Employment Contracts:
The Twelve Most Common Avoidable Drafting Errors

Appendix “A”
Employment Contract Checklist (Abbreviated)

☐ Conditional or Firm Offer – are there reference, background checks, verification of credentials or proof of right to work in Canada issues?

☐ Consideration
  ◦ New employment
  ◦ Promotion
  ◦ Raise/Bonus
  ◦ Third party consideration – i.e. closing of transaction, investment into company which benefits employee and without agreement, no closing/transaction

☐ Term (limited time period or task) or Indefinite?

☐ Scope of Position
  ☐ Job Title
  ☐ Reporting Structure – does employer have right to delegate or change?
  ☐ Geographic location – does employer have right to shift/change?
  ☐ Scope of position – does employer have right to assign/re-assign duties?
  ☐ Executive, management, supervisory, front-line worker

☐ Probation Clause

☐ Compensation
  ☐ Base
  ☐ Bonus
  ☐ Profit-sharing Plan
□ Commission
□ Stock Option
□ Car allowance
□ Pension/RRSP
□ Review Process

□ Benefits (eligibility for benefits)
□ When employee becomes eligible
□ Are there any health or other preconditions?
□ Premium contributions
□ Mandatory or not
□ Conversion upon termination
□ What happens upon termination?

□ Confidentiality Clause
□ Definition of confidentiality
□ Prohibition on copying/use outside scope of employment
□ Obligation to return confidential or proprietary materials

□ Termination of Employment
□ Notice of resignation
□ Termination without cause – options include:
  □ Employment Standards Act, 2000 minimums
  □ Fixed amount greater than ESA 2000 minimums
  □ Sliding formula that builds on years of service
  □ Requirement for mitigation
  □ Claw back upon finding alternate employment (employee must always get more than ESA 2000)
  □ Benefits upon termination

□ Termination with cause
□ Common-law definition of cause
□ Any additional definition of cause required due to industry issues
The Twelve Most Common Avoidable Drafting Errors

- Disability/Absenteeism
  - Human Rights/Duty to accommodate issues
- Death
- Definition of compensation if compensation in lieu provided

- Ownership of Intellectual Property
  - Patent
  - Trademark
  - Copyright
  - Moral rights
  - Cooperation after end of employment relationship

- Non-Solicitation/Non-Deal/Non-competition
  - Temporal limits/Geographic scope
  - Protecting clients
  - Protecting prospective clients
  - Protecting employees and independent contractors

- Other Matters
  - Layoffs
  - Policies
    - Conflict of interest
    - Harassment/workplace respect
    - Expenses
  - Boilerplate Clauses
    - Integration/excluding parole evidence
    - Stipulation as to court/forum/law
    - Severance of illegal provisions
    - Preserving minimum legislative requirements in lieu of contractual provisions

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1 The reader should read the excellent decision of Justice Perell in Martin v. ConCreate USL Limited Partnership, 2012 ONSC 1840 (CanLII), which summarizes the entire law on restrictive covenants in a precise and comprehensive manner. The case was overturned on appeal at 2013 ONSC 72, but the underlying analysis was not disturbed. Readers should also
Independent Legal Advice or opportunity to obtain

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be familiar with the decision of GasTOPS Ltd. v. Forsyth, 2009 CanLII 66153, upheld on appeal at 2012 ONCA 134 (CanLII).