

A plain language writer considers consideration

by Christine Mowat

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I come face-to-face with that insuperable obstacle, the consideration clause, right at the beginning of redrafting a mortgage into plain language. As usual, the consideration is embedded in a sea of circuitous syntax, medieval dialect, and outmoded capitalization:

I/We _____, WHO OR WHOSE SUCCESSORS AND ASSIGNS ARE
HEREINAFTER INCLUDED IN THE EXPRESSION "the mortgagor" . . . **in consideration of** the
sum of _____ DOLLARS(\$_____)

As a plain language writer, I instinctively bold the words in my mind's eye. Lawyers have seen the phrase thousands of times. It appears to legal drafters as intractable, essential, and omnipotent - no matter how incomprehensible to clients.

In my view, it shows a lack of consideration to use it.

David Mellinkoff, at the beginning of his *Legal Writing Sense and Nonsense*, reacts similarly to "In consideration of the agreements herein contained, the parties hereto agree . . .", when he writes, "An aroma as distinctive as stale cigar fills the room. A lawyer has been here." 1

Refreshing news. I dig deeper. Where is that plain language draft of a bank guarantee I picked up at the Plain Language Institute's Conference a couple of years ago? Ah, here it is. I thumb through it eagerly, —the guarantee looks wonderful, but, like a bad penny, the consideration shows up again. This time, it appears further into the document, but now it has its own heading:

3 Consideration

3.1 I acknowledge that the bank has given valuable **consideration** for this
guarantee.²

Beside this clause is an explanatory note:

An agreement is only binding upon the parties to it when it is either made under seal or supported by some valuable consideration. Valuable consideration varies from situation to situation. It may be the arrangement between the Bank and the customer to lend money or to give the customer a longer period in which to pay existing debts. When I acknowledge receipt of valuable consideration, I acknowledge that there is nothing further the bank must do in order for this guarantee to be binding and enforceable against me.

Now I'm stumped. Not only has *consideration* been used, it has grown: *valuable* has been tacked on to its bulk.

I scurry about looking for other references. Aha! Bryan Garner's *Dictionary of Modern Usage* (1987) may provide an answer. Two of the four definitions are relevant:

consideration A. Legal sense The law uses *consideration* in a technical sense generally unknown to laymen: "the act, forbearance, or promise by one party to a contract that constitutes the price for which he buys the promise of the other (CDL). This word is one of the lawyer's basic terms of art. D. *Valuable consideration* and *good consideration*. The former phrase refers to an act, forbearance, or promise having some economic value; the latter refers to natural love or affection, or moral duty. To create an enforceable contract, *valuable consideration* is required. *Good consideration* is no good.³

Think of all the contracts without the word *valuable* which are unenforceable. More importantly for plain language writers, does Garner's assertion that consideration is "one of the lawyer's basic terms of art" mean plain language writers must use it? Surely not. In fact, I scrummage about and retrieve two longstanding plain language documents which have eliminated the original consideration terminology, the Bank of Nova Scotia Mortgage⁴, and the St Paul's insurance form reproduced in *Writing Contracts in Plain Language*.⁵ And, as Michele Asprey says: "Just because something is a term of art doesn't mean we have to use it."⁶

I need to go back to the basic principles of plain language: Who are my readers? Mortgage buyers who are usually not lawyers. What is the purpose of *consideration* in the mortgage? Simply put, in exchange for putting up the security of their house to the lender, borrowers are lent money to buy their house, and repay the lender's money plus interest over an agreed term. In other words, the borrower and lender make promises to each other, and certify their promises with their signatures. Why wouldn't we draft the mortgage without the *consideration* terminology at all?

I turn to my newest and last reference, Mellinkoff's 1992 *Dictionary of American Legal Usage*.⁶ Under the entry **Contracts** is a reference to *consideration*:

It [the definition of contracts] calls up ordinary English words—agree, promise, bargain, exchange, understanding, obligation . . . It brings back a whiff of the Latin *quid pro quo*: something for something, and a latter-day something called consideration: a benefit to the promisor or a detriment to the promisee—replete with learned qualifications.⁶

Oh, blessed be. Ordinary English words. And there is a cross reference to "*valuable consideration*". I thumb to the v's and find that valuable consideration is "an imprecise variant for plain *consideration* . . . The valuable additive is misleading; valuable is in the eyes of the beholder."⁷ The obstacle is a ghost of its former self. With courtesy to my readers, I eliminate the consideration - not the legal concept, the terminology.

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- 1 David Mellinkoff, *Legal Writing: Sense and Nonsense*, St. Paul; West Publishing Co., 1982, p. 1.
- 2 Alberta Law Institute, *Demonstration Project #1, Guarantee*, Oct. 14, 1992, p. 2.
- 3 Bryan Garner, *A Dictionary of Modern Legal Usage*, New York, Oxford University Press, 1987, p. 144.
- 4 Current version is Scotia Mortgage, Scotia Mortgage Corporation, 2343010(11/90).
- 5 Carl Felsenfeld and Alan Siegal, *Writing Contracts in Plain Language*, St. Paul, West Publishing Co., 1981, pp.245-253.
- 6 Michele Asprey, *Plain Language for Lawyers*, The Federation Press, 1991, p.83.
- 7 David Mellinkoff, *Mellinkoff's Dictionary of American Legal Usage*, St. Paul, West Publishing Co., 1992, p. 116.
- 8 *Ibid*, p. 671.