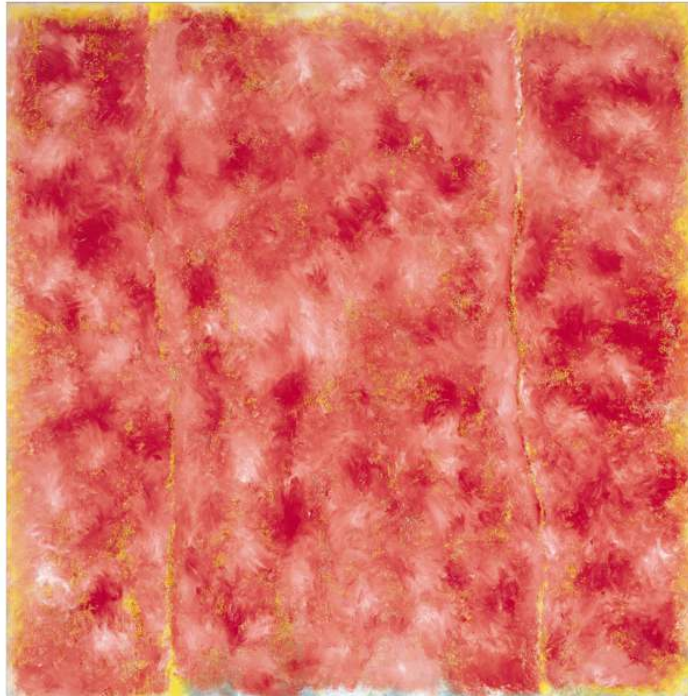


Jean McEwen, *Bonjour Marianne #3*, 1978.  
Oil on canvas, 155 cm x 155 cm



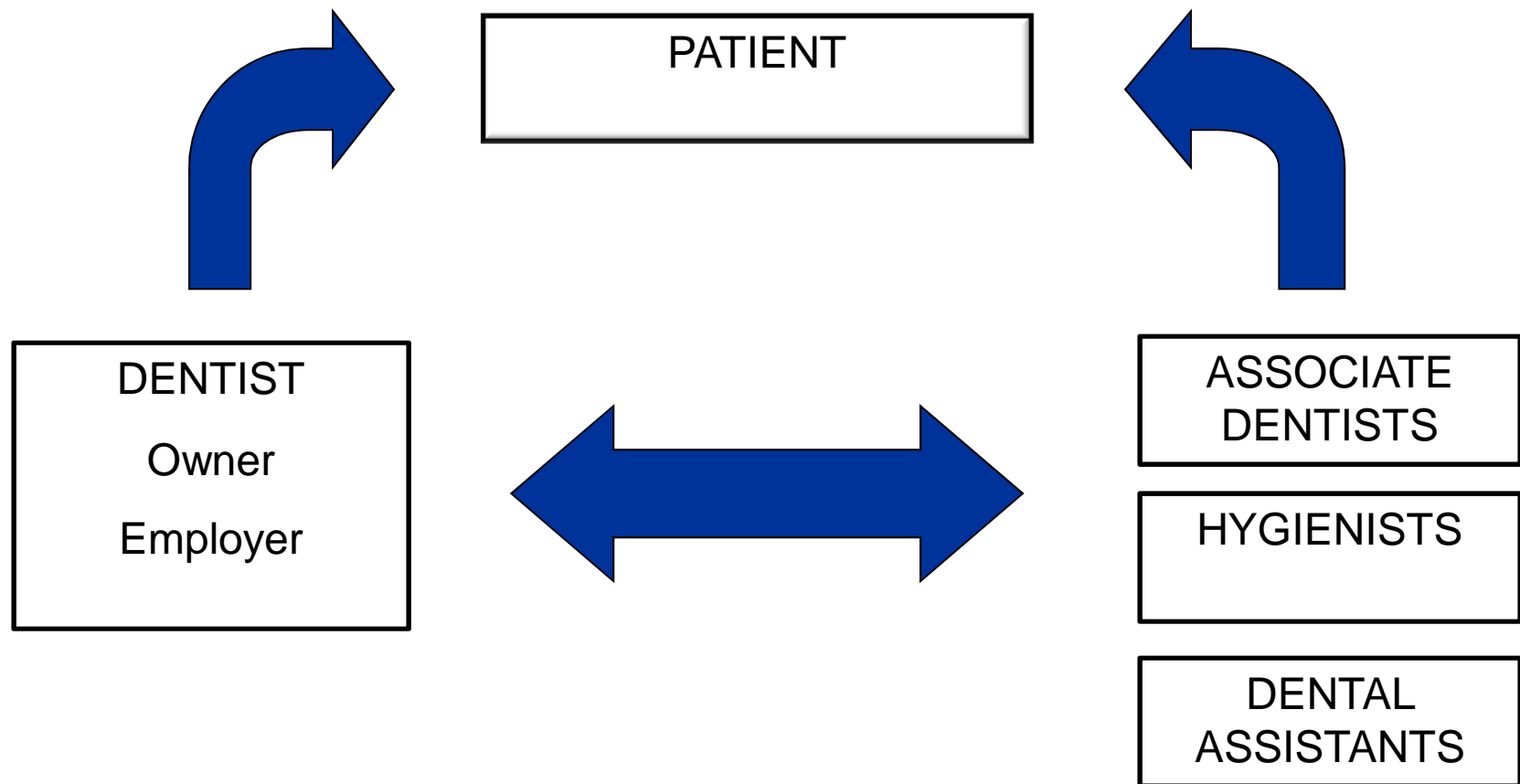
Heenan Blaikie

# Employment Law for the Dental Office

The Canadian Dental Protective Association  
Legal Symposium – June 22, 2012

Tim Lawson, Partner – Heenan Blaikie LLP

# Duties



## Define the Relationship

Employee?  
or  
Independent Contractor?

# Your Relationship Matters

	Employees	Independent Contractors
Employment Standards Act	Yes	No
Common Law Notice	Yes	No
Human Rights Code	Yes	Yes
Taxation/EI/CPP	Yes	No
Occupational Health & Safety Act	Yes	Yes (Limited)
WSIB	No (Voluntary Coverage)	No



## The Key Factor: **CONTROL!**

The more control the Dentist (owner) has over:

- working conditions
- compensation
- equipment

the more likely an employment relationship exists

## Control: Using the Hygienist as Model

### Employee

- Little control over schedule, hours
- Vacation provided
- Equipment provided by dentist
- Patients consider themselves dentist's patients
- Paid salary or on hourly basis
- Restrictions on working elsewhere
- Dentist finds replacement hygienist
- Dentist pays professional insurance

### Independent Contractor

- Sets own schedule and hours
- No "vacation"
- Brings own tools to work
- Hygienist maintains the patient relationship
- Paid per patient
- Free to work at other dentists
- Responsible for finding replacement hygienist
- Pays own professional insurance

# CASE EXAMPLE #1

## ***TLS Health Services v. Minister of National Revenue***

Dentist “converted” all 6 dental hygienists from employees to independent contractors

### **Facts for Employee:**

- hygienists did not seek out patients
- hygienists paid for hours worked, and would get paid for patient cancellation
- dentist provided most work tools

### **Facts Against Employee:**

- hygienists could work for other dentists
- hygienists determined work availability and vacation scheduling
- hygienists paid professional fees and expenses

### **VERDICT:**

- Employee

## CASE EXAMPLE #2

### *Arthur v. Minister of National Revenue*

Hygienist in dental practice worked 3 days a week in one dental practice, 2 days in another

#### **Facts for Employee:**

- billing performed by dentist's clerk
- dentist provided work tools

#### **Facts Against Employee:**

- hygienist paid dentist daily fee plus 25% of billings
- hygienist responsible for 25% of uncollected bills
- hygienist set up own patient appointments
- hygienist paid professional insurances, had own business cards, gave away free toothpaste, gum, dental floss to patients
- hygienist found own replacement

#### **VERDICT:**

- Independent Contractor



# Consequences for Misclassification

## **Employment Standards:**

- Retroactive pay for overtime and vacation pay
- Fines/prosecutions for violations of pregnancy/parental leave, vacation pay, hours of work limitations.

## **Tax:**

- Retroactive tax liability (up to 7 years)
- CPP/EI liability
- Fines/penalties

## **WILL A CONTRACT HELP AVOID MISCLASSIFICATION?**

Short Answer: No

If an employee is really an “employee”, an independent contractor agreement will not protect you

Best Practice:

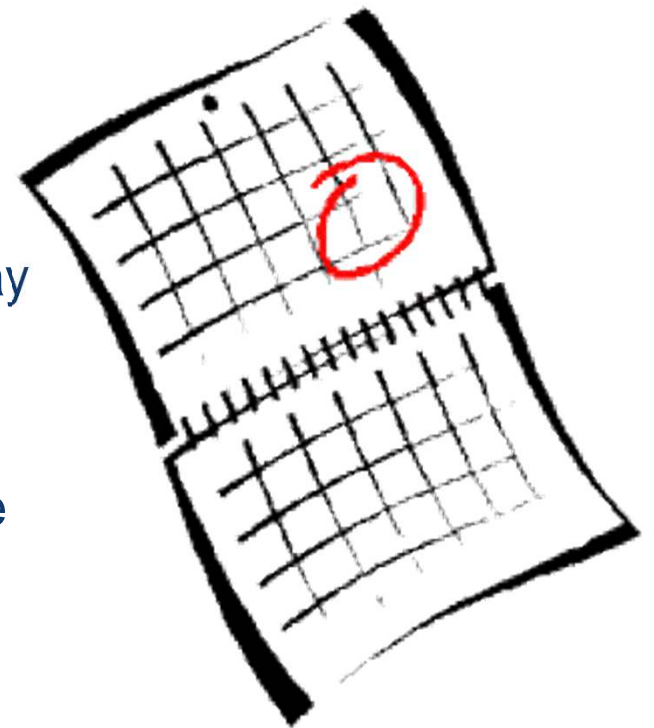
If employee is really an “employee”, set out terms in an Employment Contract

# Legal Obligations



# Hiring and Human Rights

- Dr. A. Theist plans to hire a full-time receptionist for her busy dental practice which is open Tuesday to Saturday.
- One of the job applicants is a Seventh-day Adventist who is forbidden to work on Saturday for religious reasons
- The applicant is well-qualified. However, Saturday happens to be the busiest day of the work week
- Dr. A. Theist decides that it will be easier to hire someone else



## Questions

- Can Dr. A. Theist refuse to hire the job applicant because he is unable work on Saturday?
- What if the applicant becomes a Seventh Day Adventist 6 months after being hired and is no longer available to work Saturdays?

## Poor Performance

- Dr. Payne is having trouble with his dental hygienist
- The hygienist is constantly late for work and some patients have complained that they find him “too chatty” and “annoying”
- Dr. Payne is concerned that he might lose patients if he continues to employ the hygienist
- Dr. Payne moves the hygienist from full-time work to part-time to lessen his problems, until a suitable replacement is found

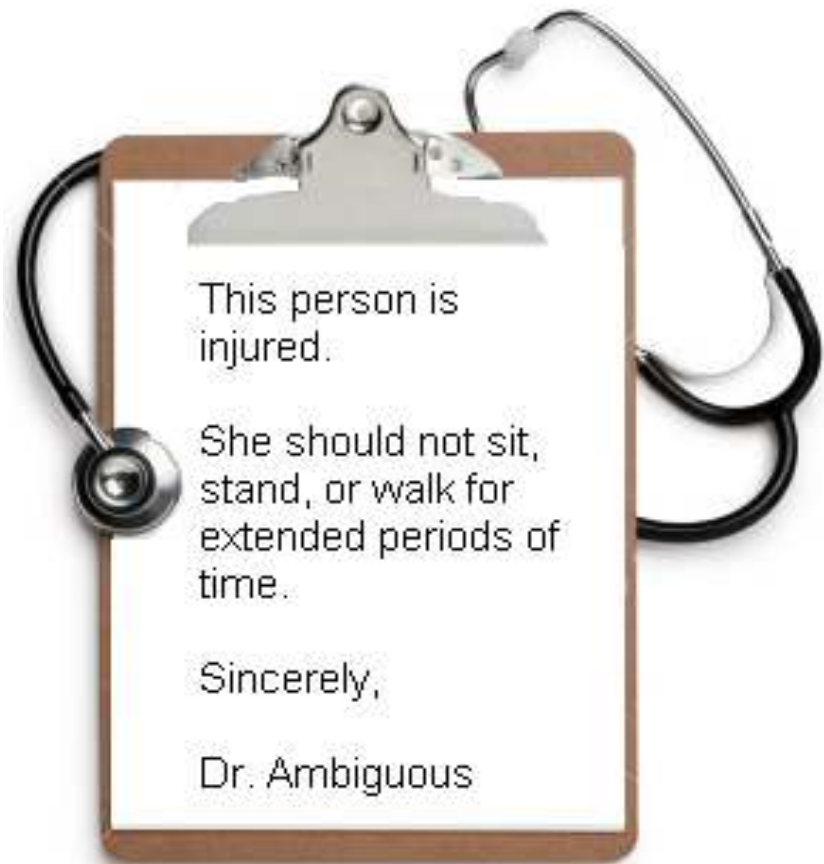


## Questions

- Can Dr. Payne move the employee from full-time to part-time work while he searches for a new hygienist?
- Can Dr. Payne terminate the hygienist due to his lateness and annoying attitude?
- What are Dr. Payne's legal obligations to the hygienist if the employee is terminated?
- What should Dr. Payne have done here?

## Vague Doctor's Note

- A dental assistant submits a medical note to her employer
- The assistant explains that she has a back injury
- She requests a break every 30 minutes

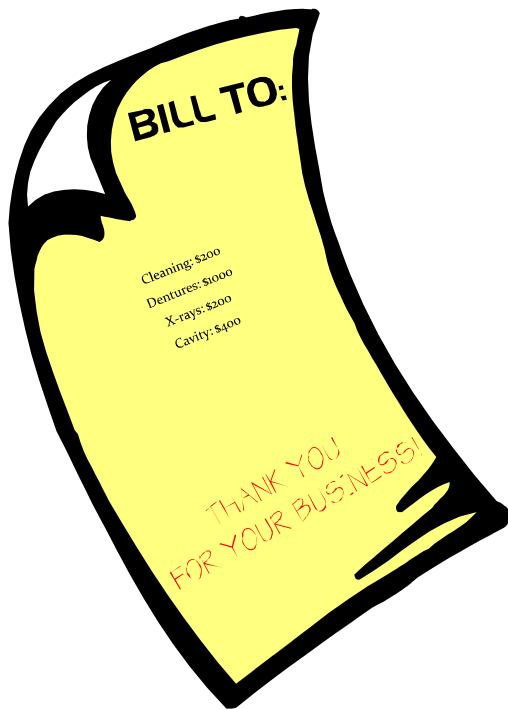




## Questions

- Is the dentist required to give the employee a break every 30 minutes?
- Is the dentist entitled to ask for further information concerning the alleged disability?
- What medical information would be helpful?

## Accommodating Patients



- Dr. Whippersnapper has an 80 year-old patient with low vision
- The patient complains that he is unable to read his invoice for dental services because the print is too small
- Dr. Whippersnapper remarks that it is probably time for the “old fart” to get new glasses

## Questions

- Has the patient been discriminated against?
- What is the impact of the *Accessibility for Ontarians with Disabilities Act*?
- What if the comment was overheard by your 65 year old dental assistant?

# Overseas Emergency



- Reshma is a short service hygienist (6 months only) working for Dr. Efficiency
- Reshma wants to take 2 months leave from work to be with her mother who still lives in the Middle East
- Dr. Efficiency has no replacement for Reshma and does not want to send patients elsewhere
- Dr. Efficiency denies the leave request
- Reshma leaves anyway and Dr. Efficiency terminates her employment

## Questions

- Can Dr. Efficiency deny the leave?
- Does Reshma have a wrongful dismissal claim against her employer?
- What should the dentist have done here?

## Workplace Accident

- Lucy works for Dr. Ace I. Dent as an office administrator
- Lucy slips on some fluoride and breaks her arm.
- Lucy will be off for one week to recover

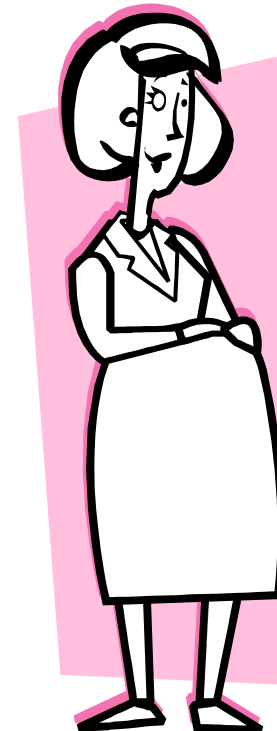


## Questions

- What are Dr. Dent's legal obligations under the *Occupational Health and Safety Act*?
- Does Dr. Dent have to report the accident to the WSIB?
- Should Dr. Dent pay the office administrator for her time off work?

## Pregnancy Leave

- Dr. Childs is pregnant and wants to take 1 year of pregnancy/parental leave.
- She employs 2 hygienists and 1 office administrator





## Questions

- What should Dr. Childs do to close her practice for a year?
- What responsibilities does she owe to the 2 hygienists if they are independent contractors?

## Closing Up Shop

- Dr. Ree Tire is 66. She thinks it is time to retire and move to Florida.
- Dr. Tire will sell her practice if she can find a buyer. If not, she will close her practice.
- She employs 1 hygienist and 1 office administrator



## Questions

- What should Dr. Tire consider doing if she sells her practice?
- What should Dr. Tire do if she closes her practice?