IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Dentalcorp Health Services Ltd. v. Dr. J.S. Minhas Dental Corp.,* 2024 BCSC 2006

Date: 20241101
Docket: S244260
Registry: Vancouver

Between:

Dentalcorp Health Services Ltd., Dr. Larry Podolsky Dental Corporation, and Dr. Larry Podolsky

Plaintiffs

And

Dr. J.S. Minhas Dental Corp., Dr. Jasdip Minhas also known as Dr. Jasdip Singh Minhas, Minhas Family Trust, 0949630 B.C. Ltd., 1006207 B.C. Ltd., 0974720 B.C. Ltd., 1091277 B.C. Ltd., 0987093 B.C. Ltd., 0767121 B.C. Ltd., and 0762247 B.C. Ltd.

Defendants

Before: The Honourable Justice Branch

Reasons for Judgment

Counsel for Plaintiffs:	M.J. Hewitt C.R. Chan
Counsel for Defendants:	L. Kotler M. Switzer
Place and Date of Hearing:	Vancouver, B.C. September 23-25, 2024
Place and Date of Judgment:	Vancouver, B.C. November 1, 2024

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I. INTRODUCTION

[1] This is an application for an interlocutory injunction brought by the purchasers of the defendants' dental practices. The injunction seeks to prevent the defendants from participating in the opening of other dental clinics. The defendants' conduct is alleged to have violated restrictive covenants in agreements between the parties.

[2] More specifically, the injunction sought would: (1) prevent the defendants from having any interest in dental clinics near the existing dental practices; (2) prevent the defendants from involvement in opening or managing dental clinics across British Columbia; (3) require the defendants to cease operating certain clinics; (4) restrain the defendants from soliciting business from previous clients and from using confidential information belonging to the plaintiffs; and (5) require the defendants to both return any confidential information in their possession and provide disclosure to the plaintiff as to how this information was used.

II. BACKGROUND

A. The Purchase

[3] The plaintiff, Dentalcorp Health Services Ltd. ("Dentalcorp"), is in the business of acquiring and operating dental clinics across Canada. Dentalcorp is an amalgamation of several companies, including DCC Health Services Inc.

[4] Dentalcorp purchased from the defendant, Dr. Minhas, his five Prince George-based dental clinics for approximately $11 million in cash and shares. These five practices are known as the Family Dental Care clinics (the "FDC Clinics"). The defendants received a large up-front payment, shares for their equity in the practices, payments for continuing to provide dental services, the opportunity to receive a share of future profits if the FDC Clinics hit certain financial targets, and the use of certain Dentalcorp information. Dentalcorp also retained Dr. Minhas to continue to operate the FDC Clinics on a contract basis.

[5] The parties entered into 11 related agreements - four asset purchase agreements dated November 30, 2017 (the "Asset Purchase Agreements"); a share

purchase agreement dated December 1, 2017 (the "Share Purchase Agreement"); a services agreement to take effect November 30, 2017 (the "Services Agreement"); and five non-competition/non-solicitation agreements; four dated November 30, 2017, in favour of Dr. Larry Podolsky Dental Corporation; and one dated December 1, 2017, in favour of DCC Health Services Inc. (the "Non-Competition Agreements"). Collectively, I will refer to these contracts as the "Agreements".

[6] The approximate $11 million (in cash and share value) received by the defendants can be broken down as follows:

a) Asset Purchase Agreement – FDC College Heights/Specialty Practice: Purchase Price: $829,470;

b) Asset Purchase Agreement – FDC Downtown: Purchase Price: $366,766;

c) Asset Purchase Agreement – FDC River Point: Purchase Price: $258,074;

d) Asset Purchase Agreement – FDC Spruceland: Purchase Price: $255,690;

e) Share Purchase Agreement: The payment to the defendants under this agreement is variable, but Dentalcorp says it yielded at least $7,166,314.80;

f) A payment of approximately $1,000,000 on November 9, 2020, pursuant to an earn-out provision; and

g) A further payment of $1,066,590 on November 19, 2021, pursuant to an agreement that extended the term of the Services Agreement until March 31, 2026, and included an additional revenue allocation buy-back (the "Amending Agreement").

B. The Agreements

[7] I review the terms of the Agreements material to the present application below.

[8] Pursuant to section 5.6 of the Asset Purchase Agreements, Dr. Minhas agreed to deliver to the plaintiffs the Non-Competition Agreements. The Non-Competition Agreements provide as follows:

> 2. The Dentist covenants and agrees with the Professional Corporation that he shall not, without the prior written consent of the Professional Corporation, or as may be required pursuant to Dentistry Laws, either individually or in partnership or jointly or in conjunction with or as the manager or agent of any Person as principal, agent, consultant, lender, contractor, employer, employee, investor or shareholder, or in any other manner, directly or indirectly, for himself or on behalf of any other person, for any reason whatsoever:
>
> a) during the Term and for a period of three (3) years after the expiration or termination of the Services Agreement, carry on or be engaged in or concerned with or interested in any Competitive Business, anywhere within the Restricted Territory;
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> b) during the Term and for a period of three (3) years after the expiration or termination of the Services Agreement, be engaged in the acquisition, consolidation and/or management of any Competitive Business within the Province of British Columbia;
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> c) disclose or otherwise communicate or make available to any Person the name of any patient of the Professional Corporation or the contents of the whole or any part of Patient Records of such patients except as required by law, including any Dentistry Laws;
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> d) during the Term and for a period of three (3) years after the expiration or termination of the Services Agreement contact, solicit, interfere with or endeavour to entice away from the Professional Corporation in any manner whatsoever: (A) any Patient/Client for their own account or on behalf of any other Person which carries on a Competitive Business; (B) any Person who has referred patients for Professional Services at the Dental Endeavour within the twelve (12) month period preceding the termination or expiry of the Services Agreement, for the purpose of encouraging such Person to refer patients to the Associate or to any other Person for Professional Services to any location other than the Dental Endeavour; or (C) any Personnel working in the Dental Endeavour during the Term; or
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> e) for a period which is the greater of: (i) seven (7) years from the date hereof; or (ii) three (3) years after the termination or expiration of the Services Agreement, provide Professional Services to any Patient/ Client, other than immediate family of the Dentist, except: (i) in the course of providing Associate Services to the Dental Endeavour; (ii) as may be required pursuant to Dentistry Laws; or (iii) with the express written consent of the Professional Corporation.

[9] The Non-Competition Agreements adopt the defined terms from the Services Agreement. “Competitive Business” is defined in the Services Agreement as follows:

> any business that is similar to or competes with the Dental Endeavour, the Facility Operator and/or the Professional Corporation, including without limitation, any business that directly or indirectly engages in or permits or otherwise facilitates the provision of products or services supplied by the Dental Endeavour, the Facility Operator and/or the Professional Corporation, including without limitation the practice of dentistry, including dental hygiene, denture therapy or any speciality practice of dentistry, and/or the provision of Health Care Services.
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> […]

[10] "Restricted Territory" is defined in the Services Agreement as a ten-kilometre radius around each FDC Clinic.

[11] The Services Agreement itself also contains non-competition and non-solicitation provisions. The defendants, Dr. Minhas (the "Dentist") and Dr. J.S. Minhas Dental Corp. (the "Associate") agreed as follows in favour of the plaintiff Dr. Larry Podolsky Dental Corporation (the "Professional Corporation"):

> 10.0 The Associate and the Dentist agree that by virtue of this Agreement the Associate and the Dentist are in a position of trust whereby the Associate and the Dentist will be entrusted to render Professional Services to patients of the Professional Corporation. Each of the Associate and the Dentist acknowledges that the full benefit of the relationship between the Associate, the Dentist and all patients of the Professional Corporation constitute the property and goodwill of the Professional Corporation. Accordingly, each of the Associate and the Dentist acknowledges that the Associate and the Dentist hold the full benefit of its or his relationship with the patients in trust for the benefit of the Professional Corporation. In furtherance of this trust, each of the Associate and the Dentist covenants and agrees with the Professional Corporation that neither the Associate nor the Dentist shall, without the prior written consent of the Professional Corporation, or as may be required pursuant to Dentistry Laws, either individually or in partnership or jointly or in conjunction with each other or as the manager or agent of any Person, as principal, agent, consultant, lender, contractor, employer, employee, investor or shareholder, or in any other manner, directly or indirectly, for themselves or on behalf of any other Person, for any reason whatsoever … [identical covenants to ss. 2(a-e) of the Non-Competition Agreements]

[12] Section 10.0.1 of the Services Agreement contains identical non-competition and non-solicitation provisions in favour of DCC Health Services Inc. (the "Facility Operator").

[13] The Services Agreement contains the following provisions regarding the enforceability of the above-noted obligations:

> 10.1 If any covenant or provision herein is determined to be void or unenforceable in whole or in part, it shall not be deemed to affect or impair the validity of any other covenant or provision and each such unenforceable or invalid covenant or other portion shall be severable from the remainder of this Agreement. In this regard it is agreed that Section 10.0 (i), (ii), (iii), (iv) and (v) and Section 10.0.1 (i), (ii), (iii), (iv) and (v) are each declared to be separate and distinct covenants. Notwithstanding the foregoing, if, in any judicial proceeding any provision of this Agreement is found to be so broad as to be unenforceable, it is hereby agreed that such provision shall be interpreted only so broadly as to be enforceable. All restrictions contained in this Agreement are agreed to be reasonable and valid and all defences to the strict enforcement thereof by the other parties are hereby waived.
>
> 10.2 Each of the Associate and the Dentist hereby acknowledges that a breach or a threatened breach by the Associate or the Dentist of any provision of Section 10.0 will result in the Professional Corporation suffering irreparable harm which cannot be fully or adequately compensated by recovery of damages alone. The Associate and the Dentist hereby acknowledge that a breach or a threatened breach of Section 10.0.1 will result in the Facility Operator suffering irreparable harm which cannot be fully or adequately compensated by recovery of damages alone. Accordingly, in the event of a breach or threatened breach of any provision of Section 10.0 or Section 10.0.1, the Professional Corporation and/or the Facility Operator, respectively, will be entitled to interim and permanent injunctive relief, specific performance and other equitable remedies, in addition to any other relief to which they may become entitled.
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> …
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> 10.4 The provisions of this Article 10 shall survive any termination of this Agreement.[1]

[14] I will refer to the non-competition and non-solicitation provisions of the Services Agreement (ss. 10.1-10.4) and the Non-Competition Agreements together as the “Restrictive Covenants”.

[1] The Non-Competition Agreements contain similar terms regarding severability, that the restrictions are reasonable, that a breach will cause irreparable harm, and that the agreements survive termination of the Services Agreement.

[15] The Services Agreement defines the nature of the plaintiffs' relationship with the defendants as follows:

> 2.0 ENGAGEMENT OF ASSOCIATE — The Professional Corporation, the Associate and the Facility Operator hereby agree to provide their respective Professional Services and Health Care Services in conjunction with each other. Nothing in this Agreement shall be deemed to create a joint-venture, partnership or an employer-employee relationship between the parties hereto. The Associate, the Professional Corporation and the Facility Operator hereby confirm with one another that the Associate, the Professional Corporation and the Facility Operator are each independent contractors. The Associate acknowledges and agrees that: (a) all Associate Professional Services shall be performed by the Associate as an independent contractor engaged by the Professional Corporation, and not as an employee or partner of the Professional Corporation; and (b) all Associate Non-Professional Services shall be performed by the Associate as an independent contractor engaged by the Facility Operator, and not as an employee or partner of the Facility Operator. The Associate, the Professional Corporation and the Facility Operator covenant that they shall not hold themselves out as being partners of each other, co-joint venturers or as having an employer-employee relationship.

[16] The Services Agreement also requires that Dr. Minhas promote the interests of Dentalcorp, continue to help manage the FDC Clinics, and protect confidential information:

> 2.3 PROMOTION OF DENTAL ENDEAVOUR - Pursuant to the terms of this Agreement, the Associate shall promote and enhance the interests of the Professional Corporation and the Facility Operator in the provision of the Associate Services. The Associate shall use commercially reasonable efforts to do all things necessary to give full effect to this Agreement and shall refrain from doing anything that may hinder the performance of this Agreement. Subject to Section 2.9 hereof, the Associate Professional Services shall be performed by the Dentist in a manner consistent with the best interests of the Dental Endeavour, including as the primary component thereof, providing patients and clients of the Dental Endeavour with the highest standard of care and patient/client experience.
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> …
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> 2.14 ASSOCIATE CONTROL OVER DAY-TO-DAY OPERATIONS – The Associate acknowledges that during the Term, and as part of the Associate Services, the Associate shall oversee the day-to-day operation of the Dental Endeavour including decisions regarding marketing, purchasing of supplies, hours of operation and other decisions impacting the overall functioning and profitability of the Dental Endeavour. The Associate shall also have effective direction, supervision and control of all Personnel, including the authority to hire or terminate the employment or engagement of any Personnel in

> consultation with the Facility Operator to ensure any such hiring or firing is properly executed in accordance with applicable employment laws and best practices. The Practice DDS shall oversee the overall business and affairs of the Dental Endeavour.
>
> …
>
> 5.0 CONFIDENTIALITY – The Associate and the Dentist, jointly and severally, covenant and agree with the Professional Corporation and the Facility Operator that they shall: (i) keep the Confidential Information confidential, except where disclosure is permitted pursuant to this Section 5.0; and (ii) take whatever measures are reasonably necessary to preserve the confidentiality of such Confidential Information … The Associate and the Dentist, jointly and severally, covenant and agree with the Professional Corporation and the Facility Operator that: (i) they shall not use the Confidential Information for any purpose other than the sole purpose of providing the Associate Services in accordance with the terms of this Agreement; and (ii) they shall not disclose any Confidential Information…

[17] "Confidential Information" is defined as follows:

> a) all confidential information including:
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> (i) trade secrets and confidential know how; and
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> (ii) financial, accounting, business, marketing and technical information, patient lists, suppliers lists, the names of third parties that refer patients and clients to the Dental Endeavour, Patient Records, know how, technology, operating procedures, fees for all services performed in the Dental Endeavour, databases, source codes and methodologies, of which the Dentist becomes aware or generates (both before or after the day this Agreement is signed) in the course of, or in connection with (including confidential information belonging to a third party) the Associate providing the Associate Services;
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> b) all copies, notes and records based on or incorporating the information referred to in paragraph (a); and
>
> c) the terms of this Agreement and the Acquisition Agreements,
>
> but does not include any information that was public knowledge when this Agreement was signed or became so at a later date (other than as a result of a breach of confidentiality by, or involving, the Dentist)

[18] Article 7 of the Services Agreement outlines the circumstances under which the Services Agreement may be terminated:

> 7.1.2 TERMINATION BY PROFESSIONAL CORPORATION AND/OR FACILITY OPERATOR - Notwithstanding anything to the contrary contained in this Agreement, but subject to notice provisions contained in Section 7.1.2(i) hereof, this Agreement may be terminated by the Professional

> Corporation and/or the Facility Operator upon the occurrence of any one of the following events (each, a "**Cause Event**"):
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> . . .
>
> i) upon the Dentist's or the Associate's failure to remedy any breach of any provision of this Agreement applicable to it (save for the provisions contained in Article 10 or in any subparagraph of this Section 7.1.2), after having been given at least thirty (30) days written notice of default concerning such breach by the Professional Corporation or the Facility Operator. The Dentist and the Associate acknowledge and agree that a breach in respect of Article 10 hereof, or in respect of any other subparagraph of this Section 7.1.2 is not a breach that is curable;
>
> . . .
>
> k) upon any misconduct of the Dentist or the Associate which would, in the opinion of the Professional Corporation or the Facility Operator, acting reasonably, bring the Dentist's or the Associate's reputation into disrepute or impair the goodwill of the Dental Endeavour.

[19] Under Article 13 of the Services Agreement, Dr. Minhas had the ability to bring potential acquisitions to Dentalcorp and had the ability to profit if Dentalcorp decided to acquire the practice:

> 13.0 SATELLITE ACQUISITION PAYMENTS – In order to help facilitate growth of the Dental Endeavour, the Facility Operator and the Professional Corporation have agreed to evaluate potential Satellite Acquisitions proposed by the Associate from time to time. If the Facility Operator and the Professional Corporation elect to fund the acquisition of a Satellite Practice (including all legal and other professional fees relating to any such acquisition), the purchase price for the Satellite Practice shall be based … (the "Satellite Purchase Price"). The purchase price payable by the Facility Operator and the Professional Corporation in respect of any Satellite Acquisition shall be determined by the Facility Operator and the Professional Corporation in their sole and unfettered discretion. In the event that the Associate is able to negotiate a Satellite Acquisition at a purchase price which is less than the Satellite Purchase Price (the "Satellite Actual Price"), the Facility Operator and the Professional Corporation agree to pay the Associate the difference … No Satellite Acquisitions shall occur except on terms and conditions which are satisfactory to the Associate, the Facility Operator and the Professional Corporation.
>
> 13.1 AMENDMENTS TO THIS AGREEMENT FOLLOWING SATELLITE ACQUISTIONS – Notwithstanding any other provision of this Agreement, upon completion of any Satellite Acquisition, the parties hereto acknowledge and agree as follows:
>
> > (a) the Initial Term of this Agreement shall be extended for a period of five (5) years from the date of the Closing of the most recent Satellite Acquisition …

> (b) in the Anniversary Year in which a Satellite Acquisition occurs, for the purposes of determining any adjustments to the revenue allocation payable to the Associate pursuant to Section 6.6 hereof, the Gross Cash Flow, Minimum Annual Cash Flow and the Net Cash Flow Amount shall be amended to include a portion of the Gross Satellite Cash Flow of the Satellite Acquisition …

[20] Pursuant to section 10.1 of the Share Purchase Agreement, the plaintiffs provided $50,000 to the defendants to allow them to secure assistance from "accounting, legal and other professional advisers" in connection with the Agreements.

[21] In the Asset Purchase Agreements, Dentalcorp purchased the professional goodwill in each of the FDC Clinics. "Professional Goodwill" is defined as follows:

> "Professional Goodwill" means the professional goodwill owned by the Vendors in connection with the Practice, including without limitation, all right, title and interest of the Vendors, the existing telephone and fax numbers of the Practice, the Domain Name, all right, title and interest of the Vendors in any trade names of the Practice, including the name "Family Dental Care College Heights", and all right, title and interest in the email addresses "collegeheights@fdcpg.ca" and "specialty@fdcpg.ca" used by the Vendors and the Personnel in respect of the Practice, the benefit and burden of carrying on the Practice in succession to the Vendors, the benefit of the Vendors' relationship with its patients, title to and custody and control of all Patient Records, but excluding goodwill, if any, attributable to Commercial Activities;

C. Dr. Minhas' Role After the Transfer

[22] Dr. Minhas' role with Dentalcorp went well beyond the simple provision of dental services. As he describes it in his written argument:

> Unlike other Dentalcorp acquisitions, Dr. Minhas's role at Dentalcorp became less focused on his clinical work and more focused on his managerial expertise, which included *inter alia* his ability to identify potential dental practices that could be acquired by Dentalcorp.

[23] Dr. Minhas says that Dentalcorp sought his advice on a number of occasions. For example, Dentalcorp asked him to visit other Dentalcorp practices and provide his thoughts on how to improve their operations. He was also involved in potential Dentalcorp acquisitions. Dr. Minhas says the idea was that Dentalcorp would acquire

a practice and he would run it as manager. Between 2018 to 2022, Dr. Minhas worked with Dentalcorp on potential acquisitions of dental clinics in Prince George, Quesnel, Ladner, North Vancouver, and Kitsilano. Dr. Minhas says the only time Dentalcorp actually acquired a clinic under this arrangement was a clinic in Kitsilano (the "Kitsilano Clinic"), but because Dentalcorp failed to support the new clinic, he lost money on the deal.

D. The Extension

[24] The Services Agreement was initially set to expire on November 30, 2024. However, the parties entered into various agreements to extend. First, on January 31, 2020, following the acquisition of the Kitsilano Clinic, the term was extended to December 31, 2024. Second, in May 2020, the term was extended to December 31, 2025. Finally, on November 19, 2021, the parties entered into the Amending Agreement, which extended the term of the Services Agreement to March 31, 2026. As mentioned, the Amending Agreement provided for a payment of $1,066,590 (through cash and shares) to Dr. Minhas.

E. The Southridge Clinic

[25] In late 2021, Dr. Minhas became interested in the potential acquisition of the operations of the Southridge Clinic, a clinic located less than 10 kilometres from the FDC College Heights Clinic ("Southridge"). He brought this opportunity forward to Dentalcorp. Dentalcorp made two offers to acquire the clinic. Both were rejected.

[26] Dr. Minhas then proposed acquiring Southridge himself, independent of Dentalcorp. He raised this possibility with Josh Gibson, Dentalcorp's British Columbia Director of Partnership Development. He says that Dentalcorp initially responded favourably to this proposal. On January 5, 2022, Mr. Gibson texted Dr. Minhas that Michelle McAra, Dentalcorp's Vice President of Corporate Development, said they could "figure something out" regarding Dr. Minhas' acquisition of Southridge.

[27] The parties describe the following conversation differently. Ms. McAra says she discussed with Dr. Minhas the concerns that Dentalcorp had regarding partners purchasing other dental clinics while the partner was still under contract with Dentalcorp. Ms. McAra says she told Dr. Minhas that Dentalcorp had made certain exceptions to their restrictive covenants for particular partners. However, these exceptions were rare and based on specific terms. Ms. McAra stated that to consider this option in relation to Southridge, Dentalcorp would require several conditions, including that:

1. Dentalcorp be given an option to purchase the new clinic in two or three years;

2. There be an equalization/set-off calculation if the old dental clinics the partner was responsible for experienced a decrease in revenue;

3. No Dentalcorp staff would work for the new clinic; and

4. The partner would continue to work at the new clinic for a few years if the new clinic was purchased by Dentalcorp.

[28] Ms. McAra told Dr. Minhas that such terms would have to be addressed for Dentalcorp to consider approving Dr. Minhas' Southridge proposal. She says that no agreement was ever presented to her that addressed Dentalcorp's concerns.

[29] Not surprisingly, Dr. Minhas describes his interactions with Dentalcorp somewhat differently. He states that during a phone call on January 7, 2022, Ms. McAra told him that Dentalcorp had allowed partners to purchase practices previously and that any concerns about diverting patients did not apply to Dr. Minhas since he had been a high-performing partner in the Dentalcorp network and had a history of running successful associate-run practices. He alleges that Ms. McAra gave him a 'green light' to proceed with the purchase of Southridge and that Dentalcorp would provide him with the framework for a deal. However, Dr. Minhas never received any framework from Dentalcorp.

[30] On February 6, 2022, Dr. Minhas emailed Ms. McAra stating that he intended to move ahead with the Southridge acquisition. He asked for more information on the "framework" that Dentalcorp wanted. Ms. McAra did not respond to this email. On February 17, 2022, Dr. Minhas was preparing to close the deal and followed up with Mr. Gibson by text message. Dr. Minhas advised him that Ms. McAra had given "the green light" to move forward with the deal, and while he understood that she wanted to provide him with a "framework," he hadn't heard anything about this. Mr. Gibson told Dr. Minhas that he would follow up with Ms. McAra, but that her "word was good" and that it would "be fun to watch this grow and then I'll say told you Jessey could do it".

[31] Dr. Minhas says he did not receive any indication that Dentalcorp disapproved of his involvement with Southridge until May 2023.

[32] Dentalcorp's Vice President of Operations, Vikas Sharma, says that he learned about Dr. Minhas' role in Southridge in around May 2023 when he went to visit the FDC Clinics. During his visit, Mr. Sharma spoke with associate dentists Drs. Choi and Chahal who advised Mr. Sharma that they had been approached by Dr. Minhas to potentially purchase a franchise. Mr. Sharma learned that several Dentalcorp employees were working for both FDC Clinics and Southridge.

F. Negative Commentary

[33] Mr. Sharma says that in early 2022, while working on a practice optimization project, Dr. Minhas responded to a contract that Dentalcorp proposed entering into with him by cursing and saying words to the effect of "this is what you guys do". Dentalcorp alleges that Dr. Minhas then refused to work with Mr. Sharma on the project, and that he continued to openly ridicule and criticize Dentalcorp management. Dr. Minhas made the following remarks over email:

> July 4, 2023: "DCC is not a company that genuinely desires to do the right thing."
>
> February 9, 2024: "It's not going to be easy for DCC to get everyone on board. Nevermind the fact everyone hates them and hopes the company fails so they can take back their offices..."

[34] Mr. Sharma says that Dr. Minhas' email of July 4, 2023, was sent to, among others, an individual who was never an employee of FDC Clinics or Dentalcorp.

[35] On February 23, 2024, in response to an email from Dentalcorp suggesting an increase in fees, Dr. Minhas wrote the following in an email to Drs. Chahal and Tao:

> "This is the constant nonsense I deal with from DCC. In short they want increases to our fee guide on codes that are covered under the "basic" fee category. The problem with this is many people have 100% coverage or dual coverage on basic procedures. When we "nickel and dime" them with 2% increase on these codes, they notice right away."

[36] In an email later that day, Dr. Minhas wrote to them that "DCC also wants us opting out of the National dental plan as well … So stupid. But it will fill up your Smili Clinics with many, many happy appreciative pts."

G. Smili Venture

[37] On November 11, 2022, Dr. Minhas called Mr. Sharma and told him about his concept for a new initiative called "Smili Dental" (the "Smili Venture"). It was a franchise model. Smili Dental would be the franchisor. The concept was that Smili Dental would help dentists find a location, start up their practice, and help them establish administrative and clinical systems.

[38] Dr. Minhas says that he asked Mr. Sharma if Dentalcorp would be supportive of the Smili Venture. He says that Mr. Sharma's response was to the effect of:

> You are one of our top performing partners. We will look to support you any way we can. I will speak with other members of the senior leadership team to see how we can support your venture.

[39] Dr. Minhas says he asked Mr. Sharma if Dentalcorp would potentially sue him and Mr. Sharma responded: "No, we would never do anything like that".

[40] Mr. Sharma denies that he ever said any such thing. Mr. Sharma says he brought to Dr. Minhas' attention the fact that this operation would be a business in competition with Dentalcorp, contrary to the Agreements. Mr. Sharma encouraged

Dr. Minhas to speak to Mr. Guy Amini, president of Dentalcorp, regarding the conflict concern.

[41] Dr. Minhas spoke with Mr. Amini in early 2023. Dr. Minhas says he raised the Smili Venture, and that Mr. Amini did not raise any objection.

[42] By early March 2023, Dr. Minhas created a public website for the Smili Venture which identified his involvement as founder and identified the involvement of certain FDC Clinic staff.

[43] On March 1, 2023, Dr. Minhas texted Mr. Sharma: “I want to renegotiate my compensation with Nate. The current arrangement makes no sense and I will not be continuing on under current terms. I also would like some urgency on this matter. I’m setting a deadline of Mar 15.” In the messages that followed that day, Mr. Sharma sought clarification as to Dr. Minhas’ position. Mr. Minhas’ stated, among other things, that: “I can have my lawyer propose a new services contract for my services moving forward. I will no longer work under any contract signed with DCC. The basic terms will be …”.

[44] Mr. Sharma responded that he assumed the new proposed terms would only take effect after the expiry of Dr. Minhas’ current Services Agreement. Dr. Minhas responded: “I’m considering myself done with any DCC contract. This is my last week in PG under current terms.”

[45] The two eventually scheduled a meeting for March 3, 2023, to discuss matters further. On March 3, Dr. Minhas texted to cancel the meeting saying, “I don’t want to negotiate anything”. He stated that he had looked closely at the financials and his contract and went on to detail several concerns he had. Dr. Minhas concluded the text by stating: “it’s futile to talk about this. I don’t agree with my compensation at all or the lack of transparency. It’s best we all move on.”

[46] Notwithstanding these declarations, Dr. Minhas continued to work for the plaintiffs. He remained with them until his termination in June 2024.

[47] On March 9, 2023, Dr. Minhas advertised the Smili Venture at a booth at the Pacific Dental Conference. FDC staff were in attendance.

[48] On March 20, 2023, Dentalcorp expressed concern to Dr. Minhas regarding the Smili Venture in a call with Mr. Perez, chief legal officer at Dentalcorp, where Mr. Perez expressed that there was "anxiety" over the Smili Venture and advised Dr. Minhas that Dentalcorp felt he was in breach of contract and would look to press legal action. Dr. Minhas says that Mr. Perez sought a financial role for Dentalcorp in the Smili Venture, suggesting that Dentalcorp could be a "silent partner". Dr Minhas rejected this proposal.

[49] Counsel for Dentalcorp sent Dr. Minhas a letter on May 2, 2023 (the "Breach Letter"), stating:

> **Re: Breach of Services Agreement**
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> …
>
> Dentalcorp has discovered you have committed various breaches of the Service Agreement which include, but are not limited to, the following:
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> a) You have started a competing dental business "Smili Dental";
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> b) You have hired employees of the Dental Endeavour to work at Smili Dental;
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> c) You have purchased and are involved in the operations of Southridge Dental Clinic, located in Prince George, BC which was never accepted or forgiven by dentalcorp as you failed to provide dentalcorp with an option to purchase or a right of first refusal;
>
> d) You have failed to promote the Dental Endeavour; and
>
> e) You have taken an unauthorized leave of absence.
>
> The above actions (a-e) were done without prior written consent from dentalcorp and breach the Services Agreement, including paragraphs 2.3, 2.16, 2.9, and article 10…
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> …
>
> As dentalcorp is currently investigating these matters further, dentalcorp hereby reserves all remedies pursuant to the Services Agreement and all claims for damages arising from these breaches and any further breaches not yet discovered … Please note that damages go far beyond any Cash Flow Decrease that may arise at the Dental Endeavour.
>
> We demand that you take immediate steps to remedy these breaches …

[50] In July 2023, Southridge changed its signage to indicate that it was part of the Smili Venture. The Smili website for Southridge also revealed that Dr. Jason Tao was its franchise owner. Dr. Jason Tao is one of Dentalcorp's associates at FDC College Heights.

[51] Around this same time, Dentalcorp made partnership offers to Jesse Chahal and Joon Choi, two associate dentists at Dentalcorp, offering to provide them with a share of the profits and retained interests. Both rejected the offers. Both told Mr. Sharma that Dr. Minhas had provided them with the option of purchasing a Smili Venture franchise.

[52] The parties explored options through 2023 to determine if they could arrive at a solution that would accommodate the Smili Venture, but those efforts were unsuccessful.

H. The Powell River Clinic

[53] In March 2024, it was announced that Smili would be opening a location in Powell River (the “Powell River Clinic”). According to the announcement, the clinic was to open in the “Summer 2024”. Dr. Minhas’ counsel advised the court that the Powell River Clinic was now operating. Evidence suggests that Dr. Jason Tao would be the owner of this clinic.

[54] Mr. Sharma says that Dentalcorp only learned of Dr. Minhas’ intention to open the Powell River Clinic in June 2024.

[55] Dentalcorp learned that its employees were meeting during the workday to discuss Smili matters involving the Powell River Clinic. On Wednesday, March 27, 2024, Dentalcorp’s Jamie Irving and Sonia Schutz were scheduled to meet at 3 pm-4 pm for a “Smili Powell River Visit Discussion”.

[56] On July 9, 2024, Dentalcorp learned that a hygienist being trained at a Dentalcorp clinic in Vancouver was moving to the Powell River Clinic.

I. Pine Centre Clinic

[57] There is evidence of the defendant's intention to open a new proposed Smili Venture clinic in Prince George's Pine Centre (the "Pine Centre Clinic"), a clinic that would be within 10 kilometres of an FDC Clinic. Dentalcorp says that it learned in June 2024 that Dr. Chahal has partnered with Dr. Minhas to open the clinic. At an adjournment application on July 30, 2024, Dr. Minhas' counsel advised the Court that the intention was for the Pine Centre Clinic to open in October/November 2024.

[58] Dr. Chahal was a high-earning Dentalcorp associate and had a loyal client base. Both Dr. Chahal and Dr. Tao were high producers for Dentalcorp. In 2022:

a) Dr. Chahal produced $1,209,894 in revenue at FDC Spruceland; and

b) Dr. Tao produced $1,120,910 in revenue at FDC College Heights.

[59] Dr. Tao and Dr. Chahal have been featured in promotional videos for the Smili Venture notwithstanding that Dr. Tao continues to be employed by Dentalcorp.

J. Employee Solicitation

[60] Dentalcorp discovered that in a January 22, 2024, email to Dentalcorp's Dr. Chan, Ms. Schutz stated: "If you will be working under the Smili umbrella the contract will have the same terms but a slightly simplified version. I can draft that as soon as we have all the details as well."

[61] On June 24, 2024, Dentalcorp learned from *When I Work*, its human resources and management software system, that staff were being shared between Pine Centre Clinic and FDC Spruceland. Dentalcorp also learned that its student Dr. Maxwell Chan was scheduled to work at the Pine Centre Clinic.

[62] Several FDC staff have been hired to do work at Smili Venture clinics.

K. Other Clinics

[63] Dentalcorp has discovered evidence of Dr. Minhas' plans to open other Smili-associated dental clinics in British Columbia, including locations in Vancouver and North Vancouver.

L. Alleged Use of Dentalcorp's Resources and Confidential Information

[64] Dentalcorp provided evidence that it has been paying for Smili's human resources and scheduling software since October 2023. The expense was approved by Dentalcorp under the mistaken assumption that the program was being used solely for FDC Clinics.

[65] Dentalcorp says it has also paid for a storage locker that was partially filled with the Smili Venture's Southridge patient files.

[66] On March 22, 2024, Ms. Schutz sent an email during the workday using her FDC email address, attaching a practice manager job posting for Smili Venture.

[67] Between June 24 to 27, 2024, there is evidence which suggests that Ms. Schutz shared various Google Drive documents from her FDC email address to her personal email address. Dentalcorp says that these documents contain Confidential Information and intellectual property of Dentalcorp.

[68] Dr. Minhas says that he does not possess any of Dentalcorp's Confidential Information and that Ms. Schutz did not provide him with anything from the Google Drive.

M. Termination

[69] On June 24, 2024, the plaintiffs delivered a termination notice to Dr. Minhas (the "Termination Letter"). Dr. Minhas' alleged breaches were outlined as follows:

> **Termination of Services Agreement**
>
> dentalcorp is terminating the Services Agreement effective immediately. This termination is due to a number of material breaches by you, which include but are not limited to:

a) the purchase and involvement in the operations of the Southridge Dental Clinic, a competing dental clinic;

b) opening and continuing to operate Smili Dental, a competing dental business;

c) opening and continuing to operate a competing dental clinic in Powell River, BC (the "Powell River Clinic");

d) soliciting and hiring individuals from the FDC Clinics to operate and be involved with the Southridge Dental Clinic, Smili Dental, and the Powell River Clinic;

e) using Confidential Information (as defined in the SA) for the benefit of the Southridge Dental Clinic, Smili Dental, and the Powell River Clinic;

f) soliciting clients/patients of the FDC Clinics for the benefit of the Southridge Dental Clinic and Smili Dental;

g) encouraging and requiring personnel to work for a competing business while employed or otherwise retained by the FDC Clinics; and

h) disparaging the FDC Clinics and dentalcorp.

Your conduct as outlined above materially breached the Services Agreement including, but not limited to, the following terms/obligations:

a) to promote and enhance the interests of dentalcorp and refrain from doing anything that may hinder the performance of the Services Agreement (SA: section 2.3);

b) to not disclose and use Confidential Information (defined in the SA) for purposes other than providing services in accordance with the terms of the Services Agreement (SA: Article 5);

c) the non-competition and non-solicitation terms (SA: Article 10); and

d) to hold the full benefit of the relationships with clients in trust for the benefit of dentalcorp (SA: section 10.0.1).

III. ANALYSIS

A. General Legal Principles

[70] The Court's authority to grant an interlocutory injunction is derived from s. 39 of the *Law and Equity Act,* RSBC 1996, c. 253, s. 39. The Court has the discretion to issue an injunction "in all cases in which it appears to the court to be just or convenient that the order should be made", either unconditionally or on such terms and conditions as the Court thinks just: *Tracy v. Instaloans Financial Solution Centres (B.C.) Ltd.,* 2007 BCCA 481 at paras. 30-33.

[71] *Diamond Delivery Inc. v. Calder*, 2023 BCSC 194 describes the test in greater detail, with particular focus on situations where the injunction sought arises in the context of a restrictive covenant agreed to as part of the sale of a business:

> [64] In *RJR-MacDonald Inc. v. Canada (Attorney General)* [1994] 1 S.C.R. 311 at 334, 1994 CanLII 117 [RJR-MacDonald], the Supreme Court of Canada affirmed the three-stage test for courts to apply when considering an application for an interlocutory injunction, which asks:
>
> > a) Have the applicants raised a fair question for trial or a serious question to be tried?
> >
> > b) If the injunction is not granted, will the applicant suffer irreparable harm, i.e., harm that cannot adequately be compensated by damages?
> >
> > c) Does the balance of convenience favour granting the injunction such that the applicants are likely to suffer greater harm than the respondents if the injunction is refused?
>
> ….
>
> [67] However, the law distinguishes between non-competition obligations that form part of an employment agreement and those arising the context of a commercial agreement involving the transfer of ownership of a business: *Payette v. Guay inc*., 2013 SCC 45 at paras. 2, 58; *Shafron v. KRG Insurance Brokers (Western) Inc*., 2009 SCC 6 at paras. 21-22.
>
> …
>
> [70] In both instances, the test for assessing the reasonability of a non-competition clause is whether it is not more restrictive than necessary to adequately protect the interests of the party seeking to uphold it, based on factors including its temporal length, territorial scope, the nature of activities prohibited and overall fairness: …
>
> [71] It is also important that the covenant be clear and unambiguous to meet the test of reasonability: *Shafron* at para. 43.
>
> [72] Thus, while a restrictive covenant arising in an agreement for sale of a business will usually be enforced because "it is in the best interests of the seller to be able to provide a reliable assurance to the purchaser that the promise not to compete in the same business can be enforced" (*IRIS The Visual Group Western Canada Inc. v. Park*, 2017 BCCA 301 at para. 21), a restrictive covenant arising in the context of an employment contract will be *prima facie* void because it is contrary to the "important public interest in discouraging restraints on trade, and maintaining free and open competition unencumbered by the fetters of restrictive covenants"…
>
> [Emphasis added.]

B. Application of the Test

1. Nature of the Agreements

[72] A preliminary issue the Court must resolve is the nature of the relationship underlying the Restrictive Covenants. The plaintiffs argue that the Restrictive Covenants should be assessed as "restrictive covenants given by the vendor on a sale of a business". The defendants take the position that the Restrictive Covenants are more properly characterized as "restrictive covenants found in employment contracts by virtue of the fact that when Dr. Minhas signed the Amending Agreement, he was effectively an employee, without the same bargaining ability that he had when the Services Agreement was initially negotiated."

[73] The legal significance of this disagreement is that it determines what presumption the Court should adopt in relation to enforcement of the covenants. As introduced above, a non-competition agreement in the employment context is presumptively unenforceable, whereas such agreements are presumptively lawful if part of a corporate sale: *Diamond Delivery Inc.* at para. 77.

[74] In determining whether a restrictive covenant is enforceable in an employment context, the court considers three questions:

a) Did the employer have a legitimate "proprietary interest" deserving protection?

b) Was the restrictive covenant "reasonable" in terms of geography and duration?

c) Is the restrictive covenant otherwise unenforceable as being against competition generally and not limited to proscribing solicitation of clients or customers of the former employer?

Powell River Industrial Sheet Metal Contracting Inc. (P.R.I.S.M.) v. Kramchynski, 2016 BCSC 883 [*PRISM*] at para. 82.

[75] Conversely, the reasonableness of a commercial non-competition clause is assessed according to the Supreme Court of Canada's more forgiving approach in *Payette v. Guay Inc.*, 2013 SCC 45:

> [61] In a commercial context, a non-competition covenant will be found to be reasonable and lawful provided that it is limited, as to its term and to the territory and activities to which it applies, to whatever is necessary for the protection of the legitimate interests of the party in whose favour it was granted: *Copiscope Inc. v. TRM Copy Centers (Canada) Ltd*., 1998 CanLII 12603 (Que. C.A.). Whether a non-competition clause is valid in such a context depends on the circumstances in which the contract containing it was entered into. The factors that can be taken into consideration include the sale price, the nature of the business's activities, the parties' experience and expertise and the fact that the parties had access to the services of legal counsel and other professionals. Each case must be considered in light of its specific circumstances.

[76] In *IRIS The Visual Group Western Canada Inc. v. Park,* 2017 BCCA 301 [*IRIS*], the Court of Appeal outlined the rationale for distinguishing non-competition clauses in an agreement to sell a business from those in employment contracts:

> [20] The rationale for the different approach was explained in *Shafron v. KRG Insurance brokers (Western) Inc*., 2009 SCC 6:
>
> > [21] The sale of a business often involves a payment to the vendor for goodwill. In consideration of the goodwill payment, the custom of the business being sold is intended to remain and reside with the purchaser. … And as stated by Dickson J. (as he then was) in *Elsley v. J. G. Collins Insurance Agencies Ltd.,* 1978 CanLII 7 (SCC), [1978] 2 S.C.R. 916, at p. 924:
> >
> > > A person seeking to sell his business might find himself with an unsaleable commodity if denied the right to assure the purchaser that he, the vendor, would not later enter into competition.
> >
> > See also *Burgess v. Industrial Frictions & Supply Co.* (1987), 1987 CanLII 2722 (BC CA), 12 B.C.L.R. (2d) 85 (C.A.), per McLachlin J.A. (as she then was), at p. 95.
> >
> > [22] The same considerations will not apply in the employer/employee context. No doubt an employee may build up a relationship with customers of the employer, but there is normally no payment for goodwill upon the employee leaving the employment of the employer. It is also accepted that there is generally an imbalance in power between employee and employer. For example, an employee may be at an economic disadvantage when litigating the reasonableness of a restrictive covenant because the employer may have access to greater resources (see, for example, *Elsley*, at p. 924,

> and *Mason v. Provident Clothing and Supply Co.*, [1913] A.C. 724 (H.L.), per Lord Moulton, at p. 745, quoted below at para. 33).
>
> [21] The distinction between these two categories reflects common sense principles. In the case of the sale of a business, the seller is normally being paid for the assets of the business including its goodwill. It is not only reasonable that the seller be held to a bargain not to compete with the purchaser in the same business, it is in the best interests of the seller to be able to provide a reliable assurance to the purchaser that the promise not to compete in the same business can be enforced.

[77] A similar point was made in *Dentalcorp Health Services Ltd v. Dr Kenneth Hamin Dental Corporation*, 2024 MBCA 44 [*Hamin MBCA*]:

> [30] The rationale for the distinction is clear. In a purely employment relationship, there is typically an imbalance in bargaining power between the parties and little to no consideration flowing to the employee in exchange for the promises given (see *Guay* at paras 5, 36, citing *Elsley* at 924; *Shafron* at para 23). Due to this, and to the traditional public policy against contracts in restraint of trade, a non-competition agreement will rarely be found to be reasonable. A non-solicitation agreement is generally less problematic as long as its scope is appropriately circumscribed. It is for these reasons that restrictive covenants in employment relationships are presumed to be unreasonable, unless demonstrated otherwise.
>
> [31] A similar power imbalance will not generally exist between a vendor and purchaser in the sale of a business in particular when, as here, all parties were represented by counsel. The inclusion of restrictive covenants "in a contract for the sale of a business is usually intended to protect the purchaser's investment" (*Guay* at para 37). Indeed, restrictive covenants work for the benefit of the vendor too. A vendor would have little value to offer if the vendor was not able to give enforceable restrictive covenants together with the keys to the business.
>
> [32] Because of these contextual differences, a restrictive covenant granted in a commercial context is presumed to be "lawful unless it can be established on a balance of probabilities that its scope is unreasonable" (*ibid* at para 58). As I have already indicated, the opposite presumption applies in the employment context. The differing approach to restrictive covenants given to support the sale of a business reflects commercial realities and "common sense principles" (*IRIS* at para 21).

[78] With those principles in view, is the present case best characterized as an employment relationship or a commercial transaction? The trial court in *Dentalcorp Health Services Ltd. et al. v. Dr. Kenneth Hamin Dental Corporation et al.*, 2023 MBKB 75, aff'd 2024 MBCA 44 [*Hamin*], considered a situation comparable to the present case, and applied the commercial test. There, the defendant sold the plaintiff

their dental practice, and the parties entered into a series of agreements that were very similar to the present fact pattern. The defendant argued that by signing an "Amended Agreement," they had become an employee of the plaintiff, and thus, the non-competition clauses must be assessed as employment agreements: at para. 32. Justice Toews disagreed with the defendant, finding that the agreement was part of a commercial arrangement (and that the later Amended Agreement did not change its character):

> [48] While the vendor agreed to provide services for a specified time period in conjunction with the purchase of the business by the purchaser, none of the terms of the sale, or the First Services Agreement specifically, give rise to a relationship akin to that of a dependent contractor or an employer/employee relationship. As the First Services Agreement specifically states, the defendants were providing the services of an independent contractor in conjunction with the plaintiffs.
>
> [49] As the court held in *Parekh*, when examining the propriety of restrictive covenants, it is important to consider the context in which those covenants were provided:
>
> > …
> >
> > [63] I am satisfied, based on the aforementioned evidence, that the non-compete covenant flowed from the bargain struck with respect to the sale of the business. Ira's goodwill in the practice was part and parcel of the sale transaction, and the Associate Agreement in which the non-compete covenant was found was a necessary and corresponding extension of the Share Purchase Agreement.
>
> [50] Similarly in this case, there has been a sale of a business by the vendor to the purchaser where the restrictive covenants were given by the vendor of the business to protect the purchaser's interest in the subject matter of the sale.
>
> [51] The fact that the parties agreed to an extension of the First Services Agreement by the execution of the Amended Agreement does not alter the fundamental nature of that relationship. The Restrictive Covenants continued in place for a period of time after the Amended Agreement expired as part and parcel of the original sale transaction, which was amended and restated by virtue of the Amended Agreement. In other words, the execution of the Amended Agreement, which then included the Kenora, Ontario dental practice, extended the timeframe during which the terms of the sale of the business, including the terms of the Restrictive Agreement, continued.
>
> …
>
> [54] There is no suggestion here by the plaintiffs that they are advancing a proprietary interest in the clients or patients themselves. The plaintiffs are simply seeking to preserve their goodwill occasioned by their management of dental practices at Reflections. As in *Mardon*, the plaintiffs here have a

legitimate proprietary interest in the goodwill and the plaintiffs are entitled to have those interests protected and enforced where there is a breach of those interests by the defendants.

[55] This position is neatly summarized in *Smilecorp Inc. v. Pesin*, 2012 ONCA 853 ("Smilecorp") where the court rejected an argument similar to the one being advanced here:

> [30] In essence, therefore, Dr. Pesin contracted to obtain the benefits of a 'turn key' dental practice built by others. By executing the management agreement, he gained an existing patient base, attracted and developed by Smilecorp and other dentists at the Centre, in exchange for his non-solicitation covenant, his professional services and his commitment that, when he left the Centre, those patients treated by him would remain at the Centre as patients of another dentist unless the patients elected otherwise. As the application judge held, at para. 76, the enticement to sign the management agreement with Smilecorp was the existence of "a built in client base and goodwill associated with the Centre".
>
> [31] Importantly, the management agreement also established a scheme to preserve the continuity of patient care and patient choice regarding patients' selection of their dentist in the event of termination of the agreement. The management agreement provided that a patient's records would be transferred, on request, to a dentist of the patient's choice (clause 19(9)(b)(iii)) and that "the patient's right to choose his or her health care provider is of paramount importance" (clause 3(4)). The management agreement also contained provisions that were designed to ensure that, upon Dr. Pesin's departure, the dental care of patients at the Centre would continue with a successor dentist at the Centre.
>
> [32] In my view, having embarked on his dental practice at the Centre on this basis, and having expressly acknowledged Smilecorp's right to protect its investment at the Centre, it was not open to Dr. Pesin, on termination of the management agreement, to deny either Smilecorp's proprietary interest in the business conducted and the premises at the Centre or its right to protect that interest by means of injunctive relief.
>
> [33] Accordingly, I would reject Dr. Pesin's attack on the application judge's finding that Smilecorp had a proprietary interest in its premises and business at the Centre. This attack is defeated by the express terms of the contracts that Dr. Pesin voluntarily entered into with Smilecorp, and of which he was the beneficiary.

[56] I find no substantive distinction between the facts in Smilecorp and the case here, insofar as the application of the relevant law to this issue

…

[73] In my opinion, the facts are clear here, not only from the specific wording of the Agreements, including the Amended Agreement, but also from the consideration of the factual matrix in which the parties operated, that there is no employment relationship between the parties. Nor is there any

> relationship here which bears the hallmarks of an employment or dependent contractor relationship. The relationship is that of an independent contractor.
>
> [Emphasis added.]

[79] In *Dentalcorp Health Services v. Poorsina*, 2023 ONSC 3531 [*Poorsina*], another comparable case, the court applied the commercial test, although the injunction was refused. There, Dentalcorp purchased five dental clinics from Dr. Poorsina and entered into a series of agreements similar to this present case, although it is not clear whether the service agreement was ever extended. Justice Ramsay found that the restrictive covenants were entered into in the commercial context:

> [23] In this case, Dentalcorp paid over three million dollars for the purchase of the professional goodwill of the defendants' clinics, which was a benefit to both sides. Dentalcorp paid over 11 million dollars for the clinics, which is a substantial investment, worthy of protection. Both sides had the benefit of legal advice and were fully aware of the business context in which the restrictive covenants were being agreed to and the commercial reality at the time. Dr. Poorsina and Poorsina DPC have implicitly acknowledged the importance of restrictive covenants to the extent that in May 2020, the defendants sought to be relieved of their agreement and negotiated a new Termination Agreement. As noted in *Tank Lining*, in such a case, regarding these restrictive covenants, it should only be in exceptional cases that the court should overrule the judgment of the parties, where the parties were advised, with equal bargaining power and enter into the business agreement.

[80] I find that the Restrictive Covenants entered into in the present case are properly treated as being part of a commercial transaction. The Agreements involved:

a) the sale of assets, including goodwill;

b) multiple operations in several locations;

c) a sale price in the many millions;

d) an express declaration that there was no employer/employee relationship; and

e) a clear intention to promote the plaintiffs' plan to expand their corporate footprint throughout British Columbia.

[81] Each of these features supports the application of the commercial test.

[82] I reject the defendants' argument that Dr. Minhas became an employee when he signed the Amending Agreement in 2021. Dr. Minhas' relationship with Dentalcorp leading up to signing the Amending Agreement, including his participation in the acquisition and management of Dentalcorp clinics, does not support a conclusion that the relationship suddenly became a mere employer/employee one. The primary factors in considering whether a relationship is that of an employee or an independent contractor are as follows: "(1) control; (2) ownership of the tools; (3) opportunities for profit from the performance of the tasks; and, (4) degree of financial risk assumed.": *Khan v. Vernon Jubilee Hospital*, 2008 BCSC 1637 at para. 60. In this case, Dr. Minhas continued to retain control over his work. He also had the opportunity under Article 13 of the Services Agreement to seek out and negotiate potential acquisitions, and if Dentalcorp decided to move forward, receive a profit from their acquisition.

[83] As such, I conclude that the essence of the Agreements was commercial. I find clear support for this conclusion from the decisions in *Hamin* and *Poorsina*. As such, the plaintiffs have a proprietary interest in the purchased goodwill protected by the Restrictive Covenants: *Poorsina* at paras. 18-29; *Hamin MBCA* at para. 39.

2. Strong Prima Facie Case

[84] The plaintiffs accepted that they need to establish a strong *prima facie* case to support the orders sought.

[85] This threshold has been described as follows:

> [17] … Courts have employed various formulations, requiring the applicant to establish a "strong and clear chance of success"; a "strong and clear" or "unusually strong and clear" case; that he or she is "clearly right" or "clearly in the right"; that he or she enjoys a "high probability" or "great likelihood of success"; a "high degree of assurance" of success; a "significant prospect" of

> success; or "almost certain" success. Common to all these formulations is a burden on the applicant to show a case of such merit that it is very likely to succeed at trial. Meaning, that upon a preliminary review of the case, the application judge must be satisfied that there is a strong likelihood on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice.
>
> *R. v. Canadian Broadcasting Corp.,* 2018 SCC 5

[86] I find that there is a strong *prima facie* case that the defendants have breached the Agreements. There is sufficient evidence to meet the standard in relation to the following alleged conduct by the defendants:

a) The defendants' involvement in the creation of the Pine Centre Clinic, a clinic within the 10-kilometre radius of an FDC Clinic: The defendants accepted in their written argument that, "Without accepting that the clause is enforceable, Dr. Minhas accepts that he is involved with a Competitive Business within the Restricted Territory, which is defined as 10 kilometers".

b) The defendants' role in the creation of the Powell River Clinic. The defendants stated in their written argument that "Dr. Minhas accepts that the Smili Venture is a Competitive Business for the purposes of this restriction, but does not accept that the Smili Venture breaches such restriction". Although a more qualified admission, I find that the evidence reviewed above is sufficient to take the matter the rest of the way up to the requisite standard.

[87] While there are other potential breaches of the Agreements, most notably in relation to the confidentiality issues, I am unable to conclude at this early stage that the relatively heavy burden has been met in relation to any other alleged breaches. The parties disagree as to whether Dr. Minhas has taken any of Dentalcorp's information and whether any of the alleged things Dr. Minhas has taken meet the definition of "Confidential Information" under the Services Agreement. The conflict in

the evidence will have to be resolved in order to more fully consider the merits as it relates to the other contested breaches.

[88] Further, Dentalcorp's strongest argument related to Confidential Information breaches was the Google Drive documents taken by Ms. Schutz. Dr. Minhas says that these documents were not shared with him. In any event, it appears these documents may have already been returned to Dentalcorp, which weighs against the necessity of an injunction in response to the alleged breach.

[89] In relation to the identified breaches of the Restrictive Covenants, the defendants advanced four key arguments against the strong *prima facie* case test having been met:

1. The Restrictive Covenants should not be enforced because they are unreasonable.

2. Consent was granted for the pursuit of the Smili Venture.

3. The plaintiffs should be prevented from relying on the identified breaches due to the operation of any one of a set of related legal principles, being waiver, condonation, acquiescence, promissory estoppel, and estoppel.

4. The plaintiffs wrongfully terminated Dr. Minhas, thereby precluding the plaintiffs from enforcing the Restrictive Covenants.

[90] In assessing whether a plaintiff has established a strong *prima facie* case, the court should consider the evidence and arguments presented by both sides: *Diamond Delivery Inc.* at para. 98. Having considered the defendants' evidence and arguments, individually and as a whole, I conclude that there remains a strong *prima facie* case in relation to the breaches identified above.

i. Reasonableness

[91] The parties expressly considered the reasonableness of the covenants when the Agreements were executed. Article 10.1 of the Services Agreement provides that:

> All restrictions contained in this Agreement are agreed to be reasonable and valid and all defences to the strict enforcement thereof by the other parties are hereby waived.

[92] Similarly, section 3 of the Non-Competition Agreements provides as follows:

> The Dentist hereby acknowledges and agrees that all restrictions contained in this Agreement are reasonable and valid and all defences to the strict enforcement thereof by the Professional Corporation or its permitted assigns, are hereby waived.

[93] In *Diamond Delivery Inc.*, Justice Sharma acknowledged the import of such advance agreements:

> [99] Finally, it is significantly material that Clause 2.1(e) of the non-competition agreement contains Mr. Calder's express acknowledgement and agreement that its terms are reasonable and necessary to protect the business being sold.
>
> [Emphasis added.]

[94] In *Payette,* the Supreme Court of Canada set out the following approach to assessing the reasonableness of a commercial non-competition agreement:

> [61] In a commercial context, a non-competition covenant will be found to be reasonable and lawful provided that it is limited, as to its term and to the territory and activities to which it applies, to whatever is necessary for the protection of the legitimate interests of the party in whose favour it was granted: *Copiscope Inc. v. TRM Copy Centers (Canada) Ltd*., 1998 CanLII 12603 (Que. C.A.). Whether a non-competition clause is valid in such a context depends on the circumstances in which the contract containing it was entered into. The factors that can be taken into consideration include the sale price, the nature of the business's activities, the parties' experience and expertise and the fact that the parties had access to the services of legal counsel and other professionals. Each case must be considered in light of its specific circumstances.
>
> [62] To properly assess the scope of the obligation of non-competition (and that of non-solicitation), it is also necessary to consider the circumstances of the parties' negotiations, including their level of expertise and experience and the extent of the resources to which they had access at that time…

[95] The factors considered in assessing reasonability include temporal length, territorial scope, the nature of the activities prohibited and overall fairness: *Diamond Delivery Inc.* para 94.

[96] The defendants rely on *PRISM*. There, the court considered that a non-competition agreement arising from the sale of a business between the plaintiff corporation and the defendant was initially reasonable, but became unreasonable and contrary to the public interest when the plaintiff failed to provide the defendant with sufficient work to allow him to receive certain benefits. In particular:

> [89] In failing to provide the defendant with sufficient work to allow him receive the benefit of a higher hourly rate of pay and the health and welfare benefits provided under the collective agreement, the plaintiff breached his obligation to the defendant under the employment agreement and rendered the non-competition agreement unenforceable against him. The broad non-competition agreement lost its legitimacy and became exploitive in circumstances where the plaintiff sought to restrict the defendant from working elsewhere but did not seek to promote the business or address the competition.

[97] As the plaintiffs point out, *PRISM* is distinguishable for the following reasons:

> This case concerns **restrictive covenants in an employment contract** between unionized worker and employer. The employer was the former owner of the business that was sold to the plaintiff. Part of the employment contract was that the employee would receive sufficient hours working. Employee's agreement not to compete for three years could not be separated from employer's agreement to employ employee in accordance with the collective agreement. The court ruled that the non-competition terms were enforceable initially but became unenforceable when there was a lack of hours provided.
>
> [Emphasis in original.]

[98] I find that the defendants' arguments about the reasonableness of the Restrictive Covenants do not prevent a finding that the plaintiffs have established a strong *prima facie* case in light of the following:

a) The defendants agreed that the terms were reasonable at the outset of the parties' relationship. This agreement was given after having received legal

advice paid for, at least in part, by the plaintiffs. As noted by Justice Sharma in *Diamond Delivery Inc.*, this is "significantly material".

b) The tightest restrictions are applied only to competitive businesses within a 10-kilometre radius of the practices transferred.

c) The more relaxed restrictions[2] are still constrained provincially.

d) I find that the temporal length of the Restrictive Covenants (three years following the expiration and/or termination of the Services Agreement) is reasonable. In *Payette,* the Court upheld a restrictive covenant that had a length of five years, noting that "courts regularly find clauses with similar terms valid": see para. 64.

e) Dentalcorp is a national corporation engaged in the business of acquiring and operating dental practices throughout the country.

f) The defendants were well aware of this fact when they sold their practices.

g) Indeed, the defendants were substantial beneficiaries of the plaintiffs' acquisition program, to the tune of many millions of dollars.

h) The purpose of the restrictions was to protect the plaintiffs' acquisition of all the goodwill and other assets of the defendants' practices. Allowing the establishment of competitive business would substantially undermine the consideration Dentalcorp was to receive.

i) The defendants were given access to funds by the plaintiffs so that they could obtain legal advice before entering into the Agreement. Dr. Minhas' business management skills and acumen were key drivers for the transaction. By inference, the defendants acknowledge this skill, given that the new Smili Venture rests upon it. Through the Smili Venture, Dr.

[2] The 10-kilometre restrictions prohibit the defendant from carrying on, being engaged or concerned with, or interested in any Competitive Business. The province-wide restrictions prohibits only the "acquisition, consolidation and/or management of any Competitive Business".

> Minhas is representing that he has special skills in locating, creating and developing dental practices above and beyond his base competency as a dentist. His involvement in the Powell River Clinic itself shows that his expertise has value outside the 10-kilometre radius and helps justify the plaintiffs' insistence on the provincial restriction.

[99] The defendants argue that the Restrictive Covenants "are not reasonable with reference to the activity protected, as they unreasonably restrain Dr. Minhas from operating clinics that do not actually compete with Dentalcorp, but fall within the ambit of the term 'Competitive Business' used in the Restrictive Covenants".

[100] The defendants point to the definition of Competitive Business in the Services Agreement, which includes "any business that is similar to or competes" with the plaintiffs, which is stated to include, without limitation:

a) any business that "directly or indirectly engages in or permits or otherwise facilitates the provision of products or services supplied" by the plaintiffs;

b) the practice of dentistry, including dental hygiene, denture therapy or any speciality practice of dentistry, and/or the provision of Health Care Services.

[101] Health Care Services is defined as follows:

> "Health Care Services" means institutional health care services, including, but not limited to: (i) dental laboratory, radiological and other technical diagnostic services; (ii) the preparation of drugs, dental amalgams and other related preparations for administration by dentists in connection with the provision of dental services; (iii) the operation of dental operatories, dental case rooms and anesthetic facilities, including all related dental surgical equipment and dental surgical supplies; (iv) the maintenance of dental operatories and dental equipment, including digital x-ray and other diagnostic imaging equipment; (v) the maintenance and operation of client recall systems; (vi) the maintenance and preparation of dental operatories, including sterilization, the preparation of dental trays; (vii) the preparation and maintenance of client dental records, including medical/dental histories and examination findings; (viii) the provision of client education in dental health care (extra-oral); (ix) assistance in dental surgical procedures, including instrument and material transfer and assistance in the administration of anaesthesia and rubber dam procedures; and (x) the employment or contracting of trained personnel, including

> registered dental assistants, dental hygienists and dental technicians, but specifically excluding any Regulated Services;

[102] I am not convinced that the definition of Competitive Business is unreasonable. The defendant agreed to the Restrictive Covenants, with the assistance of legal advice, as part of a corporate sale for substantial consideration, and further expressly agreed that the terms were reasonable. There is at least a strong *prima facie* prospect that the term will be interpreted in a manner that keeps its operation within the scope of businesses that could be competitive with the plaintiffs' operations. For example, notwithstanding the use of the words "institutional health care services, including, but not limited to", a court may find that the proper interpretation of the clause, when considering the surrounding circumstances, is effectively limited to potentially competitive businesses: *Sattva Capital Corp. v. Creston Moly Corp.,* 2014 SCC 53.

ii. Ambiguity

[103] To be reasonable, the terms of a restrictive covenant must be unambiguous: *Shafron v. KRG Insurance Brokers (Western) Inc*., 2009 SCC 6 at paras. 27, 43. Although they did not place much reliance on this point in their oral submissions, the defendants argued in their extremely fulsome written submissions that the Restrictive Covenants are ambiguous since they restrain Dr. Minhas from competition "in conjunction with" other parties.

[104] The defendants cite *IRIS,* where the Court of Appeal stated the following regarding a clause of a restrictive covenant that prohibited competition "in conjunction with" another person:

> [63] This clause fails the reasonableness test on two bases. First, it is ambiguous. What is the nature of the connection required to compete "in conjunction with" another person? How is one to determine whether an individual is "concerned with" a business that competes with IRIS?

[105] In *Karras v. Wizedemy Inc*., 2024 BCCA 301, the Court of Appeal for British Columbia stated the following regarding the assessment of ambiguity in a restrictive covenant:

> [35] As Justice Smith explained in *Rhebergen v. Creston Veterinary Clinic Ltd*., 2014 BCCA 97, a covenant is ambiguous if its meaning cannot be objectively determined. Ambiguity only arises where, on a fair reading of a contract as a whole, the language of the covenant in question is reasonably capable of more than one meaning. A covenant is not ambiguous simply because it is difficult to construe or its proper construction is a matter of differing opinions. If the meaning of a covenant is capable of being ascertained by application of the plain and ordinary meaning of the words and the ordinary rules of grammar, it is not ambiguous: *Rhebergen* at paras. 72–74.

[106] I find that the inclusion of the term "in conjunction with" in the Restrictive Covenants does not operate to make them unreasonable and thus unenforceable (at least to the level of the strong *prima facie* case standard) for the following reasons:

a) As plaintiffs note, *IRIS* is distinguishable in that it concerns the enforceability of a restrictive covenant in an employment context. A court must apply a heightened degree of scrutiny when assessing non-competition clauses in the employment context as opposed to following the sale of a business: *IRIS* at para. 19.

b) I do not read *IRIS* as holding that the use of the term "in conjunction with" will necessarily render an agreement ambiguous. For example, the Court of Appeal recently upheld an injunction prohibiting the use of confidential information based on an agreement prohibiting the use of such information "developed by [defendant] alone or in conjunction with others…": *Wizedemy Inc. v Karras*, 2024 BCSC 630 [*Wizedemy BCSC*] at para.16, aff'd 2024 BCCA 301.

iii. Consent

[107] I do not find that there is adequate evidence of consent so as to justify a finding that the plaintiffs do not have a strong *prima facie* case:

a) Consent was required to be in writing, and there is no evidence of such formal written consent for either of the two new clinics.

b) The less formal evidence of consent advanced by the defendants generally relates to Southridge, but the plaintiffs confirmed that they do not request any injunctive relief in relation to that clinic.

c) The plaintiff argues that informal consent for Southridge was effectively consent for the Smili Venture generally. I cannot accept that argument, at least for present purposes. What was initially presented by the defendants to the plaintiffs about the Smili Venture was a concept, not a clear statement of a plan with particular locations designated. At a minimum, based on the evidence before me, there was no advanced consent allowing the defendants to open as many Smili Venture clinics as they wished.

iv. Condonation, Waiver, Acquiescence, and Estoppel

[108] The defendants advance an array of potential defences to the claims on the merits. When a defendant puts forward a defence in seeking to negate an otherwise strong *prima facie* case, a court must assess whether the defence prevents the plaintiff from establishing their burden. The question is not whether the defence will ultimately succeed at trial. *Landmark Solutions Ltd. v 1082532 B.C. Ltd*., 2019 BCSC 2487 at para. 36, aff'd 2021 BCCA 29 [*Landmark Solutions BCCA*]. In *Dreco Energy Services Ltd. v. Wenzel*, 2004 ABCA 95, the Alberta Court of Appeal reasoned at para. 13 that when the plaintiff makes out a strong *prima facie* case for breach of a restrictive covenant, the defendant would need to establish a "very strong, almost ironclad, defence" to negate it.

[109] Although there is some variation between the tests underlying these various defences, I find that, on the facts of this case, they all rise or fall together. This is unsurprising given that virtually the same evidence drives each theory.

[110] Put at a high level, the defendants argue that the plaintiffs either (1) took too long to bring their injunction application, or (2) explicitly approved of the Smili Venture.

[111] On the first point, the defendants argued that the plaintiffs should have moved forward with their application by at least May 2023 and that the delay in bringing their application until July 12, 2024, should prevent them from advancing their application.

[112] I find that I cannot fault the plaintiffs for their conduct (at least to the extent required to establish a strong *prima facie* case) in light of the following:

a) Dr. Minhas was back at work for the plaintiffs after May 2023. As far as the plaintiffs were concerned, he appeared ready to respect the Agreements on a going-forward basis.

b) Given the various interactions that had taken place with Dr. Minhas regarding Southridge, it would have been reasonable for the plaintiffs not to pursue an injunctive remedy in relation to that specific clinic. In other words, the case for acquiescence, waiver or estoppel may be stronger in relation to Southridge, but the plaintiffs confirmed that Southridge is not part of the present application.

c) It was not unreasonable to wait until it was clear that the clinics at the focus of the present application were actually going to open. Any arrangements or plans to open could have fallen apart at any time. Once it was clear that they were going to open, then the plaintiffs had a far stronger case for injunctive relief, particularly on the issue of irreparable harm.

d) There is an element of inconsistency in the defendants' arguments. While arguing that the plaintiffs were in a position to take steps earlier, they also take the position that the defendants still do not have adequate evidence of harm, even after the opening of the new clinics. How could the plaintiffs be faulted for waiting until the (allegedly still inadequate evidence) was more convincing?

[113] Addressing the various legal theories with greater particularity:

a) Condonation generally requires that the party be aware of the other side's misconduct but then do nothing and continue the contractual relationship: *Nardulli v. C-W Agencies Inc*., 2012 BCSC 1686 at para. 305. The burden is on the party alleging condonation: *Nardulli* at para. 306. The cases on condonation cited by the defendants are distinguishable as they occur in the employment context.

b) Waiver occurs when a party, with full knowledge of its legal rights, communicates to the other party an unequivocal and conscious intention to abandon them: *First Majestic Silver Corp v. Davila*, 2013 BCSC 717 [*First Majestic*] at para. 171. Waiver may be inferred from the conduct of a party but cannot be inferred from silence alone: *First Majestic* at para. 175. The test is a stringent one: *First Majestic* at para. 173.

c) Acquiescence requires establishing that the plaintiff, by delaying the initiating or prosecution of their case, has either: "(a) acquiesced in the defendant's conduct or (b) caused the defendant to alter his position in reasonable reliance on the plaintiff's acceptance of the status quo, or otherwise permitted a situation to arise which it would be unjust to disturb": *Erschbamer v. Wallster*, 2014 BCSC 2171 at para. 33, citing *M. (K.) v. M. (H.)*, 1992 CanLII 31 (SCC), [1992] 3 S.C.R. 6.

d) Promissory estoppel requires that the party relying on the doctrine establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, in reliance on the representation, he acted on it or in some way changed his position: *Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 SCR 50, 1991 CanLII 58 at p. 57. This test has been restated by the Supreme Court of Canada as requiring that the following elements be established by the party seeking to rely on the doctrine:

i. the parties be in a legal relationship at the time of the promise or assurance;

ii. the promise or assurance be intended to affect that relationship and to be acted on; and

iii. the other party in fact relied on the promise or assurance to their detriment: *Trial Lawyers Association of British Columbia v. Royal & Sun Alliance Insurance Company of Canada*, 2021 SCC 47 at para. 15.

[114] In terms of the estoppel by representation and estoppel by convention defences, the legal requirements were reviewed in *Ryan v. Moore,* 2005 SCC 38:

> 4 Estoppel by convention operates where the parties have agreed that certain facts are deemed to be true and to form the basis of the transaction into which they are about to enter (G. H. L. Fridman, *The Law of Contract in Canada* (4th ed. 1999), at p. 140, note 302). If they have acted upon the agreed assumption, then, as regards that transaction, each is estopped against the other from questioning the truth of the statement of facts so assumed if it would be unjust to allow one to go back on it (G. S. Bower, *The Law Relating to Estoppel by Representation* (4th ed. 2004), at pp. 7-8).
>
> 5 Estoppel by representation requires a positive representation made by the party whom it is sought to bind, with the intention that it shall be acted on by the party with whom he or she is dealing, the latter having so acted upon it as to make it inequitable that the party making the representation should be permitted to dispute its truth, or do anything inconsistent with it (*Page v. Austin* (1884), 1884 CanLII 6 (SCC), 10 S.C.R. 132, at p. 164).

[115] For all these defences, the defendants largely rely on the alleged conversation with Mr. Sharma wherein he allegedly stated that he would speak to members of the leadership to “see how we can support your venture” and said that Dentalcorp would never sue; as well as the fact that Mr. Amini failed to register an objection to the Smili Venture. Here, the plaintiffs strongly dispute the defendants’ version of events.

[116] The issue for the defendants is that they rely solely on Dr. Minhas’ recollections of the conversations, but few, if any, of his assertions are confirmed by independent evidence. In contrast, the emails submitted support Dentalcorp’s

position that they continually expressed concern that the Smili Venture was in breach of the Restrictive Covenants. Given this, I see no basis not to give the plaintiffs' denials sufficient weight so as to maintain their strong *prima facie* case.

v. Wrongful Termination

[117] The defendants did not place much emphasis on this argument in oral submissions. The burden is on the defendants to show that there was a wrongful termination.

[118] The defendants argue that, under s. 7.1.2 of the Services Agreement, Dentalcorp cannot terminate Dr. Minhas for breach of the Restrictive Covenants, as termination requires a "cause event" and the drafters of the Services Agreement did not include a breach of Article 10 (i.e. the Restrictive Covenants) as a cause event.

[119] Under s. 7.1.2(i), Dentalcorp is allowed to terminate the Services Agreement:

> upon the Dentist's or the Associate's failure to remedy any breach of any provision of this Agreement applicable to it (save for the provisions contained in Article 10 or in any subparagraph of this Section 7.1.2), after having been given at least thirty (30) days written notice of default concerning such breach by the Professional Corporation or the Facility Operator. The Dentist and the Associate acknowledge and agree that a breach in respect of Article 10 hereof, or in respect of any other subparagraph of this Section 7.1.2 is not a breach that is curable;
>
> [emphasis added.]

[120] Section 7.1.2(i) allows Dentalcorp to terminate the Services Agreement following the breach of a provision other than those listed in s. 7.1.2, if the Dentist fails to remedy the breach within 30 days of receiving written notice concerning the breach. Article 10 is stated to be a breach that is not curable under this section.

[121] In my view, the better interpretation of this clause is not that a breach of Article 10 cannot support termination but rather that respect for Article 10 is so important that it cannot be cured. At a minimum, there is a strong *prima facie* case that this interpretation is correct.

[122] The defendants say that having repudiated the Services Agreement, and this repudiation having been accepted by Dr. Minhas, the Services Agreement and the related Restrictive Covenants are at an end, and both parties are relieved of their obligations under it.

[123] While the Services Agreement includes a clause that provides that the Restrictive Covenants will survive any termination of the Services Agreement, the defendants argue that the clause does not specifically contemplate a wrongful dismissal. The defendants cite *Globex Foreign Exchange Corporation v. Kelcher*, 2011 ABCA 240 at paras 42-72; *Yellow Pages Group v. Anderson*, 2006 BCSC 518; and *Raymond Salons Ltd. v. Boucher*, [1990] B.C.J. No. 124, 1990 CanLII 1763. All three cases are distinguishable as occurring in the employment context. Further, *Yellow Pages Group* does not appear to support the defendants' argument that a term survival clause must explicitly contemplate wrongful termination:

> [34] The defendants' suggestion that the plaintiff cannot rely on the contracts of employment since they have been terminated is also without merit. Were it the law that upon termination of employment no obligations under the contract of employment survived, there would be no possibility of ever enforcing non-competition or non-solicitation clauses that are intended to govern the immediate post-employment period. In any event, the argument put forward by the plaintiff in this regard has been rejected by this court in *Raymond Salons Ltd. v. Boucher*, 1990 CanLII 1763 (BC SC), [1990] B.C.J. No. 124, 47 B.L.R. 217 (S.C.).

[124] In *Raymond Salons Ltd*., the Court held that where there is specific contemplation of an event such as wrongful dismissal, that will be enforced. However, it does not stand for the obverse position, i.e., that the absence of that clause necessarily means that the restrictive covenant cannot be enforced.

[125] Furthermore, and in any event, at this early stage of the litigation, I cannot find adequate evidence of a wrongful termination that would prevent the plaintiffs from relying on the identified breaches of the Restrictive Covenants to support the injunction.

3. Irreparable Harm

[126] In *Wizedemy BCSC*, the court set out the requirement for a finding of irreparable harm in the context of a restrictive covenant as follows:

> [39] Irreparable harm constitutes harm that cannot be quantified in monetary terms or cannot be cured. Examples of irreparable harm include: where one party will be put out of business, permanent market loss or loss of customers, irreparable damage to reputation, loss of the ability to exploit a market, and the inability of a defendant to pay damages: *Vancouver Aquarium* at para. 57; and *Accurate Material Testing Ltd*. at paras. 35-36.
>
> [40] The evidentiary foundation for irreparable harm must be more than speculative but "clear proof of irreparable harm is not required": *Wale* at para. 50; *Vancouver Aquarium* at paras. 58-60.

[127] The defendants agreed when they entered the Agreements that any breach of the Restrictive Covenants would result in irreparable harm that would entitle the plaintiffs to an injunction: Services Agreement, s. 10.2; Non-Competition Agreements, s. 3. While not determinative on an application for an injunction, this advance consideration of the effect of any breach is a significant factor supporting a finding of irreparable harm: *Diamond Delivery Inc.* at para. 106.

[128] The plaintiffs correctly note that the irreparable harm requirement is usually satisfied in a commercial context. In *Belron Canada Inc. v. TCG International Inc.*, 2009 BCCA 577, the Court of Appeal noted that:

> [22] It is probably correct to say that in most commercial cases involving sophisticated and solvent litigants in which a strong *prima facie* case is made out that there has been or will be breach of a negative covenant, an interim injunction will be granted. But this area of law would not be well served by formulating a rule, as suggested by [the appellant], that the injunction should always be granted absent exceptional circumstances. The questions of irreparable harm and balance of convenience should be addressed. Each motion for an interim injunction should be determined on a discretionary basis under the three-part test. On the present state of the law, there is no basis for holding that the test is not of general application.

[129] In *OPA! Souvlaki Franchise Group Inc. v Tiginagas*, 2024 BCSC 1318, Justice Jackson stated:

> [26] … [A]lthough irreparable harm remains a relevant consideration where a breach of a negative covenant is pleaded, its relative importance may be

> diminished in certain circumstances including where a strong prima facie case of a breach of a negative covenant has been established….
>
> [27] The fundamental question is whether the injunction is equitable in the circumstances…
>
> [Emphasis added.]

See also *Hamin* at paras. 74-76 and *Landmark Solutions BCCA* at paras.53-55.

[130] The plaintiffs say that this aspect of the test is met given the strength of their case on the merits, and the following factors:

a) The risk of a permanent loss of market share. The plaintiffs state:

> The future permanent loss of market share, particularly in Prince George, is obvious. Dr. Minhas first set himself up within the five Dentalcorp practices and used them as his own personal resource to set up first the Southridge clinic, and more recently at least two other clinics. A key aspect of that strategy involved the poaching of experienced dentists and key administrative staff to the other clinics. It is self-evident, and established by evidence of Mr. Sharma, that the clinics will be rendered less effective by the transfer of talent out of the clinics, including both dentists and employees, and competing clinic nearby.

b) The loss of potential customers. The plaintiffs say that:

> [t]his loss is self-evident for similar reasons. The movement of dentists will by definition be followed shortly thereafter by the movement of patients. The evidence of Mr. Sharma establishes that that is the nature of the dentistry business. It is inconceivable that the Dentalcorp practices will survive the attack from within without loss of a considerable number of patients.

[131] The plaintiffs conclude by noting that:

> [r]efusal of the injunction sought would not only enable Dr. Minhas to open the two competing dental clinics that are known to be underway, it would pave the way for Dr. Minhas to expand his franchise network until trial, all of which the court will be unable to unwind by that time.

[132] The defendants respond that there is inadequate evidence of any harm having been suffered to date. There is no evidence of specific customers moving

from the plaintiffs' operations to the defendants'. There is no expert report establishing the actual or likely loss of market share. Hence any harm is speculative.

[133] While it is true that the evidence of harm is not overwhelming, I find that, with the aid of the overarching legal principles discussed above, this aspect of the test has been satisfied. To demand full economic expert evidence at this early stage of the proceeding would be unreasonable. I find that the evidence of the general business context in which the parties operate allows me to reasonably infer that, if the defendants are allowed to establish the identified and future clinics, this will undercut the plaintiffs' own expansion plans, as well as the viability of their existing locations. The movement of staff towards the defendants' operations provides additional evidence of how the plaintiffs' operations will be affected.

[134] The defendants also rely on the decision in *Poorsina*, where the court declined to grant an injunction stating:

> [29] The authorities make it clear that [irreparable harm] depends on the facts of the case. In this case, the parties are almost seven years post the sale of the business. There is some truth to the defendants' argument that the plaintiffs have had the benefit of the bargain at this stage, though I take issue with the use of the word "full". On the evidence before me, in May 2020, Dr. Poorsina wanted to terminate the agreement, which could only occur if the parties mutually agreed. The parties subsequently negotiated a new Termination Agreement in April 2021, with a two-year term. It was therefore within the expectation of the parties that the [sic] Dr. Poorsina and Poorsina DPC would no longer be bound by the restrictive covenants after April 2023. The breach occurred towards the end of the term of the restrictive covenant, as opposed to early on. And, though I agree that the parties ought to be held to their bargain, the harm, if any, has already been done and is calculable. Since the term would have ended in April 2023, and the basis to extend the term of the restrictive covenants for a further two years, beyond that, is as a result of the breach, and has nothing to do with the plaintiffs acquiring the professional and technical goodwill of the clinics sold in 2016, in my view, the damages are calculable.
>
> [Emphasis added.]

[135] As *Poorsina* acknowledges, each case turns on its own facts. In the present case, I find that the plaintiffs reasonably expected that their bargain would continue to require the defendants' full attention through the contractual period. The alleged breaches here occurred while the Services Agreement was still active, unlike in

Poorsina where the breaches occurred after the plaintiff had negotiated a termination agreement and near the end of the restrictive covenants' term. I find that the basis for the injunction here still has something "to do with the plaintiffs acquiring the professional and technical goodwill" from the defendants.

[136] Further, in *Poorsina* the court noted that there were ways for the court to calculate a possible damage award and "no evidence that the plaintiffs will suffer permanent market loss or irrevocable damage to its reputation as a result of the alleged breach at this stage": at para. 30. In *Poorsina,* it was alleged that the defendant was operating only two specific dental clinics. I find that the situation is quite different here, as the allegations are that the defendants have created what Dr. Minhas hopes will be a broad-based dental conglomerate based on a franchise model. Although the defendant maintains that the Smili Venture is not in competition with Dentalcorp, the evidence suggests otherwise. For example, as noted above, Dr. Minhas wrote to Drs. Chahal and Tao on February 23, 2024, that Dentalcorp's intention to opt out of the National dental plan would "fill up your Smili Clinics with many, many happy appreciative pts."

[137] In *Edward Jones v. Voldeng*, 2012 BCCA 295 at para. 37, the court noted that following the violation of a non-competition agreement, it may be impossible to determine whether losses occurred "as a result of prohibited competition as opposed to legitimate competition. Such damages, not being calculable, generally do constitute irreparable harm." Put another way, it may be "virtually impossible to unscramble the egg and determine how much the plaintiff lost as a result of violations of the agreement": *MD Management Ltd. v. Dhut*, 2004 BCSC 513 at para. 42. I find that these comments are apropos here. If Dr. Minhas is permitted to be involved in the Pine Centre Clinic and Powell River Clinic, and to continue expanding the Smili Venture, it may be impossible to "unscramble the egg" following a trial in order to determine damages.

[138] The defendant argues that even if the operation of the Smili Venture constitutes irreparable harm, it does not follow that irreparable harm would result if

the injunction were not granted. This is because the Pine Centre Clinic and Powell River Clinic can continue to operate under the terms of the injunction. I do not accept this argument. While the two clinics could continue to operate, the defendants would be prohibited from participating in their operation and management. As mentioned above, Dr. Minhas represents through the Smili Venture that he has special skill in acquiring, managing, and growing a dental clinic. Further, the injunction would prohibit Dr. Minhas from acquiring, consolidating, and managing additional locations.

4. Balance of Convenience

[139] I have reviewed the harm to the plaintiffs. Under this aspect of the test, this harm must be weighed against the harm to other named and unnamed parties if the injunctions are granted.

[140] The plaintiffs made it clear in argument that they do not seek orders against the defendants' franchisees. In relation to the balance of convenience test, this undercuts the suggestion of third-party harm – the franchisees will still be able to offer services to the public (although I have modified the proposed language somewhat to ensure this is so). It is only the defendants as franchisor who may be put in jeopardy. It is possible that the defendants may end up breaching their franchise support obligations as a result of the injunctions granted. But the defendants should not use the implications of their own breaches as a basis to argue their position on the balance of convenience. To analogize from nuisance law, you cannot knowingly walk into potential harm and then raise that harm as a basis to avoid injunctive relief: *Hamin*, para. 75.

[141] In *Hamin*, the court accepted that the balance of convenience favoured granting the injunction stating:

> [52] The practice of entering into restrictive covenants, as part and parcel of the sale of a customer or client-centred business, has been widely accepted by the courts. These types of restrictive covenants are necessary to protect the sale of the goodwill by the vendor to the purchaser in order to allow the purchaser's dentists and other employees to get to know the patient and build a relationship.
>
> …

[74] In my opinion, like many similar cases in which the plaintiff seeks to enforce a negative covenant which is *prima facie* reasonable, and which is given by the vendor of a business in order to protect the purchaser's interest in the subject matter of the sale, the appropriate test is that, enunciated by the court in *Miller* (at p 2 of the decision), which held that proof of irreparable harm is not required in cases of this kind. Rather, "…the proper test is not whether damages will prove to be an adequate remedy, but whether it is just, in all the circumstances, that a plaintiff should be confined to his remedy in damages".

[75] In *Miller*, the court further held that (at pp 4 and 5):

> That view was adopted by the Divisional Court of the Supreme Court of Ontario in *Bank of Montreal v. James Maine Holdings Ltd.* (1982), 28 C.P.C. 157. Delivering the judgment of the Court, Galligan, J. said (at p. 160):
>
> > "In cases of clear breach courts are inclined to grant injunctions enforcing negative covenants until trial. In such cases the inquiry as to the adequacy of damages as a remedy, and into the balance of convenience, do not have the importance that they otherwise do ...".
>
> …
>
> That is not to say that either the absence of irreparable harm or the presence of a much greater inconvenience to the covenantor is totally irrelevant. It is a question of emphasis. What it means is that, when a negative covenant of this kind is reasonable on its face, the person who gave it will have a heavy burden to show that his escape from the bargain will not cause irreparable harm to the covenantee and that the balance of convenience so substantially favours him (the person who gave the covenant) that it would be unjust to restrain his activities until the trial.
>
> In the case at bar, the defendants say that the balance of convenience is substantially in their favour. In saying that, however, the defendants rely on the situation in which they find themselves as a result of their deliberate breach of their own covenant. A party cannot tip the scales of convenience in his favour by such deliberate misconduct.
>
> This is a simple case of those who have given a negative covenant finding it inconvenient to them. To repeat the words of Megarry, J., "I see no reason for allowing a covenantor who stands in clear breach of an express prohibition to have a holiday from the enforcement of his obligation until the trial."

[76] It is this approach to the issues of irreparable harm and the balance of convenience taken by the court in the foregoing paragraphs of *Miller* that I find are applicable here, and it is the approach I have adopted in coming to my conclusion to grant injunctive relief. I am of the opinion that in the context of the sale of a business of this nature taking place between sophisticated business people and entities, the temporal and spatial features of the restrictive clauses are not too broad. The clauses do not restrict competition

> unnecessarily or generally in the Winnipeg market, or in respect of the Kenora, Ontario dental practice. In my opinion, they are carefully and specifically focused on protecting the plaintiffs' proprietary interest.
>
> [77] There is nothing unreasonable about the Restrictive Covenants which both parties agreed to in return for valuable consideration. It was stated unambiguously in the Agreements, including the Amended Agreement, that the Restrictive Covenants are in place for the clear purpose of protecting the assets and interests sold to the plaintiffs by the defendants. The comments of the court in *Miller* are directly applicable here, and the facts demonstrate that the plaintiffs are entitled to the injunctive relief sought and should not be limited to a remedy in damages.
>
> [Emphasis added.]

[142] In *Sandher Fruit Packers Ltd. v MacAskill*, 2024 BCSC 1855 at para. 29, this Court set out factors to consider when weighing the balance of convenience. I apply those factors to the present fact pattern below:

a) The adequacy of damages as a remedy for the plaintiffs if the injunction is not granted and for the defendants if an injunction is granted: I find that damages will not adequately compensate the plaintiffs if the injunction is not granted, and the defendants are permitted to continue expanding their franchises. In contrast, the defendants could be adequately compensated by damages if successful at trial.

b) The likelihood that if damages are finally awarded, they will be paid: Dr. Minhas says that he currently has no income. If unsuccessful at trial, I find that it is possible Dr. Minhas will not be able to satisfy a damage award.

c) Other factors affecting whether harm from granting or refusing the injunction would be irreparable: I find that the parties' agreement ahead of time that a breach of the Restrictive Covenants would constitute irreparable harm and require an injunction supports granting an injunction: Services Agreement, ss. 10.1-10.2.

d) Which of the parties has acted to alter the balance of their relationship and so affect the status quo: I find that by setting up the Smili Venture, and by

continuing to operate it following receipt of the Breach Letter, the defendants altered the status quo.

e) The strength of the plaintiffs' case: I find that the plaintiffs have established a very strong *prima facie* case.

f) Any factors affecting the public interest: I accept that the public has an interest in there being the greatest supply of dental services as possible. This weighs in the defendants' favour.

g) Any other factors affecting the balance of justice and convenience: I find no other factors that I have not considered above.

[143] I find that the balance of convenience supports the granting of the injunction.

5. Appropriate Terms

[144] The application seeks an order restraining Dr. Minhas in his personal capacity, or through any corporation or other name or entity, from carrying on, being engaged in or concerned with, or interested in any Competitive Business located within a 10-kilometre radius from the FDC Clinics.

[145] I find that this term is reasonable, save that it should be amended to expressly indicate that it does not include Southridge. The plaintiffs were clear on the record that they were not seeking an order in relation to Southridge at this time.

[146] Next, the plaintiffs seek an order restraining Dr. Minhas in his personal capacity, or through any corporation or other name or entity, from being engaged in the acquisition, consolidation and/or management of any Competitive Business within the province of British Columbia. Given Dr. Minhas' active efforts to expand the Smili Venture, I find that imposing some control is reasonable.

[147] Specifically, paragraph 2 of the orders sought seeks the following:

> Dr. Minhas, in his personal capacity, or through any corporation or other name or entity, shall forthwith from pronouncement of this order cease operating the following dental clinics in the province of British Columba:

> a) 7100 Alberni Street, Powell River, British Columbia (located in Powell River Town Centre);
>
> b) 3055 Massey Drive, Prince George, British Columbia (located in Pine Centre Mall); and
>
> c) any other dental clinics established or development contrary to the restrictive covenants outlined below.

[148] I find that this framing goes somewhat too far in that it arguably demands that the operations of Smili Venture's franchisees be shut down, even though the franchisees were not named and hence did not have the opportunity to make submissions. I find that the term should be narrowed to focus on the defendants' role. In particular, it should use the language from the Restrictive Covenants. The revised language shall be as follows:

> Dr. Minhas, in his personal capacity, or through any corporation or other name or entity, shall forthwith from pronouncement of this order cease to be engaged in the acquisition, consolidation and/or management of the following dental clinics in the province of British Columba:
>
> a) 7100 Alberni Street, Powell River, British Columbia (located in Powell River Town Centre);
>
> b) 3055 Massey Drive, Prince George, British Columbia (located in Pine Centre Mall); and
>
> c) any other dental clinics established or developed contrary to the Restrictive Covenants.

[149] Paragraphs 3-5 of the prayer relate to the protection of the Confidential Information. The proposed terms seek to restrain the plaintiff from using Confidential Information and require the plaintiffs to both return any Confidential Information in their possession and provide details about how the information was used. It may be that the plaintiffs will be able to make their case in relation to the use of confidential information at trial, but I found above that a strong *prima facie* case has not yet been made out. As such, paragraphs 3-5 are not granted.

IV. CONCLUSION

[150] The injunction is granted on the restricted terms set out above. Absent either party seeking to make further submissions on costs, I would award costs to the plaintiffs in the cause.

"The Honourable Mr. Justice Branch"