

# Directions

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## IN PHYSIOTHERAPY



A publication of the Physiotherapy Association of British Columbia

## PABC Moves People Across the Globe

by Emira Mears, Director of Strategic Communications



PABC member Ramsey Ezzat in *Choose to Move*

In June of this year we launched our Choose to Move public awareness video campaign to help raise awareness of the benefits physiotherapy can bring to help people in all walks of life maintain an active lifestyle. The campaign, which centred on a dynamic video, was a runaway success here in British Columbia while also garnering kudos from around the globe for the Association and profession.

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# The Departing Associate: Legal Implications on the Pursuit of Competitive Opportunities

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## Issue

As with most relationships, professional relationships also come to an end. The law implies various obligations on independent contractors and employees (Associates)<sup>1</sup>, some of which survive the termination of the relationship. But what is the nature and scope of the restrictions that the law requires when a treating professional such as a physiotherapist decides to end his/her relationship with a clinic and seek out a competitive opportunity elsewhere? What legal rights and obligations do the parties have in relation to retention of clients or patients upon the conclusion of the associate's relationship with the clinic?

The scope of this discussion is to highlight some of the legal implications (and obligations) of a departing associate with respect to leaving a clinic and seeking to compete with the clinic owner.

## Discussion

The principal concerns for most physiotherapists when leaving their current clinic will be to ensure that they may continue to practice in the geographical area of their choice and continue to work for clients/patients to whom they have previously provided professional services while at their current clinic. This is generally the case with any professional. These potentially thorny issues are governed by a number of sources, which include the provisions of their associate contract, common

law and equitable principles and any rules, guidelines and policies that may have been adopted by the particular profession's governing body<sup>2</sup> in relation to such matters.

Such professionals should also note that there are common law and equitable principles, which may serve (or at least seek) to restrict an associate from competing unfairly with their former clinic following termination of their associate relationship. Although the courts have held that there is no general restriction on former associates competing with their former clinic owner and enticing the clients/patients after termination, such conduct must not be considered to be "unfair".

For example, acts such as the copying of client/patient lists while still at the clinic have been found to breach the general "duty of good faith" owed by an associate to their clinic owner and to constitute unfair competition. In addition, senior associates in a managerial-type role, or deemed to be in a fiduciary relationship<sup>3</sup> with the clinic, will be subject to a higher standard of conduct and correspondingly stricter duties than regular associates.

Beyond the misuse of confidential information or trade secrets of a clinic, professionals (other than fiduciaries) are generally considered free to do the following:

- (a) seek employment or pursue a competitive opportunity elsewhere, including with a competitor;
- (b) take to this new position the skills and general knowledge acquired in the course of his/her position with the former clinic;
- (c) solicit those clients/patients who the associate can freely recall from memory (without reliance on the clinic's materials, client/patient lists etc.); and
- (d) recruit or solicit other associates/employees/professional staff of the former clinic.

It should be mentioned that some clinic owners may seek to enforce restrictive covenants that may form part of an associate's professional contract<sup>4</sup>. However, the general rule is that restrictive covenants in the employment context are generally considered as being contrary to public policy, as a restraint of trade. Accordingly, such provisions are generally speaking not legally enforceable, unless they are clearly worded and reasonably necessary to protect the owner's proprietary interests. It is generally insufficient for an owner to point to a concern of maintaining competitive advantage to equate to "proprietary interest".



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## Summary

This area of the law is constantly evolving and is reasonably complex. Professionals planning on competing with their employers/clinic owners upon termination of their relationship ought to both use their common sense and if in doubt, consult a lawyer with experience in this area before actively undertaking steps to compete with their current clinic.

It should also be noted that in some circumstances unwarranted or unlawful interference by the former clinic owner with the contractual relationships between the clinic and its clients/patients can potentially constitute tortious or unlawful conduct, which can be actionable against both the former associate and his/her new clinic in damages or other legal remedies.

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### (Endnotes)

- 1 There are a number of key factors that are generally used to determine whether a professional is an "employee" or an "independent contractor". There is a large body of law that has developed in this area when considering whether the associate or professional employee is indeed an employee or an independent contractor. Unfortunately, both of these important issues are beyond the narrow scope of this discussion.
- 2 see e.g.: Rule 3.7-1 and Rules 3.7-8 and 3.7-9 of the *Code of Professional Conduct for British Columbia* (for lawyers)
- 3 The unique legal implications of the fiduciary are beyond the scope of this discussion.
- 4 A discussion of the enforceability of such restrictive covenants (seeking to potentially limit or restrict the departing employee's ability to compete) through non-compete or non-solicitation clauses is beyond the scope of this discussion. 

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