

# Legalese with Ease

## *Legal Terms for Human Resources Professionals*



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FRASER MILNER CASGRAIN LLP

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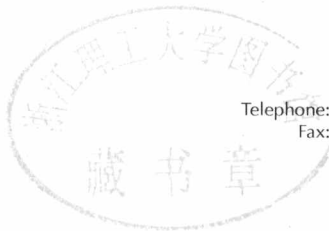
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## DEDICATION

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To Evan Batten-Cotte, the boy who has changed my life.

**MJM**

To my brother Brian, whose life speaks words that a voice cannot. And to  
Suanne deBoer-Miedema, my "wife of noble character".

**AJM**

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## FOREWORD

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Over the past quarter century, the jurisprudence in the emerging field of employment law in Canada blossomed. With this developed a large number of new terms, both in the human resources field and in the law.

The publication of *Legalese With Ease* will address a real need for human resource professionals, lawyers & business executives. Under one cover, the reader can now reference succinct and understandable definitions of key words and phrases.

This book covers the landscape from employment law to labour law to health & safety issues. In addition to a complete compendium of definitions, this work is most useful for its list of statutes and charts relating to legislative requirements.

The authors, Adrian Miedema and Malcolm Mackillop are to be highly commended for their efforts in taking complicated concepts and providing crisp and understandable definitions. In some instances specific examples are offered to the reader (see: “compressed work week”). Also useful is the system of cross-referencing.

Adrian Miedema’s practice at Fraser Milner Casgrain LLP involves employment, labour, and health and safety matters. He is a contributor to FOCUS ON CANADIAN EMPLOYMENT AND EQUALITY RIGHTS. Over the past six years, he has developed considerable experience in this field, while at the same time giving freely of his time to the not-for-profit sector through the Scott Mission and the ALS Society of Toronto.

Malcolm Mackillop is highly respected as a Leader of the Employment Law Bar in Canada. Over the past decade and a half I have marvelled at his creativity, intensity, and industry. As one of the driving forces in the Employ-

ment & Labour Group at Fraser Milner Casgrain LLP, he brings a wealth of experience and perspective to the practice. Malcolm is a prodigious writer, lecturer and commentator in the field. He is regularly consulted by the Canadian print and electronic media for his views.

It is little wonder that the Mackillop/Miedema team has produced a very useful book which will serve the business community, employers, employees, and the human resources and legal communities well.

Both are to be commended for their efforts in creating this most significant contribution to the ever growing literature in the field. I expect that it will grace many workplace shelves as an often-referenced resource.

The Honourable Mr. Justice Randall Scott Echlin,  
Ontario Superior Court of Justice,  
Toronto,  
September, 2003.

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## PREFACE

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In April, 2003, after 14 years with the same law firm, I joined the Employment and Labour group at Fraser Milner Casgrain. When I told Jamie Knight, the Manager of our group, that I had been approached by CCH to write a book on legal terms, he encouraged me to accept the offer and was extremely enthusiastic about the project. Jamie, also a celebrated author and well known labour lawyer, has shown his support not only for this book, but has repeatedly shown us his commitment and dedication to all of our writing initiatives for which we are very grateful. We are also fortunate that David Fuller, C.E.O. of Fraser Milner Casgrain, has been very supportive of this project and understands the importance for us to publish in our practice area. Our goal in writing this book is a modest one. We hope that *Legalese with Ease* will provide Human Resources Professionals with a dependable guide that can be used on a daily basis. Obviously, it would be difficult to cover all the sub-practice areas of employment law, but we have attempted to cover the four areas which are the most common, and we believe that we have provided a comprehensive list of terms in these four practice areas. I would be remiss if I did not thank my legal assistant Janki Chowbay for her hard work and dedication. Janki has worked countless hours under demanding circumstances during the last five months of transition, for which I am truly grateful. Finally, I have been blessed by the loving support of my life partner, Judy Cotte, herself an accomplished securities lawyer, for all her patience and understanding. She understands the importance of my writing projects and importantly, in times of despair, she helps me appreciate all the gifts in my life.

Malcolm J. MacKillop

September 2003

I have always enjoyed words. To a certain extent I cannot understand where this comes from. It was not a necessary product of my mathematics studies at University of Waterloo where I studied as many formulae as I did words. My best guess is that it flowed from my parents' constant encouragement to study hard, and my attempts to figure out the meaning of the Dutch words they used when they didn't want me to understand what they were saying. I owe them my thanks.

We live in an era of word bombardment. We have a constant flow of words across our desks every day. The proliferation of caselaw in the area of labour and employment law has helped define certain terms while introducing new, and sometimes unsatisfactory, words. This book is an attempt to provide plain language definitions of labour and employment law terms.

Lawyers know that no definition can be comprehensive. In litigation, a single dictionary definition rarely suffices, and an in-depth review of caselaw and context is necessary. But I hope that this book provides a useful reference for Human Resources Professionals who are confronted with legal terms, and perhaps a launching point for practitioners digging into a word.

I would particularly like to thank Janine Geddie for her tireless efforts in helping to prepare this book. As well, I would like to thank my assistant and law clerk, Melissa O'Connor, who often helps me choose the right words to use. Lastly, I am grateful to my colleagues in the Employment and Labour Law group at Fraser Milner Casgrain LLP for their encouragement of writing projects and contributions to the employment and labour law community.

Adrian Miedema

September 2003



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## EMPLOYMENT

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### A

#### ADOLESCENT

A person who is between childhood and adulthood. In certain jurisdictions, adolescence is specifically defined to include people falling within a specific age range, who have certain restrictions on the hours of work or types of work they may perform.

For example, in Alberta an adolescent is defined as an individual 12 years of age or older, but under 15 years of age. For most jobs, adolescents in that province may only be employed outside of school hours, with parental consent, and for no longer than two hours on a school day or eight hours on a non-school day. Manitoba defines an adolescent to be a person between the ages of 16 and 17, and deems them to be an adult for employment standards purposes.

*See also:* CHILD, MINIMUM AGE, YOUNG PERSON

#### ADOPTION LEAVE

The ability of a parent to take unpaid time off from work upon the adoption of a child. Adoptive parents have the same rights as natural parents, and

adoption leave is covered under the parental leave provisions for each province.

*See also:* LEAVES OF ABSENCE, CHILD CARE LEAVE, PARENTAL LEAVE

### **AGENCY EMPLOYEE**

*See:* ASSIGNMENT EMPLOYEE

### **AGGRAVATED DAMAGES**

In a wrongful dismissal action, extra damages may be awarded in order to compensate an employee who has suffered mental distress as a result of being treated in an unacceptable manner by the employer on termination. The purpose behind allowing such damages is to compensate for hurt feelings, anxiety and stress that is felt by the employee for actions that the employer should have known would be hurtful. The mental distress must be more than the basic feelings of hurt or anger that most employees feel when their employment is terminated. For example, an employer who alleges incompetence as a reason for dismissal, when there is no evidence of the employee's incompetence, might be liable for aggravated damages. Whether aggravated damages will be awarded by a court depends on the individual circumstances of each wrongful dismissal action where it is brought up as an issue.

*See also:* DAMAGES, MENTAL DISTRESS DAMAGES, PUNITIVE DAMAGES, WALLACE DAMAGES

### **ASSIGNMENT EMPLOYEE**

An employer may contract with an employment agency for certain services. The agency will then hire employees to perform those services for the employer, and they are called assignment employees or agency employees. Given their unique employment situation, assignment employees may receive less notice of termination in a wrongful dismissal action than a regular employee.

*See also:* EMPLOYEE

### **ASSIGNMENT OF WAGES**

A transfer of the right to collect wages from the employee who earned the wages to a creditor to whom the employee owes money. With written

authority from the employer, an employer may be required to transfer an employee's wages to another person or corporation, usually to satisfy a debt that the employee owes. Statutes generally govern the extent to which such assignments may be made. In particular, such deductions are specifically permitted in British Columbia, the Northwest Territories and the Yukon, and may include payments to unions, charitable organizations, pension or superannuation plans, or those authorized by collective agreement, as well as compliance with a maintenance order, to an insurer, or for any other purpose authorized by the Director of Employment Standards for the employee's benefits.

*See also:* DEDUCTIONS FROM WAGES

### **ATTACHMENT OF DEBT**

The process of taking property from a person who owes money, in order to ensure that the person's debt will be paid. This may be accomplished by a writ, summons, or other order of the Court.

In the employment law context, an attachment of debt may be used in a case where an employer owes money to an employee, likely for unpaid wages. If a person or corporation is in debt to the employer for a certain amount of money, the Director of Employment Standards may be allowed by legislation to take that debt, and use it to pay the employee the wages that he is owed. Therefore, the debt would be paid to the Director of Employment Standards, instead of to the employer, and the Director would then distribute the wages to the employee.

*See also:* PRIORITY OF WAGES, RECOVERY OF UNPAID WAGES

### **AVERAGING AGREEMENTS**

Employers may choose to average out the number of hours that their employees work over a number of weeks, so that overtime pay is not owed to the employee, even though she may have worked more than the standard overtime threshold in one week. Permission from the relevant employment standards officials, or agreement with the affected employees, will generally be required.

Using averaging agreements, an employee could work 50 hours one week, 10 the next, and 45 the next, and still not be entitled to overtime

if the threshold is 40 hours per week, since the average weekly hours of work over the three week period is only 35 hours.

*See also:* HOURS OF WORK, WORK WEEK

## B

### **BAD FAITH DAMAGES**

*See:* WALLACE DAMAGES

### **BALLPARK NOTICE**

In determining reasonable notice for a dismissed employee, some courts have used the concept of ballpark notice. This concept is based on the idea that determining an appropriate notice period for a wrongfully dismissed employee is inherently uncertain. So, under this approach, the court will look at whether the severance offer by the employer was reasonable, and within the range of awards given to similar employees in similar situations. If it is, the court will not interfere, even if the severance offer was not exactly what the court would have awarded as reasonable notice.

This approach to determining reasonable notice is problematic, and has been specifically rejected by a number of courts. Some have rejected this approach because it gives too much weight to the employer's initial offer, and puts too much of a burden on the employee to show that the offer was unfair. Similarly, determining an appropriate "range" for a particular employee may result in vastly different notice awards, depending on the views of an individual judge. As an example, say that an employee is offered 9 months' salary in lieu of notice, and it is determined that the traditional range for this class of employee is 8 to 10 months' notice. On the ballpark notice doctrine, the trial judge may choose not to interfere with the 9 month offer as it is within the reasonable range.

*See also:* DISMISSAL, REASONABLE NOTICE, WRONGFUL DISMISSAL

### **BENEFITS**

Indirect compensation given to an employee as a condition of employment. Also known as "fringe benefits", benefits are usually not directly related to job factors or performance but are offered to employees as incentives beyond basic salary and wages.

Employers may make deposits in the employee’s name into pension plans, employment insurance, workers’ compensation plan membership, or provincial health care plans as indirect benefits. More direct benefits that may be offered to an employee include:

- life or health insurance
- extended health care plans
- drug plans
- dental care plans
- vision care plans
- travel accident plans
- income replacement plans
- supplemental unemployment benefits
- other miscellaneous group benefits

See also: BONUS, SALARY, WAGES

BEREAVEMENT LEAVE

A leave of absence granted to an employee when a family member dies. Nine jurisdictions specifically provide for bereavement leave, as set out in the table below. The duration of the leave varies from one to five days, and a qualification period is frequently part of the bereavement requirements. Most jurisdictions state that the bereavement leave can be unpaid, although some state that one day must be paid, and the federal jurisdiction requires the whole bereavement leave to be paid.

BEREAVEMENT LEAVE

Jurisdiction	Qualifying Period	Length of Leave	Paid or Unpaid	Timing Restriction
Federal <sup>1</sup>	3 mos	3 days	paid	Immediately after death
Alberta	n/s	n/s	n/s	n/s
British Columbia	n/s	3 days	unpaid	n/s
Manitoba	n/s	n/s	n/s	n/s
New Brunswick	n/s	5 days <sup>2</sup>	unpaid	No later than day of funeral

<b>Jurisdiction</b>	<b>Qualifying Period</b>	<b>Length of Leave</b>	<b>Paid or Unpaid</b>	<b>Timing Restriction</b>
Newfoundland	30 days	3 days	1 day paid 2 days unpaid	n/s
Nova Scotia	n/s	1 or 3 days <sup>2</sup>	unpaid	n/s
Ontario	n/s	n/s	n/s	n/s
Prince Edward Island	n/s	3 days	unpaid	No later than day of funeral
Quebec	n/s	1 or 5 days	1 day paid 4 days unpaid	n/s
Saskatchewan	3 mos	5 days	unpaid	Within 1 week of funeral
Northwest Territories and Nunavut	n/s	n/s	n/s	n/s
Yukon	n/s	1 week	unpaid	Funeral must be within the week.

<sup>1</sup> The three-month qualifying period is for paid leave. If under three months' employment, employee is still entitled to unpaid leave.

<sup>2</sup> Varies depending on relationship of employee to deceased.

*See also:* EMERGENCY LEAVE, IMMEDIATE FAMILY, LEAVES OF ABSENCE

## BONUS

An addition to the salary or wages that are normally paid to an employee. A bonus may be given for extraordinary work, or as an incentive to employees to encourage them to be more productive or effective in their work. Some bonuses are based on the employee's performance, while others are based on the employer's profitability, and still others are based on a mixture of both.

*See also:* BENEFITS, SALARY, WAGES

## BUSINESS HOURS

The official hours of operation of a company. In certain positions, employees will be required to be present in the office during normal business hours, such as businesses involved in customer service.

## BURDEN OF PROOF

In a legal matter, one of the parties will be required to prove a fact or facts in dispute on an issue raised between the parties in order to succeed. Usually the person who brings the dispute forward will have the burden of proving

the facts that form the basis for the allegation, unless the circumstances require the other party to justify its actions. For example, if an employee is dismissed for just cause and brings a wrongful dismissal action, once the employee proves that he was employed and was subsequently dismissed, the burden shifts to the employer to demonstrate that there was just cause to dismiss the employee.

## C

### **CALL-BACK PAY**

Wages, usually above an employee's regular wage rate, for workers who are called back on the job outside of their scheduled working hours. Contract provisions usually provide for a minimum number of hours of pay, regardless of the number of hours actually worked.

### **CALL-IN PAY**

The minimum payment that employees are entitled to if they are called into or report to work, but are not given the opportunity to work an entire shift or normal work day. It protects workers from being called into work at the employer's discretion, and then being sent home without any compensation.

The call-in amount ranges between two and four hours of pay, although in most jurisdictions employees are entitled to three hours of call-in pay, whenever they are called in to work. In Manitoba, New Brunswick, Nova Scotia, Nunavut and the Northwest Territories an employee is only entitled to call-in pay if the employee is summoned to work outside of regular work hours. In British Columbia and the Yukon, employees are entitled to two hours of call-in pay, although in British Columbia employees must be paid for four hours of work if the employee was scheduled to work on that day for more than 8 hours. In the Northwest Territories and Nunavut employees are entitled to four hours of call-in pay.

It should be noted that, in some jurisdictions, there are special provisions regarding call-in pay for certain types of workers. In addition, if the cancellation of work is beyond the employer's control, call-in pay provisions may not always apply. Finally, exceptions may be made for cases where an employee reports to work, but is unfit to work.



**CHILD**

In Manitoba and Newfoundland, a person under 16 years of age is defined to be a child. Across the country, people below a specified minimum age are prohibited from working, or they are only allowed to work in certain fields and under certain restrictions.

*See also:* ADOLESCENT, MINIMUM AGE, YOUNG PERSON

**CHILD CARE LEAVE**

Parental and adoption leaves in New Brunswick are called child care leaves. In New Brunswick, employees who become a father or mother to a newborn or adopted child are entitled to child care leave without pay of up to 37 weeks.

*See also:* ADOPTION LEAVE, PARENTAL LEAVE

**CIVIC HOLIDAY**

In Ontario, many employers and employees observe the first Monday in August as a public holiday, even though it is not specifically defined as a provincial holiday.

The term "holiday" in Ontario includes a day appointed as a civic holiday by a council for a municipality, city, town, or district. Historically, the City of Toronto originated a midsummer holiday for a "day of recreation" on August 18, 1869. This was the first official recognition of an annual event that had started back in 1861. In 1871 Lord Lubbock of the British House of Lords proposed to make the first Monday in August a civic holiday based on the Toronto example of a midsummer holiday. In 1875 Toronto began observing the civic holiday on the first Monday in August, and that was the beginning of the tradition that continues to this day. In 1968, Toronto City Council officially named the civic holiday "Simcoe Day", although now it is known throughout the province as the civic holiday. Therefore, the civic holiday is a municipal, not a provincial holiday, although many municipalities do choose to observe it.

*See also:* STATUTORY HOLIDAY

**COMMON ANNIVERSARY DATE**

An employer may set a common date for all employees, for the purposes of determining a year of employment. The number of years of employment is then used to determine an employee's entitlement to vacation. In many