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clarity

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From the President

Dear Clarity members,

I'm delighted to be writing my first president's message. Vice president Stéphanie Roy and I have been meeting nearly every month to work on our goals. Stéphanie has been working on practical issues, like updating our website, while my goals are more strategic. It's a good balance, I think.

Before telling you about my goals, I want to take you back in time. In August 1984, Clarity founder John Walton published the first issue of the Clarity Newsletter, which continued for 36 years and eventually became the journal you are reading today. In that first newsletter, John Walton set out Clarity's objectives, and raised this challenge: "Exactly how [those objectives] are carried out will depend on you."

Today, I raise the same challenge: How we carry out our goals depends on you.

Our broad goal is that we are "an international organization promoting plain legal language." We publish a well-respected journal and hold stimulating conferences, but are we truly "promoting" plain legal language if journal readers and conference attendees are primarily people who already support plain legal language?

I don't profess to know the answer to this question, so during my presidency, I would like to help define our future through these four goals:

Define Clarity's strategic mission

Who are we? What do we do? Who do we want to be? I'll be asking you to help define Clarity's future and create a plan to get there.

Focus on membership

We need membership fees to carry out our goals, but a reasonable fee for one successful legal professional may be exorbitant for another. Over the next year, we will look at the costs and benefits of membership, with an eye toward sustaining a strong membership base.

Explore our organizational structure.

An international organization needs voices from around the world. But our country-representative structure could be much stronger. I would like us to keep what works and change what does not.

Incorporate other languages into all we do.

I hope you are as excited as I am to see French-language articles in Clarity 80. This is just the beginning of our efforts to promote plain legal language throughout the world. I would like to establish a structured plan for incorporating other languages into all we do.

In Clarity 54 (November 2005), 21 years after the first Clarity Newsletter, John Walton told the story of Clarity's beginnings. He wrote with pride about our progress, and he predicted that Clarity would "continue to take the ball in its arms and run." Now 14 years later, it is my turn to help Clarity "continue to take the ball in its arms and run." I cannot accomplish the goals I've identified alone. Will you help? Please email me with your ideas and how you can help lead us into Clarity's next chapter.

Coincidentally, Clarity 54 was my first issue as editor in chief. I am delighted to turn the journal over to our new editor in chief. Please join me in welcoming Thomas Myers and congratulating him on his first issue!

In this issue

Dear readers,

We are certain you will be pleased that this 80th edition of the Clarity Journal consists exclusively of articles covering topics presented last October at the Clarity 2018 Montreal Conference.

With Plain Language in Modern Times as the main theme of the three-day event, the speakers shared their knowledge and experiences on issues surrounding the use of plain legal language.

111 speakers | **70 workshops and conferences** | **550 participants** | **20 different countries**

Several speakers were delighted to continue the discussion by contributing to this edition of the Journal. Since Clarity 2018 was held in Montreal, many of the workshops and conferences were presented in both French and English. For this reason, we have translated three of the eight articles in this edition into French.

We begin with an article by **Saul Carliner** (Canada), **Éric Kavanagh** (Canada) and **Susan Kleimann** (United States), where the authors provide a great overview of the basics of design thinking. They explain how this expertise can help organizations improve the effectiveness of written communications by focusing on the readers' needs and characteristics.

In the second article, **Iva Cheung** (Canada) continues along the same lines and provides an excellent example of how co-designing with the target audience can help produce a communications tool that meets its needs more efficiently.

Tialda Sikkema (Netherlands) expands upon the needs of the target audience and explains how difficult it can be to consider all the relevant and necessary factors when testing the readability of a document. This can sometimes lead to unwanted results where the plain-language tools we have created do not benefit the intended individuals.

In the next article, **Timia Di Pietro** (Canada) points out that lawyers would be less hesitant to write in plain language if they considered their main target audience to be their clients instead of the courts. She also explains how government regulations put in place to protect consumers can be an obstacle to the use of plain language in financial institutions.

This is followed by an article in which **Ben Piper** (Australia) addresses the limits of plain language in legal drafting. He proposes a new perspective on how to evaluate whether a law is written in plain language.

Then, **Alexander Geddes** (Canada) illustrates how legislative and judicial interpretation can sometimes make plain-language legal reform difficult to enforce.

Christian Denoyelle (Belgium) continues with an initiative by Belgium's High Council of Justice to change the judicial culture and draw attention to the importance of using plain language for all legal professionals in Belgium.

To conclude, **Aino Piehl** (Finland) addresses problems concerning the use of plain language when translating legislation into different languages. This issue is a growing concern as more countries are expected to use plain language in the future.

On behalf of Éducaloi, we want to thank all the speakers, guests, staff and volunteers who made the Clarity 2018 Montreal Conference a success. We are also extremely grateful to the authors who contributed to this 80th edition of the Clarity Journal. Last but not least, we want to thank Clarity for giving Éducaloi the opportunity to organize the Conference and allowing us to contribute to this edition of the Journal as guest editors.

Bonne lecture!

Guillaume Rondeau
Chief Plain Language Specialist

Vincent Fournier-Héroux
Plain Language Specialist

New patron for Clarity:

Beverley McLachlin, Former Chief Justice of Canada

Clarity is delighted and honored to announce that The Rt Hon Beverley McLachlin, PC, CC, has accepted an invitation to become its third patron. Her career is nothing short of illustrious.

She served as the 17th Chief Justice of Canada from 2000 to 2017, the first woman to hold that position and the longest serving Chief Justice in Canadian history. Before being appointed to the Supreme Court in 1989, she had held positions on the County Court of Vancouver, the British Columbia Court of Appeal, and the Supreme Court of British Columbia (including a period as Chief Justice). She has received dozens of honorary degrees, as well as a number of other awards.

Of particular interest to Clarity members is that Justice McLachlin has been a forceful and persistent advocate for clear legal writing. Some years ago, in volume 39 of the Alberta Law Review, she said: "Lawyers, legal scholars, and judges work through words. Words are our tools. We should use them effectively. It does not serve the courts, the public, or the profession to persist with language that only lawyers can understand." She has since repeated that message many times and in many forums.

Beyond that is her extraordinary influence in shaping Canadian law. After she announced her retirement, the Globe and Mail published a retrospective that included this summary: "Her legacy, covering virtually every area of the law – from strong protections of due process for suspected terrorists and criminals, to a new legal footing for Indigenous peoples, to the resounding independence of Canada's highest court, to the vibrant growth of the 'living tree' of constitutional rights – is now part of the country's foundations."

And Justice McLachlin is not done writing: in May, she published a mystery thriller called Full Disclosure. The reviews have been glowing.

Our deep thanks to Justice McLachlin for agreeing to become a patron.

Contents

The contribution of design thinking to improve communications

Saul Carliner
Professor,
Concordia University (Canada)

Saul Carliner is a communication and educational technology professor at Concordia University, where his research and teaching focus on both the design of learning and communication materials and the management of groups that produce these materials. Among his over 200 publications are Training Design Basics, Informal Learning Basics, and The E-Learning Handbook (with Patti Shank). He is a Fellow of the Institute for Performance and Learning and of the Society for Technical Communication.

By Saul Carliner, Concordia University
Éric Kavanagh, Laval University
Susan Kleimann, Kleimann Communication Group

Design has been talked about much since the turn of the new millennium. Its concepts, methods, and processes are now found in all spheres of human activity.

But what about more precisely in the field of written communication? How can design thinking improve the overall condition of content produced: content used in everyday lives such as leaflets, websites, applications, forms, contracts, and information kiosks in public places?

We have pooled our expertise and our experiences as research professors and design practitioners to try to shed some light on this. This article answers four central questions about the role of design in written communication:

- What is design and design thinking?
- What are the benefits of using the services of a design expert?
- What are the key characteristics to consider when designing documents?
- What are the criteria for choosing a designer?

What is design and design thinking?

Let's start by saying what design is not. Contrary to some popular thought, design does not refer to an artistic form, a particular aesthetic, or a "creative talent" present only in a privileged minority of people.

Instead, design can be found everywhere that humans have made intentional modifications to their environment: in buildings, in processes, in bridges and, yes, in communication materials. Whether or not ordinary people realize it, they encounter design everywhere, and everyone practices it in one form or another. This is an admittedly broad definition of design, one that some designers object to because they feel it trivializes an important expertise.

But just because everyone practices and encounters design everywhere does not mean that all design is good design.

In a narrower sense, design is a way of thinking: a specialized process that requires mastery of core theoretical concepts by a designer who applies particular methods to define a problem and recommend a solution which, in the field of communication, results in a print or digital document, or a related service. Design also requires the ability to implement this process, leading to the correction, design or production of content or a service. Also note that design is an iterative process, in which designers propose solutions, others provide feedback, and the designers revise

the content or service to reflect that feedback. Design usually requires at least one professional designer, one who ideally has university-level education in the design of communication materials as well as years of on-the-job experience.

Of course, anyone who participates in the creation and improvement of communication products and services within their organization designs, whether or not they are recognized for it. But design thinking cannot be reduced to the simple application of a particular design method. More fundamentally, design is a way of thinking about, and addressing, problems. Because most people address problems in their work and lives, anyone can benefit from training on design processes.

Also note that professional design cannot be improvised or easily transferred. Experts require years of training. So organizations should always engage an experienced designer when developing communication materials and services to maximize the problem-solving techniques that good design thinking can bring to an organization.

What are the benefits of using the services of a design expert?

Numerous benefits exist, but we want to highlight four.

Effective project definition

Effective projects begin with clear definitions of their goals, purposes, and audience; defining projects is a core characteristic of design thinking and a core competency of professional designers. These project definitions help organizations clearly identify their communication goals, intended audiences, and expected results, and anticipate issues that could affect successful achievement of those goals. Professional designers anchor their definitions in the context of the communication challenge, not the business and technology fashions of the moment, so they identify and solve the communication challenge the organization faces. The clear definitions also provide a basis for ensuring the quality of the project.

Adapted solutions

Designers use these project definitions to devise effective communication strategies and materials, which reflect the context of the organization and the needs and expectations of the target audiences. These materials communicate their messages in clear, relevant, effective, and efficient ways and achieve their intended goals.

Transferable expertise

Designers can sensitize, train, and transfer their expertise to teams within the organization beyond the communications team. This strengthens design skills internally and can increase the sense of pride in their work.

Positive Impact on the Community

Using expert communication designers ultimately contributes to improving the democratic health of the community, especially the use of expert communication designers in legal communication. Legal organizations that engage in design thinking with the right experts design better communication products and provide better services to the public and that, in turn, creates stronger communities.

Éric Kavanagh
Professor and Director, Master's Program in Interaction Design, Laval University (Canada)

A linguist by training, Éric Kavanagh has been a professor at the Université Laval's school of design since 2002. Director of the Master's program in interaction design, he teaches design theory and specializes in service design and information design, which he has been practicing in Québec for 20 years.

He has supervised over 200 graduate students (at both the Master's and Doctorate level) studying various design specialities (graphic, interface, interaction, information, service, information architecture). His current research involves the designing of decision support tools to be used jointly by patients and health care specialists.

Susan Kleimann
President, Kleimann Communication Group (United States)

Susan Kleimann is the current Chair of the Center for Plain Language and President of Kleimann Communication Group, woman-owned, small business, since 1998. She earned her Ph.D. in rhetoric from the University of Maryland at College Park as well as a M.A. in satire—preparing her well for consulting.

What are the key characteristics to consider when designing documents?

In communication, design must be centered on readers: that is, focused on the needs of readers or users, and sensitive to their personal characteristics and the contexts in which they use the content. Reader- or user-centered communication focuses on readers' needs. This contrasts with organization-focused communication, which focuses on the message the organization wants to share, without consideration of the intended readers or the impact of the message on them. Organization-focused communication usually just addresses legal, administrative, and fiscal issues with little regard for reader comprehension of them, much less reader acceptance of these issues. Even more, design thinking can thus help organizations more clearly identify the exact communication issue as they shift the consideration to readers.

Called human-centered design, this recommended approach starts with gaining insights into the intended readers. One tool designers use to capture their understanding of readers is the persona. Personas are fictional characters who are representative of the target audience and provide insights into their characteristics (such as their level of literacy), their challenges when reading (such as a lack of legal vocabulary), and motivations. Organizations record personas in fact sheets. After completing a draft of the content, the organization can anticipate how the person described in the persona might respond to the content.

A second key characteristic of design focuses on cognitive issues: that is, the ability of readers to comprehend the message of the content or service as intended. For example, do readers have sufficient prior knowledge and experience to comprehend the message and, if they do, does the message confirm or refute that prior knowledge and experience? In the latter instance, the designer prepares content that helps rebuild readers' knowledge.

A third key characteristic of design focuses on emotional issues: that is, the state of mind of readers when using the content or service. In the context of legal material, designers might advise on the likelihood of communication materials exacerbating the asymmetrical relationship between the state and the citizen through the use of certain formalities and a directive tone.

Designers anticipate the motivation of readers to respond to the message and, if needed, enhance their designs to provide that motivation. Doing so could have budgetary implications, because, in some situations, building readers' low motivation to respond involves creating more visually elaborate designs.

Furthermore, good designers are humble by example. They show organizations how to think through critical aspects of their readers and to avoid making assumptions about them. In the same way, designers know the best way to validate the work they have done is by testing the content with actual users and readers. This testing admittedly has up-front budgetary implications, but helps to ensure that the designs work, and avoids costly problems resulting from poor communication.

All of these key characteristics reflect applications of cognitive psychology. These key characteristics further illustrate how design thinking goes beyond the surface of messages to addressing the challenges of how to convey messages in a way that readers can understand and act on them.

What are the criteria for choosing a designer?

Competence. First, look for a well-trained designer, preferably one with a bachelor's or master's degree in a relevant branch of information, graphic, or communication design. Although design training once focused primarily on

visual design, most design programs focus on the process of design and teach techniques and tactics that are rooted in scientific research. Central to current design programs is the concept of design thinking: a focus on addressing problems that begins by considering users' needs and concludes by assessing the extent to which the solutions met those needs. In legal communication, it focuses on the extent to which content helps readers address their legal challenges. Experience . . . or youth. Although experienced designers bring a vast array of challenges and solutions to their work, young, freshly graduated designers can compensate for their limited experience with training in more recent and advanced methods as well as their motivation to have an impact on their world.

The vision of design. Collaborate with designers who emphasize the process rather than ones who offer quick fixes. Those quick fixes probably solve the wrong problem.

Chemistry. Select a designer with whom your organization will feel comfortable collaborating, especially if you are considering major changes in your way of approaching communications. A designer with tact and empathy can help the team reach necessary conclusions.

Availability and openness. Look for a collaborator who wants to spend time in your organization, who sincerely want to know you and help your organization communicate as effectively as possible with your intended readers, and who wants to identify and solve problems, not impose pretty designs.

Just as importantly, you and your team, too, need to be available and open to the designer. Share time, information, and resources with the designer, and make room for them in your organization, so they can collaborate with all the people involved in the project.

Understand from the outset that design is a complex expertise. Design is not a magic or a one-time event. Rather, design is a process that follows a design thinking methodology that helps organizations clearly define the project they are undertaking and leads to solutions that focus on reaching the intended readers within any constraints affecting the project. Most of all, design represents an openness to relevant ideas and successful collaborations.

L’apport de la pensée design à l’amélioration des communications

By Saul Carliner, Université Concordia
Éric Kavanagh, Université Laval
Susan Kleimann, Kleimann Communication Group

Saul Carliner
Professeur,
Université Concordia (Canada)

Saul Carliner est professeurde communication et detechnologie de l’éducationà l’Université Concordia. Sa recherche et sonenseignement portent surla conception de matériel pédagogique et de communication, ainsi que surla gestion des groupes auteurs.Parmi ses 200 publications ou plus, citons Training Design Basics, Informal Learning Basics, et The e-LearningHandbook (avec Patti Shank). Saul Carliner est Fellow de l’Institute for Performance and Learning et de la Society for Technical Communication.

Le design retient beaucoup l’attention depuis le début du nouveau millénaire. Bon nombre d’activités humaines s’inspirent de ses concepts, de ses méthodes et de ses processus. Mais qu’en est-il plus précisément de son influence dans le domaine des communications écrites ? En quoi la pensée design (*design thinking*) peut-elle améliorer la qualité des contenus, que ce soient pour des dépliants, sites Web, demandes, formulaires, contrats, comptoirs d’information, etc. ?

Nous avons mis en commun notre expertise et notre expérience de professeurs-chercheurs et de praticiens du design pour tenter d’éclairer le débat. Le présent article répond à quatre grandes questions sur le rôle du design dans la communication écrite :

- Qu’est-ce que le design et la pensée design?
- Quels sont les avantages de recourir aux services d’un expert en design?
- Quels sont les éléments clés à prendre en considération lorsque l’on conçoit un document?
- Quels sont les critères à retenir pour choisir le bon designer?

Qu’entend-on par design et pensée design?

Commençons par dire ce que le design n’est pas. Contrairement à la pensée populaire, le design ne renvoie pas à une forme artistique, à une esthétique particulière ou encore à un "talent créatif" dont seraient dotés quelques privilégiés.

En fait, au sens large, le design est partout où l’activité humaine change les choses de façon délibérée. Tout le monde fait du design, consciemment ou non. Il faut cependant le dire, cette définition plutôt générale ne plaît pas à tous les designers dans la mesure où elle peut contribuer à banaliser une importante expertise.

Malgré ce caractère universel, tout design n’est pas forcément un bon design.

Dans un sens plus étroit, on dira que le design est surtout une façon de penser et un processus spécialisé qui supposent la maîtrise de plusieurs concepts théoriques, le recours à des méthodes très variées et certaines compétences interactionnelles. Le design nécessite aussi la capacité de mettre en œuvre ce processus, menant à la correction, la conception ou la production d’un contenu ou d’un service. Notons par ailleurs que le design est un processus itératif dans lequel les designers et qui suppose la participation de plusieurs autres intervenants. Ce processus requiert habituellement la participation d’au moins un designer de formation de préférence universitaire, doté de plusieurs années d’expérience.

Bien sûr, toute personne qui participe à la conception et à l'amélioration des produits de communication au sein de son organisation fait du design, qu'elle soit reconnue ou non à ce titre. Mais la pensée design ne peut se résumer à la simple application d'une méthode. C'est d'abord une façon particulière de penser et d'aborder les problèmes. Toute personne peut donc certainement bénéficier d'une formation d'appoint en la matière.

Il convient de dire que le design professionnel ne s'improvise pas et ne se transfère pas aisément. Des années sont nécessaires pour former un expert. Que ce soit pour de la formation ou de l'intervention en design, les organisations devraient toujours se faire accompagner par des designers diplômés et expérimentés.

Éric Kavanagh
Professeur titulaire et directeur de la maîtrise en design d'interaction, Université Laval (Canada)

Linguiste de formation, il enseigne à l'École de design depuis 2002 en théorie du design et dirige la maîtrise en design d'interaction. Il se spécialise en design de service et en design d'information (qu'il pratique depuis 20 ans au Québec). Aux cycles supérieurs, il a dirigé les travaux de plus de 200 étudiants à la maîtrise et au doctorat dans divers domaines du design (graphique, d'interface, d'interaction, d'information, de service, architecture d'information). Ses recherches actuelles portent principalement sur le design d'outils d'aide à la décision partagée dans le domaine de la santé.

Pourquoi est-il avantageux de recourir aux experts en design?

Parmi les nombreux avantages que cela représente, nous en retenons quatre particulièrement importants.

Diagnostic fiable

Le designer est un expert de la définition de problème. Il peut aider l'organisation à mieux identifier les écueils dans la communication et ainsi participer à l'établissement d'un véritable diagnostic. Son diagnostic n'est pas soumis aux goûts technologiques du moment ou aux habitudes de la maison. Sa présence est donc un gage supplémentaire de qualité.

Solutions adaptées

Le designer est un expert de la conception. Il peut accompagner une organisation dans le processus d'idéation, l'aider à mieux connaître ses publics et, surtout, à bien traduire cette connaissance en stratégies de design. Il peut ensuite aider à matérialiser les différentes solutions de communication adaptées au contexte de l'organisation et aux besoins et attentes de ses publics cibles. Le designer contribue ainsi à augmenter l'efficacité communicationnelle des documents produits.

Expertise transférable

Le designer peut sensibiliser, former et transférer de l'expertise à plusieurs équipes au sein de l'organisation. Une organisation qui accepte de se faire guider par un designer d'expérience contribue potentiellement à augmenter le niveau de compétence de ses équipes à l'interne, et de façon plus globale, à augmenter le sentiment de fierté au travail.

Impacts positifs pour la communauté

Le recours aux services d'un designer expert contribue ultimement à améliorer la santé démocratique de la communauté. C'est particulièrement vrai en matière de communication juridique. L'organisation qui s'engage dans le *design thinking* avec les bons experts en vient à concevoir de meilleurs produits de communication et de meilleurs services à la population. Les impacts positifs sur les divers aspects de la vie citoyenne peuvent être considérables.

Quels sont les points essentiels pour la conception d'un document?

La conception doit d'abord être centrée sur l'humain, c'est-à-dire sur les caractéristiques de la ou des personnes qui sont ou seront les destinataires du document en question. Ce principe est fondamental et contraste avec une

Susan Kleimann
Présidente de Kleimann Communication Group (États-Unis)

Susan Kleimann est la présidente actuelle du Center for Plain Language et présidente du Kleimann Communication Group, une petite entreprise détenue par une femme, depuis 1998. Elle est titulaire d'un doctorat en rhétorique de l'University of Maryland à College Park et d'une maîtrise en satire —ce qui l'a bien préparée pour être consultante.

communication centrée sur les besoins de l'organisation ou encore centrée sur les seules dimensions juridiques, administratives, fiscales, etc.

Dans une conception centrée sur l'humain, on cherche à bien connaître et à mieux comprendre les destinataires. C'est pourquoi les designers sont si friands de la technique du *persona*, laquelle consiste à élaborer, sous forme de fiche , un personnage fictif ou un archétype qui représente le public cible.

Tout au long du projet, ce *persona* permet à l'équipe de design de se rappeler des caractéristiques importantes des destinataires (ex. : niveau de littératie, intérêts, difficultés particulières, etc.). Et, au-delà de cette représentation fort utile, il faut en venir à comprendre le destinataire dans ses dimensions cognitive, émotionnelle et motivationnelle. Il s'agit d'un cadre pour évaluer le document à concevoir ou à corriger.

Sur le plan cognitif, on cherche, par exemple, à mieux comprendre l'adéquation entre les notions à transmettre et les connaissances du destinataire. Les stratégies de design et de communication varieront grandement selon que le destinataire n'a pas de connaissances préalables du sujet ou qu'il détient des connaissances insuffisantes, voire contraires à l'information à transmettre. Tout designer expérimenté confirmera qu'il est beaucoup plus facile de transférer du nouveau contenu que de "reconstruire" les connaissances d'un destinataire.

Sur le plan émotionnel, on cherche à connaître l'état d'esprit du destinataire lorsqu'il utilise ou lit un document. Par exemple, on évite d'exacerber le rapport asymétrique entre l'État et le citoyen en évitant certaines formalités ou l'emploi d'un ton trop directif.

Sur le plan motivationnel, le designer doit complètement adapter sa stratégie de communication selon le degré de motivation du destinataire. Cette prise en compte de la motivation peut même avoir des impacts importants sur le budget. En effet, on doit généralement déployer plus de moyens et d'efforts pour bien communiquer avec un destinataire très peu motivé. À bien des égards, le design peut souvent être considéré comme une forme de psychologie appliquée.

Quels sont les critères à retenir pour choisir le bon designer?

La compétence. Cherchez d'abord un ou une designer bien formée, de préférence à l'université (baccalauréat ou maîtrise). Alors que la formation en design était plus de nature artistique il y a quelques décennies, les programmes universitaires de design offerts aujourd'hui proposent des approches complètement transformées et beaucoup de contenus validés par la recherche scientifique. Nous recommandons ce genre de profil si vous cherchez une réelle transformation de vos processus ou une véritable expérimentation du *design thinking*.

L'expérience… ou la jeunesse. Si les designers de plusieurs années d'expérience méritent certainement une attention particulière, les jeunes designers fraîchement diplômés peuvent compenser par leur formation parfois plus pointue et par un grand désir d'améliorer l'état du monde. Les jeunes designers sont souvent porteurs de grands idéaux qui leur confèrent une motivation tout à fait précieuse.

La vision du design. Favoriser la collaboration avec un designer qui vous propose un processus plutôt qu'une gamme de solutions rapides.

La bonne entente. Sélectionnez une personne avec laquelle votre équipe et vous aurez envie de collaborer, surtout si vous envisagez des changements importants dans vos façons de faire. Un designer qui a du tact peut constituer un sérieux atout.

La disponibilité et l'ouverture. Recherchez un collaborateur qui a envie de passer du temps dans votre organisation, qui a sincèrement envie de vous connaître. Un bon designer aime être sur le " terrain ".

Et l'inverse nous semble tout aussi important : vous aussi, soyez disponible et ouvert. Faites que votre organisation accueille bien le design. Donnez du temps au designer, informez-le et attribuez-lui des ressources. Faites-lui une place dans votre organisation, pour qu'il puisse collaborer avec tous les gens concernés par le projet.

Comprenez d'entrée de jeu que le design est une expertise complexe : le designer ne vient pas faire de la magie ni de l'instantané. Il applique une méthode, parfois déroutante, qui vous permet d'améliorer vos produits de communication, mais aussi vos processus. Montrez-vous ouvert au changement. Et communiquez clairement vos réserves sans toutefois les laisser affaiblir le processus, surtout en début d'intervention.

Rights under British Columbia's *Mental Health Act*:

Co-designing mental health rights information with patients

Iva Cheung
PhD candidate, Faculty of Health Sciences, Simon Fraser University (Canada)

Iva Cheung is a PhD candidate in the Faculty of Health Sciences at Simon Fraser University. She holds a Master of Publishing degree and is a Certified Professional Editor with Editors Canada. She has worked in publishing and communication design for almost two decades and is a vocal plain-language advocate. She is compiling an oral history of the plain-language movement in Canada between 1980 and 1995.

By Iva Cheung

Each Canadian province and territory has mental health legislation that allows either physicians or the court to detain a person because of a mental disorder.[1] In British Columbia (BC), a physician who believes that a person meets the criteria for involuntary hospitalization can sign a medical certificate to hospitalize them against their will.[2]

Involuntary patients under BC's *Mental Health Act* lose their right to freedom of movement and the right to make decisions about their psychiatric treatment. For example, they can be given psychiatric medications or electroconvulsive therapy without their consent.

However, involuntary patients don't lose all of their rights. For example, they have the right:

- to know the name and location of the hospital where they're being detained,
- to know how long they can be held,
- to challenge their detention through a review panel hearing,
- to apply to the court for a discharge, and
- to challenge their treatment plan by asking for a second medical opinion.[3]

According to BC's *Mental Health Act*, involuntary patients must be notified, orally and in writing, of all of these rights upon admission. Yet, in a 2011 survey commissioned by the Ministry of Health, when involuntary patients were asked "Were your rights under the *Mental Health Act* explained in a way you could understand?", 43% said no.[4]

One reason involuntary patients report not understanding their rights might be that the document used to notify them is not an effective communication tool.

Form 13 of the Mental Health Act

In BC, a statutory document, Form 13, is used to notify involuntary patients of their rights under the *Mental Health Act*.[5,6]

1 Gray, J. E., & O'Reilly, R. L. (2001). Clinically significant differences among Canadian mental health acts. The Canadian Journal of Psychiatry, 46(4), 315–321.

2 Mental Health Act [RSBC 1996] c. 288. http://www.bclaws.ca/civix/document/id/complete/statreg/96288_01

3 Mental Health Act [RSBC 1996] c. 288, s. 34(2). http://www.bclaws.ca/civix/document/id/complete/statreg/96288_01#section34

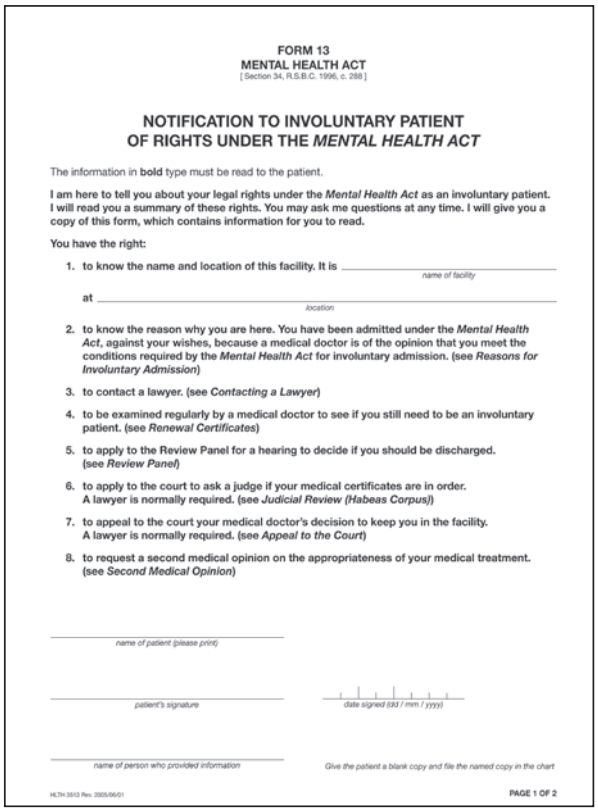
Think-aloud user testing of Form 13

Form 13's effectiveness as a communication tool had never previously been user tested.

I interviewed 18 people who had experienced involuntary hospitalization in BC, using think-aloud testing[7] to elicit opinions about Form 13's language, format, and design. I also showed these participants samples of other types of rights documents used in different jurisdictions for comparison. I audiorecorded these interviews, transcribed them, and analyzed them thematically.[8]

The analysis uncovered these themes:

- Form 13 on its own was not enough: Participants wanted information in more than one format, repeated at different times. Patients may not be in a state of mind to understand, particularly written material, when first hospitalized.
- Participants wanted information about how to exercise their rights: For example, the form tells them that they have the right to contact a lawyer, and most participants immediately asked, "How do I contact a lawyer?"
- The language on the form was overly legal: Participants found legalese, like the term habeas corpus, confusing and intimidating.



FORM 13
MENTAL HEALTH ACT
[Section 34, R.S.B.C. 1996, c. 288]

NOTIFICATION TO INVOLUNTARY PATIENT OF RIGHTS UNDER THE *MENTAL HEALTH ACT*

The information in **bold** type must be read to the patient.

I am here to tell you about your legal rights under the *Mental Health Act* as an involuntary patient. I will read you a summary of these rights. You may ask me questions at any time. I will give you a copy of this form, which contains information for you to read.

You have the right:

1. **to know the name and location of this facility. It is** _____ *name of facility*
   at _____ *location*
2. **to know the reason why you are here. You have been admitted under the *Mental Health Act*, against your wishes, because a medical doctor is of the opinion that you meet the conditions required by the *Mental Health Act* for involuntary admission. (see *Reasons for Involuntary Admission*)**
3. **to contact a lawyer. (see *Contacting a Lawyer*)**
4. **to be examined regularly by a medical doctor to see if you still need to be an involuntary patient. (see *Renewal Certificates*)**
5. **to apply to the Review Panel for a hearing to decide if you should be discharged. (see *Review Panel*)**
6. **to apply to the court to ask a judge if your medical certificates are in order. A lawyer is normally required. (see *Judicial Review (Habeas Corpus)*)**
7. **to appeal to the court your medical doctor's decision to keep you in the facility. A lawyer is normally required. (see *Appeal to the Court*)**
8. **to request a second medical opinion on the appropriateness of your medical treatment. (see *Second Medical Opinion*)**

_____ *name of patient (please print)*

_____ *patient's signature*

_____ *date signed (dd / mm / yyyy)*

_____ *name of person who provided information*

Give the patient a blank copy and file the named copy in the chart

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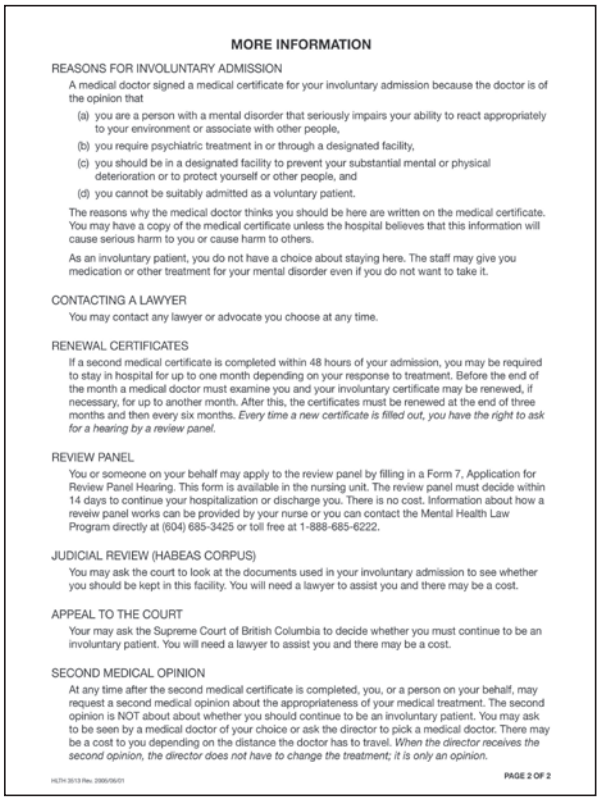

MORE INFORMATION

REASONS FOR INVOLUNTARY ADMISSION

A medical doctor signed a medical certificate for your involuntary admission because the doctor is of the opinion that

(a) you are a person with a mental disorder that seriously impairs your ability to react appropriately to your environment or associate with other people,
(b) you require psychiatric treatment in or through a designated facility,
(c) you should be in a designated facility to prevent your substantial mental or physical deterioration or to protect yourself or other people, and
(d) you cannot be suitably admitted as a voluntary patient.

The reasons why the medical doctor thinks you should be here are written on the medical certificate. You may have a copy of the medical certificate unless the hospital believes that this information will cause serious harm to you or cause harm to others.

As an involuntary patient, you do not have a choice about staying here. The staff may give you medication or other treatment for your mental disorder even if you do not want to take it.

CONTACTING A LAWYER

You may contact any lawyer or advocate you choose at any time.

RENEWAL CERTIFICATES

If a second medical certificate is completed within 48 hours of your admission, you may be required to stay in hospital for up to one month depending on your response to treatment. Before the end of the month a medical doctor must examine you and your involuntary certificate may be renewed, if necessary, for up to another month. After this, the certificates must be renewed at the end of three months and then every six months. *Every time a new certificate is filled out, you have the right to ask for a hearing by a review panel.*

REVIEW PANEL

You or someone on your behalf may apply to the review panel by filling in a Form 7, Application for Review Panel Hearing. This form is available in the nursing unit. The review panel must decide within 14 days to continue your hospitalization or discharge you. There is no cost. Information about how a reveiw panel works can be provided by your nurse or you can contact the Mental Health Law Program directly at (604) 685-3425 or toll free at 1-888-685-6222.

JUDICIAL REVIEW (HABEAS CORPUS)

You may ask the court to look at the documents used in your involuntary admission to see whether you should be kept in this facility. You will need a lawyer to assist you and there may be a cost.

APPEAL TO THE COURT

Your may ask the Supreme Court of British Columbia to decide whether you must continue to be an involuntary patient. You will need a lawyer to assist you and there may be a cost.

SECOND MEDICAL OPINION

At any time after the second medical certificate is completed, you, or a person on your behalf, may request a second medical opinion about the appropriateness of your medical treatment. The second opinion is NOT about about whether you should continue to be an involuntary patient. You may ask to be seen by a medical doctor of your choice or ask the director to pick a medical doctor. There may be a cost to you depending on the distance the doctor has to travel. *When the director receives the second opinion, the director does not have to change the treatment; it is only an opinion.*

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- The language on the form was disempowering: Participants said phrases like "You are a person with a mental disorder" left them feeling dismissed and helpless.
- The language on the form was unclear: Participants found the description of the certification renewal periods, and the distinction between "review panel" and "judicial review," confusing.

4 R.A. Malatest & Associates (2011) Patient Experiences with Short-Stay Mental Health and Substance Use Services in British Columbia. http://www.health.gov.bc.ca/library/publications/year/2011/BCMHSU-DescriptiveReport-2011.pdf

5 Mental Health Regulation, B.C. Reg. 233/99, O.C. 869/99, s. 11(13).

6 Form 13, Mental Health Act: Notification to Involuntary Patient of Rights under the Mental Health Act. https://www2.gov.bc.ca/assets/gov/health/forms/3513fil.pdf

7 Schriver, K. (1991). Plain language through protocol-aided revision. In PlainLanguage: Principles and Practice, ed. E.R. Steinberg. Detroit: Wayne State University Press.

8 Braun, V., Clarke, V., & Terry, G. (2014). Thematic analysis. Qualitative Research in Clinical and Health Psychology, 24, 95–114.

- The form format was intimidating: Certain design features, like the bolding and the signature line, provoked anxiety among some participants. The patient's signature is meant only to show that they've been given their rights information, but some participants believed that by signing the form, they were giving up their rights or entering into an agreement. Participants wanted a friendlier format, with many asking for color.

Co-design with patients

Armed with this feedback, I began working with a patient-oriented research team[9] that included two former patients who had experienced involuntary hospitalization and a psychiatric nurse, with the goal of producing a new suite of patient-centered *Mental Health Act* rights communication tools. The team received supervisory support from researchers with expertise in severe mental illness, knowledge translation, and patient-oriented research. A mental health lawyer attended some of our meetings and agreed to review our tools for legal accuracy.

The suite of full-color communication tools includes:

- a pamphlet—the most comprehensive and detailed of the documents
- an animated video—to offer the information in an audiovisual format
- posters—to be posted in the hospital for patients to read
- a wallet card—for patients to receive at discharge to remind them of their rights if they're involuntarily hospitalized again

Because the Mental Health Regulation still requires patients to receive Form 13,[10] the suite of tools was designed to supplement, rather than replace, that form.

Co-design meant handing control over to patients: our team's patient partners weren't merely consultants or testers. Based on the feedback from Form 13 user testing and on their own experiences, they developed the first draft of the communication tools, with my support as a plain-language professional. They gave input at every stage, including when the images in the video were composed, and at each round of revisions.

Driving those revisions was additional feedback from user testing with 16 people who had experienced involuntarily hospitalization. I conducted think-aloud user testing of our suite of rights materials over three cycles. Participants gave their opinions on our communication tools in interviews that I audiorecorded, transcribed, and analyzed thematically.

The analysis uncovered these themes:

- Participants vastly preferred the new communication tools to Form 13.
- Participants were able to name most of their rights. Their recall was evaluated using teach-back.[11]
- The new suite of tools addressed only one aspect of their understanding of their rights: clinicians would still have to commit to using these tools and to create an environment where patients can feel safe discussing their rights with staff. Participants also expressed concern that the tools might replace conversation with their health care providers. Our team aimed to convey these concerns to clinicians in a subsequent research project to implement these tools in hospitals within the province.

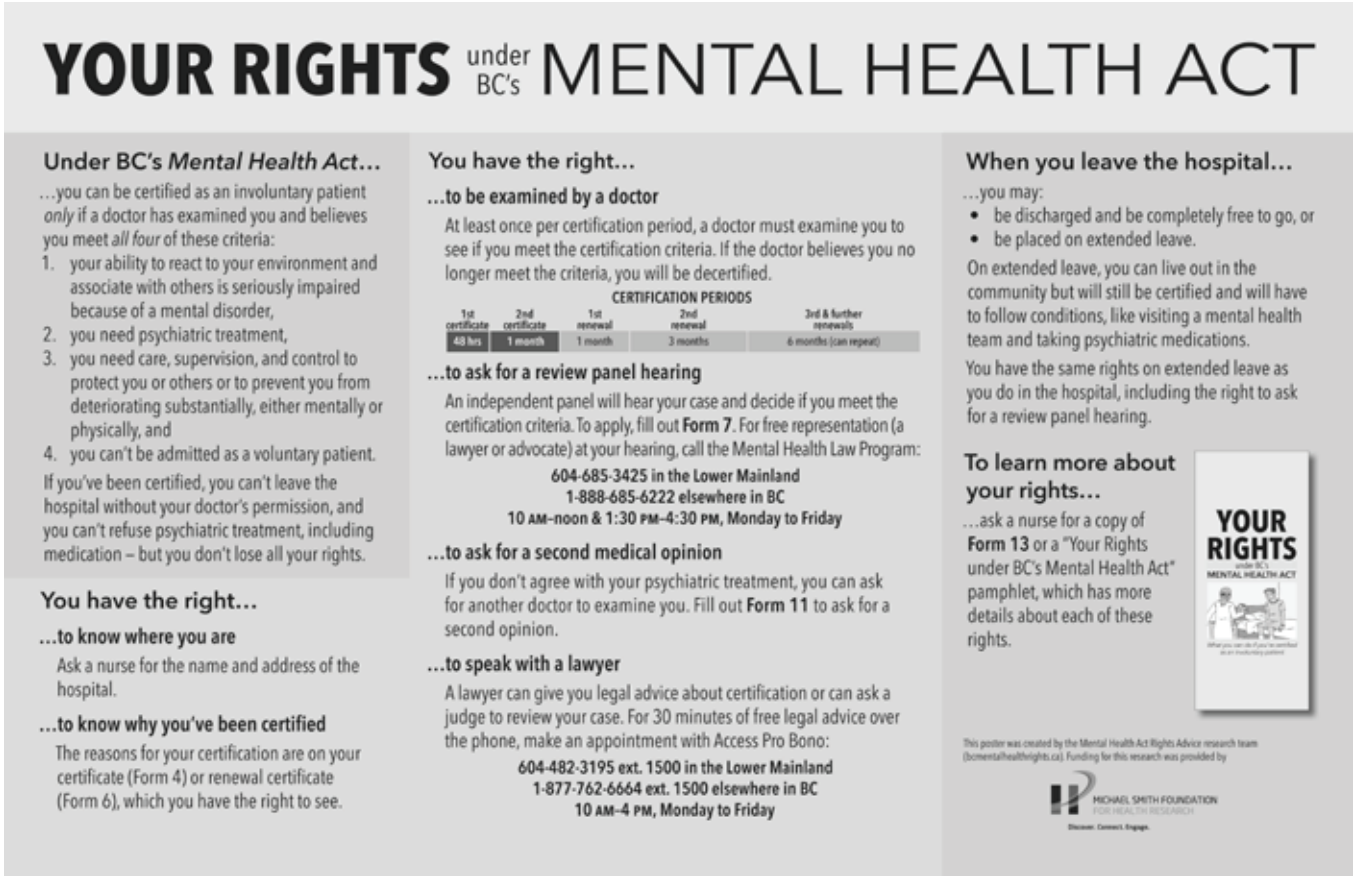
9 Canadian Institutes of Health Research (2014) Strategy for Patient-Oriented Research—Patient Engagement Framework. http://www.cihr-irsc.gc.ca/e/48413.html

10 Mental Health Regulation, B.C. Reg. 233/99, O.C. 869/99, s. 11(13).

11 Kemp, E. C., Floyd, M. R., McCord-Duncan, E., & Lang, F. (2008) Patients prefer the method of "Tell back-collaborative inquiry" to assess understanding of medical information, Journal of the American Board of Family Medicine, 21(1), 24–30.

Patient involvement improved the design

Patient involvement in creating the suite of tools was essential to its success. For example, one of our posters has far more text than I (as a document designer) would typically put on a poster.



YOUR RIGHTS under BC's MENTAL HEALTH ACT

Under BC's *Mental Health Act*...

...you can be certified as an involuntary patient *only* if a doctor has examined you and believes you meet *all four* of these criteria:

1. your ability to react to your environment and associate with others is seriously impaired because of a mental disorder,
2. you need psychiatric treatment,
3. you need care, supervision, and control to protect you or others or to prevent you from deteriorating substantially, either mentally or physically, and
4. you can't be admitted as a voluntary patient.

If you've been certified, you can't leave the hospital without your doctor's permission, and you can't refuse psychiatric treatment, including medication – but you don't lose all your rights.

You have the right...

...to know where you are

Ask a nurse for the name and address of the hospital.

...to know why you've been certified

The reasons for your certification are on your certificate (Form 4) or renewal certificate (Form 6), which you have the right to see.

You have the right...

...to be examined by a doctor

At least once per certification period, a doctor must examine you to see if you meet the certification criteria. If the doctor believes you no longer meet the criteria, you will be decertified.

CERTIFICATION PERIODS

1st certificate	2nd certificate	1st renewal	2nd renewal	3rd & further renewals
48 hrs	1 month	1 month	3 months	6 months (can repeat)

...to ask for a review panel hearing

An independent panel will hear your case and decide if you meet the certification criteria. To apply, fill out **Form 7**. For free representation (a lawyer or advocate) at your hearing, call the Mental Health Law Program:

604-685-3425 in the Lower Mainland
1-888-685-6222 elsewhere in BC
10 AM–noon & 1:30 PM–4:30 PM, Monday to Friday

...to ask for a second medical opinion

If you don't agree with your psychiatric treatment, you can ask for another doctor to examine you. Fill out **Form 11** to ask for a second opinion.

...to speak with a lawyer

A lawyer can give you legal advice about certification or can ask a judge to review your case. For 30 minutes of free legal advice over the phone, make an appointment with Access Pro Bono:

604-482-3195 ext. 1500 in the Lower Mainland
1-877-762-6664 ext. 1500 elsewhere in BC
10 AM–4 PM, Monday to Friday

When you leave the hospital...

...you may:

- be discharged and be completely free to go, or
- be placed on extended leave.

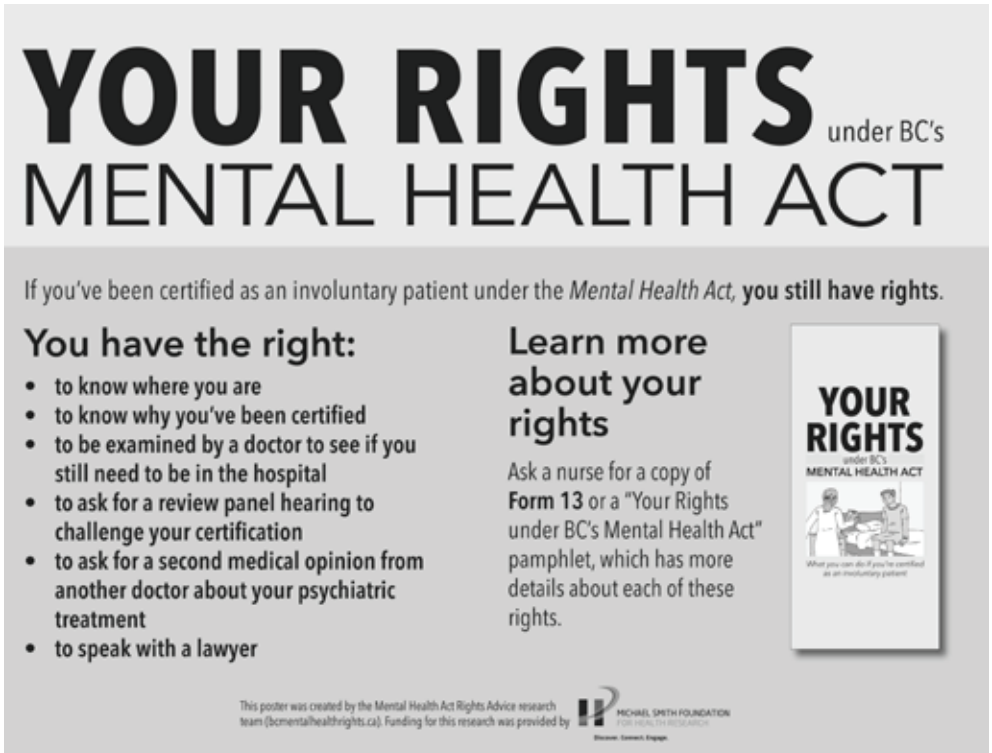
On extended leave, you can live out in the community but will still be certified and will have to follow conditions, like visiting a mental health team and taking psychiatric medications.

You have the same rights on extended leave as you do in the hospital, including the right to ask for a review panel hearing.

To learn more about your rights...

...ask a nurse for a copy of **Form 13** or a "Your Rights under BC's Mental Health Act" pamphlet, which has more details about each of these rights.

This poster was created by the Mental Health Act Rights Advice research team (bcmentalhealthrights.ca). Funding for this research was provided by MICHAEL SMITH FOUNDATION FOR HEALTH RESEARCH
Discover. Connect. Engage.



YOUR RIGHTS under BC's MENTAL HEALTH ACT

If you've been certified as an involuntary patient under the *Mental Health Act*, **you still have rights.**

You have the right:

- **to know where you are**
- **to know why you've been certified**
- **to be examined by a doctor to see if you still need to be in the hospital**
- **to ask for a review panel hearing to challenge your certification**
- **to ask for a second medical opinion from another doctor about your psychiatric treatment**
- **to speak with a lawyer**

Learn more about your rights

Ask a nurse for a copy of **Form 13** or a "Your Rights under BC's Mental Health Act" pamphlet, which has more details about each of these rights.

This poster was created by the Mental Health Act Rights Advice research team (bcmentalhealthrights.ca). Funding for this research was provided by MICHAEL SMITH FOUNDATION FOR HEALTH RESEARCH
Discover. Connect. Engage.

The design decision came from one of the team's patient partners, who recalled that when he was hospitalized, he had no books or other reading material to keep himself busy. When he became bored, he read everything on the walls. Several of the user-testing participants agreed with the text-heavy approach, underscoring the importance of our patient partner's context-specific insight.

That said, a minority of participants did tell us that the poster had too much information. In response, our team created a second poster that had only basic rights information and referred readers to the pamphlet for more details.

After the final revisions to the tools, we posted them to our website, bcmentalhealthrights.ca,[12] and developed a program to train clinicians on their use.

What did we learn from this project?

Power sharing by co-designing with patients results in a more patient-centered product. Participants identified specific expressions that they found problematic but that people who'd never been involuntarily hospitalized may not have minded.

Also, even with patient engagement on our team, user testing was still necessary to uncover issues with design and language that our team had not considered. Having several perspectives made our documents stronger.

Finally, the clarity of the documents is important, but more important is how they make readers feel, especially if the readers are people who've had disempowering interactions with the mental health system. Complex language is problematic not just because it's confusing but also because it exacerbates power differences[13] between patients and the health care providers responsible for detaining them.

Empowering patients is key

Ensuring that patients understand their rights is crucial from an access-to-justice perspective. As former Chief Justice Beverley McLachlin said:[14] "There is truth in the proposition that if we cannot understand our rights, we have no rights."

It's also critical from the perspective of *therapeutic jurisprudence*, a field of study based on the notion that agents and structures of the law can have either therapeutic or anti-therapeutic effects.[15]

Research about patient empowerment has shown that patients' experiences with the mental health system are more likely to be positive if they feel less coercion. And giving involuntary patients a sense of procedural justice by telling them their rights and helping them exercise their rights can reduce feelings of coercion and learned helplessness and engage them in their own recovery.[16]

Many of our participants said that they weren't necessarily going to exercise their rights, but they were comforted to know that they had rights and that there were limits to what the law allowed the hospital to do.

Acknowledgments

This research was funded by the Michael Smith Foundation for Health Research and the Canadian Institutes of Health Research. I'd like to thank the members of my PhD supervisory committee—Drs. Diego Silva, Kimberly Miller, Erin Michalak, and Charlie Goldsmith—for their advice and support. Thanks also to Laura Johnston for the legal review of our tools. Finally, I'd like to acknowledge members of my patient-oriented research team, including J. Wang, Andrew Woods, and Vanessa Bland, as well as my research participants, whose identities I've promised to keep confidential.

12 Mental Health Act Rights Advice research team (2018) BC Mental Health Rights: Understand your rights under BC's Mental Health Act. https://www.bcmentalhealthrights.ca/

13 Cheung, I. W. (2017). Plain Language to Minimize Cognitive Load: A Social Justice Perspective. IEEE Transactions on Professional Communication, 60(4), 448–457.

14 Right Honourable Beverley McLachlin, P.C. "Preserving Public Confidence in the Courts and the Legal Profession" (Distinguished Visitor's Lecture, University of Manitoba, Winnipeg, Manitoba, February 2, 2002).

15 Wexler, D. B. & Winick, B. J. (1991) Therapeutic jurisprudence as a new approach to mental health law policy analysis and research, University of Miami Law Review, 45(5), 979–1004.

16 Linhorst, D. M. (2006) Empowering People with Severe Mental Illness: A Practical Guide. New York: Oxford University Press, p. 58.

Does plain language only benefit the higher literate?

Avoiding the Matthew-effect in plain language revisions

By Tialda Sikkema

Tialda Sikkema
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Tialda Sikkema works in the law department of the University of Applied Sciences in Utrecht, The Netherlands. Since 2009, part of her work is to train judicial officers in document quality and legal writing. For ten years she was a member of an appeal commission in labour cases. In 2018, she will finish her PhD on the functionality of both legal and out of court documents in debt collection. As a member of Clarity International, she is a regular speaker on conferences about legal document quality. Tialda Sikkema studied Dutch Language and Literature at the University of Amsterdam.

Every reader of this journal will be convinced that plain language revisions improve reading success. But in this article, I will argue that this improved success might not help the people you wanted to help in the first place; people who do not read as easily as us, academics. And we might even increase the gap between lower and higher literate people.

This increased gap is referred to as a Matthew-effect Merton (1968). Plain language interventions might cause a Matthew-effect while the plain language practitioners actually aimed for the opposite. This idea is based on my research on improved readability of the Dutch court summons in small claims. I will clarify the Matthew-effect in PL-revisions giving you a broader context of reading research, explaining some of the results of my research, and I will explore some ways to avoid the Matthew-effect.

Matthew's parable of the talents

In the parable of the talents, a master entrusts his capital to his three servants. One gets 5 talents, the second gets two and the third one gets one talent. On his return the master asks the servants what they have done with the money. The first two doubled their money by investing, and they are being praised and rewarded. But the third, who was afraid to lose his one talent and fearing punishment, buried the silver. He digs up the money and returns it to his master. The master is furious with his bad and lazy servant and he gives his share to the other two. It is this story Matthew has in mind when he says that *For to everyone who has will more be given, and he will have abundance; but from him who has not, even what he has will be taken away* (Matthew *25:29*).

What does increased reading success mean?

You are a technical writer, communicative lawyer or researcher and you have worked hard on your text by revising it according to plain language instructions. You want to know if it actually works. You can simply test how many readers comprehend document 1 and how many comprehend the revised document 2 and guess what? The document 2 shows better results. Yes, reading success increased, but do we know what happened and why?

In this example, we actually don't know if readers who performed poorly on document 1 actually show improved comprehension in document 2. It is likely that the average comprehension is increased by the readers with high reading proficiency performing even better. Unless you have tested all factors in the reader that might be responsible for reading success, there is no way of telling if lower literate benefit or not from the improvements.

Three factors to evaluate reading success

Reading success is the result of interaction of three factors (Kintsch, 1998, Kirsch, 2001, 2005, Kirsch, Jungeblut & Mosenthal, 1998):

- the reading proficiency or literacy level of the readers;
- the function of the document;
- the difficulty of the task that is set for the reader.

When testing the effectivity of revisions, every technical writer needs to take into account these three factors. That is an expensive and complicated job, especially because the lower literate, poor and indebted don't participate much in adult reading research. In the past years I looked for reading research results where literacy of the test person was a factor, but not much was found. Exception is Lentz, Nell & Pander Maat (2017).

Taking literacy into account

The major factor in reading success, that is way more important than document features, is literacy (or reading proficiency). If we do not take literacy levels into account, we have no idea who actually benefits from our revisions and it is quite likely the group that already performs rather good and pushes up the average.

In the legal field where I work and conduct research, it is the comprehension of the low literate readers that drives me to improve the access to justice, which seems to be guarded by impressive documents. These readers usually are not only weak in reading, they are more likely to have a lower economic status and therefor are more vulnerable when dealing with complicated financial products or when involved in a legal (debt collecting) procedure. To fully understand the Matthew-effect you need to know a bit more about these specific readers.

The reading success of indebted readers

Dutch court documents are notorious for their incomprehensibility. This is a big issue because these documents can have a huge impact on the receivers, especially for the over represented group of poor and indebted readers. For example, after a conviction, debtors have to deal with a seized lone, or the risk of losing their home.

But what do we know about the receivers of court documents in debt collecting cases? They are lower literate (Jungmann, Madern & Geuns, 2016). Lower literacy is linked to poverty, depending on welfare (Christoffels & Baaij, 2016), Buckingham e.a. (2013), Hernandez (2011) and the lower literate show more risks in health (Berkman e.a., 2011). In the past years I conducted a research on the comprehensibility of the court summons in debt collection cases. When joining the judicial officer on his route delivering these court summons, I was visiting neighborhoods, families and loners mostly all living in poverty and I can't recall having seen books in any of these houses, but one.

So most of the receivers of court documents in their debt collecting case belong to the group that is most vulnerable in our society.

Testing court summons

I tested four documents in a 2x2 design on over 200 readers. The content in all four documents was the same.

The first, classic summons is normally being used throughout the legal professions involved in serving writs.

In the second version, the structure was manipulated by inserted headings and an altered order of both sentences and topics.

In the third version, only words and sentences had been manipulated, the structure however remained identical as in the classic summons.

In the fourth version, both manipulations are combined.

The results indicate that when both style and structure are revised (version 4), readers with lower literacy and a lower educational level are no longer disadvantaged and show equal reading success. But the highest average score was not on this combined version, it was on the other two versions with single manipulations (versions 2 and 3). The best average was actually showing a Matthew-effect, where the combined version showed the opposite.

The Matthew-effect

Yes, it is likely that measures aiming to help the deprived are actually the most beneficiary for the ones that aren't. For instance: educators set up a program to help poor readers in school and who benefits the most? The good readers, thus increasing the gap between poor and good readers. Or, a program set up to help low income households with financial measures, ends up being used mostly by households not in the most need of that help (Deleeck, Huybrechs & Cantillon, 1983; Pfost, Hattie, Dörfler & Artelt, 2014, Rigney, 2010).

This is how the parable of the talents is interpreted by famous sociologist Merton (1968) when he described the chance of academics being published and cited. This phenomenon has been described many times in many fields. But what does that mean for us, communication experts and lawyers? Does the Matthew-effect actually occur in our field? Alas, yes.

Davis e.a. (1996) describes how an easy to read intervention can increase the gap between poor and good readers, while the intervention wants to close that gap and not widen it. Ben Shahar & Schneider (2011) linked the unequal distribution of reading proficiency to how well people could make informed decisions with disclosing documents.

My own research showed the best results on the court summons with either an enhanced structure or style, but only because the higher literate performed so much better. And there is an abundance of reading research where we simply don't know, because reading proficiency was not tested. How can we deal with this?

Solutions to avoid the Matthew-effect

We can try, measure and see what works and what doesn't in order to create a reversed Matthew-effect, a Martin-effect, named after the Patron Saint of the city of Utrecht (Sikkema, Lentz & Pander Maat, 2018). It is interesting to know that Martin is not just the Patron Saint of the city of Utrecht, where we live and work, but also of the poor. My own project revealed a reversed Matthew-effect in reading success of the court summons as long as both style and structure revisions were combined.

Two other review studies (Garcia Retamero & Cokely, 2017; Houts, Doak, Doak & Coscalzo, 2006) showed good results with visuals, better document design, plain language and legal design thinking. This is a new perspective for the legal (communication) professionals and their toolkit to address, analyze and communicate

about law. There are also worldwide initiatives to improve access to justice with non-verbal interventions, such as Hiil Innovating justice (Netherlands) and Stanford Law Legal design lab (United-States). But there is a screaming shortage of academic, independent evaluations of what works for whom.

We also might focus on legal decisions as a result of *shared decision making*: with visuals, document design and plain language we can support comprehension by the social network of the reader who doesn't understand and indirectly improve his decision making. But we must acknowledge that it's the quality of the decision that is most important, not the quality of the document.

Finally, in our communication for the end users of our work, we have an obligation to explore other instruments to support fit decisions for lower literate readers: video or animation or even personal contact. Especially complicated financial, legal and medical decision making is too important to be solely based on written information, however plain that might be.

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Accelerating the shift to plain language within financial institutions

By Timia Di Pietro

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In-house counsel with National Bank since 2009, Timia Di Pietro practices in the area of consumer protection and retail banking. She counsels business units on the various legal aspects pertaining to product development for consumers. Prior to joining National Bank, she worked as legal counsel in a Montreal-based software company. She holds a bachelor in civil law/common law from McGill University (1999). She also holds a Master's degree in e-commerce from the University of Montreal (2002) and is a member of the Quebec Bar (2000).

As a financial institution, we're in the process of moving towards the following goals: Communicate clearly with our employees, our shareholders and our clients. The improvements to efficiency that clear communication brings to an organization are undeniable. Change can be a difficult process at times, because you need to move away from old ways of thinking and work with stakeholders in change management. Progress is possible only when a legal expert acts as an agent of change. However, regulatory frameworks can often slow our efforts to simplify communication.

Freeing ourselves from the fear of being afraid

For a legal expert, it's counter-intuitive to remove content in a document and simplify its language. Erring on the side of caution, legal experts tend to take a "better safe than sorry" approach by writing all-encompassing clauses and using overly technical terms. Why do they do this?

They might have the idea that one day, an issue that might be covered by one of these all-encompassing clauses will be brought up in a court case. By oversimplifying contracts, it could make the organization that a legal expert represents more vulnerable. When an organization has been using the same old clauses for decades, it is a bit frightening to be the legal expert who decides to remove or change them. He or she might ask, "Who am I to remove a clause that has always been there?"

Even if a legal expert is able to overcome this fear, certain legal concepts remain difficult to explain using simple terms. If one uses more common terms, there is a risk of moving away from certain well-established legal concepts. Certain nuances might be lost by using simpler language. Therefore, it is important to learn to live with this risk and think outside the box to find solutions.

Changing perspective

The fundamental question is the following: Can the uncertainty created by using simpler terms really create problems for an organization in court? In my opinion, such a situation would be rather exceptional. According to the Department of Justice Canada website, only 2% of civil lawsuits are heard in court.

Consequently, a change of perspective is needed. We need to write for our shareholders, our clients and our employees in order to make daily life easier - and not for the courts, which will only consider 2% of such cases in court. We need to be more pragmatic and stop believing that we can better protect our organization with clauses that the majority of stakeholders don't understand.

In any case, our simplification efforts demonstrated that many clauses had become obsolete as a result of process automation or changing regulatory requirements. Nevertheless, it is necessary to have the courage to question the purpose of certain clauses and to make needed changes, even if sometimes it makes our head spin!

What is particularly interesting is that using plain language not only improves the readability of the text, but also allows process optimization, both internally and externally

Our first steps

Relations with our shareholders

In the last few years, our institution has reduced:

(1) policies requiring board approval by 38%

(2) the number of words used in revised policies by 74%

(3) the number of parties involved in various governance processes by 56%

(4) the number of committees involved in governance by 36%

The improvements in efficiency are undeniable.

Relations with our employees

Human resource policies are much more accessible to employees via a search engine available on the company's intranet. Even communication with upper management is done with what we call a "one pager", which gets right to the point. Gone are the days of reports that require long and complex analyses that no one is able to grasp completely.

Relations with our clients

Between 2016 and 2018, we did away with about 40 documents and simplified about 30 forms that our personal finance clients must fill out. What does this mean? We've reduced the number of words, made documents less compact, and combined several documents, especially using technology as a tool.

For example, one of our loyalty programs saw the number of words used in is documents cut by 40%. Of course, this means the rules of the service are easier to understand. After this policy was implemented, we noticed a drop in (i) the number of calls to customer service (ii) the duration of these calls and (iii) the amount of time needed to train employees in customer service.

For fiscal year 2019-2020, we're working to eliminate about 50 forms and simplify another 100 or so forms for our personal finance clients.

Regulatory barriers

Progress does not always happen as quickly as one would like. Once constraints in the system, the budget, and time are overcome, one must then deal with unavoidable regulatory barriers. The lack of harmonization and modernization of current laws, especially in consumer law, complicates the process.

Regulatory barriers are particularly difficult to overcome, as several levels of government share the power to pass laws and create regulations. In Canada, the federal government can adopt national rules that apply to all of Canada's provinces. On the other hand, each provincial government can adopt rules that only apply within that province. As a result, federal rules and provincial rules can interfere with one another.

Lack of harmonization and modernization of the regulatory framework

Despite wanting to identify opportunities to simplify language, tackling the regulatory framework is a daunting challenge to overcome. Several laws govern the banking sector. Trying to comply with all disclosure requirements reduces the readability of client documentation and hinders our efforts to simplify language.

In themselves, federal regulations form a coherent whole; the same is true for provincial regulations. It's the superposition of these two regulatory regimes that considerably complicates the language of client forms and informational literature. Furthermore, if an organization wants to have one client information document to be used in the entire country, it is difficult to reconcile the different regulations between provinces.

According the Supreme Court of Canada, the average consumer is naïve and inexperienced, and not a reasonably diligent person. So how do we reconcile this judgment, which calls into question the ability of our communication to the average consumer to be understood with Canada's complex regulatory framework? Despite our willingness to simplify the language we use, respecting regulatory obligations can create confusion for the consumer.

An example of regulatory "shackles"

In November 2017, the National Assembly of Québec adopted bill 134 with the goal of amending the Consumer Protection Act. Despite lobbying by the financial services industry, several regulatory requirements undermine the use of plain language:

- **Required text:** Certain clauses must be included in the text of our credit contracts. However, these clauses contain legal jargon and terminology that does not pertain to the banking industry. What's more, we're obliged to use the term "merchant" when referring to the bank. It goes without saying that the unfortunate consumer will not understand, especially in a credit card contract where the "real" merchant is the product or service provider and not the bank.
- **Form requirements poorly adapted to today's digital world:** How is it possible to comply with the text size requirements or use a model contract on a mobile phone or tablet? These requirements have an impact on the visual presentation of the text, reducing readability and making it more difficult for the consumer to understand.

A few paths for finding a solution

Faced with an abundance regulatory requirements, it is difficult for us to get out of this tricky situation easily. The consumer is bombarded by all kinds of information that is not always consistent when compared side-by-side - information that was just never designed to coexist. Each province appears to have its own specific rules that do not necessarily add any value to the customer.

These rules are supposed to exist to protect the consumer and ensure his or her informed consent. However, legislators sometimes act against their desired goal since they don't have a global vision of the regulatory requirements that apply to a given sector. Even the leaders in banking law dumbfounded in front of such a difficult situation. What can be done to help the consumer?

In its report entitled *Lifting the Barriers to Internal Trade and Consumer Protection: The Example of the European Union* <https://www.uniondesconsommateurs.ca/wp-content/uploads/2015/11/R01-UC-barriere-commerce-interieur-rapport-F-v2-Eng.pdf> online: (2015), the Office of Consumer Affairs (OCA) Canada recommends, among other things:

> • "that consumers be placed at the center of any process to **lower interprovincial trade barriers,** and that the **protection of consumers** and their economic interests **be key to any harmonization policy or initiative**"
>
> • "the adoption of a principle that **harmonizing the legislative, regulatory and administrative measures** of Canadian provinces and territories aim henceforth at ensuring at all times a high level of consumer protection"
>
> • "that the Canadian government ensure the institutional support and the necessary resources for concluding and **implementing agreements to harmonize consumer protection measures**"

It is therefore necessary to work together to encourage provincial and federal legislators to focus on the best interests of the consumer in order to increase consumers' understanding of and certainty about the relevant laws.

Harmonization and modernization of the regulatory framework - particularly in consumer law - could also encourage interprovincial and digital commerce, as well as foster competition and innovation in Canadian businesses. Why have different regulations in different provinces in addition the federal regulations? Why not agree to have a common national regulatory framework?

Raising awareness, leading by example, harmonizing and modernizing

In my opinion, the key to success is raising awareness among all stakeholders about how plain language improves efficiency. Everything will change only when individual business units realize that the interests of the organization and the interests of the consumer are the same! Legal experts must lead by example and stop being afraid of being afraid. What's more, it's astounding to see how quickly stakeholders take a liking to clarity and simplicity; they somehow develop an addiction to it! Now, we must all work together to further harmonize and modernize regulatory requirements and pick up the pace of our work to achieve our common goal: the use of plain language.

Accélérer la transition vers une communication claire au sein des institutions financières

By Timia Di Pietro

Timia Di Pietro
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Avocate au sein du contentieux de la Banque Nationale depuis 2009, Me Timia Di Pietro exerce en droit bancaire et de la consommation. Elle conseille les lignes d'affaires sur les divers aspects juridiques liés au développement de produits destinés à des consommateurs. Avant de se joindre à la Banque Nationale, TimiaDi Pietro était conseillère juridique au sein d'une société de logiciels montréalaise.TimiaDi Pietro est titulaire d'un baccalauréat en droit civil/commonlawde l'Université McGill (1999) et a une maîtrise en commerce électronique de l'Université de Montréal (2002). Elle est également membre du Barreau du Québec (2000).

En tant qu'institution financière, nous tendons vers cet idéal : communiquer clairement avec nos employés, nos actionnaires et nos clients. Les gains d'efficience pour l'organisation sont indéniables. C'est un exercice parfois difficile à mener, car il faut sortir des sentiers battus et accompagner les parties prenantes dans la gestion du changement. Le progrès est possible seulement lorsque le juriste agit comme catalyseur, mais souvent le cadre réglementaire représente un frein à nos efforts de simplification.

Se libérer de la peur d'avoir peur

Le juriste a souvent du mal à élaguer le contenu et à simplifier le langage. Par souci de prudence, il a tendance à mettre "ceinture et bretelles" en rédigeant des clauses englobantes et en utilisant des termes techniques. Mais pourquoi?

C'est éventuellement par crainte de voir un jour l'une de ces clauses englobantes soumise à l'appréciation d'un tribunal. En simplifiant nos contrats, nous avons l'impression de moins protéger l'organisation. Lorsqu'une organisation utilise les mêmes clauses pendant des décennies, il est quelque peu angoissant d'être le juriste qui prend la décision de les retirer ou de les modifier. Il peut alors se demander ce qui l'autorise à retirer cette clause qui existe depuis toujours.

Et, même s'il réussit à surmonter cette peur, certains concepts juridiques demeurent difficiles à expliquer en termes simples. En utilisant des mots plus familiers, il y a un risque de s'éloigner de certains concepts bien établis en droit. Certaines nuances peuvent alors se perdre au profit de la simplicité. Il faut donc apprendre à vivre avec ce risque et à penser autrement pour trouver des solutions.

Changer de perspective

La question fondamentale est la suivante : est-ce que l'incertitude créée par l'utilisation de termes plus simples peut vraiment nuire à l'organisation devant un tribunal? À mon avis, cela serait plutôt exceptionnel. Selon le site Web de Justice Canada, seulement 2%[1] des poursuites civiles aboutissent devant les tribunaux.

Par conséquent, il faut changer de perspective. Nous devons écrire pour nos actionnaires, nos clients et nos employés afin de faciliter notre quotidien, et non pour les tribunaux qui se pencheront seulement sur 2% des dossiers dans un procès. Nous devons être plus pragmatiques et cesser de croire que nous protégeons davantage notre organisation avec des clauses qui sont incompréhensibles pour la majorité des parties prenantes.

D'ailleurs, nos exercices de simplification ont démontré que plusieurs clauses étaient devenues désuètes du fait de l'automatisation de processus ou du changement des exigences réglementaires. Il faut cependant avoir le courage de s'interroger sur

1 Ministère de la Justice Gouvernement du Canada, "Les affaires civiles et les affaires pénales – Au sujet du système de justice du Canada", < https://www.justice.gc.ca/fra/sjc-csj/just/08.html >

la raison d'être de certaines clauses et de faire les changements qui s'imposent, même si cela nous donne parfois le vertige!

L'avantage, c'est qu'un tel exercice de simplification améliore non seulement la lisibilité du texte, mais permet aussi l'optimisation des processus, tant en interne qu'en externe.

Nos premiers pas

Relations avec nos actionnaires

Ces dernières années, notre institution a réduit :

(1) de 38% les politiques nécessitant l'approbation du conseil d'administration;

(2) de 74% le nombre de mots des politiques révisées;

(3) de 56% le nombre d'intervenants impliqués dans divers processus liés à la gouvernance;

(4) de 36% le nombre de comités liés à la gouvernance.

Les gains d'efficience sont indéniables.

Relations avec nos employés

Les politiques liées aux ressources humaines sont beaucoup plus accessibles pour les employés grâce à un moteur de recherche disponible sur l'intranet de l'entreprise. Même la communication avec la haute direction se fait par ce que nous appelons communément un "*one pager*" qui va droit au but. Fini le temps des rapports qui nécessitent de longues et complexes analyses et que personne ne maîtrise parfaitement.

Relations avec nos clients

Au niveau du financement aux particuliers, entre 2016-2018, nous avons aboli une quarantaine de documents et simplifié une trentaine de formulaires destinés aux clients. Qu'est-ce que cela veut dire? Nous avons réduit le nombre de mots, aéré la présentation et fusionné plusieurs documents, notamment avec l'aide de la technologie.

Par exemple, l'un de nos programmes de fidélisation a vu le nombre de mots réduit de 40%. Cela amène naturellement à simplifier les règles du jeu et le produit. Par la suite, nous avons constaté la réduction (i) du nombre d'appels au service à la clientèle (ii) de la durée de ces appels et (iii) du temps de formation des employés.

Pour l'année 2019-2020, nous sommes à l'œuvre pour abolir une cinquantaine de formulaires et en simplifier une centaine au niveau du financement aux particuliers.

Les barrières réglementaires

Le progrès n'est pas toujours aussi rapide que l'on voudrait. Une fois surmontées les contraintes de système, de budget et de temps, il reste les restrictions réglementaires qui sont incontournables. Le manque d'harmonisation et de modernisation des lois actuelles, notamment en droit de la consommation, complexifie le processus.

L'obstacle des barrières réglementaires est particulièrement difficile à surmonter sachant que plusieurs paliers de gouvernement se partagent le pouvoir d'adopter des lois et des règlements. Au Canada, le gouvernement fédéral peut adopter des règles nationales qui s'appliquent dans toutes les provinces. Le gouvernement de chaque province peut, quant à lui, adopter des règles qui s'appliquent sur son

territoire seulement. Par conséquent, les règles fédérales et provinciales peuvent empiéter les unes sur les autres.

2 *Richard c. Time Inc.*, [2012] 1 RCS 265 (CSC).

Le manque d'harmonisation et de modernisation du cadre réglementaire

Malgré notre volonté de trouver des occasions de simplification, le cadre réglementaire représente un défi de taille. Le domaine bancaire est régi par plusieurs lois. Tenter de respecter l'ensemble des obligatoires de divulgation réduit la lisibilité de la documentation-client et freine nos efforts de simplification.

En soi, les exigences fédérales forment un tout cohérent; il en est de même pour les exigences provinciales. C'est la superposition de ces deux régimes qui complexifie la documentation considérablement. Par ailleurs, si une organisation souhaite avoir un seul et même document pour tous ses clients à travers le pays, il est difficile de concilier les exigences de chacune des provinces.

Selon un arrêt de la Cour suprême du Canada, le consommateur moyen est une personne crédule et inexpérimentée, et non pas une personne raisonnablement diligente[2]. Alors, comment concilier un tel constat, qui remet en question l'accessibilité de nos communications pour le consommateur moyen, avec notre cadre réglementaire complexe? Malgré notre volonté de simplifier le langage, le respect de nos obligations peut créer de la confusion dans l'esprit du consommateur.

Un exemple concret de carcan réglementaire

En novembre 2017, l'Assemblée nationale du Québec a adopté le projet de loi 134 visant à amender la *Loi sur la protection du consommateur*. Malgré les pressions du secteur des services financiers, plusieurs exigences réglementaires nuisent à la communication claire :

Mentions obligatoires : certaines clauses doivent être reproduites textuellement dans nos contrats de crédit. Or, ces clauses contiennent du jargon juridique et une terminologie qui ne cadre pas avec l'industrie bancaire. Qui plus est, nous devons obligatoirement utiliser le mot "commerçant" pour référer à la banque. Il va sans dire que le pauvre consommateur aura du mal à comprendre, surtout dans un contrat de carte de crédit où le "véritable" commerçant est le fournisseur de produit ou de service et non la banque.

Exigences de forme mal adaptées à la réalité numérique : sur un téléphone mobile ou une tablette, comment respecter une grosseur de caractères ou utiliser un contrat type? Ces exigences ont un impact sur le visuel du texte, ce qui nuit à la lisibilité et fait obstacle à la compréhension du consommateur.

Quelques pistes de solution

Devant la multiplicité des exigences réglementaires, il est difficile de tirer notre épingle du jeu. Le consommateur est bombardé par toutes sortes d'informations qui ne sont pas toujours cohérentes lorsqu'elles sont juxtaposées. Elles n'ont tout simplement pas été conçues pour coexister. Chaque province semble avoir sa propre spécificité sans qu'il y ait forcément une valeur ajoutée pour le consommateur.

Ces règles existent prétendument pour protéger le consommateur et assurer un consentement éclairé. Or, les législateurs agissent parfois à l'encontre du but recherché puisqu'ils n'ont pas une vision globale des exigences réglementaires applicables à un domaine donné. Même les sommités en droit bancaire sont bouche bée devant un tel casse-tête. Que faire pour aider le consommateur?

L'Union des consommateurs, dans son rapport intitulé *Levée des barrières au commerce intérieur et protection du consommateur : l'exemple de l'Union européenne*[3], recommande entre autres :

"que le consommateur soit remis au centre de tout processus visant à **abaisser les barrières de commerce interprovincial**, et que la **protection du consommateur** et de ses intérêts économiques **préside toute élaboration de politique ou initiative d'harmonisation**."[4]

"l'adoption d'un principe à l'effet que le **rapprochement des mesures législatives**, **réglementaires et administratives** des provinces et territoires canadiens vise désormais en priorité à assurer "en tout temps", un niveau de protection des consommateurs"[5]

"que le gouvernement canadien veille à assurer le soutien institutionnel et les ressources nécessaires à la conclusion et à la **mise en œuvre des ententes d'harmonisation des mesures de protection du consommateu**r".[6]

Il faut donc se concerter afin d'inciter les législateurs provinciaux et le fédéral à focaliser sur le meilleur intérêt du consommateur afin d'améliorer la compréhension du consommateur et le niveau de certitude quant au droit applicable.

L'harmonisation et la modernisation du cadre réglementaire, notamment en droit de la consommation, pourraient aussi encourager le commerce interprovincial et numérique tout comme la compétitivité et l'innovation dans les entreprises canadiennes. Pourquoi avoir des règles différentes selon la province en plus du régime fédéral? Pourquoi ne pas s'entendre pour avoir un dénominateur commun?

Sensibiliser, montrer l'exemple, harmoniser et moderniser

À mon avis, la clé du succès est de sensibiliser l'ensemble des parties prenantes aux gains d'efficience de la communication claire. C'est au moment où les unités d'affaires prennent conscience que les intérêts de l'organisation et ceux du consommateur convergent que tout change! Le juriste doit montrer l'exemple et cesser d'avoir peur d'avoir peur. Ensuite, il est étonnant de voir la vitesse à laquelle les parties prenantes prennent goût à la clarté et à la simplicité; elles développent en quelque sorte une dépendance! Maintenant, nous devons tous travailler ensemble pour harmoniser et moderniser davantage les exigences réglementaires et ainsi accélérer la cadence pour atteindre notre objectif commun, soit la communication claire.

3 Union des consommateurs, « Levée des barrières au commerce intérieur et protection du consommateur : l'exemple de l'Union européenne », en ligne : (2015) < http://www.uniondesconsommateurs.ca/wp-content/uploads/2015/11/R01-UC-barriere-commerce-interieur-rapport-F-v2-FR.pdf >

4 Ibid, page 62.

5 Ibid.

6 Ibid.

Legal drafting:
Are there limits to what you can do with plain language?

By Ben Piper

Ben Piper
Lawyer (Australia)

Ben Piper worked as a legislative drafter in the Office of the Chief Parliamentary Counsel, Victoria, Australia from 1985 to 2006. He was then employed at the National Transport Commission (Australia) from 2006 to 2013 as a drafter, lawyer, and policy maker. He has since opted to take a more independent approach to his career. He has been interested in promoting the use of Plain Language since 1982.

At the Clarity Conference in Wellington in 2016, I said that many legislative drafters have been writing laws in plain language for quite some time.[1]

Perhaps that might have caused you to check out the law in Victoria (Australia) regulating lawyers. It's called the *Legal Profession Uniform Law Application Act 2014*.

It has 660 sections spread over 557 pages. Some of those sections are big.

That's plain language?

This paper explores whether there are limits to what you can do with plain language in legal drafting.

I will look at:

- how plain can you make complex policy, vocabulary or concepts?
- how plain can you make a large legal document?
- what is the lowest level of 'reading ease' that can be achieved with laws?

How plain can you make complex policy, vocabulary or concepts?

1. Policy

Many areas regulated by government are subject to complex policy issues.

Unfortunately, plain language principles have little to offer when you are confronted with complex policy because plain language is not supposed to change policy. And as far as legislative drafters are concerned, policy is usually immutable.

So, what do you do if you, as a drafter, are given a complex policy to turn into a law?

You:

- do whatever it takes to understand the policy;
- then work out the best structure for the law;
- then work out a logical order in which to place provisions;
- then try to write each provision of the law as clearly as possible.

Of course, as complex policy usually results in a fairly big law, you would then apply plain language tools to assist users to navigate the law.

If you do all of this, then you have done all that is practically possible to make the law plain.

1 See *The Clarity Journal* 78 p.26.

2. Vocabulary and concepts

What if a policy area has specialised vocabulary or complex concepts ? For instance, take fertility treatment in humans. This is an area that freely uses terms such as gametes, oocytes and spermatids.

Plain language does not require that anything be "dumbed down". Where does that leave the drafter of a fertility control law ? Usually it means that technical terms have to go into the law.

Of course a drafter using unfamiliar vocabulary should consider including helpful explanatory material. But is it appropriate to include such material in a law ?

Should a fertility control law include a basic primer on fertility treatment ? If this is done properly, most of the law would read like a textbook.

Most legislative drafters believe this is a step too far. However, some laws are accompanied by useful explanatory information. Often drafters are responsible for that.

So, in my view plain language principles have little to offer when you are confronted by complex policy, vocabulary or concepts. That being so, it would be unfair to characterise a document as lacking plainness because those things are in it if it cannot practicably be made plainer.

How plain can you make a large legal document?

No one is going to read the lawyers' law of Victoria for fun: most readers would need hours to read it all.

The real question is whether those who attempt to understand it can do so, and whether they can find things easily.

With respect to understanding, there is no reason why the nitty-gritty of a big law need differ from that of a small law.

Thus any bit of a big law should be easily understandable. That is what you will find in most Australian big laws. For instance, if you take a page at random from the Victorian lawyers' law, I am confident that you will understand it. I am also confident that if you tried to improve it, you would expend much effort for very little result.

With respect to finding things, there are the following plain language tools:

- navigational aids such as tables of contents and helpful part and section headings;
- structural logic;
- good cross-referencing;
- explanatory material.

Most Australian big laws make good use of the first 3 of these tools, and many provide helpful explanatory material.

Returning to the question, my answer is that in terms of the nitty-gritty of the document, you can make a big document as plain as any small document.

But big documents are always going to require considerable effort from users. Plain language tools can reduce the size of that effort.

What is the lowest level of 'reading ease' that it is feasible to aim for with laws?

Reading ease is a measure of how difficult text is to read by reference to what level of education one needs to readily understand it.

Initially, to answer this question I wanted to focus on the likely education levels of those who need to use laws. That is, I wanted to address the fundamental question: who is the audience for laws?

However, this is not a helpful question.

Ignorance of the law is no excuse – everyone is assumed to know the law. Those are crucial principles of legal systems based on the English common law.

Therefore, the audience for a law in those systems is everyone with legal capacity. Legal capacity does not depend on level of schooling – it depends solely on age and mental competence. In Australia, for instance, it does not matter whether you can speak English, or are literate.

Thus, the audience for a law is essentially everyone. That is not very helpful to the writer of a law.

So, it seems that I should try to answer the question directly: what is the lowest level of reading ease that it is feasible to aim for with laws?

But is it sensible to aim for a single level of reading ease? I don't think so.

Given the complex nature of some topic areas, any minimum universal level would have to be set at the highest possible level to ensure that it does not impede the writing of necessary laws. Under the Flesch reading ease system, that highest level is a score of 0.0 to 30.0, which means "Very difficult to read - Best understood by university graduates". That is not helpful to anyone.

Thus our quest is perhaps to find the lowest reading ease level that is feasible in the case of any law. But does that quest have much purpose?

A law that deals with 'easy' subject matter might manage to get a "Plain English" rating on the Flesch reading ease scale. That means a score in the range of 60.0 to 70.0, suitable for 8th and 9th grade readers (or 13- to 15-year-old students). Based on my testing, this is likely to be the lowest level that a law can achieve.

But what does that prove? It is an outlier result. It is not something that can sensibly be used as a target for the average law.

What can, then, sensibly be used as a target for the average law?

Based on my testing, drafters will do well if they can achieve :

- for an average sort of law: a "fairly difficult to read" rating on the Flesch reading ease scale (a score of 50.0 to 60.0, suitable for 10th to 12th grade students);

- for laws with difficult subject matter: a "difficult to read" rating (a score of 30.0 to 50.0, suitable for college students).

Conclusion

There are limits to what plain language principles can do in terms of legal drafting. Applying them cannot turn complex policy into simple policy, or big documents into small documents, or complex documents into something a primary school student can understand.

So, is it still possible to call a big complex law plain?

The International Plain Language Working Group definition of plain language is:

> A communication is in plain language if its wording, structure, and design are so clear that the intended readers can easily find what they need, understand what they find, and use that information.

With the following "clarifications", I think many modern laws meet that definition:

1) With respect to "the intended readers" – clearly in the case of laws, one needs to take a practical approach to who they are.

The intended readers are readers with a high enough level of schooling to be able to understand a law of the nature of the law in question (easy, average or difficult subject matter).

2) With respect to information being "easily" found and understood:

- in the case of finding, it is easier to find information in a 3-page document than in a 600-page document; and
- in the case of understanding, information is easier to understand in the shorter document.

3) Further, with respect to ease of understanding, if a document contains complex policy, vocabulary or concepts, one needs to take a practical approach to what "easily" means in that regard.

It is not sensible to think that the reader can understand a document dealing with complex subject matter as easily as a document dealing with easy subject matter.

Taking account of those clarifications, I think most modern Australian laws have been worded, structured and designed so that "the intended readers" can "easily" find what they need, and understand and use what they find.

And that is why I think they can be called plain laws.

The aim of Clarity — the organization — is "the use of good, clear language by the legal profession." With that in mind, what path would you like to see the journal take? Do you have an article you would like published? Can you recommend authors or potential guest editors? No organization or publication can survive for long if its members (or readers) are not gaining something of value. How can Clarity help you? Please contact editor-in-chief Thomas Myers at *clarityeditorinchief@gmail.com* with your suggestions and other comments.

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Plain language law reform:
Strategies to minimize the negative effects of statutory interpretation

By Alexander Geddes

Alexander Geddes
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Alexander Geddesis a graduate student currently completing an LLM with a concentration in Legislative Studies at the University of Ottawa. He is passionate about exploring how legislative drafting can improve access to justice and researching the relationship between legislative drafting and administrative law. Outside the classroom, Alexander Geddeshas worked as a lawyer at a community legal clinic in Perth, Ontario since his call to the Bar of Ontario in 2017. He advises and represents low-income people across Eastern Ontario, and his practice is primarily focused on employment, human rights, and labour law.

Although commentators have called for clearer statutory laws for centuries[1], one principle of statutory interpretation is hindering contemporary efforts to improve the clarity of Canadian legislation: the presumption of substantive change. When judges are unsure of a legislative provision's meaning, this presumption encourages them to look to previous versions of the provision. They then presume that the legislators intended to make a substantive change to the law when the wording has changed unless there is evidence showing that the intention was to make non-substantive clarity improvements.

While this principle aims to help judges, in reality it inhibits non-substantive law reform and Canadian judges struggle with it. This paper examines different approaches to making legislative provisions more accessible, the problems caused by the presumption of substantive change, and the ways legislators can avoid its application.

Non-substantive law reform improves the accessibility of the law

If legislators accept the importance of improving the clarity of the law, a question arises over whether they should complete clarity law reforms separate from or alongside substantive law reform. Improving the clarity and content of laws at the same time seems more efficient.[2] However, separating clarity efforts from substantive law reform is more politically expedient as clarifying laws is a political position that is difficult to oppose. As well, non-substantive reform exposes weaknesses in the law and enables citizens to directly engage with substantive law reform. Therefore, non-substantive reform is an expedient and effective way to improve the law. However, if a legislature decides to carry out non-substantive clarity improvements to its laws, then the presumption of substantive change demands attention.

How statutory interpretation inhibits non-substantive clarity reform

The presumption of substantive change inhibits non-substantive clarity reform because it encourages judges to assume that a change to the wording of a legislative provision alters its substantive meaning unless there is evidence to show that the intent was mere language polishing. It causes problems because uncertainty exists in judicial decisions about it. Judges are rarely clear on how to apply it and interpretation legislation has failed to oust that confusion.

Canadian judges regularly disagree about whether they should apply the presumption, rebut it, or ignore it.[3] One example of this disagreement appears in the Supreme Court of Canada's decision in *Marche* where the majority applied the presumption and did not discuss the possibility of rebutting it while the dissent examined the possibility of rebuttal at length.[4] Similarly, judges find substantive change when a legislative alteration shows an intent to clarify the language. The Federal Court of Appeal's

decision in *Crupi* highlights this problem as two judges applied the presumption even though the legislative change had signs suggesting it was a plain language rewrite.[5] The uncertainty arising in the caselaw inhibits non-substantive clarity reform because a legislature risks having a judge find a substantive change when it did not intend to make any such change. It is easier for the legislature to keep unclear language than risk unintentional change.

Legislative attempts to oust the presumption have failed

One possible solution to the problems caused by the presumption is to legislate the presumption out of existence. Most jurisdictions have interpretation legislation that codifies, edits, or ousts the principles of statutory interpretation, so it seems that a legislature could use interpretation legislation to eliminate the presumption.

In Canada, legislatures have attempted to do this, but those efforts have fallen on deaf judicial ears. Canada's *Interpretation Act* expressly states that a change in wording does not suggest the law has changed.[6] However, the most common approach from judges to provisions like this one is to cite the provision before reinforcing the value of the presumption.[7] As the Federal Court of Appeal has explained, "the provisions of the Interpretation Act [. . .] do not preclude the Court from acknowledging that, in principle at least, the foremost purpose of amendments is to bring about a substantive change."[8] This approach has ensured that the presumption continues to cause judicial confusion and legislative worries. In the face of this uncertainty, judges need to reduce their reliance on the presumption. Legislatures, in turn, need to facilitate non-substantive clarity reforms by providing evidence that assists judges in rebutting the presumption.

Some strategies for non-substantive clarity reforms are ineffective

Formal consolidation and revision processes

The first strategy legislators can use to complete non-substantive clarity reform is to carry out a formal consolidation and revision processes. Formal revisions are large-scale overhauls of a legislature's statute book that permit revisors to make changes "to bring out more clearly what is considered to be the Legislature's intention."[9] When judges encounter a change to the wording of a law that happened during a formal revision, it is "presumed to be purely formal."[10] Judges are aware of this principle and will perform interpretive calisthenics to find that a change in wording did not change the law.[11]

Given the power of formal revisions, they seem like exceptional ways to make non-substantive changes. However, in practice they are ineffective because they are major undertakings and have become increasingly rare in Canada.[12] Most jurisdictions have replaced them by giving legislative officials limited powers to correct errors in legislation.[13] Thus, though a formal revision process may seem to be an ideal way to carry out non-substantive law reform, they are too rare to be effective for improving the clarity of laws.

Internal evidence of non-substantive clarity reform

While consolidation and revision processes are too rare, the second strategy that legislators can use to make non-substantive clarity reforms is likely too weak. The presumption of substantive change leaves the door open for a legislature to rebut it by providing evidence that shows it merely intended to improve the language of a provision. Thus, a legislature could indicate that its goal was non-substantive clarity

reform in committee discussions about the change, in statutory preambles, or other sections of the legislative text.

However, judicial decisions in Canada reveal that the result is rarely certain when judges grapple with internal evidence. Judges may or may not give weight to such evidence.[14] Thus, it is unpredictable for a legislature to rely on such evidence to buttress their non-substantive clarity reforms from the assault of the presumption of substantive change. Judge may miss these signals if they are not sufficiently strong.

Major reform projects effectively achieve non-substantive clarity reform

In between the extremes of the full revisions and internal signaling is a third strategy for a legislature to carry out non-substantive clarity law reform: major legislative reform projects outside full consolidations. Such projects accomplish the goals of clarity reform and receive the judicial attention required to escape the presumption of substantive change's application.

One Canadian example of this strategy is the small-scale revision projects that have taken place in British Columbia since its last formal revision. The chief legislative counsel in British Columbia has the power to carry out limited revisions of a single statute or part of a statute, and she has used this power to do plain language reforms of existing laws.[15] These projects have been successful as judges have endorsed the efforts by British Columbia to carry out plain language reforms.[16]

Outside of Canada, the United Kingdom and Australia have both carried out major reform projects to revise their tax legislation and have received positive reviews from judges. In the UK and Australia, judges have adapted by presuming that the tax law rewrite projects did not make substantive changes.[17] Such projects are an ideal way to carry out non-substantive reform.

The presumption of substantive change has outlived its utility

Thomas Cromwell, a former justice of the Supreme Court of Canada, has called for new scrutiny of all presumptions in statutory interpretation.[18] In the case of the presumption of substantive change, the confusion it has caused means judges need to reduce their reliance on it and legislators need to increase the availability of evidence to oust it. This change will augment Canadian legislators' ability to carry out the non-substantive reforms that improves the clarity of the law.

Efforts to improve clarity through non-substantive reform are essential for advancing the rule of law. Some critics have complained that plain language reforms are a waste of resources because only legal professionals read legislation and clarity reforms cause errors.[19] However, clearer laws make the legal system "more relevant, efficient, accessible and less costly."[20]

Even if most citizens do not read legislation, clarifying the law through non-substantive reforms allows interpreters to communicate the law's contents to citizens more effectively. These reforms strengthen the rule of law by enhancing its accessibility.

Endnotes

1 According to the Renton Report, calls for improved legislative clarity date back to at least the 17th centuries, and one early complaint came from Thomas Jefferson who said the British drafting style rendered laws "more perplexed and incomprehensible" for lawyers and non-legal readers (David Renton, *The Preparation of Legislation: Report of a Committee Appointed by the Lord President of the Council* (London: HMSO, 1975) at paras 2.8, 2.10).

2 Ruth Sullivan takes this perspective (Ruth Sullivan, "Some Implications of Plain Language Drafting" (2001) 22:3 Statue L Rev 145 at 180).

3 See e.g. *Marche v Halifax Insurance Co*, 2005 SCC 6, [2005] 1 SCR 47 [Marche]; McGuigan v R, [1982] 1 SCR 284, 1982 CanLII 41; Stoke-Graham v the Queen, [1985] 1 SCR 106, 1985 CanLII 60; R v DLW, 2016 SCC 22, [2016] 1 SCR 402; Crupi v Canada (Employment and Immigration Commission), [1986] 3 FC 3, 66 NR 93 (CA) [Crupi]; Envision Edmonton Opportunities Society v Edmonton (City), 2012 ABCA 188, [2012] AJ No 641.

4 *Marche*, *supra* note 5.

5 *Crupi, supra* note 5.

6 *Interpretation Act*, RSC 1985, c I-21, s 45(2). Other provincial interpretation statutes have similar provisions.

7 As Pierre-André Côté explains, "the practical effect of [the Interpretation Act provision] has been rather limited. Although at times used to rebut arguments based on amendment, the section has also been ignored or simply declared inapplicable" (Pierre-André Côté, Stéphane Beaulac and Mathieu Devinat The Interpretation of Legislation in Canada, 4th Ed, translated by Steven Sacks (Toronto: Carswell, 2011) at 462).

8 *Silicon Graphics Ltd v Canada*, 2002 FCA 260, [2003] FC 447.

9 *Statutes Revision Act, 1989*, SO 1989, c91, s 3(d) [*Statutes Revision Act, 1989*]. See similar phrasing in Canada's Legislation Revision and Consolidation Act, RSC 1985, c S-20, s 6 (f) and in equivalent provincial Acts.

10 Ruth Sullivan, *Statutory Interpretation*, 3rd ed (Toronto: Irwin Law, 2016) at 273.

11 *Loblaws Inc v Ancaster (Town, Chief Building Official)*, 1992 CanLII 8625, 95 DLR (4th) 695 (Ont Sup Ct).

12 Norman Larsen, "Statute Revision and Consolidation: History, Process and Problems" (1987) 19:2 Ottawa L Rev 321. The last federal consolidation and revision in Canada was in 1985.

13 For example, Ontario's Legislation Act, 2006 (SO 2006, c 21, Sched. F) gives Ontario's Chief Legislative Counsel has used this power extensively to make corrections to Ontario's laws. However, the Chief Legislative Counsel has only used that power for uncontroversial purposes like fixing administrative errors, unifying styles, updating the names of agencies, and improving French translations (See "Consolidated Statutes Change Notices" Ontario, online: <https://www.ontario.ca/laws/consolidated-statutes-change-notices> and "Consolidated Statutes Correction Notices" Ontario, online: <https://www.ontario.ca/laws/consolidated-statutes-correction-notices>).

14 See e.g. *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 SCR 559.

15 *Statute Revision Act*, RSBC 1996, c 440, s 1(b). Since 1996, she has revised 6 statutes and 28 regulations.

16 See e.g. *Anonson v North Vancouver (City)*, 2017 BCCA 205 (CanLII) and *Buhr v Manulife Financial – Canadian Division*, 2014 BCCA (CanLII).

17 Jonathan Teasdale, "Linguistics and Law Reform" (2014) 2:2 The Theory and Practice of Legislation 115Adrian Sawyer, "Rewriting Tax Legislation – Can Polishing Silver Really Turn It into Gold?" (2013) 15:1 J Australian Taxation 1 at 9-11 and Simon James and Ian Wallschutzky, "Tax Law Improvement in Australia and the UK: The Need for a Strategy for Simplification" (1997) 18:4 Fiscal Studies 445 at 450.

18 Thomas Cromwell, "Revisiting the Role of Presumptions of Legislative Intent in Statutory Interpretation" (2017) 95:2 Can Bar Rev 297.

19 Jack Stark, "Plain Language" (2012) 27:1 The Legislative Lawyer. But see the response to Stark from Joseph Kimble, "Wrong – Again – about Plain Language" (2012) 27:2 The Legislative Lawyer.

20 Ted Hughes Law Reform Commission of British Columbia, *Access to Justice: The Report of the Justice Reform Committee, 1988* (Victoria: Law Reform Commission of British Columbia, 1988) at 12. See also Ruth Sullivan, "The Promise of Plain Language Drafting" (2001) 47 McGill LJ 97; Susan Krongold, "Writing Laws: Making Them Easier to Understand" (1992); and Joseph Kimble (*Seeing through Legalese: More Essays on Plain Language* (Durham: Carolina Academic Press, 2017)).

Project flavour: Plain language for the legal sector

By Christian Denoyelle

Christian Denoyelle
Chair of the Advisory and Investigation Committee of the High Council of Justice (Belgium)

Christian Denoyelle has served as a judge of the Antwerp Court of First Instance since 2004. He's mandated as a juvenile judge since 2007. He obtained a law degree from the Catholic University of Leuven and also has academic teacher training in law. He has been Chair of the Dutch Advisory and Investigation Committee of the High Council of Justice since 2016. He has extensive professional experience, some of which include: lawyer at the Brussels Bar (1993-2000), temporary administrator of the property of mentally ill people appointed by the justice of the peace of the first sub-district of Anderlecht (1998-2000), teacher at the Familiehulp family aid and support training centre in Brussels (1997-2000), and press spokesperson for the Antwerp Court of First Instance (2014-2016).

Scientific research in Belgium has shown that 86% of its citizens find legal language to be too difficult to understand. Another remarkable finding is that the vast majority of legal professionals also consider legal language to be too difficult to understand! These findings are true for all of Belgium, where three national languages (Dutch, French and German) and the three official language communities live side-by-side.

When citizens find legal language baffling, their confidence in the democratic rule of law decreases. It is therefore a major problem. And while nearly everyone might agree that the judicial system should change its language, it appears difficult to make such changes a reality. This is why Belgium's High Council of Justice (HCJ hereafter) has launched an ambitious project: Project Flavour (published on 14 March 2018 on the website of Belgium's High Court of Justice): <http://www.csj.be/sites/default/files/related-documents/projectflavour_0.pdf>

What is the HCJ and Project Flavour?

The HCJ is a branch of the Belgian Federal Government established in the Belgian Constitution. It functions independently from the three branches of the Belgian Government. It plays a decisive role in the selection and nomination of magistrates and has the power to control the functioning of the judicial system. It concerns itself with many key actors in many sectors, including legislators, universities, lawyers, bailiffs, and magistrates.

The mission of the HCJ is to increase citizens' confidence in the judicial system. This confidence is weakened by the use of unnecessarily unclear language. In order to gain back this confidence, it is important to consider using plain language.

The main objective of "Project Flavour" is to initiate a lasting change in the way the major players in the legal profession in Belgium think and act. A good cook seasons a dish bit by bit while cooking - at the beginning, while cooking the dish, and of course does not forget to add a final touch at the end. It is almost unthinkable that a cook would not season a dish. However the cook always keeps his or her guests in mind while seasoning the dish.

Therefore, the Belgian High Court of Justice is calling on all legal professionals in Belgium to think about how they use their "linguistic ingredients" in order to find the right "seasoning" for their target audience.

How to change the minds of legal professionals?

All change begins with a realization. This is why the Belgian HCJ clearly highlights in its project report that using simpler language is necessary, useful, efficient, and effective. Clear legal language is much more than a sign of quality; it is an ethical duty for every legal professional.

However, while the majority of legal professionals may subscribe to this theory, when it comes to applying it, they are more hesitant. The study that was done before the report made it possible to clarify the reasons why it is difficult to change the barely understandable language legal professionals use.

Why is it so difficult to change legal language?

During their studies, legal experts learn technical jargon and an academic style of communication to be able to identify nuances in rules and abstract concepts in real-world cases. Legal experts are afraid that being too concise and using non-specialist language could diminish legal precision and exactitude.

Part of their reluctance is without a doubt linked to their fear of falling off of their pedestal. After all, being a magistrate is a government position of authority and their privileged partners (such as lawyers) are just as essential in a democracy under the rule of law. Using specialized language and decorum only reinforce the importance of the job. The idea that using simpler language might make them seem less erudite and "wise" actually makes more than one legal expert shudder. In addition, a number of magistrates do not hesitate to play the "attack on their independence" card when they are encouraged to use plain language.

For many legal professionals, the "time" (and therefore money) invested justifies their inability or lack of will to change how they communicate. Actually, changing how they work takes time. As French philosopher Blaise Pascal once wrote, "I am writing you a long letter, because I did not have the time to write you a short one."

"Old habits die hard," the saying goes. Even legal experts who are full of good intentions and want to use plain language are at risk of abandoning the idea if the professional hierarchy (formal or informal) are not on board. Additionally, in instances where professions influence one another, the responsibility of changing communication style is put onto others. Certain lawyers do not dare to use plain language for fear that the judge might not take them seriously. Bailiffs transcribe word for word texts from lawyers who use their services. Magistrates sometimes mention the complex language that lawyers use when they deliver their conclusions. And everyone points a finger at politicians who draft legal texts in very complex language.

In a country like Belgium where three official languages are used side-by-side, an additional problem arises: translations of legal texts that remain faithful in meaning and context to the original text. Certain nuances may disappear. The connotation or entire meaning of certain words may change in a different language. Certain sentences that are clear in one language may not be clear in another.

In Belgium, the digitization of the legal profession is happening slowly but surely. The introduction of new computerized systems allow one to tailor documents and standardized letters between languages - a service that is much needed anyway. It seems that the speed with which standardized documents are produced results in poor quality. Not to mention that as soon as one agrees on a standardized model, either IT specialists identify a list of obstacles, or the system is too slow at giving access to edited documents.

An appeal to use plain language

More accessible and clear language guarantees that one's message will be delivered and augments legal precision. Convoluted sentence structures or other outdated sentence formulations often hide inability, ignorance, or laziness on the part of the communicator. Generally, it is not the jargon that poses a problem, but rather a dependence on an academic style and useless, outdated vocabulary that has been

kept alive. If using jargon is unavoidable, a simple explanation is enough so that a litigant can concretely understand the implications in his or her particular case.

Legal professionals who believe that plain language shows a lack of authority forget that society has evolved. The judicial system can only exist if the population has confidence in legal experts. The general public has a greater appreciation for people they can understand.

Writing clearly certainly demands more time at the beginning, but this saves time later, as it means fewer requests for explanations. It is also beneficial to courts, which could see the number of appeals due to misunderstandings decrease.

Independence in assessing a case does not justify escaping one's responsibility. This independence should not be an excuse to avoid one's duty to improve the quality of the work done by clarifying language here and there.

In order to counteract escaping one's responsibilities, the HCJ is focusing its efforts on nearly all actors: legislators, universities, lawyers, bailiffs and magistrates.

What mechanisms can be used to encourage a change in mentality?

Each legal profession must adopt a clear position and use the mechanisms at its disposal. The hierarchy must explicitly support and encourage projects that promote plain legal language.

In Belgium, the majority of legal professions related to the judicial system are regulated and organized. Several key opportunities present themselves to encourage legal professionals to use plain legal language.

Thus, in order to become a lawyer, one must satisfy a certain number of conditions and pass selection exams. The same goes for bailiffs and magistrates. Legal professionals are also obliged to constantly continue their education; lawyers can even be penalized for not doing so. A legal professional's career is also often divided into evaluation cycles, as is the case for magistrates. And magistrates who want to advance in their careers are subject to some kind of evaluation.

Candidates who want to become a judge must pass an exam organised by the HCJ. The exam jury takes into account the candidate's ability to communicate. If a magistrate wants to become a chief judge, he or she he will be asked to explain the mechanisms he or she will use to encourage projects that clarify legal language in his or her court or division of the public prosecutor's office.

The HCJ can issue directives to the institute that trains Belgian magistrates. Of course, we support more training (if possible mandatory training) for both junior magistrates and more experienced magistrates. The HCJ also gives its opinion to the Belgian Government and Belgian Federal Parliament. The HCJ has recently made several suggestions to lawmakers to bring attention to the use of language and its readability. In a recent opinion on a government project to reform the Napoleonic Penal Code, the HCJ cited examples of editing a certain number of legal articles for greater readability.

In written communication with citizens and politicians, the HCJ is also trying to use more everyday language. As such, the HCJ is trying to be an example and invite other partners in the judicial system to follow suit. In short, putting plain language on the agenda of legal professionals faces many obstacles. However, "Project Flavour" anticipates many of these obstacles and offers ways to overcome them.

Le projet Épices: Le langage clair au menu du judiciaire

Christian Denoyelle
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Christian Denoyelle est juge au tribunal de première instance d'Anvers depuis 2004. Il exerce le mandat spécifique de juge de la jeunesse depuis 2007. Il détient une licence en droit de l'Université de Louvain ainsi qu'une formation académique de professeur en droit. Il agit également depuis 2016 à titre de président de la Commission d'avis et d'enquête néerlandophone du Conseil supérieur de la Justice.Il a par ailleurs cumulé plusieurs expériences avec entre autres : celle d'avocat au barreau de Bruxelles de 1993 jusqu'à 2000, d'administrateur provisoire des biens de malades mentaux, désigné par le juge de paix du premier canton d'Anderlecht de 1998 à 2000, de professeur au centre de formation agréé Familiehulp [Aide familiale] de Bruxelles de 1997 à 2000 et de porte-parole chargé des relations avec la presse (juge de presse) du tribunal de première instance d'Anvers de 2014 à 2016.

By Christian Denoyelle

La recherche scientifique en Belgique a démontré que 86% des citoyens trouvent le langage judiciaire trop opaque. Autre constat marquant : la grande majorité des professionnels judiciaires considèrent eux aussi que le langage judiciaire est trop opaque ![1] Ces constats valent pour toute la Belgique, où trois langues nationales et communautés linguistiques officielles se côtoient : néerlandais, français et allemand.

Lorsque les citoyens trouvent la justice incompréhensible, leur confiance dans l'État de droit démocratique diminue. Il s'agit donc d'une problématique majeure. Et bien que presque tout le monde soit d'accord pour que la justice change son langage, cela semble difficile à concrétiser. C'est pourquoi le Conseil supérieur de la Justice de Belgique (ci-après "CSJ") a lancé un projet ambitieux : projet Épices[2].

Qu'est-ce que le CSJ et le projet Épices ?

Le CSJ est un organe ancré dans la Constitution, au fonctionnement totalement indépendant des trois pouvoirs. Il a un rôle décisif dans la sélection et la nomination des magistrats et a le pouvoir de contrôler le fonctionnement de l'organisation judiciaire. Il s'adresse à tous les acteurs en impliquant à peu près tout le monde : le législateur, les universités, les avocats, les huissiers de justice et les magistrats.

La mission du CSJ est d'améliorer la confiance des citoyens dans la justice. Or cette confiance est ébranlée par l'utilisation d'un langage inutilement nébuleux. Et pour rétablir cette confiance, il est crucial de s'intéresser à la question du langage clair.

Quant au projet Épices, son objectif premier est d'amorcer un changement durable des mentalités parmi les acteurs judiciaires. Un bon chef assaisonne son plat au fur et à mesure qu'il le cuisine, au début, en cours de cuisson, et n'oublie évidemment pas la touche finale. Il est presque impensable pour lui de ne pas épicer. Mais il dose et mesure en pensant toujours à ses invités.

Le Conseil supérieur de la Justice appelle donc tous les professionnels du droit à prendre conscience de la manière dont ils utilisent les ingrédients linguistiques et à trouver le bon assaisonnement.

Comment changer la mentalité du monde judiciaire ?

Tout processus de changement commence par une prise de conscience. C'est pourquoi le CSJ souligne très clairement dans son rapport de projet[3] que l'utilisation d'un langage plus simple est nécessaire, utile, efficiente et efficace. Un langage juridique clair est bien plus qu'un facteur de qualité, c'est un devoir déontologique de tout professionnel du droit.

Si la plupart des professionnels du droit souscrivent peut-être à cette théorie, dès qu'il s'agit de l'appliquer, ils se montrent plutôt réticents. L'enquête qui a précédé le

rapport a permis de clarifier les motifs pour lesquels il est si difficile de modifier le langage quasi incompréhensible des professionnels du droit.

Pourquoi est-il si difficile de modifier le langage juridique ?

Au cours de leur formation, les juristes ont appris un jargon technique et un style académique pour être en mesure de nuancer des règles et des concepts abstraits dans des cas concrets. Les juristes craignent dès lors que la concision et la vulgarisation attendues ne se fassent au détriment de la précision et de l'exactitude juridique.

Une partie de leur réticence est sans doute également liée à la peur de tomber de leur piédestal. Après tout, la magistrature est un pouvoir étatique et les partenaires privilégiés (comme les avocats) sont également essentiels dans un État de droit démocratique. L'utilisation d'un langage particulier et le décorum ne font que renforcer l'importance de la fonction. L'idée qu'un langage simplifié les ferait paraître moins érudits et "sages" en fait frissonner plus d'un. Par ailleurs, un certain nombre de magistrats n'hésitent pas à brandir la carte de "l'atteinte à leur indépendance" lorsqu'ils sont encouragés à utiliser un langage clair.

Pour de nombreux professionnels du droit, le "temps" investi (et donc l'argent) justifie leur incapacité ou leur absence de volonté à changer de style de communication. En effet, changer les processus de travail prend du temps. Le philosophe français Pascal Blaise écrivait : "Je vous écris une longue lettre, parce que je n'ai pas eu le temps d'en écrire une courte".

"Les vieilles habitudes ont la vie dure," dit-on. Même les juristes qui, pétris de bonnes intentions, veulent utiliser un langage clair, risquent de décrocher si la hiérarchie (formelle ou informelle) ne veut pas y adhérer. De plus, une profession en inspirant une autre, la responsabilité de modifier son style de communication est rejetée sur l'autre. Certains avocats n›osent pas utiliser un langage simple par crainte que le juge ne les prenne plus au sérieux. Les huissiers de justice retranscrivent à l'identique les extraits de texte des avocats qui font appel à eux. Les magistrats évoquent parfois la complexité de la langue utilisée par les avocats dans leurs conclusions. Ou alors tout le monde pointe du doigt les hommes politiques qui rédigent des textes juridiques dans un langage très complexe.

Dans un pays comme la Belgique où trois langues officielles se côtoient, une difficulté supplémentaire se pose : la traduction contextuelle fidèle des textes juridiques. Certaines nuances peuvent disparaître, certains mots peuvent changer de connotation ou de sens dans une autre langue, certaines phrases claires dans une langue, peuvent ne pas l'être dans une autre.

En Belgique, l'informatisation de la justice évolue lentement mais sûrement. L'introduction de nouveaux systèmes informatiques permet également d'adapter des documents et lettres types, adaptations d'ailleurs bien nécessaires. Il semble que la rapidité de production des documents types nuise à la qualité. Sans compter que dès que l'on s'entend sur un modèle type, soit les informaticiens font l'inventaire des obstacles soit le système tarde trop à donner accès aux documents modifiés.

Un plaidoyer pour l'utilisation d'un langage clair

Un langage plus accessible et clair garantit la bonne délivrance du message et augmente la précision juridique. Les constructions de phrases souvent alambiquées ou autres formules standard désuètes dissimulent souvent une incapacité, ignorance ou paresse. En général, ce n'est pas le jargon qui pose problème, mais le recours à un style académique et un vocabulaire inutilement soutenu ou archaïque. Si le

1 Voir E. Michaux et G. Vervaeke, «Innovatie binnen justitie. Professionals en ketenpartners aan het woord», *Nieuw Juridisch Weekblad* 2017, fasc. 355, 50-59. (en Néerlandais seulement).

2 Conseil supérieur de la Justice de Belgique, "Projet Épices" (14 mars 2018), publié sur le site du *Conseil supérieur de la Justice de Belgique*, en ligne: <http://www.csj.be/fr/content/projet-epices-1>.

3 Ibid.

jargon s'avère inévitable, un mot d'explication suffit alors pour que le justiciable comprenne les implications concrètes dans son cas spécifique.

Les professionnels du droit qui croient que langage simple rime avec perte d'autorité oublient que la société a évolué. La justice n'existe que si la population fait confiance aux acteurs judiciaires. La population apprécie plus les gens qu'elle comprend.

Rédiger clairement demande certes plus de temps au début, mais cet acte permet un gain de temps considérable vu qu'il génère moins de demandes d'explications. Il signifie également un gain pour les tribunaux, qui voient baisser le nombre de recours pour des questions d'incompréhension.

L'indépendance dans l'appréciation d'une affaire ne justifie pas que l'on puisse se soustraire à sa responsabilité. Cette indépendance ne devrait pas non plus être prétexte à ne pas devoir améliorer la qualité du travail fourni en clarifiant ci et là le langage.

Pour contrer cette fuite des responsabilités, le CSJ s'adresse donc à presque tous les acteurs : législateur, universités, avocats, huissiers de justice et magistrats.

Quels leviers peut-on utiliser pour favoriser le changement de mentalité ?

Chaque profession juridique doit adopter une position claire et utiliser les leviers à sa disposition. La hiérarchie doit explicitement soutenir et encourager les projets autour d'un langage juridique clair.

En Belgique, la plupart des professions juridiques qui gravitent autour de la justice sont réglementées et organisées. Plusieurs moments clés se présentent donc pour encourager les professionnels à utiliser un langage juridique clair.

Ainsi, pour devenir avocat, il faut satisfaire à un certain nombre de conditions et réussir des épreuves de sélection. Il en va de même pour les huissiers de justice et les magistrats. Les professionnels du droit sont également tenus de suivre une formation continue ; les avocats ont même l'obligation sanctionnable de le faire. La carrière est également souvent découpée en cycles d'évaluation, comme c'est le cas pour les magistrats. Et les magistrats qui veulent évoluer dans leur carrière sont soumis à une sorte d'évaluation.

Les candidats à la fonction de juge doivent passer un examen organisé par le CSJ. Le jury prendra en compte les compétences en communication. Si un magistrat souhaite devenir chef de corps, il lui sera demandé d'expliquer les mécanismes auxquels il recourra pour encourager les projets de clarté du langage juridique au sein de son tribunal ou de sa division du ministère public.

Le CSJ peut donner des directives à l'Institut de formation des magistrats belges : nous sommes naturellement demandeurs d'une plus grande offre de formations (si possible obligatoires) pour les magistrats débutants et les magistrats plus expérimentés. Le CSJ rend également des avis au gouvernement et au parlement. C'est ainsi que le CSJ a récemment émis plusieurs suggestions au législateur afin d'attirer l'attention sur l'usage de la langue et sur sa lisibilité. Dans un récent avis sur un projet du gouvernement de réformer le Code pénal napoléonien, le CSJ a cité des exemples d'édition d'un certain nombre d'articles de loi en vue d'une plus grande lisibilité.

Aussi, dans ses communications écrites avec les citoyens et les politiciens, le CSJ s'efforce d'utiliser un langage plus courant. Le CSJ s'efforce donc de montrer l'exemple et invite les autres partenaires de la justice à emboîter le pas.

Plain Finnish in the European Union: Mission possible?

By Aino Piehl

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When Finland became a member of the EU in the beginning of 1995, it encountered a textual world and a legal tradition different from its own. This immediately raised a public discussion of the influence of the EU on the Finnish language, though few new expressions could be noticed in general use. Administrative and legal language had started to deal with new terminology and textual conventions earlier because EU legislation was already implemented during the pre-membership phase.

In 1998, an agreement between the Institutions of the European Union states that "Community legislative acts shall be drafted clearly, simply and precisely"[1]. Still, over 80% of Finnish officials who have responded to three surveys[2] done by the Institute for the Languages of Finland seem to think that the Finnish language versions are difficult to understand.

Surveys on Finnish officials' opinions

To find out the views of those persons who were involved daily with Finnish language texts produced by the EU, the Institute for the languages of Finland conducted a survey in 1998 with Finnish officials who participate in both the European and the national legislative processes. This happened before the first Finnish presidency of the EU. Two more surveys have followed, in 2006-7 and 2018, in connection with the second and third presidencies.

The target groups for all three surveys were officials who, as Finnish delegates, negotiate proposed acts at working parties and other meetings of the Council of the European Union or the European Commission, a group of about 300 persons. The core questions are the same in all surveys: the respondents' opinions on comprehensibility in Finnish and other language texts, their use of languages when reading texts in different situations, and their reasons for perceived clarity or obscurity.

English as a reference language in multilingual legislation

The leading principle guiding the language regime of the EU is multilingualism: all legislative proposals are translated into all 24 official languages. Yet the surveys show that 90-100% of the Finnish respondents read the proposed acts in English both in meetings and when preparing for them in their offices.

Free comments on the 1998 survey revealed that the Finnish delegates did not read the texts in Finnish because they could seldom use interpretation in the meetings. Obviously, it is easier to read in the same language as one is going to speak.

Another reason was that Finnish translations of proposed legislation arrived later than English ones since English was already the source for most translations. The respondents used Finnish language versions to, e.g. inform the Finnish Parliament and other stakeholders in Finland. But the late arrival of the Finnish versions still

1 Interinstitutional agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation (1999/C 73/01), https://eur-lex.europa.eu/

causes difficulties: respondents complain that they must sometimes translate passages themselves.

The percentage of respondents reading papers in Finnish in the meetings has decreased in the results of the 2018 survey compared to results of the 2006-7 survey. After 2004 the EU gained 13 new Member States and since then translation and interpretation costs have been restrained. Interpretation is usually available in the languages of the old member countries, like English, French, German, Italian and Spanish. The smaller countries may opt to skip interpretation, because in this way they can save money, for example for travel costs. Besides, in Finland it is presumed that every official can speak and understand at least English.

But even if the Finnish officials have good English skills, 40% of the respondents to the 2018 survey would like to either speak or listen to Finnish more often. However, the results show more satisfaction than in 2006-7 when half of the respondents felt they needed more interpretation. Similarly, there is now more satisfaction with the availability of Finnish translations compared to 10 years ago. Whether the reason for this is better availability or diminished needs or expectations is not possible to conclude.

Consequences of not using Finnish

The dominance of English as the Finnish civil servants' working language has consequences: if the Finnish language version is seldom used during the legislative process, it will not become familiar to the officials. In the first survey of 1998, many respondents said that they read the Finnish text only to check the final version before it was adopted, and that the time reserved for it was insufficient. The recent survey indicates that there is still not enough time to check texts in a satisfactory fashion.

So, when at the end of the legislative process the Finnish officials peruse the Finnish version, it may appear alien to them. The difficulty especially lies in long and complicated sentences and in words and phrases that feel strange. Lengthy sentences and articles should already be well-known from the English version since same content must appear between full stops in all language versions. Despite that, the English and other language texts do not, in the respondents' opinions, differ dramatically from other texts of the same genre.

This feeling of unfamiliarity may explain many respondents' comments that the English text is the real and accurate version and the Finnish version can be not only incomprehensible but even misleading, often containing terminology that is incorrect.

Cooperation between interpreters, translators and officials

Before Finland's first presidency in 1999, the European Commission trained more in-house interpreters to interpret from Finnish to their native tongues. To help this project succeed the Institute for the Languages of Finland asked the trainees to identify which features in Finnish speeches caused problems. As more translations from Finnish would also be needed during the presidency, a similar inquiry was distributed to non-Finnish translators.

The results of the inquiry were summarized in a booklet called (translated word for word) *Will your text be translated or your speech interpreted*. This short pocket-sized guide was printed by the Prime Minister's Office and distributed to all officials participating in Presidency tasks in 1999 and also in 2006 when there was a campaign to encourage the Finnish delegates to ask for interpretation. Later the Translation Centre of the EU made English and French versions of the translation

2 Piehl, A. (2012). Les fonctionnaires dans la préparation des actes législatifs de l'UE: L'équilibreentre leur propre langue et celles de travail. In J. C. Herreras & K. Ziegler (Eds.), L'Europedes 27 et ses langues (Collection Europe(s) No 3) (pp. 685–698). Valenciennes: PUV.

A survey on the Finnish officials' use of languages and their perception of the intelligibility of the EU texts. https://www.kotus.fi/en/on_language/plain_language/eu_finnish/

3 http://cdt.europa.eu/fr/documentation/ecrire-pour-etre-traduit

4 http://cdt.europa.eu/en/documentation/writing-translation

part for the writers of the source texts. These booklets (Écrire *pour* être *traduit*[3], *Writing for translation*[4]) are available on the internet.

The issue of the contacts between translators and officials was taken up in the 2006-7 survey. At the time no arrangements for contacts were in place. It was somewhat worrying that half of the respondents could not say if there was enough cooperation. "I have never had any contact with the translators", commented one. 25% of respondents thought the cooperation was sufficient and the same amount thought that there could be more.

The free comments to all surveys reveal that EU translation units have not always accepted terms suggested by the respondents, and this is only discovered when the act is adopted and published. This has caused dissatisfaction. Proposed changes tend to appear better justified if they are explained, as, of course, do the reasons for rejecting them.

In 2008, the Commission proposed to the Finnish Ministry of Justice that a regular network be established between translators and officials, with a coordinator in both Helsinki and Brussels. The Commission asked the Institute for help in persuading the Finnish Ministries to put resources into such a network, and the results of the first two surveys were presented on several occasions to different groups in the Ministries.

The outcome was positive: a network was established in 2009, and it soon proved to be very useful when a need for hitherto unused terminology arose with the Financial Crisis. When, in the recent survey, the question about contacts and cooperation was repeated, many more respondents were satisfied with the situation.

Shared responsibility for comprehensibility

Despite changes for the better, Finnish officials continue to find the Finnish texts difficult. Measures taken within one language can improve comprehensibility only so much. Long sentences and articles and the design of numbered lists cannot be altered in one language version; the source texts for translations should be improved.

In the recent survey respondents were asked if Finnish delegates could do something for the quality of source texts. 50% did not know, but 40% said yes: they could raise difficult passages in discussion and demand clearer wording. This does not appear to be an easy task to them, since time and effort are reserved for formulations that are perceived to affect the substance, and comprehensibility is not a priority issue. In the words of one respondent: "Sometimes linguistic considerations may be essential for the impact of the provision." This probably is the case more often than just sometimes: it is often overlooked that provisions' only form of existence is language.

Responsibility for the comprehensibility of legislation must be shared. European Institutions take care of the quality of proposals and translations, for which they employ skilled and experienced in-house interpreters, translators and editors. The content of legislation is a political matter decided by the Member States. Compromises they make during negotiations create unclear expressions, but do not account for all of the obscurity. Something more could surely be done in both the early and late stages of the legislative process: for example discussion, editing, testing. Would a nudge from plain language organizations help the Union and its Member States to realize the true value of comprehensibility?

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