

THE WATERS ARE STILL MURKY:

Non-Dental Ownership/Operation of Dental Practices in Ontario

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It's Already Happening...

When some private disputes involving dental professionals go public, they inadvertently re-engage an important debate – namely, whether non-dentists can legally own and operate a dental practice in Ontario.

First came *Smilecorp Inc. v. Pesin*¹. That case dealt with the enforcement of a non-solicitation clause contained in a management agreement entered into between Smilecorp Inc. (a non-dentist) and Dr. Daniel Pesin. By way of background, Smilecorp Inc. had licensed Dr. Pesin to provide dental services to patients at its Whitby dental practice. The history of that practice was such that, when a dentist left, he or she left the patient charts behind for the next incoming dentist. Although the management agreement provided that Dr. Pesin was supposed to pay fixed amounts to Smilecorp Inc. for renting premises and equipment, 55 percent of Dr. Pesin's billings were going to Smilecorp Inc. In essence, Smilecorp Inc. owned and operated the dental practice.

Another and more recent example is *Partridge v. Botony Dental Corporation*². That case involved an employment law dispute between a hygienist/office manager named Lee Partridge and her employer, Botony Dental Corporation (“Botony”). Of note is that court documents described

Botony as a “dental corporation operating at three different business locations”³ and which “provides dental services”⁴. But Botony is not a hygiene or dentistry professional corporation.⁵ Rather it was incorporated in 1999⁶ in Ontario and its sole director, officer and shareholder is Balbinder Jauhal (“Bo”), a registered dental hygienist.⁷

During courtroom testimony, Bo described Botony's business in 2008 as having a five-operatory dental practice in Barrie with roughly 3,500 patients and providing all aspects of family and cosmetic dentistry (e.g. cleanings, restorative work, Invisalign, extractions, fillings, crowns and bridges).⁸ Bo also described how dentists and hygienists were paid to provide treatment: from the \$750 a year which Botony could expect a patient to pay, the dentist would earn 40% of the \$350 dentistry component (which works out to \$140), the two hygienists would earn \$80 (\$40 each) from the \$400 hygiene component, and the net amount of roughly \$530 would go to Botony.⁹ From Bo's testimony, it was clear that Botony owned and operated a dental practice.

While these cases did not centre on the legality of non-dentists owning and operating a dental practice, their background facts revealed that it was nonetheless happening. So here's the question: was any of this legal?

For the Most Part: No Clear Answer

As discussed below, for the most part, the myriad of current laws¹⁰ governing who can own and operate a dental practice in Ontario do not provide a clear answer. Clever arguments and risk-taking dentists have sidestepped old and rigid laws. In what follows, I will take a closer look at what it means to practice dentistry, who can legally own the assets that make up a dental practice (specifically dental records), and whether non-dentists can directly profit from dentistry.

(Illegally) Practicing Dentistry?

Ontario's *Dentistry Act, 1991*¹¹ defines the practice of dentistry in very narrowly clinical terms as “the assessment of the physical condition of the oral-facial complex and the diagnosis, treatment and prevention of any disease, disorder or dysfunction of the oral-facial complex”. This leaves open the possibility that non-dentists can legally own and manage the business or administrative side of a dental practice without illegally practicing dentistry.

The Royal College of Dental Surgeons of Ontario (“RCDSO”) acknowledged this delineation when it stated that “non-dentists can *own* dental office premises, supplies and equipment”¹². The RCDSO has also stated, “If a non-dentist landlord is providing staff for a dental practice, the dentist must have supervisory *control* to ensure compliance with the regulations made under the *Dentistry Act, 1991* and all the requirements of the *Regulated*

Health Professions Act, 1991, the Personal Health Information Protection Act, 2004, and other legislation governing the practice of dentistry”¹³. Finally, non-dentists can own and install dental radiographic equipment (after obtaining approval from the Ministry of Health and Long Term Care’s X-Ray Inspection Service), though only a dentist can be a radiation protection officer and prescribe dental radiographs under the *Healing Arts Radiation Protection Act*.¹⁴ Taken together, non-dentists can legally own certain assets within a dental practice and provide certain business and administrative services (e.g. leasing space, staffing, marketing, etc.) to a dentist, so long as the dentist has *control* of key operations. Note this distinction, as it will be touched upon again.

Interestingly, U.S. caselaw supports the view that non-dentists can legally own and manage the business or administrative side of a dental practice without illegally practicing dentistry. For example, the Georgia District Court upheld business service agreements between non-dentists and dentists in a number of cases because Georgia’s *Dental Practice Act* defines the practice of dentistry similar to Ontario and the non-dentists in those cases did not perform clinical tasks; rather, the dentist’s professional corporation was given exclusive control of all dental care – including selecting equipment, employees and hygienists.¹⁵ The end result would have been different had Ontario law defined the practice of dentistry to include things

¹ 2012 ONSC 1966 (March 27, 2012), upheld by 2012 ONCA 853 (December 5, 2012). See Michael Carabash, “Are Non-Solicitation Clauses Legal? It Depends...”, *Ontario Dentist* (April 2013), p. 45; Michael Carabash, “The U.S. Experience: Non-Dental Ownership of Dental Practices”, *Oral Health Office* (October 2014), pp. 10-11; and Michael Carabash, Carlos Quiñonez, et al., “Dental Professional Corporation Laws in Canada”, *Ontario Dentist* (April 2015), p. 33.

² 2015 ONSC 343 (Ontario Superior Court of Justice), upheld by 2015 ONCA 836 (Ontario Court of Appeal) (December 3, 2015).

³ Statement of Defence and Counterclaim, paragraph 3.

⁴ Statement of Claim, paragraph 3.

⁵ Searches conducted on Royal College of Dental Surgeons of Ontario and College of Dental Hygienists of Ontario websites on February 10, 2016.

⁶ See court transcripts on November 24, 2014, p. 400.

⁷ *Supra*, note 2, at paragraph 7. See also court transcripts on November 24, 2014, p. 399-400.

⁸ See court transcripts on November 24, 2014, pp. 401, 314.

⁹ See also court transcripts on November 24, 2014, pp. 493-495. ¹⁰ For example: privacy, contract, property and professional and ethical laws governing dentists.

¹¹ S.O. 1991, c. 24.

¹² See “Proper Procedures and Appropriate Safeguards for Dental Records When a Dentist Passes Away”, *Dispatch*, (February / March 2012), Vol. 26, No. 1, p. 29.

¹³ See “Ownership of Dental Offices by Non-Dentists”, *Dispatch* (November / December 2012), Vol. 26, No. 4, p. 22.

¹⁴ R.S.O. 1990, c. H. 2. See also “Ownership of Dental Offices by Non-Dentists”, *Dispatch* (November / December 2012), Vol. 26, No. 4, p. 22 and David Rosenthal, “Non-Dental Ownership of Dental Practices”, *The Professional Advisory* (February 2013), p. 14.

¹⁵ Michael Carabash, “The U.S. Experience: Non-Dental Ownership of Dental Practices”, *Oral Health Office* (October 2014), p. 9.

like owning, maintaining, or operating an office at which a dentist is engaged or employed – as is the case in Texas. Indeed, the Texas District Court has invalidated business service agreements between non-dentists and dentists in a number of cases because of this very definition.¹⁶

Ownership of Dental Records?

A non-dentist can own most of the assets that make up a dental practice – namely, equipment, furniture, fixtures, and computer hardware / software. But what about dental records such as patient charts, lists, x-rays, models, etc. (“Dental Records”)? Can a non-dentist own these as well? For their part, Canadian courts have consistently held that physical or electronic dental records are owned by the dental professional who compiles them.¹⁷ Here’s the question: is a dentist’s ownership interest capable of being transferred to a non-dentist so long as the dentist maintains custody and control?

In certain situations, it appears so.

For example, financial institutions such as banks regularly loan money to dentists purchasing a dental practice and take back as collateral the assets that comprise the dental practices – including the dental records. What happens if the dentist defaults on their loan? Well, this was the case in *Axelrod (Re)*.¹⁸ There, a dentist had signed a general security agreement with a non-dentist and pledged patient lists and files as collateral in case the dentist defaulted on the loan. When the dentist defaulted, the non-dentist creditor sought to take possession of those lists and files, transfer them to another dentist, and obtain each patient’s consent to be treated by the new dentist (or otherwise release the file directly to the patient). The dentist debtor argued that those assets could not be pledged as security because of their confidential nature and because of the fiduciary relationship that existed between a dentist and patient.

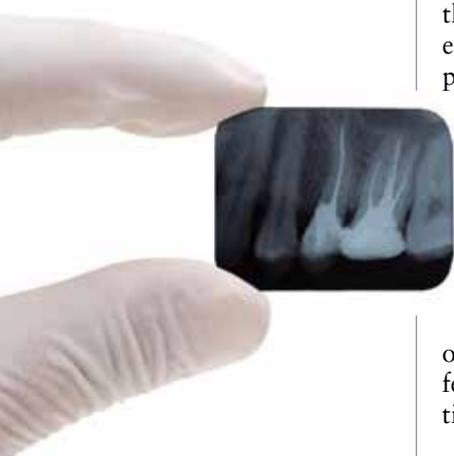
At trial, the Ontario Court of Justice found in favour of the non-dentist. Justice Ground acknowledged that a dentist’s ownership interest in Dental Records is “capable of being conveyed or charged”¹⁹. He ultimately held that the non-dentist

could realize upon its security so long as it undertook measures to protect patients’ confidentiality and access rights while allowing the dentist to discharge their obligations of good faith and loyalty to their patients. The Ontario Court of Appeal upheld Justice Ground’s decision.²⁰

Interestingly, the *Axelrod (Re)* decision was recently considered in *Maximum Financial Services Inc. v. 1144517 Alberta Ltd.*²¹ That case involved Brett Wikjord (an Alberta pharmacist) who, to purchase a pharmacy, pledged patient prescriptions and records as security to get a loan from Maximum Financial Services Inc. (a non-dentist) (“Maximum”). Mr. Wikjord ultimately closed his pharmacy, transferred the patient records to Rideau Pharmacy (a nearby pharmacy), and filed for bankruptcy. Maximum sought to have the original patient records seized from Rideau Pharmacy and transferred to a pharmacist custodian who would obtain patients’ consent to such transfer. Maximum also wanted to prevent Rideau Pharmacy from making use of those patient records. The Alberta Court of Queen’s Bench cited *Axelrod (Re)* and held that those patient records could be pledged as security for a loan so long as the pledge was compatible with the pharmacist’s professional responsibilities.

Worth mentioning is that Maximum ultimately lost in court. Justice B.E. Romaine held that the proposed manner in which Maximum sought to seize the patient records “was not feasible” in light of the Alberta College of Pharmacists’ regulatory regime. First, the Court found that no patients had consented to the transfer. Second, the Court noted that transferring only the original records to Maximum would create confusion and put patients at risk because those records probably changed since the time they were first transferred to Rideau Pharmacy. Finally, Maximum’s request for the Court to impose restrictions on Rideau Pharmacy from contacting patients or making use of patient records would interfere with patients’ rights to choose their pharmacist. For these (and other) reasons, Maximum’s case was dismissed.

Another example of a non-dentist owning dental records occurs when a dentist



dies. Here, the dentist's estate still (however temporary) owns the dental practice²² and the person responsible for administering the estate (the “**Estate Trustee**”) will likely be a non-dentist family member. As per the RCDSO, the Estate Trustee typically has up to one year to sell the dental practice and should enlist another dentist's assistance to operate the practice until it is sold and the dental records are transferred to another dentist.²³

The RCDSO has stated very carefully that, “[o]nly a dentist can ‘own’ (have custody and control of) dental records and only a dentist can ‘own’ the goodwill portion of a dental practice.”²⁴ But the real world examples above seem to extend this one step further by suggesting that a non-dentist can own dental records so long as only a dentist has custody and control of them at all times and complies with their obligations under the *Personal Health Information Protection Act, 2004*.²⁵ One needn't look very far to see more examples of this in other regulated health industries. For example, as part of Target Canada's insolvency proceedings, “[t]he patient information for the three corporate-owned pharmacies was transferred to Wal-Mart Canada Corp. on January 29, 2015.”²⁶

Directly Profiting From Dentistry?

If a non-dentist was legally allowed to profit from dentistry, it would typically come in the form of owning shares

in a dentistry professional corporation or having a fee or income splitting arrangement with a dentist. Let's take a closer look at both of these approaches.

Generally, shareholders of a corporation can earn direct income through salary, dividends, and on the sale of their shares. But when it comes to dentistry, only an Ontario corporation with a valid Certificate of Authorization can practice dentistry in Ontario (so called dentistry professional corporations or “**DPCs**”). There are significant restrictions on who can own shares of a DPC: only dentists can be voting shareholders and only certain non-dentist family members can be non-voting shareholders.²⁷ This seems to effectively preclude other non-dentists from being shareholders.²⁸

That said, both the *Business Corporations Act*²⁹ and the *Certificates of Authorization regulations*³⁰ actually say that the voting and non-voting shares of a DPC can be owned “directly or indirectly” by one of the aforementioned persons entitled to be shareholders. But what exactly does “indirectly” mean? Could it include, for example, the use of a holding corporation whose ownership includes non-dentists, so long as a majority of the directors and shareholders of each class of shares are dentists (as is the case with corporations operating pharmacies in Ontario)?³¹ Interestingly enough, the RCDSO has rejected this view and will not approve Certificates



¹⁶ Ibid.

¹⁷ See Michael Carabash, “Can Non-Dentists Own Dental Practices”, *Dental Practice Management* (Winter 2012), p. 35.

¹⁸ [1994] O.J. No. 137 (Ont. C.J.).

¹⁹ See *Axelrod (Re)*, [1994] O.J. No. 137, at para. 18.

²⁰ See *Axelrod (Re)*, [1994] O.J. No. 2277 (Ont. C.A.).

²¹ 2015 ABQB 646.

²² Either directly owning assets of the dental practice or by owning the shares of a dentistry professional corporation.

²³ See “Proper Procedures and Appropriate Safeguards for Dental Records When a Dentist Passes Away”, *Dispatch*, (February / March 2012), Vol. 26, No. 1, p. 29.

²⁴ See: “Ownership of Dental Offices by Non-Dentists”, *Dispatch* (November / December 2012), Vol. 26, No. 4, p. 22.

²⁵ This Act deals with the collection, use and disclosure of patient information. See also: Royal College of Dental Surgeons of Ontario, “Compliance With Ontario's Personal Health Information Protection Act” (October 23, 2012).

²⁶ See *Target Canada Co. et. al.*, Seventh Report of the Monitor, Alvarez & Marsal Canada Inc., CV-15-10832-00CL, March 24, 2015, section 6.8. See also Marina Strauss, “Target pharmacists seek protection as Wal-Mart secures patient records”, *The Globe and Mail* (February 2, 2015).

²⁷ See Michael Carabash, Carlos Quiñonez, et al., “Dental Professional Corporation Laws in Canada”, *Ontario Dentist* (2015), p. 33.

²⁸ Though non-dentists can own a technical or hygiene corporation, which are used for income splitting purposes by providing certain business services to dental practice or dentistry professional corporation.

²⁹ R.S.O. 1990, c. B. 16, s. 3.2(2).

³⁰ Ontario Regulation 39/02 made under the *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18.

³¹ Under section 142 of the *Drug and Pharmacies Regulation Act*, R.S.O. 1990 c. H. 4, a corporation can own and operate a pharmacy if the majority of the directors are pharmacists and a majority of each class of shares is owned by and registered in the name of pharmacists.



The author does not express any opinion as to whether non-dental ownership of dental practices is beneficial/detrimental or should be encouraged/discouraged. The author simply wishes to bring light to these important issues and considerations given the present status of the law. This article does not offer legal advice. If you need legal advice, you should consult a lawyer.

of Authorization for DPCs in these circumstances.

To make matters murkier, not too long ago, certain regulations³² were amended such that the RCDSO no longer monitors

who owns the non-voting shares of DPCs.³³ Does this open the floodgates by allowing non-dentists to profit directly through DPCs? No. It simply means the RCDSO is no longer monitoring this area and that Certificates of Authorization will be issued regardless of whom the non-voting shareholders are. Importantly, however, the laws governing who can own shares in a DPC still apply. And government agencies other than the RCDSO (such as the Canada Revenue Agency) may take an interest in using existing laws to a shareholder's detriment.

Aside from profiting directly by owning the shares of a DPC, a non-dentist might have a business arrangement with a dentist that includes some type of fee or income sharing. This seems to have been the case in *Smilecorp v. Pesin*³⁴ and *Partridge v. Botony Dental Corporation*. But is this legal? The Professional Misconduct regulations state that a dentist has a conflict of interest if they engage "in any form of fee or income sharing with any person" other than another dentist or hygienist.³⁵ While a dentist can engage in any form of fee or income splitting with another dentist or hygienist engaged in a practice owned by the dentist, a dentist would not be able to do so with a hygienist or other

non-dentist who owns the practice.³⁶ This precludes a dentist from being an employee of a non-dentist.³⁷ If caught, dentists risk being disciplined. There is also a risk that the business arrangement might not be enforceable by a court in the event of a contractual dispute.³⁸

Notwithstanding what the law and the RCDSO say,³⁹ the lure of financial gain, coupled with a willingness to accept the risk of getting caught, may lead some dentists to illegally include non-dentists in their DPCs⁴⁰ or illegally fee or income share with them. With respect to the latter, absent a public dispute (as was the case in *Smilecorp v. Pesin* and *Partridge v. Botony Dental Corporation*), who would ever find out?

Conclusion

Unfortunately, the laws governing who can legally own and operate a dental practice are either unclear or ineffective. On the one hand, strong arguments support the view that non-dentists can be involved in the business or administrative side of a dental practice and may even be allowed to own (though not have custody and control over) dental records. On the other hand, clear prohibitions on non-dentists directly profiting from dentistry may be subverted by risk-taking dentists and private arrangements that, absent a public dispute, remain unchallenged. Dentists should be cautious about who they do business with and consult with the RCDSO and legal professionals to help determine the legality of any proposed business structure.

³² Made under the *Regulated Health Professions Act*, 1991, S.O. 1991, c. 18.

³³ This was done after lobbying by various interest groups to help streamline the process of obtaining a Certificate of Authorization while not comprising the RCDSO's legal mandate.

³⁴ See Michael Carabash, Carlos Quiñonez, et al., "Dental Professional Corporation Laws in Canada", *Ontario Dentist* (April 2015), p. 33.

³⁵ Ontario Regulation 853/93, s. 5. (4)(h) made under the *Dentistry Act*, 1991, S.O. 1991, c. 24.

³⁶ E-mail from Dr. Don McFarlane (Practice Advisory Services, RCDSO) to Michael Carabash dated November 23, 2011.

³⁷ Here, "non-dentist" includes a non dentistry professional corporation.

³⁸ While the Colorado District Court has invalidated business service agreements in whole or in part because they permitted illegal fee splitting and because it would be contrary to public policy to enforce them, our own Ontario courts upheld a management agreement despite allegations of improper fee-splitting. See Michael Carabash, "The U.S. Experience: Non-Dental Ownership of Dental Practices", *Oral Health Office* (October 2014), pp. 10-11.

³⁹ "Only a dentist can profit directly from the practice of dentistry". See: "Ownership of Dental Offices by Non-Dentists", *Dispatch* (November / December 2012), Vol. 26, No. 4, p. 22.

⁴⁰ For the purpose of income splitting or to help them pay less tax when it comes to selling their shares.