

Independent Contractor Status Upheld

This article first appeared in the Alberta Dental Hygienists' Association (ADHA), InTouch newsletter, July, 2004. The article was written by legal counsel in Alberta, specifically to apply to Alberta registered dental hygienists. Readers are referred to their own legal counsel for advice that is specific to the province in which they practice.

CALL OUT: “While the determination of independent contractor status for any dental hygienist will continue to be assessed on its own individual merits, the result of these appeals was a positive step towards challenging the approach being taken by some of the auditors ...”

The ADHA is aware that there have been a number of dental offices audited over the last couple of years for the purpose, at least in part, of reviewing the employment status of the dental hygienists working in those offices. The Association was recently involved in two appeals by dental hygienists to the Tax Court of Canada regarding their status as independent contractors. In each case, the Calgary based dental hygienists were reassessed as being employees even though they were hired as independent contractors and paid as such by the dental office involved. As a result of the reassessment, the dental office was required to withhold and remit Canada Pension Plan (CPP) and Employment Insurance (EI) from the payments to these dental hygienists.

When these two appeals reached the level of the Tax Court of Canada and were scheduled to be heard before a Federal Court Judge, the Department of Justice agreed that these individuals were properly characterizing themselves as independent contractors. Therefore, without having to go through a formal court hearing, the Justice lawyer consented to a judgment confirming that the dental hygienists were independent contractors for the periods involved in the re-assessment. The result was that the dental hygienists were able to continue to treat themselves as independent business owners and gain the tax advantages associated with that status. In addition, CPP and EI remittances were not required to be withheld by the dental office.

While the determination of independent contractor status for any dental hygienist will continue to be assessed on its own individual merits, the result of these appeals was a positive step towards challenging the approach being taken by some of the auditors who have been reassessing dental offices, in particular in the Calgary area. It appears that the auditors at the field level were placing significant emphasis on the provision in the *Dental Discipline's Act* that requires a dental hygienist to be supervised by a dentist. It remains the understanding of the Association that the supervision requirement will be removed under the new Dental Hygienists' Regulations pursuant to the *Health Professions Act* although those Regulations have not yet come into effect.

The factors in these individual cases that weighed in favour of the finding that the dental hygienists were independent contractors included the following:

1. Each dental hygienist worked for a number of dental offices over the course of the years involved.
2. The dental hygienists did own some of their own tools (instruments) that they took with them to each office.
3. The work done in each of the dental offices was typically of a temporary nature filling in for sick leaves and vacations.
4. The dental hygienists charged a set hourly rate which was less than the rates billed out to the patients. The difference in billings represented payment by the dental hygienist for use of the office space and office supplies.

5. The dental hygienists invoiced the dental office for their services.
6. While there were no written agreements between the dental hygienists and the dental office involved in the re-assessment, the dental hygienists were able to produce other examples of independent contractor agreements that they subsequently used.
7. The dental office did agree with the characterization of these individuals as independent contractors (as opposed to other more permanent or full-time dental hygienists that the offices had employed).
8. In each case, the dental hygienists produced evidence of their errors and omissions liability insurance through the Canadian Dental Hygienist Association (they obtained their own liability insurance coverage).
9. The Department of Justice was advised that evidence would be called from Brenda Walker, Registrar for the Alberta Dental Hygienists' Association confirming that the supervision requirement would be removed under the new Regulations for dental hygienists under the *Health Professions Act*. In addition, evidence was going to be called confirming that the supervision requirement that currently exists in the *Dental Discipline's Act* does not involve any direct supervision. The dentist would not provide direction to the dental hygienist on how to do the dental hygiene work. There may have been a misapprehension by the auditors in the field as to the supervision element and what that meant on a practical basis. In these particular cases, there was also evidence that the dental hygienists had worked in some offices when there was not even a dentist on site.
10. The dental hygienists determined their own availability for work. It was not directed to them by the dental office.
11. The dental hygienists did risk loss of profit if they were sick, on vacation or if a patient cancelled an appointment.

These examples of dental hygienists who challenged and successfully appealed the reassessments made with respect to their work confirm that dental hygienists can practice as independent contractors in Alberta.

Any dental hygienist who practices as an independent contractor and who is reassessed as an employee based on an audit of a dental office they may have worked in, should consider an appeal of any such reassessment and encourage the dental office to appeal as well. If the manner in which you practice is similar to that as outlined in the above factors, you would likely have a strong appeal. We now have at least two examples of cases where legal counsel for the Government did agree even before the case went to court that these individuals were independent contractors. While each case will depend upon its own facts, the more of the above factors that may apply, the more likely it is that a court would find that the dental hygienist is an independent contractor.