



# Torkin|Manes BULLETIN

Torkin Manes Cohen Arbus LLP  
Barristers & Solicitors  
151 Yonge Street, Suite 1500  
Toronto, ON M5C 2W7  
Tel: 416 863 1188  
Fax: 416 863 0305  
torkinmanes.com

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## FOCUS ON HEALTH LAW

### *Good news for Ontario dentists*



Neil M. Abramson

A recent case from Ontario's Divisional Court appears to have struck a blow against the Royal

College of Dental Surgeons of Ontario. It could result in a greater emphasis on fairness to dentists across the province in future disciplinary hearings.

The case involved a prominent Ontario dentist who has treated temporomandibular joint disorders (TMD) for more than 20 years. A complaint from a patient about 10 years ago led to a college investigation. The dentist was eventually charged with more than 60 counts of professional misconduct.

The hearing took 66 days spread over four years between 1998 and 2002, with additional dates for motions, making it the longest hearing in the college's 137-year history.

In the end, the college concluded that the dentist had failed to follow its guidelines in the treatment of TMD, and slapped him with a cost award of more than \$400,000 – the largest cost award ever ordered against any health professional in Ontario.

The dentist appealed and was cleared of nearly all the charges. The courts also overturned the cost award.

#### **Turning the tide on high cost awards?**

The original cost award seems audaciously high, but it's part of a trend that I've been seeing in which professional licensing bodies across Ontario are seeking increasing cost awards.

The court's decision to overturn the award is great news, as it may send a message to the RCDSO and other professional disciplinary bodies that they should stop seeking such high amounts. Indeed, it may encourage these bodies to be more moderate in the awards they seek in the future.

#### **You are entitled to a fair trial**

The appeal of the disciplinary conviction was based, in part, on the fact that the college did not allow a witness who supported the dentist, to testify at the disciplinary proceedings. That witness, a dentist with more than 30 years of experience treating TMD, was deemed by the college to be unqualified to testify as an expert.

As a result, the court concluded that the dentist did not receive a fair hearing from the college. Professional disciplinary bodies may interpret the judges' decision to mean that they cannot run roughshod over the rights of their members.

The prosecutorial and disciplinary functions of provincial regulators are

key to the notion of self-governance. However, health professional colleges clearly do not have carte blanche.

#### **Seek legal counsel at first complaint**

From the first patient complaint to the appeal decision, this case took nearly 10 years to wrap up. One can imagine how stressful it must be to have so serious a situation drawn out over so many years.

However, the length of this ordeal may have been shortened considerably if the dentist had retained expert counsel as soon as he received the first patient complaint.

If you find yourself fielding a complaint, do not wait until formal charges have been brought against you or a formal investigation has started. Retain and instruct expert counsel right away. It could make years of difference.

*Neil M. Abramson represented this dentist in his appeal. Neil is a partner of the firm and Chair of our Health Professionals Group. He is a litigation lawyer who routinely defends health professionals in professional disciplinary proceedings and in civil litigation.*

*Neil can be reached at 416 777 5454, or [nabramson@torkinmanes.com](mailto:nabramson@torkinmanes.com).*

## *Incorporation: Where do we go from here?*



Howard Burshtein & Philip R. Christo

By now most of you are aware that the *Business Corporations Act* (Ontario) (BCA) enables health professionals to incorporate their practices and that the Royal College of Dental Surgeons



of Ontario has passed the necessary regulations authorizing professional incorporation. Although incorporation has been an option for some time, many dentists were unconvinced that the benefits outweighed the effort and the costs.

Legal practitioners and tax planners were initially of the view that incorporation would provide significant tax-planning opportunities. This proved to be true, but only to a limited extent, as income-splitting opportunities with non-dentists are severely limited by the fact that non-dentists are not permitted to become shareholders of the professional corporation. However, steady pressure has been applied to the provincial government to broaden the rules governing the corporate structure of professional corporations to enable them to become more flexible to accommodate tax-planning objectives. With a broadening of the rules, many more dentists should now take a serious look at the benefits of incorporating their professional practices.

Professional corporations are strictly regulated to ensure, among other things, that the basic corporate legal principles do not insulate practitioners from professional (as opposed to commercial) liability. Currently, the legislation also provides that:

- All shares in the professional corporation must be legally and beneficially owned by registered dentists;
- All officers and directors of the corporation must be shareholders;
- The corporation must be created with objects restricting its business to the practice of dentistry;
- The corporation must obtain an annual certificate from the RCDSO, authorizing the incorporation;
- The name of the professional corporation cannot be a number and must be limited to the name of the shareholder(s) as set out in the RCDSO Register; and
- The corporation is subject to the RCDSO's ordinary powers of regulation and investigation.

The Ontario *Budget Measures Act, 2005* introduces reforms and amendments that (when the Act becomes effective) will exempt certain classes of shareholders from professional liability. Such amendments will also permit non-members of such professions to own shares of professional corporations, although, it has not yet been determined to what extent non-members may own shares. The current thinking is that non-members will be permitted to own only a minority interest in

professional corporations, however, the government's exact position on this issue has not yet been made public.

Some of the issues that are expected to unfold in the near future include whether or not the shares of health professional corporations may also be owned by a holding corporation, or perhaps a series of holding corporations, and whether different classes of shares will be permitted to create income-splitting opportunities.

When new regulations become available, we will publish a special bulletin to keep you updated. Having said this, the proposed changes are positive and should significantly extend the appeal of professional incorporation. Be ready. If you are considering restructuring your practices, partnerships and business relationships, you should seek legal and financial advice now to ensure that all options are considered and advantageous structuring steps are implemented.

*Howard Burshtein is a partner of the firm. His commercial practice focuses on, among other things, the purchase and sale of medical and dental practices, professional incorporation and partnership issues.*

*Howard can be reached at 416 777 5456, or [hburshtein@torkinmanes.com](mailto:hburshtein@torkinmanes.com).*

*Philip R. Christo is a partner of the firm. He is a commercial lawyer with many years of experience in the purchase and sale of professional practices, related partnership issues and professional incorporation.*

*Phil can be reached at 416 777 5424, or [pchristo@torkinmanes.com](mailto:pchristo@torkinmanes.com).*

# *The end of mandatory retirement in Ontario: is there such a thing as “too long in the tooth?”*



Peter C. Straszynski

In June 2005, the Ontario government introduced legislation to abolish

“mandatory retirement.” What is mandatory retirement? How will this legislation, once passed, affect you and your dental practice?

## **The present time**

Currently, dentists are not required by law to retire from private practice at any particular age. You can practise for pretty much as long as you want, provided that you are able to maintain competency as determined by the Royal College of Dental Surgeons of Ontario. Where you have hospital privileges, however, hospital medical/dental staff by-laws sometimes impose a form of “mandatory retirement” under which those privileges may be automatically withdrawn upon your reaching 65 or some specified age. The proposed legislation may impact upon whether such by-laws are legally enforceable against a competent dentist or dental specialist.

If you currently have employees in your dental practice (or are considering the acquisition of a practice with employees) who are reaching an advanced age, you may be under the mistaken belief that the law requires them to retire at age 65 without compensation. That's not true. Under current law, you may require an employee to retire at age 65 (or some

higher, specified age) only if you have a written employment agreement or enforceable policy that says so very clearly.

In the event you do not have an effective agreement or policy in place, you do not have a right to impose mandatory retirement on your employees. Imposing retirement in these circumstances would constitute a termination of employment, triggering termination entitlements which could reach as high as 24-months' pay.

## **Proposed legislative change**

The draft legislation introduced by the Ontario government in June proposes to change the definition of age in the Ontario *Human Rights Code* in such a way that employers will no longer be able to impose mandatory retirement on their employees even if they have a written contract of employment or policy that purports to do so. Once the legislation is passed – likely later this year or early in 2006 – there will be a one-year transition period during which employers will have an opportunity to review and amend, if necessary, their employment contracts and policies in order to eliminate mandatory retirement provisions.

In the future, employers will still be able to offer early retirement incentives or packages to encourage retirement. These arrangements will likely be permissible as long as they do not amount to an “ultimatum.” Care will have to be taken in the

drafting of any of the contracts or agreements so as to ensure that this “ultimatum” argument would be unlikely to succeed.

Once the legislation comes into force, it may also be the case that hospitals will no longer be in a position to legally withdraw privileges when a dentist reaches 65 or any other specified age. There is a compelling case to be made to the effect that the applicable *Human Rights Code* protections ought to extend to dentists in the context of their hospital privileges. That is, a physician's or dentist's relationship with a public hospital is akin to the employment relationship. Why then shouldn't the protection afforded to employees similarly apply to prevent hospitals from arbitrarily determining at what age a dentist must retire from hospital practice? Should this argument succeed, age, in and of itself, would not entitle a hospital to determine when a dentist is “too long in the tooth.”

While the proposed legislation has yet to be passed, wise employers will start thinking about these issues now, rather than wait until the transition period has run out.

*Peter C. Straszynski is a partner of the firm and provides advice and litigation services to health care providers in all aspects of labour relations, employment and human rights law.*

*Peter can be reached at 416 777 5447, or [pstraszynski@torkinmanes.com](mailto:pstraszynski@torkinmanes.com).*

## “Short Notices” about personal health information



Lisa Corrente

The *Personal Health Information Protection Act* (PHIPA) governs

the manner in which personal health information is handled by health information custodians operating in the Province of Ontario. As dentists, each of you is a health information custodian to whom PHIPA's rules apply.

As health information custodians, you are required under PHIPA to develop, maintain and follow “information practices” to ensure that you:

- obtain your patients' consent to collect, use and disclose their personal health information, except in limited circumstances;
- respond to your patients' requests to view and correct their personal health information in a timely fashion – this may include making changes to your own patient charts;

- retain and dispose of your patients' personal health information in a secure manner; and
- advise your patients if you have breached their privacy, and inform them of their right to file a complaint against you with the Information & Privacy Commissioner of Ontario.

In an effort to assist dentists and other health information custodians to carry out their responsibilities under PHIPA, the Information & Privacy Commissioner has developed Short Notices.

The Short Notice, “Health Information Privacy in our Office,” is a colourful poster that can be hung on your office wall to explain to your patients the information practices that have been implemented in your office. The poster is accompanied by a

brochure that contains more detail about the rules under PHIPA.

Short Notices were developed by the Information & Privacy Commissioner in conjunction with the Ministry of Health and Long-Term Care, the Ontario Bar Association (Privacy and Health Law sections), and the Ontario Dental Association.

If you are not satisfied that the Short Notices adequately explain the information practices in your office, contact your legal advisor.

*Lisa Corrente focuses her civil litigation practice on the areas of professional discipline, as well as labour relations and employment law. She is a member of the Executive Committee of the Health Law Section, Ontario Bar Association.*

*Lisa can be reached at 416 643 8800, or [lcorrente@torkinmanes.com](mailto:lcorrente@torkinmanes.com).*



Short Notices and brochures are available free of charge through the IPC by calling (416) 325 9172, by e-mail at [ipc.publication@ipc.on.ca](mailto:ipc.publication@ipc.on.ca) or at [www.ipc.on.ca](http://www.ipc.on.ca).

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