CASE COMMENTS AND NOTES

PLAIN ENGLISH IN LEGAL DRAFTING

If you in a tongue utter speech that is not intelligible, how will anyone know what is said.[1]

A new legal drafting style that is being fostered in New York City is known as the plain-English style. It is already being used for some documents in our business community and its use will spread. Those Canadian lawyers versed in the style may become consultants to legal counsel for business corporations in Canada. Few appear to be capable of emulating this style.

New York State now has a plain-English statute. This became effective November 1st, 1978. Every written agreement, after that date, for lease of residential space, or one to which the consumer is a party and the money, property or service under the agreement is primarily for personal, family or household purposes, must be written in "a clear and coherent manner using words with common and everyday meanings". Also the agreement is to be appropriately divided and captioned by its various sections. Any creditor, seller or lessor who fails to comply is liable to a consumer for actual damages sustained plus a penalty of $50.00. The total class action penalty is not to exceed $10,000.00 and the statute does not apply to agreements involving amounts over $50,000.00. No action may be brought after both parties have performed their obligation nor against any creditor, seller or lessor who attempts in good faith to comply with the statute.

In Canada, we are now familiar with The Royal Insurance Company of Canada's new plain English policy. This is the residential policy used for fire and extended perils. When the policy was first marketed an article in *The Globe and Mail* commented as follows:[2]

> A $125,000 newspaper and radio advertising campaign will launch Royal Insurance Co. of Canada's new "simple English" insurance policy this week.
>
> This policy is intended to take the mystery out of insurance legal language and if it turns out that the company has increased its liability through dispensing with some of the niceties of legal descriptions, "We'll accept that," Royal's president . . . said in Toronto.
>
> The company's new Select Homeshield policies for home insurance are expected to help Royal raise sales of homeowner coverage by 38 percent this year, to $79 million from $57.5 million in 1976.

Rudolf Flesch, an educationist, wrote among his various books *The Art of Plain Talk* in which he developed a Flesch readability scale. *The Globe & Mail* article comments on the Flesch rating of the new policy:

> On the Flesch readibility scale, the new policy scored 69 out of 100, about the same as Readers Digest compared with a former policy, which scored 15.
> Typical of the new policy is the wording of one section which says: "Your home is protected under this policy. So is the property surrounding your home, and any private driveways and roads leading to it."

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1. 1 Corinthians 14, Revised Standard Version of Bible.
2. *The Globe & Mail*, May 18, 1977.

> The same section of the old policy said: "This policy covers the building described in the Declarations including additions in contract therewith occupied principally for dwelling purposes."
>
> It cost the company $150,000.00 to draw up the new wording . . .

The Bank of Nova Scotia has already launched a language simplification program in Canada. The Bank had redrafted a collateral mortgage form in the plain English style for use in British Columbia. Apparently there have been no problems with the document to date. In the latter half of 1979, the author personally was engaged in assisting the Bank's legal counsel in redrafting its conventional mortgage form in the same style and this form will probably be in use in 1980. The B.C. collateral mortgage form was used as a basis and it is easy to read. Instead of wording proceeding from left to right across the entire page, there are two columns of reading material. The universal typeface is one that can be easily followed but the chief feature is the plain English wording. A sample from it reads as follows:

> In this mortgage *you* and *your* mean each person who has signed this mortgage as a mortgager. *We, our* and *us* mean the mortgagee.

In effect, this amounts to a definition section. The mortgage document is made more personal by use of this device. Also this reveals immediately that the document is one that is written in the plain English style. Instead of a definition section it may be possible to use: "Words Often Used In This Document."

In a mortgage, a lawyer will look for the covenant for quiet possession and another for granting further assurances. Part of section 2 of The Bank of Nova Scotia's B.C. collateral mortgage reads this way:

> You promise not to do anything that will interfere with our interest in the property and you agree to sign any other documents which we think are necessary to transfer to us your interest in the property.

Obviously there are certain "magic words" that have entrenched legal meanings, and these are not avoided. For example, the borrower "grants and mortgages" to the lender.

At first any lawyer will find it difficult to draft in the plain English style. There is an incredible amount of time that goes into the translation of legal documents into plain English and the draftsman has to be sure that all the substantive concepts are carried over into the new document. To explain the process, an American lawyer, Diana Browne, wrote as follows in the *American Banker*:[3]

> First, while the task of translating mortgage documents into simple, everyday language was a difficult one, it was not the impossibility that we had initially believed it would be.
>
> Second, as we worked on the forms, and they did go through a number of drafts, we found that they did in fact improve both in appearance and in substance. So I think we will end up with a better form, regardless of whether it is a revision that is mandated by statute.
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> Finally, I think that it was a fascinating, although difficult and time-consuming intellectual exercise for everyone involved. Articles on plain language always point out that consumers have for years signed all kinds of atrocious documents without reading them or thinking about the consequences. However, I think that members of the legal profession who deal with particular documents every day frequently don't think about

3. Diana Browne (Associate Counsel, Federal Home Loan Mortgage Corp.) "ABCs of Language Simplification", August 14, 1978, *American Banker*. Ms. Browne was involved in a project of redrafting mortgage documents.

them or really question their format or content either, and the task of rewriting the forms, in simple language often forces the drafters to rethink the content.

In the United States and Canada it seems that it is the large institutions, mainly banks and insurance companies, that are adopting the plain English style. Will this spread to documents drafted in legal firms? Many of the documents in a law practice are provided by legal stationery companies and eventually those companies will probably be affected by the trend although they tend to be very conservative. In the book *Simplified Consumer Credit Forms*[4] there is the following extract:

> It is paradoxical that as forms become more understandable to the consumer, the lawyer often feels that they are actually less clear to him. Terminology familiar to the average person is, in the context of a legal document, new and suspect to the experts schooled in a different vocabulary.

The 1979 supplement to that book[5] has recommendations entitled Techniques for Drafting in Plain English. Without reproducing the text perhaps I can make brief comments. First of all the authors advise a draftsman to test each provision for its business function. How useful is it as a business matter? "Simplified" writing is not nearly so much a matter of good writing as it is of hard substantive analysis.

Another suggestion is to test the usefulness of protection for your client against your clients needs. Perhaps there are many risks of a minor nature that a client is willing to assume to achieve simplicity or clarity and so you may be able to eliminate some useless provisions. On the other hand, even if a risk is one in a thousand, your client may not want to incur it. The type of transaction is important as are the material resources of your client. Also, it is often too easy for a lawyer to advise that something is significant or necessary when it is merely traditional.

It is quite likely that a client will dwell on some documents and take them seriously by their very nature. They won't accept them as casually as they do a warranty on a toaster. For example, a consumer is likely to have legal help when entering into a mortgage. A higher degree of complexity is probably permitted because of the assistance to the client. An extract from *The Supplement* emphasizes organization and design as elements to be taken seriously. It reads as follows:[6]

> Increasingly, the emphasis of lawyers, business men, and finally the courts is not only on the use of words, but upon their placement, format and appearance in the contract. Reasonable content, reasonably expressed, should also be made visually accessible to the consumer customer.

In the *Simplified Consumer Credit Forms*, we find the following commentary:[7]

> Studies show a high degree of correlation between readability and design. Design improvements include:
> —larger sized type and fewer type faces and sizes;
> —frequent subsections highlighted by boldface, often marginal, headings to assist the consumer in finding specific information;
> —two-column format, easier to read because of its shorter line length, which helps ensure that the consumer doesn't overlook questions;
> —coloured type on coloured paper . . . (to make a document visually appealing);
> —elimination of the boxes and rules associated with old-fashioned forms.

4. Carl Felsenfeld and Alan Siegel, *Simplified Consumer Credit Forms*, 1978, Warren, Gorham & Lamont, Inc. Boston, Massachussets, Preface-page iii.
5. *The Supplement* at xix.
6. *Id.* at xxiii.
7. At page x.

In the past I have referred to the plain English style as the journalistic style. I gave an example of Will drafting in the plain English style in a previous article in the *Quarterly*[8]. Perhaps the version I gave of the Will was somewhat stark as a plain English translation. I meant to emphasize the difference from other styles of drafting.

No matter what document is used as an example, the plain English style has certain characteristics that are identifiable. Personal pronouns such as I, we and you are used rather than "the undersigned". For example, instead of saying "for value received, the undersigned hereby promises to pay . . .", the new style reads "to repay my loan, I promise to pay you . . .". Short sentences and contractions are used, such as "If I'm in default . . .". Active verbs are used instead of passive; the document is clearly labelled for what it is and unnecessary jargon is removed. If an expression is used that may not be readily understandable, then a brief explanation is often given that begins "this means that . . .". Another device is simply to put in brackets a brief explanation. Sometimes the reverse is true where the simple term is used (the technical legal term is inserted beside it).

The Globe & Mail[9] commented on the plain-English style being adopted in annual reports. The paper referred to the 1978 annual report of St. Paul Companies Inc., an insurance group based in St. Paul, Minnesota. In 1977 a note on interest rate calculations appeared in the annual report and simply said "All interest rate calculations give effect to compensating balance agreements". *The Globe & Mail* reported that the same 1978 note read as follows:

> In order to be able to borrow large amounts of money from some institutions at favourable rates, we must agree to keep a certain amount of money on deposit with them and receive no interest on it. These amounts are known as compensating balances. The first portion of a loan we take out, up to the amount of the compensating balance, is the same as borrowing our own money. To compute realistic interest rates, we deduct the amount of the compensating balance from what we borrow. This process reflects the fact that we are in effect, paying a higher interest rate on money we actually borrow.

As you can see clarity does not always mean brevity. Peat, Marwick, Mitchell and Co., an internationally recognized firm of accountants, approved the St. Paul notes after five drafts were written.

The First National Citibank of New York (Citibank) has been active in promoting the plain-English style and has incorporated that style into its famous consumer loan agreement and into its other consumer credit documents. Its consumer mortgage form has the following for the granting clause: "I give you a mortgage on my property at (location) and all the buildings and improvements on it." In the same form, the repairs and alterations clause reads this way:

> I will keep the buildings on the property in good repair, and I will not make major changes in them, tear them down or move them without first getting your consent. If any of the fixtures are destroyed or removed, I will replace them with other fixtures of the same quality and condition which are free of any mortgages.

Also, the default clause is simplified:

> I will be in default if I do not make any payment within the time period required by this mortgage . . . . I will also be in default if I violate any other terms and conditions of the mortgage . . . . If my property is threatened with destruction or demolition, you may consider me to be in default. If I am in default for any reason, you have the right to

8. "Comparisons in Legal Drafting", 4 *Estates and Trusts Quarterly* (1977-78) at 203.

9. September 10, 1979 entitled "Plainer English gets into annual reports".

> demand payment of the entire amount I owe you, with interest up to the date you receive payment. I agree to repay you for reasonable legal expenses, if any, in collecting what I owe.

One section of the Citibank consumer loan note concerns co-makers of a promissory note. It reads:

> If I'm signing this note as a co-maker, I agree to be equally responsible with the borrower. You don't have to notify me that this note hasn't been paid. You can change the terms of payment and release any security without notifying or releasing me from responsibility on this note.

How many times in a legal practice do we ask our clients to simply sign a document? A client usually has to rely on the lawyer's explanation. Even if he is given an opportunity to read the document, he is probably no wiser unless of course he is reading one that has been drafted into one of the more understandable styles—the modern Canadian style or the plain-English style. A basic principle of contract law is that there must be a meeting of minds or mutual assent. How can mutuality exist in a document that cannot be understood by one or both of the contracting parties? It now appears that in mass-market legal transactions such as consumer loan and credit transactions, the consumer may expect more understandable contract forms even though they are pre-printed and not negotiated. This is because of the influence of the plain-English movement. I see no reason for a client not being able to have reasonable comprehension of what he is disposing of in a Will or what kind of terms he is agreeing to in a commercial contract. For many of these agreements, the lawyer has paid little attention to organization or design and mainly relies on substantive content drafted in an old common-law style. Often, the only person capable of understanding him is another lawyer or a judge.

Admittedly, the plain-English style is a significant, untested departure from traditional legal draftmanship. However, Citibank has had good success with its simplified forms and there has not been the flood of litigation that was predicted. I find this understandable. A draftsman simply has to capture all the substantive concepts of the old form after modernizing some and purging others. In drafting a document, whether for use as a precedent for a law firm or for a client's specific use, a lawyer should have to give some instruction to his secretary on reasonable punctuation and sculpting of paragraphs for readability. In the end, a lawyer will save his own time in having to review his own drafts, if he has made them reasonably presentable to himself.

The business environment is changing whether we lawyers like it or not. There will be more plain-English business documents coming into use. The consumers simply demand them. If we continue to use an out-dated common-law style for many legal documents, that style will seem more and more out of step as the new business documents come into being. The influence of that style spreading from New York State may well cause many of us to make our documents more readable.

This article is meant to expose the commentary on, and in many respects, approve of, the plain-English trend. However, it is not meant to recommend that any Province in Canada should enact plain-English legislation. A highly regarded American draftsman[10] made the following commentary that I rather agree with:

10. Reed Dickerson, Professor of Law, Indiana University (Bloomington) from remarks made at the Conference on Plain English in a Complex Society, October 13th, 1979 at Indianapolis.

> The idea of legislating the specifics of good writing is highly repugnant to me. . . . There is also the desirability of not tying the hands of draftsmen who need elbow room.

That draftsman went on to mention that there may be a modest case to be made out for some kind of law to help the legal profession overcome its present inertia. He admits that there are already different examples of plain-English legislation and cites existing plain-English laws in Massachusetts, Connecticut and Maine.

The "plain-English" label is not terribly accurate. The concept suggests that there is an ideal way to say things that will fit all legal audiences. We all know that legal audiences differ and that a draftsman must adjust his focus. However, no great harm is involved if the law focuses solely on professionals or institutions who deal with unsophisticated consumers where there is a low level of understandability.

We should also remember that readability is not the same thing as substantive clarity. What we should aim for is a general performance standard of decently readable substantive clarity as adopted by the New York statute and Maine's law on consumer loan agreements. This may be bolstered by suggested specifics to take into account such things as typeface, paragraphing and cross-referencing. "Simplicity" should do no material violence to the substantive values inherent in any subject matter.

One great defect of the plain-English legislation is that it is tied to language. Any approach tied to language misses two important aspects of the problem. Functional clarity depends not only on clarity of language, but also on clarity of concepts and clarity of organization. There is also a fourth, and it is clarity of context. Successful communication necessarily takes account of external context which is the part of any communication that is already in the minds of the legal audience. This includes a number of tacit assumptions.

When you come right down to it, good drafting will only come with a better law school education. Until we "crack that nut", plain-English laws that are in effect in at least four American states and pending in upwards of thirty, may, if somewhat improved, be a useful temporary expedient in the United States. The plain-English influence, from south of the border and particularly the New York influence, will probably result in more understandable consumer documents. Perhaps we can feast on the American experience. I do suggest that we learn all we can about the plain-English manner of drafting and adopt it where suitable. I am far from convinced, though, that we in Canada need any plain-English legislation to force us into any mould.

Robert C. Dick, Q.C.*

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* Partner in Wray, Russell, Toronto. Author of *Legal Drafting* published by the Carswell Company in 1972.