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Comment on The Plain English Movement

*David S. Cohen**

On first impression, the private and social benefits of plain English contracts and perhaps of plain English legislation seem obvious. Theoretically, by using contracts drafted in simple language we may increase consumer comprehension of contractual terms, engender more accurate contract decision-making, and promote more precise pricing of contract goods. Perhaps consumers who understand their contractual obligations will be more likely to fulfil them. Commercial goodwill may flower, and the use of plain English contracts has been advertised as a selling tool.¹ This approach to plain English, which reflects the views of Mr. Felsenfeld, fails to address or to analyze thoroughly several major assumptions and implications of plain English contracts.

The purpose of this comment is to demonstrate that plain

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¹ The argument has been made that the voluntary decision by many commercial enterprises to adopt plain English contracts is a thinly disguised attempt to increase their respective market shares. See Black, "A Model Plain Language Law", 33 Stan. L. Rev. 255 (1981), at pp. 263-4.

English contracts may carry more risks than benefits; the approach may, in fact, present a regressive stage in the evolution of consumer law. The reasons for this decidedly negative appraisal are as follows. First, plain English contracts and legislation are not the only vehicles for achieving increased information access in consumer contracting. Plain English should not be evaluated in the abstract, but must be assessed on a relative basis with these alternative tools. Second, because plain English contracts use the process of market transfer to encourage information flow, the result may be a disproportionate level of benefits being received by a limited, select group of consumers. Third, plain English legislation, as Mr. Felsenfeld admits, has focused on simplicity of language which may not bring about a concomitant reduction in the complexity of contracts. A consideration of the amount of information which we attempt to include in consumer contracts reveals that simplicity of language is not enough. A related point is that there are more than two actors involved in contract drafting; the judiciary which will be interpreting the contracts, and lawyers who will be redrafting and interpreting these contracts are left out of the equation by plain English proponents. It is my view that subsidiary reforms must also take place in the approach and method of judicial interpretation. A fourth concern with the plain English movement is that it reintroduces a concept of contract as a bilateral *event* rather than a multilateral process, focusing judicial attention on a discrete, simple document, with the possible result that the reality of consumer decision-making may become less relevant to a determination of legal rights. My fifth concern reflects a cynical but realistic appraisal of the likelihood that any amelioration of consumer contracts will come about as a result of the plain English movement. The conceptual complexity of a great deal of contractual information, the difficulty of inter-contract comparisons of the value of various mixes of price and non-price terms, and the contracting process itself, persuade me that all that will result is the transfer of paper bearing simple language. It is unlikely that there will be a corresponding transfer of information, and even less likely that this information will be processed, analyzed and used in the transactional process.

My first concern relates to any evaluation of plain English legislation which fails to take into account both the existing vehicles for increasing access to information in the consumer transactional

process, and such alternative methods of achieving that end as may not yet be in place. While Canadian law does not now enjoy plain English legislation it is arguable that common law and statutory doctrines of unconscionability which focus on procedural dysfunction in the contracting process², and judicially crafted concepts of reasonable notice of unusual or onerous contract terms³ may be applied to afford relief to consumers who apparently bind themselves to poorly drafted, archaically worded, inordinately complex consumer contracts containing unusual and substantively onerous terms. At the same time the potential threat of the application of these doctrines provides an economic incentive to suppliers of consumer goods and services to introduce clarity into their contractual documents. In addition, provincial trade practice legislation regulating deceptive marketing and selling techniques is drafted in broad enough terms to afford relief to consumers who are misled, or are likely to be misled⁴ when faced with contractual and extra-contractual⁵

² Leff, "Unconscionability and the Code — the Emperor's New Clause", 115 U. Pa. L. Rev. 485 (1967); M. J. Trebilcock, "An Economic Approach to Unconscionability" in B. J. Reiter and J. Swan, *Studies in Contract Law* (Toronto, Butterworths 1980), Study 11, p. 379. See *American Home Improvement Inc. v. MacIver*, 201 A. 2d 886 (use of terms so obtuse and archaic that a layman is not capable of understanding them). Article 2-316 of the Uniform Commercial Code adopts a similar approach in requiring certain exclusion clauses to be conspicuous in order to be enforced. Legislative intervention in several provinces supports the view that the statutory doctrine of unconscionability will include judicial review of the contract process, and of the consumer's ability to understand the agreement. See the Business Practices Act, R.S.O. 1980, c. 55, s. 2(b)(i); Trade Practice Act, R.S.B.C. 1979, c. 406, s. 4(2)(b); the Unfair Trade Practices Act, R.S.A. 1980, c. U-3, s. 4(1)(b); the Trade Practices Act, S. Nfld. 1978, c. 10, s. 6(1)(f).

³ See *Tilden Rent-A-Car Co. v. Clendenning* (1978), 83 D.L.R. (3d) 400, 18 O.R. (2d) 601 (C.A.); R. Hasson, "The Unconscionability Business — A Comment On *Tilden Rent-A-Car Co. v. Clendenning*", 3 C.B.L.J. 193 (1979).

⁴ Trade Practice Act, R.S.B.C. 1979, c. 406, s. 3(1); the Business Practices Act, R.S.O. 1980, c. 55, s. 2(a); The Unfair Trade Practices Act, R.S.A. 1980, c. U-3, s. 4(1)(d). See *Director of Trade Practices v. Household Finance Corp. of Can.* (1977), 33 C.P.R. (2d) 284, [1977] 3 W.W.R. 390 (B.C.C.A.). In *Commonwealth v. Monumental Properties Inc.*, 365 A. 2d 442 the argument was made that technical and archaic language violated a state statutory prohibition against "any other fraudulent conduct which creates a likelihood of confusion or misunderstanding".

⁵ By "extra-contractual" I mean to say that trade practice legislation has discarded the common law distinction between contract terms and representations which do not give rise to contractual liability. Generally, the legislation refers to representations, that is, statements which influence consumer decision-making. While the details of the legislation differ from province to province, the legislation is uniform in so far as it discards the contract/non-contract distinction. See Belobaba, "Unfair Trade Practices Legislation: Symbolism and Substance in Consumer Protection", 15 Osgoode Hall L.J. 327 (1977), at pp. 336-7.

representations which are deceptively drafted. The point to be made is that plain English may not be necessary or appropriate in *all* consumer contracts. In addition, trade practice legislation recognizes that contract is not bilateral, and accordingly the legislation regulates deceptive practices of *all* enterprises which disseminate information to consumers.⁶ Finally, common law doctrines of unconscionability and reasonable notice permit a flexibility of application which statutory plain English legislation may not. Any evaluation of plain English contracts and legislation must assess the benefits of the movement against these existing tools.

More importantly, the plain English movement must be evaluated against an approach which will provide consumers with comparative information about consumer products, services, and contract terms prior to the time at which their decision to enter into the transaction becomes effectively irrevocable. If we are concerned with consumer transactional decision-making, which of necessity will involve significant search costs, we ought to be providing comparative data of price and other primary contract terms.⁷ At the very least we might consider structuring our legal

⁶ The legislative philosophy which becomes apparent on close examination is that traditional contract analysis, which focuses on a bilateral event is an overly simplistic and unrealistic model in reflecting legal relationships. See Goldberg, "Toward an Expanded Economic Theory of Contract", 10 J. of Econ. Issues 45 (1976), at pp. 49-52; Macneil, "Economic Analysis of Contractual Relations: Its Shortfalls and the Need for a 'Rich Classificatory Apparatus'", 75 Nw. U. L. Rev. 1018 (1981); Macneil, *Contracts: Exchange Transactions and Relations*, 2d ed. (1978). The concept of contractual relations as distinguished from discrete events may reflect, as well, a view of decision-making as multilateral negotiations. In the consumer context, this would recognize that expectations, influence and remedial behaviour, both legal and non-legal in form, exist between consumers and direct suppliers, distributors, advertisers, individual sales employees and manufacturing enterprises. The legislation explicitly recognizes this perspective in severely limiting the traditional contract doctrine of vertical privity. Belobaba, *supra*, footnote 5 at pp. 340-1. See Trade Practice Act, R.S.B.C. 1979, c. 406, s. 1 (definition of supplier); the Unfair Business Practices Act, R.S.A. 1980, c. U-3, s. 1(h) (definition of supplier).

⁷ This is one of the services provided by consumer organizations in Canada and the United States. See R. A. Posner, *Economic Analysis of Law*, 2nd ed. (Toronto, Little, Brown & Co., 1977), p. 84. An example of this comparative information is The Standard Cox Life Insurance Tables, which is a compilation of life insurance premium price data. (See *The Globe and Mail* (Toronto, December 10, 1979).) The Quebec government has for several years funded a popular consumer magazine (*Protegez-vous*) with a circulation of several 100,000 which provides comparative data on numerous consumer products and services. The provision of information about one product, without comparative information, simply does not permit the consumer to make an informed decision to choose more

system to promote the private investment necessary to acquire, collect, evaluate and distribute that information prior to contracting. Perhaps comparative information will not be provided either by suppliers of goods or by private organizations organized for that purpose.⁸ If that is so, then we might seriously contemplate providing information about available contractual offerings out of public funds. Plain English contracts appear, at least on first impression, to be a terribly inefficient vehicle for reinforcing inter-contractual comparison of contractual terms. My point again is simply that plain English legislation must be evaluated on a relative basis with full appreciation of the benefits of existing approaches and potential alternatives.

My second criticism of plain English legislation and contracts is a response to the presumption underlying the movement that consumers are homogeneous.⁹ We are repeatedly referred to "the consumers", all of whom stand to benefit from the redesign and redrafting of contracts, and all of whom apparently will benefit equally. The truth of the matter is far more complex. Purchasers of some kinds of consumer goods and services may be drawn from particular socio-economic classes. Some consumers have little or no education, others have business experience, and still others have law degrees. Research bears out one's intuitive impression that the plain English movement may benefit a certain, limited class of consumers who are highly motivated to acquire information, assess contractual risks and take those risks into account when making purchase decisions.¹⁰ These consumers

or less of the desired good (whether that "good" is safety, durability, contractual remedies on breach, service facilities, notice terms or any other legal right set out in the contractual document) which will be recognized by the court. An alternative approach is to provide "labelling" information which depicts the relevant quality of a product, on a relative basis. Hirschhorn, *Product Safety Regulation and the Hazardous Products Act*, Technical Report No. 10, Economic Council of Canada (1981), at pp. 77-8.

⁸ The reasons for this non-disclosure range from the "public good" nature of a great deal of consumer information, market instability giving rise to a "high information depreciation rate", the private costs of disclosure to the supplier, and non-competitive marketing environments. See Trebilcock, *supra*, footnote 2 at p. 409; Posner, *supra*, footnote 7 at pp. 80-4.

⁹ A similar argument may be made on the side of commercial enterprise. Plain language legislation may have a disproportionate impact on small businesses which may be carrying on business in a very competitive environment. Leete, "Plain Language Legislation: A Comparison of Approaches", 18 Am. Bus. L. J. 511 (1981), at p. 517.

¹⁰ I admit, of course, that, in theory, the behaviour of this segment of the market may influence the contract terms available to non-marginal consumers. See text at footnotes 69 to 72, *infra*.

may in fact be those who would have been most likely to benefit from contractual information presented in traditional contract form.¹¹ Thus, the distributive consequences of the approach may be less than satisfying. If one assumes that all or some of the costs¹² of the plain English movement are passed on to all consumers as part of the price of the consumer good, a large sector of the public may unwittingly be subsidizing benefits received by a small, elite sub-class of consumers. The evidence suggests that, while lower socio-economic classes may stand to gain more from disclosure of information than other groups (since arguably they begin with less information), disclosure laws may in fact worsen the relative position of the poor. Such laws, instead of reducing the gap between rich and poor, may operate to give a net advantage to the "average" consumer.¹³ The explanation for the potential discriminatory impact of plain English and disclosure laws includes the fact that the poor may be disadvantaged to the extent that their particular background information, relative ability to process conceptual information, and educational levels may distort their comprehension of decidedly complex contractual terms.¹⁴ In addition, income disadvantages may play a significant role in the ability of the poor to invest in search costs necessary to evaluate transactional information on a comparative basis. Finally, the poor may suffer from market segregation in "contract terms",¹⁵ similar to the segmentation of

¹¹ Davis, "Protecting Consumers From Overdisclosure and Gobbledygook: An Empirical Look at the Simplification of Consumer Credit-Contracts", 63 Va. L. Rev. 841 (1977), at pp. 842, 844; National Commission on Consumer Finance, *Consumer Credit in the United States*, (1972), at pp. 176-7.

¹² These costs, while likely to be of a capital nature, are not insignificant. Virtually every description of plain English legislation stresses the inordinate amount of time, effort and money invested in redrafting consumer contracts. Experts from several disciplines are necessarily involved in the process, and the drafting process must take into account not only business risks and evaluation of legal consequences, but also language, syntax, style, sentence structure and length, format, colour and numerous other variables. See Black, "A Model Plain Language Law", *supra*, footnote 1 at p. 260.

¹³ McNeil, "Market Discrimination Against the Poor and the Impact of Consumer Disclosure Laws: The Used Car Industry", 13 Law & Soc. Rev. 695 (1979), at pp. 697-701; Garwood, "A Look at Truth in Lending — Five Years After", 14 Sant. Cl. L. Rev. 491 (1974), at pp. 500-3.

¹⁴ Davis, *supra*, footnote 11 at pp. 847-56; Schroder, Driver and Streufort, *Human Information Processing* (1967), pp. 109-15; Andreassen and Best, "Consumer Response to Unsatisfactory Purchases: A Survey of Perceiving Defects, Voicing Complaints, and Obtaining Redress", 11 Law & Soc. Rev. 701 (1977).

¹⁵ See Leff, "Contract as Thing", 19 Am. U.L. Rev. 131 (1970). In this essay, the contract

product markets along income lines. Research suggests that markets which serve a disproportionately high concentration of low income consumers may provide lower quality goods, exhibit less competition and perhaps have more marginal sellers than other markets.¹⁶ It is reasonable to suppose that the contractual terms distributed in these markets may be similarly skewed. If so, plain English legislation may simply represent a net gain to middle income consumers. Like so much consumer protection legislation and initiatives, the movement may benefit only those members of the special interest groups which support it.

The third point which must be raised in any assessment of the plain English movement is the scale against which one measures simplicity. As Mr. Felsenfeld and others have pointed out, a central object of the New York Plain English law has been to improve "readability".¹⁷ This itself poses some second order decisions relating to the standard of readability against which consumer contracts are to be measured,¹⁸ and relating to the degree of sophistication with which one approaches the task of improving readability, however we choose to define the term. While arguments may be raised in favour of a vague New York standard of readability, equally persuasive arguments may be made to support an objective quantitative standard or scale against which a particular contract is measured. Perhaps a "reasonableness" standard coupled with legislatively crafted criteria which the courts are directed to use when assessing a particular contract is a more suitable approach.¹⁹ In view of my later remarks, I do not consider the issue to be terribly important,

itself, as distinguished from the product distributed is viewed as a product bought by consumers.

¹⁶ See Schnapper, "Consumer Legislation and the Poor", 76 Yale L.J. 745 (1967); Andreason, *The Disadvantaged Consumer* (1975), pp. 36-54.

¹⁷ What is meant by readability is comprehension or understandability. This is the object of the plain English movement, and apparently is the attribute which the various quantitative tests employed in assessing plain English contracts are designed to measure. The New York legislation requires contracts to be "written in a clear and coherent manner using words with common and everyday meanings": N.Y. Gen. Oblig. Law, s. 5-702(a) (McKinney Supp. 1980-81).

¹⁸ See Black, *supra*, footnote 1 at pp. 278-80. Apparently, General Motors has developed a computer programme which assesses "readability". See *Drafting Documents in Plain Language* (Practising Law Institute, 1979), pp. 97-106; Redish, "Readability", *ibid*, pp. 163-4.

¹⁹ Black, *supra*, footnote 1 at pp. 273-85. See 1980 N.J. Sess. Law Serv. 492 (West), c. 125, ss. 2, 10.

although on balance I concur with the view that a vague "understandability" standard is apt to secure a more sensitive and realistic approach to the drafting of these contracts than is an objective standard.

My concern on this point relates rather to the emphasis placed on readability, with a concomitant reduction in attention to and emphasis on the issue of information load. An assumption underlying the New York plain English law is that information comprehension is maximized primarily by improving the readability of consumer contracts. There can be little doubt that syntax, grammatical structure, layout and design, colour, captions and headings, sentence structure and length, the use of non-technical language, and similar efforts to reduce obscurity of language are necessary elements of a comprehensive information programme.²⁰ As Mr. Felsenfeld points out, however, this is only part of the battle. An important element in the redrafting of consumer contracts is the elimination of content. This involves the considerable risk that substantive legal rights will be affected by this process of literary surgery. This risk is, none the less, a necessary element in the plain English movement.

A number of studies have indicated that an individual's ability to process information depends, to a significant degree, on the amount of information which is presented to him for assimilation.²¹ Assuming this to be true, how does plain English legislation operate to reduce extraneous clauses and needless clutter? Furthermore, if the legislation or approach does mandate brevity, who is to decide what goes in and what comes out? The answer, of course, is the supplier of the contract. Even a rudimentary understanding of the place of contractual documents in contract law suggests that a reduction in contract terms will take place in only one direction.

I begin with the thesis that one purpose of contract law is to

²⁰ This is not to say that plain English legislation ought to establish detailed rules for all these variables. Connecticut apparently has attempted to do precisely that: Pub. Act. No. 79-532, s. 2(c), 1979 Conn. Pub. Acts 776.

²¹ See Davis, *supra*, footnote 11 at p. 846; Leete, *supra*, footnote 9 at p. 512; Whitford, "The Functions of Disclosure Regulation in Consumer Transactions", [1973] Wis. L. Rev. 401; Forshey, "Plain English Contracts: The Demise of Legalese", 30 Bay. L. Rev. 765 (1978). In *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568 (1980), the court said that "Meaningful disclosure does not mean *more* disclosure. Rather, it describes a balance between 'competing considerations of complete disclosure ... and the need to avoid [information overload]'."

provide contracting parties with a judicially crafted standard form contract,²² and thus to reduce the transaction costs which would otherwise be incurred in an attempt to anticipate and to provide explicitly for all significant kinds of contractual risk. This reduction in transaction costs, including the costs of identifying the risks, negotiating the allocation of the risks, drafting the document and perhaps enforcement, is complemented by the argument that the common law or judicial rule will itself reflect an efficient allocation of risk.²³ Where the legal background consisting of common law or statute law²⁴ would, where the contract is silent, allocate a particular risk to the consumer (*i.e.*, where the judicial decision would favour the commercial enterprise) it is unlikely that a plain English contract would include disclosure of this implicit risk allocation. It is equally unlikely that a consumer would be aware of the contingency, and even if he were, it is highly unlikely that he would be cognizant of the legal allocation of risk. Possible reasons for a decision not to disclose this allocation of risk are not difficult to identify. First, the private costs of this "warning" of contractual risk will be borne entirely by the seller. Second, disclosure of this risk may encourage aggressive bargainers, once they have access to this information, to attempt to bargain for a reallocation of risk to the commercial enterprise. There is little reason to suspect that the latter will wish to accept the contingency, or even to engage in the negotiations. Finally, the supplier may point to the plain English interest of brevity and simplicity as a reason for silence. Whatever the reason, the result will be non-disclosure of material risks allocated by the common law or statute to consumers. Thus, the plain English movement, when assessed in light of these private incentives towards material non-disclosure²⁵ has serious implica-

²² See Fuller and Eisenberg, *Basic Contract Law*, 3rd ed. (1972), pp. 89-103; Tullock, *The Logic of the Law* (1971), pp. 35-47.

²³ See text at footnotes 32, 33, *infra*.

²⁴ For example, the use of appropriate language in a contractual document will trigger the operation of provincial sales legislation, or perhaps federal negotiable instruments law. Legal concepts drawn from the general law outside the terms of a contractual document cannot possibly be disclosed in the contract itself. This function of common law and legislation was expressly recognized by the House of Lords in *Ashington Piggeries Ltd. v. Christopher Hill Ltd.*, [1971] 1 All E.R. 847 at p. 881 *per* Lord Diplock.

²⁵ See Kronman, "Mistake, Disclosure, Information, and the Law of Contracts", 7 J. of Leg. Studies 1 (1978); Posner, "Strict Liability: A Comment", 2 J. of Leg. Studies 205 (1973), at p. 211; Green and Moore, "Winter's Discontent: Market Failure and Consumer Welfare", 82 Yale L.J. 903 (1973), at p. 907.

tions. Plain English contracts which leave out information of greater significance than the information which is put in, can only lead to irrational decisions premised on the remaining misleading, albeit simply put, information.²⁶

If, on the other hand, prior common law decisions or statutes would allocate a particular risk to the seller, common sense, or rather self-interest, would demand that the supplier, very simply, in very plain English, allocate that risk to the consumer. Thus, plain English contracts which take into account information load as well as simplicity will become vehicles for disclosing only those risks which would otherwise be borne by the commercial enterprise. Mr. Felsenfeld has suggested that altruism and perhaps commercial embarrassment will influence commercial enterprises to refrain from the most excessive, visible abuses of this otherwise inexorable process. Absent strong evidence of this former motive in commercial practice, and in light of my later remarks regarding the probability of any appreciable modification of consumer behaviour, some other indicia to business of what terms ought to be left out in the interests of improving comprehension may be appropriate.

One commentator has pointed out that the use of a legal concept such as a "security interest", or alternatively a decision to remain silent, may be devices to describe extremely complex sets of ideas and rules where the result called for by the legal concept or silence is in accord with the "ordinary expectations and experience" of consumers.²⁷ However, in a great many cases consumers have no expectations as to the allocation of a great majority of contractual risks. To ask the courts to engage in a fruitless search for a fictional intention is not likely to produce a rational outcome. In addition, there is a serious risk that what is an "ordinary expectation and experience" must be derived at least in part from prior law and previous contracts. The result may be that traditional substantive allocations of risk will continue unabated.

Another approach is to eliminate all information which is not sufficiently valuable to justify the increased information load, and

²⁶ See Landers and Rohner, "A Functional Analysis of Truth in Lending", 26 U.C.L.A. L. Rev. 711 (1979), at p. 730.

²⁷ Procaccia, "Readable Insurance Policies: Judicial Regulation and Interpretation", 14 Is. L. Rev. 74 (1979).

which is too complex to be communicated effectively.²⁸ This approach, while attractive, necessitates a relatively precise calculation of the effect of an additional bit of information on human decision-making. In addition, we are told that what is or is not “valuable” is to be determined by assessing the likelihood that the creditor will in fact rely on the legal right established by the term in light of the impact of the occurrence of the contingency on his business enterprise. If the term has rarely if ever been relied upon in fact, it is termed non-essential and, therefore, ought to be excluded in the interests of consumer comprehension of the remaining terms. As a starting point, this definition of what is “essential” fails to take into account that the occurrence of a specific contingency may have an impact which varies with time, economic conditions, cost of money, and with the severity of the loss or damage suffered. Equally important, it fails to consider what lawyers and judges will do with the contract if and when the contingency does occur.²⁹

Finally, I might add that terms which are unenforceable pursuant to provincial legislation,³⁰ or which are likely to be held unenforceable through the application of common law or statutory principles of unconscionability and the like, must be excluded from plain English contracts. Those terms not only add to information load and thus reduce comprehension, they actually reduce awareness of the actual allocation of responsibility in law.³¹ It seems trite to say that a term which effectively

²⁸ Davis, *supra*, footnote 11 at pp. 900-04. See Landers and Rohner, *supra*, footnote 26 at pp. 723, 734.

²⁹ See text at footnotes 33 to 36, *infra*.

³⁰ An obvious example would include a clause purporting to permit a secured creditor in British Columbia to seize consumer goods, and to sue for the deficiency owing on the debt obligation. See Chattel Mortgage Act, R.S.B.C. 1979, c. 48, ss. 23, 25(1); Sale of Goods on Condition Act, R.S.B.C. 1979, c. 373, s. 19. Another instance of such a clause would be an attempt to abrogate the implied conditions under sales legislation in several provinces. See the Consumer Protection Act, R.S.O. 1980, c. 87, s. 34; the Consumer Protection Act, R.S.M. 1970, c. C200, s. 58 as amended; Sale of Goods Act, R.S.B.C. 1979, c. 370, s. 20.

³¹ The New York Plain Language law has not, apparently, eliminated this practice. See Siegel, “Drafting Simplified Legal Documents” in *Drafting Documents in Plain Language* (Practising Law Institute, 1979), p. 190. See Black, *supra*, footnote 1 at pp. 286-87. The point has been made that at least one province has enacted legislation which establishes that the inclusion of such clauses is a violation of the Act, giving rise to the imposition of a fine or a term of imprisonment. See the Consumer Products Warranties Act, R.S.S. 1978, c. C-30, s. 7(2) as amended. It is possible that provincial trade

misleads a consumer into believing that he is under a legal obligation when he is not, or which purports to deny the existence of legal rights which in law cannot be varied, directly contradicts the object of the plain English movement, which is to facilitate the processing of transactional information.

I referred earlier to the failure of the plain English movement to consider fully the likely consequences of a judicial resolution of a dispute where a plain English contract is either silent on a private allocation of risk, or perhaps uses an ambiguous or technical term. Economic theorists,³² and more recently the courts in the application of doctrine,³³ have adopted as an explicit analytical tool the argument that where the contract is silent, the court should allocate the risk to the party who could have avoided the loss by taking appropriate preventive measures, or alternatively could have assumed the risk through liability insurance or self-insurance, at the lower cost of the two parties. If one adopts this analysis, silent consumer contracts will often result in an allocation of risk to the commercial enterprise which is apt to have more accurate information as to the risk, obtained at a lower cost, and which can take advantage of economies of scale to prevent or insure against the risk at a marginal cost lower than the consumer's. If that is how the courts will resolve disputes in the future, and I have no reason to believe that they will not, I foresee substantial intrusions into the concept of brevity and reduced information load, as more and more contingencies become "essential" or "valuable" over time, and commercial enterprises are faced with absorbing the costs of silence which may accompany efficient judicial allocations of risk.

Related to this issue is an appreciation of the risks inherent in

practice legislation which prohibits a term which leads a consumer into believing he does not have rights where in fact he does, may afford relief in the case of "dishonest" contract terms. See Trade Practice Act, R.S.B.C. 1979, c. 406, s. 3(3)(m); Consumer Research and Evaluation Branch, Consumer and Corporate Affairs Canada, *Product Liability: Reflections on Legal Aspects of the Policy Issues* (1980), pp. 17-18.

³² See MacKaay, "The Costliness of Information and Its Effect on the Analysis of Law" in *Proceedings of the Seventh Annual Workshop on Commercial and Consumer Law*, Jacob S. Ziegel, ed. (Toronto, Canada Law Book Ltd., 1979), p. 135; Posner, *supra*, footnote 7 at pp. 74-7; Demsetz, "When Does the Rule of Liability Matter", 1 J. of Leg. Studies 12 (1972), at p. 28; Posner, "Some Uses and Abuses of Economics in Law", 46 U. Chi. L. Rev. 281 (1979), at p. 285.

³³ See *Photo Production Ltd. v. Securicor Transport Ltd.*, [1980] 1 All E.R. 556 (H.L.), at p. 568 *per* Lord Diplock; *George Mitchell (Chesterhall) Ltd. v. Finning Lock Seeds Ltd.*, [1981] 1 Lloyd's L. Rep. 476 at p. 480.

the application of traditional canons of contractual construction. Much of the existing complexity of contracts results from the quite rational response of draftsmen to adverse judicial decisions based upon distorted and artificial meanings attributed to contractual terms.³⁴ If one expects commercial enterprises to simplify their contractual documents, and to bear the entire risk of any resulting ambiguity, one is apt to be disappointed. Judicial concerns with consent and risk allocation carried out through a facade of contractual interpretation³⁵ can only serve to exacerbate contractual complexity. It is one thing to acknowledge the incentive effect of rules of interpretation which demand linguistic precision.³⁶ It is an entirely different matter to send out a market signal to commercial enterprises to redraft their plain English contracts to complicate already precise language, and to include explicit additional clauses designed to resolve anticipated disputes. The only result will be to shift the risk expressly to the consumer, while simultaneously reducing the over-all degree of consumer comprehension of the contract terms due to increased information load.

My fourth, and possibly most serious dissatisfaction with the plain English movement derives from its apparent assumption that the contract is a bilateral, discrete event, rather than a multi-lateral process. Plain English advocates apparently adhere to the historical view of the contract as a temporally well-defined (in fact, instantaneous) reciprocal consensual event: a meeting of the minds.³⁷ Prior to the contract there is no legally relevant relation-

³⁴ See Holden, *Securities for Bankers' Advances* (1954), p. 186:

In view of the fact that a contract of guarantee is a relatively simple transaction, it may be thought strange that the guarantee forms employed by the banks are such extremely lengthy documents. Even in recent years fresh clauses have been added to them. The highly-skilled legal advisers employed by the banks try to foresee every possible contingency but, alas, even they are not gifted with the wisdom of Solomon, with the result that very occasionally a guarantor is able to escape liability. When that happens, yet another clause is added and, in this fashion, the mesh around future guarantors is drawn tighter and tighter.

³⁵ See, for example, *Wallis, Son & Wells v. Pratt & Haynes*, [1911] A.C. 394 (H.L.) (exclusion of warranties will not exclude conditions); *Webster v. Higgin*, [1948] 2 All E.R. 127 (C.A.); *George Mitchell (Chesterhall) Ltd. v. Finning Lock Seeds Ltd.*, *supra*, footnote 33. See generally G. H. Treitel, *The Law of Contract*, 4th ed. (London, Stevens & Sons, 1975), pp. 141-2; Waddams, *The Law of Contracts* (Toronto, Canada Law Book Ltd., 1977), pp. 282-3.

³⁶ See Procaccia, *supra*, footnote 27 at p. 79.

³⁷ This approach to contract formation — the model of discrete events — has for too long

ship, and after the contract the parties' legal relationship is unamendable except perhaps by another contract.³⁸ Accordingly, plain English movement advocates assume that all of the information in a plain English contract must be given to the consumer at once. He is expected to read the document, assimilate the information, place a value on the various risks and contingencies described in the document, assess those risks in light of risks described in competitors' contracts, reflect on the relative value of the risks in the context of the actual product or service being transferred, and make a purchase decision. To describe this "event" is to admit that it does not take place.

Decades of legal reform have been directed at an expansion of the legally relevant temporal boundaries of contract law,³⁹ and at an expansion of the legally relevant parties who participate in the process of contract formation. Some authors have advocated an obligation of good faith bargaining in the pre-contractual phase of sales contracts.⁴⁰ "Pre-contractual" damages are recoverable in contract,⁴¹ in recognition of the fact that complex commercial arrangements may involve a large number of parties whose relationships are interdependent and evolve over time. Trade practice legislation expressly establishes that legally relevant representations may occur before, at the time of, and subsequent

been the focus of classical Anglo-Canadian contract jurisprudence. See P. S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford, Clarendon Press, 1979), p. 427. The view corresponds, as Professor Macneil has pointed out, to neo-classical economic analysis of exchange "in which no duties exist between the parties prior to contract formation, and in which the duties of the parties are determined at the formation stage": Goldberg, *supra*, footnote 6 at p. 49; Macneil, "The Many Futures of Contract", 47 So. Cal. L. Rev. 691 (1974).

³⁸ See *Gilbert Steel Ltd. v. University Const. Ltd.* (1976), 67 D.L.R. (3d) 606, 12 O.R. (2d) 19 (C.A.).

³⁹ As one commentator has quite correctly expressed it, "A characteristic of certain consumer offences is that they are complex, diffused over time and unpublicized": Cranston, "Creeping Economism: Some Thoughts on Law and Economics", 4 Brit. J. of L. & Soc. 103 (1977), at p. 109. See also Leff, "Injury, Ignorance and Spite — The Dynamics of Coercive Collection", 80 Yale L.J. 1 (1970), at pp. 32-3.

⁴⁰ Ontario Law Reform Commission, *Report on Sale of Goods* (1979), at p. 169. Labour relations legislation has for decades recognized an obligation to bargain in good faith in negotiating a collective agreement: the Labour Relations Act, R.S.O. 1980, c. 228, s. 15; Labour Code, R.S.B.C. 1979, c. 212, s. 63. I do not mean to say that determining what is meant by "good faith" bargaining is a simple task. The point is simply that the recognition of formation obligations constitutes implicit legislative acknowledgment of the ongoing relationship in contract.

⁴¹ *Anglia Television Ltd. v. Reed*, [1972] 1 Q.B. 60 (C.A.); Ogus, "Note", 35 Mod. L.R. 423 (1972). See also *Lloyd v. Stanbury*, [1971] 1 W.L.R. 535 (Ch. D.).

to the occurrence of a consumer transaction.⁴² Abolition of the parol evidence rule in consumer transactions,⁴³ increased statutory and judicial supervision of advertising and other promotional activities,⁴⁴ and contractual integration of point of sale representations⁴⁵ evidence a judicial and legislative awareness that relevant information influencing transactional decisions is received over an extended period of time, and may be disseminated by a wide range of enterprises participating in the design, manufacture, marketing and ultimate supply of a consumer good or service. Protection of expectations in a modern context reflects the multilateral nature of contracts, and the temporal elasticity of consumer decisions. Plain English contracts may, therefore, represent a regressive development in the legal analysis of consumer contracts. To the extent that the courts are encouraged to focus on a bilateral relationship defined entirely by the terms of a discrete printed document, we risk a de-emphasis of the realities of transactional decision-making in the consumer context.

Plain English advocates have made the point that one of the benefits of the use of plain English contracts is that "because consumers can read and understand plain English forms, the forms are *more* likely to stand up in court."⁴⁶ If that is so, and one might realistically suspect that the apparent amelioration of procedural unfairness will engender a greater willingness to enforce plain English contract terms, then we have created a tool

⁴² See Trade Practice Act, R.S.B.C. 1979, c. 406, s. 3(2).

⁴³ The Business Practices Act, R.S.O. 1980, c. 55, s. 4(7); Trade Practice Act, *supra*, footnote 42, s. 28; The Consumer Products Warranties Act, R.S.S. 1978, c. C-30, s. 9. This approach has been advocated on a more general basis. See Law Reform Commission of British Columbia, *Report on Parol Evidence Rule* (1979), at pp. 17-21; Ontario Law Reform Commission, *Report on Sale of Goods* (1979), at p. 115.

⁴⁴ Much of the recent trade practice legislation deals expressly with representations made in advertising and other promotional material. See Trade Practice Act, *supra*, footnote 42, s. 2; the Business Practices Act, R.S.O. 1980, c. 55, s. 4(9). In addition the courts have been increasingly receptive to arguments imposing contractual liability on manufacturers and direct suppliers of goods founded on representations contained in "extra-contractual" material. See *Fuller v. Ford Motor Co. of Can. Ltd.* (1978), 94 D.L.R. (3d) 127, 22 O.R. (2d) 764 (Co. Ct.); *Murray v. Sperry Rand Corp.* (1979), 96 D.L.R. (3d) 113, 5 B.L.R. 284 (Ont. H.C.J.); *Naken v. General Motors of Can. Ltd.* (1979), 92 D.L.R. (3d) 100, 21 O.R. (2d) 780 (C.A.); *Thauberger v. Simon Fraser Sales Ltd.* (1977), 3 B.C.L.R. 193 (Prov. Ct.).

⁴⁵ See Consumer Protection Act, R.S.B.C. 1979, c. 65, s. 10; The Consumer Products Warranties Act, R.S.S. 1978, c. 30, s. 35.1 (new by S.S. 1979-80, c. 17, s. 14).

⁴⁶ Black, *supra*, footnote 1 at p. 264.

which focuses judicial attention on the discrete contract event to the exclusion of the less visible, but certainly as relevant, extra-contractual influences. If one were to rephrase the quotation above as "because consumers [do] read and understand plain English forms, [have a competitive variety of contract terms available to them], [and make purchase decisions on the basis of an inter-contract comparison of a range of consumer contracts], the forms are more likely to stand up in court", my concern with regression would be less valid. However, in the discussion which follows I suggest that this revision of the quotation is entirely unrealistic. Consumers, even if given plain English contract forms, will behave no differently than they do when faced with complex contract forms. If that is so, then the mere fact that they *can* read and understand the terms is not especially relevant.

My point regarding the plain English movement involves an assessment of the primary assumption upon which it is based, that consumers will not only receive a plain English document, but that they will also receive and process the information contained in the document and use it in the transactional process. Mr. Felsenfeld argues that the ultimate goal of plain English should be to influence consumer behaviour. This assumption explains the single most important object of the plain English movement: to use Mr. Felsenfeld's words, "the general amelioration of consumer contracts",⁴⁷ thereby benefiting consumers generally, and lessening the impact of my earlier criticism that this kind of regulation constitutes a distribution of wealth from the many to the few.

Research and analysis demonstrate that this goal, however laudable, is unlikely to be attained. Increased disclosure of information, even when coupled with some degree of increased comprehension, has not apparently resulted in increased competitiveness in the distribution of sets of contractual terms. A preliminary empirical study⁴⁸ of the Magnuson-Moss Warranty Act carried out four years after its enactment compared pre-Act warranty coverage with post-Act coverage across six industries.⁴⁹

⁴⁷ The same point has been made by others. See 119 Cong. Rec. at pp. 972-3.

⁴⁸ See Wisdom, "An Empirical Study of the Magnuson-Moss Warranty Act", 31 Stan. L. Rev. 1117 (1979). A more recent published study, which assessed warranties distributed in 1975, demonstrated a similar narrow range of available warranties: Gerner and Bryant, "Appliance Warranties as a Market Signal?", 15 J. of Cons. Affairs 75 (1981).

⁴⁹ These were manufacturers of refrigerators, television sets, automobiles, toasters, digital watches and tennis rackets.

The data revealed that only one industry had experienced a significant modification of its contractual warranty coverage. Almost 80% of the contractual warranty terms were unchanged, and the remaining demonstrated only a slight shift towards increased coverage.⁵⁰ Even if one accepts that these results are not entirely free from uncontrolled variables, and even if one discounts their relevance by positing that the pre-Act coverage reflected a reasonable level of competition, they cannot be entirely disregarded. Notwithstanding the motives of altruism and risk of embarrassment offered by Mr. Felsenfeld as possible explanations for higher quality contractual terms, suppliers of contracts, even plain English contracts, need clear economic incentives to alter their product. These market signals will only be generated by consumers whose purchase decisions are influenced by the information made available to them through the plain English movement. If that does not occur, the only product of the plain English movement will be well-drafted, simple contractual documents which expressly allocate the risk of all major contingencies to the consumer where silence could result in enterprise liability, which remain silent as to risks allocated by law to the consumer, and which omit reference to minor, valueless contingencies.

The question which must be answered is whether the transactional process has been or is likely to be influenced by plain English legislation or plain English contracts. The object of the movement, which is to create a contractual environment in which consumers' behavior will be modified by the information they are receiving (and in which the information they are receiving will be modified by their behavior) is unlikely to be achieved for several reasons. Some of these we can do nothing about; others are exacerbated by the existing plain English legislation described by Mr. Felsenfeld; while still others have been left unattended to.

The foundation for my position that plain English legislation may not have an impact on consumer transacting is quite simple. Standard form consumer contracts may be characterized as exercises of private legislative power.⁵¹ As others have described

⁵⁰ Wisdom, *supra*, footnote 48 at pp. 1137-41.

⁵¹ Kessler, "Contracts of Adhesion — Some Thoughts About Freedom of Contract", 43 Col. L. Rev. 629 (1943); Llewellyn, *The Common Law Tradition: Deciding Appeals* (Boston, Little, Brown & Co., 1960), pp. 362-71; Goldberg, "Institutional Change and the Quasi-invisible Hand", 17 J. of L. & Econ. 461 (1974), at p. 484.

it, an enforceable consumer contract entered into in a situation of monopoly, or *quasi*-monopoly, or where the industry competitors have acted in collusion in drafting the contract is simply the application of private law by one party on to another.⁵² The consumer is offered contractual terms on a take-it-or-leave-it basis in a situation where no second option is available or where all competitors use the same clause. It is not the lack of bargaining which disturbs us; that much is perfectly understandable. The costs of negotiation, or even the anticipated costs of potential negotiation, drafting, pricing and enforcement of even a significant percentage of uniquely tailored consumer contracts is prohibitive.⁵³ Our concern must be with the availability of the alternatives to which a consumer may turn, since any definition of non-coercive consumer contracting involves an assessment of the existence of an opportunity to make an informed decision among a competitive range of alternative choices.⁵⁴ Our analysis of the value of the plain English movement must take into account the likelihood that consumers will have this range of choices available to them, will understand the particular contractual term at issue, will make a rational decision to invest in acquiring information about competitive terms, will be able to make a comparison among those terms, and will be able to decide upon a particular mix of supplier reliability, quality, quantity, price, express contractual allocations of primary risks, and implicit contractual allocations of primary and secondary risks. If such endeavours were costless, if consumers were able to acquire, process, comprehend, evaluate and act upon information about competitive contractual terms at no cost, we would not need to be concerned with standard form contracts in their traditional form, let alone embark upon the plain English movement. Such inter-contract comparisons are not, of course, costless, and thus we must assess whether the marginal benefits of the additional information exceed the marginal costs of its acquisition, processing, evaluation and comparison.⁵⁵

⁵² Gluck, "Standard Form Contracts: The Contract Theory Reconsidered", 28 Int. & Comp. L.Q. 72 (1979), at p. 79; Slawson, "Standard Form Contracts and Democratic Control of Law Making Power", 84 Harv. L. Rev. 529 (1971), at pp. 552-3.

⁵³ Llewellyn, "Book Review", 52 Harv. L. Rev. 700 (1939); Posner, *supra*, footnote 7 at pp. 84 *et seq.*

⁵⁴ Trebilcock, *supra*, footnote 2 at p. 395; Gluck, *supra*, footnote 52 at pp. 79, 80.

⁵⁵ See Trebilcock, *supra*, footnote 2 at pp. 412-19; Schwartz and Wilde, "Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis", 127 U. Pa. L. Rev. 630 (1979); Landers and Rohner, *supra*, footnote 26 at pp. 718-19.

We will presume that a reasonable level of competition exists in the industry in respect of contract terms; that we are not dealing with a monopolistic or oligopolistic industry structure; and that competitors have not colluded in the drafting of contractual documents.⁵⁶ But even if one presumes a competitive environment in respect of contractual terms, the conceptual difficulty of the information presented, the information processing capabilities of consumers, the environment in which this acquisition and processing is expected to occur and the search costs necessary to draw relevant comparisons, all suggest that the plain English contract as a device to “ameliorate consumer contracts” is a misdirected endeavour.

Our object in plain English contracts is not simply to exhibit information. We expect that information to be received, processed and evaluated by the consumer. Research into consumer behavior suggests that a critical variable influencing comprehension is the conceptual difficulty of the information presented.⁵⁷ It is at this point that the nature of contractual information becomes critical. Contractual information may describe a set of very complex facts. Very often, however, it describes a set of potential future facts, and establishes a second set of absolute future facts which will flow from the first. This second set will typically describe the legal rights of one or both of the parties. The contractual information thus does not merely describe facts, but rather creates law, and may involve a level of legal complexity which may reduce comprehension to a level below that which justifies the cost of the reform.

⁵⁶ See *Henningsen v. Bloomfield Motors Inc.*, 161 A. 2d 69, 87 (N.J.S.C., 1960); Procaccia, *supra*, footnote 27 at p. 93; Keeton, *Insurance Law* (1971), para. 2.11. The practice of adopting industry-wide contract terms has been magnified by the recent practice of adopting industry codes of practice. The motives for such organization may or may not be laudable. The result may be standard form contracts which are identical among all commercial enterprises offering the relevant goods or services within a particular market. Lowe and Woodroffe, *Consumer Law and Practice* (1980), pp. 310-49; Harvey, *The Law of Consumer Protection and Fair Trading* (1978), pp. 206-13. Where the standard form contracts are negotiated, as is the case in England under the Fair Trading Act 1973 (U.K.), c. 41, s. 124, then there is some assurance that the reduction in choice may be offset by a corresponding benefit in substantive legal rights. Where the standard form contract is simply a result of industry collusion, then the only effect is to reduce the range of options open to consumers.

⁵⁷ Davis, *supra*, footnote 11 at pp. 853-6.

One study⁵⁸ has examined the ability of consumers to understand the following clause:

Default: I will be in default if I fail to pay an instalment on time or if I sell or fail to take proper care of the collateral or if I move the collateral to another location without notifying the seller.

Only 20% of the subjects correctly identified the meaning of the clause when given the following choices:

If, through your carelessness, the refrigerator becomes damaged and the seller finds out about it:

- (a) There is nothing seller can do as long as you make your payments on time.
- (b) You will be in default, and seller may repossess the refrigerator.
- (c) Seller must permit you to have the refrigerator repaired, but if you do so, there is nothing more the seller can do.
- (d) Seller can force you to trade it in and buy another one.
- (e) Don't know/unsure.

Another less reliable study involved exposing law students to a "readable" automobile insurance policy. The students were requested to answer a series of simple informational questions about the policy including the identity of the persons insured and excluded events. None was certain about the answers, and most could not offer unambiguous information even after re-examining the policy.⁵⁹ If we accept that the level of conceptual difficulty of information in many consumer contracts will be no lower than that of the default provision described above, a level of comprehension necessary to have consumer preferences revealed in a competitive market-place is unlikely to be achieved.

An additional difficulty becomes apparent if one evaluates the environment in which plain English contracts are presented to consumers. Consumers' ability to process information is apt to be directly related, at least at the outset, to the length of time during which they are able to consider the information. Plain English contracts are likely to be presented to consumers no earlier in the contracting process than were traditional contractual documents. In addition, the information is presented to the consumer in an environment created by the supplier; distractions may range from non-contractual promotional material and the "good" itself, to background sales pitches by the supplier and his agents. More

⁵⁸ *Ibid.*, at p. 879.

⁵⁹ Procaccia, *supra*, footnote 27 at p. 83.

importantly, the plain English contract is apt to be presented after the agreement has been concluded. Thus in the case of a collateral promissory note to secure a consumer sales transaction, the consumer would have psychologically committed himself to the purchase, the price of the good, the price of the loan and perhaps the magnitude of the periodic loan payments. Disclosure of the contract terms under the plain English contract takes place after this non-legal commitment has occurred, with the result that search costs necessary to an effective inter-contract comparison of the terms are far less likely to be incurred. Thus plain English contracts, which allegedly are designed to influence transactional behavior, would be employed in such a way as to transfer information when it is least likely to influence behavior.⁶⁰

This phenomenon is simply a manifestation of the behavioral perspective described earlier under which transactions are viewed as discrete events rather than processes. If one considers that purchase decisions are made over time, then the search costs as to the expected kind and value of contractual terms will be incurred (if at all) to acquire pre-contract information on an informal basis from advertisements, popular knowledge of commercial reputation, and perhaps from organizations which produce inter-contract comparisons of contract goods.⁶¹ There is a significant risk that this information will come to be considered less relevant in a legal evaluation of contractual relationships which are consummated by clearly written, readable, plain English contracts.

Even if we were to assume an adequate level of comprehension, a consumer must still face the formidable task of assessing the value, at least on a relative basis, of the contractual allocation of risk.⁶² This valuation should involve, at the very least, an evaluation of the likelihood of the risk occurring, an attempt to estimate the financial loss likely to occur as a result,⁶³ and a forecast of the time when the risk will occur in order to arrive at an appropriate time discount factor. Not all of this information can be conveyed in the contract itself; some of the variables will

⁶⁰ Landers and Rohner, *supra*, footnote 26 at pp. 715-16.

⁶¹ See text at footnote 7.

⁶² See Trebilcock, *supra*, footnote 2 at p. 417.

⁶³ Even to know that the kind of loss for which recovery is possible is limited to those "likely" to occur presumes that the consumer has digested both historical and more recent decisions defining "remoteness" in contract law.

be idiosyncratic, while the occurrence of the risk may depend on deliberate choice as well as unforeseen events.

Equally relevant is the difficulty of evaluating these cost factors in light of the "unfeasibility of numerical comparisons"⁶⁴ of low risk contingencies. The entire process may be worthless. One analyst apparently has concluded that the contractual default packages on a \$1,300 loan must be perceived to vary by at least \$850, in order to make it rational for the consumer to agree to an additional one percent annual rate of interest on the loan.⁶⁵ This analysis is further reinforced by the argument that consumers may misperceive the costs of low risk contingencies,⁶⁶ leading them to focus on the major element of the transaction — price — and the physical attributes of the consumer good. The result may be that plain English contracts, like contracts in general, may suffer from an over-emphasis on price, the major component of the transaction, and a complementary under-appreciation of the contractual risk contingencies, the classical harsh-terms-low-price combination.⁶⁷

Once this valuation has been done for one contract term, it must be done for all others (since we have assumed that only major contingencies are included in plain English contracts) and as well for major contingencies which are not expressly allocated under the contract. The consumer must then engage in the evaluation process, assuming it can be carried out accurately, for a reasonable cross-section of alternative contract formulations to arrive at an inter-contractual comparison of the relative value of the mixes of contractual terms available to him. The processing costs alone are likely to render any benefit from the task irrelevant.

To these processing costs we must add search costs. At the very least the consumer must invest some time, effort, and perhaps money in acquiring information about these alternative contract formulations. The ability to compare alternative mixes of contract terms as a pre-condition to effective participation is made all the more difficult if one adopts, as a premise of the plain

⁶⁴ Landers and Rohner, *supra*, footnote 26 at p. 728.

⁶⁵ *Ibid.*, at pp. 729-30.

⁶⁶ See Tversky and Kahneman, "Judgment under Uncertainty: Heuristics and Biases", 185 Science 1124 (1974); MacKaay, *supra*, footnote 32 at pp. 128-9; Hirshhorn, *supra*, footnote 7 at p. 5.

⁶⁷ Goldberg, *supra*, footnote 51 at p. 486.

English movement, an approach which favours flexibility, innovation and experimentation in language, format, style and structure. The approach advocated by Mr. Felsenfeld — that plain English draftsmen be permitted to work in freedom — can only result in a variety of contractual provisions relating to the same risk, which are so phrased as to make each of them when viewed alone as reasonably clear, but which effectively preclude, or at least make prohibitively expensive, meaningful inter-contractual comparisons. Standardization of terminology will reduce these transaction costs, while individual freedom of artistic and linguistic expression may reduce the ability of consumers to process comparative contractual information. A sophisticated analysis of plain English contracts, and of consumer decision-making, suggests that standard comparative data describing and evaluating contract terms may be preferable to plain English contracts as a technique for facilitating and reinforcing consumer decision-making.⁶⁸

Advocates of plain English legislation may respond to these criticisms by pointing to the existence of market competition; not all consumers need react to certain price-quality combinations in order to influence sellers to offer competitive contract terms. Rather, as Posner, Trebilcock and others have put it, suppliers of contract terms will have to arrange a mix of price and non-price terms attractive enough to prevent consumers at the margin from switching their business to another supplier.⁶⁹ Thus we need not concern ourselves with the multitude of consumers who may exhibit amotivational tendencies, who lack the ability to

⁶⁸ See text at footnote 7. Cranston, *supra*, footnote 39 at p. 109; Leff, *supra*, footnote 39 at p. 33. One author has suggested that consumer decision-making may be improved by establishing an "information environment" which will permit comparative data on products (and one presumes, on contract terms) to be used by consumers most effectively. See Bettman, "Issues in Designing Consumer Information Environments", [1975] J. of Cons. Res. 169; Bettman and Zinin, "Information Format and Choice Task Effects in Decision Making", [1979] J. of Cons. Res. 141. Recent evidence suggests that consumers prefer comparative *standard* information to improve prepurchase information. See Claxton and Ritchie, *Consumers' Perceptions of Prepurchase Shopping Problems and Solutions: Major Problems and Solutions* (Consumer Research and Evaluation Branch, Consumer and Corporate Affairs Canada, 1981), p. 31. Standardization of form was one of the primary objectives of the Truth in Lending Legislation. See Landers, "Some Reflections on Truth in Lending", U. Ill. L.F. 669 (1977), at pp. 684-7.

⁶⁹ Trebilcock, *supra*, footnote 2 at p. 399; Posner, *supra*, footnote 7 at pp. 84-8; Kornhauser, "Unconscionability in Standard Forms", 64 Cal. L. Rev. 1151 (1976); Goldberg, *supra*, footnote 51 at p. 485.

comprehend and evaluate contract terms, or who cannot afford the search costs to engage in inter-contractual comparisons of non-price terms. Rather, if plain English legislation increases information acquisition to some degree, and if elimination of express allocation of low risk contingencies reduces the distortion in assessing the value of contract terms, we might perceive a thickening "of the margin of sophisticated consumers whose actions 'make' the market."⁷⁰

Unfortunately, this analysis suffers from two serious shortcomings. The first is that the movement of consumers away from a supplier presumes an element of knowledge of the product's undesired characteristics. What was or was not a rational purchase decision in respect of a contractual term may not be discovered for a considerable length of time in the case of some long term consumer contracts. Even if an event does occur, is the loss due to non-compensation by the other contracting party related to the price paid by the consumer, the reliability of the commercial supplier, the failure to take out insurance, or to the misallocation of risk? In many cases the contingency may never arise, and where things are apparently working out, it is next to impossible to assume that a consumer will be driven to conclude that a paid for allocation of risk to the seller was not worth the cost. In other words, participation in the market-place may not generate information about the product. Theoretically, when a consumer purchases a particular mix of contract terms on a regular basis he may discover that his perceptions of the value of the particular mix was not accurate. Not only may the imperfection not be discovered (or if discovered, improperly ascribed), the effective ability of even a sophisticated consumer to signal his supplier that he prefers an alternate mix of terms is certainly subject to the same constraints as was the original contract

⁷⁰ Trebilcock, *supra*, footnote 2 at p. 418; Schwartz, "Sellers Unequal Bargaining Power and the Judicial Process", 49 Ind. L.J. 367 (1974); Schwartz, "A Re-examination of Non-substantive Unconscionability", 63 Va. L. Rev. 1053 (1978); MacKaay, *supra*, footnote 32 at pp. 133-4. The sophisticated consumer whose behavior may be influenced by increased access to information, may be joined by consumer "agents", who "negotiate" standard form contracts with commercial enterprises. See *A. Schroeder Music Publishing Co. Ltd. v. Macaulay*, [1974] 1 W.L.R. 1308 (H.L.), at p. 1316 *per* Lord Diplock; *Green Ltd. v. Cade Bros. Farms*, [1978] 1 Lloyd's L. Rep. 602 as noted by Ziegel in 57 Can. Bar Rev. 105 (1979). This form of standard form contract negotiation has been institutionalized in England under the Fair Trading Act 1973 (U.K.), c. 41, s. 124(3).

decision. Indeed the switch may be less likely to occur in light of the sunk investment of time, money and effort presumably undertaken as a prerequisite to the original, sophisticated, ultimately unsatisfactory decision.

The analysis of the marginal consumer may also be misleading in so far as it presumes that all consumers will be treated alike. As we saw earlier, it may be that different markets in contract terms exist for different classes of consumers. Suppliers may “contract term discriminate” by agreeing to renegotiate the mix of contract terms for the aggressive bargain-seeking, sophisticated consumer while retaining the prohibitive search and processing costs of inter-contract comparisons for others.⁷¹ All plain English contracts may do is to increase the numbers of the elite information-seeking consumers who know enough to be bought off.⁷²

For the majority of consumers, plain language contracts may simply make us feel better. Feeling better may be valuable, indeed that may be all that we are paying for in contracting for consumer goods. If that is so, then it makes little difference if we derive pleasure from the good or the contract language. And if feeling better is worth the price, then the transaction — the purchase of the psychological satisfaction of believing that we know what we are doing — may be efficient. Yet there are two unanswered questions. The first involves the proposition that plain language contracts may *increase* contractual distortions. Trebilcock has argued that consumers attach a price to uncertainty and lack of information by discounting the consideration

⁷¹ It is remarkable that so little empirical data has been collected on this critical issue. See Mueller, “Residential Tenants and Their Leases: An Empirical Study”, 69 Mich. L. Rev. 247 (1970).

⁷² It is true, of course, that the use of plain English contracts may create some offsetting benefits. There is some evidence that consumer understanding may, in fact, improve where simplified documents are used. Davis, *supra*, footnote 11 at p. 896. In addition, even if consumers do not *use* the information in transacting, the incidence of contractual defaults may decrease if consumers are made aware, even after contracting, of the legal consequences of certain behaviour. Similarly, contract terms requiring action once a certain event has occurred (such as a term requiring notification of an insurance loss within a prescribed time) may be adhered to with greater frequency where consumers are able to understand terms once a loss has taken place. Finally, the inequality of wealth and knowledge between commercial enterprises and consumers brought about by the formers’ accessibility to legal advice, familiarity with contract terms, and expected return on legal investments may be reduced, if the contract terms are comprehensible to a non-expert when a dispute has arisen as to compliance with the contract.

they are prepared to pay for entering into undetermined, but intuitively adverse risk allocation arrangements.⁷³ The misperception that consumers may have that they *do* understand the plain English terms offered to them may operate to reduce that discount, and thus exacerbate the consumers' misallocations of resources. The second point involves an intuitive dissatisfaction with the morality of selling *only* happiness. One must always face the question as to whether consumers would, with full knowledge of the game, agree to it.