LITERACY AND ACCESS TO ADMINISTRATIVE JUSTICE IN CANADA:

A Guide for the Promotion of Plain Language

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Copies of *Literacy and Access to Administrative Justice in Canada*, **which includes a CD-ROM**, may be obtained by contacting

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Arthur B. Trudeau
Executive Director
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FOREWORD

It is a fact that today thousands of people in our country cannot afford a lawyer and must rely on their own skills and resources to access the justice system, be it through the courts or one of the many administrative tribunals. Those who represent themselves often do not understand the legal system, the role of courts and tribunals, or the law. When these self-represented litigants also suffer from low literacy skills, the challenges for them and the justice system are compounded.

Those of us who have no problem reading, and for whom the written word is as understandable as the spoken word, may not fully comprehend the frustration experienced by those who have difficulty reading when faced with the document-laden justice system. How can they understand tribunal procedures and rules? How can they understand the documents put forward by the opposing party? How can they understand the tribunal's decision itself? This is a problem that requires a multi-faceted solution.

Key participants have been working to develop new strategies to help meet these challenges. For example, the National Judicial Institute has published a report on the effects of low literacy on individuals who come before the courts. The Canadian Judicial Council has completed a set of Model Jury Instructions in plain language and is working on tools for judges and lawyers to help them better communicate with self-represented litigants. Recently, a collaboration among a number of interested parties in British Columbia has resulted in a pilot project Self-help Information Centre for self-represented litigants in Vancouver.

This publication is another valuable piece in the solution matrix. It provides helpful observations, commentary and suggestions on how administrative tribunals can more effectively deal with the challenges presented by self-represented persons who have difficulty understanding written documents. I hope this booklet will help those involved with the management of administrative tribunals relate to the problems faced by persons who have low literacy skills, and that it will result in making this aspect of the justice system more understandable and accessible for all.

The Right Honourable Beverley McLachlin, P.C.
Chief Justice of Canada

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1. Introduction

Administrative tribunals affect people in all aspects of their lives: decisions in disputes with landlords, neighbours, tenants, and co-workers, workers' compensation cases; tax assessment appeals; Employment Insurance benefits appeals, to name but a few. Tribunals were set up to be more accessible and less costly than courts. In addition, the subject expertise of the tribunal members should allow fair, impartial, and timely decision-making.

Hundreds of thousands of Canadians come to administrative tribunals each year. Clients who appear before administrative tribunals are less likely to be represented by counsel than if they were in court. These people are faced with an unfamiliar environment, probably unknown administrative processes, and difficult legal language. Add low literacy skills and we have to question how well justice is served.

Almost 50 per cent of Canadians aged 16 and over have difficulty understanding and using information in documents such as job applications, bus and train schedules, instructions for taking medicine or for operating machinery.[1]

The Right Honourable Beverley McLachlin summed up the situation very well: "If we cannot understand our rights, we have no rights."[2]

Purpose of the manual

Our main purpose is to improve access to justice for people with low literacy skills by

1. making administrative tribunals more aware of the literacy problems faced by many of their clients;
2. describing how tribunals can set up a literacy program;

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1. Statistics Canada, Human Resources and Skills Development Canada, and the National Literacy Secretariat, *Reading the Future: A Portrait of Literacy In Canada* (Ottawa: Statistics Canada, 1996). See generally.
2. Right Honourable Beverley McLachlin, P.C. "Preserving Public Confidence in the Courts and the Legal Profession" (distinguished Visitor's Lecture, University of Manitoba, Winnipeg, Manitoba, February 2, 2002).

3. providing information on revising written and visual materials so they are clear and easy to understand;
4. providing suggestions on training staff to recognize and work with clients who have low literacy skills.

Rights of clients and participants

People have a right to understand the legal processes they are involved in. Case law in Canada states that fair justice is received only when a person can understand what is going on in a court or tribunal and can represent him/herself adequately. Administrative tribunals, like other courts, have to meet the standards set in case law and make sure their clients know what is going on. If this is not done, case law states that individuals are not truly informed and therefore cannot truly exercise their rights. The result may be denial of justice.

In March 2004, the Canadian Judicial Council announced that plain language should be used for instructions in the courtroom. The Chief Justice of Canada made the following comments when these instructions were released:

> The instructions will help judges explain legal technicalities in plain language that ordinary people can understand and apply…They will benefit judges, lawyers and jurors, and strengthen the administration of justice in this country.[3]

An extensive section on case law is in Appendix A.

Responsibilities of administrative tribunals

We—tribunal staff, members, lawyers—cannot solve the literacy problems of clients, witnesses, interveners, and others (called participants from here on) appearing before us. But we are responsible for making sure that people with literacy problems have access to justice.

3. Canadian Judicial Council, "Model Jury Instructions," press release, March 26, 2004.

Procedural fairness

Administrative tribunals, along with the courts, have the mandate to make decisions about rights. Tribunals' decisions have legal consequences—just like those of the courts—and therefore we have to observe procedural fairness in all our deliberations. Judith McCormack summarizes it neatly in her article, "Nimble Justice":

> Tribunal processes should be fast, fair, accessible and responsive to the needs of the parties, and…tribunal jurisprudence should be original, vigorous and continually evolving.[4]

Clear and understandable communications

Tribunals have many opportunities to tell clients about the process they will go through and to explain everything simply and clearly. We must make tribunal processes and materials as understandable as possible to all those with low literacy skills. The ways we communicate include the following:

- written material
- brochures and pamphlets
- videos
- posters
- signage
- forms
- web sites
- pre-hearing explanations or instructions
- language and explanations used during the hearing

However, there will be cases where tribunals cannot help a client understand the process. We should then refer the client to appropriate literacy services.

4. Judith McCormack, "Nimble Justice: Revitalizing Administrative Tribunals in a Climate of Rapid Change," *Saskatchewan Law Review 59* (1995): p. 385.

Assistance for unrepresented clients

A quote from the Chief Justice, although dealing with courts, also applies to tribunals where participants are less likely to be represented by counsel:

> Unrepresented litigants encounter their first difficulties at the Courthouse door. Court staff, already overburdened…face increasing numbers of self-represented litigants who ask for explanations of the legal process as it pertains to their cases…[court staff] are rightly hesitant to offer legal advice.
>
> That means not only devoting sufficient resources, but also using the most creative mechanisms possible to ensure full and meaningful access to, and participation in, the legal process…
>
> Ideas include easy accessibility to forms and instructions, provision of brochures and other educational materials, and information about the availability of lawyers for consultation about specific questions…
>
> …we should do what we can to make the law clear and accessible to average Canadians. The law is, perhaps, the most important example of how words affect people's lives. There is truth in the proposition that if we cannot understand our rights, we have no rights.[5]

The unrepresented client puts more pressure on us, the tribunal members and adjudicators. We have to help the unrepresented client to ensure fairness but we still have to be the impartial decision-maker. If the client also has literacy problems, the situation is made more difficult.

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

Accessible justice

We need to look at three areas to make sure justice is accessible to all:

1. literacy skills that individuals need to make their case
2. user-friendliness of the written and visual material that is a part of the tribunal process
3. training of our tribunal staff and members to recognize clients with literacy problems and to work with them appropriately.

In the next section, we briefly review the state of literacy in Canada to show how widespread the problem of low literacy is. We then look at plain language as a way of making all our communications—written, visual, and spoken—clear and easy to understand.

2. Literacy in Canada

What is literacy?

Many definitions exist. The dictionary calls literacy "the ability to read and write."[6] But literacy is more than that. It is the ability to read, yes, but it is also being able to understand the meaning behind the words. The International Adult Literacy Survey defines literacy as:

> the ability to understand and employ printed information in daily activities, at home, at work and in the community, to achieve one's goals and to develop one's knowledge and potential.[7]

The Canada Information Office (CIO) further refined the notion of literacy as:

> the ability to use printed and written information to function in society…. [to use] visual information …based on written texts…[that] calls upon the logic of the written word.[8]

How is it measured?

A school grade level is often used to measure functional literacy. Grade 8 is the level generally accepted as the benchmark by most national and international organizations—organizations such as the Organization for Economic Cooperation and Development, the United Nations, and the Canadian federal and provincial governments.

A Statistics Canada survey reported that, of those Canadians with less than a grade 8 education, 98 per cent have low reading skills. But even grade 8 does not promise a great degree of literacy. For those who have

6. *Canadian Oxford Dictionnary*, 2nd ed. (Toronto: Oxford University Press, 2004), p. 897.
7. Susan Goldberg, *Literacy in the Courtroom: A Guide for Judges* (Ottawa: National Judicial Institute, 2004) p. 9.
8. Canada Information Office, *Issues and Challenges in Communicating with Less Literate Canadians* (Ottawa: Canada Information Office, 2000), p. 1.

completed this grade, 88 per cent have low reading skills.[9] (Other characteristics that could flag possible literacy problems are looked at in Section 4, Step 4, "Communications.")

But we cannot assume that higher education automatically means a person is literate. The same study says some people at all educational levels will have difficulty with the written word. For example, 11 per cent of those with university education have low reading skills.[10]

The problem will just get worse. The Hudson Institute suggested in the late 1980s that the workplace requires greater degrees of literacy.[11] As the requirements for literacy go up, so do the costs of low literacy.

How literate are Canadians?

A series of reports, studies, and newspaper articles from the mid-1980s to the mid-1990s brought literacy squarely to the public's attention. Southam News, backed by research from the Creative Research Group, determined that approximately 4.5 million Canadians did not have the tools to read and write simple things or to do arithmetic at the level needed to cope with daily activities.[12]

The Statistics Canada study contains sobering numbers:

- 48 per cent of Canadians aged 16+ have difficulty understanding and using information contained in editorials and articles, as well as instructions (for machinery, equipment, medicine, etc.).
- 47 per cent of Canadians aged 16+ have difficulty extracting and using information presented in forms, job applications, transportation schedules, maps, tables, graphs.

9. Statistics Canada, et al., *Reading the Future*, p. 9.
10. Statistics Canada, et al., *Reading the Future*, p. 6.
11. Marie-Josée Drouin, *Workforce Literacy: An Economic Challenge for Canada* (Ottawa: Hudson Institute of Canada, 1990), see generally.
12. Peter Calamai, "Broken Words: Why Five Million Canadians Are Illiterate—A Special Southam Survey" (Toronto: Southam Communications Ltd., 1987).

- 48 per cent of Canadians aged 16+ do not have the necessary knowledge to perform simple math based on printed documents such as calculating a tip, or interest on a loan.[13]

Compounding the problem is that the mother tongue of many Canadians is neither English nor French. And if these Canadians have low literacy skills in their mother tongue, they will also have them in French or English.

Another survey by Statistics Canada looked at the reading levels of Canadians and the day-to-day practical tasks we all do.[14] Then the Canadian Bar Association "translated" the everyday tasks into basic legal tasks. The levels of reading and understanding are the same as those used in the Statistics Canada survey.[15] These examples show clearly how challenging life is for Canadians without literacy skills.

- **Level 1: 7 per cent read at this level; they would have difficulty**
  - signing a simplified lease in the space designated for the tenant's signature if there were several places for signatures;
  - finding the appointment time in a simply written letter from a lawyer;
  - finding out when to reply or to appear after receiving a court notice or summons.

- **Level 2: 9 per cent read at this level; they would have difficulty**
  - consulting the Yellow Pages to find a local legal aid office in a list of several offices;
  - finding the two mornings a week when their counsellor is available in a schedule of office hours of three family court counsellors;

13. Statistics Canada, et al., *Reading the Future*, as referred to in *Issues and Challenges in Communicating with Less Literate Canadians*, Canada Information Office, June 2000, p. 1.
14. Statistics Canada, *The Survey of Literacy Skills Used in Daily Activities* (Ottawa: Statistics Canada, 1990), see generally.
15. Canadian Bar Association, *Reading the Legal World: Literacy and Justice in Canada* (Ottawa: CBA, 1992), p. 21–23.

  - looking at a catalogue of brochures about legal subjects and filling in an order form with publication numbers and prices.

- **Level 3: 22 per cent read at this level: they would have difficulty**
  - reading a standard rental agreement or lease and finding the section that deals with a particular issue, such as who is responsible for repairs;
  - finding and using information in documents or letters if the information is not stated clearly and explicitly or if it is written in "traditional" legal language;
  - preparing a financial statement for an application for child support.

- **Level 4: 62 per cent read at this level and**
  - can read most everyday material;
  - can integrate information from several parts of a document;
  - would have some problems rewording a news account of a legal decision.

What are the costs of low literacy?

To society

Low literacy costs all of us money—an estimated $5 billion in 1987.[16]

There is the time lost, information not understood, errors made, work having to be redone, appointments missed, and underemployment. Our own economy and our ability to compete in the expanding global economy are affected by low literacy skills of many of the population.

Employment problems for low literacy Canadians are growing and that affects Canadian business.[17]

16. Canadian Business Task Force on Literacy, *Measuring the Costs of Illiteracy in Canada* (1988), see generally.
17. Robert Deslauriers, *The Impact of Employee Illiteracy on Canadian Business* (Ottawa: Conference Board of Canada, 1992), see generally.

To the individual

Our daily lives include many essential activities, some simple, others more complicated:

- reading and understanding voting instructions;
- doing homework with our children;
- reading notes and instructions from their school;
- dealing with banking information;
- reading the instructions on a bottle of medicine;
- reading instructions at work on how to operate machinery, understanding manuals, reading and employing safety and emergency procedures;
- finding or applying for a job;
- reading forms and filling them in to apply for birth certificates, passports;
- reading a lease or a car rental agreement;
- studying for a written exam for a driver's licence;
- reading the newspaper to find out about job opportunities, the weather, sports, health issues, political issues.

Not being able to fully understand what they read makes every day a challenge for those with low literacy skills.

Inadequate literacy skills put a stop to further education, make it harder to get a job, make it difficult to participate fully in the community, and sometimes block access to justice. The Lawyers for Literacy project in British Columbia describes how low literacy often prevents clients from pursuing legal remedies. It can also interfere with lawyers' "ability to obtain the appropriate remedy."[18]

18. Lawyers for Literacy, British Columbia Branch of the Canadian Bar Association, *Communicating Clearly, How To Recognize When Your Client Doesn't Understand and How You Can Help* (www.plainlanguagenetwork.org/LawyersForLiteracy/Booklet/index.html).

What is legal literacy?

Legal literacy is the ability to understand the words used in the legal context and to access rights in the justice system.[19] Most people, literate or not, don't understand even the simplest legal expressions.[20]

Legal language is very structured with very specific meanings and concepts. Even if people with low literacy have found a way to cope with their daily routine, they find it very difficult to read, understand, and use material related to legal problems. They do not understand the concepts contained in the words, even if they understand the words themselves. Therefore, they cannot understand what is expected of them and often the implications of what is being said.

The John Howard Society of Canada did a thorough study of inmates' literacy levels. The survey showed that 70 per cent had literacy levels below grade 8 and that 88 per cent fell below the grade 10 level.[21]

The courts' lack of understanding about low literacy can

- result in miscarriages of justice
- reduce court efficiency and effectiveness
- be a barrier to reducing crime and recidivism
- contribute to a culture of systemic discrimination based on ability to read and write.[22]

In their report, the Canadian Bar Association said it "was struck by the simple but profound awareness that the legal system is based entirely on the written word. If you have trouble with the act of reading, it may not be possible to work through the system."[23]

19. Canadian Bar Association, *Reading the Legal World*, pp. 23–24.
20. Lawyers for Literacy, *Communicating Clearly*.
21. Susan Goldberg, *Literacy in the Courtroom*, p. 7.
22. Susan Goldberg, *Literacy in the Courtroom*, pp. 12–13.
23. Canadian Bar Association, *Reading the Legal World*, p. 23.

What can be done?

Administrative tribunals, like other courts, have to follow the standards set in case law. We can

- make sure, as much as is possible, that our clients understand all the proceedings;
- examine how we deal with low literacy clients and how this can affect fair administration of justice;
- follow the lead of many organizations and use “plain language” in all our communications, written, visual, and spoken.

The next section discusses plain language and how it can help us serve the public better.

3. Plain Language

What is plain language?

Plain language is a way of writing and presenting information so it is clear and concise and so the reader knows how to act on the information. We have to think about the needs of the client in every piece of information we produce.

This is not a manual on plain language but here are some plain language techniques to give you an idea of what we mean:[24]

- Use plain words and simple expressions.
- Use short sentences.
- Use only one or two ideas per sentence.
- Use the active voice.
- Use verbs rather than nouns made from verbs (e.g., “suggest,” not “make a suggestion”).
- Cut out unnecessary words.
- Use personal pronouns.
- Be positive in tone.
- Use white space effectively in the layout.
- Keep lines to a reasonable length.
- Use bullets wherever possible.
- Use a serif font in written material (this is a serif font) in the body of the text rather than sans serif (Arial is best used in headings).

24. Gordon Writing Group, “Plain Language: All You Really Need” (workshop, Ottawa).

Why use it?

There are many reasons, all of them good.

- 48 per cent of the population has difficulty reading printed materials and can deal only with simple and clearly laid out materials.
- More people, whether they have reading problems or not, will understand documents, how to fill out forms, and what is expected of them.
- Low literacy and other vulnerable people will be better served.
- Staff save time as they also understand the policies and other documents better and can answer questions more quickly and easily.
- Governments are more accessible to the public and save staff time.
- It saves money.
- It "is…the single most helpful technique…for ensuring that everyone understands court proceedings."[25]

Who uses it?

- Governments and businesses in Canada, the United States, Australia, and England—it saves money and increases efficiency.
- The Small Claims Court in British Columbia—the same staff can handle 40 per cent more work after its Acts, forms, and brochures were re-written in plain language.[26]
- The Alberta Department of Agriculture—simplifying its forms saved easily $3.5 million.[27]

25. Canadian Bar Association, *Reading the Legal World*, p. 34.
26. Joseph Kimble, "Writing for Dollars, Writing to Please", *Scribes Journal of Legal Writing* (1996): p. 8.
27. Christine Mowat, "Alberta Agriculture Saves Money with Plain Language", *Clarity* 38 (1997): p. 6.

- The British Columbia Securities Commission—it wanted to be a more effective regulator. It undertook an extensive plain language program, reduced the number and complexity of its regulations, trained staff, and developed a very successful guide, *The BCSC Plain Language Style Guide*.[28]
- The Federal Communications Commission in the United States—re-writing its regulations in plain language made them more accessible. This saved five full-time positions.[29]
- Veterans Affairs in the United States—it wanted to make its materials more understandable. After revising a form letter, staff received 83 per cent *fewer* calls asking for clarification. Savings from this one revised form? $40,000 a year.[30]
- Australian justice system—simplifying the wording in a summons freed up 26 employees.[31]

Where should it be used?

Plain language goes beyond just re-writing written communications. We have to look at all the ways we use to communicate with clients and change them if necessary:

- written material such as forms, brochures, pamphlets, posters
- spoken communication
- signs in the tribunal offices
- videos
- web sites

28. Joyce Maykut, Q.C., "Plain Language: A Case Study at the British Columbia Securities Commission" (presentation to the Plain Language Conference, Toronto, September 26–29, 2002).
29. Joseph Kimble, "Writing for Dollars," p. 9.
30. Joseph Kimble, "Writing for Dollars," p. 9.
31. Joseph Kimble, "Writing for Dollars," p. 10.

Any arguments against plain language?

The main argument is that plain language cannot convey the same meaning and nuances as traditional legal writing. This implies that legal writing or communications are meant only for those with specialized training. But this view does not take into account the following:

- Those working in legal areas who do not have the specialized training of lawyers also have to fully understand legal information.
- Members of the public do not have specialized training. They need to understand legal documents (such as leases, wills, summons, etc.) or the court/tribunal processes. They are not literate in legal matters or legal language and often do not have legal counsel to help them.
- If members of the public have low literacy levels in general, they are doubly affected when faced with specialized legal language.

Peter Butt, an Associate Professor of Law at the University of Sydney, believes strongly that you can express all the legal concepts necessary using plain language. He gives the example of a 20-year-old plain language insurance policy being used by Australia's largest car insurance company. There has been no litigation against their document in that time.[32]

How to find out more about plain language

Appendix B, "Resources," contains an extensive list of guides to plain language as well as other references in print and on the Internet.

32. Chuck Letourneau, "The Plain Web" (presentation to the Plain Language Conference, Toronto,September 27, 2002).

4. Developing and Implementing a Literacy Program

Getting started

How do you turn your organization into one that answers the needs of people with low literacy skills? You need the following:

- the support and commitment of the people at the top
- a clear understanding of how the tribunal operates
- knowledge of who your clients are
- a strong plan
- communications that are as clear as possible
- trained tribunal staff and members who make the process easier for clients
- ways to evaluate the program and monitor it on an on-going basis

Six steps

These steps will start you off on developing a literacy program. However, because administrative tribunals vary a lot, you will have to adapt what follows to your particular tribunal and to the needs of your clients.

Step 1. Organization audit

- What is your mandate?
- Who do you serve?

Step 2. Client/participant literacy audit

- Who are your clients/participants?
- What are their literacy needs?

Step 3. Planning the literacy program

- Is there senior management commitment?
- Is there an action plan?

Step 4. Communications

- Is there a plan to review and revise communications?
- Who is responsible?

Step 5. Training

- How will staff become aware of literacy needs?
- Is there a training plan?

Step 6. Evaluation and maintenance of the program

- Do you have an evaluation plan?
- Who will have ongoing responsibility for the program?

Goals for the program:

The goals for the program are

- improved access to justice;
- well-trained staff who are sensitive to clients' literacy problems;
- adjudicators who are sensitive to the literacy issue;
- a well-understood way of dealing with vulnerable Canadians;
- providing timely, relevant, understandable information;
- meeting the needs of the clients;
- fulfilling the mandate of the tribunal.

Step 1. Organization audit

What is your mandate?

Who do you serve?

How do clients find you?

How do you communicate with your clients before, during, and after a hearing?

Before we start changing anything, we have to examine the tribunal as it is at the moment—its purpose, structure, communications, and how it deals with clients at all stages of the process. Only then can we make appropriate suggestions for improvement.

Mandate and clients

Review the mandate of the tribunal. This will help to identify who the clients are likely to be and give an idea of any literacy problems to be expected. It will also help in identifying others who might come before the tribunal—for example, witnesses, and interveners. We are calling these other persons "participants" in this manual.

Clients and participants will be looked at in greater detail in Step 2.

Communication with clients

An audit will reveal

- how clients hear about the tribunal;
- how your tribunal communicates with clients and participants—before, during, and after a hearing;
- who communicates with them;
- what materials are used throughout the whole tribunal process;
- any current efforts to make access to the tribunal easier for low literacy clients.

This whole topic of communications is discussed in more detail in Step 4.

Sample audit questions

You can use the following checklist as a starting point when reviewing the organization of the tribunal. Some of your answers will lead to a system to deal with the needs of clients and participants with low literacy skills. And some of these preliminary questions may lead to other questions that are specific to your tribunal mandate.

1. What is your core business?
2. How do clients reach your tribunal? How do they find out about you?
3. Do you have an outreach program to reach possible clients?
4. What forms and written material do you use?
5. Do you use printed material?
6. Do you use videos?
7. Do you have a web site?
8. What literacy level are your communications aimed at?
9. Where is your office and how is it designed?
10. What signage is there?
11. How is the waiting room designed?
12. Do you have the facilities to meet clients privately?
13. Which members of staff deal directly with clients and participants, before, during, and after the hearing?
14. How do you deal with clients and participants when they come into your office?
15. How do you deal with clients and participants once they have started into the process?
16. What procedures and processes do you have in place?
17. What kind of information do clients have to provide at each stage of the process, and in what format?
18. How do you deal with clients and participants during the hearing process?
19. Do you help clients and participants when they come before the tribunal?
20. How do you deal with clients after the hearing?
21. Can you identify clients and participants with low literacy skills?
22. Can you list how the tribunal process could affect people with low literacy?
23. What efforts are you making to make sure clients understand what is expected of them before, during, and after the hearing?
24. Do other organizations advertise your services?

Step 2. Client/participant literacy audit

Who are your clients and other participants?

What are their needs?

Do they have a first language other than English or French?

What are the markers for literacy?

How do you recognize literacy problems

- before a hearing?
- during a hearing?
- after a hearing?

Who are your clients and other participants?

Your clients and other participants were identified in Step 1. Knowing who your clients are can help you design communications that they can read.

First language other than French or English?

If a client's mother tongue is not English or French, and if there are also literacy problems, the situation becomes more difficult. The tribunal then has to be inventive in its ways to solve this double problem.

What are their needs?

Clients' needs are, of course, directly related to the reason they are coming to the tribunal. These will vary tremendously due to the great variety of tribunals. However, legal literacy will usually be an issue for unrepresented clients.

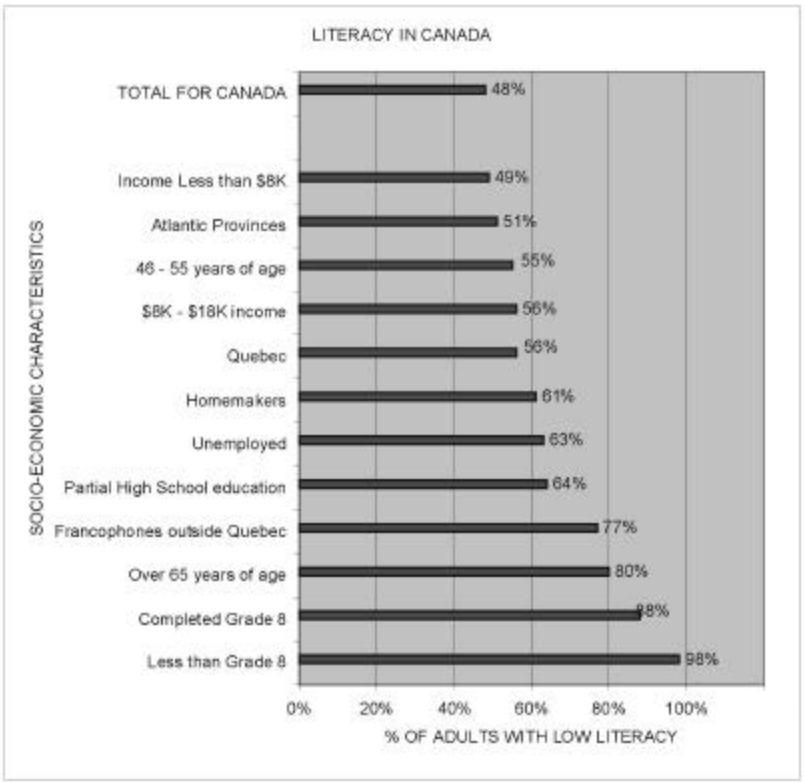
Clients with literacy problems will also have legal literacy problems. In general, they will need help from tribunal staff and members **even if they have a lawyer**.

We are concentrating here on their literacy needs and how we can identify those with problems reading.

Markers or indicators for literacy

A Statistics Canada study provides a startling picture of where we might expect to find people with low literacy skills. The study suggests there are some groups in Canada that have a much higher proportion of barely literate people.[33]

The following chart shows how widespread literacy problems are. It also indicates which of a tribunal's clients might, at first glance, be suspected of having reading problems. The chart shows what we have already learned—that 98 per cent of those with less than a grade 8 education have low reading skills.



33. Statistics Canada, et al., *Reading the Future,* as referred to in *Issues and Challenges in Communicating with Less Literate Canadians*, Canada Information Office, June 2000, p. 2.

But we cannot assume that clients with grade 10 or their high school diploma or a university degree for that matter can read easily. Here are some statistics showing the percentage of adult Canadians who have low reading skills:[34]

- 11 per cent of those with a university diploma
- 30 per cent of those with a college diploma
- 43 per cent of high school graduates
- 51 per cent of those who have some high school
- 88 per cent of those with Grade 8
- 98 per cent of those with less than Grade 8

Recognizing literacy problems before the hearing

Many with low literacy levels are very skilled at coping. They have various ways of hiding the problem. Knowing what these markers are—and training staff to recognize and handle them—will go a long way to improving access to the services of your tribunal.

Asking the client directly

It may not be appropriate or useful to ask clients directly if they can read. Opinion is divided on whether an outright question is insensitive, or if it should be any different from asking clients and participants any other kind of personal question. However, there are a number of ways to get an idea of who the clients might be and if they might have low literacy skills.

Reviewing the file

Check if there are any data on past clients or if some information can be collected from the file. A profile may begin to emerge, especially if the client fits into one or more of the groups that have a high proportion of people with literacy problems. If the person is a past client, it should be marked on the file so everyone will be aware of the problem and help appropriately.

34. Statistics Canada, et al., *Reading the Future,* p. 4.

Behaviours and mannerisms

When staff meet the client initially, there are certain behaviours that might indicate literacy problems.[35] Some behaviours that can help you identify a person with low reading skills follow

Checklist to identify client literacy before the hearing begins			
FACTOR	**YES**	**NO**	**COMMENTS**
Fails to show up for appointments			
Loses documents or fails to bring in information			
Is embarrassed or nervous during interview			
Acts confused; asks unrelated questions			
Does not ask for clarification			
Cannot tell a coherent story			
Does not answer the questions			
Reads too fast or too slowly for the length of the document			
Has difficulty following instructions			
Acts frustrated and leaves in a hurry			
Levels of written and spoken words do not match			
Becomes angry and storms out			
Initiates a physical confrontation			
Handwriting doesn't match signature			
Portrays issues in terms of conspiracy or personal victimization			
Is compliant or agrees, but not to what you expect			
Uses excuses: "I forgot my glasses"			
Says, "I don't have time to read this now. Can I take it home?"			
Says, "I hurt my hand; I can't fill these out"			
Brings along a friend or relative (to help with reading and forms)			
Says things clearly inconsistent with written information in their possession			

35. Lawyers for Literacy, *Communicating Clearly*. John Howard Society, *Taking Down the Wall of Words: Community Agencies and Literacy* (Ottawa: The Society, 1990).

Recognizing literacy problems during the hearing

If literacy problems have not been identified before the hearing, clients' problems with literacy can be identified during the hearing.

A group of judges, working with the John Howard Society, has suggested steps they took in their courtrooms. We have adapted these suggestions slightly to suit administrative tribunals. This list may be useful.

1. If the client is represented by counsel and you suspect a client may not understand, ask counsel for more information about their client's background.
2. Ask the tribunal staff who were involved in the intake process.
3. It may be necessary for you to ask the client or participant directly (although some have expressed concern about this). If you are worried about embarrassing the client or making inappropriate inferences about the client, ask counsel to make discreet inquiries.
4. If the client is not represented by counsel, rely on any information in the file, ask intake staff, or ask the client directly where possible.
5. Be aware of the statistics on literacy, as outlined elsewhere in this manual, as possible markers for low literacy.
6. Be alert to the varying degrees of literacy and the negative impact it can have on all aspects of a hearing, including any conclusions that may be drawn.
7. Be aware of the markers for literacy previously mentioned, and be on guard for them.
    a. Is the client or participant reading too slowly or too quickly for the level of the material they are asked to review?
    b. Are clients and participants unable to summarize what they have read?
    c. Are clients and participants unable to explain the process?

   d. Do clients and participants have difficulty speaking English or French?
   e. Are the forms filled out with errors in spelling, grammar, or language, or are they filled out incorrectly?
   f. Is the client or participant inappropriately defensive, surly, aggressive, disruptive?
   g. Does the client or participant signal agreement inappropriately?
   h. Is the client or participant uncommunicative?
   i. Can the client or participant tell a coherent story?
   j. Does the client's writing style match the speaking style?
   k. Does the handwriting on documents match the signature style?
8. Talk to other administrative tribunals about literacy, share your experiences, and learn about best practices.

Conducting the hearing

1. Remember to speak plainly so you can be understood by all people present. It is possible to simplify the level of your language so the proceedings can be understood by those with low literacy skills.
2. Explain the documents being used, the process, the implications of each step, and the results. Use simple language.
3. Explain as often as necessary, rewording anything complex.
4. Reassure clients and ask them to repeat back what they understood you to say.
5. Repeat important information to increase understanding. Often people with low literacy skills rely on memory.
6. Have other tribunal officials explain the complexities of the process.
7. Take the time at each step to rephrase and simplify.
8. If necessary, recess the hearing. Then speak to counsel and staff and have them assist the client.
9. When the client is not present and low literacy is suspected, rely on the markers to review the file for hints or ask counsel or staff to provide more information.

Step 3. Planning the literacy program

Is there senior commitment?
What are your goals and objectives?
Who will be responsible?
What actions do you plan?
What are the priorities?
Do you have an implementation plan?
Do you have a training plan?
Do you have (or need) a budget?

When building our plan for the literacy program, we need the following:

- commitment from senior management
- goals, organized by priority
- objectives for each goal
- persons who are responsible for each goal and objective
- deadlines
- benchmarks to measure the outcomes
- budgets as necessary

Commitment

The highest level in the organization has to clearly commit to the program for it to work. This commitment has to be made known to all staff. Involving staff as much as possible in all stages of the program sets the stage for a more successful literacy program.

Goals and objectives

Goals are statements about the general aim of the program. They are broad, long-range, and are the intended outcomes of programs or initiatives.

Objectives are aimed at the same results as the goals but describe them in a lot more detail. Each objective should be linked to a goal. Objectives should

- describe the outcome rather than the process of getting there;
- have just one outcome per objective;
- be realistic and able to be achieved;
- be measurable.

Strategies are the actions taken to achieve the objectives.

Goals for a literacy program could include the following:

- identifying low literacy clients
- clear communications written in plain language
- staff trained in recognizing and working with low literacy clients
- evaluation and monitoring program

Each tribunal has to rank its goals in order of importance in its particular situation. Communications and training are large areas and we will deal with them in the next two sections.

The following is a sample action plan for one of the goals with five objectives.

Sample action plan

Goal: Identifying low literacy clients				
Objectives	**Person(s) responsible**	**Due date**	**Outcome**	**Budget if needed**
1. Develop literacy markers, pre-hearing				
2. Develop literacy markers, during hearing				
3. Test markers				
4. Share markers with staff				
5. Develop imple-mentation plan for markers				

Strategies

All these objectives (e.g., #5. Developing an implementation plan for markers) need someone responsible for bringing them about, deadlines for the work, and perhaps a budget. These people will develop strategies to meet the objectives.

The process used to implement a literacy program is as important as the tasks you take on. You need a good plan and good strategies to be successful. As mentioned above, one or more people have to be given the responsibility together with a deadline. Involving staff in all stages is a learning and sensitization opportunity for them.

Step 4. Communications

Do you know how clients like to get information?

Have you reviewed your communications?

- written: forms, information, documents, signs, ads, design, graphics
- spoken
- Internet and web sites
- office set-up and location

What is the literacy level of the communications?

What is your plan to revise how you communicate?

Are your processes sensitive to literacy?

Do you have a glossary of terms?

Do you understand plain language?

Will you test material with clients?

Will you find out about best practices?

People who have trouble reading cannot easily understand—or only with a lot of difficulty—most of tribunals' written brochures, pamphlets, instructions, and forms. The words and sentences are too complicated. But tribunals and courts use mainly written material to communicate with their clients.

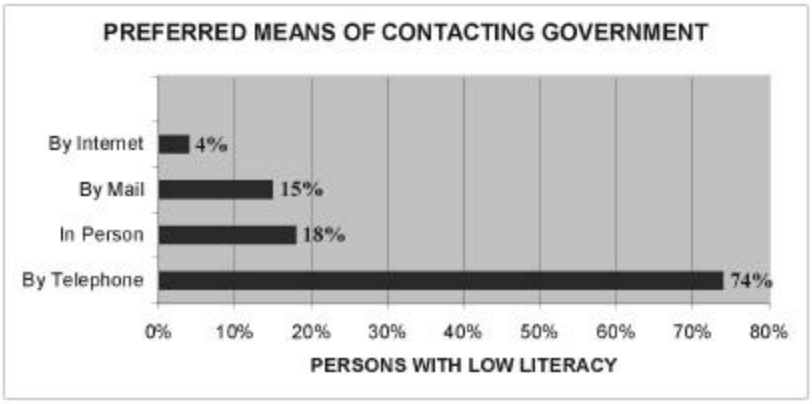
It isn't much better when we speak—the words we choose are often hard to understand.

So the challenge is to look at all the ways we communicate with clients. We can then decide what would be the best way of making them clearer, simpler, and easier to understand.

Communication preferences—persons with low literacy levels

You can survey your tribunal's clients to find out how they prefer to get information. The results would be specific to your tribunal and very effective. However, work has been done by Communication Canada (among others) to find out how people with literacy problems like to receive information. These studies can help with general background.

The spoken word is by far the first choice of those with low literacy skills. A 2002 survey showed that 74 per cent of those with reading problems prefer the telephone when contacting government.[36]



Another Communication Canada publication gives a very good picture of how less literate Canadians get their information.[37] It is a very useful document to read when you prepare for your literacy program.

36. Communication Canada, *Listening to Canadians: Communications Survey* (Ottawa: Communication Canada, Spring 2002), as quoted in *Successful Communication Tool Kit, Literacy and You*, Canada Information Office, May 2003, section2, p. 2.
37. Communication Canada, *Issues and Challenges in Communicating with Less Literate Canadians*, Rev. ed. (Ottawa: Communication Canada, 2002), p. 20.

- 57 per cent say television is the main source of information, especially in the evening;
- 18 per cent read daily newspapers;
- 15 per cent listen to the radio, especially in the morning;
- 3 per cent read weekly papers;
- 2 per cent read magazines;
- 1 per cent use the Internet.

In yet another document, Communication Canada says some with literacy problems want written material that they can take home or have mailed to them. They can then read it in private, taking as much time as they need. They can also get help from family and friends.[38]

Literacy levels of communications

William H. DuBay, who works extensively on plain language, puts common written material in perspective:

> Comics are written at the 4th-grade level or lower. Most popular fiction is written at the 6th-grade level. *Reader's Digest* is written at the 9th-grade level, the *New Yorker* at the 10th-grade level, and newspapers at the 12th-grade level. The target reading level for large, public audiences is the 7th grade.[39]

As already mentioned, the reading level of material used by tribunals is too high.

You can use a combination of techniques to help people with low literacy. Some tribunals and courts have already started to simplify communications with

38. Communication Canada, *Successful Communication, Literacy and You* (Ottawa: Communication Canada, May 2003), see generally.
39. William H. DuBay, "Using Readability Tools" (presentation to the Plain Language Conference, Toronto, September 27, 2002). Available from www.plainlanguagenetwork.org/conferences/2002/index.htm.

- official greeters or information booths at the doors of their buildings
- clearer and simpler signage; use of graphics where possible
- written information rewritten in plain language
- greater use of videos
- forms given out in advance so clients can take them home and fill them out in private and with help from family and friends
- private areas in the tribunal offices so people with low literacy skills can be helped with less embarrassment
- staff training to recognize literacy problems
- files coded so other staff will know that help is needed for certain clients

Internet

The Internet supposedly solves a lot of communication problems:

- It has completely changed the way we reach clients, friends, businesses.
- More and more businesses and government departments use the Internet as a way of reaching their clients.
- There are web sites for every government department, federal and provincial.
- You can file your income tax electronically.
- You can download forms and applications.
- You can register online.

The Internet is a communication revolution, but not for people with low literacy skills.

We've seen two figures—4 per cent and 1 per cent—that show how little they use the Internet to contact government or to get information.

Suggestions for reviewing and revising communications

Preliminary steps

1. Contact colleagues in other tribunals or other fields to see what they have discovered about their clients and learn from their experience.
2. Perhaps conduct a client survey to find out how they want to receive information.

Review stage

3. Evaluate the literacy level of your current communications:
   – written and spoken
   – information documents and forms
   – videos and advertisements
   – Internet sites
   – signage, instructions, processes that rely on written material
4. Review the documents a client must fill in.
5. Review document design.
6. Review oral communication and processes that rely on oral communications.
7. Evaluate the office set-up for privacy and user-friendliness for those with low literacy skills.
8. Determine if it is only a "reading" issue or if it is also a comprehension issue.

Revision stage

9. Revise material using plain language.
10. Simplify document design.
11. Simplify and reduce the number the documents a client must fill in wherever possible.
12. Simplify signage in office and use graphics wherever possible.
13. Develop videos and audiotapes to explain processes.
14. Develop a glossary of most frequently used terms with their plain language alternatives.

Internet

15. Look at suggestions for making web sites more accessible to low literacy clients as well as those with sight disabilities.
16. Design as well as content has to be considered.
17. The Web Accessibility Initiative of the World Wide Web Consortium (W3C) is a worthwhile site to visit (www.w3.org/WAI/).
18. The W3C has a working group that prepared Web Content Accessibility Guidelines. There are 14 major guidelines for developing a web site for low literacy people and those with disabilities (www.w3.org/WAI/GL/).

Re-arranging office layout

19. Consider having an information person at the entrance to the office who can help direct clients and provide them with information.
20. Make sure there are private areas where clients with low literacy skills can be helped in private.

Staff conduct and training

21. Develop a code of conduct for employees when dealing with low literacy individuals.
22. Train staff to be respectful and accommodating.
23. Make certain staff know how to discover what is being understood by the clients.
24. Involve staff in developing new procedures for dealing with people, for example:
    - make reminder phone calls for appointments or needed documents instead of providing written material
    - read and explain letters and important information
    - do not rely on the client's ability to understand
    - ask questions to determine understanding, for example, asking clients and participants to restate what they understood you to say
    - make it easy for clients and participants to ask questions
    - consider using a video or audiotape for basic information

Step 5. Training

What training is needed?

Do you have a training plan?

- training topics
- time frames
- budget
- assessments

Who is responsible for the training plan?

What budget is needed for the training?

Will the training be in-house or outside?

How will you evaluate it?

Changing the way we deal with clients and participants means changing the way we perceive and deal with the issues. It means understanding that respect for clients and participants is of the highest importance.

Staff can learn to use many simple measures to help those with low literacy levels. Speaking plainly, looking for ways to help people understand, and then making sure they do understand, must become normal tribunal procedure.

Types of training needed

The following types of training should be considered for both adjudicators and staff:

- literacy awareness
- recognizing literacy problems in clients/participants (see "Markers or indicators for literacy" in Step 2)
- plain language, written and spoken
- document and form design
- web site design
- new office procedures to make communication easier for low literacy clients

Training plan and budget

One goal for the literacy program mentioned in Step 3 was to have "staff trained in recognizing and working with low literacy clients."

An action plan similar to the example in Step 3 needs to be prepared for training. A person should be named to be responsible for drawing up the plan and working out the objectives of the training. Staff should be involved as much as possible in order to feel part of the process, not just the passive recipients. Once the objectives are clear, then the rest of the action plan can be filled in:

- person responsible for each objective
- time frame for completion
- expected outcomes
- any budget requirements

Where the training will take place

The next decision will be whether the training takes place at the tribunal offices or at off-site courses or seminars.

The availability of appropriate trainers, the size and layout of the tribunal offices, and the budget will help decide this.

There is a large and growing list of firms and groups that offer plain language training. These sessions can be customized to your particular situation or your staff and adjudicators can attend a general workshop or seminar. (See the Resources section for some suggestions.)

Evaluation

You can evaluate the training by examining how it has changed the staff and tribunal members' treatment of clients. Some of the benchmarks can come from the objectives of the training plan.

Clients can be surveyed about the whole hearing process and asked whether

- they understood the whole tribunal process and when things should be done and why;

- they received help if they needed it;
- they were made to feel inferior because of their reading problems;
- staff explained documents, forms, and the proceedings clearly.

Staff can be surveyed whether

- knowing about literacy and markers has made it easier for them to identify low literacy clients;
- plain language training has helped them in choosing simpler words and ways of explaining things;
- clients understand information more quickly with fewer requests for clarification;
- forms and other documents are filled in more fully and accurately.

Step 6. Evaluation and maintenance of the program

Who will have ongoing responsibility for literacy?

Do you have an evaluation strategy and plan?

How will you measure change?

How will you measure impact?

What are the goals of the literacy project?

Will you get client feedback?

Will you test material?

How will you keep informed about best practices?

Changes and training are accomplished over time. Changes must be introduced in small segments and be thoroughly absorbed into the whole way of doing things. Evaluation and ongoing monitoring of changes are key parts of a successful plan for literacy.

Purposes of evaluation and monitoring

- To find out what works and what doesn't (for example, training, implementation of changes, rewritten material, new videos, new procedures)
- To find any flaws in the current plans and figure out what has to be changed
- To see if some step has been omitted
- To determine what the next steps should be
- To check whether the new procedures and ways of dealing with clients have become part of regular office procedure
- To help improve the program

Ongoing responsibility for literacy program

As with the other steps, you have to name a person who will be responsible for evaluating the program and the program itself. This person should be senior and have the authority to go along with the responsibility.

Evaluation plan and strategy

The goals and objectives you developed in Step 3 are the starting point. The objectives had to be realistic and able to be achieved. In the action plans, you listed the outcomes aimed at and these outcomes had to be measurable.

Selected Steps in Evaluating Outcomes of the Literacy Program

1. Plan to evaluate the program formally once a year.
2. Develop outcome measures at the beginning of the planning stage, for example, how are you going to measure the effectiveness of a particular change? These should be noted on your action plans for the various goals and objectives.
3. Identify what information will be needed and set up a simple system to collect it.
4. Test the re-worked written material, videos, signage, and other simplified communications procedures and methods with clients and staff.
5. Measure the effects on both staff and clients—whether they find the simpler material easier to understand and explain.

   Lawyers for Literacy have developed some simple questions to ask in order to evaluate the impact of the literacy program.[40] These can be found at www.plainlanguagenetwork.org/LawyersForLiteracy/Audit/index.html. They can be easily adapted to the needs of administrative tribunals.
6. Using the results, review material and training.

40. Lawyers for Literacy, *The Law Firm Literacy Audit* (Vancouver: British Columbia Branch of the Canadian Bar Association).

7. Revise and update material and work plan as you go along.
8. Use these evaluation results to update the overall plans for the next year.
9. Discuss the literacy program with colleagues and exchange information about what you have learned and what you believe is a “best practice.”

5. Conclusion

Our aim with this manual is to convince you of the benefits of using simple, clear language when working with clients. We have given you a few of the quite startling statistics on the literacy level of Canadians. We have to provide information that can be understood by the majority of our clients and cannot assume everyone reads at a grade 12 level. We have also provided some guidance and steps to take to start a literacy program for your tribunal.

The courts have stated it plainly: if individuals do not understand the legal process in which they are involved, then justice has been denied. There is an extensive body of case law on this topic and the most relevant cases are included in Appendix A. The cases are divided into six major topics:

- The need to understand signed documents
- Literacy and informed consent
- Literacy and immigration law
- Literacy and criminal law—understanding one's rights in the standard police charge
- Literacy and accessibility to law
- Unrepresented clients and clients with low literacy skills

This manual is phase one of our planned attack on low literacy and the administrative justice system. It was funded by the National Literacy Secretariat of Human Resources and Skills Development Canada. We are looking forward to continuing our work by providing workshops on a regional basis and also for individual tribunals. Online learning is another project we would like to develop, one that makes a lot of sense in a country as large as ours with 10 provinces and 3 territories. These next steps will depend, however, on continued funding from HRSDC to go forward with this important work.

APPENDIX A
Case Law

1. Introduction

Recent Canadian jurisprudence is increasingly aware of the literacy issue as it relates to access to the Canadian justice system. Canadian courts and tribunals have shown a sensitivity to the impact of low literacy when considering the legal consequences of one's inability to

- understand the right to counsel;
- fully understand and appreciate the meaning of, and obligations in, a written document, or consent to a medical procedure or treatment;
- follow a court order;
- adequately represent oneself in a legal proceeding;
- understand the proceedings.

This lack of understanding has a direct bearing on their ability to receive fair justice. This situation places additional stress on judges or tribunal members to assist the unrepresented party to ensure fairness in the process, as required by law, while still maintaining their role as impartial decision maker.

In Quebec, by legislation, administrative tribunals are expected to ensure that "procedures are conducted…according to simple and flexible rules devoid of formalism." (*An Act Respecting Administrative Justice, R.S.Q., c.J-3. s.4*)

The following casebook summarizes recent jurisprudence that deals with literacy and access to justice in the areas of criminal, tort, immigration, and administrative law.

2. The need to understand signed documents

The plea of non est factum

Every day in our courts and tribunals, we are called upon to base our decisions and judgment on documents signed by parties to an action. Was the lease signed knowingly by the tenant? Was this written statement understood by the witness? Was this affidavit read over and

understood by a party to a hearing? Generally, we presume literacy and hold people accountable to documents they sign. The plea of *non est factum*, originating in Thoroughgood's Case (1582) 76 E.R. 408, was designed to protect "illiterate persons" who had been rushed into signing a contract of a different nature than what was represented to them. The following section reviews the non est factum plea and what has to be considered when assessing the liability of people who do not have the literacy skills necessary to formulate legally binding obligations.[41]

- In **Foster v. Mackinnon (1869), L.R. 4 C.P. 704**, Byles J. said: "It seems plain, on principle and on authority, that, if a blind man, or a man who cannot read, or who for some reason (not implying negligence) forbears to read, has a written contract falsely read over to him, the reader misreading to such a degree that the written contact is of a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate man afterwards signs; then, at least if there be no negligence, the signature so obtained is of no force (p. 711).
- The plea of *non est factum* went through significant change and modification. It was eventually returned to its original position in the decision of the English Court of Appeal in ***Saunders v. Anglia Building Society*** **[1971] A.C. 1039**. Lord Pearson wrote at p.1050: "the plea of *non est factum* ought to be available in a proper case for the relief of a person who for permanent or temporary reasons (not limited to blindness or illi-teracy) is not capable of both reading and sufficiently understanding the deed or other document to be signed."
- The leading Canadian decision on the principle of *non est factum* is ***Marvco Color Research Ltd. v. Harris*****, [1982] 2 S.C.R. 774**. In ***Marvco***, the Court excluded the defence of *non est factum* as against an innocent third party because of careless conduct on the part of the signer who, as the result of the fraud of another,

41. The following section on the plea of *non est factum* does not intend to be a summary of the law in this area of contract law. It is intended to provide some examples of decisions where the plea of *non est factum* is discussed in the context of the literacy skills of the signer to an agreement.

executed a mortgage without reading it. However, Mr. Justice Estey, speaking for a unanimous court, added this caveat (p. 587): "I wish only to add that the application of the principle that carelessness will disentitle a party to the document of the right to disown the document in law must depend upon the circumstances of each case."

- According to the 3rd edition of *Law of Contract* by Fridman (p.282), "there have been times when the interpretation given by the courts has been so narrow as to apply to only those persons demonstrating a disability akin to blindness or mental infirmity. At other times the doctrine has been used with a more curative philosophy." He described the general trend in case law on *non est factum* as follows: "Subsequent cases have accepted and applied the Saunders and Marvco cases. … It is a difficult matter to invoke the plea successfully. The onus of proof is heavy upon a party raising the plea. … Where the plea has been successful, it has been because the party signing the document was ignorant of the English language and did not know what was going on; or was of limited education and reading ability and was mistaken as to what the document was" (pp. 291–292).

Legal requirements for successful plea

- The decision in ***Voukelatos v. Canada (Minister of National Revenue)*, [1991] T.C.J. No. 1120 (T.C.C.)** suggests that the following questions should be examined when considering a plea of *non est factum*: "Was such a party an experienced business person? Was it a novel situation? What, if any, representations were made by the other party to the contract, that party's solicitor, or others? Was the party signing careless as a result of his or her age, literacy, level of education, experience in business? And was such carelessness the appropriate standard of behaviour for a person in such a situation? Was it reasonable for the party to rely upon the other party's statements or representations, or those of a solicitor, bank manager or similar person? What were the abilities of such a person to understand the nature and effect of what (s)he was signing? Was it reasonable for such a party to sign the document without reading it or asking to have its contents and effect explained?" [emphasis added].

Cases where plea successful

- ***Flexilease (Canada) Inc. v. Masters*, [1997] O.J. No. 2872 (Ont. Ct. J. Gen. Div.)** The defendant was a 64-year old with a grade six education. She was approached by her son to act as a guarantor for his lease of an automobile from the plaintiff. She agreed, but she executed the various lease documents as though she were the primary lessee and not the guarantor. When the payments under the lease stopped, the plaintiff repossessed the car. The defendant signed the documents without reading them, but claimed that she thought she was signing as a guarantor for her son. Wilkins J. wrote: "Having regard to the above passages, it seems reasonable for me to conclude that in situations where a party is significantly less well educated, noticeably of limited literacy in the English language and lacking a basic understanding of business or financing matters, the defence of *non est factum* might still be available despite the fact that the party did not read the document." (at para. 31).
- ***Butt v. Humber*, [1976] N.J. No. 36 (Nfld. Sup. Ct. T.D.)** The defendant alleged that he signed an agreement that he believed was to contain a specified condition. The defendant alleged that the plaintiff deliberately omitted the relevant condition. The evidence demonstrated that the plaintiff could not read, though, as is the case with many individuals with low literacy skills, he learned to sign his name. There was evidence that someone carefully read over each document to the plaintiff. Goodridge J., referring to *Thoroughgood's Case*, supra, wrote at para. 82: "I am aware and take judicial notice (if I may) of the fact that many illiterate people (and even many of those who are literate) will have a legal document read to them and will not understand it. Therefore, I think it follows that where a deed is read over and explained, and the explanation does not follow the intent of the document, the plea of non est factum is available if there is execution of the document following such reading and explaining."

Duty of signer to ask questions

Despite the preceding cases, there is jurisprudence that suggests that where a party with low literacy skills signs a legally binding agreement

and fails to make inquiries or advise the other parties that he/she cannot read or fully understand the nature of and obligations under the contract, a plea of *non est facum* cannot succeed.

- ***Alta Vista Towers v. Nalaya,* [2000] O.R.H.T.D. No. 45** The landlord in this case applied to the tribunal for an order to terminate the tenancy and evict the tenant because of damage to the premises. The applicant had signed an Occupancy Agreement that stated that he was only an occupant of the unit and that the tenant was "the legal tenant." The applicant believed that the agreement was an assignment of the lease to him. The tribunal found as fact that the applicant was an occupant of the rental unit and not a tenant and this is clear from the Occupancy Agreement. The tribunal wrote, "If he had any doubts as to the contents of what he had signed, then the onus was on him to satisfy himself of what he had agreed to."

Situation in Quebec

In Québec, the language in which the contract is written cannot be used as a reason to annul the contract. Thus, a signatory is obliged to insure that he or she understands fully the document he or she is signing

- **Social affairs—598, [2000] T.A.Q., files No.SAS-M-022636-9806 / SAS-M-022842-9807**

  The court has been seized with two appeals against a decision from the respondent, dated May 21st 1998, claiming from the applicants a sum of $24,217, in reimbursement of income security benefits paid to an individual for whom they acted as a guarantor. The applicants were married and then divorced, but during their married life, they had filed an application to act as guarantors in order to allow the entry into Canada of the male applicant's mother. Despite their divorce, they bound themselves as guarantors of the mother of the applicant and undertook to reimburse to the Government of Quebec all financial benefits [paid by the latter] during a period of ten years. When the Government of Quebec called in the guarantee, the applicants raised several defences. The female applicant attacked the validity of the undertaking, on the grounds that it is an excessive provision, and that the contract should be held void for lack of consent. The female applicant pretended that she was not

capable of understanding the real meaning of the undertaking because of her lack of understanding of the French language.

The court rejected this argument:

[Translation] "In Quebec, the language in which a contract is drafted—as long as it is French or English—is not a valid ground for annulment; and the applicant is even less entitled to raise this ground since she signed the undertaking jointly with her husband, who has a good knowledge of the French language. Also, since it is a standard form contract, the court is quite unable to understand how one who has adhered to such a contract could ask its annulment because he or she doesn't understand its different provisions." (Paragraphs 20 and 21.)

Problems, comments, and observations

- The plea of *non est factum* is centuries old and was intended to protect "the illiterate and the blind" from liability. However, the cases are nonetheless instructive as they demonstrate the level of responsibility placed on a person with low literacy skills who signs legally binding agreements. The cases suggest that where a document is not fully explained or is not explained properly, the plea of *non est factum* can be successful. This can be the result even if the signing party had the document read to them but was not able to fully appreciate the contents due to literacy limitations.
- As stated above, even if the person is successful in showing a radical or fundamental difference, the person raising the plea of *non est factum* must not be careless in taking reasonable measures to inform himself when signing the document as to the contents and effect of the document. The signer must take reasonable measures to inform him or herself of the effect of the document and its content. The difficulty with this approach is that it fails to acknowledge the reality that many people with low literacy skills are unlikely to admit this when signing a document. As explained in the resource manual, due to the social stigma associated with low literacy, many people sign legally binding documents without fully appreciating their implications or obligations.

3. Literacy and informed consent

A series of cases around informed consent for medical treatment gives us some idea of the types of inquiry that can be made to see if a person has limited literacy skills. They are also helpful in suggesting markers that administrative tribunal members might look for in their day-to-day operations.

The principle of informed consent

Canadian courts have identified several criteria necessary for valid consent. The most important for our discussion is that the client must be informed. Patients have a legal right be warned of all material risks inherent in a given procedure or treatment, the consequences of leaving the ailment untreated, alternative means of treatment and their risks, and the cause of the injury suffered by the plaintiff. More important, this critical information must be passed along to the patient in words that the patient, considering language skills and education, can understand. Prior to the decision in ***Reibl v. Hughes*** **(1980), 114 D.L.R. (3d) 1 (S.C.C.)**, one of the leading cases in the area of informed consent, there was some doubt as to whether the doctor had the duty to ensure that he was understood by his patient. However, Laskin C.J. made it quite clear in that case that it is incumbent on the doctor to make sure that he is understood, particularly where it appears that the patient had some difficulty with the language spoken by the doctor.

Cases involving informed consent and literacy and/or language barriers

- ***Finch v. Carpenter,*** **[1993] B.C.J. No. 1918 (B.C.S.C.)** In this case the defendant was an oral surgeon. The plaintiff claimed that the defendant was negligent in failing to obtain her informed consent to the removal of an impacted wisdom tooth. While some information was provided to the plaintiff, in the form of a printed page entitled “Impacted Teeth,” Macdonald J. held that this fell short of what was necessary to obtain informed consent in the circumstances of this case. The court accepted that the plaintiff had no recollection of reading the pamphlet, a document in relatively

fine print containing in the final paragraph a list of "Several complications and risks …associated with impacted tooth surgery." Macdonald J. found that this was not an adequate explanation of the risk associated with the removal of this particular tooth. The court noted that the location of this warning at the end of the leaflet rather than at the beginning, together with the technical language in which it is phrased, detracted substantially from its impact on an understandably tense patient.

- ***Lue v. St. Michael's Hospital,* [1997] O.J. No. 255 (Gen. Div.)** In this case, the court considered the issue of whether the defendant doctor had satisfied his duty of disclosure to the plaintiff patient. Kiteley J. set out the following eight criteria to guide doctors in ensuring that a patient has understood the nature and consequences of the procedure. At para. 116, the court held the following objective criteria should be applied in non-emergency situations:

  1. Whether the patient asked any questions. A failure to ask appropriate questions may indicate the patient is overwhelmed and uncomprehending. As a corollary, the comments or questions that the patient does raise may also reveal comprehension of the material risks.

  2. Whether diagrams or other visual aids are relevant. Depending on the intellectual abilities of the patient, pictorial descriptions sufficient to communicate seriousness may be part of the process.

  3. Whether the patient can restate what the physician has communicated. At some point after the disclosure, can the patient describe, in his or her own terms, the procedure and risks that are about to unfold?

  4. Whether the patient has asked for a second opinion. Patients are understandably reluctant to be perceived as doubting the advice of the doctor by suggesting a second opinion. But when the "…organ of our humanity…" is involved, the doctor should consider raising it as a possibility and explain to the patient how that course of action could be implemented.

5. Whether any information is put in writing. For example, does the patient have access to brochures that describe the generic condition with usual questions and answers? Did the physician write a note or letter to the patient, or a letter to the general physician with the stated expectation that the latter would review it with the patient? Did the doctor make a note in the patient's chart? Is there a protocol in writing for the physician to follow and was it followed?

6. Whether the time spent with the patient is realistic in terms of enabling the patient to hear, understand, and evaluate. Was the information communicated in the language most likely to be understood and on more than one occasion, to reinforce the seriousness and to give the patient a chance to ask questions that did not occur to the patient in the anxiety of the original disclosure?

7. Whether the patient is dependent on family members for assistance in decision-making. Could the treatment (or lack thereof) result in impaired cognitive abilities? In either case, involvement of the family is not a courtesy; it is a necessity. If others are involved, does their recollection of events coincide with the doctor's? The more obviously the patient is dependent on such people, the more importance should be attached to 1-6 above in the context of those others.

8. Whether the patient or family express spontaneous surprise when the event, allegedly described in advance as a material risk, unfolds.

Problems, comments, and observations

- The cases describe an advancement in a patient's right to accept or refuse medical treatment. Doctors must now explain the medical options in terms or language that a patient can understand. There is a greater onus placed on doctors to make inquiries into whether the patient understands the medical advice or at least to be aware of signs suggesting that a patient may not have the literacy skills to understand. These same lessons may help us with parties to administrative tribunals.

4. Literacy and immigration law

Citizenship and immigration is an area of administrative law where literacy and the understanding of law presents a daily challenge. Matters coming before immigration boards and tribunals involving the issue of literacy are often in the context of citizenship requirements—namely, the applicant's knowledge of the official language, as well as knowledge of Canada and the responsibilities and privileges of citizenship. Similarly, low literacy presents an obstacle for individuals required to complete potentially complex and confusing documentation in a clear and accurate manner.

- ***Hassan v. Canada (Minister of Citizenship and Immigration),* [2002] F.C.J. No. 1049 (Fed. Ct. T.D.)** Hassan was a citizen of Somalia and a permanent resident of Canada. She was denied citizenship on the basis of her inability to understand either official language. A psychologist's opinion was considered—as Hassan did not receive an education, she therefore did not have skills required to learn a new language. The citizenship judge considered the opinion but held that other people in Hassan's situation had benefited from literacy programs and that she had many opportunities in Canada to improve her education. On appeal, a letter was placed before the court by an instructor of a literacy program that said Hassan had been enrolled in the program since September 1997 but had made no progress. The court allowed the appeal. The finding that Hassan had many opportunities in Canada to improve her education was patently unreasonable and perverse as medical evidence established that she did not have the skills needed to use the programs available.
- ***Mohammed v. Canada (Minister of Citizenship and Immigration),* [1997] F.C.J. No. 605 (Fed. Ct. T.D.)** The applicant applied, with his parents and five siblings, for permanent residence in Canada. At the time of application, neither he nor any of his family were literate in either English or French, so he relied on another person to prepare his application. After he and his family received their visas, but before leaving Bangladesh, the applicant was married. He did not notify immigration officials of the change in his marital status, even though the requirement to do so was clearly stated on

his application form. He alleged that the person who prepared his application did not inform him of that requirement. When he arrived in Canada, he signed a record of landing indicating that he was single with no dependants. His true marital status was discovered when he tried to sponsor his wife to come to Canada. An adjudicator of the Immigration and Refugee Board ordered the applicant removed from Canada as he was granted landing by fraudulent means or misrepresentation. An appeal to the Board and the Federal court failed. The Court held that it was the applicant's responsibility to meet the requirements of the *Act*. The fact that he could not communicate in English or in French did not absolve him of that responsibility. Interestingly, counsel for the applicant argued that s. 27(1)(e) violated s. 15(1) of the *Charter* in that it discriminates against the illiterate and uneducated. This argument was rejected by the Court.

- ***Ibrahim v. Canada (Minister of Citizenship and Immigration),* [1996] I.A.D.D. No. 916** This is an appeal by Mr. Mohammed Ibrahim from a refusal by a visa officer to approve a sponsored application. On appeal the Board held:

  > [20] The panel is therefore left with the unfortunate situation that, notwithstanding the documentary evidence to the contrary, an illiterate 53-year-old woman has either been interviewed or provided written information in three languages … none of which she reads, writes, speaks or understands.
  >
  > [21] As a result of such a process a decision has been made on the basis of what was in her mind when she made her application...
  >
  > [22] Were this the normal situation where the interview was conducted in the applicant's native language, the panel would be able to assess the conflicting evidence and determine, on a balance of probabilities, based on evidence it considers credible and trustworthy, whether the appellant has met the onus of proof to rebut a substantial case presented by the visa officer.

> [23] But this is not a normal situation. Given the findings of fact made supra with respect to the language problem, and in spite of the fact that the interview difficulties are almost entirely of the applicant's own making, the inescapable result in law is that this process is a nullity.

5. Literacy and criminal law—understanding one's rights in the standard police charge

Many administrative tribunals have to consider evidence of investigators and police officers. As would be expected, a high standard has been set by the courts for assuring that accused persons with weak literacy skills understand their rights. The lessons learned here may help inform practices of administrative tribunals that may face a similar challenge.

General principles

Concern for the right to understand[42] has been reflected in several decisions by courts across Canada. The 1991 decision of the Supreme Court of Canada in***R. v. Evans,* [1991] 1 S.C.R. 869** emphasized that a person is not legally informed unless he/she has understood the information conveyed to them. Canadian jurisprudence, particularly since *Evans*, has strongly supported the emphasis on understanding. In order for an accused person to be informed of his rights, it is necessary that the accused be capable of understanding and appreciating the substance of the right to counsel and the consequences of giving up that right.

A detainee or accused person must be informed of his rights in a manner that is understandable to him. The mere recitation of the right to counsel is insufficient. If the right to counsel is to be meaningful, then it may be necessary for the police in the appropriate circumstances to go beyond a mere statement of the words of s. 10(b). (***R. v. Dubois* (1990), 54 C.C.C. (3d) 166 (Que. C.A.) at pp. 195-96**).

42. In the other words, the right to understand implies the obligation on police officers and judges to take steps toward ensuring that rights are understood.

However, in the absence of any evidence to suggest the contrary, a constitutionally sufficient understanding of the right will necessarily be inferred from a positive response to the question, "Do you understand?" Even where there is evidence of a less than perfect understanding, courts have held that it may nonetheless be constitutionally sufficient. (***R. v. Roberts* (1991), 95 Nfld. & P.E.I.R. 49 (Nfld. Prov. Ct.).; *Dubois*, supra, at pp. 195-97**)

R. v. Evans

- The Supreme Court of Canada in *Evans* held that understanding one's rights is integral to meaningfully asserting one's rights. In *Evans*, the accused was arrested by police officers on a slimly founded marijuana charge. Their "collateral purpose" was to obtain evidence against the accused's brother in relation to two murders. The two brothers lived together. The arresting officers knew that the accused had limited cognitive capacity. They had been cautioned to ensure that he understood the warnings given to him. However, the police questioned him despite his stated lack of appreciation of the *Charter* and police warnings. The investigation was overly aggressive and "dirty tricks" were employed. The accused made requests to speak to a lawyer but was unable to reach him. Nonetheless, the police obtained a written confession from the accused to the murders.
- The Supreme Court, in a unanimous decision, held that the s.10(b) rights of the accused had been violated and that the admission of his statements would bring the administration of justice into disrepute. McLachlin J., as she then was, stated at paras. 44 and 46:

> *A person who does not understand his or her right cannot be expected to assert it.* The purpose of s. 10(b) is to require the police to communicate the right to counsel to the detainee. In most cases one can infer from the circumstances that the accused understands what he has been told. In such cases, the police are required to go no further…But where, as here, there is a positive indication that the accused does not understand his right to counsel, *the police cannot rely on their mechanical recitation of the right to the accused; they must take steps to facilitate that understanding.*

Courts have reached similar results in cases where the police failed to act appropriately when they were aware of the limited cognitive capacity of the accused when reading the standard police caution.

- ***R. v. Roberts, supra*** The investigating and arresting officer was aware of the accused's limited education and communication skills. The officer should have known that as the accused was both "unsophisticated and unlearned," he was unlikely to have understood the police charge. Special care should have been taken during the interview process. See para. 41.
- The notion of special circumstances has also been defined to include language barriers. This includes situations where it is evident that the accused's native language is something other than English or if a person is deaf.

Problems, comments, and observations

- In ***Evans, supra***, McLachlin J. stated that in most cases, it can be inferred from the circumstances that the detainee understood what he/she has been told. In such cases, the duty on police to go to further lengths to ensure understanding will be discharged when the individual responds affirmatively to the question of whether the given charge is understood. Without special circumstances, such as the obvious cognitive or language impairment of the accused, police are not required to go further and facilitate understanding.

There is one problem in all of this: What happens when the circumstances are not so clear and it is not obvious that the accused person does not understand? The research contained in the program materials as well as the evidence in the reports on literacy prepared by the John Howard Society reveal that if a person has low literacy skills, he or she has likely spent much of life attempting to hide a lack of understanding. It is therefore doubtful that people with low literacy skills will readily admit that they cannot read or write well.

6. Literacy and accessibility of justice

Access and right to legal aid

There is a series of cases that may be useful to tribunal members. They give some guidance for recognizing a person with weak literacy skills who may require additional assistance and involve access to Legal Aid.

- As a general rule, there is no constitutional right to be provided with state-funded counsel. It is for the court to determine whether the particular accused could not receive a fair trial without counsel. [***R. v. Rowbotham*** **(1988), 41 C.C.C. (3d) 1 (Ont. C.A.); R. v. Keating (1997), 159 N.S.R. (2d) 357 (N.S.C.A.)**]
- These cases often arise out of situations where a litigant cannot afford counsel and has been denied legal aid assistance. With many administrative tribunals, legal aid is not even an option. Courts have recognized that where a trial judge is satisfied that an accused person lacks the means to employ counsel and that counsel is necessary to ensure a fair trial for the accused, a stay of proceedings until funded counsel is provided is an appropriate remedy under s.24(1) of the *Charter*.
- The Court of Appeal for Ontario in ***Rowbotham, supra***, established a three-part test for determining when an application for state-funded counsel will be granted. The applicant must demonstrate the following:

  1. he/she is without financial means to employ counsel;
  2. legal aid funding has been refused; and
  3. his/her case is *sufficiently complex* to warrant the appointment of counsel, taking into consideration the *capacity of the accused* to comprehend the issues before the court.

The third part of the test is relevant to our discussion regarding literacy and accessibility to the justice system. This step explicitly contemplates the capacity of an accused person to understand the process and issues before the court. Where an individual is not capable, then counsel must be provided in order to ensure his/her right to a fair trial.

- ***R. v. Taylor* (1996), 150 N.S.R. (2d) 97 (N.S. S.C.)** The main issue to be decided in this case was when is an accused entitled to have state funded legal defence. The court held that an accused must be unable to represent himself or herself because of the complexity of the case or as a result of a personal attribute such as illiteracy.
- ***R. v. Wilson* (1997), 121 C.C.C. (3d) 92 (N.S.C.A.)** The court held that a determination about the seriousness and complexity of the case and whether an accused is capable of representing him/herself must include, *at a minimum*, an inquiry into: (a) the personal abilities of the accused such as her educational and employment background and whether she is able to read, understand the language, and make herself understood; (b) the complexities of the evidence and the law on which the Crown proposes to reply; and, (c) whether there are likely to be any complicated trial procedures such as a voir dire.
- ***Canada (Attorney General) v. Seifert*, 2003 B.C.S.C. 398** The court applied the complexity and ability test. Evidence was led that, among other things, the accused was "effectively illiterate" and had the equivalent of a grade three or four education and did not have a conceptual ability to understand the proceedings. The court concluded that given the accused's "interrupted education, limited literacy and limited English vocabulary, he would likely require the assistance of counsel."

Situation in Quebec

It seems that there, as in all the other provinces of Canada, the accused or applicant has the right to obtain legal aid if he or she is unable to ensure his or her own defence, so he or she can receive a just and fair trial.

But if the applicant doesn't ask to be represented by an attorney, comes before the judge and declares his readiness to answer the judge, the latter is not obliged to suspend the proceedings in order to find an attorney for the applicant.

- **R. v. Lépine, [2002] C.Q., No 460-01-002014-987/460-01-002015-984** The accused are insurance brokers. They are charged with fraud against insurance companies, and the Crown prosecutor contends that the sums involved vary between two and three million dollars. If they are held guilty, he will ask the Court to sentence them to a term in a penitentiary.

  The court quotes several Canadian cases concerning the right to legal aid, including **R. v. Sechon** [1995] A.Q. No. 918 (C.A.), paragraph 30, (104) C.C.C. (3rd) 554; **R. v. Rowbotham** [1988] 41 C.C.C. (3rd) 1; **R. v. Potts** [1996] P.E.I.J. No. 168 (P.E.I. C.A.); **R. v. Brisebois** [2002] J.Q. No. 294 (S.C.), paragraph 16; **Dagenais v. Canadian Broadcasting Corp.** [1994] 3 S.C.R. 835.

  On the basis of the case law and the situation of the accused, the court is of the opinion that the latter is uncapable to insure his own defence:

  > [Translation] "Even if he has been a businessman, he has neither the knowledge, nor the skills, that are necessary to defend himself adequately and thus receive a fair trial. Although the Crown attorney contends that the evidence will bear only on the facts, the length of the trial (30 days), the principles which will be invoked herein, as well as the subtleties of the administration of the evidence, make this, at least for the accused, a complex case.
  >
  > Also, the defendant is certainly unable financially to afford a lawyer in such an important case.
  >
  > Everything leads me to conclude that these are the "exceptional circumstances" that are foreseen in the Legal Aid Act. If it is not the case, everything leads me to believe that I should apply the principles established by the courts of appeal in the aforesaid cases **R. v. Sechon**, and **R. v. Rowbotham**, as well as in the following cases:

- **Côté v. Attorney general of Québec**, [2001] J.Q. No. 3814 (S.C.) (Justice Belleavance);
- **R. v. Roy**, [2000] J.Q. No. 726 (C.Q.) (Justice Garneau);
- **R. v. Savoie**, [2002] J.Q. No. 351 (C.Q.) (Justice Decoste);
- **R. v. Verret**, [2002] J.Q. No. 508 (C.Q.) (Justice Verdon)." (Paragraphs 24 to 26.)

- **Torosian c. Department of Employment and Social solidarity, [2003] C.S. No. 500-05-074188-028:**

  This is a request by Henrik Torosian for judicial review of a judgment rendered on March 27, 2002 by the Quebec administrative tribunal, Social Affairs Division, refusing to relieve him from default in the late filing of his recourse and declaring his recourse prescribed and thus inadmissible.

  The claimant's lawyer withdrew from the file a few minutes before the hearing, leaving him alone to argue his own case. But the claimant testified that day and did not ask for an adjournment in order to find himself a new attorney.

  Following the Tribunal's judgment that his appeal was late and thus inadmissible, the claimant attacks the judgment on the ground that the Tribunal should have granted him a postponement until he could find a new lawyer. Thus, he pleads, he was afforded a full and complete defence.

  The Superior Court found that the Tribunal had not erred by hearing the claimant without a lawyer.

Family law—child protection proceedings

- In ***New Brunswick (Minister of Health and Community Services) v. G. (J),*** **[1999] 3 S.C.R. 46**, the Supreme Court of Canada considered, for the first time, the issue of whether indigent parents have a constitutional right to state-funded counsel when a government

seeks a judicial order suspending such parents' custody of their children. Applying the three considerations in ***Rowbotham, supra***, the court concluded that the New Brunswick government was under a constitutional obligation to provide counsel in order to ensure a fair hearing consistent with s. 7 of the *Charter*. Whether counsel will be required depends upon the seriousness of the interests at stake, the complexity of the proceedings and the capacities of the parent. If counsel is not provided, then a trial judge has the power to order the government to provide state-funded counsel under s. 24(1) of the *Charter*.[43]

- At para. 86, Lamer C.J. (as he then was), writing for the majority, held that the right to a fair hearing will not always require an individual to be represented by counsel when a decision is made affecting that individual's s. 7 rights. Rather, the seriousness and complexity of a hearing and the capacity of the parent will vary from case to case. Regarding the capacity of the parent, Lamer C.J. wrote in para. 89: "Some parents may be well educated, familiar with the legal system, and possess above-average communication skills and the composure to advise effectively in an emotional setting. At the other extreme, some parents may have little education and difficulty communicating, particularly in a court of law. It is unfortunately the case that this is true of a disproportionate number of parents involved in child custody proceedings, who often are members of the least advantaged groups in society. The more serious and complex the proceedings, the more likely it will be that the parent will need to possess exceptional capacities for there to be a fair hearing if the parent is unrepresented."

43. The Supreme Court decision in G.J. appears to be the leading case on the matter. The only other cases dealing with child protection hearings and/or family law matters only mention literacy in passing when considering a parent's ability to care for a child or future employment opportunities when considering maintenance issues. Literacy is not mentioned explicitly as an issue as it is in the other areas described above.

7. Unrepresented clients and clients with low literacy skills

Role of judges and tribunal members in assisting unrepresented parties

What happens when counsel is not provided or when a party chooses to proceed without counsel? What are the obligations of a judge or tribunal to assist the unrepresented party and ensure the fairness of the process? While the litigants in these cases do not necessarily have literacy issues, the cases are nonetheless instructive for illustrating the delicate balance that must be struck by courts and tribunal members in assisting parties while still remaining impartial. These considerations will become all the more acute if the administrative adjudicator suspects weak literacy skills.

The duty of a trial judge or tribunal member is first and foremost to ensure the fairness of the trial. This task is made significantly more difficult where an accused person or litigant appears unrepresented or self-represented. An impartial adjudicator is a fundamental component of natural justice and a partial adjudicator will have a negative impact on the administration of justice. As a result, tribunal members, as with judges, must attempt to deal with the difficult situation of assisting the unrepresented party by explaining the proceedings and ensuring fairness in the process, without crossing the line from neutral to biased arbiter.

- In ***R. v. McGibbon*** **(1988), 45 C.C.C. (3d) 334 (Ont. C.A.)** at p.347, the Court of Appeal for Ontario held that where an accused person is unrepresented by counsel, the trial judge may provide reasonable assistance to the accused in the presentation of evidence, putting any defences before the court and guiding the accused in such a way that his or her defence is brought out with its full force and effect. Specifically, the court held: “Consistent with the duty to ensure that the accused has a fair trial, the trial judge is required within reason to provide assistance to the unrepresented accused, to aid him in the proper conduct of his defence, and to guide him throughout the trial in such a way that his defence is brought out with its full force and effect. How far a trial judge should go in

assisting the accused in such matters as the examination and cross-examination of witnesses must of necessity be a matter of discretion."

Civil cases

- ***Davids v. Davids*, [1999] O.J. No. 3930 (Ont. C.A.)** The Ontario Court of Appeal discussed the role of a trial judge where one of the parties is unrepresented. At para. 36, the court wrote: "Fairness does not demand that the unrepresented litigant be able to present his case as effectively as a competent lawyer. Rather, it demands that he have a fair opportunity to present his case to the best of his ability. Nor does fairness dictate that the unrepresented litigant have a lawyer's familiarity with procedures and forensic tactics. It does require that the trial judge treat the litigant fairly and attempt to accommodate unrepresented litigants' unfamiliarity with the process so as to permit them to present their case. In doing so, the trial judge must, of course, respect the rights of the other party."

Small Claims Court

- There is a small body of jurisprudence dealing with the extent to which small claims court judges may assist unrepresented parties. Small claims rules and proceedings are intended to ensure that claims are resolved in a manner that is just, simple, and inexpensive. More importantly, small claims court is a legal forum that is accessible to lay litigants: ***Cappos v. Zurich* Canada (1996), 12 C.C.L.I. (3d) 9 (B.C. Prov. Ct.)**. In this way, the courts have recognized that a less formal approach is permissible in order to facilitate accessibility.
- ***Clayton v. Earthcraft Landscape Ltd.*, [2002] N.S.J. No. 516 (N.S.S.C.)** LeBlanc J. held that there is authority to the effect that a trial judge who is faced with an unrepresented litigant has an obligation to direct that litigant's attention to salient points of law and procedure. In this case, the Nova Scotia Supreme Court overturned the decision of a small claims adjudicator who did not draw the litigant's attention to the fact that his documentary evidence would be entitled to more weight if he called the author of the document as a witness. At para. 28, the court held: "It seems clear from the cases

that the requirements of natural justice create a duty for a small claims adjudicator to assist unrepresented parties, particularly where a legal or procedural issue of which the party is not aware, is relevant in assessing the merits."

- ***Strait Engineering Ltd. v. Brian MacLane's Backhoe and Trucking,* [1996] N.S.J. No. 38 (S.C.)** Scanlan J. held, at para. 8: "Without legal representation, the parties do not always understand the technical requirements of proof. Often there are substantive issues that must be proven and I am satisfied that the presiding adjudicator should at least direct the minds of the parties to those issues. The parties in the informal settings of Small Claims Court often rely on the adjudicator to direct the attention of the parties to the relevant issues. This gives the parties an opportunity to put evidence before the court to satisfy the adjudicator as to proof of substantive issues." See also ***MacDonald v. Weather Products Corp.*, [1982] N.S.J. No. 30 (N.S.C.A.)**.

Administrative tribunals

In cases where the party has chosen to proceed without counsel, panel members, like judges, must strike the appropriate balance between accepting the decision to represent oneself and accepting the consequences inherent in that choice, yet still ensuring that the party receives a fair hearing.

- ***Canadian Union of Public Employees and Local 11*, [1992] O.L.R.D. No. 3647** This case involved a complaint pursuant to the *Ontario Labour Relations Act*. The vice-chair Janice Johnston wrote at para. 6: "As noted, the complainant was represented at the hearing by his father, not legal counsel. The Board therefore explained that parties often choose to appear before the Board unrepresented by legal counsel as there are no requirements that they do so. However, it was pointed out that proceedings before the Board are legal proceedings and that persons appearing without legal counsel must bear any risks and the consequences involved with doing so. I indicated that I could explain the nature of the proceedings but that I could not provide legal advice. It is the role of the Board to adjudicate and it would be inconsistent with that role for me to provide one party with legal advice at various stages of

the proceedings. Both the complainant and his representative indicated that they understood the Board's comments in this regard." At the request of the intervener in this case, the Board also ensured at the outset that both the complainant and his representative understood the purpose of the hearing.

- ***Afkieh v. Canada (Minister of Citizenship and Immigration),* [1999] I.A.D.D. No. 2778** At para. 21: "This tribunal frequently deals with unrepresented appellants, many of whom are not sophisticated. In these circumstances panel members take extra care to ensure that appellants understand the process, the possible avenues of appeal and the relevance of their evidence to the grounds of appeal. This is an appropriate, although difficult role for panel members to play, as they must balance their functions as neutrals in an essentially adversarial process with the need to make the Appeal Division a tribunal which is accessible and open to all litigants, especially those who are unrepresented."
- ***Andre v. Canada (Minister of Citizenship and Immigration,* [2000] I.A.D.D. No. 1455** The appellant appeared before the Immigration and Refugee Board of Canada, Appeal Division, unrepresented by counsel. At the very outset of its reasons, the panel noted that the appellant had serious literacy requirements and "was in fact illiterate." As a result, the panel asked that the appellant's family, girlfriend, and employer be present for the explanation of what was going to happen. The appellant had requested a postponement to enable him to retain counsel, because counsel of choice was not available to proceed on that day. It was alleged that the appellant failed to comply with the terms of his stay of removal order; namely that he failed to participate in literacy training and that he had engaged in criminal activity. The applicant submitted that he had been charged with only one offence. In an attempt to support this position, he provided the panel with documentary evidence relating to the criminal offence proffered as corroborating his evidence. The document, however, indicated that he had been charged with eight criminal offences. The panel stated: "It therefore does not support your evidence, but would actually appear to contradict it. At this point, I have to assume that because you are illiterate, you did not fully appreciate its contents" (at para. 5). The panel was also alerted to the appellant's difficulties in understanding

the proceedings when he asked how the panel thought the case was going. In the end, the panel permitted the postponement to allow the appellant to be represented by counsel and continued the stay of the removal order.

Situation in Quebec

Generally speaking, the Quebec courts protect plaintiffs whose low level of schooling prevents them from filing legal documents on time, or who are unable to defend themselves for reasons of communication, language or education. Thus, although ignorance of the law is not a reasonable excuse to condone procedural errors, it seems that Quebec courts agree that the claimant must have such access to justice that he receives a just and fair trial, even if this means granting delays in order to prepare or translate documents.

- **Industrial injuries—28, [1985] CAS 63:**

  The appellant asked for a review of the decision of the Commission de la santé et de la sécurité du travail du Québec more than one year after the latter's decision, on the basis of his low level of schooling, among other things, that explained his lateness.

  The low level of schooling of the appellant did not place him in a situation in which he was incapable to act according to paragraph 64 (3) of the *Workers's Compensation Act* (L. R. Q., chapter A-3).

- **Car insurance—11, [1992] CAS 219:**

  The appellant, who speaks neither English nor French, was involved in a car accident and had to undergo surgery. She was not reimbursed by the Société de l'Assurance Automobile du Québec, which contended that it was unable to establish a causal relationship between the accident and the surgical procedure.

  The tribunal found that because of her absolute incapacity to understand either French or English, the appellant had to trust the persons whom she had asked to act for her. In the present case, those persons committed errors and it would be inappropriate to deprive her of her right of appeal in consequence of such errors. Thus, although they were filed late, the appeals are admissible.

The evidence suggests that the appellant was always willing to fight the decision and tried to fight it. She was never negligent in that regard and the confusion results essentially from her inability to understand French, the errors made by others, and the text following the decision of 28 September 1987, which was confusing when he invited the victim to call her indemnity agent if she disagreed with the decision made. Thus, the SAAQ must revise its decision.

- **Automobile insurance—7, [1994] C.A.S. 203 (S.A.C.):**

  The applicant made an application for review later than the end of the 60 days delay provided for in section 55 of the *Automobile Insurance Act*. He recognizes that he was late in his application for review, but he asks for an extension of the 60 days for filing the application, because he has been unable to act before. Essentially, he was unable to act because he cannot read or write. Indeed, after the judgment in the lower court, he received a letter from the respondent, with a cheque he cashed. He asked his neighbour to explain the content of the letter. The letter said that the application for review had to be sent within 60 days following the mailing of that letter. The court found that the applicant was not unable to act.

  > [Translation] "In the present case, the Social Affairs Appeal Board is of the opinion that the applicant's inability to read or to write is not a reason for his inability to act within the statutory delay. When he received the decision of March 15, 1990, the applicant trusted some people—probably as he always had done before—to translate and interpret the document which he had received. But, the Board has difficulty in believing that the neighbour who knew how to read was not able to read and interpret correctly the decision of March 1990. And his inability to read or to write is not a sufficient ground, of itself and within the framework of that Act, to find that he was unable to act."

- **Social affairs—144, [1998] T.A.Q. File No. AA-63358, (14 October 1998):**

  The applicant, the 36-year-old mother of three children, was involved in a car accident. About 25 days after the accident, she suffered a post-accident miscarriage. She applied for an indemnity from the Automobile Insurance Corp. of Quebec, which rejected her application because of the difficulty in establishing a causal relatationship between the abortion and the accident. After she received this decision, she had to wait about 10 days for a Syrian friend to explain the content of the letter to her, since she does not read or write French. She applied for review but still had to wait for her friend to translate the correspondence she received. The result was that she sent the documents back after the time period provided in the *Automobile Insurance Act.* The document she received from the Corporation were drafted in legal jargon, which constituted a barrier for her, who is totally illiterate in French. The Tribunal found that the lateness in the filing of the application for review was not caused by the negligence of the applicant, but by the cumbersome bureaucratic process. Such process should not be a barrier to justice.

- **Social affairs—175, [1998] T.A.Q., File No. SR-63565, (21 December 1998):**

  The applicant had received a notice of claim concerning obligations he had undertaken concerning two individuals. He met with a collection agent, and told the latter that he wanted to apply for review and to consult a lawyer. His understanding of written and spoken French was very bad. The collection agent gave him a form to claim reimbursement but did not help him to to fill out that form. He also received a letter requesting that he reimburse the financial help he had received to the Quebec government. He met the lady who had sent the letter and told her that he did not understand the consequences of the letter very well. She told him to sign the document, which he did, thereby promising to reimburse the government $56 a month. He then applied for review but after the statutory period. The Tribunal found that he was unable to act:

> [Translation] "The Tribunal found that the applicant sometimes had difficulty understanding French and that he had great difficulty expressing himself in that language.
>
> All those facts lead the Tribunal to conclude that, during the specific time period, the applicant was unable to act. It is possible that the facts, taken separately, could not allow us to find that the applicant was unable to act during that period. But all the facts linked together one after the other constitute an accumulation which, in the opinion of the undersigned, had a determinative effect on his ability, during that period, to manage his business adequately. One should not forget that, as soon as he received the notice of claim, the claimant showed very clearly his intent to oppose the decision. One should also not forget that the meeting of January 6, 1997, followed a letter in which Mrs. Petit-Homme asked the applicant to meet with her within 10 days, otherwise measures would have to be taken to ensure the enforcement of the sponsorship undertaking. The undersigned finds that the promise to reimburse made by the applicant on January 6 is irrelevant to the proceedings. In fact, in the Tribunal's eyes, the applicant appeared as an insecure person, who had physical and psychological difficulties, and could be influenced by the content of the letter sent to him by the agent in charge, on November 20, 1996.
>
> The Tribunal finds, from the evidence heard during the hearing, that the application for review filed by the applicant was admissible in the circumstances, even if it was received outside of the time period." (Paragraphs 8 to 10.)

- **Social affairs—255, [1999] T.A.Q. File No. SR-58161 (25 May 1999)**

  The applicant received financial help for a single adult, as he had asked in his application for financial help. Later, he contended that

the information he had provided was erroneous, and that he should receive financial help for a couple, which was his real family situation. He applied for the review of his application, which was rejected for lateness under section 155 of the *Administrative Justice Act*. He said that he was ignorant of the financial assistance scales and contended that he was illiterate. He added that he had his forms filled out by different individuals. The Tribunal found that it was impossible that each and every one of those individuals successively would have been mistaken. Furthermore, the claimant did not show up to explain more clearly to the Tribunal the reasons why he did not present himself within the time period or why he is asking for the judicial review of the decision.

- **Social affairs—318, [1998] T.A.Q. File No. SR-65416 (7 October 1999)**

  The applicant is asking for the annulment of the consequences of her failure to respect the statutory period for asking the annulment of the respondent's decision in review. The applicant is a unilingual Anglophone. When she received the decision, she contacted an agent of the respondent in order to receive an explanation. The respondent's agent advised her to wait for the translation. She received the translation only six weeks later. The Tribunal found that [translation]: "when the applicant asked for a translation of the decision, she was exercising a right guaranteed by the *Charter of the French Language*. The excess delay incurred for the exercise of that right is a valid and legitimate reason for the failure of the applicant to act within the time prescribed for asking a review." (Paragraph 5.)

- **I.M. v. The Minister for Social solidarity, [2000] T.A.Q. Files No. SAS-Q-022891-9808 / SAS-Q-027101-9105 / SAS-Q-028561-9802 (17 October 2000):**

  This judgment deals with three application, the third of which deals with access to justice. In this case, the applicant is an Anglophone. He said he had notice of the decision but contends that he understood it only after he received the translation after June 10, 1998. He contends that the 60-day appeal period starts only after the translation of the decision has been reviewed and that his application for review on August 10, 1998, is within this period. The Tribunal came to the following conclusion:

> [Translation] "According to this case law, it is obvious that the application for review was filed by the applicant after the expiry of the statutory appeal period.
>
> But, section 106 of the *Administrative Justice Act* allows the Tribunal to relieve a party from failure to act within the time prescribed by law, if the party establishes that he was unable, for serious and valid reasons, to act sooner and if the Tribunal considers that no other party suffers serious harm therefrom.
>
> In this case, the applicant is an Anglophone who doesn't read French and who was not, at the relevant time, represented by a lawyer who could have informed him of the content of the disputed decision to review.
>
> The tribunal finds that this is a serious and valid reason, especially as the other party suffers no serious harm therefrom.
>
> In consequence, the Tribunal relieves the applicant from his failure to act within the time prescribed and says that the applicant's recourse is hereby admissible." (Paragraphs 29 to 33.)

- **C.T. v. The Minister of Justice, [2001] T.A.Q. File No. SAS-Q-055403-9910 (28 March 2001)**

  The applicant was the victim of physical assault at his residence in Umiujaq, in Quebec's Far North. He claimed an indemnity in pursuance to the *Crime Victims Compensation Act,* and he applied for an extension of the delay because he was ignorant of the provisions of the Act. Both applications were rejected, the first because it was late and the second because ignorance of the law is not a reasonable excuse. The applicant speaks neither French nor English. The Tribunal found as follows:

  > [Translation] "In the present case, it is impossible to ascribe lack of due diligence to the applicant. On the second opportunity he had, he consulted a lawyer to find out his rights. In fact, it might have been the first

> opportunity he had to consult with a lawyer since he does not remember to having been present at the village when the Circuit Court came on February 19, 1997.
>
> The special cultural context of the applicant, who lives in an isolated community in Quebec's far North, who speaks practically no English or French, who depends on the lawyers accompanying the Circuit Court for professional consultation, who consulted a lawyer at the first or second opportunity shows that he had not abandoned his rights under the *Crime Victims Compensation Act*, even though his application was filed more than a year after the occurrence of the physical damages." (Paragraphs 7 and 8.)

- **Léveillée v. Howick Textiles, [2002] C.A.Q., 2002 IIJCan37225 (Qc C.A.)**

  In this case, Mr. Justice Morin, dissenting, reaffirmed that ignorance of the law is not a reasonable ground to relieve a person from failure to act within the time prescribed by law, which is a generally recognized principle. (Paragraph 25.)

  But the application was allowed by the majority, on principles of statutory interpretation. The majority found that there was a reasonable ground to act outside of the time prescribed by law.

- **J.B. v. The Quebec Minister for Social solidarity, [2000] T.A.Q. File No. SAS-M-07388-0202 (18 September 2002)**

  The applicant contested the respondent minister's decision in review dated February 6, 2002, which refused to decide upon his application because the latter had been filed beyond the time prescribed by law and no impossibility to act had been proven.

  The applicant met with his socioeconomic assistance agent, with whom he had communication problems because he does not speak French and she does not speak English. The applicant finally provided her with the documents that he thought she wanted, but when he sent his application for review, the prescribed period had lapsed.

The Tribunal found that the applicant was not unable to act because he had not understood that he owed money to the respondent. On the contrary, he had understood this very well since he had met his socioeconomic assistance agent. Rather, it was the agent who did not help him to formulate correctly his application for review:

> [Translation] "In this file, even though the socio-economic assistance agent understood very well the applicant's intention to challenge the claim, she lent him no help whatsoever in formulating his application for review. She had him sign a declaration explaining the use of a sum of money, and she asked him to provide other documents. While the applicant was taking those steps, the period for the filing of the application to review was running, and when the applicant acted, that period was expired.
>
> In addition to the difficulties of those two individuals, the passivity of the socioeconomic assistance agent left the applicant with the belief that the collection of new documents had no consequences:
>
> The Tribunal is not suggesting that the socioeconomic assistance agent wilfully left the applicant in error and, thus, let the 90 days delay expire.
>
> But in failing to act in conformity with the provisions of section 131 of the Act, and thus failing to explain precisely to the applicant his obligation to file his application for review within the prescribed time period, the agent put the latter in a situation where it was impossible for him to act earlier." (Paragraphs 19 to 22.)

- **M.K. v. The Minister for Social solidarity and family, [2004] T.A.Q. File No. SAS-M-077604-0207 (19 August 2002)**

  The applicant disputes the respondent's decision to refuse to pay her some employment insurance benefits as a single adult family, because she was living within a common-law relationship.

> The applicant did not speak or understand French or English. During the hearing, problems arose because of the absence of an interpreter.
>
> The Tribunal is bound to ensure it can communicate with the applicant. Thus the hearing was adjourned until the Tribunal was able to find an interpreter between the Punjabi and French languages.

Assistance in presenting Charter *arguments*

- ***Spracklin v. Kichton*** **[2001] A.J. No. 990 (Q.B.)** The issue in this case was whether the interests of justice demanded that the province assist the plaintiff by covering the cost of representation on a *Charter* challenge. In concluding that the plaintiff should be provided with state-funded counsel, the court held at para. 82, "This is not a situation where a trial can proceed with the Trial Judge giving technical assistance to an unrepresented litigant, as discussed in Rain, McGibbon, Romanowicz, or Wood. The general principle in such cases is characterized as the Judge giving a "helping hand" to allow the position of the accused to have its full force and effect. By comparison, a judicial effort to assist Spracklin to put forward a *Charter* challenge here to its full force and effect could well be regarded as an affront to justice. It would not be fair to Spracklin, inasmuch as the Judge could not tell her what to think or say, or what evidence to call, or why, or to what purpose. Expert evidence is expected here. It would not be fair to Kichton. It would not be fair to Alberta, not because the Judge would necessarily become an adversary to Alberta but due to the seriously distracting effect of the Judge being both a form of advocate and the Judge, it would not look like justice to a reasonable observer."

However, there is some indication that directing the unrepresented party in how to go about presenting or bringing forward a *Charter* proceeding may be permissible. See ***Steemson v. British Columbia*****, [2002] B.C.J. No. 388 (B.C.S.C.)**

Problems, comments, and observations

The principles that emerge from cases involving unrepresented litigants may be useful with litigants, witnesses or other participants with low literacy skills in administrative hearings. The basis for guidance or assistance by an adjudicator is to ensure a fair hearing for the unrepresented party, while remaining neutral and impartial. However, the question arises: Is there a difference between a fully literate, but unrepresented litigant, and an unrepresented litigant with low literacy skills?

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