

# Achieving technological neutrality in the drafting of legislation



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# Law of disruption

...the Law of Disruption is a simple but unavoidable principle of modern life: *technology changes exponentially, but social, economic, and legal systems change incrementally*. The technology we invent has the potential to change the world at an accelerating pace, but humans can no longer keep up.

Larry Downes



A large, jagged iceberg floats in a deep blue ocean under a clear sky. The iceberg's surface is textured with various ridges, grooves, and small pools of water. The text is overlaid on the upper half of the iceberg.

INTERNET  
CHANGES  
EVERYTHING



NEW ZEALAND  
PASSPORT

URUWHENUA  
AOTEAROA



# Terminology of paper

- prescribed form
- application in writing
- signed
- lodge/file
- written notice
- service

facebook<sup>®</sup>

twitter 

Gmail<sup>™</sup>  
by Google

# Terms/Principles

- Technology neutrality
- Media neutrality
- Functional equivalence
- Equivalence of risk



# Is technology-neutral legislation even possible?



"Trying to predict the future is like trying to drive down a country road at night with no lights while looking out the back window."

Peter F. Drucker



# **Is technology-neutral legislation even possible?**

"Language cannot be completely technology-neutral. It is impossible to draft legislation with sufficient precision and clarity that addresses every possible future technical variation."

"Drafters... are limited by foresight. If technological change is unpredictable, it is difficult to allow for it in advance."

Lyria Bennett Moses

"If it is only difficult, it is done; if it is impossible, we shall see."

Charles-Alexandre de Calonne





# Overview

- Interpretation legislation
- Electronic transactions legislation
- Statutory interpretation principles
- Specific drafting approaches

# Interpretation legislation

- usefulness varies according to jurisdiction
- definitions of "document", "writing"



***document*** includes any publication and any matter written, expressed or described upon any substance by means of letters, figures, or marks, or by more than one or more of those means, which is intended to be used or may be used for the purposes of recording that matter;

***writing*** and expressions referring to writing include printing, photography, photocopying, lithography, typewriting and any other modes of representing or reproducing words in visible form;

“writing”  
« écrit »

“writing”, or any term of like import, includes words printed, typewritten, painted, engraved, lithographed, photographed or represented or reproduced by any mode of representing or reproducing words in visible form.

*Interpretation Act (Canada)*

“Writing” includes representing or reproducing words, figures, or symbols —

- (a) in a visible and tangible form by any means and in any medium;
- (b) in a visible form in any medium by electronic means that enable them to be stored in permanent form and be retrieved and read.

*Interpretation Act (New Zealand)*



**document** means any record of information, and includes:

- (a) anything on which there is writing; and
- (b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them; and
- (c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else; and
- (d) a map, plan, drawing or photograph.

**record** includes information stored or recorded by means of a computer.

**writing** includes any mode of representing or reproducing words, figures, drawings or symbols in a visible form.

*Acts Interpretation Act* (Commonwealth)

# Prescribed forms

- (1) A person who is authorised to prescribe a form under an enactment is authorised –
  - (a) to prescribe an electronic form for the purposes of that enactment; and
  - (b) to prescribe requirements in connection with the use of that electronic form, including requirements for its electronic signature.

*Electronic Transactions Act 2002 (NZ) s. 37*



# Electronic transactions legislation

- UNCITRAL Model Law on Electronic Commerce
- Uniform Electronic Commerce Act
- jurisdictional variations

# Electronic transactions legislation

- typical provisions
  - electronic communication satisfies requirement for writing/signature
  - requirement to retain/provide/produce information in paper or other non-electronic form satisfied by information in electronic form

# Electronic transactions legislation

- limitations
  - exclusion of specific documents, requirements or transactions
  - restricted application to designated laws
  - particular technology required
  - consent of parties required
  - governmental transactions excluded



# Electronic transactions legislation

- specific provision for public bodies
  - *PIPEDA* (Canada)
  - *Electronic Communications and Transactions Act, 2002* (South Africa)
  - *Kenyan Information and Communications Act 1998*

# Statutory interpretation issues

"It may indeed be the chief merit of a statute that by its employment of general words it is possible to adapt it to changing social needs....The experienced draftsman [sic] will not try to keep the judges on too tight a rein."

DJ Payne

"statutes should be put to work, not let work to rule"

O'Flaherty J. in *Keane v An Bord Pleanala*

# **Statutory interpretation issues - cont'd**

- The dynamic/ambulatory/updating approach:  
the law is always speaking
- Technologically neutral interpretation



# Dynamic/ambulatory/updating approach

- An Act may cover developments not foreseen when Act passed if developments within purpose of Act and words, interpreted liberally, capable of extending to them
- The law is always speaking:

## 8. Enactments apply to circumstances as they arise

An enactment applies to circumstances as they arise.

*Interpretation Act 1999 (NZ)*

## LAW ALWAYS SPEAKING

Law always  
speaking

**10.** The law shall be considered as always speaking, and where a matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to the enactment according to its true spirit, intent and meaning.

R.S., c. I-23, s. 10.

# **Legislation must be interpreted in the light of changing circumstances**

7. (1) Legislation must be interpreted--

(a) as applying to circumstances as they arise; and

(b) in accordance with the contemporary meaning of the language.

(2) Any interpretation of legislation in terms of subsection (1) must be consistent with the purpose and scope of the legislation.

(South African Law Reform Commission)



# The law is always speaking

Construing  
provisions in  
changing  
circumstances



**6.** -- In construing a provision of any Act or statutory instrument, a court may make allowances for any changes in the law, social conditions, technology, the meaning of words used in that Act or statutory instrument and other relevant matters, which have occurred since the date of the passing of that Act or the making of that statutory instrument, but only in so far as its text, purpose and context permit.

# **Technologically neutral interpretation**

"Legislation should not be interpreted so as to limit rights and defences to technologies known at the time those rights and defences were enacted."

# Drafting approaches

- Awareness of the problem
- Draft in general terms
- Specify outcomes, not processes
- General empowering/overriding provisions
- Prescribe technologies by subordinate legislation



# Draft in general terms

- The "whatever" approach
- Facilitates application of:
  - dynamic/updating approach
  - statutory provisions incorporating "law is always speaking" principle

# **Specify outcomes, not processes**

- Statement of desired outcomes rather than prescriptive rules ("outcomes-based drafting")
- Desired outcome does not require any particular technology

# **General empowering/overriding provisions**

- approach in electronic transaction legislation
- general authority to use electronic technology
- override paper-centric legislation

## Acceptance of electronic filing and issuing of documents

**27.** Any public body that, pursuant to law--

- (a) accepts the filing of documents, or requires that documents be created or retained;
- (b) issues any permit, licence or approval; or
- (c) provides for a manner of payment,

may, notwithstanding anything to the contrary in such law--

- (i) accept the filing of such documents, or the creation or retention of such documents in the form of data messages;
- (ii) issue such permit, licence or approval in the form of a data message; or
- (iii) make or receive payment in electronic form or by electronic means.



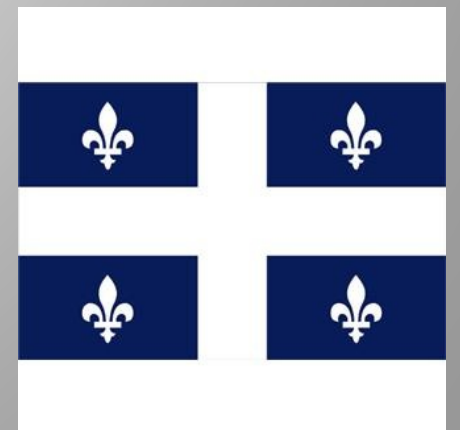
## **14. Commissioner and Registrar may exercise functions electronically**

- (1) Anything that the Commissioner is required or authorised to do under this Act may be done by the Commissioner by electronic means in any way the Commissioner determines is appropriate.
- (2) Anything that the Registrar is required or authorised to do under this Act may be done by the Registrar by electronic means in any way the Registrar determines is appropriate.
- (3) If, in reliance on this section, something is done electronically when it would otherwise be required to have been done, or could have been done, using or with respect to a paper document, the doing of that thing electronically has the same effect as if that thing had been done using or with respect to a paper document.
- (4) This section applies even though the provision requiring or authorising the Commissioner or Registrar to do something expressly or impliedly requires or authorises the thing to be done by means of a paper document.

# General overriding provisions

**76.** A provision creating an offence that specifies that the offence may be committed with the use of a document shall be construed as meaning that an offence may be committed whatever the medium of the document may have been, whether paper or any other, at any point in its life cycle.

*An Act to Establish a Legal Framework for  
Information Technology (RSQ, C-1.1) (Quebec)*



# Prescribing technologies by subordinate legislation

- *PIPEDA* s.46
- *Interpretation Act 1987* (NSW) s.45C
- *Legislation Act 2012* (NZ) s.17

# **Extending subordinate legislation-making powers**

## **13. Power to make regulations extended**

- (1) If a provision of an enactment to which section 12 applies empowers the making of any regulations for the purposes of that enactment, that power is to be construed (with all necessary changes) as including a general power to make regulations for the purposes of section 12.
- (2) Without limiting subsection (1), the power conferred by subsection (1) includes power to make regulations in relation to the use of electronic technology in particular circumstances even though no regulations are required with respect to the use of written information, documents or records in the same or similar circumstances.

# **Extending subordinate legislation-making powers**

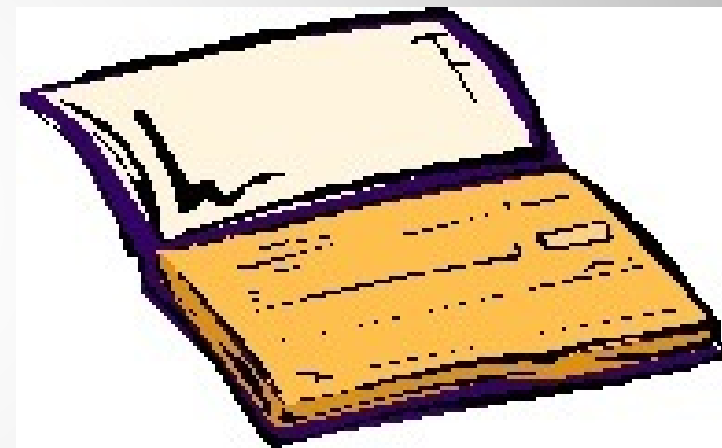
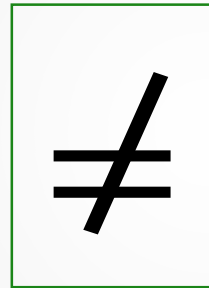
- (3) Without limiting subsection (1), the power conferred by subsection (1) to provide that any information, document or record, or a copy of any document or record, is to be given to a person in electronic form includes power to determine when a document, record or copy given to a person in that form is to be taken to be, or to be presumed to be, received by, or brought to the attention of, the person.



# *Board of Inland Revenue v Haddock (1930) Misleading Cases 90*



# Functional equivalence?



"Our new laws won't look much like the old ones. Treaties, statutes, regulations, and judicial opinions are giving way to more organic forms. The Declaration of Independence of digital life has already been written. Its Constitution, made up of wikis, terms of service agreements, privacy policies, and the software code itself, is now being drafted....Lawmakers and business leaders need to catch up quickly if they want to have a voice."

Larry Downes



Questions?

# CALC paper

## **Achieving technological neutrality in drafting legislation**

January 2014 edition of *The Loophole*,  
the Journal of the Commonwealth Association of  
Legislative Counsel, available at:

[http://www.opc.gov.au/calc/docs/Loophole/Loophole\\_Jan14.pdf](http://www.opc.gov.au/calc/docs/Loophole/Loophole_Jan14.pdf)





Bungle Bungles  
Western Australia