

Buddhists, Running, and Plain Language in Calgary (Part Two)
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1. Format changes

Perhaps the most dramatic and immediately noticeable change was adding a title page and table of contents for quick document recognition and ease of use. The drafters also moved the brief five-term definitions section to the end where they served as a reference. Most significant was the move of the exhibits to the beginning where they quickly provide key information - for example, incorporating type of service, delivery point, price, term, and date and signature blanks. This new placement provides quicker information retrieval for regular and first-time readers, and allows for efficient signing of the exhibits.

2. Shrinkage

Compressing and restructuring text often reduced sections by 50% as shown below:

BEFORE AFTER

Nominations

(23 words)

If no new nomination is made pursuant to Section 5.1, Supplier shall be entitled to rely on the last nomination received from the Customer.

(12 words)

A nomination will remain in effect until replaced by a new nomination.

Billings and Payments

(42 words)

On or before the tenth(10th) day of each month, Supplier shall present to Customer an invoice showing the daily and total deliveries to Customer during the preceding month, the amount due and information sufficient to explain and support the amount due.

(22 words)

On or before the 10th day of each month, Western Gas will invoice Industrial Customer for deliveries made during the preceding month.

Force Majeure

(55 words)

Without limiting the generality of the foregoing, strikes, lockouts or other industrial disturbances shall be events of force majeure for the purposes of this Agreement, and the settlement of these matters shall be entirely within the discretion of the party directly affected. In no event shall force majeure mean the inability to meet financial obligations.

(29 words)

For the purposes of this Agreement, force majeure will also include strikes, lockouts, or other labour disputes, but will exclude the inability of either party to meet financial obligations.

3. Segmentation

When a writer shrinks the word mass and then itemizes as well, the readability is increased even more:

BEFORE AFTER

(65-word sentence)

Further, Supplier may, upon two days notice by telephone and telecopier, suspend deliveries until such time as the amount due, including interest, is paid, provided that Supplier shall not have the right to suspend deliveries prior to five days after the date payment was due, and further provided that this right to suspend shall be in addition to any and all other remedies available to Supplier.

(49 words for all 3 segments)

Western Gas may, in addition to any other available remedies, suspend deliveries until the amount due is paid, provided that:

(a) Western Gas has, by telephone or telecopier, given Industrial Customer 2 days' notice of the suspension, and

(b) the suspension will not commence earlier than 5 days after the due date.

4. Deletion

Sometimes the rewriting discussions result in wholesale deletion of text segments. "Why do we need that anyway?" is a refrain of pure joy to the writing specialist's ear. Here's another illustration:

BEFORE AFTER

14. Term

14.1 This Agreement will be effective as of from the date first written above.

However the obligations of Supplier and Customer to deliver and receive shall, subject to Section 2.1, be effective for the term of the Pricing Period.

14.2 This Agreement shall remain in effect until the end of the latest Pricing Period.

14. Effective Date

This agreement shall be effective the date first noted on the first page.

5. Legalese Meltdown

You probably noticed that the ubiquitous, imprecise, and royal-sounding shall has been dethroned in these samples. In its place, the writers substituted either must, will, is or may, depending on the context. Gone, too, is the formality and archaism of the WITNESSES THAT, the WHEREAS and NOW, THEREFORE, in consideration of recitals syntax. An earlier draft had already eradicated the hereby and hereinbefore type of language. Finally, the signature section has been streamlined:

BEFORE AFTER

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed as of the date first written above.

[FULL LEGAL CORPORATE NAME]

[WESTERN GAS MARKETING LIMITED]

Signed: _____

Industrial Customer Ltd.:

Western Gas Marketing Limited

6. Visuals

Just as I needed to *see* a new way of looking at the Buddhist mountain problem, readers and writers of legal text need help in *seeing* their way through complex text. In the last document I consulted on, a Temporary Excess Volumes Gas Release, we came upon an interesting example of the need for graphical literacy in the definitions section.

In other plain language WGM documents, definitions had been placed in a tabular format, and this practice usually works well. In the example here, the column format exacerbated the problem of understanding a complex formula. You don't have to read it all in order to see the difference!

BEFORE

TEV GAS

is gas dedicated to TransCanada under the Contracts and released under this Release by TransCanada as Temporary Excess Volumes Gas, and is the volume of gas that is the lesser of:

a) the volume that is the difference calculated when:

(1) the sum of the Annual Delivery Quantities under the Producer Contracts for the immediately preceding contract year,
is subtracted from

(2) the sum of the Allocation Reference Quantities under the Producer Contracts for the immediately preceding contract year, and

b) the volume that is the difference calculated when:

(1) the sum of the nominations of TransCanada under the Producer Contracts for the immediately preceding contract year,
is subtracted from

(2) the product that is calculated by multiplying (i) the minimum daily quantity under the Producer Contracts for the immediately preceding contract year, by (ii) the number of days of delivery specified under the Producer Contracts.

AFTER

TEV Gas is Temporary Excess Volumes Gas released by this Agreement from the gas dedicated to TransCanada under the Contracts. TEV is the smaller volume of gas of a) and b) below:

a) the volume left when the sum of the Annual Delivery Quantities under the Producer Contracts for the preceding year is subtracted from the sum of the Allocation Reference Quantities under the Producer Contracts for the preceding year

b) the volume left when the total of TransCanada's nominations under the Producer Contracts for the preceding year is subtracted from the amount calculated by multiplying the minimum daily quantity under the Producer Contracts for the preceding contract year by the number of delivery days specified under the Producer Contracts.

Clearly, plain language has as much to do with *revising* - literally *seeing again* - as it does with paring down words and pruning off deadwood legalese. In the visuals example above, it is easier to understand the complex choices when they are laid out horizontally rather than vertically.

The challenges to legal writers of "plained" documents summon another stage of enlightenment. Plain language, based on the seminal principle of writing for all the document's readers inspired the WGM writers to adopt a new vision of legal writing. Their primary focus was to write clear contracts for their customer readers. With the understanding and good will of their customers in hand, the courts and other lawyers are less likely to ever have to read the text.

For legal writers committed to excellence in writing, there are many spiralling mountain marathons ahead.

POSTSCRIPT

Western Gas Marketing Limited report that they have had no complaints about their plain language contracts from customers. Early comments included one from a customer who said he loved the drafting so much he planned on borrowing some of it for future agreements at his company. Another customer called to compliment WGM on how easy it was to read a complex series of amending agreements. She said she really liked the plain language. Appendix A which follows is a questionnaire answered by four WGM plain language aficionados, all lawyers. Corporate legal departments or law firms considering training in plain language legal writing may find their observations of help.

WGM's Annual Review 1992 informed readers about their new approach in this manner:

Goodbye Legalese, Hello Plain Language

Findings of a 1991 survey indicated that customers and producers wanted simpler contracts, and that's what the Legal group delivered. In 1992, Western Gas became one of the first energy companies to replace legal jargon with plain language. The Canadian Industrial Sales Agreement was one of the first to be transformed. Working closely with marketing staff, the Legal group reduced the complexity of the contract by half, as measured by the Fog Index. The Fog Index is a measure of the number of years of education required to understand a written passage. Parts of the old contract measured between 25 and 32, while the new form stands at about 11. In 1993, the group plans to continue converting all standard form contracts into plain language.

Finally, what follows is a questionnaire answered by four Western Gas lawyers. These are some of their comments:

1. *How and when did you first learn about plain language? What was your reaction to it then? What is your reaction now?*

[Two respondents first learned about plain language in university, one from reading Canadian Bar Association publications, and another from hearing of efforts to convert insurance policies and real estate forms to plain language]

I was intrigued by plain language. I thought this might offer the prospect of making our contracts easier to understand and more accessible to employees and customers. One of my

concerns is that by being overly cautious and trying to cover all the possibilities in their drafting, lawyers often create ambiguity by using complicated language. My hopes are now being realized Our contracts are well received by customers and our employees can understand them. This results in better turn-around of documents. Fewer clarifications and explanations are required.

My reaction to it then was Dick and Jane. I believed that court interpretations on "tried and true" wording were better protection than writing something new so clearly that no one would need to go to court for an interpretation. My reaction now is the opposite. I now believe that the clear expression of parties' intentions in agreements is very important to minimize disputes and simplify administration costs.

My reaction to it then was it was a fluff course. Although writing in plain language can initially be difficult and time consuming, it becomes more natural with continued use Now it's frustrating to have to read documents written by other lawyers (or by lay-people writing legal documents) that are not in plain language. It takes so much longer to read and fully understand. My reaction to it then is the same as now – positive.

2. What role does plain language play in your own writing at work?

I make an effort to use plain language in all my writing. Old habits die hard. I often go through several revisions before I end up with a piece of clear concise writing. The revisions take time, but are worth the effort. I received a number of comments about how effective some of my memos were. A couple of comments suggested the memos were surprisingly clear coming from a lawyer.

When I sit down to write any memorandum, Quick Mail, letter, or formal agreement, I try to write clearly and concisely and to avoid the use of big words when simpler words can be substituted.

I try to write all my letters, agreements and memorandum in plain language. I try to write all documents in plain language. Since the Wordsmith Workshop, I demand more of myself when I write a document. Increasingly, I am using grammar checkers and proofreaders to rate most documents.

3. How has the plain language workshop generally affected writing in your department? If there have been types of responses, please categorize. For example, who or how many among the group use plain language consistently, conscientiously and effectively? What number do not?

The workshop brought our Vice President on side. While terrible at using plain language himself, he allowed me to proceed to convert existing contracts into plain language. We formed a Plain Language Committee of two lawyers and two paralegals to convert the contacts. The members of the committee are the most effective users of plain language. Some of the members of the department find [using] plain language difficult. As an example, I discovered clerical staff sending plain language contracts out with covering letters written in archaic legal language. I encourage lawyers and paralegals to use simple, clear, and concise [writing.] After the plain language workshop, a group of us conscientiously [wrote] in a more plain manner. . . . Some of the others from the seminar do not seem to be using the training and have retained the old presentation styles and legalistic approach.

Approximately 1/3 of the people make a conscious effort to write in plain language; 1/3 will not make the effort or believe that they write in plain language anyway; the other 1/3 still do not understand how to write in plain language.

4. Your company has now produced 15 plain language customer precedents. Do you have a means of tracking customer reactions to both plain and unplain customer documents?

Conversion of other forms of agreements continues. We do not have a formal mechanism for collecting customer reactions to our plain language contracts. I have requested staff to make note of any comments received. We have produced several sales agreements, purchase amendments, an assignment precedent and correspondence forms. We continue to work on additional agreements, transmittal letters and internal correspondence It would be a major undertaking to track customer reactions to all our agreements . . .

We have received favourable comments from several of our producers. In fact, one producer asked whether they could adopt our standard form contract, (with modifications to suit their business needs).

Of the reactions, most are positive. One comment in particular comes from a fellow at Imperial Oil. He loved the drafting of a particular document so much he wants to use parts of it for their future proforma agreements. [A] common concern is how the documents will be interpreted in court With the plain language assignment agreement, we sent copies to certain customers to get feedback. As a result, the document will likely be changed to incorporate some customer ideas.

5. From your perspective, what steps did the process of translating these precedents into plain language entail? Is this the best method?

The committee converts the documents. One person takes the first cut at the conversion. The rest of the committee then review the draft. The draft is then discussed and debated. This iterative process continues until a final form is agreed on. Some drafts are subsequently reviewed by an outside plain language expert. The process build internal expertise. It is a slow process and it might be faster to use more outside expertise. there are tradeoffs because outside experts in plain language generally lack the expertise in our business that employees have. [The committee reviews the plain language precedent, to]ensure continuity of meaning, and appropriate presentation, as well as that the connotation, context and flavour of the meaning have been retainedThe debate that ensues at this stage makes for a better product [We feel that the] time investment is worthwhile.

6. Have you met any resistance to plain language in the company? If so, could you describe what barriers you perceive prevent your group from developing plain language to its full extent?

Yes, we have met resistance to adopting plain language. The resistance stems from lack of understanding, a resistance to change, a belief that complexity is a mark of intelligence, and general laziness. We're doing what we can to meet the resistance and are basically forging ahead despite it.

One of the barriers is overcoming the habits that people have developed over years of writing in the old style, and the comfort they feel in using it. There is also a certain amount of "showing

off" in using an extensive vocabulary and in using industry technical jargon. These barriers can be overcome by education. Some people still feel that the large print looks like Dick and Jane, that right justified margins are "more professional", and that plain language generally is less professional [than the historical styles].

Some people are concerned that if we do not use legal words, agreements may not be as binding. Some people refer to plain language as easy talk, [and as] perhaps being unprofessional in not using big words.

7. In your view, what factors most helped those individuals who have developed strong interest and skills in plain language?

The most important factor has been that Diane and I have driven the initiative and made it happen. We have made plain language conversions part of our staff objectives. A pride in authoring plain language agreements is now emerging among the staff involved in the conversion process. Customer reactions to the new agreements helps create company pride. The satisfaction of seeing a long convoluted legal clause emerge as a clear statement of the parties' intentions is a strong motivating factor to using plain language in agreements. Positive customer responses, which are starting to trickle in, also motivate us. Rewriting the agreements and my own letters requires me to think the concepts through more clearly and ensures that they have been expressed so that others can understand them.

The factors that have helped individuals develop interest and skill in plain language are commitment by management and the Wordsmith course.

8. What encouragement have you had to continue the plain language process in the company?

The company's public recognition of the plain language Industrial Sales Agreement as one of the major accomplishments of last year's quality initiatives has encouraged us. Positive customer feedback has also been a factor.

The most encouragement comes from the people that request agreements from me. They can't get over [the fact]that they can actually understand the agreement.

[Two respondents mentioned encouragement from the Vice President, although acknowledging that he does not use plain language himself. Respondents also mentioned encouragement from each other.]

9. How have you advertised your successes with plain language documents?

Our 1992 Annual Review and the TransCanada 1992 Annual Report mentioned our initiative. I have mixed feelings about making a fuss about what we're doing. I prefer to proceed to convert all the agreements and get them into circulation If we tout the plain language documents as new, they are liable to attract more opposition than if we simply start using them.

We have advertised a few of our plain language documents in company newsletters I could see us using our covering letter for the agreements to introduce the document to customers - it might be more personal that way.

[Three respondents gave a presentation to the Calgary Plain Language Section of the Canadian Bar Association in December, 1993.]

10. *What else could be done to encourage more effective implementation of plain language in your group?*

Good customer feedback would pave the way for greater internal acceptance.

Establish half-day sessions where we separate into groups and work on plaining certain documents and letters. Departmental plain language standards could be developed so that letters and certain types of agreements must pass these standards before being sent to customers.

[Three respondents felt it might be necessary to have a refresher course as well as to train new members of the department.]

11. *Was the recognition of the need for plain language internally motivated or customer driven? Is it now motivated by the same source?*

The original motivation was internal, but it dove-tailed nicely with our customer-focused service quality initiative. We use the customer focus to lend credibility to the initiative.

Initially, the motivation was internally driven. We devised the strategy in response to comments made in our survey of customers conducted in 1990. . . . Now, with positive customer comments, the motivation is customer driven and will continue to be so.

Thanks to Doug McLean, Diane Pettie, Karen Michalko and Drew Gromnicki—the four responders to the questionnaire.

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