices.

[1009] Andy Gunarsons was questioned, in-chief, about the receivables mentioned in this e-mail:

> Q. Now, what information, if any, do you have that [Fridriksson] was trying to get all of the receivables?
>
> A. I have no other information [apart from this e-mail].

[1010] Andy Gunarsons thinks that the "letter Karl had you have me fax to them" is a reference to the cut-off memo (it is sometimes referred to by the witnesses as the "cut-off agreement," however, it never reached the stage of an agreement, certainly not a signed agreement); in other words, work in progress.

(ii) *e-mail from Maria Snook to Fridriksson*

[1011] At 10:12 a.m., Maria Snook e-mailed Fridriksson:

> I received a message from Karin Mitchell at Bell. She advised that she received the revised forms and has processed the transfer.

[1012] James Naumovich had faxed the Assumption of Contractual Obligations to Bell Canada on November 9th, at 3:23 p.m.

(iii) *e-mail from Dee Lewis to Andy Gunarsons*

[1013] At 11:01 a.m., Dee Lewis sent an e-mail to Andy Gunarsons:

> This is the summary. Mickey and I will establish who had received aids before and find out if authorization is assumed, therefore we are entitled to service block 1 for them. You can see from her summary how much money is involved.

[1014] In this e-mail, Dee Lewis is referring to the "pending" invoices. She testified that this was a preliminary summary "and does not mean much." The summary was two typed pages of what appears to be carefully set-out calculations. There is nothing on the face of it to suggest it is "preliminary" or that it "does not mean much." The e-mail summary originated with the e-mail from Mickey Tersigni on November 16th, at 4:06 p.m.

(iv) *letter from James Naumovich to Michael Mann*

[1015] At 2:51 p.m., James Naumovich forwarded a lengthy letter to Michael Mann dealing with the ADP problem, irregularities in the WSIB billings, the Bell Canada dispute and, finally, the problem with Canada Post. The letter reads, in part:

> . . . I understand the purchasers sent to my clients a notice to be signed by the vendors advising [ADP] that there was a change in ownership and that the vendor's permit number be assumed by The Hearing Clinic (Niagara Falls) Inc. The notice

> prepared by your clients involved a change of ownership of the business. This is incorrect. My clients feel that this was an attempt by the purchaser to assume my clients' vendor's number, which would have entitled your client to all of my clients' receivables. The purchaser is required to obtain his own vendor's number . . .
>
> I understand that your client still has not taken the necessary steps to assume the Niagara Falls telephone number. My clients will be discontinuing that line as they must do so in order to have Bell cease further billings to my clients . . .
>
> I have also been advised today that your client refuses to release my clients' mail that has been delivered to the premises . . .

[1016] It is beyond belief that, almost one month after closing, all of these petty problems (which should have been foreseen and resolved before closing) still were occupying the parties and their representatives.[75]

(v) *letter from James Naumovich to Michael Mann*

[1017] On December 5th, James Naumovich sent what appears to be a second letter that day to Michael Mann:

> . . . Your clients have yet to sign up with Bell and accordingly our clients are still on the invoice. I also understand that the purchasers added an additional telephone line, which in essence is at the expense of Mr. and Mrs. Lewis because the purchasers have not yet taken the necessary steps and signed the necessary papers to remove Mr. and Mrs. Lewis from the account . .

(vi) *letter from Michael Mann to James Naumovich*

[1018] At 4:55 p.m., Michael Mann faxed a letter to James Naumovich concerning the never-ending ADP problem:

> . . . Our client has never attempted to assume the Vendor Permit Number belonging to your client. What is clear is that there cannot be two Vendor Permits operating from the same premises and we respectfully suggest that you speak directly with Mr. Chris Young (sic) of the [ADP] who will confirm same to you. Our client cannot proceed to obtain a Vendor Permit Number for the subject premises until your client makes appropriate amendments with the Ministry concerning his Vendor Permit . . .

(c) December 6th

(i) *Canada Post Change of Address Notification*

[1019] On behalf of The Hearing Clinic (the business name used by the defendants), 6800 Morrison Street, Niagara Falls, the defendants completed a

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75 One would think that this was the first sale of a hearing clinic anywhere in the world.

Canada Post Change of Address Notification, with a "service start date" of December 6, 2006, showing its new address as Eglinton Avenue East, Toronto.

(d) December 8th

(i) *letter from James Naumovich to Michael Mann*

[1020] At 12:56 p.m., on December 8th, Mr. Naumovich sent a fax letter to Mr. Mann addressing eight points, the first of which was the ADP problem:

> (1) . . . after our clients sent out the required notification [for the ADP] it appears [Carol] Klassen prepared a notice to the Ontario Ministry of Health which she demanded that Terry Lewis sign which would effectively have transferred my clients' vendor's number to your client. I enclose a copy of the e-mail from your client's own accountant insisting that the form be signed. I am advised by my clients that [Carol] Klassen insisted that this was a government form and that it was required to be signed and then had her own accountant follow up with an e-mail copy, which I am enclosing herewith. The e-mail also requested that the attached form be signed as [Carol] Klassen said, 'This letter is needed.'
>
> I am also advised that Mr. Chris Young (sic) of the [ADP] was contacted by the purchaser and was told that the purchaser wanted my clients' vendor number and not a new number. Enclosed is a copy of an e-mail from the accountant for the purchaser to my clients' accountant corroborating same. How can you say that your clients did not attempt to assume my clients' vendor permit number?
>
> . . . (3) The lawyer for the [ADP], Mr. Chris Young (sic), told the accountant for the vendors that the purchaser (your client) told him (Mr. Chris Young) (sic) that they had bought the business and should get the vendor's permit number. This can also be corroborated . . .

[1021] The letter also dealt with the Bell Canada conundrum:

> (6) We completely disagree that the failure to transfer the Bell account was an error on the part of Bell. My clients state that they have been in continuous contact with Bell and were advised that it was only due to your client's failure to provide them with the notice of change. In fact, I am advised by my clients that [Carol] Klassen advised Bell that she had never received the form. Notwithstanding this statement, she must have had the form because she added an additional telephone line to the office almost immediately after the closing. In addition, the number could not have been transferred on December 1st, because my clients checked and as of December 4th, the account was still in my clients' name . . .

[1022] Finally, the letter from Mr. Naumovich spoke of the mailing mess:

> (8) With regard to the reimbursing of your client in the amount of $3,800.00, my clients advise that they are prepared to compensate the purchaser as per the

> agreement of the mailing costs of the initial notice which took up one page and not the cost of the additional postage due to the fact that each envelope was stuffed with other items. The proper cost for first class mail would be $.51 x 2,500 copies plus GST, amounts to . . . $1,351.50 due and owing to your client. This will be set off against the amount owing by your client to my clients for the November phone bill . . . My clients demand to see confirmation that this mailing was actually sent out . . .

(e) December 11th

(i) *e-mail from Dee Lewis to Andy Gunarsons*

[1023] At 11:43 p.m., on December 11th, Dee Lewis e-mailed Andy Gunarsons:

> . . . Could you please, at around 3 p.m., send Karl Bowley an e-mail demanding receipts for the mailing by 5 p.m. If they can't produce them immediately, we will clear it with Jim [Naumovich] and send out our own.

[1024] In cross-examination, Dee Lewis could not remember why she imposed those time limitations and Andy Gunarsons, when questioned, also did not know the reason. It is easy to conclude that she was merely trying to be difficult, as such a conclusion is consistent with her character.

[1025] The e-mail went on to say: [Upper case in original]

> [Fridriksson] seems to have convinced someone at WSIB that ALL our billings for even more than the last week and all monies owed in the future are fraudulent, and they are reauthorizing to him hearing aids that were approved for us, and that we had ordered . . . Mickey checked with the head of billing . . . This person is on our side and hates [Fridriksson].[76] This should be a mess . . . [Fridriksson] has finally told lies that can be proved to be lies and if he has lied to WSIB, there will be hell to pay . . .
>
> Checked the profits for this year for real instead of by feel and I was exactly right, as usual.[77] Our profit is down $500,000. Nice . . .

[1026] Andy Gunarsons was asked about the $500,000 drop in profits and he confirmed that it was for all three of the hearing clinics owned by the defendants.

(f) **December 14th**

(i) *letter from Michael Mann to James Naumovich*

[1027] On December 14, 2006, Michael Mann wrote to James Naumovich with respect to mail problems:

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[76] This is like reading the diary of a jilted high school student.

[77] I thought that infallibility was a papal thing.

> It has come to our attention that your client has taken steps to have mail for our client's business re-routed to Mr. Lewis . . . our client views this as a blatant attempt by Mr. Lewis to create a detrimental impact upon its business activities . . .
>
> We are advised that, as promised, our client has returned your client's mail which was received after closing to Mr. Lewis . . .
>
> If steps are not taken by your client to have the mail for our client's business continue to arrive at the Niagara Falls location by the close of business today . . . we will accept instructions from our client to commence legal proceedings . . .

(ii) *letter from Canada Post to Terry Lewis and Dee Lewis*

[1028] On December 14th, William Friesen, with Canada Post, wrote to the Lewises confirming receipt of their Change of Address Notification and advising that he required a "joint agreement from both parties":

> We have also been in contact with the present owners of the business . . . who state that they are entitled to the mail.
>
> Since we have conflicting claims we can do neither. We require a joint agreement from both parties instructing Canada Post how to process mail addressed to 'The Hearing Clinic, 6800 Morrison Street' . . . If this joint agreement is not received in thirty days mail addressed as noted will be returned to sender.

(g) December 18th

(i) *letter from the ADP to Terry Lewis*

[1029] On December 18th, Joan Stevens, program manager for the Assistive Devices Program (which falls under the Ministry of Health and Long-Term Care) wrote to Terry Lewis: [Underlining added]

> The [ADP] has received information that you apparently have sold the material assets of your business, including the naming rights and the right to operate in the present location effective from October 30, 2006. <u>However, to date, you have not informed the ADP of this sale</u>.
>
> This action is a violation of section 10 of your vendor contract with the ADP and your immediate response is required . . .

(h) December 19th

(i) *e-mail from Dee Lewis to Andy Gunarsons*

[1030] At 4:40 p.m., on December 19th, Dee Lewis e-mailed Andy Gunarsons about the will-not-go-away ADP dilemma:

> I can tell you are sick about this, but [Fridriksson] is again trying to seize our ADP receivables, and he has backdated the sales date to October 31, probably to try to cash in an ADP form that preceded the date of the actual sale. The head of the [ADP] is going to cut us off and give everything to him, unless we can stop her [the 'head']. We have no ideas how to contact Chris Young (sic) . . . We are meeting with Jim [Naumovich] on Thursday. How is it not a crime for him to keep trying to defraud us like this . . .

(i) December 20th

(i) *letter from Fridriksson to the ADP*

[1031] Included in the exhibits (at Tab 392 of Volume 7 of Exhibit 9) is what purports to be a letter from Fridriksson to the ADP. As this letter was not touched upon in the testimony of any of the witnesses, I am not going to give it further attention.

(j) December 21st

(i) *e-mail from Andy Gunarsons to Karl Bowley*

[1032] At 11:05 a.m., on December 21st, Andy Gunarsons e-mailed Karl Bowley, saying: "I got the ADP sorted out, call me when you get in."

(ii) *e-mail from Dee Lewis to Andy Gunarsons*

[1033] At 12:25 p.m., Dee Lewis e-mailed Mr. Gunarsons: [Underlining added]

> . . . The ADP vendor number is unique and is exclusive to 866073 Ontario Ltd for its Niagara Falls location . . .The change of address was also never acknowledged by ADP and forms with minor omissions were sent to the Niagara Falls address where the new owner held them, along with other mail, while he tried to get the vendor number illegally transferred to him so he could claim receivables he did not legally own . . .

[1034] I find that the plaintiff did improperly hold mail belonging to the defendants, but I am not convinced that Fridriksson "tried to get the [ADP] vendor number illegally transferred to him."

(iii) *letter from James Naumovich to Christopher Young (sic)*

[1035] On December 21, Mr. Naumovich wrote to Mr. Young (sic), who then was thought to be the lawyer for the ADP: [Underlining added]

> . . . I am pleased to enclose herewith a notice sent by The Hearing Clinic to the [ADP] dated December 18, 2006 advising of the sale of the Niagara Falls location

> and confirming that the sale took place on November 9, 2006. I am also enclosing herewith the fax log confirming delivery of the said notice on November 20, 2006 at 5:23 p.m. My clients wrote up the notice one day and sent it the next . . .
>
> The agreement of purchase and sale excludes receivables and I would remind you that the vendor's number 90688 remains the property of The Hearing Clinic and my clients. Mr. and Mrs. Terry and Dee Lewis . . . I am enclosing herewith a copy of a change in ownership prepared apparently by the purchaser Carol Klassen, unsigned and dated November 10, 2006. This transfer was never signed because my clients have no intention of giving up their vendor number . . .

(k) December 22nd

(i) *letter from James Naumovich to Michael Mann*

[1036] On December 22nd, James Naumovich replied to the December 14th letter from Michael Mann:

> . . . I believe that you are misinformed. The purchaser's own accountant admitted to my clients' accountant that the purchaser is deliberately withholding mail, which is the property of Mr. and Mrs. Lewis . . . some of these letters contain cheques payable to my clients . . .
>
> We disagree with your allegation that my clients have re-directed the mail, which is intended to be sent to the purchaser . . . Enclosed herewith please find a copy of a letter dated December 14th from Canada Post . . .
>
> This still does not resolve the issue of the mail currently held by your client which is addressed to and is the property of my clients. I have suggested that my clients contact the police if this matter is not resolved . . .[78]

11. January 2007

[1037] We now find ourselves in the year following closing, with only a little lessening of the communications regarding the deal that cannot, it seems, be completed.

(a) January 4th

(i) *e-mail from Andy Gunarsons to Dee Lewis*

[1038] At 5:01 p.m., on January 4, 2007, Mr. Gunarsons sent an e-mail to Dee Lewis stating that he had just learned that "Christopher Young, lawyer" is "Christopher Yeung, accountant."

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[78] You know that a purchase and sale is not going well when there is a threat by one side to involve the police.

(ii) *e-mail from Dee Lewis to Andy Gunarsons*

[1039] At 8:44 p.m., Dee Lewis replied to Mr. Gunarsons: [Upper case in original]

> So who started the misrepresentation, Karl or Chris? And why didn't what's his name at ADP correct this little piece of lying. I don't think Jim [Naumovich] is going to be happy about this because we sent copies of the sales papers to a LAWYER, not an accountant . . . If it gets us our way, OK, but I am tired of this.
>
> My feeling about [Fridriksson] is that he is trying to get our receivables by what he considers to be charm. Mickey and I will get everything squared away next week, and if [Fridriksson] doesn't start seeing WSIB rechecks and sending in the forms to prove it (through which we get paid) we will start filing complaints against him for poor patient care with everyone who might be interested. The only way he can prove he actually saw the patients is to send in the required forms. Tee hee.

[1040] The opening paragraph of this e-mail is downright silly.[79] The first reference in the evidence that I can find to Christopher "Young" is in the e-mail from Karl Bowley to Andy Gunarsons on November 28th, at 12:42 p.m. wherein Mr. Bowley refers to him as the ADP lawyer. I take this to be an innocent misunderstanding that was innocently repeated in subsequent communications and any rational person would view it the same way.

[1041] The second paragraph of the 8:44 p.m. e-mail is vindictive and puerile.

(b) January 8th

(i) *e-mail from Canada Post to Terry Lewis*

[1042] At 10:18 a.m., on January 8th, William Friesen, with Canada Post, sent an e-mail to Terry Lewis commenting that he had not received a reply to his December 14, 2006 letter and stating: "I require that you provide proof of ownership of this business name [The Hearing Clinic] so that we can resolve this issue . . ."

(ii) *e-mail from Terry Lewis to William Friesen*

[1043] Later that day, Terry Lewis e-mailed Mr. Friesen, saying, in part:

> . . . I thought that the official name of the new owner is different enough from our name that our mail could be forwarded by the post office. The new owner . . . is granted a license to use the name 'The Hearing Clinic' by our company. He did not purchase the accounts receivable or the work in progress. Our inability to have our mail transferred is greatly interfering with our collection of our accounts receivable.

---

79 At some point in the evidence, I do not know where, mordant mistrust morphed into palpable paranoia.

(c) January 9th

(i) *letter from Terry Lewis to James Naumovich*

[1044] On January 9th, Terry Lewis wrote to James Naumovich for advice on what he should provide to Mr. Friesen in respect of the ownership issue.

(d) January 11th

(i) *letter from Fridriksson to the WSIB*

[1045] The documentary evidence includes a four-page letter dated January 11, 2007, from Fridriksson to Matt Wilson, Manager of Health Services for the Workplace Safety & Insurance Board.

[1046] The letter begins:

> As per our telephone conversation Thursday January 11, 2007. As per your request, I am writing to provide you with the details of the transactions that occurred at The Hearing Clinic in Niagara Falls immediately prior to the date of an asset sale (Nov. 9, 2006, 12:00 noon) and since that time . . .

Four pages, containing 23 numbered paragraphs, follow. The letter, among many other topics, purports to recount telephone conversations that Fridriksson says he had with George Gordon of the WSIB (earlier that month) in relation to what Fridriksson felt were improper billing practices by the defendants in the form of double-billing.

[1047] In cross-examination, Fridriksson stated that he did not send this four-page letter to Matt Wilson, but, instead, sent a modified version:

> A. I sent the contents of the . . . four pages in a modified form, with changes to it as a letter to Mr. Wilson . . . this . . . was not sent to Mr. Wilson but . . . a letter that is very similar to the . . . four pages . . . was sent to Mr. Wilson.

[1048] The “modified” version of the letter to Mr. Wilson was never produced.

[1049] Mickey Tersigni performed bookkeeping services for the defendants as an independent contractor. She did not work exclusively for them and had one other client. As well, she did not do, as she put it, “the whole spectrum of bookkeeping.” Instead, she “kept track of the accounts receivable” and “the third party payments.” As for double-billing at the Niagara Falls Clinic, Ms. Tersigni stated: “I’ve never seen it done.” In general, I find Ms. Tersigni to be a credible witness.

(e) January 12th

(i) *ADP vendor number issued*

[1050] On January 12, 2007, the ADP issued a temporary vendor number to the plaintiff retroactive to November 9, 2006.

(f) January 15th

(i) *letter from Canada Post to Terry Lewis and Dee Lewis*

[1051] On January 15th, Canada Post wrote to the Lewises, indicating that, since a reply had not been received to the letter of December 14, 2006 in which a "joint agreement" was requested, "effective tomorrow, January 16, 2007, any mail addressed to The Hearing Clinic at 6800 Morrison Street, Niagara Falls, will be returned to sender."

(g) January 16th

(i) *letter from Terry Lewis to James Naumovich*

[1052] On January 16, 2007, Terry Lewis wrote to James Naumovich:

> Enclosed is the form for direction of mail. We still have the problem that [Fridriksson] is holding mail from November. That mail includes 3 cheques from Blue Cross and probably some other mail from the Ministry of Health ADP Branch.
>
> I suggest that a condition of our sending this 'direction' is: That all mail addressed to us, particularly ADP forms and those 3 Blue Cross cheques . . . be sent to arrive at our office by noon tomorrow . . .

(ii) *letter from James Naumovich to Michael Mann*

[1053] On January 16th, James Naumovich forwarded a letter to Michael Mann advising that "our client has signed the direction re the mail however he would like to have confirmation that once the . . ." The copy of the letter filed at trial ends here. Presumably, the confirmation relates to the three Blue Cross cheques and perhaps the ADP forms that are referenced in the above letter from Terry Lewis to James Naumovich.

(h) January 17th

(i) *letter from Malte von Anrep to James Naumovich*

[1054] By letter dated January 17th, Malte von Anrep, Q.C., lead counsel for the plaintiff, wrote to James Naumovich:

> . . . Please send [the direction] right away so I can get it signed by my client and then forward it to the post office in Niagara Falls today.
>
> Our clients have had no mail delivery since December 8, 2006. You may rely on this correspondence as an undertaking by our clients that all mail received to date which is addressed to your clients has been forwarded to them and that any mail received in the future addressed to your clients will be promptly forwarded to them . . .

(i) January 18th

[1055] Behind the same Tab of the Exhibit at which the January 11th letter to the WSIB is found, there is an undated nine-page enclosure titled, "Payment due for work done by the purchaser for the sake of the vendor" with 20 numbered paragraphs. This document, which was prepared by Fridriksson, begins: "On January 17 and 18 I obtained letters from three different manufacturers . . ." Therefore, the document likely was created at that time or very shortly thereafter.

[1056] Fridriksson admitted, in cross-examination, that there is a similarity between this document and the claims in the action:

> Q. Sir, would you agree with me, as we go through this [document] . . . it in many ways mirrors the plaintiff's claim in this proceeding?
>
> A. Yes . . .

[1057] At page two, in the middle of paragraph number 1, there is a heading: "The costs to our clinic as a result of [the conduct of the defendants] were." Fridriksson was cross-examined on the accuracy of the document:

> Q. The dollar amounts and whatnot, under the heading, "The costs to our clinic as a result of [the conduct of the defendants] were," are all those exaggerated that follow?
>
> A. No . . . but some are.

[1058] In respect of at least one item, the reimbursement set out as owing to the plaintiff was false:

> Q. And this is not true is it?
>
> A. It is not true.

[1059] Another item merits attention. Paragraph 12 states, in part: [Underlining added]

> 12. Inventory – . . . The day we took over the clinic, there were just 2 boxes of 4 packs of each type of hearing aid battery left on the shelf . . . In a week the practice could sell as many as 150 boxes of batteries . . .

[1060] This "Inventory" went on to say that when the plaintiff took over the Niagara Falls Clinic, more than 600 batteries, valued in excess of $12,000, were missing (which is grossly inconsistent with the e-mail from Fridriksson to Karl Bowley on November 11, 2006, at 5:19 a.m., wherein he quantified the inventory shortage as "probably several hundred dollars").

[1061] Fridriksson was asked, in cross-examination, whether it was true that "in a week the practice could sell as many as 150 boxes of batteries":

> Q. Is that true?
>
> A. I don't, I don't think so, no.
>
> Q. No? Then why would you write that?
>
> A. Because I was angry.
>
> Q. So you just make things up when you're angry?
>
> A. I didn't send this to [WSIB] . . .
>
> Q. So this isn't a slight exaggeration, this is completely absurd?
>
> A. You're right.

[1062] It is instructive to compare the numbers of boxes of batteries set out in this document (which Fridriksson says were missing on closing) with the handwritten inventory that Fridriksson says he compiled on September 17, 2006. The former, in some instances, is three to four times higher.

[1063] Ginette Galati was cross-examined on the issue of the battery sales:

> Q. . . . Mr. Fridriksson writes that in a normal business week the practice would sell 'as many as 150 boxes of batteries,' and you've agreed with that, correct?
>
> A. Yes.

[1064] The cross-examination then revealed the one weakness of Ginette Galati as a witness. In matters of her own thoughts and observations she is believable, but she accepts as truthful anything told to her by Fridriksson: [Underlining added]

> Q. Okay and Mr. Fridriksson also references that there are over 600 batteries valued at $12,000 went missing. Do you agree with that?
>
> A. I don't remember that inventory, checking it out, like as far as how many quantities.
>
> Q. So it would be accurate based on what Mr. Fridriksson would have written here?
>
> A. If this is what he wrote, yes.

[1065] Ms. Galati was cross-examined on her experience with Fridriksson and she said that she found him to be truthful and not inclined to embellish or exaggerate. This exchange followed:

> Q. Well, Ms. Galati, what I would say to you is that Mr. Fridriksson admitted in his evidence during cross-examination that the claim that the clinic can sell 150 boxes in a week is completely absurd and this document that we've been questioning you on . . . contains exaggerations and embellishments and untruths.
>
> A. I didn't, I didn't know that.

[1066] Because she is a blind disciple of Fridriksson, the credibility of Ms. Galati is occasionally compromised.

(j) January 19th

(i) *letter from Malte von Anrep to James Naumovich*

[1067] On January 19th, Mr. von Anrep wrote to Mr. Naumovich about the refusal of the defendants to provide a direction to satisfy Canada Post:

> I really don't understand your refusal to provide me with the signed direction, especially in light of your acknowledgement that, if Canada Post returns the accumulated mail to the senders, there would be dire financial consequences to both our clients . . .
>
> If I don't receive the direction today my client will have to seek injunctive relief immediately.

(k) January 22nd

(i) *notice of action and motion*

[1068] A notice of action was issued on January 22, 2007 and a motion was served seeking a mandatory injunction requiring the defendants to sign the Canada Post direction.

(l) January 24th

(i) *letter from Malte von Anrep, Q.C. to James Naumovich*

[1069] On January 24th, Mr. von Anrep wrote to Mr. Naumovich:

> Thank you for your fax received this afternoon enclosing the direction signed by your client. This avoids having to argue for the issuance of the mandatory order on Friday [January 26th] and leaves only the issue of costs to be determined.

[1070] The costs were estimated at $4,500.

[1071] The direction was signed by Terry Lewis on behalf of the corporate defendant.

(m) January 26th

(i) *letter from Canada Post to Fridriksson and to the Lewis'*

[1072] On January 26th, William Friesen confirmed that the information received "clarifies the Change of Address Notification . . . As a result, all mail that was held has been delivered to your address."

(ii) *costs order*

[1073] Although the substance of the motion by the plaintiff for a mandatory injunction was resolved, the issue of costs remained and was dealt with on January 26th, the return date of the motion. The defendants were ordered to pay costs to the plaintiff of $4,493.08, all-inclusive.

12. February 2007

(a) February 7th

(i) *letter from the ADP to Carol Klassen*

[1074] On February 7th, the ADP wrote to Carol Klassen stating that her "application to become a registered [ADP] hearing aid vendor" had been approved. An agreement was enclosed for her to complete.

(b) February 15th

(i) *letter from Fridriksson to the ADP*

[1075] On February 15th, Fridriksson sent a lengthy letter to the ADP "to inquire about the series of events that lead to the 10 week delay in receiving a temporary

[ADP] hearing aid vendor number for The Hearing Clinic (Niagara Falls) Inc . . ." and "asking for a letter from the ADP confirming the reasons we were not granted the necessary temporary vendor number until January 16, 2007 . . ."

(ii) *letter from the WSIB to Fridriksson*

[1076] On February 23, 2007, Eric Kupka, with the WSIB, wrote to Fridriksson, responding to the January 11th letter from Fridriksson to Matt Wilson: [Underlining added]

> <u>The various statements that you attribute to George Gordon in your letter and its attachments are incorrect</u>.[80] In particular, Mr. Gordon never gave assurances as to whom would be paid for the services or devices in question.
>
> Also, it is unclear what 'WSIB process' and 'rules' you are referring to in paragraph 20 of your letter.
>
> The WSIB either has no knowledge of or cannot comment on the remaining issues that you raise, as these relate to your dispute with the former owners of your business. The WSIB has no involvement in that dispute and therefore is not in a position to make any further comment.

[1077] Mr. Kupta refers to paragraph 20 of the letter of January 11, 2007. Paragraph 20 of the January 11th letter filed in this trial reads:

> 20. On December 21, I contacted George Gordon and he assured me they would not be paid for service unless they had provided the service.

Thus, this paragraph 20 obviously is not the paragraph 20 being described by Mr. Kupta.

[1078] Consequently, when Fridriksson testified that the letter dated January 11, 2007, produced in evidence and dealt with earlier, was not sent but, instead, it was replaced by a modified version, it would seem that he is correct. Yet, we never saw the modified version.

(iii) *e-mail from Andy Gunarsons to Terry Lewis*

[1079] On February 28th, at 1:41 p.m., Andy Gunarsons sent an e-mail to Terry Lewis:

> There was never any mention of Donna having a 'list,' simply because there was no 'list' made available to her per se (that I know of). If Donna illegally went in and

80 Does anyone see the scrumptious irony here? More misstated and misremembered telephone conversations. Maybe the problem is Fridriksson's telephone.

> pirated one by using the QuickBooks file details or alternatively she illegally went into the patient files and copied confidential details, then, in either circumstance, that is illegal. In any case, neither you nor Dee had any knowledge of it . . . and you remain steadfast that you have no knowledge of her ever having a 'list' . . .

[1080] I do not know what prompted this e-mail. It sounds like coaching. The contents are curious (suspicious, actually), when one considers the e-mail from Terry Lewis to the Office of the Privacy Commission on September 6, 2006.

13. March 2007

(a) March 14th

(i) *e-mail from Fridriksson to his counsel*

[1081] At 1:08 p.m., on March 4, 2007, Fridriksson e-mailed his counsel: [Underlining added]

> . . . I spoke to Ginette this morning and she told me that Mickey was in the Niagara Falls office <u>at least two times per month</u> and spent much of the final week in Niagara Falls. <u>Sarah was in the Niagara Falls office two to three days per week</u>. She [Ginette] said that there are months of schedules in the computers that show the days they were in Niagara Falls and which people they saw and what they did while they were in the office.

[1082] Mickey Tersigni testified that the suggestion Sarah Peverley attended the Niagara Falls Clinic two to three days per week, "sounds about right."

[1083] It was the evidence of Ms. Tersigni that she attended the Niagara Falls Clinic "two times per month . . . there were some months I didn't go and some months where I went maybe a couple more times than two times a month."

[1084] I already have mentioned that Ms. Tersigni was at the Niagara Falls Clinic in the period November 7 – 9, 2006, preparing the "pending" invoices.

14. December 2007

(a) December 26th

(i) *e-mail from Dee Lewis to Andy Gunarsons*

[1085] At 7:15 p.m., on December 26, 2007, Dee Lewis e-mailed Andy Gunarsons regarding the cut-off/work-in-progress memo:

> According to below, you, for some unfathomable reason, agreed to Karl's self-serving demand. What the ???? You give him permission to flip hearing aids and

> steal our receivables. Tell me you did not tell him this was OK[81] . . . I need a clear answer on this soonest, OK? Karl is such a snake.

[1086] Dee Lewis is referring to the e-mail from Andy Gunarsons sent to her at 1:40 p.m., on November 14, 2006, which, for some reason, was re-sent to her on December 7, 2007 at 4:53 p.m. Did she not read the November 14th e-mail the first time? Or is this another example of the fragile human memory that I have witnessed in this trial?

(b) December 31st

(i) *e-mail from Andy Gunarsons to Dee Lewis*

[1087] At 10:54 a.m., on December 31, 2007, Andy Gunarsons replied to the December 26th e-mail from Dee Lewis:

> No, I did not do this. Please note that this was just a 'FYI' to you at that time to simply inform you to read it over his new work-in-progress proposal suggested at that time. I never agreed to his proposal provided to him by [Fridriksson]. He was asking Terry/you/me to confirm his new '[Fridriksson] suggested' work-in-progress cut-off proposal and have you sign it off but I said 'No' . . . I said that I would flow his e-mail to you . . . [it was only a proposal] without your express direction and written approval (which of course was a strong and simple no) . . .

15. <u>2008 - 2011</u>

(a) December 17, 2008

(i) *letter from Minden Gross*

[1088] The plaintiff contends that the "conduct of Donna Bradley" resulted in the loss of 212 patients from the Niagara Falls Clinic. Exhibit 100 is a letter dated December 17, 2008, from Minden Gross, the lawyers representing the defendants in the legal proceedings commenced by the plaintiff against Donna Bradley and the hearing clinic by which she was hired after leaving the employment of the Niagara Falls Clinic. This Exhibit does not mention 212 patients, but it identifies 179 "clients" that the defendants in that action described "as having previously been clients of the Lewis' clinic." The letter was allowed into evidence but, at the time, I indicated that, without more, it would receive little weight. The author of the letter was not called to address how that number was compiled or to speak to the method

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[81] Goodness gracious, she is now turning on her own accountant. The Dee Lewis circle of mistrust is complete. Her paranoia rages on.

of determining the reason for the "clients" leaving the Niagara Falls Clinic. I do not find the letter to be helpful to me in my task.

(b) March 4, 2009

(i) *letter from Fridriksson to Heather Winger of the WSIB*

[1089] In the world of hearing aids, the WSIB is an important entity because it pays for those devices where they are needed by WSIB recipients for such conditions as noise-induced hearing loss in the workplace. However, there is a prohibition against using other payors (for example, the Government of Ontario Assistive Devices Program and third-party insurers) to fund hearing aids for those who have WSIB coverage.

[1090] Fridriksson wrote to Heather Winger, a WSIB adjudicator, on March 4, 2009, explaining that he had purchased the Niagara Falls Clinic and complaining that the defendants had violated the above prohibition. In other words, this letter accused the defendants of improper billings. The letter includes the following passage: [Underlining added]

> This point is of interest to me, because the extra billing for those hearing aids influenced the net income of the Clinic I purchased. <u>The purchase price of the Clinic was based on a multiple of that net income</u>. If these billings were inappropriate, the purchase price of the Clinic would therefore be inflated by the amount of those extra billings. We have chosen to take this matter to court because, along with a number of other irregularities, this extra billing has significantly inflated the valuation of this Clinic . . .

[1091] The underlined sentence contradicts the position taken by the plaintiff in this court that the purchase price of the Niagara Falls Clinic was based on the number of patients. Fridriksson was cross-examined on the matter:

> Q. Okay and everything you write in [the letter] you truly believe is true and correct, right? You wouldn't put something on paper that wouldn't be true and correct, would you?
>
> A. I know there's something in here that's not correct.
>
> Q. What is that?
>
> A. The purchase of the Clinic was based on a multiple of an income.
>
> Q. That's not correct?
>
> A. That's not correct . . . that was never true or correct.

[1092] How can Fridriksson write to the WSIB and say that the purchase price of the Niagara Falls Clinic was based on a multiple of income, yet come to court and testify for days and days and days that the purchase price was determined by the number of patients?[82]

[1093] The serious nature of this letter was acknowledged by Fridriksson:

> Q. This is a serious letter?
>
> A. Mm – hmm.
>
> Q. You're in the business, you're a professional audiologist. Mr. Lewis and the defendants are in the same business?
>
> A. Mm – hmm.
>
> Q. You're writing to a pay provider of hearing aids for the WSIB population, so to speak, that has a hearing impairment, right?
>
> A. Yes.

[1094] Fridriksson had no hesitancy about lying to the WSIB, as long as the lie advanced the point he was trying to make.[83]

(c) April 6, 2009

(i) *letter from the WSIB to Fridriksson*

[1095] On April 6, 2009, Fridriksson received a reply to his March 4th letter to the WSIB stating that, after a review of their records, "entitlement to hearing related benefits [for the claims investigated] remains unchanged . . ." In other words, the concerns expressed by Fridriksson were not shared by the WSIB.

[1096] This completes my general review of the evidence.

VI. DISCUSSION (the alleged fraudulent misrepresentations)

[1097] In the next three parts to these Reasons I will discuss: the alleged fraudulent misrepresentations; the other misconduct alleged by the plaintiff; and, the CASLPO allegations.

[1098] The plaintiff contends that there were eleven fraudulent misrepresentations. They are described in the court-ordered Amended Amended Particulars, delivered

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[82] What is wrong with this man?

[83] Why should I think that he found God in my courtroom?

in 2011, more than four years after the initial statement of claim was issued and a few weeks before the trial commenced. It is said that the fraudulent misrepresentations were made by Terry Lewis, Dee Lewis and their accountant, Andy Gunarsons, to Fridriksson and to Karl Bowley, the accountant for the plaintiff, and, further, that they were made in telephone conversations and e-mails, between July 13, 2006 and November 9, 2006.

[1099] The plaintiff argues that it relied upon these misrepresentations in agreeing to a $1 million purchase price and, had the accurate facts been known, it would not have paid more than $250,000.00.

[1100] Subparagraph 1(a) of the statement of claim reads:

> 1. The plaintiff claims:
>
> (a) general damages for breach of contract, negligence, breach of fiduciary duty and fraudulent misrepresentations, in the sum of $750,000.00.

Such a concurrent pleading is permitted. "[W]here a given wrong *prima facie* supports an action in contract and in tort, the party may sue in either or both . . .": see, for example, *BG Checo International Ltd. v. British Columbia Hydro and Power Authority,* [1963] 1 SCR 12 at para. 15. However, beyond subparagraph 1(a), the words "breach of contract," "negligence" and "breach of fiduciary duty" do not appear anywhere in the statement of claim.

[1101] The Amended Amended Particulars begins with this preamble:

> 1. The following are alleged fraudulent misrepresentations made by the defendants, Terry Lewis, Dee Lewis and Andy Gunarsons, their accountant, who was negotiating the sale of the clinic.

[1102] The Amended Amended Particulars goes on to allege 11 fraudulent misrepresentations in subparagraphs 1(a)-(k) which I will address in a moment.

[1103] The "elements of fraudulent misrepresentation" are set out in *Mariani v. Lemstra* 2004 CarswellOnt 5126 (C.A.) at para. 12: "(1) that the defendant made a false representation of fact; (2) that the defendant knew the statement was false or was reckless as to its truth; (3) that the defendant made the representation with the intention that it would be acted upon by the plaintiff; (4) that the plaintiff relied upon the statement; and (5) that the plaintiff suffered damage as a result."

[1104] Although fraud is a serious matter, it is undisputed that the standard of proof for fraudulent misrepresentation is the civil burden (the balance of probabilities).

[1105] Reliance is a contentious issue in this case. "[I]f the Court sees on the face of the statement that it is of such nature as would induce a person to enter into the contract, the inference is, if he entered into the contract, that he acted on the inducement so held out, unless it is shown that he knew the facts, or that he avowedly did not rely on the statement whether he knew the facts or not": see *Arnison v. Smith* (1887), 41 Ch. 348 (C.A.), at p. 369, *per* Halsbury, L., cited with approval in such cases as *Opron Construction Co. v. Alberta*, [1994] A.J. No. 224 (Q.B.) at para. 560.

[1106] When considering the requirement of reliance, it is worth remembering that Fridriksson is alleging that Terry Lewis and Andy Gunarsons made fraudulent misrepresentations, yet Fridriksson thought both of them were bullshitters. As of September 13, 2006, Fridriksson *thought* Andy Gunarsons was a bullshitter. But he *knew* Mr. Gunarsons was a bullshitter by October 10th or 11th. Also, by October 10th, he *believed* Terry Lewis was similarly afflicted. Fridriksson unconvincingly changed his testimony to say that by October he *suspected* Terry Lewis was a bullshitter, but he was not *sure* until after closing.[84]

[1107] Unless I expressly say otherwise, the Asset Purchase Agreement is silent as to the eleven matters now about to be discussed.

1. Number of "active" patients

(i) *the allegation*

[1108] In subparagraph 1(a) of the Amended Amended Particulars, the plaintiff contends that the Lewises and Andy Gunarsons fraudulently misrepresented that "the [Niagara Falls Clinic] had 5,000 active patients, including 500 patients insured by the Workplace Safety and Insurance Board."

(ii) *some evidence*

[1109] It is conceded by counsel for the plaintiff that the issue of the number of patients is heavily dependent upon the credibility of Fridriksson.

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[84] Bearing in mind that Fridriksson agrees that a "bullshitter" is a "liar," a philosophical question arises: Is it actionable if a liar lies?

[1110] Fridriksson was cross-examined on the professed importance to him of the patient numbers:

> Q. Sir, it's your evidence that the most important representation made to you was that the clinic had 5,000 patients. Is that correct?
>
> A. I think the most important or the most important misrepresentations were the combination of the 5,000 and the [500] WSIBs.

[1111] The statement of claim, throughout all of its incarnations, pleaded, at paragraph 10, that "the plaintiff was induced to purchase the assets of the clinic for $1,000,000 based on specific representations of the defendant, Terry Lewis, that the clinic had 5,000 active patients." The statement of claim does not mention WSIB patients. It was not until particulars were ordered in 2011 that the number of WSIB patients become part of the allegations.

[1112] The first reference to the Niagara Falls Clinic having 5,000 patients and 500 WSIB patients is in the handwritten notes made by Fridriksson of his alleged telephone conversation with Terry Lewis on September 7, 2006, at 10:20 a.m. These figures do not appear in any of the many dozens of e-mails and pieces of correspondence prior to closing; if they can be found, it is occasionally in other handwritten notes of Fridriksson. The September 7th notes describe the patients as "regular" patients and the number of WSIB patients is recorded as being "1/10" of the "regular" patients, that is to say, 500 (1/10 x 5,000).

[1113] It will be recalled that the letter of March 4, 2009, from Fridriksson to Heather Winger of the WSIB, complaining about the billing practices of the defendants, includes this passage [Underlining added]:

> This point is of interest to me, because the extra billing for those hearing aids influenced the net income of the clinic I purchased. <u>The purchase price of the Clinic was based on a multiple of that net income</u>. If these billings were inappropriate, the purchase price of the Clinic would therefore be inflated by the amount of those extra billings. We have chosen to take this matter to court because, along with a number of other irregularities, this extra billing has significantly inflated the valuation of this Clinic.

[1114] When cross-examined, Fridriksson conceded that this letter does not say that the purchase price of the Niagara Falls Clinic was based upon the number of patients:

> Q. And again, sir, if you look at the totality of this letter . . . you'd agree with me that the purchase price was not in any way based on the number of patients?

A. I'm, I agree with that.

[1115] The letter and this answer, of course, contradict his repeated assertions during the trial that the purchase price was determined by the number of patients.

[1116] So, Fridriksson lied to the WSIB. There is no need to soften my language.

[1117] And then we have the e-mails of August 28th, at 4:19 p.m. and August 29, 2006, at 11:33 a.m., both of which support the argument that the purchase price was negotiated on the basis of income not patient numbers. Thus, even if there was a misrepresentation as to the number of patients (and I find that there was not) it would be irrelevant to the issue of the purchase price arrived at by Fridriksson. Reliance is missing.

[1118] Fridriksson conceded that there was no reference to the actual number of patients in the Asset Purchase Agreement or in any draft of that agreement. He was cross-examined on the absence of e-mails and other correspondence in respect of the issue of 5,000 patients:

> Q. Is there any e-mail correspondence between you and Mr. Bowley prior to signing the agreement of purchase and sale that references or states that a representation of 5,000 patients was made to you?
>
> A. Not prior to that.
>
> Q. Is there any e-mail correspondence, or any other written correspondence I should say, between you and Terry Lewis . . . between you and Dee Lewis . . . between you and Mr. Andy Gunarsons . . . prior to the signing of the agreement of purchase and sale on October 30, 2006, referencing the 5,000 patients?
>
> A. No.

[1119] Fridriksson was cross-examined further:

> Q. Is there any e-mail correspondence or any other written correspondence between Mr. Bowley and any other person that you're aware of, prior to the signing of the agreement of purchase and sale on October 30, 2006, which references 5,000 patients?
>
> A. No.
>
> Q. Has Mr. Bowley produced any handwritten notes to you or in this proceeding that you're aware of, taken prior to the closing of the transaction, that being November 9 of 2006, referencing 5,000 patients?
>
> A. No.

> Q. So, then the only written documentation that we have that references 5,000 patients . . . prior to the agreement of purchase and sale . . . are your own notes of telephone calls and what not, correct?
>
> A. Prior to the agreement of purchase and sale, yes.

[1120] Karl Bowley testified that he does not recall being told by Fridriksson (or by Andy Gunarsons) about the Niagara Falls Clinic having 5,000 patients:

> Q. So you, you don’t have any recollection of 5,000 patients ever being mentioned?
>
> A. Me being told 5,000? I do not.

[1121] This is telling testimony, when one considers how frequently Karl Bowley was in communication with Fridriksson and how important the figure of 5,000 supposedly was to Fridriksson.

[1122] This is not to say that patient numbers are irrelevant. For example, we have the following testimony from Andy Gunarsons, in cross-examination:

> Q. Are we in agreement that goodwill is the excess of purchase price over tangible assets?
>
> A. Yes.
>
> Q. And the number of patients is a relevant factor of goodwill?
>
> A. In this business it would be, yes.

Nevertheless, the number of patients was not used by Fridriksson and Karl Bowley in arriving at the purchase price.

[1123] When Dee Lewis was questioned about the 5,000 figure, she stated that she would not have had the staff for such a number:

> A. . . . we would have required at least as much staff as we had for all the clinics. Donna [Bradley] and the receptionist and Terry [the audiologist] in one day could never possibly have done, have taken care of 5,000 patients at all, let alone 5,000 regular patients.

(iii) *the 405-active-patients analysis by Carol Klassen*

[1124] Carol Klassen tendered a list that she compiled based upon her analysis of the patient files for the Niagara Falls Clinic and she concluded that there were “405 active patients” at the time of closing. The term “active” is not found in any of the hundreds of pages of documents in this trial (although it is used in the statement of claim). Fridriksson, in his handwritten notes for the September 7, 2006 telephone conversation, at 10:20 a.m., with Terry Lewis, used the adjective "regular."

[1125] What is an "active" patient? Carol Klassen adopted her own, patient-by-patient, *ad hoc* definition which struck me as irrational one moment and incoherent the next. Typical of her testimony was the following description that she gave about her approach to compiling the list: [Underlining added]

> A. I gave an explanation for most of them but, like the first one says, 'no Lewis file,' the second one, 'batteries only.' The third person, the, the file or the ones with the one on the far right, indicate patients that are not, or people that are not really patients of ours but have come in for, like, like <u>the third person came in for a hearing test in 2007 and never came back</u>. <u>So they didn't become a patient of ours really</u>.

The plaintiff purchased the Niagara Falls Clinic on November 9, 2006. If a person comes to the clinic for a hearing test in 2007, by what distorted thinking is that person not a patient of the clinic?

[1126] In any event, Ms. Klassen described how she went through the QuickBooks customer list and excluded those patients whom she did not regard as "active." For example, a patient who was fitted for a hearing aid in 1999 and attended for repairs in 2008 was ruled out as an active patient on the date of closing (November 9, 2006); as was a patient who was fitted for a hearing aid in April of 2006 and returned for a hearing test in 2008.

[1127] Ms. Klassen displayed a puzzling lack of knowledge about the list she purportedly prepared. One of the criteria she arbitrarily adopted was to exclude anyone who did not answer his or her telephone when called post-closing, even if there was a patient file for that person:

> Q. Okay. So what did you mean by . . . 'No response to calls.' Do you recall?
>
> A. We were unable to contact them, no response to calls. I guess that would mean that we were unable to contact them.
>
> Q. Are you guessing or do you know that for a fact?
>
> A. Well, I'm looking at it and trying to interpret what it means.
>
> Q. But this is a document you prepared, correct?
>
> A. Yes it is.
>
> Q. Why does it need interpretation? Don't you just have a direct recollection of what it means?

A. No, I don't have a direct recollection of everything I write.

[1128] Rather unconvincing, I would say.

[1129] The evidence of Carol Klassen was unhelpful to the court. This was not the first analysis carried out by her in this trial and, as in all of them, she did not create confidence.

(iv) *general credibility of Carol Klassen*

[1130] Now is as good a time as any to mention that, in general, the testimony of Carol Klassen on all issues was problematic primarily for two reasons: Firstly, she readily accepted anything about this case told to her by Fridriksson, explaining: "I know that's what [Fridriksson] told me and he wouldn't lie to me about that kind of thing. He doesn't lie to me." Then adding: "He doesn't lie"; Secondly, she was in the body of the courtroom for every word of the testimony given by Fridriksson during the more than 20 days that he occupied the witness box. She tried to be the finger in the dike to plug the holes in his testimony.[85]

[1131] There was an order excluding witnesses made under subrule 52.06(1) of the *Rules of Civil Procedure,* R.R.O 1990, Reg. 194. Subrules 52.06(1) and (2) state:

> 52.06(1) The trial judge may, at the request of any party, order that a witness be excluded from the courtroom until called to give evidence, subject to subrule (2).
>
> (2) An order under subrule (1) may not be made in respect of a party to the action or a witness whose presence is essential to instruct the lawyer for the party calling the witness, but the trial judge may require any such party or witness to give evidence before any other witnesses are called to give evidence on behalf of that party.

[1132] Carol Klassen, as the sole officer, director and shareholder of the plaintiff, is, effectively, the plaintiff and, as a party, could not be excluded under subrule 52.06(1). I was not asked to make an order under subrule 52.06(2) requiring Carol Klassen to give her evidence before any other witnesses called by the plaintiff. However, the absence of an order requiring a party to testify first is not an invitation for that party to testify last (a principle that I expressed in *Marine Clean Ltd. v. Forge,* [2009] O.J. No. 1042 at paragraph 19). In the absence of a contrary order, counsel for the plaintiff were free to determine the sequence of witnesses. It is presumed that counsel were aware of the risks associated with allowing Fridriksson to testify first. Because of the way that this trial unfolded, I find that

85 Alas, the holes outnumbered the fingers.

the credibility of Carol Klassen was compromised by the fact that she testified after listening to the evidence of Fridriksson for in excess of 20 days.

(v) *back to the 405-active-patients analysis by Carol Klassen*

[1133] Using the 405-active-patients analysis of Carol Klassen, Karl Bowley prepared a report. Counsel for the defendants objected to the tendering of this report and to Mr. Bowley giving evidence about its preparation, on the grounds that he is not an expert in the field of business valuation (such as a certified business valuator) and, even if he were, Rule 53.03 of the *Rules of Civil Procedure* had not been followed. Rule 53.03 outlines an elaborate procedure for the preparation and service of the report of an expert witness whom a party intends to call at trial.

[1134] The purpose of the report and testimony of Mr. Bowley was as to the advice he would have given to Fridriksson had he known that the Niagara Falls Clinic had only 405 active patients. It is obvious from the evidence that Karl Bowley played an integral role in negotiating the purchase of the Niagara Falls Clinic. He was consulted by Fridriksson throughout the negotiations and played a part in the decision of the plaintiff to pay $1 million as the purchase price.

[1135] I ruled that the proposed testimony of Mr. Bowley was relevant and admissible on the narrow issue of the effect certain post-closing information (that is to say, the 405-active-patients analysis by Carol Klassen) would have had on his pre-contract advice to Fridriksson regarding the purchase of the Niagara Falls Clinic.

[1136] I further ruled, however, that his proposed testimony was not relevant on the issue of the value (then or now) of the Niagara Falls Clinic, as Mr. Bowley was not qualified to give an expert opinion on that issue. I recognized the existence of a discrete difference between the market value of the clinic and what Fridriksson was prepared to pay as the purchase price. At the time, I also expressed the view that the proposed testimony of Mr. Bowley might not be of much assistance to the court on damages, should the plaintiff tie damages to value.

[1137] The report of Mr. Bowley was not a report as contemplated by Rule 53.03 the *Rules of Civil Procedure* or in any legal sense (being undated, unsigned and with no mention of the author or of his credentials). It was a collection of notes, comments and calculations that I held could be used as an aid to Mr. Bowley when testifying and to the court in following the testimony. For convenience, the report was filed as an exhibit with the caveat that the contents would not be facts in the case unless proved. Rule 53.03 of the *Rules of Civil Procedure* had no application in the circumstances.

[1138] The importance of the figure of 405 patients in the preparation of his report is seen in this testimony that Mr. Bowley gave:

> A. The concept of the number of patients is critical to . . . this [report] . . .

[1139] Having found that the figure of 405 is not accurate, and having rejected the analysis of Ms. Klassen, the report and testimony of Mr. Bowley must suffer the same evidentiary fate (the domino effect).

[1140] Using QuickBooks, Dee Lewis did her own analysis of those whom Carol Klassen had categorized as non-patients or not "active" patients and her 36-page summary revealed numerous patients who had been excluded by Ms. Klassen but who had made substantial purchases in the years leading up to the closing. Although I am wary of the analytical prowess of the parties in this case, the analysis prepared by Dee Lewis seems far more logical and reflective of what I would categorize as an "active" patient.

[1141] Before leaving this issue, there is a final curious piece of evidence to consider. Karl Bowley, as I have said, prepared a report based upon the analysis of Carol Klassen that the Niagara Falls Clinic had 405 patients. On August 7, 2012, he was cross-examined regarding the date on which he prepared his report (remember – the trial began in July of 2011 and the closing was November 9, 2006):

> Q. So when did you prepare this report?
>
> A. I don't remember the year, it was certainly post-closing, it was during preparations for court proceedings . . .
>
> Q. Was it this year [2012]?
>
> A. No.
>
> Q. It was prepared previous to this year?
>
> A. Certainly, definitely not in 2012. It would have been a couple of years ago, but I honestly do not recall.
>
> Q. So all you can say conclusively today is that it wasn't prepared this year?
>
> A. Correct.

Q. Okay and it could have been in 2011 or a couple years prior to this year which would have put it in 2010, correct?

A. Correct.

[1142] The cross-examination continued:

Q. And who directed you to prepare the report?

A. [Fridriksson] had asked the question which was, what impact would it have had, what might someone have paid for the practice if they had known there were only 405 patients.

[1143] However, Carol Klassen was examined in-chief on June 1, 2012. She testified that she "prepared a list for the court" which showed the number of regular patients of the Niagara Falls Clinic to be 405:

Q. And do you recall approximately when you did that?

A. Just the other day, over the last few days [which would be in May of 2012].

[1144] If the 405 figure was not known until sometime in May of 2012, how is it that Karl Bowley was given that figure by Fridriksson in 2011 or earlier?

[1145] Dee Lewis was questioned in-chief regarding the number of "customers" of the Niagara Falls Clinic:

Q. Okay, did you have any idea as to the number of patients that the business had as a whole out of all three clinics back in 2006?

A. No, but I knew, I did know that Niagara Falls was around 2,000 because that's about what we estimated it would be . . . and then it gets into who was a patient because that would be anybody who had purchased from us. Some people who purchased from us were people buying for someone who had bought a hearing aid . . . but if you're looking at advertising you're also looking at those people because . . . they may be buying for a parent who is not coming in because they are in a nursing home . . . So they're all people to be considered.

Q. Now, how did you determine that there were approximately 2,000 patients?

A. You mean 2,000 customers of any kind?

Q. Yes.

A. You have to make a list of sales-by-customer summary for the entire period and export it to Excel, count the lines . . .

[1146] There is no evidence as to the generally accepted distinction, if any, in the world of audiology, between "customer" and "patient." The plaintiff argues that "an appropriate distinction is the existence of a patient file." I find such a distinction to be too narrow and illogical. Andy Gunarsons was cross-examined on the matter, however, he is not in a position to give an informed opinion on the distinction. It is not an accounting issue; instead, it is a medical or audiological issue. Fortunately, because of the conclusion I have reached, it is unnecessary for me to distinguish "customer" from "patient." But I volunteer the view that it is self-flattery for a hearing clinic to think that it has "patients." They have "customers."

(vi) *conclusion*

[1147] The defendants correctly submit:

> The only probable basis on which the decision to proceed with the purchase was based, was that after looking at the multiple of expected net profit to purchase price, and after looking at the cash flow from the Forecast [prepared by Karl Bowley and reviewed with Fridriksson on October 11, 2006], the decision to purchase was made relying on the discount (which Phonak/Island Hearing was offering) which would have applied not only to [the Niagara Falls Clinic] but also to Fridriksson's other two clinics (a substantial windfall which Fridriksson would not admit)[86] and because of the incredible offer made by Phonak/Island Hearing and truly the package was an offer of financing that [the plaintiff] did not want to refuse. It certainly was not made on any reliance of 'approx 5,000' [the wording in the handwritten notes of September 7, 2006] regular patients.

[1148] I find that a statement was never made to Fridriksson that the Niagara Falls Clinic had 5,000 patients, regular, active or otherwise or that it had 500 WSIB patients. In any event, even if such a statement were made, there was no reliance upon it, because, despite the protestations by Fridriksson to the contrary, the purchase price was based upon a price/earnings multiple, not the number of patients. Thus, any inference of reliance has been rebutted.

2. Donna Bradley and the patient list

(i) *the allegation*

[1149] In subparagraph 1(b) of the Amended Amended Particulars, it is alleged by the plaintiff that the Lewises and Andy Gunarsons fraudulently misrepresented that "Donna Bradley, a former employee of the [Niagara Falls Clinic], did not have a

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86 But the existence of which is confirmed in the notes made by Karl Bowley on October 10, 2006, containing the preface: "a summary of where we were at."

patient list and was not contacting patients of the [Niagara Falls Clinic] to lure them away to her new clinic."

(ii) *what is a "patient list"?*

[1150] It is frustratingly typical of this case that there is no common understanding, among the parties, as to what is meant when they refer to a "patient list." If the Niagara Falls Clinic, for example, has 2,500 patients, is a list containing 200 names a patient list? Or would that be a list of patients? Is there a valid distinction?

(iii) *Asset Purchase Agreement*

[1151] The Asset Purchase Agreement, while referring to a patient list, does not provide a definition. We have Article 2.01(f), which describes "patient lists" as being part of the purchased assets:

> 2.01(f) Patient Lists and Information: all patient lists, files, data and information relating to patients and prospective patients of the Business as of the Closing Time including, without limitation, the patient list which has been delivered by the Vendor to the Purchaser prior to the date hereof;

[1152] According to Article 2.01(f), the Niagara Falls Clinic has more than one patient list.

[1153] And, there is Article 3.01(21) which reads:

> 3.01(21) PATIENTS
> At the Time of Closing, the Vendor will deliver to the Purchaser a true and complete list of all patients of the Business as of the Closing Date. The Vendor is the sole and exclusive owner of, and has the unrestricted right to use, such patient list. The Vendor has complied with all applicable privacy legislation in respect of Patient personal information and details.

(iv) *some evidence*

[1154] To begin with, I will refer to four items of evidence relating to whether Donna Bradley possessed a patient list when she left the employment of the defendants:

▪ Although Ginette Galati does not have direct knowledge that Donna Bradley took a patient list upon departing the Niagara Falls Clinic, she testified:

> A. . . . anyone who could call the same people that I was calling and have the information that I had that I was working on with the files, it would be difficult unless you had a list.

▪ We have the handwritten notes of Fridriksson in respect of the telephone conversation that he had with Terry Lewis on September 7, 2006, at 10:20 a.m., in which Mr. Lewis allegedly answered “No” to the question: “Did [Donna Bradley] have a list of your patients?”

▪ Also, there are the handwritten notes that Fridriksson says he made during a telephone call to Andy Gunarsons on September 13, 2006, at 4:45 p.m., wherein Mr. Gunarsons allegedly stated, “Donna does not have a list,” a statement which he denies making.

▪ And, there is the e-mail from Terry Lewis to the Office of the Information and Privacy Commissioner on September 6, 2006 (complaining about Donna Bradley and Linda Fraser contacting patients of the Niagara Falls Clinic) which includes this passage:

> The only source of the patients’ names that they could be using would have been copies of lists of patients’ names that they would have copied from our QuickBooks files or lists of names that they would have printed out or copied manually from my office’s computer files . . .

[1155] Based upon this last e-mail, it can be concluded that it was the belief of Terry Lewis that Donna Bradley and Linda Fraser had a list of patients’ names.

[1156] There are three further pieces of evidence that I will mention, however, I find them unhelpful due to their ambiguity:

▪ The e-mail from Terry Lewis to Andy Gunarsons on September 8, 2006, at 8:09 a.m., in which Mr. Lewis says:

> . . . We discussed his [Fridriksson’s] concerns over Donna, and he is less worried now . . .

The problem here is that we do not know what is meant by the words, “concerns over Donna”; and, “less worried” implies that Fridriksson, to some extent, is still worried.

▪ In-chief, Karl Bowley testified that he remembered being reassured by Andy Gunarsons:

> Q. Do you recall what conversations, if any, you had with Andy Gunarsons about Donna Bradley?

> A. Yes.
>
> Q. Do you, do you know approximately when that took place?
>
> A. Before closing, other than that I don't remember exactly, I do remember quire clearly in terms of, you know, what was said and I was told, 'Don't worry about Donna she's a wing nut, nothing to worry about.'
>
> Q. What was the context of that conversation or that response from Andy . . . how did the subject-matter of Donna Bradley come up in your conversation between the two of you?
>
> A. I brought up Donna. She was no longer employed there, I didn't know why or how that she was no longer employed there, was she anybody to be concerned about, and I was told, nope, she's a wing nut, don't worry about her.
>
> Q. And was that expanded upon?
>
> A. That was the extent of, there was no expansion.

I can see how Mr. Bowley would remember the "wing nut" reference. However, why should I interpret that reference to include a representation that Donna Bradley did not have a patient list?

▪ As well, there is the e-mail from Dee Lewis to Andy Gunarsons on November 3, 2006, at 4:54 p.m., in which she passes on information told to her that the clinic where Donna Bradley was working "is doing horribly" and that "Donna . . . will be out in three months if things don't improve . . ." The defendants argue that this is "reliable, contemporary evidence showing that the defendants actually did believe that Donna would not be a threat to Fridriksson's operations." Yet, the e-mail does not address the matter of a patient list.

[1157] There are other items of evidence and argument to consider.

[1158] In her testimony, when describing the procedure at the Niagara Falls Clinic for telephoning patients prior to the 2006 sale to the plaintiff, Ginette Galati stated:

> A. . . . So Linda [Fraser] would . . . have a list of the patients that were to be called to make appointments for . . . it was on a notepad, I'd say an eight by ten, it would have the name of the patients, it would have their WSIB number, the date of birth and their phone number.

[1159] While Ginette Galati had been fired by Donna Bradley (and rehired by the Lewises in April of 2006), I did not observe that she was biased against Ms. Bradley (contrary to what was urged upon me by counsel for the defendants).

[1160] When considering the general credibility of Ms. Galati, I am somewhat shaken by the following testimony that she gave, in cross-examination, after stating that she had a number of telephone conversations with a patient of the Niagara Falls Clinic named Savos Rados: [Underlining added]

> Q. And he told you that he was going to Donna [Bradley]?
>
> A. Yes, he did.
>
> Q. And he told you that when you were working at the [Niagara Falls Clinic]?
>
> A. Yes. As a matter of fact sometime he would call by mistake looking for Donna, because he would have the wrong phone number, and he needed batteries . . . <u>it was somebody that I would remember because he called a few times</u> . . .

[1161] Mr. Korosis, cross-examining counsel, was gifted with an opportunity that would be too far-fetched for a courtroom lawyer to even dream about. He produced a death certificate, establishing that Savos Rados had died on February 2, 2005, at the age of 87, and Ms. Galati was not employed with the Niagara Falls Clinic during that period of time.[87]

[1162] What does the court do with an otherwise likeable and believable witness who could be so definite about something that was so wrong? On balance, I do not think that I should allow this fact to damage her general credibility. Instead, I will invoke caution. This is what happens when witnesses are asked to testify about events from long ago. Innocent mistakes surface, without any deliberate intention to mislead the court. Not all untruthful answers are lies.

[1163] From the handwritten notes of his telephone call to Terry Lewis, on August 24, 2006, at 12:10 p.m., Fridriksson was aware that Donna Bradley was "working in Niagara Falls somewhere"; and, in the handwritten notes of his call to Terry Lewis on August 30, 2006, at 12:44 p.m., Fridriksson records himself saying to Mr. Lewis: "I heard she is working for Canada Hearing and that they have opened in Niagara Falls." Yet, there is a distinction between Fridriksson, on the one hand, being aware that Donna Bradley was working in Niagara Falls and, on the other hand, knowing that she was using a patient list from the Niagara Falls Clinic.

[1164] The defendants argue that Donna Bradley would have known, by memory alone, the names of many of the patients of the Niagara Falls Clinic and that she could have obtained their telephone numbers from a telephone directory. I

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[87] Counsel for the plaintiff argue that Ms. Galati had confused Savos Rados with a patient having a similar name. However, when she was asked, in re-examination, whether she was aware of any confusion between the two patients, Ms. Galati candidly answered, "No."

understood Fridriksson to have conceded this point. In fact, he thought that he could probably remember the names of 40% to 50% of the patients in his St. Catharines clinic, "if I really put my mind to it."

[1165] Ginette Galati testified similarly:

> Q. Okay, so you would agree with me it's probable that someone could source the name of a patient by memory. Correct? You can do that, can you not?
>
> A. Yes.
>
> Q. And if you recalled somebody's name . . . would you not be able to go to the white pages to see if you could locate that person's phone number?
>
> A. Yes, I could.
>
> Q. And if it's there and you locate it you would be able to call them, correct?
>
> A. Yes.

[1166] Although her long years of experience working for the defendants would mean that Donna Bradley probably could remember, without the aid of a list, the names of some patients, it is far more likely that she possessed a list. The good-memory argument does not explain how it came to be that Ms. Bradley was telephoning the patients in the same sequence as was Ms. Galati.

[1167] Fridriksson acknowledged, in cross-examination, that there were several reasons why patients may have been contacting Donna Bradley:

> Q. And sir, is it fair to say that Donna Bradley who was at the hearing clinic in Niagara Falls for, I think, 18 years, would have established a fairly good rapport with the patients that she dealt with?
>
> A. Yes.
>
> Q. Okay and sir, would you agree with me that [in 2006] Donna was advertising her services pretty heavily in the Niagara Region or that clinic [where she worked] was advertising her services very heavily in the Niagara Region?
>
> A. Yes.
>
> Q. And would you agree with me that many of her former patients may have seen those advertisements?
>
> A. Yes.
>
> Q. And sir, would you agree with me that it is very possible that many of Donna's former patients contacted her because they liked her, they were familiar

> with her, they were comfortable with her, they had a longstanding relationship with her and sought out her services on that basis?
>
> A. Yes.

[1168] It is significant that Fridriksson was aware that Donna Bradley might attract patients by means other than a list and, as result, have a financial impact on the Niagara Falls Clinic to some extent.

[1169] We also have the e-mail from Fridriksson to Terry Lewis on October 25, 2006, at 8:02 a.m., which recognizes the importance of Donna Bradley to the Niagara Falls Clinic:

> In normal circumstances, in order to facilitate transfer of goodwill, the vendor of a clinic would be physically present for a period of time in order to introduce the purchaser . . . leaving Donna as the normal successor to the 'continuity of care.' I realize Terry's health issues preclude this option . . .

(v) *failure of plaintiff to call Donna Bradley as witness – adverse inference?*

[1170] The defendants argue:

> It is simply not enough to show that Terry Lewis believed Donna had a list and did not tell Fridriksson – the plaintiff has an obligation to prove, on the balance of probabilities, that Donna Bradley had such a list. It is indisputable that the best evidence for that determination is Donna herself. The next best would be the evidence of Linda Fraser . . . The plaintiff sued Donna for using the purported list, settled that lawsuit, and then declined to even call Donna or Linda as a witness at this trial.

[1171] It is true that the plaintiff did not call Donna Bradley as a witness and did not, in evidence, explain why. The defendants ask the court to adversely infer that Ms. Bradley did not have a list and that there were other reasons why some patients migrated to her (for example, they knew her, they liked her and they saw her advertisements).

[1172] Counsel for the plaintiff submits that Donna Bradley and Linda Fraser would have been hostile witnesses. It is undisputed that they were sued by the plaintiff in a separate action, along with their new employer, based upon the allegation that patients of the Niagara Falls Clinic had been improperly solicited by Ms. Bradley and Ms. Fraser. The only evidence that I have about the other action came in the cross-examination of Fridriksson, wherein I learned that it was "resolved." There is no evidence as to the basis of that resolution or whether admissions were obtained.

[1173] "The general rule developed in civil cases respecting adverse inferences from failure to tender a witness goes back at least to *Blatch v. Archer* (1774), 1 Cowp. 63, 98 E.R. 969, where, at p. 65, Lord Mansfield states: 'It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted' ": see *R. v. Jolivet,* [2007] 1 S.C.R. 751 at para. 25.

[1174] "The 'adverse inference' principle is derived from ordinary logic and experience . . .": see *R. v. Jolivet, supra,* at para. 24.

[1175] "[T]he party affected by the inference may of course explain it away by showing circumstances which otherwise account for his failure to produce the witness. There should be no limitation upon this right to explain, except that the trial judge is to be satisfied that the circumstances thus offered would, in ordinary logic and experience, furnish a plausible reason for nonproduction": see *R. v. Rooke* (1998), 40 C.C.C. (3d) 484 at 513 (B.C.C.A.) quoting *Wigmore on Evidence* (Chadbourn rev. 1979), vol. 2, at para. 290.

[1176] "One must also be precise about the exact nature of the 'adverse inference' sought to be drawn. In J. Sopinka, S.N. Lederman and A.W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at p. 297, para. 6.321, it is pointed out that the failure to call evidence may, depending on the circumstances, amount 'to an implied admission that the evidence of the absent witness would be contrary to the party's case, or at least would not support it,' as stated in the civil case of *Murray v. Saskatoon*, [1952] 2 D.L.R. 499 (Sask. C.A.), at p. 506. The circumstances in which trial counsel decide not to call a particular witness may restrict the nature of the appropriate 'adverse inference.' Experienced trial lawyers will often decide against calling an available witness because the point has been adequately covered by another witness, or an honest witness has a poor demeanour, or other factors unrelated to the truth of the testimony": see *R. v. Jolivet*, [2000] 1 S.C.R. 751, at para. 28.

[1177] "The law is clear that the circumstances in which an adverse inference may be drawn by a trier of fact based on a failure to call a witness or adduce certain evidence will be rare and should only be done with 'the greatest of caution,' particularly where an explanation for not introducing the evidence has already been provided to the court": see *R. v. Ogunsakin*, [2008] O.J. No. 10 (S.C.J.) at para. 20, citing *R. v. Dupuis* (1995), 98 C.C.C. (3d) 496 (Ont. C.A.) at pp. 500, 506-507 and *R. v. Zehr* (1980), 54 C.C.C. (2d) 65 (Ont. C.A.) at pp.68-69, 72-73.

[1178] "An adverse inference can be drawn against a party for failure to call a witness who may give material evidence when that party alone could bring the witness before the court. Where those uncalled witnesses are equally available to the other parties, an adverse interest will be unwarranted": see Gordon D. Cudmore, *Civil Evidence Handbook* (Toronto; Carswell, 2006), at p. 6-22.

(vi) *conclusion*

[1179] On the issue of adverse inference, although I would have preferred more evidence on the matter, calling Donna Bradley or Linda Fraser would have been fraught with risk for the plaintiff because they would have been hostile witnesses. In the circumstances, I do not think that an adverse inference should be drawn against the plaintiff as asked by the defendants.

[1180] Although, in addition to Ginette Galati, there were other witnesses who testified on the issue of Donna Bradley and Linda Fraser using a patient list,[88] I consider the e-mail to the Office of the Information and Privacy Commissioner to be convincing proof that: (1) Donna Bradley and Linda Fraser improperly possessed a list of at least some of the patients of the Niagara Falls Clinic; (2) Donna Bradley was soliciting the business of those patients, particularly at times when they were eligible for new hearing aids; and (3) Terry Lewis and Dee Lewis were aware of (1) and (2) as of September 6, 2006, if not sooner.

[1181] The defendants had a duty to disclose to the plaintiff the extent of their knowledge and belief as to the use of a patient list by Donna Bradley. Ms. Bradley was a key employee of the Niagara Falls Clinic. Her departure was the subject of discussion amongst those involved in the purchase and sale negotiations and it also was a point of concern to Fridriksson. In those circumstances, a duty arose requiring the defendants to provide full disclosure to the plaintiff.

[1182] "Duties of disclosure may arise in the course of negotiations from special facts in the particular case . . .": see *Opron Construction Co. v Alberta,* [1994] A.J. No. 224 (Q.B.) at para. 511, citing Spencer Bower, Turner & Sutton, *The Law Relating to Actionable Non-Disclosure,* 2d ed. (London: Butterworths, 1990) at pp. 205-206.

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[88] The witnesses Peter Gossen, Abdal Mirdawi, Thomas Giagnorio (patients of the Niagara Falls Clinic) and Dorothy Smith (the wife of a patient) were generally corroborative – but on its own, their testimony had flaws and would be insufficient to prove the point.

[1183] It was not for the defendants to conclude (as they contend) that the information relating to Donna Bradley was unimportant based upon their professed subjective belief.

[1184] "[P]artial information is misleading information": see *National Bank of Canada v. Soucisse*, [1981] 2 S.C.R. 339 at p. 351.

[1185] Although the defendants deliberately breached their duty and intended for the plaintiff to act on their silence and non-disclosure, the reliance-component of fraudulent misrepresentation has not been established. The evidence satisfies me that the plaintiff still would have purchased the Niagara Falls Clinic for the same price. As well, there is no evidence of damages having been sustained due to Donna Bradley possessing a list of patients. I find that her solicitation efforts did not result in any quantifiable loss to the plaintiff. The essential features of fraudulent misrepresentation have not been proved.

[1186] Had fraudulent misrepresentation been established, there would be the matter of double recovery to consider. In a separate action, the plaintiff sued Donna Bradley, Linda Fraser and their new employer, seeking damages for the misappropriation and use of the patient list of the Niagara Falls Clinic. According to Fridriksson, that action was "resolved." There is no evidence as to the particulars of the resolution. While the law permits more than one action arising out of the same loss, the law bars double recovery: see, for example, *Treaty Group Inc. v. Drake International Inc.*, 2007 ONCA 450 at para. 13. Any damages that I might have awarded to the plaintiff concerning the Donna Bradley issue would require reduction by any recovery in the other action.

3. Referrals from ENT specialists

(i) *the allegation*

[1187] Subparagraph 1(c) of the Amended Amended Particulars alleges that Terry Lewis, Dee Lewis and Andy Gunarsons fraudulently misrepresented that the Niagara Falls Clinic "received very few referrals from specific Ear, Nose and Throat specialists in Niagara Falls."

[1188] The City of Niagara Falls has two ENT specialists: Dr. Makerewich and Dr. Caetano. In accordance with the WSIB requirements, to obtain funding for a hearing aid, a WSIB patient must have a supporting diagnosis from an ENT specialist.

(ii) *what is a "referral"?*

[1189] This allegation cannot be argued, proved or decided, without a proper definition of "referral" or "referrals."

[1190] Fridriksson has his own definition of a referral:

> A. . . . if [the audiogram is] the very first document in the chart, you can be certain that the patient was not generated by the [Niagara Falls Clinic], that patient was generated by the ear, nose and throat office . . . if the first item in the chart was a [Dr.] Makerewich or [Dr.] Caetano audiogram, that would suggest to me that the patient came from Makerewich or Caetano and I believe that now and I believed that then.

[1191] In addition to arbitrarily tying a referral to the presence of an audiogram in the chart of a patient, Fridriksson introduces a new, also undefined, term – "generated."

[1192] It is my opinion that the presence of an audiogram is not determinative of the referral issue.

[1193] Fridriksson held to his definition of "referral," despite making the following concession:

> Q. But that same patient could have gone to two other [hearing] clinics before arriving at the [Niagara Falls Clinic] because they were shopping around for pricing. Could they not have?
>
> A. [After being told the difference between a 'possibility' and a 'probability'] Okay . . . it is a probability that the patient may have gone to someplace else before they arrived at the [Niagara Falls Clinic].

[1194] When Dee Lewis was cross-examined on this issue, she asked counsel to "define exactly what you mean by a 'referral' ":

> COUNSEL: A patient that originated in [an ENT]'s office and came to your office for a fitting.
>
> A. That's not a referral. Patients often were given audiograms and came to our office with audiograms and letters to WSIB who had not been directed to come to our office.
>
> COUNSEL: You can't give that evidence. You don't know what was said between the doctors and patient . . .

Which is why testimony from the ENT specialists (or representatives of their offices) is necessary, in order that we "know what was said."

(iii) *are referrals unethical?*

[1195] It is likely unethical for an ENT specialist to make a referral to a specific hearing clinic – which may explain why the plaintiff did not call Dr. Makerewich or Dr. Caetano as witnesses. The plaintiff could have brought the world of referrals out of the darkness by calling those doctors (or at least someone from their offices) to testify.[89] Fridriksson was acquainted with the audiologist in the office of Dr. Makerewich (Mary Catharine O'Rorke) and her testimony would have been valuable.

(iv) *some evidence*

[1196] Apart from the problem of defining "referral," the evidence at trial in respect of ENT referrals is found in four places:

- The handwritten notes made by Fridriksson in the course of his July 13, 2006 telephone conversation with Terry Lewis, at 11:36 a.m., which read: "Gets many referrals from [Dr.] Caetano and [Dr.] Makerewich";

- The handwritten notes made by Fridriksson in his telephone call to Terry Lewis at 12:44 p.m., on August 30, 2006: "Don't worry not that many people from [Dr.] Makerewich";

- The e-mail from Terry Lewis to Fridriksson at 2:34 p.m., on August 30, 2006: "Dr. Makerewich has not been a source of any but a small trickle of referrals, no more than 4 hearing aids a month";

- The handwritten notes of Fridriksson for his September 18, 2006 telephone call to Andy Gunarsons, at 4:45 p.m., that have Mr. Gunarsons saying: "Terry does not get that many [patients] from [Dr.] Makerewich."

[1197] Depending, I suppose, upon the definition of "referral," the last three pieces of evidence actually negate the allegation being made by the plaintiff.

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[89] Counsel for the defendants make the interesting argument that Fridriksson, although admitting that referrals are prohibited, "nonetheless wishes the court to compensate him for not getting a piece of it." The argument continues: "As a matter of fact, he went so far as to admit to having his own prohibited referral relationships, and, in particular, ones with Dr. Robichaud and a Dr. Amin. Apparently, these referral relationships were so utterly mercenary in character that Fridriksson would divert his patients unnecessarily through their family doctors for the sole purpose of extracting an additional $4.60 per head."

[1198] Ginette Galati was questioned, in-chief, about the referrals:

> Q. Are you aware of any referrals from Dr. Makerewich?
>
> A. We did get referrals from Dr. Makerewich. I'd say, from what Donna and what I saw a little bit of it we would get, I'd say, 10 to 15 referrals a week and it was [Mary Catharine O'Rorke], she was the audiologist [in Dr. Makerewich's office] that would send us a lot of people.
>
> Q. Okay and when you came back for the second period of employment, was there any change in the number of referrals, if you recall?
>
> A. We weren't getting any referrals from, from [Dr. Makerewich] anymore, I don't know what transpired but it's as if they stopped sending us any, any patients at all.

(v) *conclusion*

[1199] To determine this allegation, the court requires a proper definition of "referral." This, in turn, necessitates independent expert evidence as to accepted practices in the field of hearing clinics and in the offices of ENT specialists. No such evidence was presented and so the allegation has not been proved.

[1200] If I were obligated to define "referral" or "referred" I would say that a patient is referred to a hearing clinic when he or she is instructed by an ENT specialist (or by an audiologist employed by that specialist) to go to a specific hearing clinic. Ascertaining whether a patient was so instructed would require evidence from the ENT specialist or from someone in his or her office. Such evidence is absent in this case.

[1201] This allegation has not been proved.

4. Presence of an audiologist

(i) *the allegation*

[1202] It is alleged by the plaintiff, at subparagraph 1(d) of the Amended Amended Particulars, that Terry Lewis, Dee Lewis and Andy Gunarsons fraudulently misrepresented that "the audiologist was present in the Niagara Falls Clinic 2 to 3 days per week."

(ii) *some evidence*

[1203] Evidence in respect of this issue can be found:

▪ In the handwritten notes of Fridriksson of his alleged conversation with Terry Lewis on July 13, 2006, at 11:36 a.m. ("1 – 2 to 3 days per week");

▪ In the e-mail from Terry Lewis to Mark Hambley on July 21, 2006, at 5:56 p.m. ("two or three days a week");

▪ In the handwritten notes of Fridriksson of his telephone conversation with Terry Lewis on September 7, 2006, at 10:20 a.m. ("1 – 2 days per week");[90]

▪ In the e-mail from Fridriksson to his counsel on March 14, 2007, at 1:08 p.m. ("two to three days per week").

[1204] There also is the testimony of Ginette Galati and Mickey Tersigni.

[1205] Ginette Galati, who was rehired by the defendants in April of 2006, was present at the Niagara Falls Clinic in the period April – November of that year. She testified:

> A. Sarah [Peverley, the audiologist] and Mumtaz [Andani, the dispenser] . . . worked one to two days a week [at the Niagara Falls Clinic] and the other three days I was on my own.

[1206] Later, Ms. Galati expanded on her evidence:

> Q. Okay and typically my understanding is that Sarah and Mumtaz would come down [to the Niagara Falls Clinic] for Thursday appointments?
>
> A. Sometimes Wednesday, Thursday, sometimes Tuesday, Wednesday, depending on what they had in Scarborough [the location of the other hearing clinics owned by the defendants]?
>
> Q. And what was booked for Niagara Falls?
>
> A. Yes.
>
> Q. And for the rest of the week, that being Monday and Friday, you would be alone?
>
> A. Yes, I was.

[1207] Mickey Tersigni, the bookkeeper for the defendants, was questioned about the frequency with which Sarah Peverley, the audiologist, attended at the Niagara Falls Clinic. She was referred to the March 14, 2007 e-mail from Fridriksson to his

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[90] The low end of the numerical frequency alleged by the plaintiff is twice contradicted by the handwritten notes of Fridriksson. Therefore, in fairness, the allegation should be "1 to 3 days per week" and not "2 to 3 days per week."

counsel wherein he cites Ms. Galati as saying that "Sarah was in the Niagara Falls office two to three days per week" in the period from April to November of 2006. Ms. Tersigni testified: "That sounds about right."

[1208] Ms. Tersigni was asked if the information about when Sarah Peverley attended the Niagara Falls Clinic "would have been in the computers":

> A. It would have been Outlook . . . the program Outlook which was the daily schedule for the, the audiologist and the dispenser.
>
> Q. Okay and who managed the Outlook program and the schedule that it contained?
>
> A. It would have been Ginette.
>
> Q. Okay and the, and the Outlook schedule would have contained all appointments basically that would have been booked?
>
> A. Yes.

[1209] The e-mail from Fridriksson to his counsel, which I just mentioned, dated March 14, 2007, at 1:08 p.m., refers to Ginette Galati informing Fridriksson about "schedules in the computers":

> . . . I spoke to Ginette this morning . . . she said that there are months of schedules in the computers that show the days they were in Niagara Falls and which people they saw and what they did while they were in the office.

[1210] During the cross-examination of Dee Lewis, the plaintiff introduced what was said to be the 2006 "paper" appointment book for the Niagara Falls Clinic. As I understand the matter, it was being suggested by the plaintiff that the appointment book showed that the audiologist, Sarah Peverley, attended the Niagara Falls Clinic less frequently than as allegedly represented by the defendants. None of the witnesses for the plaintiff was questioned about the appointment book. The only evidence is that of Dee Lewis (and there was no reply evidence called by the plaintiff).

[1211] I am not satisfied as to the identities of those who made the entries in the appointment book, whether the entries are accurate and how they compare with the data in Outlook (the electronic data was not produced by the plaintiff).

[1212] Why would Fridriksson prefer his interpretation of the contents of an appointment book, and its reliability, over the evidence of Ginette Galati and Mickey Tersigni, his own e-mail of March 4, 2007 and the schedules in the computer (which he did not produce) and allege a fraudulent misrepresentation?

(iii) *conclusion*

[1213] The plaintiff has failed to prove that the alleged misrepresentation was untrue. In fact, the evidence of Ginette Galati, Mickey Tersigni and the March 14, 2007 e-mail, all say otherwise. Sarah Peverley, the audiologist, was at the Niagara Falls Clinic one to three days per week.

5. "Unfettered access" to Niagara Falls Clinic records by Carol Klassen

(i) *the allegation*

[1214] In subparagraph 1(e) of the Amended Amended Particulars, the plaintiff alleges that Terry Lewis, Dee Lewis and Andy Gunarsons fraudulently misrepresented that "Carol Klassen, the president of the plaintiff corporation, would have unfettered access to the [Niagara Falls Clinic] records before the closing of the purchase to determine how many active patients the clinic had, how many patients were insured by third parties, what bookings had been scheduled by the vendors and to review patient file records."

(ii) *some evidence*

[1215] I will trace some of the evidence in which there is a reference to Carol Klassen being permitted access to the Niagara Falls Clinic prior to the completion of the purchase:

- In the e-mail from Terry Lewis to Andy Gunarsons on September 8, 2006, at 8:09 a.m., there is mention of a request by Fridriksson that Carol Klassen be permitted to visit the Niagara Falls Clinic: [Underlining added]

> He also would like his wife to be able to visit the office and to get acquainted with the accounting software. That would give her access to our patients' names etc. and would only be acceptable after we have money in hands. Unless you think that he would be unable to back out of the deal. Even so, once he has our patient names, he could do a lot of damage . . .

- Also, in the e-mail from Terry Lewis to Andy Gunarsons on September 9, 2006, at 11:29 p.m., access is mentioned: [Underlining added]

> He [Fridriksson] also asked me on Thursday, on the phone, if his wife could go into the office and start getting trained on our QuickBooks system. I don't think that is possible until he has actually bought the office for two reasons. One is our security in case he is not actually going through with the purchase. And two, that we cannot allow access to the patient information if we are to remain in compliance with our obligations under the Ontario and Federal Patient Privacy Regulations. I would

> appreciate a response to him by you regarding that issue, with an opinion from your legal staff . . .

▪ At 4:45 p.m., on September 13, 2006, we have the handwritten notes of a telephone call from Fridriksson to Andy Gunarsons in which certain statements are attributed to Mr. Gunarsons (which he denies) including: "Carol [Klassen] will get to see the files . . ." and she will have "full access."

▪ Fridriksson and Ms. Klassen did have access to the Niagara Falls Clinic on September 17, 2006, although this is not the type of access contemplated in the allegation.

▪ Fridriksson produced handwritten notes for a telephone conversation that he says he had with Andy Gunarsons at 4:45 p.m., on September 18th, in which Fridriksson is supposed to have asked whether Carol Klassen will "have unfettered access to the patient schedule . . . and be able to look at all files" and it is alleged that Mr. Gunarsons answered (something he denies doing): "Yes, she will have complete access after the Letter of Intent is signed."

▪ On September 21, 2006, Fridriksson and Ms. Klassen signed the Letter of Intent which said: ". . . final due diligence still to be completed."

▪ The handwritten notes of the telephone conversation that Fridriksson contends he had with Andy Gunarsons on September 25, 2006, at 1:30 p.m., say:

> . . . you promised my wife unfettered access to the files, the patient list, the secretary and would be free to ask questions. You promised me this two weeks ago, you promised me this last week. Now it is 'next week' again. What is going on? What are you trying to hide?

▪ In an e-mail from Fridriksson to Karl Bowley on September 28, 2006, at 8:54 p.m., access is mentioned:

> All of his words regarding this clinic need to be spelled out . . . what . . . access to Carol PDQ to the present and future schedule . . .

▪ An e-mail from Fridriksson to Karl Bowley on September 29th, at 7:47 a.m., contains a reference to Carol Klassen and access:

> . . . Will my wife Carol be given unfettered access to study past and present booking schedules so we can plan and so we can feel that we have done our part of the due diligence . . .

▪ Fridriksson produced handwritten notes of a telephone conversation with Karl Bowley on October 4, 2006, at 3:10 p.m.:

> Remind him [Andy Gunarsons] that he promised Carol unfettered access – his own words – to the books. . . I want in writing and I want Andy to promise in writing. Karl said he would write to Andy. Andy said Carol could go this Friday and spend the day.

▪ At 3:16 p.m., on October 4th, after returning to his St. Catharines office following the four-hour meeting with Andy Gunarsons, Karl Bowley e-mailed Mr. Gunarsons:

> Thank you for your time and attention today. Nice to put a face to a voice after out many conversations to this point. As discussed I am putting in writing [Fridriksson]'s request (cut and paste here [from an e-mail sent by Fridriksson on September 29th at 7:47 a.m.]): 'Will my wife Carol be given unfettered access to study past and present booking schedules so we can plan and so we can feel we have done our part of the due diligence.'
>
> The earliest possible attention to this matter would help to move this thing along. [Fridriksson] had wondered if Friday of this week is possible.

▪ Fridriksson produced handwritten notes relating to a telephone conversation he says he had with Karl Bowley at 9:26 a.m., on October 11th, in which this passage appears:

> [Fridriksson speaking] My concern is that we still do not have the promised access to Ginette . . .

▪ After preparing the Forecast and discussing it with Fridriksson, Karl Bowley sent an e-mail to Andy Gunarsons on October 11, 2006, at 8:12 p.m.: [Upper case in original]

> FULL STEAM AHEAD. Just met with [Fridriksson]. No Problems . . . Only thing we still want to do due diligence wise is to see the 'bookings' i.e. what kind of appointments (volume etc.) and how far out in time is the clinic booked. How do we get this info?

[1216] The FULL-STEAM-AHEAD e-mail is clear evidence that the "only thing" that the plaintiff wanted "to do due diligence wise" was to see the appointments booked at the Niagara Falls Clinic. This e-mail is far better evidence than that of Fridriksson and Carol Klassen. For example, at trial, Ms. Klassen stated that there were certain things that she wanted to verify about the Niagara Falls Clinic prior to closing – the number of patients, the number of patient files in the back, the booking schedules, the number of referrals from Dr. Makerewich and/or Dr. Caetano and she also wanted access to QuickBooks. This may have been the wish list of the plaintiff during the negotiations, but, by the time of the FULL-STEAM-

AHEAD e-mail, the list had been whittled down to verifying the bookings and future appointments.

[1217] Continuing with some of the evidence in respect of the allegation under discussion:

- On October 12th, at 3:25 p.m., Fridriksson telephoned Terry Lewis and made handwritten notes of the conversation. This is the only telephone conversation (for which we have notes) between Fridriksson and Terry Lewis wherein there is a reference to the access-to-the-clinic issue:

> Last time I spoke to you I told you what I needed. I am still very interested in buying the clinic but Andy still has not given us everything we asked for. My wife still has not met with Ginette [Galati] or seen the files and we need to know we are getting what you told us was there.

[1218] On October 13th, Fridriksson signed the Letter of Commitment in which there is no mention of due diligence of any kind, by means of access or otherwise.

- At approximately 3:00 p.m., on November 9th, Michael Mann (the lawyer for the plaintiff on the purchase) faxed a letter to James Naumovich (the lawyer for the defendants on the sale): [Underlining added]

> Further to our previous correspondence, we are in the process of depositing to your trust account the balance due on closing. These funds are being delivered to you on an escrow basis pending confirmation that <u>escrow will be released upon mutual agreement</u> that all documents are satisfactory and <u>that all acts to be performed at closing have been satisfactorily performed</u>.

[1219] The fact that closing occurred and the funds were released to the vendors, supports the conclusion that, in the end, access to, or attending at, the Niagara Falls Clinic prior to closing was not part of the deal.

(iii) *conclusion*

[1220] I am satisfied that there were discussions had, and e-mails exchanged, in respect of the request by Fridriksson for his wife to have access to the Niagara Falls Clinic for the purpose of ascertaining certain information prior to closing. Such access was requested but it was never granted. There was no promise or representation of access. There certainly was no misrepresentation.

[1221] The best evidence of why the matter of access to the Niagara Falls Clinic was not addressed in the Asset Purchase Agreement would be that of its author, Michael Mann. He was not called as a witness.

[1222] This allegation has not been proved.

6. "Complete due diligence, including access to the patient list"

(i) *the allegation*

[1223] It is alleged by the plaintiff, at subparagraph 1(f) of the Amended Amended Particulars, that Terry Lewis, Dee Lewis and Andy Gunarsons, fraudulently misrepresented that "Stefan Fridriksson and Carol Klassen would be allowed to complete due diligence, including access to the patient list, once a Letter of Intent was signed."

(ii) *conclusion*

[1224] I see no material distinction between this alleged misrepresentation and the immediately preceding one. The supporting evidence and, therefore, my findings and conclusion are the same.

7. "Able to contact . . . Ginette Galati prior to the closing"

(i) *the allegation*

[1225] It is alleged by the plaintiff, at subparagraph 1(g) of the Amended Amended Particulars, that Terry Lewis, Dee Lewis and Andy Gunarsons fraudulently misrepresented that "Stefan Fridriksson and/or Carol Klassen would be able to contact the secretary of [the Niagara Falls Clinic], Ginette Galati, prior to the closing."

(ii) *some evidence*

[1226] The only reliable evidence in respect of this allegation is found in the e-mails. I will set out five of them:

- At 2:22 p.m., on November 1st, Karl Bowley sent an e-mail to Andy Gunarsons:

> Just floating a balloon here. The deal should be closing on 9th. Considering the transition – when will Ginette be told? When can [Fridriksson] meet with her, have a look at the clinic, see what is booked on 10th etc. etc. etc. It would be nice to start some of this in advance of the 9th.

- At 12:36 a.m., on November 2nd, Dee Lewis e-mailed Andy Gunarsons:

> There is also the matter of confidentiality of patient files and about the sale, so no weekend visits will be allowed either . . . But [Fridriksson] may enter the premises

> only after the 10th. Again, we will not book appointments before the completion of the sale, because we do not know if it will be completed until it is. Someone could be hit by a truck . . . Until then, we book only what we can handle . . .

▪ At 2:02 p.m., on November 2nd, Andy Gunarsons e-mailed Karl Bowley:

> Ginette has been told. She is OK and on-board with everything. Dee has asked Ginette herself to call [Fridriksson] and liaise directly herself with [Fridriksson] re booking appointments for the 10th on . . . I also talked it over with Dee and agreed that the easiest is to have Ginette talk to [Fridriksson] directly e.g. differences in style . . . let them sort things out [Fridriksson]'s way and let [Fridriksson] and Ginette discuss how they will handle things . . . and advising [Fridriksson] re changeover of local utilities . . . and any other matters that need to be addressed . . .

▪ In the e-mail of November 3, 2006, at 4:51 p.m., Dee Lewis told Andy Gunarsons that she had "suggested to Ginette that she call [Fridriksson] . . ." (Ginette did not know, until November 2nd, that the Niagara Falls Clinic had been sold to the plaintiff.)

▪ The e-mail of November 6th, at 5:28 p.m., from Dee Lewis to Andy Gunarsons, confirms that Ms. Galati telephoned Fridriksson on Friday, November 3rd and "they got on very well." Consequently, Fridriksson did "contact the secretary of [the Niagara Falls Clinic], Ginette Galati, prior to the closing."

(iii) *conclusion*

[1227] This being a matter of fraudulent misrepresentation, the allegation, as pled, must be strictly construed. Contact did occur prior to closing. Therefore, the allegation fails.

8. "Steady growth of patients and hearing aids sold per month since 2000"

(i) *the allegation*

[1228] In subparagraph 1(h) of the Amended Amended Particulars, the plaintiff alleges that Terry Lewis, Dee Lewis and Andy Gunarsons fraudulently misrepresented that "the [Niagara Falls Clinic] had a steady growth of patients and hearing aids sold per month since 2000."

[1229] This allegation is two-pronged: the steady growth of patients; and, the steady growth of hearing aid sales. I will address each separately.

(ii) *some evidence re "steady growth of patients"*

[1230] This allegation seems to stem from the handwritten notes made by Fridriksson in respect of the telephone conversation with Terry Lewis on September 7, 2006, at 10:20 a.m. The notes record that Terry Lewis told Fridriksson that the Niagara Falls Clinic had approximately 5,000 regular patients, after which this passage appears:

> 8. How has this number changed since 2000? Steady growth.

[1231] On September 14, 2006, Andy Gunarsons prepared a Comparative Year-Over-Year Summary which included the total sales of the Niagara Falls Clinic for the years 2001 – 2006 (with 2006 being a remnant year):

	2001	2002	2003	2004	2005	2006
Total Sales	$875,989	$834,517	$974,924	$917,788	$910,021	$516,945

[1232] Mr. Gunarsons testified that this Summary (which was provided to Karl Bowley and to Fridriksson) was "extracted from QuickBooks" and, therefore, contains "hard numbers." Therefore, even if Terry Lewis made the statement attributable to him on September 7th (and I find otherwise) it is not materially inaccurate.

(iii) *conclusion re "steady growth of patients"*

[1233] The notes of September 7th seem to be the only reference, in any pre-closing document, to "steady growth of patients." This reference is not corroborated by any credible evidence and so I reject it as an accurate transcription of what was said on that occasion.

[1234] However, even if the September 7th statement were to have been made, no sensible person would suggest that it should be viewed as more reliable than the Comparative Year-Over-Year Summary. Put another way, no rational person would cling to the September 7th statement in the face of the Summary.

[1235] This allegation has not been proved.

(iv) *some evidence re "steady growth . . . of hearing aids sold per month"*

[1236] The hearing aids prong of the allegation is rooted in the same handwritten notes of September 7, 2006, which read:

> 3. How many hearing aids per month? 50 no change since 2001.
>
> 4. Has there been any changes in the average number of hearing aids per month over the past 5 years? No change always about 50.

[1237] Additionally, there are the handwritten notes of Fridriksson for two telephone calls on September 13th. In the first call, with Terry Lewis, at 9:12 a.m., Fridriksson records:

> ▪ You told me that you sold 50 hearing aids per month – I need proof.

And, in the second call, with Andy Gunarsons, at 4:45 p.m., the notes read:

> You said the clinic sells 45 to 50 hearing aids per month . . .

[1238] More reliably, there are notes that Karl Bowley made on October 10, 2006, in which he wrote: ". . . thought doing 40 hasn't and isn't." There also is his e-mail of October 12th, at 8:45 a.m., to Andy Gunarsons which includes these passages: [Underlining added]

> As clarification, the reason for looking at the current appointment schedule is so critical is the hearing aid numbers have been dropping. My notes from earlier conversations said that they were 40-44/mth. The sales by item info shows sales avg was:
>
> 2003 = 40 2004 = 39 2005 = 35 2006 to Aug = 31[91]
>
> But July was 23 and August was 28 . . . Do you have the Sept #s? i.e. Sept sales by item report?[92]

[1239] Consequently, if Fridriksson had been operating on the assumption that hearing aid sales averaged 50 per month, his accountant, as of October 10th, clearly believed otherwise.

[1240] In addition, we have the Sales-by-Item Summary (printed from QuickBooks by Andy Gunarsons at 11:36 a.m., on October 2nd and viewed by Karl Bowley during the meeting of October 4th). According to this document, the monthly hearing aid sales, from 2001 to August of 2006, were:

	2001	2002	2003	2004	2005	2006
Monthly Sales	42.0	Unknown	43.5	41.6	35.8	44.0

[1241] The total for 2005 is lower than the rest because it was in or about September of that year that Terry Lewis became too ill to travel to the Niagara

91 These figures may be inaccurate and low, nevertheless, they should have disabused Fridriksson of any thoughts that an average of 50 hearing aids were sold monthly by the Niagara Falls Clinic.

92 This must mean that the Sales-by-Customer Summary, although printed from QuickBooks by Andy Gunarsons on October 2nd, did not include September but only went up to August.

Falls Clinic to provide audiological services. The figure for 2006 only covers the period from January to August.

(v) *conclusion re "steady growth . . . of hearing aids sold per month"*

[1242] I reject the truthfulness of the September 7th and September 13th handwritten notes. Yet, even if they are accurate, and represent statements made to Fridriksson as to the average monthly hearing aid sales being 50, this information was replaced by other more reliable figures. All of this was known to Fridriksson before closing. How can he seriously suggest that the hearing aid sales were fraudulently misrepresented?

[1243] This allegation has not been proved.

9. "22 years' worth of unrecalled patients"

(i) *the allegation*

[1244] In subparagraph 1(i) of the Amended Amended Particulars, the plaintiff alleges that Terry Lewis, Dee Lewis and Andy Gunarsons fraudulently misrepresented that "in addition to the current active patients of the [Niagara Falls Clinic], there were 22 years' worth of unrecalled patients whose files were kept at the clinic because Terry Lewis had not recalled them. These files could be turned into thousands of additional patients for the clinic."

(ii) *some evidence*

[1245] Fridriksson produced handwritten notes of a telephone conversation with Andy Gunarsons on September 12, 2006, at 2:20 p.m., in which it is alleged that Mr. Gunarsons stated: "22 years of unrecalled files, a room full of files." When questioned about this at trial, Mr. Gunarsons said: "That the clinic has been in business for 22 years, to say that 22 years of files have not been recalled is bizarre to me . . . I never said that." I accept his evidence. It is inherently more logical and probable.

[1246] The handwritten notes of September 12th seem to be the first occasion on which Fridriksson says he was informed that the Niagara Falls Clinic had a room full of unrecalled files. I do not know which is more preposterous: to say that you were told this or to believe it if you were told.[93]

[1247] Andy Gunarsons was questioned further, in-chief, on the unrecalled files;

---

93 I understand that similar gullibility has resulted in the Brooklyn Bridge being sold multiple times.

Q. Do you have any recollection of any reference in your e-mails to unrecalled patients?

A. Definitely not.

[1248] In his handwritten notes of a telephone call with Andy Gunarsons on September 13th, at 4:45 p.m., Fridriksson contends that Andy Gunarsons stated:

> This clinic is different. It has been in [Niagara Falls] for 22 years. It has thousands of satisfied patients who have been coming here for years. None of them have been recalled. It is a gold mine. All you have to do is start recalling those patients and you will be full five days a week . . .

[1249] In his testimony, Mr. Gunarsons denies making this statement. I accept his denial. It is believable.

[1250] Fridriksson produced handwritten notes for a telephone call he maintains that he placed to Andy Gunarsons on September 21st, at 5:10 p.m., in which he (Fridriksson) allegedly said to Andy Gunarsons:

> - Terry said he has lots of unrecalled patients and a room full of files. We need proof.

[1251] Fridriksson was never given proof of the "room full of files." If, as of September 21st, he was unconvinced of the truthfulness of this statement, how can he now say he relied upon it to his detriment?

[1252] Andy Gunarsons testified that he had no knowledge of the number of patients or of the unrecalled files.

[1253] Continuing with the evidence, Fridriksson produced handwritten notes relating to a telephone conversation he says he had with Karl Bowley on October 11th, at 9:26 a.m., in which the following appears:

> [Fridriksson] – Does this deal make sense to you Karl?
>
> [Bowley] – The only reason this deal makes sense is that you got good financing otherwise it does not make sense.
>
> [Fridriksson] – Even with the financing it does not make sense. The only thing that makes it make sense is the fact that the clinic has 5,000 patients and 22 years of files...

[1254] Karl Bowley gave evidence that he has no recollection of this telephone call or of being told that the Niagara Falls Clinic had 5,000 patients. However, as for the "22 years of files," Mr. Bowley testified:

> A. I do recall [Fridriksson] telling me [but not necessarily in this call], you know, probably because I got the same answer, that thousands of the files in the back, recall at your whim.
>
> Q. Is your recollection that there were thousands and thousands of files in the back . . .?
>
> A. It was thousands and thousands of files . . . that's my recollection.

[1255] I think it is more likely that Karl Bowley heard this from Fridriksson. Mr. Bowley and Fridriksson communicated with each other almost daily and nowhere in any e-mails is there mention that Andy Gunarsons had represented to him (Karl Bowley) that there were thousands of unrecalled patient files sitting at the Niagara Falls Clinic. In general, I found Mr. Bowley to be a decent and honourable man but, in this instance, he was mistaken.

(iii) *conclusion*

[1256] The lack of written evidence and the unreliability and conflicting nature of the balance of the evidence, means that the plaintiff has not proved this allegation.

10. The "fall mailing"

(i) *the allegation*

[1257] The plaintiff alleges, at subparagraph 1(j) of the Amended Amended Particulars, that Terry Lewis, Dee Lewis and Andy Gunarsons fraudulently misrepresented that "Terry and Dee Lewis would complete a 'fall mailing' of postcards that contained an offer from Siemens to patients of the [Niagara Falls Clinic], on behalf of Fridriksson." I understand this to be a promotional mailing.

[1258] Siemens is a hearing aid supplier. However, the plaintiff did business with another supplier, Phonak. In fact, Phonak funded the purchase of the Niagara Falls Clinic. It is strange that the plaintiff would want Siemens promotional material sent to patients of the Niagara Falls Clinic.

(ii) *some evidence*

[1259] The evidence in respect of this allegation is brief.

[1260] On September 28, 2006, at 8:54 p.m., Fridriksson sent an e-mail to Karl Bowley which included the following:

> While certainly Terry [Lewis] never said 'I promise to do the mailing,' he did say he was going to do a mailing before Thanksgiving . . . I want a clear statement about what Terry is and is not going to do.

[1261] If Fridriksson concedes in his own e-mail (a refreshing change, by the way, from the ubiquitous and questionable handwritten notes) that Terry Lewis did not "promise to do the mailing," and with there being no subsequent "clear statement about what Terry is and is not going to do," how can it be suggested that there was any misrepresentation?

[1262] The Letter of Intent (September 21st) and the Letter of Commitment (October 13th) are both silent as to a "fall mailing."

(iii) *conclusion*

[1263] There is no credible evidence to support this allegation of fraudulent misrepresentation (and it certainly did not have anything to do with the plaintiff purchasing the Niagara Falls Clinic for the agreed upon price nor did it lead to damages).

11. Comparative Year-Over-Year Summary

(i) *the plaintiff changes course*

[1264] During the trial, Fridriksson repeatedly testified that the alleged statements as to patient numbers were the most important misrepresentations. For example, as was set out earlier, he testified:

> Q. Sir, it's your evidence that the most important representation made to you was that the clinic had 5,000 patients. Is that correct?
>
> A. I think the most important or the most important misrepresentations were the combination of the 5,000 and the WSIBs.

[1265] Furthermore, when Fridriksson was cross-examined on whether he had based the purchase price on the earnings of the Niagara Falls Clinic (three times earnings – with the earnings being $300,000-$350,000 per year), he stated: [Underlining added]

> A. I was told specifically that you cannot trust those numbers . . . I did not base the purchase price on earnings . . .

[1266] Perhaps sensing that things were not going well and realizing that Fridriksson was testifying against the evidentiary tide, the plaintiff, one year into the trial, changed course and took the position that the earnings of the Niagara Falls Clinic, as reflected in the Comparative Year-Over-Year Summary of September 14, 2006, were intentionally inflated and were the most important fraudulent representation made by the defendants.

(ii) *the "Hail Mary" amendment*

[1267] In July of 2012 (the trial had commenced in July of 2011), the plaintiff moved for leave to amend the statement of claim to allege, for the first time, that the representations of earnings contained in the Comparative Year-Over-Year Summary (for the purposes of this discussion, "CYOY Summary") prepared by Andy Gunarsons, on September 14, 2006, were false and fraudulent. Counsel for the defendants label this "a Hail Mary attempt to establish fraud."[94]

[1268] The affidavit in support of the motion included these passages:

> 4. The accuracy of [the CYOY Summary] was not challenged by Karl Bowley when he was examined for discovery on July 5, 2011, as he was unaware of any evidence that would suggest it was not accurate at that time.
>
> 5. Prior to the commencement of the trial continuation scheduled July 3, 2012, Mr. Bowley became aware of evidence that would suggest that the document was not accurate and, through counsel, indicated that he needed to correct the answer given during his examination [for discovery] with respect to the financial document.
>
> 6. It is the intent of the plaintiff to tender Mr. Bowley's evidence with respect to the inaccuracy of the [CYOY Summary] in support of the plaintiff's claim for fraudulent misrepresentation.

[1269] Counsel for the defendants reminded the court that this was the second amendment sought by the plaintiff concerning the claim of fraudulent misrepresentation. In late April of 2011, with the trial set to begin the week of May 9, 2011, the plaintiff successfully moved to amend the statement of claim to include allegations of fraudulent misrepresentation (the statement of claim, at that point, alleged only negligent misrepresentation). It is worth noting that the CYOY Summary was first provided to Karl Bowley, the accountant for the plaintiff, in 2006 and it was not until July of 2012, six years later, that Mr. Bowley took the position that the CYOY Summary was inaccurate.

[1270] The threshold for the amendment of a pleading is low. Rule 26.01 of the *Rules of Civil Procedure* states:

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94 I think that it would be necessary to invoke the assistance of someone higher up in Mary's family tree; which, of course, presents a genealogical problem.

> 26.01 On motion at any stage of an action the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

[1271] When considering whether prejudice can be off-set by an adjournment, frequently it is what takes place during (and after) the adjournment that is important, not merely the fact of the adjournment.

[1272] It was my ruling that the amendment would cause inconvenience, expense and delay but that these were types of prejudice compensable by costs or an adjournment. I fixed costs thrown away at $30,000, all-inclusive, and payable forthwith. However, I ordered that the costs be held in trust by either law firm pending the completion of the trial and then paid to the defendants, set off or returned to the plaintiff, depending on the final judgment. The in-trust requirement was intended to reflect the fact that fraud is being alleged against the defendants and, if it is proved, it would be unseemly that a party is punished in costs for proving fraud.

[1273] To fully wind back the procedural/evidentiary clock, I ordered that the defendants were entitled to a further examination for discovery of Fridriksson and of Karl Bowley and that the defendants would be permitted additional cross-examination of Fridriksson and Carol Klassen on matters surrounding the amendment and they would be required to return to the witness box for that purpose (Mr. Bowley had yet to testify).

(iii) *duelling accountants*

[1274] The CYOY Summary covered the period 2001-2006 (with 2006 being a remnant year because the document was dated September 14, 2006). For those years, it identified total sales, an estimate of cost of goods sold, gross profit, advertising, rent and operating expenses (excluding advertising and rent) and, finally, it showed EBITDA (earnings before interest, taxes, depreciation and amortization).

[1275] On March 22, 2012, during the lengthy hiatus preceding the resumption of the trial in July of 2012, Karl Bowley sent an e-mail to Carol Klassen. It began:

> So this is the document Andy [Gunarsons] sent to me. He says COGS [cost of goods sold] are reflected using the yearly rates.

[1276] The document that Mr. Bowley is forwarding to Carol Klassen is the CYOY Summary. I do not know why it is being sent to her almost six years after it was created.

[1277] In any event, the e-mail continues:

> So our comments are: it seems Andy [Gunarsons] has attempted to deceive us . . . Clearly they were attempting to deceive us from the inception.

[1278] Mr. Bowley was cross-examined:

> Q. Did you believe, after you say 'our comments are: it seems Andy [Gunarsons] has attempted to deceive us,' did you believe that?
>
> A. I had done no work at this point in time. I wasn't able to make that comment.

[1279] In his evidence, Mr. Bowley said that his comments were merely a suggestion to Carol Klassen: ". . . if that's what you think, here's how you might say it." He was cross-examined on his explanation:

> Q. So you've written down this, you've written this in an e-mail suggesting that this is how [Carol Klassen] should write something up. Correct?
>
> A. Yes.
>
> Q. Without any reflection on whether or not what she would be writing up would be truthful or accurate. Is that what you are saying?
>
> A. Yes.
>
> Q. And do you typically do that, do you make recommendations to people that are neither based on truth or accuracy?
>
> A. No.

[1280] Mr. Bowley was cross-examined further about his comment – "it seems Andy [Gunarsons] has attempted to deceive us": [Underlining added]

> Q. Did you believe this at that time?
>
> A. At that time I hadn't seen information to show me otherwise. <u>And still as I sit here today I don't think that I can answer that question</u>.

[1281] In or about April of 2012, Carol Klassen compiled a report which attempted to show that the CYOY Summary was inaccurate. On May 28th, she and Karl Bowley met with counsel for the plaintiff. Mr. Bowley testified as to the purpose of the meeting:

> A. Ms. Klassen had produced a document outlining her concerns . . .and one of the purposes of that meeting or if not the purpose of the meeting on May 28th was to look at this with Ms. Klassen and [counsel]. It was at that meeting we decided, 'Gee

> this is, can't quite follow this,' perhaps I would review this . . . Subsequent to that, I did.

[1282] As a result, following this meeting Mr. Bowley prepared a document, dated either June 29th or 30th, titled "Analysis of EBITDA." The analysis of Mr. Bowley contradicts the CYOY Summary of Mr. Gunarsons. Unlike the CYOY Summary, which included the years 2001-2006, the analysis by Mr. Bowley covered only 2001-2005. As well, his analysis was demonstrably wrong in respect of the cost of goods sold in the years 2001 and 2002. Therefore, effectively, it applies only to the period 2003-2005.

(iv) *part one of the allegation*

[1283] The allegation being made by the plaintiff here is wordy and, in fact, it is comprised of three distinct allegations which are said to flow from the CYOY Summary.

[1284] The first part of the allegation is that the CYOY Summary overstated the profitability of the Niagara Falls Clinic. It reads:

> The Comparative-Year-Over-Year Summary provided by Andy Gunarsons, a representative of the Defendant, to Karl Bowley, a representative of the Plaintiff, in order to demonstrate profitability of the [Niagara Falls] Clinic contained inaccurate figures such that the profitability was overstated. Particulars of the inaccurate figures are as follows:
>
> EBITA as represented by the Defendants:

2005	2004	2003	2002	2001
311,290	324,487	334,973	330,875	300,638

> EBITA as calculated by the Plaintiff:

2005	2004	2003	2002	2001
178,032	201,987	290,725	209,164	61,551

> Difference:

2005	2004	2003	2002	2001
133,258	122,500	44,248	121,711	239,084

[1285] The analysis of Karl Bowley concluded that the sales tabulated in the CYOY Summary "were incorrect." Interestingly, in cross-examination, Mr. Bowley testified that the sales figures in the CYOY Summary were "different" than what he came up with, not "incorrect": [Underlining added]

> Q. Sir, how do you explain the difference in sales between your figures . . . and the . . . figures [in the CYOY Summary]?
>
> A. I cannot. I did attempt to see if I could find a reason for it. I could not determine the reason for the difference.
>
> Q. Then, how can you say that your figures are more accurate than the sales figures that Mr. Gunarsons provided in [the CYOY Summary]?
>
> A. I don't believe I say anywhere in [my analysis] that mine are more accurate . . . perhaps that should say, 'sales were different.'
>
> Q. Did you compare your report to the [CYOY Summary] and identify where the differences in sales originated?
>
> A. I was not able to determine the reason.

[1286] Both Karl Bowley and Andy Gunarsons testified at considerable length about the analysis of the former and the CYOY Summary of the latter. Mr. Gunarsons did not wilt, faced his cross-examination forthrightly and countered each and every point made in the analysis of Mr. Bowley. After taking into account all of the circumstances, I am not persuaded that any error has been demonstrated in the CYOY Summary, certainly not anything fraudulent or otherwise deliberate.

[1287] Mr. Bowley, to his credit (he is fair-minded), would not go so far as to say that the figures in the CYOY Summary were incorrect. Instead, he called them "different." In addition, he could not determine the reason for the difference. One cannot label as wrong what one does not understand. Put another way, one cannot disagree with an opinion unless one understands that opinion.

[1288] Part one of the allegation has not been proved.

(v) *part two of the allegation*

[1289] The second part of this allegation complains that the defendants misrepresented the non-existence of financial statements for the Niagara Falls Clinic:

> The defendants stated that there were no financial statements available pertaining to the Niagara Falls Clinic as the financial statements for the period of 2001 to November 9, 2006 covered all three clinics owned and operated by the defendants. In fact, separate records of sales and cost of goods sold were maintained for the Niagara Falls Clinic for the fiscal years ending December 31, 2001 and December 31st, 2002 were contained in the QuickBooks records which were not produced to the plaintiff until November 11, 2006.

[1290] The plaintiff incorrectly equates "financial statements" with "records of sales and cost of goods sold . . . contained in . . . QuickBooks." The latter are not "financial statements" as that term is commonly understood: there is no balance sheet, there is no statement of profit and loss.

[1291] In any event, Fridriksson admitted that he knew "well before the agreement of purchase and sale" that financial statements would not be provided for the Niagara Falls Clinic (the defendants owned three hearing clinics and all financial statements customarily were for the entire business of the defendants):

> A. We were told that they would not be able to deliver that to us.

[1292] Fridriksson further admitted that there was no reliance by the plaintiff on the non-delivery of financial statements. He was cross-examined on this point:

> Q. . . . you understood this as well that there was no way to provide independent financial statements for the Niagara Falls Clinic because it was intermingled with all of the other clinics that [the defendants] operated, correct?
>
> A. That's what we were told.
>
> Q. Okay and you knew that well before the agreement of purchase and sale, correct?
>
> A. We were told that, yes.
>
> Q. Okay. So at the time you signed the agreement of purchase and sale on behalf of the plaintiff you knew that they wouldn't be able to deliver this to you, right?
>
> A. We were told that they would not be able to deliver that to us.
>
> Q. Okay. So there's no reliance then on the part of the plaintiff with respect to the non-delivery of the financial statements set out at [Article] 1.01(c), correct?
>
> A. There's a reliance on the financial information that we were given, but there's no reliance on the financial statements.

[1293] Part two of the allegation fails.

(vi) *part three of the allegation*

[1294] The third and final part of this allegation is that the defendants deliberately concealed all information needed by the plaintiff to verify the profitability of the Niagara Falls Clinic:

> The defendants deliberately concealed all information which would enable the plaintiff to verify that the alleged annual profit for the Niagara Falls Clinic was between $300,000.00 and $350,000.00 in the years 2001 to 2005 inclusive. In fact, it turns out that the annual profit of the Niagara Falls Clinic was between $61,554.00 and $290,725.00 or an average of $133,292.40 in the years 2001to 2005 inclusive.

[1295] Simply put, there is no credible evidence to support part three of the allegation.

[1296] In the result, the Hail Mary pass was incomplete and the plaintiff must return to the line of scrimmage.

VII. DISCUSSION (the other misconduct alleged)

[1297] Paragraph 9 of the statement of claim alleges certain misconduct:

> 9. The defendants Terry Lewis and Dee Lewis have acted in bad faith by failing to complete the terms of the agreement. Their activities on behalf of the defendant corporation constitutes (sic) misconduct and borders upon fraud, particulars of which are as follows:

I will refer to the above passage as the "preamble" to paragraph 9. The preamble is followed by 19 subparagraphs, 9(a)-9(s), in which various acts and activities are described. The plaintiff obviously opted for quantity over quality.

[1298] I did not pay attention to paragraph 9 during the trial. It was only when I was considering the written submissions of counsel that I noticed how strangely the preamble to paragraph 9 is worded. It is a jurisprudential puzzle. Although it complains that the Lewises failed to complete the terms of the Asset Purchase Agreement (which, I gather, is one way of alleging a breach of contract), it describes their conduct as amounting to "bad faith" and constituting "misconduct [that] borders upon fraud." What does that mean? What cause of action is contemplated? Why was that language used?

[1299] I requested additional submissions but, as I did not find them to be helpful, I sought yet further submissions. I specifically asked counsel two questions: (1) What cause of action is contemplated in the preamble to paragraph 9 of the statement of claim? (2) Why was the language "bad faith" and "misconduct [that] borders upon fraud" used? The further submissions did not address (2) but, in response to (1), counsel for the plaintiff advised that the cause of action contemplated "is breach of contract and breach of fiduciary duty."

[1300] I was surprised to hear that breach of fiduciary duty was being alleged in paragraph 9 because those words do not appear there or anywhere in the statement of claim, apart from subparagraph 1(a):

> 1. The plaintiff claims:
>
> (a) general damages for breach of contract, negligence, breach of fiduciary duty and fraudulent misrepresentations, in the sum of $750,000.00.

In addition, "breach of fiduciary duty" is not mentioned in the 296 pages of written submissions from counsel for the plaintiff or the 54 pages of their reply submissions. The entire action was presented and argued as one involving fraudulent misrepresentation and breach of contract.

[1301] " '[F]iduciary' comes from the Latin 'fiducia' meaning 'trust.' Thus, the adjective 'fiduciary' means of or pertaining to a trust or trustee . . .": see *Hodgkinson v. Simms,* [1994] 3 S.C.R. 377 at p. 464. Whether there has been a breach of fiduciary duty is a question of fact: see *Hodgkinson v. Simms, supra,* at pp. 418-19.

[1302] There are three primary criteria for a fiduciary relationship: (1) The fiduciary has scope for the exercise of some discretion or power; (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests; and, (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power: see *International Corona Resources Ltd. v. Lac Minerals Ltd.,* [1989] 2 S.C.R. 574 at pp. 577-78.

[1303] These criteria were refined or enlarged upon in *Elder Advocates of Alberta Society v. Alberta*, [2011] 2 S.C.R. 261 at para. 36, where we find the following statement: "In summary, for an *ad hoc* fiduciary duty to arise, the claimant must show, in addition to the vulnerability arising from the relationship . . . (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control."

[1304] In my view, there is not an atom of evidence to show that a fiduciary relationship existed in this case.[95] The issue is a non-starter. May I be blunt? It is silly. Mr. Korosis, in his submissions, correctly stated: ". . . as a rigorously

95 It would be difficult to describe as "vulnerable" a person who, from the witness box, could tell cross-examining counsel to "f*-off. "

negotiated, arm's length, commercial transaction, between two audiologists and businessmen (who had each run their own practices for decades), each represented by their own experienced chartered accountants and experienced lawyers [and, I would add, with Fridriksson having previously sold five hearing clinics], no fiduciary relationship could have possibly arisen from the purchase and sale of the Niagara Falls Clinic."

[1305] That leaves breach of contract as the remaining cause of action relied upon by the plaintiff when it comes to paragraph 9 of the statement of claim. However, as counsel for the plaintiff had not answered question (2) above (in their further submissions) I sought additional submissions on why, in the preamble, the plaintiff used the language, "bad faith" and "misconduct [that] borders upon fraud." After all, they are not essential features or necessary criteria for breach of contract. And, if a breach of contract is proved, it is not any more of a breach if the accompanying conduct involves "bad faith" and "misconduct [that] borders upon fraud."

[1306] When received, the additional submissions from counsel for the plaintiff explained that if the conduct associated with breach of fiduciary duty "is so egregious as to warrant the imposition of punitive or exemplary damages, it is more of a breach than is simply a breach which is contemplated by special damages." Although punitive or exemplary damages are not pleaded, it is submitted that the court may grant same under the such-further-and-other-relief-as-may-seem-just request at subparagraph 1(e) of the statement of claim.

[1307] Because I have found that the claim of breach of fiduciary duty fails, there is no need for me to consider the additional claim of punitive or exemplary damages. Nonetheless, I will say that this court could not award such damages in any event. Punitive damages must be expressly pleaded: see *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595 at paras. 86-87.

[1308] I have concluded that, in the preamble to paragraph 9 of the statement of claim, the words "bad faith" and "misconduct [that] borders upon fraud" have no significance in law, do not define any cause of action in this case, are meaningless here and amount to mere surplusage. Therefore, they should be excised such that, effectively, the preamble reads:

> 9. The defendants Terry Lewis and Dee Lewis have . . . fail[ed] to complete the terms of the agreement:

Thus, what remains (the "revised preamble") is a claim of breach of contract. Are the problems with paragraph 9 behind us? No.

[1309] The 19 subparagraphs that follow the revised preamble – 9(a) to 9(s) – do not all refer to the Asset Purchase Agreement having been breached. In fact, of the 19 instances addressed in the subparagraphs, only 9(d), (e), (f), (g) and (l) allege a breach of the Asset Purchase Agreement. How should that be handled?

[1310] I think that the failure to refer to a breach of the Asset Purchase Agreement in subparagraphs 9(a)-(c), (h)-(k) and (m)-(s) is an oversight that is cured by the revised preamble to paragraph 9 which, effectively, modifies all of the subparagraphs.

[1311] Mr. Korosis raises a final problem with paragraph 9. The 19 subparagraphs make allegations against Terry Lewis and Dee Lewis. They are not the contracting party. The corporate defendant is the vendor in the Asset Purchase Agreement. At no point in paragraph 9 or the subparagraphs is it said that the corporate defendant breached the Asset Purchase Agreement. So as to give paragraph 9 some meaning, I will treat the Lewises (who are the sole officers, directors and controlling minds of the corporate defendant) and their company as interchangeable.

[1312] It is frustrating for a pleading to require so much clipping and snipping, but I do not think that the defendants have been prejudiced in the conduct of the trial by the sloppy drafting of paragraph 9. Had they found paragraph 9 troubling, an appropriate motion could have been brought before trial (on the other hand, there is justification for defendants not aiding a plaintiff by improving the statement of claim).

[1313] I will now address the 19 subparagraphs in paragraph 9:[96]

1. “Failed to give to the plaintiff a number of the high security keys”

(i) *the allegation*

[1314] At subparagraph 9(a) of the statement of claim the plaintiff pleads:

> 9(a) The defendants failed to give to the plaintiff a number of the high security keys to the premises. The plaintiff suffered damages as a result of having to hire a locksmith on an emergency basis to attend at the site and change the locks. Full particulars of the loss will be provided prior to a trial of the action.

[96] Some of the complaints raised in the subparagraphs are annoyingly petty. I have not seen such modest amounts in issue since I was a law student appearing in Small Claims Court in the early 1970s. I suspect this may be the result of what Lord Templeman observed as “a tendency in some cases for legal advisers, pressed by their clients, to make every point conceivable and inconceivable without judgment or discrimination”: see *Ashmore v. Corp. of Lloyd’s,* [1992] 2 All E.R. 486 (H.L.) at p. 493.

(ii) *Asset Purchase Agreement*

[1315] It will be seen that subparagraph 9(a) of the statement of claim does not allege a breach of the Asset Purchase Agreement. However, in argument, the plaintiff relied upon Article 9.01, a very general catch-all provision:

> 9.01 FURTHER ASSURANCES
> Each of the Vendor and the Purchaser hereby covenants and agrees that at any time and from time to time after the Closing date it will, upon the request of the other, do, execute, acknowledge and deliver or cause to be done, executed, acknowledged and delivered all such further acts, deeds, assignments, transfers, conveyances and assurances as may be required for the better carrying out and performance of all terms of this Agreement.

(iii) *some evidence*

[1316] It was the testimony of Fridriksson, that when he went to the Niagara Falls Clinic on November 10, 2006, the day after the completion of the purchase, there were "either two or three or maybe four" keys available for the premises. He testified that Ginette Galati said: "This is definitely not all the keys."

[1317] Fridriksson reasons that the defendants possessed 17 keys for the Niagara Falls Clinic. He is relying upon the April 25, 2006 invoice from Accu-Lock and Security, which refers to 12 keys having been supplied to the defendants, and upon the July 12, 2006 invoice from the same company wherein it is said that five keys were provided to the defendants.

[1318] Fridriksson, in-chief, explained why he changed the locks:

> A. . . . that means there's a bunch of keys out there and the decision was made because of the way I found, the state of which I found the clinic, and I know we're going to talk about inventory later, but I thought that it would be very important to have the premises secured especially if there were people who had done what they did to the inventory still out there with my keys.

[1319] Dee Lewis was questioned, in-chief, about the keys:

> Q. . . . . to the best of your recollection, how many keys did you have to the premises prior to closing?
>
> A. I only know how many keys were on the list from the, we had I think six outdoor keys prior to closing. I never saw them so I don't, they were handled by Ginette [Galati] and the staff . . . and the landlord and I believe the real estate agent had one.

> Q. What, if any, number of keys do you have direct knowledge of that were in the possession of Ginette at the time of closing?
>
> A. The staff had left the keys, the landlord still had his, I think the real estate agent had his, I'm not sure but, Ginette had all of the keys except for the landlord's and possibly the real estate agent's.
>
> Q. . . . how many keys were delivered to the plaintiff following closing?
>
> A. I have no way of knowing directly. Ginette had the keys, Ginette, whatever Ginette told him was there.

[1320] Dee Lewis went on to testify that neither she nor her husband had a key to the Niagara Falls Clinic.

[1321] On behalf of the defendants it is argued that a complete answer to this allegation are the fax letters from Michael Mann to James Naumovich on November 8th and, at 3:00 p.m., on November 9th. The former encloses the balance due on closing and other items and states that they are "to be held in escrow pending receipt" of a number of items, including the keys to the Niagara Falls Clinic. The latter advises that the balance due on closing is to be held in escrow, and "escrow will be released upon mutual agreement that all documents are satisfactory and that all acts to be performed at closing have been satisfactorily performed."

[1322] The defendants submit that one of the acts to be performed at closing was the delivery of the keys. Hence, with the deal having closed and the balance due on closing released to the defendants, it is implied that the keys were turned over to the plaintiff. The flaw in that submission is that the completion of this purchase and sale did not address the number of keys. The obligation of the defendants to deliver the keys to the plaintiff logically must include all keys (or account for those that are missing). I accept the documentary evidence (invoices to the defendants for the Niagara Falls Clinic from Accu-Lock and Security dated April 25, 2006 for 12 keys and July 12, 2006 for five keys) which establishes that there were from 12 to 17 keys for the Niagara Falls Clinic. Far fewer than that number were turned over to the plaintiff on closing and the remaining keys are unaccounted for.

[1323] The plaintiff seeks payment of $874.27 as reimbursement for its key-related expenses. According to the written submissions of the plaintiff, the supporting invoices are found at Volume 2 of Exhibit 1, Tabs 132-135 inclusive. The invoice at Tab 135 ($180.20) is improperly included because Fridriksson testified that he was "not sure what this is" (and, it predates the plaintiff's ownership of the Niagara Falls Clinic). The invoice at Tab 134 also must be excluded because the evidence of Fridriksson was: "I am not sure what this relates to." And, the plaintiff seems to have omitted the invoice at Tab 131 ($212.66). Therefore, it is the invoices at Tabs 131-133, inclusive, which require attention. They total $465.36: (1) Pinder's Security Products, November 11, 2006, for $212.66 to remove the locks and install new ones; (2) Pinder's Security Products (the date of the invoice is indecipherable), for $132.50 to remove the locks at the request of the landlord; and, (3) Accu-Lock and Security, November 16, 2006, for $120.20 to install the type of locks desired by the landlord.

[1324] Because the plaintiff was only a tenant of the premises, it was not reasonable for Fridriksson to have changed the locks without the prior permission of the landlord. Thus, the expenses associated with the services of Pinder's Security Products are the responsibility of the plaintiff, leaving only (3) above, the invoice of November 16, 2006 ($120.20), as qualifying for reimbursement.

(iv) *conclusion*

[1325] On the completion of the purchase and sale, the defendants had an obligation to provide all keys to the plaintiff and an explanation for any missing keys. I think that Article 9.01 of the Asset Purchase Agreement is sufficiently wide to capture such an obligation. The defendants, therefore, breached Article 9.01. The breach was not deliberate.

[1326] The allegation in subparagraph 9(a) of the statement of claim has been proved. I fix damages at $120.20.

2. "Failed to notify Bell Canada of the change in ownership"

(i) *the allegation*

[1327] In subparagraph 9(b) of the statement of claim, the plaintiff pleads:

> 9(b) The defendants failed to notify Bell Canada of the change in ownership. The plaintiff suffered damages in an amount to be determined as a result of having to spend two days negotiating with Bell Canada to restore telephone service to the business. Bell Canada required the defendants to sign a direction authorizing the transfer of the telephone number to the plaintiff. When the defendants finally signed the direction in December 2006, they misrepresented the change of ownership date as of October 31, 2006 as a result of which the plaintiff paid $680.00 of the defendants' charges.

(ii) *Asset Purchase Agreement*

[1328] Subparagraph 9(b) of the statement of claim does not allege a breach of the Asset Purchase Agreement. However, in argument, the plaintiff relied upon Article 9.01, which I will repeat for convenience:

> 9.01 FURTHER ASSURANCES
> Each of the Vendor and the Purchaser hereby covenants and agrees that at any time and from time to time after the Closing date it will, upon the request of the other, do, execute, acknowledge and deliver or cause to be done, executed, acknowledged and delivered all such further acts, deeds, assignments, transfers, conveyances and assurances as may be required for the better carrying out and performance of all terms of this Agreement.

(iii) *some evidence*

[1329] The most reliable piece of evidence here is the fax of November 9, 2006, showing that, at 3:23 p.m., James Naumovich sent the fully executed Assumption of Contractual Obligations to Bell Canada. Fridriksson agreed, in cross-examination, that it was sent:

> Q. Okay but you agree with me that Mr. Naumovich sent the assumption agreement on to Bell on November 9th which was the day of closing, right?
>
> A. I do agree with that but, but . . .
>
> Q. And you had signed that?
>
> A. Yes. I agree that that is the case, but we continued to be unable to use the, the system and change the system as we like to, put, put our passwords on it etc. etc.

(iv) *conclusion*

[1330] There is no credible evidence to support any part of the allegation in subparagraph 9(b) of the statement of claim.

3. "Failure to notify . . . Internet Service to remove the defendants"

(i) *the allegation*

[1331]The allegation regarding the internet service is found in subparagraph 9(c) of the statement of claim: [Underlining added]

> 9(c) <u>The plaintiff suffered damages as a result of the defendants' failure to notify Bell Sympatico Internet Service to remove the defendants from the access codes and to provide the plaintiff with access to the internet in a timely manner and removing the Sympatico Security Access book from the premises</u>. The defendants continued to access the plaintiff's computer and use the internet service after being requested to

> stop doing so. As a result, the plaintiff had to retain the services of computer experts to block such access. Further, the plaintiff was unable to access their online billing programs causing economic loss in an amount to be determined. The defendants Lewis did not provide the required documents to Bell Sympatico until mid-December 2006 and only after the plaintiff spent 37 hours dealing with this problem.

(ii) *Asset Purchase Agreement*

[1332] Subparagraph 9(c) of the statement of claim does not allege a breach of the Asset Purchase Agreement. However, in argument, the plaintiff again relied upon Article 9.01 which I have already set out.

(iii) *some evidence*

[1333] At trial, Fridriksson testified that he was without internet service between November 9th (the date of closing) and December 5th.

(iv) *conclusion*

[1334] Only the underlined portion of subparagraph 9(c) can fairly be viewed as a breach-of-contract allegation. The balance of subparagraph 9(c) goes beyond breach of contract and seems to enter a different field or, as described by counsel for the defendants, represents "some kind of independent tort of wrongful computer access."

[1335] In any event, there is no credible evidence that, if there was a delay with the internet service changeover, it was the fault of the defendants.

[1336] I also point out that there are no specific expenses or financial losses that have been proved. Fridriksson gave this evidence, in cross-examination:

> Q. And what impact did that have on the operations of the hearing clinic from November 9th of 2006 through December 5th?
>
> A. It meant we couldn't operate as, as a clinic, properly operates a clinic . . . it meant we couldn't have a smooth operation . . .
>
> Q. And what are you suggesting sir, are you claiming that you lost some revenue or suffered some other losses or expenses as a result of that?
>
> A. It's under general damages, being unable to use the, the phone service properly, being unable to use the internet service properly.

[1337] When one factors in the usual Fridriksson hyperbole, what remains is insufficient proof of anything.

[1338] The allegation in subparagraph 9(c) of the statement of claim fails.

4. "Failed to send out postcards to the existing patients"

(i) *the allegation*

[1339] At subparagraph 9(d) of the statement of claim, the plaintiff raises the issue of postcards:

> 9(d) The defendant corporation failed to send out postcards to the existing patients and/or clientele of the Niagara Falls Clinic prior to the sale to ensure that the patient flow would not be interrupted as required by the asset purchase agreement. After many excuses why he had not sent the postcards, the defendant, Terry Lewis, agreed in late October 2006 to send them in two batches of 2,500 each; however, he failed to do so. The cost of printing the cards and postage, exclusive of labour, was $7,500.

(ii) *the Asset Purchase Agreement*

[1340] Subparagraph 9(d) of the statement of claim alleges the breach of an unspecified provision of the Asset Purchase Agreement. In argument, the plaintiff relied upon Article 9.07, which mentions postcards. The relevant part reads:

> 9.07 ANNOUNCEMENTS
> . . . the Vendor agrees that he will cooperate with the Purchaser in relation to . . . the delivery of postcards as previously discussed by the Vendor and the Purchaser, all at the Vendor's sole cost . . .

(iii) *conclusion*

[1341] The obligation of the defendants, pursuant to Article 9.07, is to "cooperate" with the plaintiff in respect of a matter "previously discussed" – not "previously agreed upon." Upon my review of the evidence, I cannot find any clear consensus about what was "previously discussed" regarding the postcards. In fact, the evidence is vague and uncertain even as to the meaning of "postcards" in the context of the Asset Purchase Agreement. I realize that a trial judge should not, too quickly, find a contractual provision to be unenforceable because of vagueness or uncertainty. However, where that provision is a very minor part of an otherwise enforceable contract, surely the obligation on the trial judge is less rigidly viewed.

[1342] In respect of subparagraph 9(d) of the statement of claim, the plaintiff has failed to prove the breach of an enforceable contractual obligation.

5. "Failed to deliver the letter of introduction"

(i) *the allegation*

[1343] Subparagraph 9(e) of the statement of claim provides:

> 9(e) The defendants failed to deliver the letter of introduction to the patients and/or clientele of the Niagara Falls Clinic as required by the terms of the agreement causing a negative impact on the number of patients choosing the Niagara Falls location. The plaintiff suffered damages as a result, full particulars of which will be provided prior to a trial of this action.

(ii) *Asset Purchase Agreement*

[1344] Subparagraph 9(e) of the statement of claim alleges the breach of an unspecified provision of the Asset Purchase Agreement. In argument, the plaintiff again relied upon Article 9.07, which deals with the letter of introduction, amongst other matters: [Underlining added]

> 9.07 ANNOUNCEMENTS
> No announcement with respect to this Agreement will be made by any party hereto without the prior approval of the other party. The foregoing will not apply to any announcement by any party required in order to comply with laws pertaining to timely disclosure, provided that such party consults with the other parties before making any such announcement. Without limiting the foregoing, <u>the Vendor agrees that he will cooperate with the Purchaser in relation to letters of introduction to be sent to Patients and/or suppliers of the Business . . . all at the Vendor's sole cost</u>. The form of letter of introduction, to be prepared by the Vendor's solicitor, is attached hereto as Schedule "E".

(iii) *some evidence*

[1345] The letter of November 20, 2006, from James Naumovich to Michael Mann, which I set out earlier, addresses the concern of the defendants that the mutual announcements "have not yet been delivered." In that letter, Mr. Naumovich requests that the announcements and envelopes be sent to the defendants in Toronto and that they "will then proceed to mail them out at their own expense as required by the agreement of purchase and sale." In his cross-examination, Fridriksson admits that he did not comply with this request:

> Q. And sir, the fact is, that notwithstanding Mr. Naumovich's request, you never did send the announcements to the defendants, did you?
>
> A. No, we did not.

[1346] At 11:50 a.m., on November 23, 2006, Karl Bowley e-mailed Andy Gunarsons:

> Short story is – no worry for Terry – [Fridriksson] will get the letter out ASAP and both of Terry and [Fridriksson] will be in compliance. [Fridriksson]'s request is simple. Please forward cheque for the postage.

The plaintiff, therefore, agreed to send the letter of introduction but wants to be reimbursed for the postage.

[1347] At 10:03 p.m., on November 23rd, Dee Lewis sent an e-mail to Andy Gunarsons: [Underlining added]

> Since we have no guarantee that [Fridriksson] will mail the announcements, <u>we will give the cheque to Jim [Naumovich] to transfer to [Fridriksson]'s lawyer, in trust, to be released when we have proof that the letter has been sent</u>. A copy of the letter Jim will send to [Fridriksson]'s lawyer will be forwarded to the College. We have no guarantee that [Fridriksson] will send the mailing without involving lawyers, unfortunately, and we must inform the College about our efforts in order to counter [Fridriksson]'s nonsense.

[1348] "Proof that the letter has been sent" was never provided by the plaintiff and, accordingly, Mr. Naumovich was not given a cheque for postage.

[1349] At 8:22 a.m., on November 28th, Karl Bowley forwarded an e-mail to Andy Gunarsons that he (Bowley) had received from Fridriksson, outlining the amount said to be owing for "sending notification of change of ownership to patients." I pause here to point out the careless use of terms by the parties. There is no clear definition of "mutual announcements" and "notification of change in ownership" and no indication how they relate, if at all, to the "letters of introduction" mentioned in Article 9.07.

[1350] Returning to the 8:22 a.m. e-mail, it claims $3,164.03 and reads:

> Please find below the cost for sending the letter. As required by the PHIP Act, I am sending a copy of this letter and the receipts to the Ontario Privacy Commissioner . . . I have enclosed the letter [to the Commissioner] . . .

1.	Postage 4200 x $.51	$2,142.00
2.	GST on postage (6%)	$128.52
3.	Supplies: envelopes labels etc.	$293.51
4.	Labour to stuff, address, seal Stamp and mail letters, 6.5 hours	$635.00

4 adults and 5 teenagers. Adults
$15/hr teenagers $8/hr.

Total $3,164.03

[1351] I have five comments about this e-mail: (1) It refers to "receipts," but they (or copies) were never provided to the defendants; (2) Karl Bowley had asked for reimbursement of postage only; (3) I do not see the basis to charge labour; (4) The Niagara Falls Clinic only received 2,500 Letters of Introduction and Fridriksson says he mailed 3,800, both numbers being less than the 4,200 now being invoiced to the defendants; (5) It refers to "sending notification of change of ownership to patients." Is that the same as the "letters of introduction" contemplated by Article 9.07?

[1352] Fridriksson was cross-examined on the 4,200 figure:

> Q. Where did you get the number of 4,200 from?
>
> A. Well, it was actually . . . 3,800 . . . On the 25th of November we sent out 3,800 and we were going to send out another 400 on the following week-end . . . I estimated there were 400 more [files] in that, in the file drawers . . . I had my staff look through those file drawers . . . the files were all marked 'deceased.' So we didn't, we never sent out 4,200. We sent out 3,800.

[1353] The cross-examination continued:

> Q. So you guessed there were 4,200 that you had to send out?
>
> A. I guessed there was another 400 more . . . I know there was 3,800 sent out because there are now 1,200, approximately 1,200 papers left in the, in the boxes, of the two boxes that were, that were full.

[1354] Fridriksson testified for several minutes about how he arrived at the 400 figure. Finally, I stopped the merry-go-round:

> Q. THE COURT: Just so that I understand, as you sit here today you do not know how you came up with the figure 400?
>
> A. I do not know how I came up with the figure 400.[97]

[1355] Fridriksson was cross-examined on "the quantum of any losses of revenue or expenses incurred by the plaintiff" in respect of subparagraph 9(e) of the statement of claim:

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[97] This man is incapable of preparing a simple invoice without embellishment. The whole truth and nothing but the truth, for him, is a foreign concept and an unattainable goal.

Q. You have a figure for that?

A. It's going to be included in the items presented by my wife.

Q. But that hasn't been produced to date?

A. It has been partially produced . . .

Q. And did you have a hand in the production of this document that is to be produced?

A. Yes.

Q. Yet it's not before us, so I can't question you on it, right? When was it produced, sir?

A. I think about two months ago.

[1356] Carol Klassen was sitting in the body of the courtroom during this testimony and would have heard Fridriksson speak of that document. It was never produced.

(iv) *conclusion*

[1357] The plaintiff has not provided proof that the letters of introduction were delivered. Even if delivery were to be inferred from the evidence (and I am not convinced that such an inference is appropriate), the plaintiff has not provided receipts to support the amount claimed. I am not prepared to trust the testimony of Fridriksson. He has invented evidence before, why not now? He has prepared letters before that he did not send. Why should I believe that this letter was sent?

[1358] Finally, there is no credible evidence of "a negative impact on the number of patients choosing" the Niagara Falls Clinic, as pled in the statement of claim, and no evidence at all of damages being suffered by the plaintiff.

[1359] The allegation in subparagraph 9(e) of the statement of claim has not been proved.

6. "List of its patients . . . permitted . . . to get into the possession of . . ."

(i) *the allegation*

[1360] Subparagraph 9(f) of the statement of claim alleges: [Underlining added]

> 9(f) The defendants retained a <u>list of its patients</u> and/or clientele prior to the sale and have <u>permitted the list to get into the possession of two former employees</u> who have continued to contact patients subsequent to the sale, as they became eligible for

> services from the [WSIB] and the [ADP] causing economic loss to the plaintiff in an amount to be determined.

[1361] I will call this the "permitted" allegation.

[1362] Subparagraph 9(f) continues with two clauses: [Underlining added]

> 9(f)(i) The asset purchase agreement required the defendants to deliver to the plaintiff a true complete list of all of the patients of the business as of the date of closing. On closing, the defendants did not provide such a list, contending that such a list did not exist. In the negotiations leading up to the agreement, the defendants Lewis represented that the business had 5,000 patients. The plaintiff subsequently obtained the patient list and ascertained that the business had only 1,500 patients.
>
> 9(f)(ii) The asset purchase agreement also had a provision that stipulated that the vendor is the sole and exclusive owner of, and has the unrestricted right to use, such patient list. The plaintiff subsequently found out that the defendants Lewis permitted a former employee, Donna Bradley to copy a list of the patients. Donna Bradley is contacting the most valuable patients on that list and is soliciting their business. These are the patients who are covered by the [WSIB] and tend to be repeat patients.

(ii) *Asset Purchase Agreement*

[1363] In respect of the "permitted" allegation, subparagraph 9(f) of the statement of claim does not suggest any provision of the Asset Purchase Agreement that has been breached. In argument, the plaintiff relied upon Articles 1.02 and 3.01(22): [Underlining added]

> 1.02 BEST OF KNOWLEDGE
> Any reference herein to 'the best of the knowledge' of the Vendor will mean the actual knowledge of the Vendor and the knowledge which he/it would have had if he/it had conducted a diligent inquiry into the relevant subject matter.
>
> 3.01(22) RESTRICTIONS ON DOING BUSINESS
> The Vendor is not a party to or bound by any agreement in relation to the Business which would restrict or limit its right to carry on any activity or to solicit business from any person or in any geographical area or otherwise to conduct the Business as the Vendor may determine. The Vendor is not subject to any judgment, order or requirement of any court or governmental authority in relation to the Business which is not of general application to persons carrying on a business similar to the Business. To the best of the knowledge of the Vendor, there are no facts or circumstances in relation to the Business which could materially adversely affect the ability of the Purchaser to continue to operate the Business as presently conducted following the completion of the transactions contemplated by this Agreement.

[1364] For the allegation in clause 9(f)(i), breach of an unspecified provision of the Asset Purchase Agreement is alleged and, in argument, the plaintiff relied upon Articles 3.01(21) and 7.02: [Underlining added]

> 3.01(21) PATIENTS
> At the Time of Closing, the Vendor will deliver to the Purchaser a true and complete list of all patients of the Business as of the Closing Date. The Vendor is the sole and exclusive owner of, and has the unrestricted right to use, such patient list. The Vendor has complied with all applicable privacy legislation in respect of Patient personal information and details.
>
> 7.02 DOCUMENTS TO BE DELIVERED
> At or before the Closing Time, the Vendor shall execute, or cause to be executed, and shall deliver, or cause to be delivered, to the Purchaser all documents, instruments and things which are to be delivered by the Vendor pursuant to the provisions of this Agreement, and the Purchaser shall execute, or cause to be executed, and shall deliver, or cause to be delivered, to the Vendor all cheques or bank drafts and all documents, instruments and things which the Purchaser is to deliver or to cause to be delivered pursuant to the provisions of this Agreement.

[1365] Regarding the allegation in clause 9(f)(ii) of the statement of claim, there is no mention of a specific provision of the Asset Purchase Agreement that was breached. But, in argument, the plaintiff, betraying the weakness of its position, cited a plethora of Articles – 2.01(f) and (g), 3.01(6), 3.01(7), 3.01(21), 3.01(35) and 5.01(1)(iii) and (v):

> 2.01 PURCHASED ASSETS
> On the terms and subject to the fulfillment of the conditions hereof, the Vendor hereby agrees to sell, transfer and assign to the Purchaser, and the Purchaser hereby agrees to purchase and accept from the Vendor, the undertaking of the Business as a going concern and all properties, assets, rights and interests of the Vendor related to the Business of every kind and description and wheresoever situate, except for the Excluded Assets. Without limiting the generality of the foregoing, the Purchased Assets will include all assets of the Business shown or reflected in the Financial Statements, other than Excluded Assets and assets which have been disposed of or consumed in the ordinary course of the Business since the Statements Date, and will include the following assets:
>
> 2.01(f) Patient Lists and Information: all patient lists, files, data and information relating to patients and prospective patients of the Business as of the Closing Time including, without limitation, the patient list which has been delivered by the Vendor to the Purchaser prior to the date hereof;
>
> 2.01(g) Patient Contracts/Files: all right, title and interest of the Vendor in and to all Patient Contracts, including all information critical to patient care, plus

'QuickBooks' data file of sales history and the 'Outlook' data file used in the Business;

[1366] "Patient Contracts" are defined in Article 1.01(j):

(j) "*Patient Contracts*" means any and all agreements entered into between the Vendor and one or more third parties relating to the sale or provision of goods or services by the Vendor to such third parties in connection with the Business, including unfilled orders, commitments and other engagements by or with such third parties;

[1367] Continuing with the Articles relied upon by the plaintiff:

3.01(6) FINANCIAL STATEMENTS
The financial condition of the Business is now at least as good as the financial condition reflected in the Financial Statements.

3.01(7) FINANCIAL RECORDS
All material financial transactions of the Business have been recorded in the financial books and records of the Vendor in accordance with good business practice, and such financial records:

(i) accurately reflect in all material respects the basis for the financial condition and the revenues, expenses and results of operation of the Business shown in the Financial Statements, and

(ii) together with all disclosures made in this Agreement or in the schedules hereto, present fairly in all material respects the financial condition and the revenues, expenses and results of the operations of the Business as of and to the date hereof.

No information, records or systems pertaining to the operation or administration of the Business are in the possession of, recorded, stored, maintained by or otherwise dependent upon any other person.

3.01(21) PATIENTS
At the Time of Closing, the Vendor will deliver to the Purchaser a true and complete list of all patients of the Business as of the Closing Date. The Vendor is the sole and exclusive owner of, and has the unrestricted right to use, such patient list. The Vendor has complied with all applicable privacy legislation in respect of Patient personal information and details.

3.01(35) DISCLOSURE
No representation or warranty contained in this section, and no statement contained in any schedule, certificate, list, summary or other disclosure document provided or to be provided to the Purchaser pursuant hereto, or in connection with the transactions contemplated hereby, contains or will contain any untrue statement of a

> material fact, or omits or will omit to state any material fact which is necessary in order to make the statements contained therein not misleading.
>
> 5.01 COVENANTS BY THE VENDOR
> The Vendor covenants to the Purchaser that it will do or cause to be done the following:
>
> 1. CONDUCT OF BUSINESS
> Except as contemplated by this agreement or with the prior written consent of the Purchaser, during the Interim Period the Vendor will:
>
> . . . . . .
>
> (iii) promptly advise the Purchaser of any facts that come to its attention which would cause any of the Vendor's representations and warranties herein contained to be untrue in any respect;
>
> . . . . . .
>
> (v) promptly advise the Purchaser in writing of any material adverse change in the condition of the business during the Interim Period;

(iii) *some evidence*

[1368] On behalf of the plaintiff it is submitted that "a patient list can be compiled from the records of the clinic and the Lewises had a contractual obligation to prepare the list. They did not notify the purchaser until the day of closing that a list would not be provided."

[1369] In his e-mail to Karl Bowley of September 25, 2006, at 4:21 p.m., Andy Gunarsons confirmed that the QuickBooks data files contain "the full patient info list database and not just the sales file . . ." Those data files were delivered to the plaintiff shortly after closing. They were the only "patient list" that existed.

[1370] Dee Lewis, in her evidence, stated that one cannot confirm, within the QuickBooks Customer Contact List alone, the number or identities of "active" patients. Dee Lewis was cross-examined on the Customer Contact List (which is the terminology used by QuickBooks). It contained "about 2,200" names and addresses:

> Q. And I suggest that this Customer Contact List includes anyone who had contact with the clinic, including those marked deceased, those that had moved, those who came in and purchased batteries for a family member, and those whose name exists without a file being opened. Would you agree with that?
>
> A. Um, it included some of those things, yes. Not all of them.

[1371] After some toing and froing on the point, I intervened:

> THE COURT: The question is, whether you could ascertain from the Customer Contact List alone, the numbers or identities of active patients.
>
> A. Alone, no.

[1372] So, the QuickBooks data files include active patients, deceased patients, patients who had moved and persons who had made purchases for family members. Nevertheless, those files were the “patient list” of the defendants and they were provided to the plaintiff a few days after closing.

(iv) *conclusion*

[1373] The plaintiff has chosen to frame the “permitted” allegation as one where it is said that the defendants permitted Donna Bradley and Linda Fraser to copy or to possess a patient list. This means that the plaintiff must prove that the defendants allowed Ms. Bradley and Ms. Fraser to possess a patient list or consented to their possessing a list. The evidence does not support such a finding.

[1374] The allegation contained in clause 9(f)(i) complains that the defendants did not provide a list of the patients to the plaintiff. The Asset Purchase Agreement required, in Article 3.01(21), that, “at the Time of Closing, the vendor will deliver to the purchaser a true and complete list of all patients of the business . . .” I find that complete information with respect to the patients of the Niagara Falls Clinic was provided to Fridriksson in the QuickBooks data files which he received shortly after closing. The plaintiff knowingly closed the transaction without a “complete list of all patients” and cannot now complain of the short delay in compliance.

[1375] The balance of clause 9(f)(i) is a rehash of the 5,000-patient complaint which I addressed and rejected earlier.

[1376] The allegation raised in clause 9(f)(ii) is a repetition of the “permitted” allegation.

[1377] The entirety of the allegation in subparagraph 9(f) of the statement of claim has not been proved as pled.

7. “Failed to maintain the customary level of inventory”

(i) *the allegation*

[1378] At subparagraph 9(g) of the statement of claim, the plaintiff pleads:

> 9(g) The defendant corporation failed to maintain the customary level of inventory to be acquired by the asset purchase agreement. In the days prior to the

> closing the defendants Lewis removed many boxes of inventory and transported them to their other hearing aid clinics. Upon entering the premises the plaintiff determined that there was virtually no inventory at all and that the cupboards had been stripped of their contents. The plaintiff incurred damages to replace the inventory, full particulars of which will be provided prior to trial.

(ii) *Asset Purchase Agreement*

[1379] The statement of claim does not cite a specific term of the Asset Purchase Agreement that was breached. However, in closing argument, the plaintiff relied upon Articles 2.01(a), 3.01(14) and 5.01(1)(xii):

> 2.01 PURCHASED ASSETS
> On the terms and subject to the fulfillment of the conditions hereof, the Vendor hereby agrees to sell, transfer and assign to the Purchaser, and the Purchaser hereby agrees to purchase and accept from the Vendor, the undertaking of the Business as a going concern and all properties, assets, rights and interests of the Vendor related to the Business of every kind and description and wheresoever situate, except for the Excluded Assets. Without limiting the generality of the foregoing, the Purchased Assets will include all assets of the Business shown or reflected in the Financial Statements, other than Excluded Assets and assets which have been disposed of or consumed in the ordinary course of the Business since the Statements Date, and will include the following assets:
>
> (a) Inventories: all inventories or relating to the Business as of the Closing Time, including all raw materials, supplies and packaging materials;
>
> 3.01(14) INVENTORY
> The inventory included in the Purchased Assets, subject to a reasonable allowance for obsolete inventory (consistent with the allowances reflected in the Financial Statements), is good and usable and is capable of being processed and sold in the ordinary course of the Business at normal profit margins. A ‘standard level’ of inventory, consistent with the usual practices of the Business, shall be available and transferred to the Purchaser at the Time of Closing.
>
> 5.01 COVENANTS BY THE VENDOR
> The Vendor covenants to the Purchaser that it will do or cause to be done the following:
>
> 1. CONDUCT OF BUSINESS
> Except as contemplated by this agreement or with the prior written consent of the Purchaser, during the Interim Period the Vendor will:
>
> . . . . . .
>
> (xii) maintain the inventories of the Business in accordance with past practice;

(iii) *some evidence*

[1380] Ginette Galati testified, in-chief, that she went to the Niagara Falls Clinic on Thursday, November 9th, the day of closing:

> Q. Now, what if anything did you notice in relation to the removal of any contents of the clinic in the short period of time prior to November 9th?
>
> A. Well, when I went in on Thursday the girls came in around ten o'clock, 10:30, because they said they had been there really late . . . and they were tired and there was a lot of, there was a lot of stuff that, that wasn't there anymore and Mickey had a van and Sarah [Peverley, the audiologist] and Mumtaz [Andani, the dispenser] had a car, so I don't know what transpired but there was a lot of missing inventory.
>
> Q. Can you tell us the types of things that you noticed that were missing?
>
> A. Well, there was the batteries, there was a huge T.V. that wasn't there anymore and there was some machinery from the back that wasn't there anymore.

[1381] I point out that the "huge T.V." and the "machinery" are not items of inventory. They would fall under "machinery, equipment and furniture," which are dealt with separately in the Asset Purchase Agreement.

[1382] I should also mention that the term "inventory" is not defined in the Asset Purchase Agreement. Therefore, I will ascribe the meaning found in Daphne A. Dukelow and Betsy Nuse, *The Dictionary of Canadian Law* (Scarborough, Ont.: Thomson Professional Publishing Canada, 1991), which, in the circumstances of this purchase and sale, seems most apt: "goods that are held by a person for sale or lease . . . or that are raw materials, work in process or materials used or consumed in a business or profession."

[1383] Fridriksson was cross-examined regarding the absence, in the Asset Purchase Agreement, of any value for the inventory:

> Q. You've claimed damages in the thousands of dollars for depleted inventory . . . in the plaintiff's claim before the court, correct?
>
> A. Yes.
>
> Q. Sir, do you agree with me that there's no mention of any specific dollar figure for inventory in [the Asset Purchase Agreement]?
>
> A. No specific dollar figure, I agree.

[1384] And he was questioned, in-chief, about what was missing from the Niagara Falls Clinic when he took possession of the premises after closing:

> A. . . . the things that are valuable, all of the contents of the supplies for audiological and hearing aid services were taken and plus two Audioscan machines that are worth $15,000 each were taken.

[1385] Audioscan machines are not items of inventory.

[1386] One of the documents tendered in evidence on behalf of the plaintiff is a three-page set of handwritten notes made by Fridriksson. I dealt with this earlier, at paragraphs [65]-[73], under the heading "Exaggerations and untruths." These are the notes titled "payment due for work done." One paragraph reads:

> (9) Inventory – stripped $25,000. No phone, no batteries, no stock, removed TV, DVD, alarm clocks, telephones, ALDs.

[1387] In cross-examination, when asked about this document, Fridriksson said, "there are items in [the notes] that are exaggerated." But, he insisted that item (9) "is not exaggerated." Of course.

[1388] At 3:20 p.m., on November 8, 2006, Andy Gunarsons e-mailed to Michael Mann and Karl Bowley, a current list of assets, "the furniture and computers and equipment and leaseholds in the offices," showing "the allocation of $45,000 ascribed to chattels and leaseholds." The computers, furniture, equipment (including audiometric equipment) were identified, described and given a value; and, I observe, that the inventory was valued at $2,000.

[1389] Fridriksson seeks $34,055.19 for the depleted inventory.

[1390] This is another of the endless examples of Fridriksson's frustrating habit of exaggerating and distorting the truth. Inventory was missing, but not of the value suggested by Fridriksson ($34,055.19). In the face of the November 8th e-mail from Andy Gunarsons to Michael Mann, valuing the inventory at $2,000, how can Fridriksson suggest such a preposterous figure?

[1391] Even counsel for the plaintiff concede that an accurate calculation for this part of the claim is problematic. Their submission is: "As no itemized list of the inventory of the clinic was prepared, it is impossible to determine accurately how much of the inventory was removed on November 9, 2006 by the employees of the defendants."

[1392] Dee Lewis was asked, in-chief, for her response to this allegation:

> A. I don't, it's not true.

> Q. Okay. What if any instructions or discussions were had with your employees or given to your employees as to inventory levels?
>
> A. That they were to leave what was there there, that it, anything that was under consignment or was to be taken away but the inventory to be sold was to be left there.

[1393] In all of the many hundreds of documents filed in evidence, I do not recall seeing any mention of items being possessed or held by the defendants "under consignment."

[1394] Her testimony continued:

> Q. You're referring to in and around the time of closing now?
>
> A. Yes.
>
> Q. Okay and who gave those instructions?
>
> A. I did.
>
> Q. What if any is your knowledge or what are you aware of what inventory was left to the plaintiff?
>
> A. I don't know. I was, I was not there . . .

[1395] In cross-examination, she stated:

> A. . . . the only thing [the employees had] been asked to remove were documents and things that had to do with the corporation that were not part of the assets of the clinic. They were not asked to remove anything that was assets.

[1396] She did not explain how her staff could make that distinction.

[1397] Dee Lewis was questioned, in-chief, regarding the standard level of inventory:

> Q. In terms of the actual inventory, what dollar value would you normally keep?
>
> A. We never, we kept about $2,000 worth . . . That pretty much was what we kept on hand down there [in the Niagara Falls Clinic] at any time.

[1398] In cross-examination, she was asked about an item in the business records that showed a discount being given of $2,260 for battery purchases:

> Q. . . . So help me understand that, you're saying the usual practice was $2,000 worth of inventory, when we had as an example one invoice which says that the purchase of batteries was discounted by $2,260?
>
> A. That was an unusual purchase. The average sales for the month show that inventory was about $2,000.

[1399] This is a reasonable explanation.

(iv) *conclusion*

[1400] I find that some items of inventory were deliberately removed from the Niagara Falls Clinic prior to closing, probably by Sarah Peverley and Mumtaz Andani, and on the instructions (or with the knowledge) of the Lewises.

[1401] I think that the Lewises, particularly Dee Lewis, are quite capable of orchestrating this thievery, as it is wholly consistent with the petty and vindictive attitude so readily revealed in their e-mails.

[1402] The vagueness of the Asset Purchase Agreement and the inability of Fridriksson to give truthful evidence when it comes to numbers and dollars, make it impossible to determine the value of what was improperly removed before closing. Fortunately, we do have the e-mail from Fridriksson himself to Karl Bowley, at 5:19 a.m., on November 11th, which addressed the missing inventory:

> 2. The inventory was run to near nothing. I needed to order batteries immediately . . . very cheesy . . . probably several hundred dollars short on the inventory . . .

[1403] The allegation in subparagraph 9(g) of the statement of claim has been proved. I fix the damages at $300.00, being the "several hundred dollars" estimated by Fridriksson in his e-mail of November 11, 2006.

8. "Failed to notify the landlord . . . of its intention to transfer the lease"

(i) *the allegation*

[1404] Subparagraph 9(h) of the statement of claim reads:

> 9(h) The defendant corporation failed to notify the landlord [of the premises occupied by the Niagara Falls Clinic] of its intention to transfer the lease, contrary to the lease agreement. The plaintiff incurred damages for the cost of transferring the lease. Full particulars of the loss will be provided prior to trial.

(ii) *Asset Purchase Agreement*

[1405] The statement of claim does not refer to a specific term of the Asset Purchase Agreement that was breached but, in closing argument, the plaintiff relied upon Articles 6.03(1) and 3.01(3):

> 6.03 CONDITIONS TO THE OBLIGATIONS OF THE VENDOR
> Notwithstanding anything herein contained, the obligations of the Vendor to complete the transactions provided for herein will be subject to the fulfillment of the following conditions at or prior to the Closing Time, and the Purchaser will use its best efforts to ensure that such conditions are fulfilled.
>
> 1. CONSENT TO ASSIGNMENT OF PREMISES LEASE
> At the Closing Time the Vendor shall have received confirmation that the Premises Lease has been duly and properly assigned to the Purchaser.
>
> 3.01(3) CONTRACTUAL AND REGULATORY APPROVALS
> Except for the consent of the landlord of the Leased Premises as to an assignment of the Lease, the Vendor is not under any obligation, contractual or otherwise, to request or obtain the consent of any person, and no permits, licences, certifications, authorizations or approvals of, or notifications to, any federal, provincial, municipal or local government or government agency, board, commission or authority are required to be obtained by the Vendor . . .

[1406] The Asset Purchase Agreement is silent in respect of who is to bear the cost of the lease assignment, which is the issue before the court.

(iii) *some evidence*

[1407] In late 2007, the plaintiff obtained an undated letter from Joseph Cuviello, the landlord, pointing out that the lease required that he be given 30 days notice of the intention to transfer same and alleging that the short notice resulted in "extra costs": [Underlining added]

> TO WHOM IT MAY CONCERN
> This is to advise that Terry Lewis and Dee Lewis, as owners of 'The Hearing Clinic' and a tenant at our building being 6800 Morrison Street, Units 1 and 2, failed to notify us, the landlord . . . , of their intention to transfer the lease pursuant to section 13.02 of the said lease.
>
> The said lease states that the tenant give the landlord 30 days notice of any transfer. The tenant did not notify us of any transfer until 5 days prior to the said transfer. This short notice did not allow us time to meet and approve the new tenant and caused extra work for our solicitors and <u>extra costs</u> to us.

[1408] Fridriksson was asked whether he knew the amount of the "extra costs" incurred by the landlord:

A. Yes, I paid it.

Q. And how much was that do you recall?

A. The legal fees, I believe, were $270 and I took the landlord out to dinner.

[1409] Fridriksson testified that he "requested they [the Lewises] refund the money that we paid to the lawyer but it was not paid."

[1410] I do not know how the sum of $270.00 relates, if at all, to the figure of $371.00, the latter being the amount that James Naumovich advised Michael Mann, in his letter of November 6, 2006, was needed for "the landlord's solicitor" in connection with the lease assignment. At first, I thought that the $371.00 was the fee for the lease assignment before it was known that the 30-days-notice provision could not be satisfied and that the $270.00 was in connection with the "extra costs" associated with the late notice. However, there is no evidence on the matter. Also, there is no convincing evidence that either sum was paid by Fridriksson or by the plaintiff.

[1411] The defendants had leased 6800 Morrison Street, Niagara Falls, the premises upon which the Niagara Falls Clinic carried on business. The lease agreement required the defendants to provide 30 days notice to the landlord of the intention to transfer the lease. However, the Asset Purchase Agreement between the plaintiff and the defendants was signed on October 30, 2006 and the purchase/sale was completed on November 9, 2006. Thus, it was impossible to comply with the notice requirement of 30 days. As well, the plaintiff, which became the tenant, was not incorporated until October 31, 2006.

[1412] The testimony of Fridriksson alone is insufficient to prove the amount of the "extra costs" or any costs, for that matter. The undated letter from the landlord, on its face, deserves to be given little weight. The landlord did not testify.

(iv) *conclusion*

[1413] The timing of both the execution of the Asset Purchase Agreement and the closing (not to mention the date of incorporation of the plaintiff) made it impossible for the defendants to provide the landlord with the required notice of the desired lease assignment. It would not be productive for me to review the mould-as-you-largely-like law relating to impossibility, mistake and frustration. Why? Because, for a minor contractual glitch such as this one, I would determine the result first and the legal justification second. The result should be fair and just and, if that is achieved, it could be justified under any of the three areas of the law just mentioned. The justification is not rationally important. Here, fairness favours the defendants. In any event, the cost of assigning the lease (whether notice was given within or outside the 30 days) is not addressed in the Asset Purchase Agreement. If those costs are not contractually covered, it is difficult to see how responsibility for the alleged "extra costs" can be contractually allocated. It is worth observing that, had the parties known, on the date of closing, that 30 days notice were required for the lease assignment, neither side would have wanted the closing delayed to permit the 30 days to run and certainly neither side would have wanted the defendants to withdraw from the transaction as they were allowed to do, in my opinion, under Article 6.03 of the Asset Purchase Agreement: [Underlining added]

> 6.03 CONDITIONS TO THE OBLIGATIONS OF THE VENDOR
> Notwithstanding anything herein contained, <u>the obligations of the Vendor to complete the transactions provided for herein will be subject to the fulfillment of the following conditions at or prior to the Closing Time</u>, and the Purchaser will use its best efforts to ensure that such conditions are fulfilled.
>
> 1. CONSENT TO ASSIGNMENT OF PREMISES LEASE
> At the Closing Time the Vendor <u>shall have received confirmation</u> that the Premises Lease has been duly and properly assigned to the Purchaser.

In other words, if, at the time of closing, the defendants have not "received confirmation" of the lease assignment, the defendants are not obligated "to complete the transactions provided for . . ."

[1414] The allegation in subparagraph 9(h) of the statement of claim fails. There is no credible evidence concerning the "extra costs" associated with the assignment of the lease and, even if there were, there is no contractual basis for me to make them the responsibility of the defendants.

9. "The defendants removed computer software discs"

(i) *the allegation*

[1415] Subparagraph 9(i) of the statement of claim states:

> 9(i) The defendants removed computer software discs required for the daily operation of the business. The plaintiff requests the immediate return of the computer software discs for Windows XP, Bell Sympatico, QuickBooks and Noah 3 software.

(ii) *Asset Purchase Agreement*

[1416] The statement of claim does not say that any provision of the Asset Purchase Agreement was breached. However, in closing argument, the plaintiff relied upon Articles 2.01(c) and (d): [Italics added]

> 2.01 PURCHASED ASSETS
> On the terms and subject to the fulfillment of the conditions hereof, the Vendor hereby agrees to sell, transfer and assign to the Purchaser, and the Purchaser hereby agrees to purchase and accept from the Vendor, the undertaking of the Business as a going concern and *all* properties, *assets*, rights and interests *of the Vendor related to the Business of every kind and description* and wheresoever situate, except for the Excluded Assets. *Without limiting the generality of the foregoing, the Purchased Assets will include* all assets of the Business shown or reflected in the Financial Statements, other than Excluded Assets and assets which have been disposed of or consumed in the ordinary course of the Business since the Statements Date, and will include the following assets:
>
> 2.01(c) Machinery, Equipment and Furniture: all machinery, equipment, tools, furniture, furnishings and other miscellaneous items used in or relating to the Business including, without limitation, all those listed in Schedule "A" attached hereto;
>
> 2.01(d) Computer Equipment: all of the Vendor's right, title and interest in all computer hardware used in the Business including, without limitation, that described in Schedule "A" attached hereto;

[1417] Schedule "A" was not physically part of the Asset Purchase Agreement that was entered into evidence. It was, however, attached to another exhibit, the bill of sale, but that exhibit was not the subject of any testimony. In any event, Schedule "A" is not helpful. It reads:

> Computers – Niagara Falls has two IBM desktops, one purchased in 2002 or 2003 and the other in 2004 used for accounting and a third IBM desktop also purchased in 2004 for hearing and programming.

[1418] Although I do not think that "computer software" is captured by the plain and ordinary meaning of Articles 2.01(c) and (d), nor is it found in Schedule "A", I find that "computer software" is caught by the words "all . . . assets of the vendor related to the Business of every kind and description . . ." in the italicized part of the preamble to Article 2.01.

(iii) *some evidence*

[1419] There was an acknowledged delay by the defendants of several days in some of this material being handed over to the plaintiff. The absence of the computer software was not discovered by the plaintiff until after closing and so the requirement for its delivery did not merge on closing.

(iv) *conclusion*

[1420] I find that the delay was deliberate on the part of Dee Lewis and Terry Lewis (who were acting on behalf of the corporate defendant) and it was motivated by their quasi-hysterical confidentiality concerns. The allegation in subparagraph 9(i) has been proved. With no evidence of actual damages being suffered by the plaintiff, there is nothing for the court to award in order to put the plaintiff in as good a position as would have been enjoyed but for this breach. Nominal damages are appropriate where there has been an actionable breach, but no actual damages. I award the plaintiff $1.00 in damages.

10. "Failed to provide QuickBooks accounting data file"

(i) *the allegation*

[1421] Subparagraph 9(j) of the statement of claim provides:

> 9(j) The defendants failed to provide the QuickBooks accounting data file on the date of closing. As a result of the plaintiff's inability to access the internet, the plaintiff was unable to prevent others from accessing and viewing the details of its transactions or to use the QuickBooks computer program for a day. Full particulars of the loss will be provided prior to trial.

(ii) *Asset Purchase Agreement*

[1422] Subparagraph 9(j) does not refer to the Asset Purchase Agreement having been breached. However, in closing argument, the plaintiff contends that Articles 2.01(f) and (g) were breached:

> 2.01 PURCHASED ASSETS
> On the terms and subject to the fulfillment of the conditions hereof, the Vendor hereby agrees to sell, transfer and assign to the Purchaser, and the Purchaser hereby agrees to purchase and accept from the Vendor, the undertaking of the Business as a going concern and all properties, assets, rights and interests of the Vendor related to the Business of every kind and description and wheresoever situate, except for the Excluded Assets. Without limiting the generality of the foregoing, the Purchased Assets will include all assets of the Business shown or reflected in the Financial Statements, other than Excluded Assets and assets which have been disposed of or consumed in the ordinary course of the Business since the Statements Date, and will include the following assets:

> 2.01(f) Patient Lists and Information: all patient lists, files, data and information relating to patients and prospective patients of the Business as of the Closing Time including, without limitation, the patient list which has been delivered by the Vendor to the Purchaser prior to the date hereof;
>
> 2.01(g) Patient Contracts/Files: all right, title and interest of the Vendor in and to all Patient Contracts, including all information critical to patient care, plus 'QuickBooks' data file of sales history and the 'Outlook' data file used in the Business;

[1423] "Patient Contracts" are defined in Article 1.01(j):

> (j) "*Patient Contracts*" means any and all agreements entered into between the Vendor and one or more third parties relating to the sale or provision of goods or services by the Vendor to such third parties in connection with the Business, including unfilled orders, commitments and other engagements by or with such third parties;

(iii) *conclusion*

[1424] The allegation in subparagraph 9(j) has been proved. There was an admitted delay by the Lewises, acting on behalf of the corporate defendant, but, as with the allegation in respect of subparagraph 9(i), it was only several days in length and no actual loss was sustained by the plaintiff. Yet, the delay was deliberate and technically actionable. Nominal damages are merited. I award $1.00.

11. "Failed to notify the security alarm service provider"

(i) *the allegation*

[1425] Subparagraph 9(k) of the statement of claim alleges:

> 9(k) The defendants failed to notify the security alarm service provider of a change of ownership. The plaintiff incurred damages necessitated by having to call the service provider and spend several hours of time to rectify the matter. Full particulars of the loss will be provided prior to trial.

(ii) *Asset Purchase Agreement*

[1426] Although subparagraph 9(k) does not refer to any provision of the Asset Purchase Agreement having been breached, in closing argument, the plaintiff contended that Article 9.01 was not followed:

> 9.01 FURTHER ASSURANCES
> Each of the Vendor and the Purchaser hereby covenants and agrees that at any time and from time to time after the Closing date it will, upon the request of the other, do,

> execute, acknowledge and deliver or cause to be done, executed, acknowledged and delivered all such further acts, deeds, assignments, transfers, conveyances and assurances as may be required for the better carrying out and performance of all terms of this Agreement.

(iii) *some evidence*

[1427] The Asset Purchase Closing Agenda for November 9, 2006, set out three post-closing items, one of which named the purchaser/plaintiff as being responsible to "deliver notices and directions to contract parties advising of assignment of contracts." I find that it was the responsibility of the plaintiff to notify the security alarm service provider of the change in ownership.

(iv) *conclusion*

[1428] The allegation in subparagraph 9(k) of the statement of claim fails (and, no losses were proved).

12. "Improperly billed WSIB"

(i) *the allegation*

[1429] Subparagraph 9(l) of the statement of claim states:

> 9(l) Contrary to the Workplace Safety & Insurance Board (WSIB) contracts, rules and guidelines, the defendants improperly billed WSIB for work not yet performed or authorized, work that would have been done by the plaintiff, totaling some $101,088.45 causing economic loss to the plaintiff. In the first eight days of November the defendants billed over $138,000.00. The normal billing rate of the defendants was $45,000.00 to $60,000 per month. This pre-closing rush to bill caused significant ill-will with the patients of the clinic. Many of the patients seen in these eight days came back complaining of ill-fitting or poorly prescribed hearing aids, many of which had to be adjusted or returned at the cost of the plaintiff. This conduct by the defendants breached the provisions of the agreement which required the defendants to continue to operate the clinic in the normal course of business until closing.

[1430] Much of this allegation concerns the much-discussed "pending" invoices.

(ii) *Asset Purchase Agreement*

[1431] Subparagraph 9(l) alleges breach of an unspecified provision of the Asset Purchase Agreement and, in argument, the plaintiff relied upon Articles 3.01(9)(vii), (viii), (x) and (xi) and 5.01(1)(i) and (vii):

> 3.01(9) ABSENCE OF CERTAIN CHANGES OR EVENTS
> Since the Statements Date, the Vendor has not, in respect of the Business:
>
> . . . . . .
>
> (vii) made any material change in the method of billing patients or the credit terms made available by the Business to patients;
>
> (viii) made any material change with respect to any method of management, operation or accounting in respect of the Business;
>
> . . . . . .
>
> (x) suffered any extraordinary loss relating to the Business;
>
> (xi) made or incurred any material change in, or become aware of any event or condition which is likely to result in a material change in, the Condition of the Business or its relationships with its patients, suppliers or employees, or
>
> 5.01 COVENANTS BY THE VENDOR
> The Vendor covenants to the Purchaser that it will do or cause to be done the following:
>
> 1. CONDUCT OF BUSINESS
> Except as contemplated by this agreement or with the prior written consent of the Purchaser, during the Interim Period the Vendor will:
>
> (i) operate the Business in the ordinary course thereof, consistent with past practices;
>
> . . . . . .
>
> (vii) maintain the books, records and accounts of the Business in the ordinary course and record all transactions on a basis consistent with past practice;

(iii) *some evidence*

[1432] The parties began these proceedings disputing who was entitled to certain block fees for WSIB patients where some services in the “block” were rendered by the defendants *before* closing, but related and follow-up services would be provided by the plaintiff *after* closing. It was obvious that, as the trial progressed, both sides differed dramatically on their understanding of proper WSIB billing practices and neither impressed me as a dependable arbiter of such practices. I advised counsel that, without a witness from the WSIB (or some other independent expert) to explain what the WSIB considered proper billing practices, neither side could prove an entitlement to these fees. The evidentiary record was lacking and it would have been irresponsible for me to make the findings requested by the plaintiff.

[1433] The parties concluded that they were about to embark on a time-consuming and expensive diversion and, accordingly, the claim of the plaintiff relating to the

WSIB "pending" invoices and billing practices of the defendants and the counterclaim by the defendants for the amount of the "pending" invoices, were withdrawn on consent.

[1434] Notwithstanding the above, the plaintiff submits that the WSIB billing issue is clear evidence of dishonesty on the part of the Lewises in attempting to obtain payment for services to be performed in the future by the plaintiff and, therefore, is "an important aspect of the credibility of the defendants." I respectfully disagree. Dishonesty cannot be proved on the existing record. I have no way of determining dishonesty without evidence of the accepted billing practices of the WSIB. I do not know how the WSIB treats work in progress.

(iv) *conclusion*

[1435] The allegation in subparagraph 9(l) of the statement of claim fails.

13. "Improperly billed third party insurers"

(i) *the allegation*

[1436] Subparagraph 9(m) of the statement of claim states:

> 9(m) Contrary to the WSIB and Ontario Assistive Devices Program (ADP) contracts, rules and guidelines, the defendants have improperly billed third party insurers such as ADP and Sun Life for services rendered to WSIB patients.

(ii) *Asset Purchase Agreement*

[1437] In subparagraph 9(m), the plaintiff neither pleaded that the Asset Purchase Agreement had been breached nor cited any provision thereof in argument.

(iii) *conclusion*

[1438] As with subparagraph 9(l) above, no representative of these entities, or other independent experts, testified. Accordingly, there is no credible evidence from which I can identify improper billing by the defendants.

[1439] The allegation in subparagraph 9(m) of the statement of claim has not been proved.

14. "Caused Canada Post to take the position that the mail would be held"

(i) *the allegation*

[1440] Subparagraph 9(n) alleges:

> 9(n) Upon closing of the sale the defendants provided Canada Post with a change of address notification to redirect the mail for The Hearing Clinic at 6800 Morrison Street, Unit 1, Niagara Falls, to another address. The result of that notification caused Canada Post to take the position that the mail would be held by them unless an agreement signed by both parties was received. Canada Post began holding the mail on December 8, 2006. Despite efforts by the plaintiff to resolve the issue through their respective counsel and their accountants, no resolution was reached. By letter dated January 15, 2007 Canada Post notified the plaintiff that effective January 15, 2007, all mail addressed to The Hearing Clinic at 6800 Morrison Street, Niagara Falls would be returned to sender. A direction as prepared by the plaintiff's counsel and forwarded to the defendants' counsel on January 15, 2007 (sic). The signed direction was not received by the defendants until January 24, 2007 causing economic loss to the plaintiff in an amount to be determined.

(ii) *Asset Purchase Agreement*

[1441] Although the plaintiff, in subparagraph 9(n), did not allege the breach of any provision of the Asset Purchase Agreement, in argument, reliance was placed upon Article 9.01:

> 9.01 FURTHER ASSURANCES
> Each of the Vendor and the Purchaser hereby covenants and agrees that at any time and from time to time after the Closing date it will, upon the request of the other, do, execute, acknowledge and deliver or cause to be done, executed, acknowledged and delivered all such further acts, deeds, assignments, transfers, conveyances and assurances as may be required for the better carrying out and performance of all terms of this Agreement.

(iii) *some evidence*

[1442] The similarity in the names of the two operations – "The Hearing Clinic," as it was known when run by the defendants, versus "The Hearing Clinic (Niagara Falls) Inc.," the corporate name used by the plaintiff – presented a predictable problem for the parties that was not addressed before completion of the purchase and sale and was lamentably handled thereafter. It should have been obvious to everyone that mail for the plaintiff would not be scrupulously addressed to its corporate name but, instead, would simply read: "The Hearing Clinic."

[1443] The letter from Canada Post, dated December 14, 2006, indicated that a "joint agreement from both parties" was required providing instructions on how the mail was to be delivered. The defendants, who must be taken to have acted on behalf of the corporate defendant, refused to sign any document to that effect and, as a result, the plaintiff was required to bring a motion, returnable January 22, 2007, for a mandatory injunction. After service of the motion, the defendants relented and signed the desired document and the motion proceeded, on January 26, 2007, only as to costs. The plaintiff was awarded costs, fixed at $4,493.08, and they have been paid.

[1444] The defendants complain that the plaintiff opened their mail. I expect that, without opening the mail and studying the contents, one might not know the correct recipient. The plaintiff, however, went further and withheld some cheques payable to the defendants, contending that "there were three cheques containing monies that were partially ours."

[1445] I see nothing wrong in the defendants having provided Canada Post with the Change of Address Notification on December 6, 2006 (although I would have expected this to be more appropriately sent earlier).

(iv) *conclusion*

[1446] This allegation, effectively, was resolved in the course of the motion brought by the plaintiff and was moot at the time of trial. No damages have been proved beyond the costs of the motion, which have been paid by the defendants.

[1447] Nevertheless, the conduct of the Lewises, acting on behalf of the corporate defendant, in refusing to sign the "joint agreement" required by Canada Post, was a deliberate breach of Article 9.01. The allegation in subparagraph 9(n) has been proved. As no actual damages were proved, nominal damages are in order. I fix them at $1.00.

15. "Contacted the various manufacturers . . . to divert delivery of goods"

(i) *the allegation*

[1448] Subparagraph 9(o) of the statement of claim alleges what, in short, has been described in this action as "supplier interference":

> The defendants Lewis contacted the various manufacturers supplying inventory and equipment to the plaintiff to divert delivery of goods ordered by the plaintiff to the hearing clinic operated by the defendants Lewis in Scarborough. As a result, the principle of the plaintiff corporation, Dr. Stefan Fridriksson, had to spend many hours in travel and negotiations to re-establish the delivery of supplies to the business. The plaintiff requests an order requiring the defendants to deliver to the plaintiff any such goods still in their possession.

(ii) *Asset Purchase Agreement*

[1449] Subparagraph 9(o) does not say that the Asset Purchase Agreement was breached and, in argument, the plaintiff did not cite any provision thereof in support of this allegation.

(iii) *some evidence*

[1450] The allegation here is wide in scope. In-chief, Fridriksson stated that the defendants:

> . . . contacted every supplier in Ontario that we know of . . . and I couldn't order anything from anybody until I, until I used the leverage from [the buying group] Harmony Hearing.

This allegation is marred by typical Fridriksson hyperbole. I will mention only two areas of the evidence which give the flavour of the matter.

[1451] Firstly, in the e-mail from Mark Haskins on November 14, 2006, at 12:38 p.m., it is said that Siemens put all shipments to the Niagara Falls Clinic on hold. And, previously, on November 2nd, Unitron Hearing did likewise, as did Phonak in early November.

[1452] Unitron Hearing is one of the suppliers Fridriksson alleges did not, or would not, take orders from the Niagara Falls Clinic. However, the letter from Unitron Hearing, dated January 17, 2007, explains that it was not until November 15, 2006 that the plaintiff requested Unitron Hearing "to set up a new account for the Niagara Falls location." Fridriksson testified that the defendants blocked the plaintiff from setting up an account:

> Q. And the agreement of purchase and sale was signed on October 30, 2006?
>
> A. Yes.
>
> Q. So from October 30, 2006, right up until closing, you could have taken steps, the plaintiff could have taken steps to set up its own account [with Unitron Hearing], correct?
>
> A. We did take steps . . . but the Lewises had blocked me from doing so . . .

[1453] There is no credible evidence that "the Lewises had blocked" the plaintiff. Fridriksson was cross-examined further about the "steps" that he took:

> Q. And there's no reference [in the letter of January 17, 2007 from Unitron Hearing] that there was an attempt other than this one [on November 15, 2006] by the buyer to set up an account, is there?
>
> A. There is not.
>
> Q. And no other document has been produced in this proceeding, right?
>
> A. I know I tried to set up an account before this.
>
> Q. But no other documentation has been produced, right?
>
> A. Correct.

[1454] Secondly, Fridriksson testified that he could not obtain from Phonak (another supplier of hearing aids and related products) a repaired hearing aid for a patient (Leslie Stamp). He testified, in-chief:

> Q. And did you have difficulty obtaining supplies and equipment from Phonak?
>
> A. Once again, the hearing aids that were repair orders from the Niagara Falls location were sent to the Lewis' office in Scarborough and . . . the Lewises did not return the hearing aid for a patient called Leslie Stamp and . . . even at Christmas time [in 2006], we're asking for that hearing aid from the Lewises. . .

[1455] However, the patient file for Leslie Stamp, which was produced as part of the records of the plaintiff, tells a different story. The file contains documentation from Phonak showing that the hearing aid for Leslie Stamp was sent to the Niagara Falls Clinic by ICS courier on November 28, 2006 and it was sent from Phonak (not from the "Lewis' office in Scarborough"). Fridriksson boldly disputed the accuracy of this documentation, but then was confronted with an invoice from the Niagara Falls Clinic to Leslie Stamp, for the hearing aid in question, dated November 30, 2006. Fridriksson acknowledged that, in the ordinary course of business, one does not prepare an invoice unless the hearing aid is "in the office." At this point, Fridriksson did some back-peddling:[98]

> A. I have to check. I don't know. I, I agree that that's what it says on the invoice.
>
> Q. And this is your document, this is the plaintiff's document, correct?
>
> A. Yes, but I have to check exactly what happened in this situation because I don't remember.

---

[98] Throughout this trial, while Fridriksson was in the witness box, I often thought that I heard the distinctive Beep! Beep! Beep! indicative of a heavy piece of equipment proceeding in reverse.

> Q. Okay, but your evidence in-chief was that Mr. Stamp did not receive his hearing aid until well into December, do you remember, you said you remembered that, right sir?
>
> A. We did not receive, I don't know what exactly I said in evidence in-chief but, because I don't remember, but I will tell you that we did not receive the hearing aid . . . This is not the hearing aid . . . This is a remake of the hearing aid done by Phonak.
>
> Q. Sir, are you saying that Phonak provided a new hearing aid?
>
> A. Yes.

[1456] Fridriksson was taken through an e-mail trail with Phonak which established that this was not a new hearing aid. Nevertheless, Fridriksson, in a credibility-bruising exercise, stubbornly insisted otherwise.

[1457] There also is the e-mail from Joyce Beaven,[99] of Phonak, Accounts Receivable, to which I earlier referred, saying:

> I received a call in early November from Mickey [Tersigni] at the Hearing Clinic in Scarborough. She advised that all repairs and new orders for the Niagara Falls office should be forwarded directly to them. On that date, I updated the customer's file and advised to use the new account for future orders.

[1458] Mickey Tersigni, in cross-examination, stated that she "can't recall the conversation" but thought that the above letter "doesn't sound right." She added:

> A. . . . I can't see her saying 'new orders' from the, I probably would have told her if they were our orders that we had started before we left, to have sent them to our office, but not the new ones after November the 9th.

[1459] I accept the testimony of Ms. Tersigni as being more likely and preferred to a letter where the author did not give evidence.

[1460] Ginette Galati testified, in-chief:

> Q. Was there any issue after closing in obtaining supplies?
>
> A. Yes, I would send some hearing aids out for repair and I would wait at least seven to 10 days and I wasn't getting anything back so I would call the company and they would tell me that the hearing aids were sent to Scarborough . . . that they were instructed to send everything back to Scarborough. They said they were instructed by Dee.

---

99 This e-mail was to Fridriksson on February 23, 2007 at 12:59 p.m.

[1461] Although this testimony is troubling, I am reluctant to act on it absent evidence from "the company" to which she refers.

(iv) *conclusion*

[1462] This allegation was the product of the now-familiar chaos and confusion that accompanied the completion of the purchase and sale. I have no doubt that there were difficulties with suppliers for a short period of time following completion. However, even if this allegation is covered by a provision in the Asset Purchase Agreement, such as Article 9.01, there is no credible evidence that the defendants interfered with suppliers in the manner alleged. The problems with deliveries were the careless fault of both sides.

[1463] The allegation in subparagraph 9(o) of the statement of claim has not been proved.

16. "Caused . . . Fridriksson and Carol Klassen to spend many hours"

(i) *the allegation*

[1464] Subparagraph 9(p) of the statement of claim states:

> 9(p) The numerous problems created by the defendants Lewis caused [Fridriksson and his wife] to spend many hours of their time to deal with these problems, time they could not spend treating patients, thereby causing a substantial loss of revenue to the plaintiff, full particulars of which will be provided prior to trial.

(ii) *Asset Purchase Agreement*

[1465] Subparagraph 9(p) of the statement of claim does not speak of any breach of the Asset Purchase Agreement and none was mentioned in argument.

(iii) *conclusion*

[1466] Assuming that this allegation is covered by the Asset Purchase Agreement, it is not supported by any credible evidence. In fact, I do not recall that it was addressed by counsel for the plaintiff in closing argument.[100]

[100] The light is growing dim as we descend to the bottom of the complaints barrel.

17. "Harassed the plaintiff's employees after closing"

(i) *the allegation*

[1467] Subparagraph 9(q) of the statement of claim reads:

> 9(q) The defendants harassed the plaintiff's employees after closing requiring the plaintiff to give written notice to the defendants that they cease and desist.

(ii) *Asset Purchase Agreement*

[1468] Subparagraph 9(q) does not mention a breach of the Asset Purchase Agreement and, in argument, the plaintiff did not refer to any provision that had been breached.

(iii) *some evidence*

[1469] Subparagraph 9(q) refers to "written notice" having been given. No such notice was presented at trial. The only evidence that the plaintiff can point to in support of this allegation came from the examination in-chief of Ginette Galati:

> Q. Did you receive any calls from Dee Lewis after closing?
>
> A. I did receive a couple of calls from Dee and you know there was so much going on that I, I finally had to say to please stop calling me because all the issues that were going on was becoming very stressful for me to be dealing with what was going on with [Fridriksson] and what was going on with the Lewises. So I asked her to please stop calling.
>
> Q. What were the natures, nature of these calls from her?
>
> A. In all honesty, I can't remember 100% so I really can't, I think it was just to do with the issues that were going on, you know, as far as the mail and so far as you know things being sent to us. I think those were the issues but I didn't really, I didn't feel it was my place to talk to, to her about it. So I just asked her to stop calling me.
>
> Q. And did she do so?
>
> A. Yes, she did.

(iv) *conclusion*

[1470] The allegation in subparagraph 9(q) was not addressed by the plaintiff in its closing written argument of approximately 300 pages. It was only after I raised the matter of paragraph 9(q) that counsel for the plaintiff referred the court to the above passages from the evidence of Ginette Galati. This allegation should never have been allowed to clutter up a statement of claim. Assuming that some general provision of the Asset Purchase Agreement is applicable, such as Article 9.01, there has been no breach.

18. “Failed to notify the Privacy Commissioner of the sale”

(i) *the allegation*

[1471] Subparagraph 9(r) of the statement of claim states:

> 9(r) The defendants failed to notify the Privacy Commissioner of the sale of the clinic assets as required, causing the plaintiff to utilize extensive time and effort to effect compliance.

(ii) *Asset Purchase Agreement*

[1472] A breach of the Asset Purchase Agreement is not mentioned in subparagraph 9(r) and the matter was ignored in final argument.

(iii) *conclusion*

[1473] Even if some general provision of the Asset Purchase Agreement is applicable to this complaint, there is no credible evidence of wrongdoing by the defendants. Also, no damages were proved.

19. “Failed to notify ADP of the asset sale”

(i) *the allegation*

[1474] At subparagraph 9(s) of the statement of claim the plaintiff alleges:

> 9(s) The defendants failed to notify ADP of the asset sale thereby delaying the granting of a temporary vendor number to the plaintiff until January 12, 2007. This required the plaintiff to lose substantial revenue and a great deal of time and effort to correct.

(ii) *Asset Purchase Agreement*

[1475] Subparagraph 9(s) does not refer to a breach of the Asset Purchase Agreement. However, in argument, the plaintiff relied upon Article 9.01:

> 9.01 FURTHER ASSURANCES
> Each of the Vendor and the Purchaser hereby covenants and agrees that at any time and from time to time after the Closing date it will, upon the request of the other, do, execute, acknowledge and deliver or cause to be done, executed, acknowledged and delivered all such further acts, deeds, assignments, transfers, conveyances and assurances as may be required for the better carrying out and performance of all terms of this Agreement.

(iii) *some evidence*

[1476] The letter of December 18, 2006, from Joan Stevens, program manager for the Assistive Devices Program (which falls under the Ministry of Health and Long-Term Care), to Terry Lewis, states that the defendants did not notify the ADP of the sale of their clinic "in violation of section 10 of your vendor contract." Earlier, I mentioned the "facsimile document," dated November 19, 2006, from Dee Lewis to the ADP, advising of the sale. I also reviewed other correspondence around that time, which had the effect of clothing this issue in uncertainty.

[1477] It is to be noted that Fridriksson advised the ADP of the purchase and sale on November 14, 2006, but declined to cooperate with the ADP by forwarding the Asset Purchase Agreement as requested, claiming confidentiality (as can be seen in the letter from the ADP to him on May 8, 2007). He did not do so for two weeks. In the end, a vendor permit number was issued on January 12, 2007, retroactive to November 9, 2006.

[1478] I also observe that the ADP matter was delayed because of the wording of the form that Carol Klassen was asking the defendants to sign. Arguably, the wording that she was proposing would have assigned the vendor permit number of the defendants to the plaintiff, thereby allowing the plaintiff to appropriate the receivables of the defendants. (The form in question can be seen with the November 27, 2006 e-mail, at 3:27 p.m., from Karl Bowley to Andy Gunarsons.)

(iv) *conclusion*

[1479] The most reliable evidence on this issue consists of the e-mails and correspondence in the period November 2006 – February 2007, along with the letter of May 8, 2007, from the ADP to Fridriksson, none of which supports the position of the plaintiff.

[1480] On a balance of probabilities, I think that the defendants did notify the ADP as they contend.

[1481] The allegation in subparagraph 9(s) of the statement of claim fails, assuming that Article 9.01 is applicable.

[1482] I cannot help adding the observation that the issue of the ADP vendor permit number, like so many other issues, was predictable and, when it surfaced, poorly handled by everyone.

VIII. DISCUSSION (the CASLPO allegations)

(i) *the allegation*

[1483] The action was commenced in 2007. The trial began in July of 2011. After eight days, and with Fridriksson having completed his evidence in-chief, we slipped into a lengthy hiatus. On the resumption of trial, April 10, 2012, after an argued motion, the plaintiff was granted leave for Fridriksson to give additional evidence in-chief: see *Hearing Clinic v. Lewis,* 2012 ONSC 7067 (CanLII). The additional evidence pertained to: (1) an appointment book used by the defendants at the Niagara Falls Clinic prior to the sale; and, (2) the guidelines of CASLPO (the College of Audiologists and Speech-Language Pathologists of Ontario) for the use of supportive personnel in hearing clinics.

[1484] The thrust of the additional evidence from Fridriksson was an allegation that the defendants were guilty of improper practices in the provision of services at the Niagara Falls Clinic, having breached CASLPO guidelines.

[1485] In his additional evidence, Fridriksson made seven allegations, all of them facially serious:

1. The total earnings or sales from the Niagara Falls Clinic, when owned and operated by the defendants, were grossly inflated because the services of their hearing instrument practitioner, Donna Bradley, were billed as if she were an audiologist (in contravention of CASLPO guidelines). [101]

2. Certain services of Donna Bradley were not performed in the presence of an audiologist (again, allegedly contrary to CASLPO guidelines).[102]

3. Donna Bradley used improper, out-dated testing equipment when measuring hearing aids.

4. Donna Bradley was allowed to perform tasks for which she was not qualified by education, training and experience.

5. Forms were signed by the defendant, Terry Lewis, an audiologist, and by another audiologist, Sarah Peverley, for services provided on dates

[101] If services were improperly provided by a non-audiologist, the expenses of the Niagara Falls Clinic are artificially low and the profits are, correspondingly, artificially high.

[102] Inappropriate use and supervision of "supportive personnel" may result in charges of professional misconduct being brought against a member of CASLPO.

when neither was at the Niagara Falls Clinic (those services were performed by "supportive personnel") once more, allegedly, in breach of CASLPO guidelines.

6. The defendant, Terry Lewis, and the other audiologist, Sarah Peverley, did not provide follow-up services for WSIB patients.

7. The defendants improperly billed WSIB for hearing aids prior to the fitting date. (This is part of the "pending"-invoices issue.)

(ii) *conclusion*

[1486] The CASLPO literature, filed as evidence, consists of guidelines, not hard-and-fast rules. Was there improper delegation by Terry Lewis or Sarah Peverley, both audiologists, to Donna Bradley, a hearing instrument practitioner? It is conceded by the defendants that Donna Bradley provided certain services while not under the direct supervision of an audiologist. Was that improper? Were forms improperly processed by the Niagara Falls Clinic (some were signed by the audiologist in blank)? What is the full range of services that can be provided by a hearing instrument practitioner? I do not see how I can be satisfied about such matters without hearing evidence from a representative of CASLPO or some other independent expert as to accepted practices. I cannot make the findings sought by the plaintiff without such evidence. It is not the function of this court to hold audiologists to a higher or different standard than does their governing body. What seems improper to me may be viewed otherwise by CASLPO.[103]

[1487] Fridriksson is basing the CASLPO allegations on his review of the records and schedules of the Niagara Falls Clinic and his personal assessment of both. This is not sufficient, coming from a man who has been proved wrong so many times in this trial and, more bluntly, who has repeatedly invented evidence to advance the imagined case of the plaintiff.

[1488] While there was much testimony from Fridriksson as to allegedly improper conduct of the defendants in their operation of the Niagara Falls Clinic, I am not even slightly persuaded that the views expressed by Fridriksson are helpful in determining this part of the case. His opinions are worthless. The court requires evidence from a reliable witness concerning the full range of services that can be carried out by a hearing instrument practitioner, how CASLPO interprets its

[103] I would like to know whether CASLPO considers "hearing assistant" (a term it uses in Exhibit #14) to be synonymous with "hearing instrument practitioner" (the term used by the WSIB in Exhibit #53). And what does the Association of Hearing Instrument Practitioners of Ontario say about all of this?

guidelines, the distinction between a guideline and a mandatory rule, the existence and limits of acceptable audiological practices, and, importantly, the role played by professional judgment in following the guidelines. It is to be emphasized that I do not have the benefit in this trial of sound evidence from an audiologist: Dee Lewis is not an audiologist; Fridriksson, although an audiologist, is not trustworthy. Maria Perez, who testified, is an audiologist who worked for Fridriksson from 2006-2009. However, I would regard her as a partisan witness and not fit to assist the court in determining accepted CASLPO conduct.

[1489] On behalf of the plaintiff it is submitted that "the defendants did not provide a member of CASLPO to advise on the professional obligations of the audiologist in the clinic" as it relates to the impugned conduct. The plaintiff is the party who raised allegations of CASLPO transgressions and so it is the plaintiff who bears the burden of proof. It is not for the defendants to disprove unproved allegations. The evidence adduced by the plaintiff did not reach the level where an evidentiary burden shifted to the defendants.

[1490] The CASLPO allegations fail.

IX. RESULT

[1491] Fraudulent misrepresentation has not been proved. All claims by the plaintiff associated with the allegations of fraudulent misrepresentation are dismissed.

[1492] Five specific claims by the plaintiff for breach of contract are allowed. They relate to the following subparagraphs in the statement of claim: 9(a) (keys); 9(g) (inventory); 9(i) (software); 9(j) (QuickBooks accounting data file); and, 9(n) (Canada Post).

[1493] Damages for those five breaches are assessed at $120.20, $300.00, $1.00, $1.00 and $1.00, respectively, for a total of $423.20.

[1494] All other relief sought in the statement of claim (but for costs) is dismissed.

[1495] Fridriksson has taken everyone on a hideously time-consuming and obscenely expensive journey down his private yellow brick road to the outskirts of the Emerald City where, it appears, he has a residence. It was not a worthwhile adventure.

[1496] Costs will be a challenge. I expect that they are enormous. I would not be surprised to learn that solicitor-and-client costs exceed $1 million for *each* side.

[1497] I will mention a few costs factors to consider, for the assistance of counsel in their negotiations: (1) Success was divided, although only modestly so; (2) This might be a case where costs should be awarded or refused on an issue-by-issue basis; (3) Is there "conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding," as contemplated by clause 57.01(1)(e) of the *Rules of Civil Procedure*? (4) The case was marked by unproved allegations of fraud and other misconduct.

[1498] Early in the trial, I alerted the parties to the reputational and financial risks associated with this type of litigation. Not a word that I said registered with them. All of those risks have materialized. Once more, I caution the litigants that the issue of costs carries more of the same risks: reputational damage is repeated; and, financial obligations increase. This story is not likely to improve with a re-telling. The parties are not bringing credit to the world of audiology and hearing clinics.

[1499] Counsel shall collaborate on a mutual table of contents for the costs submissions and forward a draft copy to the trial co-ordinator, for my attention, within 60 days. Thereafter, I shall set time limits for written submissions.

[1500] By way of conclusion, I express my appreciation to all counsel for their diligence in this case. In particular, I compliment Mr. Korosis on conducting some of the most effective cross-examination that I have ever witnessed.

The Honourable Mr. Justice J.W. Quinn

RELEASED: October 7, 2014

CITATION: The Hearing Clinic (Niagara Falls) Inc. v. 866073 Ontario Limited, et al., 2014 ONSC 5831

COURT FILE NO.: 49278/07

DATE: October 7, 2014

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

THE HEARING CLINIC (NIAGARA FALLS) INC.

Plaintiff

- and -

866073 ONTARIO LIMITED, TERRY LEWIS and DEE LEWIS

Defendants

REASONS FOR JUDGMENT

J.W. Quinn J.

Released: October 7, 2014