Court of King's Bench of Alberta

Citation: FYi Eye Care Services and Products Inc v Steller, 2026 ABKB 757

Date: 20261029
Docket: 2601 14871
Registry: Calgary

2026 ABKB 757 (CanLII)

Between:

FYi Eye Care Services and Products Inc

Applicant

- and -

Dr Matthew Steller

Respondent

Reasons for Decision
of the
Honourable Justice Colin C.J. Feasby

I. Introduction

[1] FYi Eye Care Services and Products Inc ("FYi Eye Care") operates optometry clinics across Canada. Matthew Steller ("Dr Steller") is an optometrist who worked at FYi Eye Care clinics in and around Mississauga, Ontario. When Dr Steller ended his association with FYi Eye Care earlier this year, he continued his optometry practice at an FYi Eye Care competitor close to the FYi Eye Care location where he had previously worked. FYi Eye Care asserts that this is a breach of the non-competition covenant in the Administrative Services and License Agreement ("ALSA") dated April 12, 2022. FYi Eye Care seeks an injunction to prevent Dr Steller from practicing optometry within a 5 km radius of the FYi Eye Care clinic where he used to work.

[2] FYi Eye Care's application raises two issues. First, does this Court have jurisdiction to hear the application? Second, if the Court has jurisdiction, should the restrictive covenant in the ALSA be enforced? These reasons will explain that the Court has jurisdiction to hear the application and it is appropriate in the circumstances to grant an injunction enforcing the restrictive covenant.

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II. Jurisdiction

[3] There are two jurisdictional issues that must be addressed before the merits of FYi Eye Care's injunction application are considered. First, FYi Eye Care takes the position that Dr Steller attorned to the jurisdiction of the Alberta Court of King's Bench by participating in the injunction application on what Dr Steller characterized as a "contingent" basis. Second, FYi Eye Care submits that the ALSA forum selection clause, which chooses the Court of King's Bench of Alberta as the venue for injunctive relief, gives this Court jurisdiction to hear FYi Eye Care's injunction application. Dr Steller asserts that despite the forum selection clause, Alberta is not the appropriate forum for this dispute because other relevant factors for determining jurisdiction point to Ontario being the appropriate jurisdiction.

A. Attornment by Conduct

[4] Dr Steller characterizes his participation in this application as "contingent." He stated as follows in his affidavit:

> I object to the jurisdiction of this Honourable Court and, alternatively, to Alberta being the forum in which this dispute is determined. I am advised by my counsel and believe that the Respondent will bring an application seeking an order declining jurisdiction and/or staying this proceeding in favour of Ontario.
>
> This Affidavit is sworn for the purposes of that jurisdictional objection and, only in the alternative if this Court determines that it will exercise jurisdiction. In response to FYi's application for interlocutory injunctive relief. Nothing in this Affidavit is intended to constitute an attornment to Alberta's jurisdiction.

[5] Dr Steller brought a cross-application challenging the Court's jurisdiction and asserted that he only responded to the substance of FYi Eye Care's application because it is ostensibly an urgent application. Dr Steller relies on ***Cincurak v Lamoureux***, 2002 ABQB 777 at paras 24-26 where Rooke J, as he then was, found that where a party defended a case on the merits it was still possible to contest the question of attornment.

[6] FYi Eye Care submits that Dr Steller, by responding to the substance of the FYi Eye Care injunction application, has attorned to the jurisdiction of the Alberta Court of King's Bench. FYi Eye Care relies on ***RDX Technologies Corporation v Appel***, 2019 ABQB 477 where Justice Mahoney held at para 22 that a party "cannot engage the merits of this action and at the same time reserve the right to challenge jurisdiction. It cannot have it both ways." FYi Eye Care also cites ***Fath v Quadrant Construction Ltd***, 2019 ABQB 151 at para 47 and ***Obcorp Holdings Inc v Mammoet Canada Western Ltd***, 2019 ABQB 960 at para 15 which both quote the following passage from Jean F Côté and William A Stevenson, *Civil Procedure Encyclopedia* (Edmonton: Juriliber, 2003), Chapter 2B, 11:

> Submission (attornment) is objective or factual, and does not depend on intent; defending on the merits attorns despite simultaneous contest of the jurisdiction. A

> contest of the jurisdiction (wanting to have service out of the jurisdiction set aside) must be clear and unambiguous, *and there must not be any other steps in proceeding until the jurisdiction question has been settled. The contest to the jurisdiction will be waived if it is left in abeyance and a defence and other interlocutory proceedings in the action are proceeded with.* It is then too late to revive the objection to the jurisdiction. Therefore one cannot defend on the merits even if one has first had to appear to contest a seizure of assets. Attornment to the jurisdiction by defending does not bar a later motion to object to this forum as unsuitable. [Emphasis as quoted in ***Fath*** and ***Obcorp***]

[7] In the authorities that Stevenson and Côté relied on, a party could apply for a stay on the grounds of *forum non conveniens* despite having attorned to the jurisdiction. However, more recent legal authorities are split on whether attornment to the jurisdiction by defending bars a later motion to object to the forum. In ***RDX Technologies Corporation v Appel***, 2019 ABQB 477 at paras 23-25, Justice Mahoney held that a party who has attorned is precluded from further challenging jurisdiction. Whereas Master Robertson in ***The Semex Alliance v Hi Tech Dairy Equipments Inc***, 2019 ABQB 70 at paras 68-74, applied the *forum non conveniens* analysis after finding the defendants attorned to Alberta's jurisdiction. Given the uncertainty in the law, I consider both the question of attornment and *forum non conveniens*.

[8] I am satisfied that the common law position that taking a conditional or contingent position on the merits of a dispute constitutes attornment remains the law of Alberta despite the anomaly of ***Cincurak***. With that said, I think that this is an anachronism that could be addressed by the Rules of Court Committee. To penalize a litigant for participating in a substantive application on a contingent basis, when it is an efficient use of resources for both the Court and the parties and it is in the interest of the moving party on the substantive application because it avoids delay, would incentivize the wrong kind of litigation conduct.

[9] The unfortunate reality of litigation in our era of constrained court resources is that the correct order of operations – a jurisdiction application first and then, if the Court has jurisdiction, an injunction application after the parties have created an evidential record – is often not realistic. Convenience for the parties and the efficient use of court resources often demands that the applications be heard at the same time by the same judge. As a result, the contingent participation of the party contesting jurisdiction in the substantive application can be a sensible approach.

[10] Until the law changes, as a matter of litigation practice, before participating in a substantive step in a proceeding on a contingent basis, counsel must reach an agreement that recognizes that the party contesting jurisdiction's participation in the substantive application is contingent on the outcome of the jurisdiction application and without prejudice to the jurisdiction application so that nothing is left to chance. That was not done in this case.

[11] The question of contingent participation and attornment is an issue that could be resolved through an amendment to the *Rules of Court* that expressly provides for contingent participation and sets out the requirements of and limits on contingent participation. An example of such a rule may be found in the British Columbia *Supreme Court Civil Rules*, BC Reg 168/2009, Rule 21-8(5), which provides that after disputing jurisdiction but prior to the Court deciding the jurisdictional question, a party may "defend the proceeding on its merits" without submitting to the jurisdiction of the Court.

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[12] Despite my misgivings, the law requires me to conclude that Dr Steller attorned to the jurisdiction of the Court of King's Bench of Alberta.

B. Is Alberta the Proper Forum?

i. Forum Selection Clause

[13] FYi Eye Care asserts that this case is properly before this Court even though it concerns a business that was in Ontario because the parties chose dispute resolution in Alberta in the ALSA forum selection clause. Dr Steller submits that the ALSA forum selection clause should not be honoured because it is contrary to public policy.

[14] To properly assess the merits of the competing positions, it is first necessary to step back and take stock of the whole process for dispute resolution set out in the ALSA. ALSA s 11.12(a) provides that the ALSA "will be interpreted and governed in accordance with the laws of the Province of Alberta" and ALSA s 11.11 provides that all matters between the parties shall be submitted to arbitration pursuant to the *Arbitration Act*, RSA 2000, c A-43. ALSA s 11.12(b) then provides that the arbitration clause does not apply to non-monetary relief and that the parties submit to the exclusive jurisdiction of the courts of Alberta for the purposes of applications for injunctive and other types of urgent non-monetary relief.

[15] *Arbitration Act* s 8 outlines the ways in which the "court" – which is defined to mean the Court of King's Bench of Alberta – has the power to support arbitration proceedings. For example, *Arbitration Act* s 8(1) provides that "[t]he court's powers with respect to ... interim injunctions ... are the same in arbitrations as in court actions." This means that a choice to arbitrate pursuant to the *Arbitration Act* is, in effect, a choice to submit to the jurisdiction of the Court of King's Bench of Alberta for certain matters ancillary to the arbitration, including interim injunctive relief. The scheme of the ALSA is similar to that of the *Arbitration Act*, which indicates that the parties understood Alberta to be the appropriate jurisdiction for injunctive relief.

[16] Justices Karakatsanis, Wagner (as he then was), and Gascon held for the majority in ***Douez v Facebook, Inc***, 2017 SCC 33 at para 1 that "forum selection clauses are generally enforced to hold sophisticated parties to their bargain, absent exceptional circumstances." The majority went on to explain the common law test for determining whether to enforce a forum selection clause. First, a court must "appl[y] the principles of contract law to determine the validity of the forum selection clause": ***Douez*** at para 28. If the forum selection clause passes this test, the onus shifts to the party resisting enforcement to "show strong reasons why the court should not enforce the forum selection clause and stay the action": ***Douez*** at para 29 and ***ZI Pompey Industrie v ECU-Line NV***, 2003 SCC 27 at para 39. At this second stage, the Court must consider the "convenience of the parties, fairness between the parties and the interests of justice" and public policy: ***Douez*** at para 29.

[17] FYi Eye Care relies on the forum selection clause in the ALSA, which provides as follows:

> The Parties acknowledge and agree that the provisions of Section 11.11 will not apply in the event of any breach or violation of the provisions of this Agreement which, in the sole opinion of the nonbreaching Party, would result in damages which could not adequately be compensated by monetary reward and accordingly require application to the courts of the Province of Alberta for relief by way of

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> restraining order, injunction, decree or otherwise, and each of the Parties irrevocably submits and attorns to the exclusive jurisdiction of the courts of the Province of Alberta in respect of any such matters.

[18] As a matter of contract law, there is no obstacle to the enforcement of the forum selection clause. The forum selection clause is stated in clear language and there is nothing unconscionable about enforcing the forum selection clause in the present circumstances. FYi Eye Care and Dr Steller are both sophisticated parties and there is no credible suggestion that there was any sort of duress or power imbalance such that the forum selection clause should not be honoured.

[19] Dr Steller advances two main arguments against the enforcement of the forum selection clause. First, he asserts that FYi Eye Care is seeking to avoid the terms of the *Employment Standards Act*, SO 2000, c 41, s 67.2 ("OESA"), which provides that "[n]o employer shall enter into an employment contract or other agreement with an employee that is, or that includes, a non-compete agreement." Accordingly, he submits that enforcement of the forum selection clause is contrary to public policy. Second, he asserts that this Court should decline to hear FYi Eye Care's application because "every substantive connection concerning the restraint is in Ontario." Dr Steller points out that the relevant business was located in Ontario, and if the alleged breaches of the ALSA occurred, they occurred in Ontario. He adds that the relevant professional regulatory regime is Ontario's, and the injunction, if granted, would restrain conduct in Ontario.

[20] Dr Steller's first argument requires the Court to consider whether there was an employment relationship between FYi Eye Care and Dr Steller. Justice Major, writing for the Court in ***671122 Ontario Ltd v Sagaz Industries Canada Inc***, 2001 SCC 59 at para 47, explained that the question of whether a person is an employee or an independent contractor is determined by considering the degree of control over the worker's activities and other factors including "whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks." See also, ***Belton v Liberty Insurance Co of Canada***, (2004) 72 OR (3d) 81 (ONCA).

[21] The evidence shows that the relationship between FYi Eye Care and Dr Steller was not that of an employee-employer. The FYi Eye Care business model is to provide turnkey clinics for optometrists. The optometrist provides services to patients and FYi Eye Care provides the physical facilities, equipment, staff, and controls the retail sales component of the business. In exchange, the optometrist pays a percentage of patient billings to FYi Eye Care. This does not, in any sense, resemble a customary employer-employee relationship. Though the words that the parties use to describe their relationship should not be given too much weight, it is noteworthy that Dr Steller described himself in communications with FYi Eye Care as an independent contractor and the ALSA provides that he is not an employee of FYi Eye Care: ***Gerling v Camrose Regional Exhibition & Agricultural Society***, 2022 ABCA 210 at para 27; ***Pringle v Zenova Group PLC***, 2026 ONCA 549 at para 84. The best label to describe the status of Dr Steller is "independent contractor."

[22] Dr Steller's argument that taking jurisdiction over this dispute is contrary to public policy because the Ontario *Employment Standards Act* does not permit non-competition covenants has no merit because he was not an employee. Though an independent contractor may be described

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in a casual sense as a quasi-employee, that does not mean that Dr Steller was an "employee" within the meaning of OESA. The OESA defines "employee" as including:

> (a) a person, including an officer of a corporation, who performs work for an employer for wages,
>
> (b) a person who supplies services to an employer for wages,
>
> (c) a person who receives training from a person who is an employer, if the skill in which the person is being trained is a skill used by the employer's employees, or
>
> (d) a person who is a homeworker....

[23] Dr Steller cannot be characterized as a wage earner, a trainee, or a homeworker. As a contractor, he clearly falls outside the scope of the OESA definition of employee: ***TJ Dustin Ruttan v Hennessey Point Property Maintenance***, 2020 CanLII 42462 (ONLRB) at para 32.

[24] The Ontario regulatory regime for optometrists reinforces my conclusion that Dr Steller was an independent contractor. The regulation governing conflicts of interest under the *Optometry Act, 1991*, SO 1991, c 35 sets limits on the practice of optometry. Section 3(2)(g) of the regulation (General, O Reg 119/94) provides that an optometrist may only engage in the practice of the profession with other optometrists, as an employee of the government, or in several other ways not relevant to the present case. The effect of the regulation is that optometrists cannot be employees of companies like FYi Eye Care.

ii. *Forum Non Conveniens*

[25] Dr Steller's objection to Alberta on the grounds of *forum non conveniens* must also fail. Pursuant to the doctrine of *forum non conveniens* the Court may stay an action in favour of a more appropriate forum. To determine which forum is more appropriate, the Court must consider a range of factors, including expense and convenience to the parties, expense and convenience to witnesses, loss of legitimate juridical advantage, fairness, enforcement, and the applicable law: ***Haaretz.com v Goldhar***, 2018 SCC 28 at paras 51-94.

[26] To the extent that the *forum non conveniens* objection relates to the present application, the argument that Alberta is not an appropriate forum is belied by the reality that Dr Steller has participated in this application on a contingent basis. There is no inconvenience to witnesses because they have already given their evidence and likewise there can be no inconvenience to the parties because they have already gone to the trouble and expense of litigating the application in Alberta. The idea that it is more convenient for the parties for this Court to decline jurisdiction so that they can start over again with an injunction application in Ontario is absurd.

[27] To the extent that the *forum non conveniens* objection relates to the whole proceeding, it must be kept in mind that the Court only has jurisdiction over injunctive relief. Any determination on the merits in a proceeding for damages will take place in an arbitration because Dr Steller has not disputed the ALSA requirement to arbitrate pursuant to the Alberta *Arbitration Act*. There is no such thing as a *forum non conveniens* objection to arbitration (***Zomongo Inc v Fisher Enterprises LLC***, 2016 ABPC 19 at para 10) and it is typically the responsibility of the arbitrator to rule first on their own jurisdiction: ***Dell Computer Corp v Union des consommateurs***, 2007 SCC 34 at para 70. Regardless, I note that there is nothing inherently unfair about arbitration and the parties have chosen to be governed by Alberta law.

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[28] Dr Steller argued that by litigating in Alberta he would lose the legitimate juridical advantage of the OESA proscription on non-competition clauses. However, as I have already explained, as an independent contractor he does not meet the definition of employee under the OESA. Regardless of the location of the litigation, he would not have the benefit of the OESA proscription on non-competition clauses.

[29] Ontario is not a more appropriate forum for this application or the main action. I decline to stay the proceeding on the grounds of *forum non conveniens*.

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III. Injunction

A. What is the appropriate injunction standard?

[30] The standard injunction test was set out in ***RJR-MacDonald Inc v Canada (Attorney General)***, [1994] 1 SCR 311 at 314-15. An applicant must establish that:

(a) there is a serious issue to be tried;

(b) irreparable harm will result if the injunction is not granted; and

(c) the balance of convenience favours granting the injunction.

[31] Where a party seeks to enforce a non-competition covenant in the employment context or to restrain the misappropriation of confidential information, the first part of the standard injunction test should be modified to ask if the applicant has a strong *prima facie* case: ***City Wide Towing and Recovery Service Ltd v Poole***, 2020 ABCA 305 at para 26; ***GG & HH Inc v 2306084 Alberta Ltd***, 2022 ABQB 58 at para 85.

[32] FYi Eye Care argues that the lower serious issue to be tried standard is appropriate because Dr Steller was an independent contractor, not an employee. FYi Eye Care relies on ***Payette v Guay***, 2013 SCC 45 at para 39 where it was held that "the common law rules for restrictive covenants relating to employment do not apply with the same rigour or intensity where the obligations are assumed in the context of a commercial contract." ***Payette***, however, was not an injunction case. Wagner J, as he then was, explained at para 2 that ***Payette*** was a case about the interpretation of a restrictive covenant.

[33] There is no definitive statement from an appellate court that the appropriate standard to apply to determine if an injunction to enforce a restrictive covenant in a quasi-employment context is the "serious issue to be tried" standard. The Court of Appeal in ***City Wide Towing*** left undecided the question of whether the strong *prima facie* case standard applied when an employee's non-competition covenant was connected to the sale of a business. After surveying the caselaw from several jurisdictions in ***Intellimedia Limited Partnership v Jawad***, 2026 ABKB 247 at para 20, Justice Marion decided the question. He concluded that "the strong *prima facie* case standard does not apply where restrictive covenants are linked to a contract for the sale of a business." But that is quite different from saying that the serious issue to be tried standard applies in the context of quasi-employment.

[34] The relationship between FYi Eye Care and Dr Steller did not involve the sale of a business and, as I have already explained, is best characterized as an independent contractor relationship. But the circumstances between FYi Eye Care and Dr Steller cannot be compared to those that exist in the context of the sale of a business by an owner-operator. FYi Eye Care did not purchase the goodwill associated with the business and pay consideration for the non-

competition covenant in the same way that an acquiror of a business does. FYi Eye Care's business existed before Dr Steller was associated with it and continued to exist after he left. This is fundamentally different from a situation where an optometrist sold an optometry business to FYi Eye Care and then left to compete with that business. FYi Eye Care is much less vulnerable in the present circumstances than if it had been the acquiror of an optometry business from an owner-operator. By contrast, the non-competition covenant purports to restrict Dr Steller's ability to practice his profession, which raises the same restraint of trade issues as it would if there had been an employment relationship. The circumstances, in my opinion, call for the strong *prima facie* case standard.

B. Strong *Prima Facie* Case

[35] The onus on a party seeking to enforce a non-competition covenant is to demonstrate that it is reasonable: ***Shafron v KRG Insurance Brokers (Western) Inc***, 2009 SCC 6 at para 26. The assessment of reasonableness must consider both the circumstances of the parties and the public interest: ***Elsley v JG Collins Insurance Agencies Limited***, [1978] 2 SCR 916 at 923. A non-competition covenant will be reasonable where it is unambiguous and the temporal and geographic restrictions are reasonable in the sense that they are necessary to protect the business of the non-breaching party and are not contrary to the public interest in free trade.

[36] The non-competition covenant in ALSA s 7.4 provides as follows:

> The Optometrist covenants and agrees with FYI that it will not (without the prior written consent of FYI, which consent may be arbitrarily withheld), practice Optometry, other than as provided for within this Agreement, within the entire area comprising a five (5) kilometre radius from the Practice Location, during the period commencing 90 days from the Start Date and ending on the date which is 12 months after the Termination Date. "**Optometry**" means the health-care profession concerned especially with examining the eye for defects and faults of refraction, with prescribing correctional lenses or eye exercises, with diagnosing diseases of the eye, and with treating such diseases or referring them for treatment.

[37] Dr Steller argues that the ALSA non-competition covenant is ambiguous because the Practice Location is uncertain. Dr Steller first practiced at FYi Eye Care's Speck Clinic and then transferred to FYi Eye Care's Kingsbridge Clinic. He says that the ALSA can only be amended in writing and that it was not amended when he transferred from the Speck Clinic to the Kingsbridge Clinic.

[38] The first difficulty with this argument is that Dr Steller's current optometry clinic is 600 metres from the Kingsbridge Clinic and 1.7 km from the Speck Clinic, so his current conduct is proscribed regardless of the point from which the geographic restriction is measured. The second problem is that even though the ALSA specified the Speck Clinic as the Practice Location from which the geographic scope of the non-competition covenant was calculated, I am satisfied that the ALSA was amended in writing when Dr Steller signed off on his change of status with FYi Eye Care. The change of status document memorialized that he changed clinics and took on a position of greater responsibility with a corresponding increase in opportunity for profit. I am satisfied that the non-competition clause is clear and may be enforced if it is not otherwise unreasonable.

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[39] The geographic scope of the restriction is reasonable considering the activity prohibited and the market in which Dr Steller and FYi Eye Care are operating. Prohibiting Dr Steller from practicing optometry within a 5 km radius of his former clinic is not a significant restraint of trade given the size of the market for optometry services in the Greater Toronto Area and Southwestern Ontario. It is noteworthy that, in addition to practicing within the prohibited zone, Dr Steller practices half-time in Brampton, Ontario which is outside the prohibited zone.

[40] I am satisfied that the 5 km radius of the non-competition covenant is reasonable in the sense that it is necessary to protect FYi Eye Care's business. Justice Hollins found in ***Karavos v Smith***, 2021 ABQB 714 at para 20 that dentists competing within 5 km of one another were competing for the same customers. ***Karavos*** pitted two dentists against each other, so the present circumstances are arguably not analogous because Dr Steller and FYi Eye Care do not provide the same services because he is an optometrist and FYi Eye Care provides turnkey clinics for optometrists. But this is a distinction without a difference. FYi Eye Care's revenue was derived from two sources: (1) a percentage of Dr Steller's patient billings; and (2) sales of prescription eyewear and other eye products to customers who were mostly Dr Steller's patients. The structure of the business relationship between Dr Steller and FYi Eye Care meant that FYi Eye Care had a legitimate interest in protecting itself from Dr Steller competing with FYi Eye Care at a nearby clinic.

[41] My conclusion that the geographical scope of the non-competition covenant is reasonable is reinforced by ***Karavos*** where a 5 km radius non-competition covenant was found to be reasonable in the context of a dental practice in Grande Prairie, Alberta. The provider-patient relationship for dentists and optometrists is analogous and the market considerations in favour of enforceability are stronger in Mississauga than in Grande Prairie given the greater opportunity for patients to find alternate optometry providers and for optometry providers to find alternative places to practice outside of the 5 km radius.

[42] The temporal scope of the non-competition covenant is also reasonable. The one-year non-competition covenant in the ALSA is significantly shorter than the three-year non-competition covenant found to be reasonable for an optometrist in ***IRIS The Visual Group Western Canada Inc v Park***, 2016 BCSC 2059 at paras 34-36. The rationale for the three-year restriction in ***IRIS*** was that it took 6-12 months to recruit and train a new optometrist, and patients average two years between optometry appointments. By comparison, FYi Eye Care's non-competition covenant is modest.

[43] Having considered both the circumstances of the parties and the public interest, I find that there is a strong *prima facie* case that the ALSA non-competition covenant is enforceable.

C. Irreparable Harm

[44] Justice Marion explained in ***Intellimedia*** at para 142 that "where there is a clear breach of an enforceable restrictive covenant, irreparable harm and balance of convenience are still considered but may attract less weight": see also, ***City Wide Towing*** at para 28.

[45] Irreparable harm refers to the nature of the harm, not the magnitude of the harm: ***RJR*** at 341. Harm that can be quantified in money terms does not, as a general rule, constitute irreparable harm: ***RJR*** at 341; ***American Cyanamid Co v Ethicon Ltd***, [1975] AC 396 (HL) at 408; ***Unifor, Local 707A v Suncor Energy Inc***, 2018 ABCA 75 at para 8.

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[46] Permanent loss of market share and irrevocable loss to business reputation have been found to be irreparable harm: ***RJR*** at 341. Likewise, damage to goodwill in the form of loss of patients or customer relationships and referrals has been found to be impossible to quantify and thus constitutes irreparable harm: ***GG & HH*** at para 181; ***Parekh et al v Schecter et al,*** 2022 ONSC 302 at paras 78-79; ***Karavos*** at para 31; ***Intellimedia*** at para 146.

[47] At least 25 patients have already followed Dr Steller to his new clinic. That indicates that measurable harm is occurring and suggests that unquantifiable harm is also taking place. I am satisfied that FYi Eye Care's potential loss of market share and loss of referrals constitutes irreparable harm. While I agree that after the fact it may be possible to discern the number of patients/customers that migrated from FYi Eye Care's Kingsbridge clinic to Dr Steller's new clinic nearby, it will not be possible to ascertain how many referrals were lost or what impact those referrals would have had on the revenue of FYi Eye Care's Kingsbridge clinic.

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D. Balance of Convenience

[48] The balance of convenience weighs the impact of not granting the injunction on the applicant against the impact of granting the injunction on the respondent. The balancing in each case is fact-specific: ***RJR*** at 342; ***Manchester Rose Group Inc v Rutherford Seniors Development Ltd***, 2025 ABKB 491 at para 51.

[49] Does the harm to Dr Steller that will come from granting an injunction outweigh the irreparable harm to FYi Eye Care if an injunction is not granted? As noted earlier in these reasons, Dr Steller works half-time at an optometry clinic in Brampton, which is well outside the geographic scope of the non-competition covenant. This is good evidence that there is work available to him outside the 5 km radius of the Kingsbridge clinic. Moreover, as explained earlier in these reasons, the Greater Toronto Area and Southwestern Ontario are densely populated, which means that there is a large demand for optometry services. There is no good reason why Dr Steller cannot be fully employed as an optometrist outside the 5 km radius of the Kingsbridge clinic at minimal inconvenience.

[50] The public has an interest in open competition in optometry as in other areas of the economy. Nevertheless, there is no evidence that the enforcement of the non-competition covenant between Dr Steller and FYi Eye Care will have an adverse impact on the public. As previously noted, the Greater Toronto Area and Southwestern Ontario are large markets such that the short-term restriction on the practice of one optometrist will not affect the public's ability to obtain eye care.

[51] I am satisfied that the balance of convenience favours the granting of the injunction.

E. Other Considerations

[52] FYi Eye Care also alleges that Dr Steller misappropriated confidential information. The evidence shows only that he took some emails that he thought could be useful in this litigation. This is improper and the emails must be returned: ***Mentzelopoulos v Alberta Health Services***, 2026 ABKB 675 at paras 58-59. However, the confidential information that Dr Steller took did not include business plans or patient information, so there is no reason to conclude that possession of the confidential information gave him a competitive advantage in relation to FYi Eye Care. Accordingly, the fact that he took the confidential information does not support FYi Eye Care's case for an injunction to enforce the ALSA non-competition covenant.

IV. Conclusion

[53] Dr Steller is enjoined from practicing optometry within a 5 km radius of FYi Eye Care's Kingsbridge clinic for a period of 12 months commencing as of the date of his termination. If the parties are unable to agree on costs, they may make submissions of two pages or less supported by a proposed bill of costs.

Heard on the 23rd day of October, 2026.
Dated at the City of Calgary, Alberta this 29th day of October, 2026.

Colin C.J. Feasby
J.C.K.B.A.

Appearances:

Trevor McDonald and Hema Ahuja
for FYi Eye Care Services and Products Inc

Oluwatobi Ibiyemi and Charles Osuji
for Matthew Steller

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