

CANADA / JUDGMENT

Heaps & Doyle Practice Solutions Inc. v. Pacula

2025 BCSC 699

COURT

Supreme Court of British Columbia

DECIDED

15 April 2025

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2025 BCSC 699 Heaps & Doyle Practice Solutions Inc. v. Pacula

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Heaps & Doyle Practice Solutions Inc. v. Pacula,

2025 BCSC 699

Date: 20250415

Docket: S251498

Registry: Vancouver

Between:

Heaps & Doyle Practice Solutions Inc.

Plaintiff

And

Kimberly Pacula and Inspire Professional Teeth Whitening Inc.

Defendants

Before: The Honourable Madam Justice W.A. Baker

Reasons for Judgment

Counsel for Plaintiff:

G. Boothroyd-Roberts

Counsel for Defendants:

G.W. Bowden

Place and Date of Hearing:

Vancouver, B.C.

April 10, 2025

Place and Date of Judgment:

Vancouver, B.C.

April 15, 2025

Introduction

- [1] The plaintiff Heaps & Doyle Practice Solutions Inc. seeks an injunction restraining the defendants from, in general terms, engaging in associate dentist recruitment services in Canada. The basis for this injunction is a restrictive covenant in place further to two agreements entered into in 2018.
- [2] The defendants consent to the following orders:
- a) For the purposes of associate dentist recruitment services, the defendants shall not engage with, advertise to, promote to, market to, or solicit clients that currently use the services of Heaps & Doyle until July 8, 2026 or a final order is made.
 - b) The defendants shall not use the name "Associates on Demand" until July 8, 2026 or a final order is made.
- [3] The defendants oppose any blanket injunction which would prevent Kimberly Pacula from working as a recruiter in the dental industry in Canada until July 8, 2026.
- [4] I note that while the application was brought against both defendants, there are no facts before me in relation to any alleged breaches by the defendant Inspire Professional Teeth Whitening Inc. All breaches are alleged against Kimberly Pacula.

Background facts

- [5] On March 23, 2018 Hill Kindy Practice Sales & Realty Inc., Kimberly Pacula, and Inspire entered into a purchase and sale agreement, whereby Hill Kindy agreed to purchase the business assets of Inspire and Ms. Pacula for \$10,000. As part of the transaction, Inspire and Ms. Pacula agreed to enter into an associate agreement, and comply with the restrictive covenants contained in such agreement.

- [6] The defendants submit that Heaps & Doyle has not adequately proven that it is the successor to Hill Kindy, entitled to take the benefit of any agreements made by Hill Kindy. For the purposes of my decision, I do not need to decide this issue. My decision is made on the assumption that Heaps & Doyle are able to enforce the agreements Hill Kindy made with the defendants. My decision should not be taken as an obstacle to the defendants arguing this issue at trial, should they so choose.
- [7] On April 9, 2023, Hill Kindy (the "Company"), Inspire (the "Contractor") and Ms. Pacula (the "Covenantor") entered into an independent contractor agreement (the "ICA"). There is no dispute that this agreement was the associate agreement referred to in the purchase and sale agreement. The key terms of the ICA include the following:
- a) Recital A: The Company is in the business of brokering sales of dental practices including but not limited to the listing, offering, purchase, sale, appraisal and evaluation of dental practices and all incident business related therefrom (the "Company's Business") within Canada and the USA.
 - b) Recital B: The Contractor is independently carrying on the business of providing recruitment and other consulting services to businesses generally, and has offered to provide its services to the Company with respect to the dental practice sector, in the Territory (hereafter defined), on an independent contractor basis.
 - c) S. 2.1 The Company retains the Contractor as an independent contractor for the Term (as defined herein) to render the following services:
 - (a) To provide recruitment and other consulting services to the Company for the Company's Business (such services hereinafter referred to as, "Services"), on an exclusive basis in the Territory except as otherwise provided for in paragraph 2.3 herein
 - d) S. 2.3 The Parties agree that the Contractor will provide its recruitment and other consulting services herein to the Company on an exclusive basis, with respect to enterprises in the dental field, provided however that the Contractor is at liberty to concurrently engage in other endeavours and in other business development activities direction to other business sectors, on its own account or for others, in the Territory or elsewhere, provided that it does not do so in the name of the Company.
 - e) 8. Non-Competition

S. 8.2 The Contractor and/or Covenantor acknowledges that the Company's name, business reputation associated therewith, the referral base, the methods and techniques employed by the Company, the training and instruction of employees, the knowledge of the services and methods of the Company and the opportunities, associations and experiences established and acquired by the Company are of considerable value. In consideration thereof and in the event of termination of the engagement of the Contractor with the Company for any reason whatsoever, the Contractor and the Covenantor will not, without the prior written consent of the Company at any time during the Restricted Period (as defined below), either individually or in a partnership or jointly

or in conjunction with any person [etc] or in any manner whatsoever, carry on, be engaged in or be concerned with or interested in or advise, any entity in competition or engaged in the Company's Business within the Territory. In this Article 8, "Restricted Period" means the following number of months after the Contractor's engagement with the Company has terminated [2 years].

- f) Schedule "A", s. 1(c) The range and scope of Services shall include acting as recruitment consultant, undertaking reviewing and consulting for dental practice associate recruitment.
- [8] On July 8, 2024 Inspire and Ms. Pacula ceased providing services to Heaps & Doyle. The Restricted Period for any obligations under the agreements began July 8, 2024 and ends on July 8, 2026.
- [9] Inspire has not continued providing any services in the dental industry. However, Ms. Pacula has continued to work as a dental recruiter.
- [10] Ms. Pacula describes her work as follows, "A dental recruiter is a professional who specializes in hiring and placing dental professionals within dental practices, clinics, and corporate dental organizations. Their role involves identifying, attracting, and connecting qualified candidates (such as dentists, hygienists, dental assistants, and administrative staff) with suitable job opportunities."
- [11] In January 2025, Mr. Stephen Doyle, the principal of Heaps & Doyle, learned from Ms. Megan Tralenberg, Ms. Pacula's former partner, that Ms. Pacula had been working in the dental industry as a recruiter. Mr. Doyle alleges that Ms. Pacula attempts to solicit clients were focussed primarily on former clients of Heaps & Doyle. However, this assertion was not supported by any evidence and I do not accept it as proven. Mr. Doyle obtained from Ms. Tralenberg a listing of dental clinic clients to which Ms. Pacula, through a new company, was providing recruitment services. On this listing, Mr. Doyle identified eight clients as former clients of Heaps & Doyle.

Test for an injunction

- [12] The test for an injunction is well settled since *RJR-MacDonald v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. Heaps & Doyle must establish the following:
 - a) It has presented a serious question to be tried (or a strong prima facie case, as I will discuss below),
 - b) It will suffer irreparable harm if the injunction is refused, and
 - c) The balance of convenience favour granting the injunction.

Serious question to be tried / strong prima facie case

- [13] Heaps & Doyle submits that it must only establish a serious question to be tried on the issue of whether Ms. Pacula has breached the restrictive covenant agreed to between the parties.

- [14] The defendants submit that Heaps & Doyle must establish a strong prima facie case that such breach occurred.
- [15] In *Northam Distributor Ltd. v. Roman Hardware Inc.*, 2025 BCSC 238, the court reviewed the context for the two different standards:
- [45] The first stage of the RJR-MacDonald test requires an assessment of the merits of the claim. A covenant not to compete is a form of restraint of trade and is presumptively unenforceable unless it is reasonable both between the parties and with reference to the public interest. However, courts apply different standards of scrutiny depending on the context in which the restrictive covenant arises.
- [46] Courts apply two different standards depending on the nature of the injunction sought:
- a) **Serious Question to Be Tried** - This is a low threshold, requiring the applicant to show only that the claim is not frivolous or vexatious: RJR-MacDonald at 337-38. The court does not assess the strength of the claim at this stage: *Kwantlen Pizza* at para. 25.
 - b) **Strong Prima Facie Case** - This test requires that "upon a preliminary review of the case, the application judge must be satisfied that there is a strong likelihood on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice": *R. v. Canadian Broadcasting Corporation*, 2018 SCC 5 at para. 17 [CBC].
- [47] The distinction is important because injunctions can have varying impacts on the rights of the responding party.
- [48] The standard of "a serious question to be tried" is not a rigorous test, and the threshold is not high. The standard is merely intended to exclude frivolous or vexatious claims: *Harm Reduction Nurses Association v. British Columbia (Attorney General)*, 2023 BCSC 2290 at paras. 35, 47. In short, the determination of whether there is "a serious question to be tried" is made based on common sense and an extremely limited view of the merits: RJR-MacDonald at 348.
- [49] To expand further, the threshold of a strong prima facie test has been described in CBC as follows:
- [17] This brings me to just what is entailed by showing a "strong prima facie case". Courts have employed various formulations, requiring the applicant to establish a "strong and clear chance of success"; a "strong and clear" or "unusually strong and clear" case; that he or she is "clearly right" or "clearly in the right"; that he or she enjoys a "high probability" or "great likelihood of success"; a "high degree of assurance" of success; a "significant prospect" of success; or "almost certain" success. Common to all these formulations is a burden on the applicant to show a case of such merit that it is very likely to succeed at trial

[50] Courts generally apply the low threshold when the injunction seeks to preserve the status quo. However, where the injunction would significantly impact a party's ability to earn a livelihood, such as enforcing a restrictive covenant or prohibiting competition, the applicant must meet the higher "strong prima facie case" standard: *Ipsos S.A. v. Angus Reid*, 2005 BCSC 1114 at para. 69; *Quizno's Canada Restaurant Corporation v. 1450987 Ontario Corp.*, 2009 CanLII 20708 (O.N.S.C.) at para. 38. In such cases, courts recognize that granting an injunction may effectively determine the dispute before trial, warranting a more rigorous assessment of the merits.

[51] In *RJR-Macdonald* at 338, the Supreme Court of Canada outlined the following justifications for departing from the general rule that a judge should not engage in an extensive review of the merits:

[One exception] arises when the result of the interlocutory motion will in effect amount to a final determination of the action. This will be the case either when the right which the applicant seeks to protect can only be exercised immediately or not at all, or when the result of the application will impose such hardship on one party as to remove any potential benefit from proceeding to trial.

[16] Heaps & Doyle submits that this application will not finally determine the case, as it has outstanding claims in damages and misuse of confidential information which will be dealt with at trial. However, if the injunction is granted, it will very likely finally dispose of a central aspect of the Heaps & Doyle's claim, namely whether Ms. Pacula is properly restrained in the operation of her new business.

[17] If I grant the injunction, and at trial it is determined that the restrictive covenant cannot be properly construed as restraining Ms. Pacula's business, that outcome will be meaningless to Ms. Pacula as she will have already suffered the effects of the restraint on her business. Therefore, in assessing the issues on this application, I find that I must be satisfied that Heaps & Doyle has strong and clear chance of success on this issue before I consider issuing an injunction.

[18] In the result, I find that the appropriate standard on the first branch of the *RJR-MacDonald* test is that Heaps & Doyle must establish a strong prima case that it will be successful at trial in proving that the restrictive covenant in the ICA restrains Ms. Pacula from operating her business recruiting associate dentists.

What do the restrictive covenants restrain?

[19] Heaps & Doyle submits that s. 8.2 of the ICA restrains Ms. Pacula from carrying on, engaging in or being concerned with or interested in or advising, any entity in competition or engaged in the Company's Business within the Territory, and that the Company's Business includes recruitment in the dental field.

- [20] The term "Company's Business" is defined in the ICA as "brokering sales of dental practices including but not limited to the listing, offering, purchase, sale, appraisal and evaluation of dental practices and all incident business related therefrom".
- [21] Heaps & Doyle submits that recruitment and consulting services form part of the Company's Business by virtue of s. 2.1(a) of the ICA, which states that the Contractor (Inspire) is retained to provide recruitment and other consulting services to the Company for the Company's Business.
- [22] I have some difficulty with this submission by Heaps & Doyle. If the parties intended recruitment and consulting services to be included in the Company's Business, these services could have been included within the definition of the Company's Business in the agreement. I do not agree that when a party agrees to provide services to another business, those services then necessarily become part of the other business. If an IT company agreed to provide IT services to a law firm, it does not follow that IT services would then automatically form part of the law firm's business.
- [23] On this application, Heaps & Doyle has not established an evidentiary foundation that would allow me to find the intentions of the parties were to include recruitment services in the definition of Company's Business in the ICA. There are statements from both parties that Ms. Pacula and her business were retained to provide recruitment services and knowledge to Heaps & Doyle. However, such statements, alone, are insufficient to overcome the plain language of the agreement. Would Ms. Pacula have agreed to restrain her ability to work her field for two years in exchange for \$10,000, which was the purchase price paid by Heaps & Doyle? That seems unlikely to me, and I would need to see compelling evidence before I would conclude the parties intended to include such a restriction in the ICA.
- [24] On this interlocutory application, I will not make a finding on whether the ICA is properly interpreted to include recruitment and consulting services within the definition of the Company's Business. Such an interpretation varies the plain language of the agreement. Heaps & Doyle may be successful on this issue at trial following the introduction of additional evidence of the parties on their intentions at the time the agreement was made. However, on the application before me, the evidence was not sufficient to allow such an interpretation. My task is to determine whether the applicant has established a strong and clear chance of success in this argument. On the material before me on this application, I find it has not.
- [25] I find that Heaps & Doyle has not established a strong prima facie case that the restrictive covenants in the ICA prevent the defendants, and Ms. Pacula in particular, from engaging in recruitment of associate dentists in Canada.

Reasonableness of the restrictive covenants

- [26] The only issue before me is whether the restrictive covenants restrain the defendants from engaging in general associate dentist recruitment services in Canada. I have found Heaps & Doyle has not established a strong prima facie case in this respect.
- [27] The restrictive covenants address other issues, including the use of confidential information and the solicitation of customers. The defendants have consented to an order restraining the solicitation of customers, and there are no issues before me relating to confidential information, as set out in the ICA.
- [28] Both parties argued the appropriate standard in reviewing the reasonableness of the restrictive covenants (serious question to be tried v. strong prima facie case). However, given my finding on the interpretation of the restrictive covenant in relation to Ms. Pacula's recruitment services, and not wanting to make unnecessary findings on issues left for trial, I decline to address the reasonableness of the restrictive covenants as it is unnecessary on this application relative to the findings I have made.

Irreparable Harm

- [29] I will address the issue of irreparable harm, the second branch of the RJR-MacDonald test.
- [30] Heaps & Doyle must establish that it will suffer harm which cannot be quantified in monetary terms. As stated in RJR-MacDonald at p. 341:
- "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other.
- [31] Examples given in RJR-MacDonald include permanent market loss, or irrevocable damage to business reputation.
- [32] Heaps & Doyle points to the fact that Ms. Pacula's client list includes eight former clients of Heaps & Doyle, to argue that the test for irreparable harm has been met.
- [33] Heaps & Doyle relies heavily on Landmark Solutions Ltd. v. 1082532 B.C. Ltd., 2021 BCCA 29 in its submissions on irreparable harm. Landmark was a case involving a non-solicitation clause, where irreparable harm was established. However, it is important to note that in Landmark the moving party had the benefit of a contractual clause wherein the parties agreed that in the event of a breach of the agreement the moving party would be entitled to injunctive relief. This fact was the basis for the finding of irreparable harm.
- [34] In the case before me, the ICA contained such a clause in relation to breaches by the Contractor (Inspire). Section 8.5 provides that a breach of the covenants by the Contractor would result in damages that could not be compensated for with a monetary award, and the Contractor agreed that Heaps & Doyle could apply to court for an injunction to restrain it for such breaches. This clause did not include the Covenantor (Ms. Pacula), and counsel for

Heaps & Doyle confirmed on the hearing that he did not rely on this clause in this application.

[35] In *Landmark*, the court of appeal held:

[53] Nevertheless, *Sharpe*, at para. 9.40, and in the specific context of enforcing negative covenants, states, "The stronger the plaintiff's case the less emphasis should be placed on irreparable harm and balance of convenience and, in cases of a clear breach of an express negative covenant, interlocutory relief will ordinarily be granted."

[54] This broad proposition finds support in several decisions of this Court. In *Belron Canada Inc. v. TCG International Inc.*, 2009 BCCA 577, the Court rejected the proposition that an injunction should always ensue in cases involving the enforcement of a negative covenant where the plaintiff has established a strong *prima facie* case. The Court noted that "[t]he questions of irreparable harm and balance of convenience should be addressed": at para. 22. The Court did accept that "[i]t is probably correct to say that in most commercial cases involving sophisticated and solvent litigants in which a strong *prima facie* case is made out that there has been or will be breach of a negative covenant, an interim injunction will be granted": at para. 22.

[36] Heaps & Doyle submits that, because the covenants arise in the context of a commercial purchase and sale agreement, and there is some evidence that Ms. Pacula has acquired clients that were previously clients of Heaps & Doyle, irreparable harm should be found.

[37] However, while enforcement of negative covenants through injunctions is common, as a matter of law it does not follow that an injunction will always be enforced in this way. There must be a basis in the evidence to support a finding of irreparable harm, in the analysis of whether to grant an injunction.

[38] I have some difficulty with Heaps & Doyle's position, as no evidence was led as to the harm occasioned by Ms. Pacula's actions to allow me to assess whether damages are not an adequate remedy. For example, there is no evidence that Ms. Pacula has done anything to tarnish the reputation of Heaps & Doyle or discourage potential clients from retaining Heaps & Doyle, as was the case in *Landmark*. There is no evidence that Ms. Pacula has solicited former clients of Heaps & Doyle and, in fact, Ms. Pacula's evidence is that the eight clients that were former clients of Heaps & Doyle came to her of their own accord. She did not seek them out or solicit them.

[39] In *Vancouver Aquarium Marine Science Centre v. Charbonneau*, 2017 BCCA 395, the court of appeal confirmed that, while clear proof of irreparable harm is not required, some evidence is required:

[60] However, there surely must be a foundation, beyond mere speculation, that irreparable harm will result. Interlocutory injunctive relief pending the trial of the issues is a significant remedy, and should be invoked only when the test in RJR-MacDonald is satisfied on a sound evidentiary foundation.

[61] The chambers judge accepted the affidavit of Ms. Imrie as the evidentiary basis for her conclusion that there was irreparable harm. Ms. Imrie deposed:

The harm to the Aquarium and its copyrighted material by virtue of its unauthorized use by the Defendants, including the derogatory manner of their use, is impossible to calculate or repair. The longer the unauthorized use continues, the greater the harm.

[62] This was the only material speaking to irreparable harm before the chambers judge. She accepted this statement without any further analysis, concluded that damages would not place the Aquarium in its former position, and found irreparable harm on that basis. There was not a shred of evidence in support of that conclusion. If the damage was in the form of loss of donations, the loss of attendance, or a similar basis, that could have been articulated in Ms. Imrie's affidavit, but it was not.

[63] In my view, the chambers judge's holding on irreparable harm cannot stand. In the language of RJR-MacDonald at 341, Ms. Imrie's affidavit does not provide a sufficient evidentiary basis to conclude that the harm "could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application".

[40] In the case before me, I do not have in the evidence even a conclusory statement by the principal of Heaps & Doyle that harm of any kind will result if the injunction is not granted. Heaps & Doyle simply relies on the language of the covenant and Ms. Pacula's client list. I was provided with no evidence of the value of those eight clients, or whether Heaps & Doyle has suffered a loss of clients since July 8, 2024 that it attributes to Ms. Pacula's business. I was not provided with information about the size of the market in dental recruiting - are Heaps & Doyle and Ms. Pacula two of hundreds of such businesses, or are they only two in the country? Can Ms. Pacula's income from her clients be calculated and, if so, why does that not provide an adequate basis for a damages remedy? I had before me no such evidence that might allow me to assess the second part of the test - namely would Heaps & Doyle suffer irreparable harm should the injunction not be granted?

[41] I find Heaps & Doyle has not established that it will suffer irreparable harm if the injunction is not granted.

Balance of convenience

[42] Having found that Heaps & Doyle has not satisfied the first two branches of the RJR-MacDonald test, there is really no need to consider the balance of convenience.

- [43] However, I will note that Ms. Pacula deposed that her recruiting business is her sole business, and she is the sole earner in her family. While Heaps & Doyle only seeks to restrain the recruiting of associate dentists, leaving her free to recruit office administrator and dental technicians, it appears from Ms. Pacula's affidavit, and her client list exhibited to Mr. Doyle's affidavit, that the majority of her work relates to associate dentists. I am satisfied that any restraint on that business would have a significant impact on her livelihood.
- [44] As defined in the ICA, Heaps & Doyle's business is brokering sales of dental practices. It is not clear from the evidence the extent to which Ms. Pacula's recruitment services impacted the financial position of the business or related, in any way, to the brokering of dental practices. Ms. Pacula sold her business to Heaps & Doyle for \$10,000. Under the ICA she was paid a percentage of the earnings she brought in, but there was no evidence about her financial contribution to Heaps & Doyle over the years she worked under the ICA, and no evidence as to the potential impact, financial or otherwise, that may flow if the injunction was not granted.
- [45] On the evidence before me, I find the balance of convenience favours Ms. Pacula as she has established a real harm which would flow from a restraint on her business until July 8, 2026.

Disposition

- [46] Heaps & Doyle's application for an injunction restraining the defendants from engaging in the recruitment of dental associates in Canada is dismissed.
- [47] The following orders are made by consent:
- For the purposes of associate dentist recruitment services, the defendants shall not engage with, advertise to, promote to, market to, or solicit clients that currently use the services of Heaps & Doyle until July 8, 2026 or a final order is made.
 - The defendants shall not use the name "Associates on Demand" until July 8, 2026 or a final order is made.

"W.A. Baker J."

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