B.C. Decision Highlights Importance Of Clarity In Restrictive Covenants



Does your contractor agreement adequately reflect and protect your business interests?

Restrictive covenant intended to protect business of brokering sales of dental practices

In *Heaps & Doyle Practice Solutions Inc. v. Pacula*[1] (*Pacula*), the Supreme Court of British Columbia narrowly interpreted the scope of a restrictive covenant in an independent contractor agreement such that the contractor was entitled to continue recruiting dentists immediately after ceasing to provide the company with these services.

The *Pacula* case involved a purchase and sale agreement in which Hill Kindy Practice Sales & Realty Inc. (Hill Kindy) purchased the assets of Inspire Professional Teeth Whitening Inc. (Inspire). The parties' transaction included an independent contractor agreement dated April 9, 2023 (Contractor Agreement) pursuant to which Inspire and its principal, Kimberly Pacula, agreed to provide Heaps & Doyle with recruitment and consulting services.

The Contractor Agreement contained a restrictive covenant prohibiting Ms. Pacula, for two years after ceasing to provide the recruitment and consulting services, from competing with Hill Kindy's 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*" (collectively, the Company's Business) within Canada and the USA. During the term of the Contractor Agreement, Heaps & Doyle Practice Solutions Inc. (Heaps & Doyle) became the successor to Hill Kindy and thus benefitted from the terms of the Contractor Agreement.

On July 8, 2024, Inspire and Ms. Pacula ceased providing Heaps & Doyle with the recruitment and consulting services, thus starting the two-year restriction period. However, Ms. Pacula resumed working as a dental recruiter during the restriction period. Heaps & Doyle alleged that Ms. Pacula had attempted to solicit former clients of Heaps & Doyle and, in doing so, was interfering with the Company's Business. Heaps & Doyle applied for an injunction to restrain Inspire and Ms. Pacula from recruiting dental associates in Canada during the two-year restriction period.

Court analyzes restrictive covenant when applying test for injunction

The Court, in determining whether the restrictive covenant contemplated the recruitment of dentists such that injunctive relief was warranted, considered the three-stage test for an injunction: a strong *prima facie* case, irreparable harm, and balance of convenience.

The Court found that Heaps & Doyle failed to establish a strong *prima facie* case because the definition of the Company's Business, as set out in the Contractor Agreement, did not make express reference to recruitment. Of note, the Court did not consider whether "recruitment" was captured by the non-exhaustive definition of the Company's Business (i.e. "*including but not limited to*").

With respect to irreparable harm, the Court found no evidence that Ms. Pacula's recruitment of dentists caused harm to Heaps & Doyle, nor did it cause Heaps & Doyle a loss of clients or reputation.

Finally, the Court found that the balance of convenience favoured Ms. Pacula because recruitment was her sole business, she was the sole earner in her family, and thus a restraint on her business would significantly impact her livelihood. The Court ultimately found that on the evidence before it, the parties did not intend for the restrictive covenant to include the recruitment of dentists and that injunctive relief was therefore not warranted. The Court left open the possibility that the parties may adduce additional evidence at trial in respect of the parties' intentions to include recruitment in the definition of the Company's Business at the time the Contractor Agreement was made.

Key takeaway

The *Pacula* case provides a reminder that companies and employers, when drafting restrictive covenants in independent contractor and employment agreements, should carefully consider the range of conduct that they wish to restrain and the connection of such conduct to their business interests.

Footnote

1 2025 BCSC 699.

Read the original article on GowlingWLG.com

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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