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**PLAIN LANGUAGE, LEGAL DOCUMENTS AND FORMS:**

**BACKGROUND INFORMATION**

**A paper presented by**

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## ABSTRACT

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This paper has been divided into three sections. In the first section, the need for plain language is explained, a definition and distinctive characteristics of plain language are provided and some of the reasons for its widespread acceptance are given. The second section focuses attention on the types of documents and forms that are most frequently rewritten in plain language. Particular attention is paid to legislative involvement in plain language. The third section suggests the problems encountered by those trying to use plain language in Canada and tells what actions the Canadian Law Information Council (CLIC) is going to take to solve these problems.

The paper was prepared for the Canadian Institute for the Administration of Justice Seminar, "Legislative Drafting and Interpretation", August 19 - 21, 1987. It will be used as the basis for the discussion by the author and Roch Rioux at the section on "Plain Language Drafting".

## SECTION ONE

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### THE PROBLEM OF ACCESS TO THE LAW

Canada's commitment to provide access to the law must include a commitment to provide accessible legal language. Efforts to provide access to information on the law are stymied by a fundamental problem: the public does not understand the language of the law. The public believes that the traditional language of legal documents puts a barrier between them and their ability to read and understand:

- \* the legal documents they are asked to sign,
- \* the warranties and explanations of the law they need to read,
- \* the legal and administrative forms they must fill out, and
- \* the regulations and statutes they want to see.

The traditional language of the law intimidates the people it is written to serve. Legal language is perceived as hindering, not helping, the public gain access to information on their rights and responsibilities. It makes understanding, much less acting on these rights and responsibilities, far more difficult than it should be.

Some groups within the population are particularly disadvantaged by complex legal language: native persons, the poor and newcomers to Canada. In addition, the number of functional illiterates is growing, and their inability to use everyday legal documents and forms presents a major

problem for Canadian society.

Because the traditional language of the law isn't easily understandable, the public has trouble using that language to express its ideas, concerns and priorities about our laws and legal system. The public cannot fully participate in the law reform dialogue if, by its language, the law remains hidden or intimidating.

### **PLAIN LANGUAGE AS A SOLUTION**

The language of the law should be a bridge between the public and the law. Plain language can provide that bridge.

Plain language marries content and format to create documents that can be understood by anybody. It is an approach to writing that is more successful in helping readers understand what they're reading than is a more formal and traditional style of writing. It has been used successfully to translate technical or complex ideas in medicine, science and engineering into information accessible by all.

Applying plain language to legal writing can create a revolution in the way consumer documents, forms, regulations and even statutes are written. The objective is to create legal language that can be understood by the public so that information on the law can be communicated as effectively as possible.

The plain language approach to legal writing\* creates documents that:

- \* are written in language that is appropriate for the needs of the reader and the purpose of the document,
- \* are designed so that important information can be easily located,
- \* can be understood the first time they are read, and
- \* are legally binding.

Plain language promotes both intellectual and physical access to the law and law reform. It helps people know and appreciate the message of law and it complements attempts to provide physical access to information on the law through legal aid, public legal education activities, government information services, advocacy services, and volunteer efforts.

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\*For detailed explanation of plain language, see Plain Language and the Law: CLIC's Background Documents, published by CLIC in 1985, or the books and articles listed in the bibliography of this paper. New publications of note are: Legislation, Legal Rights and Plain English (Australia, 1986); Forms Design: An International Perspective (U.K., 1987) Plain English and the Law (Canada, 1986) and Plain Words for Consumers (U.K., 1984).

## RULES

Writing is a process. It involves planning what to write, selecting and organizing the content, writing, reviewing and revising a draft and evaluating the product. Using a plain language approach to creating legal documents also involves using a process. It is exactly the same process, with additional guidelines to help the writer make sure that the information on the law will be clearly and easily understood.

The additional guidelines recognize that the language of the law can pose special problems for the public and the traditional layout of legal documents does not help readers find or understand information.

Experienced users of the plain language approach have prepared rules or guidelines for writers of legal documents. Mellinkoff lists seven rules, Wydick has eight. Redish recommends six steps, Goldfarb and Raymond describe ten rules to follow. A Canadian drafting expert, Robert Dick, details thirty-three rules.\* The number of rules may vary but the principles stay the same from expert to expert.

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\*There isn't enough space to list all of the plain language legal writing rules, much less provide a side-by-side comparison. The manuals that describe the rules are easily available and essential reading for everyone interested in legal writing (Mellinkoff, 1982, xvii; Wydick, 1985, (i-ii); Redish, 1981, 2-28; Goldfarb and Raymond, 1982 130-158; Dick, 1985, ix-xi).

What is different about plain language from the standards of good writing everyone hopes to achieve? Modern legislative drafting, contract preparation and form design techniques all call for clarity in the use of language. The difference between normal writing and plain language is that the readers' need for information always takes precedence in plain language.

For example, a booklet on small claims courts in Ontario might begin, "The Small Claims Court system is a division of the Ontario provincial court system and is properly called the Provincial Court, Civil Division." The booklet then spends three paragraphs describing the court system in Ontario.

There isn't anything wrong with learning how the courts work in Ontario. There is nothing difficult to understand about the first sentence of that booklet. There's only one thing wrong with it: nobody cares. Readers looking for information on how to sue someone don't care whether or not the court is called "small claims" or "provincial court, civil division". The opening sentence in that brochure was written from an administrator's perspective.

All too often legal documents and administrative forms are written from the perspective of the writer's need to inform, rather than the reader's need to know. The right of the audience to inform themselves is paramount, overriding the writer's need to publish or gather information.

**The central platform of the plain language movement is the right of the audience - the right to understand any document that confers a benefit**

or imposes an obligation. Due consideration of audience should be a feature of all documents. Sadly, however, much official writing largely ignores the needs of the audience. Official writers can forget that it is their obligation to make their material accessible to their readers. It is not the readers' responsibility to have to labour to discover the meaning. Plain English has brought the audience back into the sights of the writer, reminding us again of the ethical dimension of writing. Documents are not equitable if they cannot be understood by all parties who have to read them.

Law Reform Commission of Victoria (1986) p. 3.

Plain language is not a vocabulary exercise. It is not the simple replacement of 'bad' words (legalisms, foreign phrases, negative words, triplets, long words) with 'good' words (short words, common words, positive words). Vocabulary can be a problem, but vocabulary can be learned. If terms of art are essential to the meaning of the document, then a term of art can be used. It is the style of legal writing more than terms of art that confuse and intimidate.

Research has discovered that the public has more problems with the unfamiliar organization of text in legal documents, the difficult sentence structure and the lack of a shared context than they do with the vocabulary of the law. Unfamiliar patterns of capitalization, punctuation, paragraph structure and indentation combine to create barriers to understanding the



legal document. Readers frequently can't figure out what action they are supposed to take after reading a legal document (especially regulations) because the writing style is devoid of actions and doesn't identify the actors.

## CHARACTERISTICS OF PLAIN LANGUAGE

Plain language is based on the principles of clear writing as set out in books of composition such as Strunk and White, The Elements of Style.

Plain language looks for problems people might have in trying to understand legal language and legal documents.

Plain language uses language and layout to develop solutions to the problems.

Plain language uses ordinary speech unless there is a compelling reason not to use it.

Plain language uses

- short sentences or, if needed, a mixture of sentence lengths to clearly explain an idea,

- normal punctuation, capitalization and paragraph structure, action verbs, the active voice and the present tense,

- pronouns to indicate the reader and any other individuals or institutions in the document.

Plain language helps the reader understand the meaning of the document by using stories, scenarios and examples of action that must be taken, by whom, when and for what reason. It takes advantage of the research that has been done to find out how people learn: how information is processed and what techniques can be effective in enhancing the learning process.

## SECTION TWO

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### USES FOR PLAIN LANGUAGE

Plain language has been applied to

- \* consumer contracts, residential leases and personal insurance policies
- \* legal and administrative forms prepared for public use
- \* regulations
- \* statutes
- \* bylaws
- \* explanations of the law and government services prepared for the public.

This section of the paper will look at the plain language experience with these documents with particular emphasis on legislative involvement in the plain language process. This paper can only point out major developments and must leave the detailed explanation to other books and papers. The bibliography at the end of this paper lists many excellent survey articles on plain language. The Canadian Law Information Council has collected many other books, papers, unpublished documents and research reports on this area. Readers interested in learning more about the subject are urged to contact CLIC.

## CONSUMER CONTRACTS

The idea of plain language has been around for a long time.\* In the past there were attempts to mandate change, but they lacked a catalyst that would propel the concept of plain language into the public consciousness and encourage writers of the law to develop the skills necessary to change their writing habits.

The catalyst in the modern history of plain language was the consumer movement that developed in the United States in the 1960's and 1970's. Because of the enormous increase in government regulation, the amount of paperwork (largely forms) and the infusion of law into every aspect of daily life, a plain language approach to writing the law was seen as the only way to communicate essential information on the law to the public.

Of particular interest to the consumer movement were the types of contracts signed every day by the public for goods and services. It was strongly felt that in a balancing act between the consumer and business, business had all the power and the scales were unfairly tipped in its favour. Consumers were seen as powerless even though they had signed contracts because their inability to understand the language of the contract meant they couldn't stand up for their rights.

The traditional reliance on common law remedies regarding misuse or careless use of language in contracts was seen as ineffectual and biased in favour of big business. Early U.S. attempts to create a more balanced

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\*There are any number of excellent articles outlining the history of plain language. See Redish, 1986, Felsenfeld 1982/2, Foers, 1987, Eagleson 1986, Mellinkoff, 1982, and especially Blake et al, 1986. In addition, the Canadian Law Information Council published an introduction to plain language and an overview of current activities in 1986.

consumer-business relationship concentrated on increasing the amount of information available to consumers. The assumption was that with more information consumers would make better decisions and avoid some of the common preventable legal problems. By the 1970's it became clear that the problem was not just the amount of information; it was also the clarity of the information being provided to consumers.

In some countries, for example the U.K., Canada and most of Europe, the free market for goods and services was seen as the appropriate way to right the information balance between consumers and business. Goods and services sold with understandable contracts would prevail; confusing contracts would deter consumers from selecting products from companies that do not provide plain language contracts.

In the United States, a more interventionist approach was adopted by the federal government and some states. Plain language laws were passed calling for clear and concise language and easy to read formats in consumer contracts, leases and personal insurance contracts (life, home).

#### **STATUS OF PLAIN LANGUAGE LAWS**

As of July 1, 1987 nine states have passed plain language laws.\* Generally these laws apply to residential leases and consumer contracts for goods and

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\*CLIC surveyed the status of plain language legislation, regulations and resolutions in June 1987. Detailed information on each state's legislation/regulations is available from CLIC. This information will be updated regularly and information on current Canadian activity added.

States with plain language laws include: New York (1977), Connecticut and Maine (1979), New Jersey and Hawaii (1980), Minnesota and West Virginia (1981), Montana (1985 amended 1987), and Oregon (1987). The state of South Carolina passed a resolution regarding plain language in 1979. Sometimes South Carolina is included in the total of states with plain language laws.

services that fall within a specific dollar amount. \$25,000 and \$50,000 are the most frequently cited numbers. In some states life, health or home insurance are covered; in other states these are excluded. (See the discussion on insurance later in this paper).

Typical wording of the statutes calls for

**... plain and clear English which can be readily understood by the public - Maine**

5 Me. Rev. Statutes Annotated 8002 9 (1986 Suppl.)

**.. every consumer contract shall be written in a clear and coherent manner using words with common and everyday meanings and shall be appropriately divided and captioned by its various sections ... - Minnesota**

325G.29 Minnesota Plain Language Contract Act

The states' statutes can be put into two categories. A minority of statutes call for objective tests to determine appropriateness of the contract or lease. The majority of statutes call for subjective tests that provide general guidelines, but do not count number of words in a sentence or number of sentences in a paragraph in determining the appropriateness of the contract.

**... Specific guidelines and a readability formula may appear to be objective and to ease the burden of drafters, but they do not ensure comprehensibility and cannot be used as rewriting guides ... The general approach, on the other hand, gives business a few loose guidelines.**

Plain words for Consumers (1984, 34)

Opposition to these laws was originally based on three points:

- \* The statute would cause unnecessary litigation and clog the courts,
- \* The costs of compliance would be large and impose unfair burdens on small businesses in particular,
- \* Contracts and leases are so complex they must stay in traditional legal language.

The litigation has failed to materialize. The cost of compliance has become a standard business expense. As for the argument about traditional legal language, that argument will probably continue into the twenty-second century.

Current opposition to plain language laws concentrates on criticizing the objective test standard as unworkable. Harold Lloyd's article in the Law Library Journal, "Plain Language Statutes: Plain Good Sense or Plain Nonsense?", is characteristic of those who feel these statutes are unworkable and unwarranted. He does, however, feel plain language statutes might be an impetus to the better drafting of statutes and regulations.

Although private law subjective plain language statutes would not suffer from the unique problems that plague statutes which simply focus upon words simpliciter, such statutes, of course, would be subject to the

market force, economic experimentation, and transcendency objections discussed supra and, for these reasons, would prove unacceptable. However, in one area of public law, subjective plain language statutes might be welcome: requiring legislation and rule making to be clear and effective.

Lloyd, p. 694

#### **UNIFORM PLAIN LANGUAGE LAW**

In the United States a uniform plain language law has been proposed and is currently being considered. The proposal for a "Uniform Consumer Clear Information Act" states:

The purpose of this act is to assure that individuals who contract with professionals respecting goods, services or money will be more adequately informed of the rights and duties fixed by the forms they sign.

The supplier ... shall provide an agreement that is sufficiently clear using, so far as practicable, words with common meanings; is appropriately divided into sections and paragraphs and captioned by headings; and uses 10-point or larger type, with at least one point of leading between lines, and ink that contrasts sufficiently with the paper.

A needed technical term may be used whenever there is no satisfactory clear substitute.

In determining whether an agreement complies with <the act> a court shall take into account such specific deficiencies as

- \* ambiguity
- \* unwarranted vagueness
- \* synonyms or other redundancies
- \* double negatives
- \* exceptions to exceptions
- \* exceptions expressed in smaller type
- \* over-use of nominalizations where equivalent verbs are available
- \* over-use of the passive voice
- \* unnecessarily long sentences
- \* awkward arrangement

Draft Uniform Consumer Clear Information Act,  
supplied to the author by George Hathaway,  
Counsel, Detroit Edison and Chair of the  
Michigan Bar Association's Plain Language  
Committee

The basic fine proposed by this act is \$50.00 plus damages and lawyers' fees.

Reed Dickerson, Indiana University, is a recognized expert in legal drafting. His support for the uniform law is based on the growing problems faced by companies attempting to meet different standards and tests of plain language as more state legislatures pass plain language statutes.



Mandating it <plain language> by statute should be confined to so-called "consumer" instruments, such as leases, warranties, and insurance policies. Elsewhere simplification must make its peace with the exigencies of substance ... Because these laws (plain language statutes) differ widely in their requirements, they create undesirable difficulties for companies operating in more than one state.

Letter from Reed Dickerson, March 6, 1987

The debate over the usefulness of statutes requiring plain language contracts is not finished. A number of U.S. states are considering passing such legislation. The National Consumer Council of the U.K. strongly advocates the passage of such legislation. In Canada only one province has had a bill on plain language contracts introduced. An M.P.P. in Ontario introduced a private members bill; it did not pass.

#### **U. K. LAW**

In the U.K. the National Consumer Council has been a leading force in the development of plain language legal documents and forms. In conjunction with the Plain English Campaign they have prepared sample documents and undertaken a national plain language public awareness program. The U.K. is regarded as being a well-spring of information on plain language and alive with exciting plain language activities.

The National Consumer Council now advocates the adoption of a plain language law for consumer contracts. They no longer feel that market forces will encourage voluntary compliance with plain language principles.

The great strength of a plain language law along the moderate lines we have proposed would be its catalyst effect. Legislation would, at the very least, overcome inertia and make firms and traders review their documents. For those now reluctant to be the only ones to attempt change, it would guarantee universal coverage, with all contracts simultaneously adopting a new approach. The unspecific test of acceptability we propose - 'clear and readily understandable language', 'words with common and everyday meanings' - would keep to a minimum the effort required of businesses, being easy to comply with while at the same time promoting a basic acceptable standard.

National Consumer Council, 1984, p. 43

A Plain Language Act for this country would go a long way to bring plain English into consumer and housing contracts. Its strength would lie in its largely declaratory nature, with a deliberately low level of actual enforcement. As a law, it would declare a standard. Most businesses would seek to meet the standard, but would not be slavishly bound by detailed rules and regulations. They would not be hounded or pressured into getting everything just right. Nor would they be penalized when they had made genuine efforts to comply. The law would act as a definite prod and

encouragement, but it would not amount to any sort of unacceptable imposition.

National Consumer Council, 1984, p. 48

## IMPACT OF PLAIN LANGUAGE ON CONTRACTS

What has been the effect of preparing consumer contracts and leases in plain language? The activities listed below are symptomatic of the widespread acceptance of plain language consumer contracts in many many countries.

- \* Banks and insurance companies have accepted the idea of plain language and currently prepare their consumer information in that style. Citibank is generally regarded as being the catalyst for much of the U.S. plain language activity. Most U.S. banks, and many in Canada and the U.K., now try to use plain language principles as their writing standard. Ninety-five percent of all U.S. insurance companies use plain language. Companies doing business in multiple jurisdictions are faced with often conflicting plain language standards.
- \* Contracts for other consumer goods, such as cars and appliances, are written in plain language. Especially in the U.S., the list of companies using plain language consultants to prepare rewritten contracts and related consumer information reads like a who's who of the

largest consumer and public utility companies.

- \* Leases in plain language have proven to be very popular with tenants and even landlords. In Canada two examples of plain language residential leases are the standard Quebec residential lease and the new CLIC plain language lease. CLIC's lease was done as a demonstration project with Toronto's municipal housing authority, Cityhome.

## **INSURANCE**

Regulations governing the personal insurance contract exist in 32 U.S. states and the District of Columbia. These regulations require that the policy meet specific readability standards based on the National Association of Insurance Companies model. Canada doesn't regulate plain language in insurance contracts. However, many companies do use plain language in their contracts and forms.

## **FORMS**

Although "access to justice" provides the cornerstone for the plain language movement, the cement has turned out to be the enormous savings in time and money created by a switch to plain language forms.

Plain language forms save money. Here are examples from Robert Eagleson's 1985 survey of cost savings due to the use of a plain language approach to rewrite legal documents and forms.

- \* In the U.K., the Department of Health and Social Security introduced plain language application forms for legal aid in 1984. It cost the Department about \$50,055 to develop and test the forms, but they saved \$2,917,290 in staff time every year.
  
- \* The Department of Defense (U.K.) receives 750,000 claims for travelling expenses per year from its civilian employees. By rewriting the form into plain language, the error rate was cut by 50%, the time needed to fill it out was reduced by 10% and the time needed to process it by 15%. Preparing the plain language form cost \$23,265 but it saved about \$778,320 per year.
  
- \* Insurance companies in Australia have found that it takes less time to train new staff if the forms they process are written in plain language. The advice given clients is more accurate and junior staff interrupt senior staff with questions less frequently.

In Canada two major plain language form revisions stand out as examples of what can be done.

- \* Quebec has a plain language tax form created by Revenue Quebec in 1982 and in use since then. The entire package of tax information and forms was

redesigned and tested by Revenue Quebec and the communication consultation firm they hired. The tax form is easy to use and has proven to be easy to administer.

- \* Ontario is creating a plain language drivers and vehicles registration form. This form, filled out by three million people over the course of a year, will be revised by the Ministry and tested in the summer/fall of 1987. The Ministry has adopted a plain language approach for all of its new public-use forms and plans to revise its old forms to meet their plain language standards.

## RESEARCH

The leading centres for plain language form design are the U.K. and the U.S. Privately and publicly funded plain language research agencies are exploring how and why the public has trouble with forms and are learning the best methods to solve those problems.

As a result of Sir Derek Rayner's study (1981-82) on government forms in the U.K., every government department is now required to report annually on what steps they have taken to eliminate unnecessary paperwork for the public and to provide their forms in understandable language. Other results of the process Rayner started are forms revision research and design departments created in many ministries and a wholesale rewriting of administrative forms by government departments. The Rayner report was initiated by Prime Minister Thatcher, and plain language has continued to

receive her wholehearted support.

As an example of the worldwide use of plain language forms, the Inland Revenue recently published a fascinating study of tax forms around the world. The study was the result of a Civil Service Travelling Fellowship given to J. M. Foers of the department. His study compares the plain language forms design experience in many countries and reviews the current state of the research into forms design.

Plain language forms have become good business. Cost savings, increased productivity and heightened customer satisfaction have led companies to invest money in redoing their forms as well as their contracts. Now, public service companies - gas, telephone, electricity - have begun to see the advantages of plain language. Government departments with heavy reliance on forms for user contact are considering redoing their forms in plain language.\*

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\* There are excellent summaries of current plain language form activities by government and business in Eagleson (1986), Foers (1987), Eagleson (1985) and in every edition of the Document Design Center's Simply Stated.

## REGULATIONS

President Carter's orders that

**... regulations should be as simple and  
clear as possible**

U.S. Executive Order 12044, 23 March 1978

**... (government forms) should be as short as  
possible and should elicit information in a  
simple straightforward fashion**

U.S. Executive Order 12174, 30 November 1979

paved the way for a widespread regulatory reform program in the United States. Even though President Reagan shifted the emphasis from a consumer's perspective to a business orientation ("get rid of paperwork"), the impetus for change prevailed and plain language has become an accepted standard for consumer-oriented regulation writing.

It is an accepted standard but one that is not widely practised.

Regulations, whether in the U.S., the U.K., Australia, or even Canada, are hard for the public to understand. The account by Rudolf Flesch about his work creating plain language regulations is illuminating. It provides example after example of consumer-oriented regulations that were impossible to understand until redesigned in plain language. Flesch's reliance on the readability formula he created as the guideline for producing plain language documents has been widely criticized. Even though his method might not be really useful in creating plain language regulations, the story of his struggle is well worth reading.



Only the U.S. has relied as heavily on legislated action to improve the understandability of its regulations. Canada and other Commonwealth countries have generally relied on the gradual improvement of legal writing standards to improve regulations. However, in some jurisdictions Freedom of Information legislation requires information to be "clear and understandable". Perhaps this will prove to be the impetus needed to focus more attention on the need to review and revise regulations to make them more clear. Those regulations that need to be read by the public ought to be prepared in plain language.

## STATUTES

It is tempting to set out the arguments, pro and con, about the application of plain language principles to legislation as a series of side by side quotes. They could be lined up as if they were soldiers marching down the page. The pro quotes arrayed to the left; the con, to the right. There they would be, point and counterpoint, shot and answering volley: each side intent upon the rightness of their position and, I fear, deaf to the logic of the other.

For every statement that plain language can be applied to preparing legislation, there is an opposing statement that argues against. The quotes are usually passionate, and evidence of the strong emotions and the opposing views of the world, language and legal process held by authors on both sides.

PRO

To date, much of the effort in plain English has been directed to redrafting general commercial and administrative documents which have wide distribution in the community, such as insurance policies, residential leases, tax returns, and claim forms for social service benefits...

More and more, however, the need has been felt to tackle legislative documents, not just for their own deficiencies but also because they wield such an influence on other official writing. Not only do they sometimes dictate the words that have to be used, but as a result of their status, public servants are tempted to imitate their style of language. While there have been some endeavors at improving legislation elsewhere, none matches this systematic investigation of the problem by the Victorian Government through its plain English reference. To this extent the reference is in advance of developments elsewhere. It has already attracted interest and support from overseas.

Law Reform Commission of  
Victoria, p. 3

CON

It is often observed that legislation should be readily intelligible not only to the lawyer, but also the layman. That may be the ideal. Regrettably it is also a pipe dream for all but the most simple of matters. Complicated matters are neither easily understood nor explained. And it is not only experts that have to deal with complicated matters. Average house-holders and housewives are confronted with but cannot be expected to master the intricacies of the law governing their tenancies any more than the workings of their television sets. The sooner such fanciful notions are abandoned the quicker we should be able to get on with the business of achieving such a measure of simplicity and intelligibility as is attainable.

Nazareth, p. 5

The proponents of plain language would argue that plain language must be applied to statutes because:

- \* The statutes are used by the public and as the end users, and the base upon which all government rests, their needs for understandable language should be paramount.

- \* The statutes are quoted, and certainly made reference to, in regulations, contracts, forms and other important documents. By clarifying the statutes' language, the language of these other documents can be clarified more easily.

The proponents of the status quo would argue that the status quo must be maintained because

- \* The need for precision and accuracy in writing legislation is so great it makes simplification of the language impossible.
- \* Convention, judicial review and acceptance of traditional language and document format make changing the language or format of legislation inadvisable.
- \* Statutes must be consistent. If the old statute doesn't use plain language, then the new amendment can't either.

Those are the arguments for doing something - either changing the language or keeping it the same. Most of the authors engaged in this debate spend their time rebutting the arguments of the opposite side. And everyone uses examples to prove their points. It is tempting to classify these as the "Yes, you can - No, you can't arguments". They are referred to in this paper as the traditionalists and the innovators, since all other names are not borne out by a study of the literature. The sides are not

neatly polarized along a lawyer - non-lawyer, drafter - non-drafter axis.

The argument looks something like this:

Traditionalists

The courts insist we use this language.

The real users of statutes are lawyers or judges. They understand traditional legal language.

There isn't time. Bills are drafted in a hurry.

Most laws have troublesome exceptions and other provisions that make simplistic language impossible.

Tradition demands detail and allows for ambiguity of purpose in legislation. Governments and legislators expect it.

Radical changes in the style of language would require attitudinal, constitutional, and procedural changes at all levels in society.

Innovators

No they don't. Most language isn't defined by law or judicial review, you just think it is.

Don't be so sure of that. The public reads statutes all of the time. Furthermore, they're the ones that are paying for the statutes. They ought to be able to read them.

Most bills are drafted in a hurry, but statutes are not. There is always a lengthy hearings and revision process in which they can be changed.

They can still be worked on so they are more clear.

True, but these traditions can be changed.

True.

**REVISION ACTIVITIES**

A number of jurisdictions are involved in plain language statute revision programs. In Australia the Attorney General of the State of Victoria announced that from 1985 on, Victorian statutes would be simplified. He

recommended the Law Reform Commission of Victoria undertake a sweeping study of the statutes and make specific recommendations for future plain language drafting. The Commission hired Dr. Robert Eagleson, an authority on language. Dr. Eagleson and his staff are thoroughly investigating the situation regarding plain language worldwide, contacting drafters and plain language professionals and preparing detailed examinations of why and how plain language can improve the comprehensibility of the statutes by everyone who uses them, public and lawyer alike.

The work of the Commission is presented in a discussion paper Legislation, Legal Rights and Plain English (Melbourne, 1986). The Commission has also made available unpublished working papers and reports that provide detailed guidelines for plain language drafting of statutes, forms and public legal education materials. Their final report is expected in 1987.

In the United States, Minnesota has set up a Statute Revision Office and is working on rewriting their statutes and preparing their current bills in plain language. A team of lawyers and a language consultant use a detailed drafting manual to revise 10 to 15 chapters of the Statutes of Minnesota every year, as well as to prepare bills for introduction in the legislature. They are also working on preparing administrative rules in plain language.

In New Zealand the Law Reform Commission has been newly created to review and revise both current legislation and the statutes in plain language. The Commission was just created in 1985 it and has only been operating since December 1986. They are so new they have yet to decide precisely how they will operate in cooperation with the parliamentary counsel. Their mandate is to "advise the Minister of Justice on ways to make the law as

understandable and accessible as possible and simplify the expression and content of the law as much as is practicable."

Montgomery County, Virginia is writing their municipal by-laws in plain language. Other jurisdictions in the U.S. are also using plain language communication techniques.

In Canada a bill was introduced in 1986 by Brian Lee, MLA (Calgary Buffalo) calling for the creation of a committee to review all bills which had passed second reading in the Legislative Assembly of Alberta. The review committee would consist of representatives of the general public, and experts in English and legal drafting. The bill did not pass.

In his paper, "The Interaction of Language and the Legal Process," (unpublished 1986) Norman Larsen makes a number of practical, easy-to-apply suggestions to reformat and rewrite the statutes of Manitoba. He was at that time the director of the Validation Project for the Ministry of the Attorney General, given responsibility for creating the new French-English revision of the statutes. He suggests that far from being

**...an unnecessary and onerous task <it is> a once-in-a-lifetime opportunity to review the entire process, including all the legislation, and to improve it.**

Larsen p. 2

He goes on to suggest that a few statutes of obvious public interest such as landlord-tenant and highway traffic, be redone in plain language. It is, in his opinion, more important to get the 'big demand statutes' into plain language rather than trying to systematically redo all of the

statutes.

Most parliamentary counsel and legislative drafting sections have adopted modern drafting style which is a great improvement on the older drafting style with its convoluted expressions and antiquated language. While not exactly "plain language", drafting and drafters are concerned with public access and have made attempts to provide the public with more understandable statutes and bills.

### OBSERVATIONS

It isn't the purpose of this paper to settle the debate between the plain language innovators and the drafting traditionalists by declaring a winner. I doubt if there are winners or losers in this debate. It isn't even the purpose of this paper to outline in any detail all the arguments of either side. There are many detailed examinations of the topic listed in the bibliography and readers are urged to consult them.

There is room in this paper to make a few observations.

- \* If traditionalism and plain language stand at the ends of the spectrum, surely there is great room for clarification to occupy the middle ground. With the exception of the religious texts of this world, works of great literary merit and your favourite children's story, almost every piece of writing can be improved, even statutes.

\* The civil law tradition offers drafters of legislation a different perspective and one that would benefit Canadian drafters in particular. The debate between plain language innovators and drafting traditionalists could profit by the intercession of the civilian's approach to writing the law. The need to create common law statutes in French might offer Canadians an opportunity to develop the "clarified" approach to drafting -- a pleasing compromise between the two ends of the drafting spectrum.

Much more needs to be learned by the common law world about the civil law approach to drafting. This topic should be a priority on drafting's list of potential research topics.\*

\* To call on drafters to drastically change the way the law is written, without at the same time working toward changing the minds of the judiciary, legislators, government officials, the legal profession and the public is not only unfair, it won't work. Our laws, and the way our laws are written, are a function of our society: both must reexamine their goals in order to create a climate for access to the law to be a reality.

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\* Nazareth (1986) lists a number of useful sources for those interested in comparing the two drafting styles. His article comments on the work of Dale and Renton in particular.



\* Just because you can write a sentence doesn't mean you can write a good novel. Just because you went to law school doesn't mean you can write good contracts, leases and statutes. Not enough attention is given to "writing the law" in law schools or in continuing legal education programs. Lawyers are not trained to recognize and deal with writing problems. They receive no information on why and how people have problems understanding the language and format of the law. Communication skills must receive higher priority in the law school or bar admission curricula and special courses on the preparation of legal documents must be provided.

## SECTION THREE

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### PROBLEMS

Canadians who want to use plain language to prepare legal documents and administrative forms are faced with problems.

- \* **It's hard to find out how to apply the plain language approach to your own writing process.**

Many excellent manuals provide 'rules' for using plain language, but nobody really tells you how to do it. Do you simply change tenses, take out archaic words and latin phrases, use short sentences and let it go at that?

Or, is using the plain language process for writing something more than that?

- \* **It's hard to figure out what kind of problems the public has comprehending legal language and using legal forms.**

Unless you're a professional adult educator, or someone who spends all of your time helping others fill out forms, it's difficult to figure out what kind of problems the public will have with the document you're creating. Most research studies on the public's use of legal

documents are themselves filled with technical terms and require substantial knowledge of educational learning theories.

- \* **It's hard to figure out when you've done enough: when the document you're preparing is really in plain language.**

Readability tests are roundly criticized as inaccurate measures to figure out if a document can be understood. Are there other objective tests that can be used? Are subjective tests the only measuring stick available to determine when the language is plain enough?

- \* **It's hard to find someone to teach you how to use the plain language approach.**

Most documents and forms that cross your desk are not in plain language. If you don't see plain language very often, how can you learn to prepare plain language documents? By practising, obviously, but practising under the direction of someone who is experienced and is a good teacher. You must learn to apply the plain language process by yourself. Courses, workshops, seminars on plain

language are few and far between. While plain language might be mentioned in legal writing courses in law school, the weight of accumulated non-plain language treatises and the accepted legal writing style guarantee that most law students don't get much plain language writing exposure or experience.

- \* **It's hard to design a major project for drafting plain language documents.**

Without a good idea of how much time it will take, how much money it will cost, who has to be involved and whether or not to use consultants - it's hard to suggest that your firm rewrite all of its consumer forms.

- \* **It's hard to use the plain language approach without precedents.**

Precedents for plain language use would make the 'selling' job for plain language easier. With examples of similar documents in hand, it's easier to redo yours. With a good idea how the courts have treated plain language documents, it's easier to make sure yours meet the courts' standards. With

information about the success of other firms that have begun plain language projects, it's easier to convince your colleagues to start your own plain language project.

### **CLIC'S SOLUTION**

CLIC is going to solve these problems. We have designed a major project to help Canadians learn about plain language and to teach them how to use it. We will also investigate the availability of Canadian fee-for-service plain language services and the advisability of CLIC's preparing documents in plain language on a fee-for-service basis for business and governments.

### **CLIC'S ENDORSEMENT**

The Canadian Law Information Council endorses the principles of plain language and its application to legal documents and administrative forms. In a resolution unanimously passed by the Council at its May 1986 meeting, CLIC adopted the promotion of plain language as a priority and directed the staff to prepare a plan for future activities.

**The Canadian Law Information Council recognizes that much more needs to be done by governments and others to assist Canadians to learn about their laws, the legal system and legal documentation through the use of plain, clear and understandable language.**

**The Council believes, as part of its mandate, that it should become more involved in promoting the use of plainer language in the law.**

The composition of the Council makes its wholehearted support a significant vote of Canadian confidence in plain language. The Council consists of representatives from a wide spectrum of the legal profession. Every law society sends a representative and there are additional representatives from the Canadian Bar Association, law schools, law libraries, law deans and the Uniform Law Conference. CLIC's government and law book publisher members guarantee that CLIC is the forum for the producers and users of information on the law to meet and discuss how to improve access to legal information.

The Council understands the need for a plain language partnership to exist between the public and private sectors with the legal profession leading the way. Plain language documents and forms must be widely available from governments, business and the courts.

It is clear to CLIC that Canada needs a plain language catalyst, an organization to spark interest and promote increased activity in plain language. We need an organization to act as the communication link, training resource and coordinator of public and private sector plain language activities.

Further, Canada needs to explore and develop plain language communication methods. As experience in other jurisdictions has clearly indicated, the development and application of appropriate plain language communication techniques requires an organization to first create an awareness of plain language and to then create the tools to make it work.

## WHY CLIC?

CLIC is not only the logical organization to fill these gaps, it is the perfect organization to do so.

CLIC's mandate is to improve access to information on the law. Plain language has proven to be an effective way to improve the public's access to the law because it helps them understand the language of the law.

CLIC can provide the forum the plain language movement needs in Canada. Its consultative approach to uncovering and studying legal information problems, as well as its cooperative approach to problem solving, can advance the use and impact of plain language. CLIC's network of experienced people and wide representation from users and producers of legal information can help plain language develop a Canadian context.

CLIC has a proven track record in taking new information delivery concepts and developing them to their fullest. CLIC's experience in Public Legal Education and indexing Canadian statutes has provided it with a wealth of information on the public's need for information and the problems encountered searching for information. Furthermore, CLIC can help the plain language movement learn about the public's legal information problems.

## WHAT WILL CLIC DO?

CLIC will create a Canadian centre for plain language activities.

Approved in principle by the Council in 1986, the CLIC plain language program has two goals:

- \* To create an awareness of plain language among the public and those who prepare legal documents and administrative forms, and
- \* To provide the tools, information, advice, training and research needed to use plain language.

The plain language program will be a special project within CLIC with a group of advisors drawn from the legal profession, the public, business, government and law schools. It will draw upon the plain language resources already developed by CLIC and those CLIC will need to create in order to provide a full range of communication, training and research services.

The priorities for the CLIC plain language program are to work on consumer-oriented legal documents and administrative forms. These widely used documents must be made easier to use and easier to understand. It goes without saying that explanations of the law and government services for the public must be available in plain language. CLIC will focus its attention, at least initially, on preparing

- \* training materials and "how to" workshops to teach those who prepare legal documents and administrative forms how to use plain language;



- \* information services and a comprehensive resource collection of plain language samples, instruction manuals and descriptions of current plain language activities to let people use the experience of others in solving their own communication problems;
- \* an investigation of the availability of current plain language consultation services and the feasibility of creating a CLIC plain language contract agency

## TRAINING

In order to make sure our plain language program meets the needs of those who prepare legal documents, CLIC will undertake an extensive analysis of how lawyers are trained to write, what types of instruction would be most helpful, and when in the legal education process it would be most appropriate to provide plain language instructional modules, or full courses, for use in law schools and continuing legal education programs.

We will be doing needs assessments on the training needs of government officials and producers of public legal education materials in order to create "how to" workshops on writing and form design to meet their needs.

CLIC is prepared to invest the time and energy needed to undertake a substantial research phase prior to designing "how to" courses or creating instructional guides. Training, if it's ever to be used six weeks after the course is given, must solve real life problems. In plain language terms, CLIC needs to find solutions to the common writing problems that

occur every day. We will be calling on those who face these problems to help us find solutions. Professors of law, government form designers, lawyers and public legal educators from both common and civil law jurisdictions will be asked to help us in our research and to assist in the development and testing of 'how to' courses.

### **SAMPLES AND INFORMATION SERVICES**

When the Bank of Nova Scotia and the Royal Insurance Company were redrafting their consumer contracts, they worked in isolation. Neither was aware of the other's work even though they were in the same city, in fact, within a few blocks of one another. That was 1978-1979. It's 1987 and isolation is still a problem.

Those who have decided to use plain language want and can learn from each other's experience.

- \* Seeing how someone else designed a tax form can help you redesign yours.
  
- \* Seeing a plain language residential lease and hearing about the process that was used to create it, can shrink your four-page single spaced lease to a more manageable size.

A comprehensive bank of samples of plain language legal documents and administrative forms is urgently required. Being able to use other people's documents to guide you through the plain language drafting process will save time and money and will increase the likelihood that your new plain language document will be a success.

CLIC will survey the existing plain language samples and determine where there are gaps. New samples of documents and forms will be created to fill these gaps and to add to our knowledge of how the plain language process works. It is essential that CLIC develop sufficient expertise to help the public and private sectors accurately predict what staff resources, time and money will be required to initiate a plain language re-do of their documents and forms.

Another solution to the problem of isolation will be the communication tools CLIC will create to put people in touch with others interested in plain language. Newsletters and a database of information on current activities, publications and conferences will connect people with plain language interests and experience.

CLIC will be able to maintain a comprehensive view of the plain language experience in Canada and monitor the areas that need plain language attention. Calling on the expertise of the CLIC plain language advisory board and experts in the field, CLIC will be able to effectively target its research efforts and produce practical recommendations for future action.

#### **CONSULTATION SERVICES**

Ever since CLIC started researching plain language, the Council has been asked to undertake fee-for-service projects. We will respond to this growing need by investigating the possibility of providing a range of plain language consultation services. CLIC will consider establishing an agency that will be able to tackle small or large plain language redesign/rewrite projects, as well as creating plain language forms and documents from scratch.

CLIC will also be able to help governments and business assess their need for plain language documents and provide guidance on selecting communication consultants and how best to introduce plain language documents to their users/clients.

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