SUPREME COURT OF NOVA SCOTIA

Citation: *Jorna & Craig Inc. v. Chiasson*, 2018 NSSC 220

Date: 20180917
Docket: Hfx No. 450323
Registry: Halifax

Between:

Jorna & Craig Inc.

Applicant

v.

David Chiasson and City of Lakes Pharmacy Limited

Respondents

Docket: Hfx No. 461648
Registry: Halifax

Between:

David Chiasson and Brenda Chiasson in their capacities as the Trustees of the Chiasson Family Trust (2004)

Applicants

v.

Jorna & Craig Incorporated, Peter Jorna and Jennifer Craig

Respondents

D E C I S I O N

Corrected decision: **The text of the original decision has been corrected according to the attached corrigendum dated January 30, 2019**

Judge: The Honourable Justice Glen G. McDougall

Heard: April 9 and 10, 2018, in Halifax, Nova Scotia

Counsel: Matt Saunders and Caitlin Regan-Cottreau, for the Applicant/ Respondents
Brian K. Awad, for the Respondents/Applicants

By the Court:

A Tale of Two Pharmacies

[1] In 2011, Peter Jorna, a pharmacist, and Jennifer Craig (now Jorna) wanted to purchase a pharmacy on the Halifax peninsula. Their options were limited. The only pharmacy for sale was Scotia Drugs ("Scotia"), on Gottingen Street in Halifax. Scotia was beneficially owned and managed by pharmacist David Chiasson, who also owned the City of Lakes Pharmacy ("City of Lakes") in Dartmouth. The parties executed an agreement of purchase and sale ("APS") in December 2011, along with a non-competition agreement ("NCA"). Both agreements contained the same language prohibiting Mr. Chiasson from directly or indirectly opening, operating, investing in, or advising a pharmacy, in any manner whatsoever, anywhere on peninsular Halifax for seven years, and from having any involvement with Direction 180, a local methadone clinic, for ten years. The parties have very different interpretations of the restrictive covenant, and ask this Court to determine whether Mr. Chiasson has breached the agreements by not excluding Halifax peninsula residents from City of Lakes' prescription-delivery service and its customer-loyalty program. Mr. Jorna also alleges that Mr. Chiasson has remained "involved" with Direction 180, contrary to the restrictive covenant, which Mr. Chiasson denies.

Background

[2] David Chiasson was licensed as a pharmacist in 1996. Three years later, he purchased a pharmacy on Gottingen Street. He purchased a second pharmacy in the area in 2001, and merged the two to form Scotia. In January 2010, he opened City of Lakes on Portland Street in Dartmouth.

[3] While the owner of Scotia, Mr. Chiasson developed relationships with local doctors and their staff, with the local Mainline Needle Exchange, and with Direction 180, a local methadone clinic. Direction 180 is staffed by physicians, nurses, addiction services experts, and other social workers. It is overseen by an Executive Director and is managed as a program of the Mic Mac Native Friendship Centre. Mr. Chiasson was a member of Direction 180's board of directors when the clinic was founded in 2001. From that time forward, Scotia and Direction 180 agreed that Scotia would supply the methadone prescribed by the clinic's doctors, while Scotia would provide monthly "educational funding" to Direction 180.

[4] Negotiations for the purchase and sale of Scotia began in mid-2011 and continued through the summer and fall. Both parties were represented by legal counsel, and there was "a lot of back and forth between the parties and counsel over the course of the negotiations."

[5] As a condition of the sale, Mr. Chiasson was required to negotiate a five-year extension of the agreement between Scotia and Direction 180. The new agreement was executed on December 9, 2011. Mr. Jorna understood that Mr. Chiasson paid $50,000 to Direction 180 to finalize the agreement. Later that month, Mr. Jorna (as president of Jorna & Craig Incorporated ("JCI")) and Mr. Chiasson (as trustee for the Chiasson Family Trust (2004)) executed an APS for the issued and outstanding shares of Scotia, and an NCA. Article 4.01(g) of the APS states:

> **David Chiasson agrees** to sign a non-competition agreement **not to open, operate, invest in, or advise a pharmacy company or company in a related industry for Seven (7) years following the Closing Date or have any involvement with Direction 180 for Ten (10) years anywhere within the geographic confines of the Halifax peninsula, directly or indirectly, in any manner whatsoever**, including, without limitation, either individually or in partnership or jointly, or in conjunction with any other person or persons, firm, association, syndicate, company, or corporation, as principal, agent, shareholder, or in any other manner whatsoever, whether for remuneration or otherwise, carry on or be engaged in or be concerned with or interested in or lend money to, guarantee the debts or obligations or, permit his name or any part thereof to be used or employed by any person, persons, firm, association, syndicate, company or corporation engaged in or concerned with or interested in any business which is the same or substantially similar to the Business, **without the express written consent of the Purchaser;**
>
> [*Emphasis added*]

Identical language was included in the NCA.

[6] The parties agreed on a purchase price of $2,800,000, payable in installments. JCI was to pay the purchase price as follows:

(a) $1,200,000 by trust cheque on the closing date;

(b) vendor holdback mortgage of $700,000, payable within two months of receiving the "Review Engagement Financial" for the year ending November 30, 2012, and,

(c) vendor takeback mortgage of $900,000 due on December 20, 2016, and secured by a promissory note.

[7] On December 20, 2016, JCI paid only a portion ($400,000) of the final payment. Mr. Jorna says he became concerned in 2014 that Mr. Chiasson was delivering prescriptions on peninsular Halifax and was offering incentives to peninsula residents to fill their prescriptions at City of Lakes. Mr. Jorna felt that these activities breached the APS and the NCA. On May 19, 2015, JCI's lawyer sent a letter to Mr. Chiasson, demanding that he stop soliciting business and offering incentives to patients on peninsular Halifax. Mr. Jorna's concerns persisted and, on October 19, 2015, JCI's lawyer sent another letter advising Mr. Chiasson that if he did not stop soliciting business on peninsular Halifax, JCI would set off its damages against the final $900,000 payment due on December 20, 2016. Mr. Chiasson replied, through his lawyer, and denied soliciting business on peninsular Halifax. He did not deny delivering prescriptions to patients on peninsular Halifax.

[8] On April 18, 2016, JCI filed an application for damages caused by Mr. Chiasson's alleged breaches of the APS and NCA (Hfx. No. 450323). The application was originally scheduled to be heard on October 16, 2016. Disagreements about disclosure resulted in the matter being adjourned without a future date scheduled. On September 9, 2016, JCI's lawyer wrote to Mr. Chiasson's lawyer and advised that $500,000 would be withheld from the final payment under the APS. On December 20, 2016, JCI paid $400,000 to Mr. Chiasson, and confirmed that an additional $500,000 had been set off against the final payment for JCI's reasonably estimated damages. On March 21, 2017, Mr. Chiasson, as trustee for the Chiasson Family Trust (2004), filed an application seeking payment of the holdback amount (Hfx. No. 461648). The hearing before me dealt with both applications.

[9] In addition to competing applications, the parties filed motions to strike parts of each other's affidavits. Rather than waiting for a decision on the affidavit motions, the parties agreed that I would consider their objections when weighing the evidence before me. I have disregarded the inadmissible parts of the affidavits.

Positions of the Parties

[10] Peter Jorna says the restrictive covenant in the APS and the NCA prohibits David Chiasson from offering incentives to Halifax peninsula patients to fill their prescriptions at City of Lakes, and from making deliveries to those patients. He

submits that the restrictive covenant applies to City of Lakes, and that Mr. Chiasson's activities constitute "operating" a pharmacy on the Halifax peninsula. Mr. Jorna says Mr. Chiasson's breaches of the APS and the NCA have caused significant losses to JCI that will continue into the future. JCI has filed an expert report estimating its past and future losses at approximately $560,000. With respect to Direction 180, Mr. Jorna says Mr. Chiasson has breached the restrictive covenant by continuing to interact with physicians who work with Direction 180, and by donating $50,000 to the clinic in 2012.

[11] David Chiasson says Mr. Jorna, as president of JCI, was always aware that he would continue to own and operate City of Lakes after the sale of Scotia; that peninsular customers would continue to be customers of City of Lakes in the normal course; and that City of Lakes had a "Perks" incentive program and a delivery service, neither of which had excluded peninsula residents in the past. He says that only a small part of the City of Lakes clientele are residents of the peninsula and that only a handful of those patients receive deliveries. He denies targeting peninsula residents.

[12] Mr. Chiasson submits that the restrictive covenant does not apply to City of Lakes. He says he did not agree to any restriction on the regular conduct of business at City of Lakes, and if JCI had wanted the restrictive covenant to apply to those activities, it should have demanded language to that effect. In the alternative, he says the restrictive covenant is ambiguous, and therefore unenforceable. In the further alternative, if the restrictive covenant does apply to City of Lakes, Mr. Chiasson submits that delivering a handful of prescriptions to the peninsula does not amount to "operating a pharmacy" there. Mr. Chiasson also denies breaching the portion of the covenant that prohibits him from any involvement with Direction 180. He says his interactions with physicians at Direction 180 have been strictly with respect to patient care, and that the two donations he made in 2012 represented the $50,000 he agreed to pay to Direction 180 to finalize the five-year extension to the agreement with Scotia.

The Evidence

[13] In addition to his own affidavits and an expert report, Peter Jorna filed affidavits from Lindsey Odell, a legal assistant at Cox & Palmer; Frank Dileo, a Scotia employee; Bill Burke, a private investigator; K.R., a former customer of both Scotia and City of Lakes; and Jennifer (Craig) Jorna. Only Mr. Jorna and K.R. were cross-examined on their affidavits. David Chiasson filed only his own affidavits, and he was cross-examined on them.

[14] Mr. Jorna's evidence is that Scotia appeared to be a strong investment opportunity due to its location (i.e., lack of competing pharmacies), its contract with Direction 180, and its proximity to the North End Clinic, a multidisciplinary clinic that services the population of the North End of Halifax. He also felt that there were opportunities to increase efficiencies in the pharmacy's operations, which in turn could lead to an increase in its profitability. Mr. Jorna stated that buying Scotia was a significant purchase, and he wanted to protect his investment. For this reason, he made the execution of an NCA a term of the APS. It was important to him that Direction 180 was included under the APS and NCA because the agreement with Direction 180 generates significant revenue for Scotia.

[15] Mr. Jorna said that in late December 2011, after the parties had signed the APS and the NCA, Mr. Chiasson asked to meet with him at a coffee shop in Dartmouth. Mr. Jorna and Jennifer Jorna attended the meeting. Mr. Chiasson explained that he had been in contact with Cindy MacIsaac, Direction 180's Executive Director, and that Direction 180 wanted to operate a new methadone clinic with Mr. Chiasson that would help reduce the wait-list at the Gottingen clinic. Mr. Jorna described his reaction to the proposal as "unequivocal", and said he told Mr. Chiasson that he would not approve it. He believed the proposed clinic would directly impact his revenues and relationship with Direction 180, and that Mr. Chiasson's involvement would amount to a breach of the restrictive covenant. The next day, Mr. Chiasson called and informed Mr. Jorna that he would not be moving forward with the proposal. He allegedly encouraged Mr. Jorna to come up with a solution for Direction 180's wait-list, but told him not to open any methadone clinics next to City of Lakes.

[16] According to Mr. Jorna, in the spring of 2015, a customer, referred to as "Patient X", came into Scotia to fill a prescription. Mr. Jorna knew Patient X lived on the peninsula and had filled their prescriptions at Scotia since the pharmacy was purchased by JCI in 2011. Mr. Jorna said he asked Patient X if they needed any additional prescriptions filled that day. Patient X explained that they get their other prescriptions filled at City of Lakes because Mr. Chiasson provided them with a $25 gift card every week to do so. Mr. Jorna said he heard similar things from two other Scotia patients during the second half of 2015.

[17] In February 2016, JCI's lawyer retained Bill Burke, of BurkeCo Investigations, to conduct five days of surveillance of City of Lakes. The resulting surveillance report stated that City of Lakes was delivering small, white paper bags to people within the geographic confines of peninsular Halifax. On April 18, 2016,

Mr. Jorna filed an application alleging that Mr. Chiasson was competing with Scotia on peninsular Halifax, contrary to the APS and the NCA.

[18] In late 2016, Mr. Jorna learned from another of his customers, “Patient Z”, that he had decided to move his prescriptions to City of Lakes after learning of their delivery program and other incentives he would receive for having his prescriptions filled there. Mr. Jorna said that Patient Z lives on the Halifax peninsula.

[19] On cross-examination, Mr. Jorna denied knowing that City of Lakes had customers on the Halifax peninsula prior to the sale of Scotia, or that City of Lakes was doing deliveries on peninsular Halifax. He conceded that he knew City of Lakes *could* have customers who resided on peninsular Halifax, but maintained that this was the reason for the non-compete. Mr. Jorna said he had no difficulty with people walking in and physically doing business at City of Lakes, but he did have an issue with Mr. Chiasson actively soliciting customers on the peninsula. He had expected the restrictive covenant to keep Mr. Chiasson from extending his pharmacy operations by delivering to peninsular Halifax and offering incentives for peninsula residents to receive those deliveries. He agreed that there were no discussions during negotiations about the impact of the restrictive covenant on the conduct of business at City of Lakes, but he maintained that the language of the non-compete clause clearly covers its activities.

[20] Mr. Jorna conceded that Direction 180 had a significant wait-list problem at the time of his meeting with Mr. Chiasson at the coffee shop. There were more people needing treatment than could be served at the clinic on Gottingen. For this reason, Mr. Jorna bought a house in Fairview and modified it to be suitable as a methadone clinic. When word spread about the proposed new clinic, a group of local residents, business owners, and developers campaigned to stop it from opening. The developers were so motivated to keep the methadone clinic out of the area that they bought the building from Mr. Jorna, reimbursed him for the work he had done on it, and agreed to give $100,000 to Direction 180 to buy a bus that could be turned into a mobile methadone clinic.

[21] Jennifer Jorna’s affidavit contains her recollection of the coffee shop meeting with Mr. Chiasson in December 2011, which mirrors that of Mr. Jorna. She also stated that she called City of Lakes in October 2015 and asked about getting prescriptions filled. The employee who answered the phone indicated that it would not be a problem to deliver to Halifax because they offered free prescription delivery to patients on the Halifax peninsula.

[22] Bill Burke's affidavit states that he was retained by a lawyer at Cox & Palmer to conduct discreet surveillance of City of Lakes and to document any deliveries from the pharmacy to areas within peninsular Halifax. The attached investigation report indicates that, over the course of four days in February 2016, a City of Lakes employee was observed making once-daily deliveries to the Halifax peninsula.

[23] Frank Dileo is a licensed pharmacist currently employed by JCI. He has worked at Scotia since 1989. Mr. Dileo's affidavit states that from approximately 2006 to December 2011, Scotia operated under the Pharmachoice network of pharmacies. During that time, David Chiasson was the owner and operator of Scotia, and the pharmacy provided a "Perks" program to its customers. The Pharmachoice Perks program allowed customers who filled their prescriptions at Scotia to receive a "perk" for each prescription filled. Clients could then turn in twelve "perks" back to the pharmacy for a $5 gift card that could be used to purchase anything in the pharmacy. Mr. Dileo said the Perks program at Scotia ended in June 2012 when the pharmacy was no longer affiliated with the Pharmachoice network. Mr. Dileo's affidavit also described a conversation with Patient X in late 2016 like the one recounted by Mr. Jorna.

[24] The final affidavit filed by JCI is from K.R., a former client of both Scotia and City of Lakes. K.R. is a former intravenous drug user who has been taking prescription methadone to treat his addiction for the past thirteen years. From February 2014 to August 2015, K.R. lived on Gottingen Street and filled his prescriptions at Scotia. K.R. said his prescriptions at that time included large quantities of narcotics, and he was afraid of being robbed or losing his medications after picking them up at Scotia and walking back to his apartment. He explained on cross-examination that there were a lot of people who went to Scotia to obtain methadone. He said some of those individuals would have been in the initial stages of treatment and might still have been using illicit drugs.

[25] In late 2015, a fellow resident of K.R.'s apartment building told him about a quiet pharmacy in Dartmouth that provided at-home delivery for prescriptions and also customer rewards for using the pharmacy. K.R. visited City of Lakes and met Mr. Chiasson, who he said made him feel comfortable about his situation and medications, and about using the pharmacy. K.R. said they quickly developed a friendship.

[26] According to K.R., during the first visit, Mr. Chiasson mentioned that he could help K.R. out by providing him with gift cards. K.R. said the gift cards

usually totaled $50 per month if he had his prescriptions filled at City of Lakes, but that Mr. Chiasson would sometimes provide him with gift cards even if he did not have a prescription that needed filling.

[27] Also during the first visit, K.R. asked Mr. Chiasson about whether his pharmacy made deliveries. He said Mr. Chiasson confirmed that K.R.'s prescriptions could be delivered to his apartment. K.R. said he had prescriptions delivered on several occasions while he was a City of Lakes customer.

[28] According to K.R., about a month after he began filling his prescriptions at City of Lakes, Mr. Chiasson asked him to tell any friends who could use City of Lakes' services about the pharmacy. He said Mr. Chiasson never paid him for telling people about the pharmacy and its services. K.R. told his partner and some residents of his apartment building about City of Lakes.

[29] K.R. said that in October 2016, he met with his former family doctor in relation to severe stress-related issues. The doctor prescribed 116 tablets of instant-acting Ativan, and K.R. took the prescription to City of Lakes. He said that Mr. Chiasson told him he only had 37 tablets of Ativan in his pharmacy at the time, and that the rest of the prescription would be filled the next day. The next day, when K.R. went to pick up the rest of the prescription, Mr. Chiasson refused to fill it and accused K.R. of giving him a forged prescription. K.R. said he denied that the prescription was forged. He said they had an argument, and Mr. Chiasson told him to leave the store. K.R. never spoke to Mr. Chiasson again, and moved his prescriptions back to Scotia in early 2017.

[30] On cross-examination, K.R. agreed that he did not keep track of the "perks" he had accumulated at City of Lakes, but denied that he was wrong about Mr. Chiasson giving him extra gift cards for no reason. He maintained that he always received $50 per month for the prescriptions, and Mr. Chiasson had given him a few extra gift cards as well. With respect to the forged prescription allegations, K.R. said his doctor admitted that she had made an error and gave him a note to give to the prescription monitoring program.

[31] David Chiasson's evidence is that he decided to sell Scotia for a few reasons. Owning, managing, and working at two pharmacies was very taxing due to the time, attention, and energy required to do it well. He was also more optimistic about the future prospects for City of Lakes.

[32] Mr. Chiasson said that in the fall of 2011, Direction 180 asked him whether he would be willing to help it set up a clinic near City of Lakes in order to deal with overflow from the Gottingen Street clinic. He said he was not particularly interested in the idea because it would be a lot of work to help open a new clinic. He also believed, based on his experience with Scotia, that a methadone clinic could put significant stress on a neighbourhood. City of Lakes was relatively new to downtown Dartmouth and he did not want to be associated with bringing a methadone clinic to the area. He described his response to Direction 180 as "polite and non-committal".

[33] Mr. Chiasson said Direction 180 raised the matter again at the end of 2011. He explained that he was selling Scotia and, as part of that transaction, he was agreeing to have no further involvement with Direction 180. The representative from Direction 180 then asked him to approach Mr. Jorna to see if he would be willing to permit Mr. Chiasson to be involved with Direction 180 in Dartmouth. According to Mr. Chiasson, he agreed to ask out of politeness, and was relieved when Mr. Jorna refused. He denied any further discussions with Direction 180 about the proposal.

[34] In relation to the $50,000 in donations he made to Direction 180 in 2012, Mr. Chiasson said in his affidavit that the donations were solicited by Direction 180 in order to help finance the bus that would be turned into a mobile methadone clinic. He stated that he received no benefit from Direction 180 for the donation and was motivated by philanthropy, and the belief that the growth of Direction 180 would mean more revenue for Scotia. On cross-examination, however, Mr. Chiasson said the two $25,000 cheques actually represented the $50,000 he agreed to pay Direction 180 to extend the agreement with Scotia, prior to execution of the APS and the NCA. He said he told Direction 180 that the first donation of $25,000 would be made when he received payment from the sale of Scotia, and the second donation would be made in 2016 when he received the final $900,000 payment. He wrote the first cheque on January 5, 2012. Mr. Chiasson said Direction 180 approached him in October 2012 and asked if he could make the second donation early, so they could buy the methadone bus. He said he agreed, and wrote the second cheque on October 9, 2012.

[35] With respect to his pharmacy's customer-loyalty program, Mr. Chiasson stated that, as of mid-2011, both Scotia and City of Lakes operated as Pharmachoice pharmacies. In order to compete with the customer-loyalty programs offered by most other pharmacy chains in Canada, Pharmachoice had created a program called "Perks". Each Pharmachoice-branded pharmacy could

institute, offer, and administer a Perks program. Mr. Chiasson said there is a Lawton's pharmacy one block away from City of Lakes. Due to its extreme proximity, he said, he always needed to keep a careful eye on the benefits being offered under the Lawton's customer-loyalty program, and, when necessary, to increase the Perks program benefits in order to remain competitive.

[36] Mr. Chiasson explained that the vast majority of customers of City of Lakes are infrequent users of the pharmacy. When such a customer attends to fill a prescription, they are given a "perk" – an actual small slip of paper or coupon. When the customer has accumulated twelve perks, they can exchange the coupons for a cash card of their choice worth $5.00, or receive a $5.00 discount on the purchase of items from the retail store. City of Lakes does not keep a record of the handing out or return of perks coupons. Mr. Chiasson said that a small minority of customers are frequent users of the pharmacy, and a yet-smaller minority are dispensed daily doses of their medications, as prescribed by their physicians. Since a pharmacy is normally compensated on a per-fill basis, a daily-fill, multiple-prescription customer generates substantially more revenue than an infrequent or single-prescription customer during a given period of time. To keep daily-fill individuals as customers of City of Lakes, and with Lawton's pharmacy in mind, Mr. Chiasson has offered double the perks to those customers. He said he has had customers whose prescriptions were such that they required over 250 fills per month. Those persons could earn up to $100 per month in gift cards or store credits. He said he has never provided more than $100 per month to any customer, and he denied ever giving away gift cards for no reason, as alleged by K.R.

[37] In addition to its customer-loyalty program, City of Lakes offers a prescription-delivery service. Mr. Chiasson said he considers the service a necessity in order to remain competitive with Lawton's and other pharmacies that also offer delivery. The delivery service is advertised on the pharmacy's front window. Mr. Chiasson said he has always made both the Perks program and the delivery service available to all City of Lakes' customers, without regard to where they live. He denied ever specifically soliciting residents of the Halifax peninsula to become or to remain customers of City of Lakes, or ever advertising on the peninsula. He said the delivery vehicle has always been unmarked.

[38] Mr. Chiasson indicated that between January 2012 and November 2016, there were four City of Lakes' customers who received prescription deliveries to locations on the Halifax peninsula at a frequency of once per month, and five who received deliveries at a frequency of greater than once per month. The latter group included K.R., who Mr. Chiasson said often came to the pharmacy to pick up his

prescriptions. It also included a woman who, according to Mr. Chiasson, called City of Lakes in June 2014 and expressed that she had recently become dissatisfied with the service at Scotia and wanted to use another pharmacy. Mr. Chiasson said he agreed to take her on, and she remains a customer. The other three were not Scotia customers immediately before they became City of Lakes' customers. Only three of the five individuals were still City of Lakes' customers at the time of the hearing.

[39] In relation to K.R., Mr. Chiasson said he became a City of Lakes' customer in September 2013, but from some time in 2014 until some time in 2016, Mr. Chiasson did not see him at the pharmacy or prepare any medication for him. He said that, based on information from K.R., he believed K.R. was living on the South Shore during that period. He did not recall ever asking K.R. to tell his friends about City of Lakes. Mr. Chiasson said K.R. came back to City of Lakes in late 2016 with a new prescription from a South Shore doctor. Mr. Chiasson provided a partial fill, but then contacted the doctor. Based on information he received from the doctor, he concluded that the prescription was a forgery, refused to fill the remainder of the prescription, and barred K.R. from being a customer of City of Lakes.

The Expert Report

[40] On the issue of damages, JCI filed the expert accountant's report of Steven Goodfellow of Ernst & Young LLP. After summarizing Scotia's operations and revenue streams, Mr. Goodfellow noted that prescription revenues made up the vast majority of Scotia's total revenues between 2010 and 2017. He divided the prescription-based revenues into three categories: methadone (a low-cost, high-margin drug), the Sovaldi category (which consist of high-cost, low-margin drugs), and all other prescriptions. Mr. Goodfellow concluded that the alleged competing activities would not impact the methadone and Sovaldi categories. As such, the analysis of the potential loss was limited to the category of "all other drugs", which had declined over the 2012-2017 period.

[41] Mr. Goodfellow provided an economic overview of the Canadian pharmaceutical industry and the prescription drug market. He noted that the forecasted compound annual growth of the Canadian pharmaceutical market for 2017-2021 is just under 3%. For the period of 2011-2017, he assessed average revenue growth by reviewing publicly available information for US and Canadian public pharmacies that he considered to be somewhat comparable to Scotia. Mr. Goodfellow placed particular emphasis on the prescription count information for

the Jean Coutu Group – a Canadian drugstore chain with a presence in Atlantic Canada.

[42] Before calculating JCI's financial loss, Mr. Goodfellow set out several key assumptions upon which he relied, including the following:

> We have assumed that JCI's business operations, "but for" the alleged Competing Activities, would generally be in line with historical and forecast Industry performance. Specifically, we have assumed that the historical growth in Rx count applicable to JCI should have approximated 3% over the 2012 to 2017 historical period and in the forecast years.

[43] Mr. Goodfellow calculated JCI's theoretical loss of business revenue (termed "lost contribution margin") as the difference between:

- the estimated business results "but for" the competing activities for the past and future loss periods; and
- the business results attainable given the competing activities, for the past and future loss periods.

Applying this methodology, Mr. Goodfellow estimated that JCI's loss due to the competing activities is approximately $560,000.

[44] For his part, Mr. Chiasson acknowledges that the arithmetical technique employed by Mr. Goodfellow is a valid method for estimating a theoretical loss of business revenue. He submits, however, that Mr. Goodfellow's report suffers from serious deficiencies that render it useless to the Court. In particular, Mr. Chiasson says, Mr. Goodfellow assumed that the conduct of Mr. Chiasson and City of Lakes caused the entire loss that he was estimating – a fact, he says, that JCI has failed to prove. Mr. Goodfellow's report does not consider other possible reasons why Scotia's "all other drugs" segment might not be not in line with his proposed historical and future growth rates.

[45] JCI argues that Mr. Chiasson's decision not to cross-examine Mr. Goodfellow disentitles him from now attacking any of the report's conclusions. JCI says the Court should draw an adverse inference from Mr. Chiasson's decision not to cross-examine.

The Law

[46] The legal principles to be applied when interpreting commercial contracts are straightforward. The Ontario Court of Appeal summarized them in *Salah v. Timothy's Coffees of the World Inc.*, 2010 ONCA 673, [2010] O.J. No. 4336:

> **16** The basic principles of commercial contractual interpretation may be summarized as follows. When interpreting a contract, the court aims to determine the intentions of the parties in accordance with the language used in the written document and presumes that the parties have intended what they have said. The court construes the contract as a whole, in a manner that gives meaning to all of its terms, and avoids an interpretation that would render one or more of its terms ineffective. In interpreting the contract, the court must have regard to the objective evidence of the "factual matrix" or context underlying the negotiation of the contract, but not the subjective evidence of the intention of the parties. The court should interpret the contract so as to accord with sound commercial principles and good business sense, and avoid commercial absurdity. If the court finds that the contract is ambiguous, it may then resort to extrinsic evidence to clear up the ambiguity. …

[47] In *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] S.C.J. No. 53, the Supreme Court of Canada recognized the importance of context in the court's search for intent. Contracts are not made in a vacuum, and "words alone do not have an immutable or absolute meaning": *Sattva*, para. 47. Although "the interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract", decision-makers should use the surrounding circumstances to deepen their understanding of the mutual and objective intentions of the parties, as expressed in the words of the contract: *Sattva*, para. 57. The Supreme Court cautioned, however, that the surrounding circumstances must never be allowed to overwhelm the words of the agreement: *Sattva*, para. 57. Rothstein J., for the Court, defined "surrounding circumstances" as follows:

> 58 The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract (*King*, at paras. 66 and 70), that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting. Subject to these requirements and the parol evidence rule discussed below, this includes, in the words of Lord Hoffmann, "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man" (*Investors Compensation Scheme*, at p. 114). Whether something

> was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact.

[48] The common law governing restrictive covenants has not changed since the decision in *J.G. Collins Insurance Agencies v. Elsley*, [1978] 2 S.C.R. 916, 1978 CarswellOnt 1235. The Ontario Court of Appeal provided a helpful summary in *Martin v. ConCreate USL Limited Partnership*, 2013 ONCA 72, [2013] O.J. No. 515:

> 49 Covenants in restraint of trade are contrary to public policy because they interfere with individual liberty and the exercise of trade: see *Elsley v. J.G. Collins Ins. Agencies Ltd.*, [1978] 2 S.C.R. 916, at p. 923. They are *prima facie* unenforceable. A covenant will only be upheld if it is reasonable in reference to the interests of the parties concerned and the interests of the public in discouraging restraints on trade: see *Elsley*, at p. 923.
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> 50 The party that seeks to enforce a restrictive covenant has the onus of demonstrating that the covenants are reasonable as between the parties. The party seeking to avoid enforcement of the covenant bears the onus of demonstrating that it is not reasonable with respect to the public interest: see *Stephens v. Gulf Oil Canada Ltd.* (1975), 11 O.R. (2d) 129 (C.A.), at p. 141.
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> 51 If a covenant is ambiguous, in the sense that what is prohibited is not clear as to activity, time, or geography, it is not possible to demonstrate that it is reasonable: see *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6, [2009] 1 S.C.R. 157, at paras. 27, 43; *Mason*, at para. 14. It is therefore unreasonable and unenforceable.
>
> 52 The law distinguishes between a restrictive covenant in connection with the sale of a business, and one between an employer and an employee: see *Elsley*, at p. 924. The former may be required to protect the goodwill sold to the purchaser, and does not usually involve the imbalance of power that exists between employer and employee. Accordingly, a less rigorous test is applied in determining the reasonableness of a restrictive covenant given in connection with the sale of a business: see *Shafron*, at para. 23; *Elsley*, at p. 924.
>
> 53 Greater deference is given to the freedom of contract of "knowledgeable persons of equal bargaining power": *Elsley*, at p. 923. Nevertheless, the broader restraints on trade justifiable in the context of a sale of a business must be reasonable within such a context. There is a strong public interest "in discouraging restraints on trade and, maintaining free and open competition unencumbered by the fetters of restrictive covenants": *Elsley*, at p. 923; see also *H.L. Staebler Co. v. Allan*, 2008 ONCA 576, 239 O.A.C. 230, at para. 34.
>
> 54 The factors relevant in determining whether a restrictive covenant is reasonable are the same in the contexts of the sale of a business and an employment agreement: the geographic coverage of the covenant, the period of time that it is in effect and the extent of the activity prohibited: see *Shafron*, at

> para. 43. And, as the application judge noted, reasonableness is determined in light of the circumstances existing at the time that the covenant was made. Those circumstances include the reasonable expectations of the parties about the future activities and marketplace of the business: see *Tank Lining Co. v. Dunlop Industrial Ltd.* (1982), 40 O.R. (2d) 219 (C.A.), p. 226.

[49] The Court in *Elsley* said the following about restrictive covenants in connection with the sale of a business:

> 15 The distinction made in the cases between a restrictive covenant contained in an agreement for the sale of a business and one contained in a contract of employment is well-conceived and responsive to practical considerations. 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. Difficulty lies in definition of the time during which, and the area within which, the non-competitive covenant is to operate, but if these are reasonable, the courts will normally give effect to the covenant.

[50] In *Canadian Contractual Interpretation Law*, 3d ed., (Toronto: LexisNexis Canada Inc., 2016) Geoff Hall observed at p. 374 that "[t]he rule against enforcement of restrictive covenants, unless they are reasonable as between the parties and in the public interest, is an important, and rare, circumstance in which parties' clear intentions can be entirely overridden by a policy goal."

[51] JCI relies on *Doerner v. Bliss & Laughlin Industries Inc.*, [1980] 2 S.C.R. 865, 1980 CarswellOnt 116, *Brouwer Claims Canada & Co. v. Doge*, 2002 BCSC 988, [2002] B.C.J. No. 1524, and *Capital Safe & Lock Service Ltd. v. Steeves*, 2000 NBCA 1, [2000] N.B.J. No. 356, to support its proposed interpretation of the restrictive covenant in this case.

[52] In *Doerner*, the plaintiff purchased all of the outstanding shares of Frank Doerner & Sons Limited (the "Doerner Company"), from the defendants. The Doerner Company designed, manufactured, and marketed chair bases and controls. The defendants started the business with their father. At the time of the sale, Doerner Company products had 98 percent of the Canadian market. Upon selling their shares, each defendant signed the following non-competition agreement:

> … I hereby covenant and agree that for a period of five years from the closing date of such purchase or from the termination of my employment with you, whichever period ends later, I will not, without your prior written consent, anywhere within any county of any province of Canada or of any state of the United States in which the business of Frank Doerner & Sons Limited is being

> carried on, own, manage, operate, control, be employed by, participate in, or be connected with the ownership, management, operation or control of any business (i) similar to the type of business being conducted by Frank Doerner & Sons Limited or (ii) operating under any name similar to that of Frank Doerner & Sons Limited; nor will I give any such business any information concerning the business, products, prices, customers or affairs of Frank Doerner & Sons Limited.

[53] Nine years after the sale, the defendants left the Doerner Company and started a new, competing, company. Within a year, the Doerner Company's sales declined and its profits were substantially reduced. The plaintiff filed an action alleging a breach of the restrictive covenant. The plaintiff lost at trial, but was successful on appeal. The defendants appealed to the Supreme Court of Canada. The Court, *per* McIntyre J., held that the covenant was "clearly reasonable" as between the parties because the price paid included a "substantial allowance" for the goodwill associated with the defendants' "intimate connection with the business": *Doerner*, para. 14. The Court continued at para. 15:

> The purchaser, having paid for the goodwill, was entitled to the five-year protection. The business had been conducted by the Doerners personally. They knew all the customers and enjoyed a virtual monopoly in the field in Canada. In the eyes of the public they were the business. It was this fact which made their continuation in the business so desirable, and their competition with the business so dangerous. The falloff in the business done by the company after the Doerners commenced a competitive operation in 1974 bears testimony to this proposition. While, as Dickson J. has said in *Elsley*, each case must be decided on the basis of its own peculiar facts, a review of the various cases on this subject … would indicate that the restrictions imposed in the case at Bar fall within the range of others which have been found acceptable.

[54] In *Brouwer*, the defendant was an insurance adjuster who entered an employment contract with the plaintiff. As part of the transaction, the plaintiff acquired assets of the defendant's insurance adjusting company, including its goodwill. The employment contract was subject to a restrictive covenant prohibiting the defendant from carrying on business as an independent insurance adjuster after termination for a period of twelve months and within fifty kilometres of the defendant's head office in Vancouver.

[55] The defendant worked for the plaintiff for the next five years. His billings and earnings increased each year. In May 1999, he gave notice of his intention to resign and advised that he intended to establish his own business with an office in excess of fifty kilometres from the plaintiff's head office. Prior to his departure, the defendant told several of his major clients that he was leaving and would be

opening his own office outside the radius of the restrictive covenant. He testified that he did not solicit their business, but merely advised his clients that he was going to continue in Abbottsford as an independent adjuster and would provide them with further details when he started up his office.

[56] The defendant went to great lengths to structure his business affairs in such a manner that clients who followed him would not be inconvenienced by the change in location. He set up post office boxes in Vancouver and paid for toll-free telephone and fax lines for clients calling from Vancouver. He also advised clients that he would not offset the extra transportation and communication expenses resulting from locating his office in Abbottsford by increased billing. The Court noted that, other than the location of his office, there was "little change" in the defendant's business practices. He continued to service the same type of claims in the same geographical area.

[57] Relying on cases involving restrictive covenants in employment contracts, the defendant argued that there was an imbalance of bargaining power between himself and the plaintiff, and that the covenant was unreasonable because it went beyond what was necessary to protect the plaintiff's existing client base. The Court disagreed, and held that the covenant was reasonable and enforceable:

> 26 In my opinion the cases cited on behalf of the defendant are distinguishable. In those cases the restrictive covenant arose solely in the context of an employment agreement. That is not the situation in the case at bar. The restrictive covenant in this case arose in the context of Mr. Doge selling the goodwill of Adjusters Ltd. to Brouwer Claims. **While contracts of employment in restraint of trade are viewed by the law as *prima facie* offensive, an opposite approach applies to contracts for the sale of the goodwill of a business where it is the policy of the law that such restrictions should be *prima facie* enforced**. …
>
> 27 It was made clear to Mr. Doge at the outset of negotiations that Brouwer Claims would not be prepared to enter into any agreement absent a restrictive covenant. Brouwer Claims had already experienced Mr. Doge's original departure from the firm in which he had taken firm business with him. They were not prepared to allow that to happen again. **The nature of the insurance business is that insurers are loyal to the adjusters who handle their claims. The personal relationship between an adjuster and a claims manager often dictates to whom claims will be sent. Brouwer Claims had a legitimate interest to protect. Absent a restrictive covenant it was predictable that many of Mr. Doge's clients would continue to use his services if he left the firm.** The one year prohibition would give Brouwer Claims the opportunity to service the clients during that time and hopefully assist them in competing with Mr. Doge for the business after the restrictive covenant expired.

> 28 This was a negotiation conducted by relative equals. … I am satisfied in view of all of the surrounding circumstances that the covenant, its duration and geographic area are reasonable and enforceable.
>
> [*Emphasis added*]

[58] The defendant further argued that he did not breach the covenant by carrying on independent adjusting services within the prohibited geographic area because he received his assignments and prepared his reports to insurers in the Abbotsford office. He acknowledged, however, that most of the claims he adjusted arose within the proscribed area and required him to complete field work there. The Court rejected this argument and held that the location of the office was not determinative:

> 35 … **The purpose of the restrictive covenant was to prevent Mr. Doge from working on claims within the restricted geographical area.** That is precisely, however, what he did. The fact that his office was located outside the geographical area does not provide him with a defence. Such a result would make the restrictions in the agreement illusory. I find Mr. Doge in breach of paragraph two of the restrictive covenant.
>
> [*Emphasis added*]

[59] In *Capital Safe*, the appellants sold their interest in Capital Safe & Lock Service Ltd. to the respondents in September 1992. Their execution of a non-competition agreement was a key feature of the share purchase agreement. The restrictive covenant prohibited the appellants from carrying on or being engaged in any business which was competitive with that carried on by Capital "within a radius of one hundred miles from the City of Fredericton" for a period of ten years. Several years later, the appellants opened a competing business "within sight distance" of Capital. The appellants argued that the restrictive covenant was too vague to be enforced because it did not expressly identify the point from which the distance of one hundred miles was to be measured. They also argued that the covenant's spatial, temporal, and trade restrictions were excessive, having regard to the public interest and the interests of the parties. The Court of Appeal, *per* Drapeau J.A. (as he then was), noted that, in a sale of business context, "deference for the views and wishes of the parties, as expressed in their contractual arrangements, should weigh heavily in the balance when courts pass judgment on the vendor's post-sale contention that his or her restrictive covenant is unreasonable": para. 34. The Court found that the restrictive covenant was not too broad or too vague, and that its restrictions were "no greater than what was needed" to protect the respondents' proprietary interest: para. 37.

[60] JCI says the purpose behind the restrictive covenant in this case, as in *Brouwer*, was to prevent Mr. Chiasson and City of Lakes from operating – in any way – within the restricted geographical area of the Halifax peninsula. It says that although Mr. Chiasson's pharmacy-related operations are physically based outside of the Halifax peninsula, he is effectively operating within the area that was to be restricted to him. JCI submits that Mr. Chiasson received good consideration for the sale of his business and it is in the public's interest to protect JCI's investment as the purchaser.

[61] Mr. Chiasson does not challenge the reasonableness of the temporal and geographical limitations of the restrictive covenant. He further acknowledges that the physical location of a business is not determinative of whether it is operating in a territory. He says, however, that the cases cited by JCI are distinguishable because the purchasers in those cases were not attempting to apply a restrictive covenant to the normal-course operations of a pre-existing business. Mr. Chiasson submits that the correct interpretation of the restrictive covenant is that it does not extend to the normal-course operations of City of Lakes. He says that key elements of the factual matrix – that City of Lakes was an existing business, that it was not being sold, and that it would continue in operation – confirm the interpretation he suggests. Mr. Chiasson further submits that JCI's proposed interpretation would introduce significant impracticalities to the operation of City of Lakes. Accordingly, if JCI had intended to restrict the activities of City of Lakes, it should have ensured that this intention was reflected in the language of the covenant.

[62] Mr. Chiasson cites *Weiss v. Welch*, 2015 BCSC 2431, [2015] B.C.J. No. 2852, as an example of the importance of the factual matrix when interpreting restrictive covenants. In that case, the plaintiffs purchased all of the outstanding shares in the capital of Connie's Petites Inc. ("CPI") from the defendants in November 2012. At that time, CPI operated two women's retail clothing stores selling fashions marketed to petite women (primarily blouses, sweaters, shirts, and dresses) and accessories. As a condition of the transaction, the plaintiffs required the defendants to enter into a non-competition agreement which stated that the defendants would not engage in any business within five hundred kilometres of Victoria, British Columbia, "that competes with the Business for a period of 7 years". The term "Business" in the agreement referred to CPI, "which operates two retail clothing stores in Victoria".

[63] In March 2015, the defendants opened a small store in Victoria called "Lily Pad Lingerie". Approximately 80% of Lily Pad Lingerie's sales were from bras

and panties, with the remainder from sleepwear, cover-ups, accessories and miscellaneous items. The plaintiffs filed an action for breach of the non-competition agreement, arguing that the restrictive covenant prohibited the defendants from engaging in any retail clothing business within the restricted area. The Court disagreed, finding that the market for women's fashions for petites was readily distinguishable from lingerie and undergarments. The evidence showed that CPI did not sell bras and panties, and the Court was not satisfied that any minor overlap with respect to sleepwear and cover-ups fell within the meaning of "competition": para. 30. The Court concluded:

> 32 The language of a non-competition covenant is, like other contractual provisions, the result of the bargain struck by the parties. If the plaintiffs had wanted to prevent the defendants from engaging in the sale of any retail clothing, the plaintiffs could have bargained for such a covenant. As it stands, the NCNS Agreement uses the word competes and refers to the operation of the two particular retail stores. The Court must be guided by the language the parties used.

[64] Mr. Chiasson submits in the alternative that if the Court is not prepared to outright accept the interpretation he is advancing, the Court should find that it is a reasonable interpretation. If there are two reasonable interpretations, he says, then the restrictive covenant is ambiguous, and fatally flawed.

[65] In the further alternative, if the restrictive covenant does apply to City of Lakes, Mr. Chiasson submits that delivering a handful of prescriptions to the peninsula does not amount to "operating a pharmacy" there. He submits that, as in *Weiss*, these activities do not rise to the level of competition.

Analysis

[66] I will deal first with the allegation that Mr. Chiasson has breached the portion of the restrictive covenant that prohibits him from having "any involvement" with Direction 180 for a period of ten years. Although JCI devoted considerable time to this issue, I find that the allegation has no merit, from either a liability or a damages perspective.

[67] To prove that Mr. Chiasson has remained involved with Direction 180, JCI first points to the coffee shop meeting in late December 2011. At that meeting, Mr. Chiasson told Peter and Jennifer Jorna that Direction 180 wanted to operate a methadone clinic with him in Dartmouth that would help reduce the wait-list at the

Gottingen Street location. The Jornas rejected this proposal, and Mr. Chiasson did not pursue it further. The restrictive covenant prohibits him from having any involvement with Direction 180 "without the express written consent of the Purchaser". Mr. Chiasson asked the purchaser for consent to be involved with Direction 180 in Dartmouth, which was refused. The covenant clearly contemplates that consent may be requested, and the request made by Mr. Chiasson does not, without more, amount to a breach of the covenant.

[68] Next, JCI relies on the fact that Mr. Chiasson made donations to Direction 180 in January and October 2012. I am satisfied that these two donations represented the $50,000 he agreed to pay the clinic to extend the agreement with Scotia. The fact that Mr. Chiasson agreed in December 2011 to pay $50,000 to Direction 180 in return for extending the agreement is not disputed. Although Mr. Jorna assumed that Mr. Chiasson made the payment before the sale of Scotia, I accept Mr. Chiasson's evidence that he agreed with Direction 180 that the funds would come from the proceeds of the sale. In my view, this is far more likely than Mr. Jorna's assertion that in January 2012, less than one month after paying $50,000 to Direction 180, Mr. Chiasson donated another $25,000, followed by a further $25,000 nine months later. In making this finding, I am mindful of the conflict between Mr. Chiasson's affidavit evidence and his evidence on cross-examination as to the reason for the donations. I note, however, that Mr. Chiasson's evidence on cross-examination, which I accept, is consistent with the evidence he gave on discovery prior to the swearing of his affidavit.

[69] Although JCI alleges that Mr. Chiasson "continued to interact with physicians who work with Direction 180", there was little to no evidence to challenge Mr. Chiasson's statement that any interactions he had with these physicians were strictly related to patient care.

[70] Even if I were satisfied, however, that Mr. Chiasson had breached the restrictive covenant by remaining involved with Direction 180, there is no evidence before the Court that JCI suffered any losses as a result of that involvement.

[71] I will now consider whether Mr. Chiasson has breached the restrictive covenant by not excluding Halifax peninsula residents from City of Lakes' prescription-delivery service and Perks customer-loyalty program.

[72] These are the key facts, as I find them. Prior to the sale of Scotia, City of Lakes offered incentives and prescription-delivery services to all of its clients,

regardless of where they lived. Peter Jorna, as president of JCI, knew that David Chiasson would continue to own and operate City of Lakes after the sale. There were no discussions during negotiations as to the impact, if any, of the restrictive covenant on City of Lakes' operations. Following the sale of Scotia, City of Lakes continued to offer incentives and prescription-delivery services to its customers, including a handful of Halifax peninsula residents. There is no evidence that Mr. Chiasson actively solicited Halifax peninsula clients. K.R., the only customer who testified, said that he heard about City of Lakes from another resident of his apartment building. He said Mr. Chiasson asked him to tell any of his friends who could use the pharmacy about his services. Mr. Chiasson denied saying this, but it is ultimately of no consequence. Even if he said it, he did not ask K.R. to tell only his friends who lived on the peninsula, and K.R. admits that he was not offered any compensation for recommending City of Lakes. As to whether Mr. Chiasson gave K.R. extra gift cards on occasion, again, nothing turns on this.

[73] The facts of this case appear to be unique. The parties have not provided the Court with any cases where the terms of a restrictive covenant contained in an agreement for the sale of a business have been applied to a vendor's pre-existing business. The Court's own research has not turned up any helpful cases, either. In my view, however, the principles of contractual interpretation dictate only one result.

[74] When David Chiasson signed the APS and the NCA, he agreed that he would not "open, operate, invest in, or advise a pharmacy company or company in a related industry for Seven (7) years following the Closing Date … anywhere within the geographic confines of the Halifax peninsula, directly or indirectly, in any manner whatsoever … without the express written consent of the Purchaser." Although the Court's interpretation of this restrictive covenant must always be grounded in the text, the law recognizes that contracts are not created in a vacuum. The Court must also consider the factual matrix or surrounding circumstances. The factual matrix consists of the background facts that were or reasonably ought to have been within the knowledge of both parties at or before the date of contracting.

[75] During negotiations, Peter Jorna, as president of JCI, was aware that David Chiasson owned and operated a second pharmacy in Dartmouth, and that he intended to continue operating that pharmacy after selling Scotia. Although he denied knowing that City of Lakes had customers living on the Halifax peninsula, Mr. Jorna conceded that he knew it *could* have such customers. The evidence establishes that customer-loyalty programs and delivery services are not only very

common in the pharmacy business, but are often critical to a pharmacy's ability to remain competitive. I find that Mr. Jorna knew or reasonably ought to have known, when he agreed to the contract, that City of Lakes had Halifax peninsula clients, and that it had a customer-loyalty program and delivery service. Put differently, when the parties negotiated the language of the restrictive covenant, Mr. Jorna knew, or ought to have known, that City of Lakes might already be making deliveries on the peninsula. If he intended, as he now says he did, that the restrictive covenant prohibit City of Lakes from making deliveries on the peninsula, and from offering incentives to peninsula residents who receive those deliveries, he could have negotiated language to that effect. Notwithstanding that there were no discussions between the parties about the conduct of business at City of Lakes, Mr. Jorna asks this Court to interpret the restrictive covenant in a manner that would require Mr. Chiasson to obtain Mr. Jorna's written consent to continue the regular operations of his existing pharmacy. I cannot accept that interpretation.

[76] As Mr. Chiasson points out, Mr. Jorna's interpretation would also introduce significant impracticalities into the operation of City of Lakes. It would be unreasonable to interpret the covenant as requiring Mr. Chiasson, at the time of signing the agreements, to have dropped any existing customers who lived on the peninsula and received deliveries, or to drop an existing customer because they happened to move to the peninsula at some point thereafter and request delivery. It would be equally unreasonable to interpret the covenant as requiring Mr. Chiasson to refuse delivery to an existing Halifax peninsula customer who usually picks up their prescriptions in Dartmouth, but, for some reason, becomes unable to do so. Pharmacies deliver essential healthcare services and pharmacists have ethical obligations to their clients. For this reason, extensive negotiation and precise drafting would be required where a restrictive covenant is intended to apply to existing pharmacist-client relationships. Even with these safeguards, however, a restrictive covenant of this nature might be ineffective for policy reasons, being contrary to the public interest.

[77] If I had found that the restrictive covenant applied to City of Lakes, I would have rejected Mr. Chiasson's alternative arguments that making a handful of deliveries to the Halifax peninsula does not amount to "operating" a pharmacy in the proscribed area, or that it does not rise to some undefined level of "competition" required to trigger the covenant's enforceability. If the covenant applied to City of Lakes, its purpose would be to prevent City of Lakes from servicing clients in the proscribed area. In my view, whether it was servicing three clients or three hundred clients would be relevant to damages, not liability. The

reasoning in *Weiss v. Welch*, where the restrictive covenant specifically used the word "compete", has no application here. That said, if I had found that Mr. Chiasson breached the restrictive covenant, I would not have relied on Mr. Goodfellow's report in assessing damages. Cross-examination was not necessary to reveal the report's deficiencies. Its utility was compromised by Mr. Goodfellow's assumption that the alleged competing activities were the sole reason why Scotia's "all other drugs" category was not in line with his proposed historical and future growth rates. Other possible causes would include Scotia's location in an economically depressed neighbourhood, the presence of a nearby needle exchange and methadone clinic, competition from other local pharmacies, and so on. For instance, K.R. testified that he switched pharmacies because he was afraid of being robbed of his medications upon exiting Scotia. The report's failure to consider potential alternative causes of the loss, coupled with the lack of other evidence from JCI on causation, renders the report useless to the Court. I agree with Mr. Chiasson that if JCI had proved that, but for the alleged competing activities, those City of Lakes' customers receiving deliveries on the Halifax peninsula would have obtained their prescriptions at Scotia, the best available measure of damages would be the revenue City of Lakes obtained from these customers during the life of the restrictive covenant.

[78] Having concluded that David Chiasson has not breached the restrictive covenant, I find that the Chiasson Family Trust (2004) is entitled to the $500,000 balance of the final payment due on December 20, 2016. The General Security Agreement ("GSA") executed by the parties provides for interest at the rate of 10% per annum on any amounts required to be paid to the Trust. JCI argues that the Court should decline to award any interest to Mr. Chiasson under the GSA because JCI's application was originally scheduled to be heard in October 2016, two months before the final payment was due. JCI says it is only because of Mr. Chiasson's delays in meeting his disclosure obligations, along with delay occasioned by filing his own competing application, that he is now in a position to recover a substantial interest payment. JCI submits that the Court should not permit Mr. Chiasson to benefit from his own delay. No authority was provided for JCI's position.

[79] Since JCI filed its application in April 2016, obtaining relevant documents from Mr. Chiasson has been an uphill battle. He repeatedly took the position that, since he had not breached the covenant, he had no relevant documents to produce. Litigation would grind to a halt if only those defendants who believed they were liable to the plaintiff were subject to disclosure obligations. In March 2017, Mr.

Chiasson, having maintained his position that he had nothing to disclose in the JCI application, filed his own application on behalf of the Chiasson Family Trust (2004) for the balance of the final payment under the APS. The issue of the Trust's entitlement to those funds was already before the Court in the earlier application, and this new application did nothing but add further delay and expense. It should not have been filed. In November 2017, when JCI's counsel finally tired of the pointless back-and-forth with Mr. Chiasson's counsel, they brought a successful motion for a production order.

[80] If this Court had the discretion to deny contracted interest, I would exercise it in this case. The authorities suggest, however, that the Court has no jurisdiction in this area. In *Agate Developments Ltd. v. United Gulf Developments Ltd.*, 2009 NSSC 160, [2009] N.S.J. No. 221, Moir J. stated:

> 84 Unlike prejudgment interest under the *Judicature Act*, this court does not have a broad discretion over contracted interest. I do not have the power to refuse contracted interest, unless the contract is contrary to law. …

[81] Similar statements appear in *Scotia Mortgage Corp. v. Manzouri,* 2012 ABQB 395, [2012] A.J. No. 636, at para. 28; and *Greenslade's Construction Co. v. Conception Bay South (Town)*, (2001), 8 C.L.R. (3d) 120, [2001] N.J. No. 24 (Nfld. S.C. (T.D.)), at para. 14.

[82] I agree with Moir J. that this Court has no discretion over contracted interest. The Chiasson Family Trust (2004) is entitled to interest in accordance with JCI's obligations under the GSA. That said, the unnecessary delay that resulted from Mr. Chiasson's unreasonable approach to disclosure and his decision to file his own application is a factor the Court will consider in determining costs. I will hear from the parties on this issue before making a decision, but an award of solicitor-client costs to JCI arising from the second application is certainly a possibility.

Conclusion

[83] JCI's application is dismissed, and I find that The Chiasson Family Trust (2004) is entitled to the $500,000 still owing on the promissory note, along with interest from December 21, 2016, to the date of this decision at a rate of 10% per annum ($86,986). Since interest is payable under the contract, there will be no award for prejudgment interest. While it would have been preferable for The Chiasson Family Trust (2004) to seek to be added as a party to the JCI application

and to file its claim in that proceeding that is not what occurred. The order will therefore be issued in The Chiasson Family Trust (2004) application.

[84] I will leave it to the parties to try to agree on costs, failing which, they may file further written submissions within 60 days of the date of this decision.

McDougall, J.

SUPREME COURT OF NOVA SCOTIA

Citation: *Jorna & Craig Inc. v. Chiasson*, 2018 NSSC 220

Date: 20180917
Docket: Hfx No. 450323
Registry: Halifax

Between:

Jorna & Craig Inc.

Applicant

v.

David Chiasson and City of Lakes Pharmacy Limited

Respondents

Docket: Hfx No. 461648
Registry: Halifax

Between:

David Chiasson and Brenda Chiasson in their capacities as the Trustees of the Chiasson Family Trust (2004)

Applicants

v.

Jorna & Craig Incorporated, Peter Jorna and Jennifer Craig

Respondents

CORRIGENDUM

Corrected Decision:	The text of the original decision has been corrected according to the attached corrigendum dated January 30, 2019
Judge:	The Honourable Justice Glen G. McDougall
Heard:	April 9 and 10, 2018, in Halifax, Nova Scotia
Written Decision:	September 17, 2018
Counsel:	Caitlin Regan-Cottreau and Matt Saunders, for the Applicant/ Respondents Brian K. Awad, for the Respondents/Applicants

Corrigendum:

Page 26 and 27, para. 83 of the decision released on September 17, 2018 shall now read as follows:

[83] JCI's application is dismissed, and I find that The Chiasson Family Trust (2004) is entitled to the $500,000 still owing on the promissory note, along with interest from December 21, 2016, to the date of this decision at a rate of 10% per annum ($86,986). Since interest is payable under the contract, there will be no award for prejudgment interest. ~~The Chiasson Family Trust (2004) application is dismissed.~~ While it would have been preferable for The Chiasson Family Trust (2004) to seek to be added as a party to the JCI application and to file its claim in that proceeding that is not what occurred. The order will therefore be issued in The Chiasson Family Trust (2004) application.

McDougall, J.