



STANDING JOINT COMMITTEE FOR THE SCRUTINY OF REGULATIONS

The Standing Joint Committee for the Scrutiny of Regulations has the honour to present its

SECOND REPORT

(Report No. 90 - Accessibility of Documents Incorporated by Reference in Federal Regulations)

Pursuant to its permanent reference, section 19 of the *Statutory Instruments Act*, R.S.C. 1985, c. S-22, and the order of reference approved by the Senate on March 22, 2016 and by the House of Commons on March 24, 2016, the Joint Committee wishes to draw the attention of the Houses to its views on certain issues relating to the accessibility of documents incorporated by reference in federal regulations.

This Report arises from the Joint Committee's review of instruments following the amendments to the *Statutory Instruments Act* that authorized as a general practice ambulatory incorporation by reference in federal regulations. A summary of the Joint Committee's views on this matter may serve as a useful background for a broader discussion as to how the accessibility of incorporated documents can be ensured.

Background

When Parliament confers a power to make regulations, the regulation-maker usually exercises this power by drafting the text of the regulation to be enacted. The regulation-maker may also decide that the contents of an existing document are what should be used in the regulation it intends to enact. One way to make the contents of such a document part of the text of the regulation would be to reproduce it word for word in the regulation. Alternatively, the regulation-maker can simply refer to the title of the document in the regulation. The contents of the document will then be said to be "incorporated by reference." The legal effect of incorporation by reference is to write the words of the incorporated document into the regulation just as if it had actually been reproduced word for word. When material is incorporated "as amended from time to time," any change to that material will automatically become part of the incorporating regulation.

It had long been the position of the Joint Committee that, absent express authority, ambulatory incorporation by reference amounts to an unlawful subdelegation of regulation-making power, in that it will be the body amending the incorporated material, and not the authority on whom the power to make the regulations has been conferred, that will determine the content of the regulations. The Joint Committee explained this position in its *Report No. 80*, tabled in 2007.

Although the Department of Justice did not accept the Joint Committee's view, the Minister of Justice proposed that consideration be given to developing a legislative solution

that would resolve the impasse between the Department and the Joint Committee by setting out rules governing the use of incorporation by reference in federal regulations. This proposition ultimately became Bill S-2, the *Incorporation by Reference in Regulations Act*, which received royal assent on June 18, 2015.

The new section 18.1 of the *Statutory Instruments Act* specifies that the power to make regulations includes the power to incorporate by reference a document, whether in an ambulatory or static manner. That document may not originate with the regulation-making authority, unless it meets the specific criteria listed in subsection 18.1(2). Section 18.4 confirms that documents incorporated by reference are not required to be transmitted for registration or published in the *Canada Gazette* for the purposes of the *Statutory Instruments Act*. But it is the reference to accessibility spelled out in section 18.3 and 18.6 that give rise to the present report. Sections 18.3 and 18.6 read as follows (emphasis added):

18.3 (1) The regulation-making authority shall ensure that a document, index, rate or number that is incorporated by reference is accessible.

(2) If the Governor in Council or the Treasury Board is the regulation-making authority, the obligation under subsection (1) rests with the minister who is accountable to Parliament for the administration of the regulation.

18.6 A person is not liable to be found guilty of an offence or subjected to an administrative sanction for any contravention in respect of which a document, index, rate or number — that is incorporated by reference in a regulation — is relevant unless, at the time of the alleged contravention, it was accessible as required by section 18.3 or it was otherwise accessible to that person.

Section 18.3 can be commended to the extent that it seeks to ensure that persons governed by incorporated material may obtain that material, and that it places responsibility in that regard on the regulation-making authority. Questions, however, arise from the wording of that section, which provides simply that regulation-making authorities shall ensure that incorporated material is accessible. What exactly does this require?

The Joint Committee had occasion to consider the issue of accessibility for the first time during the course of its examination of SOR/2009-162, *Chromium Electroplating, Chromium Anodizing and Reverse Etching Regulations*. These Regulations incorporate by reference a third-party standard, ASTM D1331-89, which is available for purchase online, in English only, at a cost of US\$48. Environment and Climate Change Canada was asked, as the regulation-making authority, what measures it had taken in order to make the standard “accessible” as per section 18.3 of the *Statutory Instruments Act*. In its response, the Department stated that:

[a]ccessible does not require that the standard be obtained free of charge. In addition, it is our position that the requirement in the *Statutory Instruments Act* that the Minister ensure that the document is “accessible” does not require that all documents that are incorporated be bilingual. In this case, we are of the view that unilingual incorporation by reference is justified as this is the generally accepted standard on this topic, the standard is well known in the industry, as an American standard it is available only in English and the standard is subject to copyright protection.

If a technical standard that is available at a cost and in only one official language is said to be “accessible,” it bears asking the question when an incorporated document would ever not be considered accessible. Further, it does not seem that the Department sees its responsibilities to have changed as a result of the coming into force of the statutory requirement to ensure the accessibility of incorporated material. To adopt this view would essentially mean that Parliament has legislated in vain when it adopted section 18.3.

Furthermore, the Joint Committee would like to emphasize that the defence provided for under section 18.6, against being found guilty of an offence if it was later determined that an incorporated document was not accessible, is not a substitute for clearly stated requirements to make incorporated material accessible to the public. Citizens should be able to ascertain their rights and responsibilities without having to incur the time and cost associated with court proceedings.

In pursuing its mandate of ensuring the requirements of the *Statutory Instruments Act* are met, particularly the accessibility requirement set forth in section 18.3, the Joint Committee would like to raise the following issues.

Language

The Joint Committee considers that the first barrier to access to material incorporated by reference is its availability in only one official language. In a country that is officially bilingual, access to the law should not be dependent on which official language one speaks.

The Supreme Court of Canada had the opportunity to rule on the minimal constitutional requirements with regard to language rights in *Reference re Manitoba Language Rights (No.3)*, [1992] 1 S.C.R. 212. This case dealt with the question of the applicability of constitutional language requirements to referentially incorporated documents.

Section 133 of the *Constitution Act, 1867* requires that the Acts of the Parliament of Canada and of the Legislature of Quebec be printed and published in both English and French. In 1985, the Supreme Court had ruled that the scope of section 133 and of section 23 of the *Manitoba Act, 1870* were identical and that section 23, and therefore section 133 as well, applied to “instruments of a legislative nature.” In the subsequent *Reference re Manitoba Language Rights (No.3)*, the Court was asked to clarify which documents were subject to the section 133 requirements.

As regards the application of section 133 to documents incorporated by reference in the laws of Manitoba, the Court indicated there were two threshold questions that needed to be answered. First, is the primary instrument of a legislative nature? Second, is the incorporated document essential to understanding the primary instrument? If these questions were answered in the affirmative, then:

the central issue becomes whether or not there is a *bona fide* reason for incorporation without translation. To make this determination, the origin of the document and the purpose of its incorporation must be examined.

The Court went on to describe the factors which may be taken into consideration to determine whether or not there are “legitimate reasons” for the referential incorporation of a document that exists in only one official language. When the incorporated material originates from an external body, the Court enunciated by way of example two situations where there could be legitimate reasons to incorporate unilingual material: where the incorporated material implements cooperative arrangements between governmental bodies and where the incorporated material is a standard, developed by a non-governmental body, that is continually changing, particularly when it involves a high level of technical expertise.

Governmental departments have sought to transpose this ruling on the minimum constitutional language requirements to the administrative law sphere in order to justify the incorporation of unilingual standards. To do so fails to take into account the additional requirement imposed by section 18.3 of the *Statutory Instruments Act*.

It is a tenet of statutory interpretation that when Parliament legislates, it benefits from a presumption of knowledge and competence. In *Sullivan on the Construction of Statutes*, 6th edition, the author discusses Parliament’s presumed knowledge in the following terms:

The legislature is presumed to know all that is necessary to produce rational and effective legislation. This presumption is very far-reaching. It credits the legislature with the vast body of knowledge referred to as legislative facts and with mastery of existing law, common law and the *Civil Code of Québec* as well as ordinary statute law, and the case law interpreting statutes. [...] In short, the legislature is presumed to know whatever facts are relevant to the conception and operation of its legislation.

When Parliament adopted section 18.3 of the *Statutory Instruments Act*, it did so while fully aware of the state of the law. Therefore, Parliament must have meant to impose more of an obligation on regulation-making authorities to ensure the “accessibility” of incorporated documents than meeting the bare minimum constitutional language requirements stated in *Reference re Manitoba Language Rights (No.3)*, which were applicable in any event.

In other words, if Parliament had been satisfied with constitutional minimum language requirements, there would have been no need for section 18.3.

While their prior practice of relying on unilingual documents that can be purchased at a cost may have met constitutional minimum standards, departments must adapt to the new statutory obligations of ensuring accessibility.

If regulation-making authorities want to benefit from the work of external organizations, the onus should be on them to ensure it is in a format that makes law accessible to all Canadians, regardless of their official language of choice. The Joint Committee therefore takes the position that in order to be considered accessible a document incorporated by reference should be available in both official languages.

Cost

The Joint Committee also considers cost to be an additional barrier to access. Cost is usually associated with standards established by non-governmental organizations. The price paid then serves the purpose of amortizing the cost of developing the standard. These standards are also usually protected by copyright.

The practice of incorporation by reference initially stemmed from the government's need to exercise its regulation-making powers in an increasingly complex and technical environment, subject to rapid changes and with limited resources. Rather than expend resources to develop its own standards, a department may instead incorporate standards developed by external organizations. Ultimately, the cost of developing the standard is passed on to end users, who have no choice but to go through the expenditure in order to ascertain their obligations under the law. In the absence of any policy or guidance on the use of this practice, a governmental organization may incorporate as many standards as it sees fit. For instance, the *Transportation of Dangerous Goods Regulations*, SOR/2001-286, currently incorporates by reference 42 safety standards; the cost associated with purchasing the 36 standards that emanate from external bodies would be approximately \$7000.

The relative ease with which a department may incorporate by reference an external document is but one of the many facets of the issue. Whereas other jurisdictions have enacted a procedure to assess the necessity of incorporating by reference any external standards that bear a cost, Canadian federal governmental organizations may in general incorporate costly standards without restriction.

At present, the Canadian Food Inspection Agency is the only governmental body with a policy on incorporation by reference. This policy serves as a guide for the Agency in determining whether referential incorporation is appropriate and uses criteria such as cost and language. The policy, however, remains an administrative document and as such does not bear the force of law.

Other jurisdictions have dealt with this issue in various ways. The New Zealand Regulations Review Committee tabled several reports on materials incorporated by reference. These in turn led to the adoption by the Legislative Advisory Committee, a government committee that advised departments and agencies on the design of bills and statutory instruments, of *Principles for incorporation by reference*, the first of which is "use of incorporation by reference only if impractical to do otherwise." Another principle adopted by the Legislative Advisory Committee was that an agency that incorporates a document by reference should make readily available for inspection, free of charge, a reasonable number of hard copies of the document, and, when practicable, a copy of the document must be available free of charge on the Internet. A list of incorporated documents is also published annually. If any of those principles cannot be complied with, incorporation by reference must not be used. A further report of 2008 dealt with providing alternatives to mandatory publication following issues relating to copyright. These reports and principles led to the enactment of the *New Zealand Legislation Act 2012*, sections 51 and 52 of which formally require that consultations take place prior to incorporating materials by

reference and that the regulation-maker make said materials available for inspection free of charge at inspection sites, and when possible make the materials available free of charge on the Internet.

In the United States, the American National Standards Institute administers an Incorporated by Reference (IBR) Portal on the Internet, which provides no-charge, read-only access to standards incorporated in the *U.S. Code of Federal Regulations*. The Portal offers standards by twelve third-party organizations. While this system has the benefit of demonstrating what can be done in order to facilitate accessibility while being mindful of copyright law, at present adherence is voluntary and the Portal is not exhaustive. This is why the American Bar Association recently adopted resolution 112 in order to urge Congress to enact legislation stating that when an agency proposes to referentially incorporate a document:

- (a) The agency must make the portion of the standard that the agency intends to incorporate by reference accessible, without charge, to members of the public.
- (b) If the material is subject to copyright protection, the agency must obtain authorization from the copyright holder for public access to that material.
- (c) The required public access must include at least online, read-only access to the incorporated portion of the standard, including availability at computer facilities in government depository libraries, but it need not include access to the incorporated material in hard-copy printed form.
- (d) The legislation should provide that it will have no effect on any rights or defenses that any person may possess under the Copyright Act or other current law.

While the incorporation by reference of external materials that bear a cost might not be completely avoidable, the Joint Committee is of the view that more could be done to ensure that this practice becomes a solution of last resort for governmental organizations. Further, when it takes place, departments must take formal steps in order to make the materials available.

Temporal application

The last issue related to accessibility pertains to the temporal application of documents incorporated by reference.

Considering the changing nature of certain of those documents, it poses the singular question of what rule a citizen is to follow. For instance, will departments keep track of amendments made to the materials incorporated by reference in an ambulatory manner, and will the latest version always be the one enforced? When it comes to past versions of the material, if it is incorporated in an ambulatory manner, should a person not be expressly entitled to see what changes have been made in the law, particularly if a past version of the incorporated material applied at the relevant time?

One avenue to address these issues would be to require departments to perform a periodic maintenance of the standards incorporated by reference. This could take the form

of an annual declaration listing all external documents incorporated by reference, with the changes made to them. In addition, it could be made mandatory that a document incorporated “as amended from time to time” must be re-incorporated after a certain period of time or be automatically revoked. This would have the added benefit of ensuring a regulation-making authority must review changes to the incorporated document every so often.

In addition, where ambulatory incorporation by reference is to be permitted, regulation-making authorities should also be required to take steps to ensure that the current version of an incorporated document is readily available to the public, as are all previous versions that were previously incorporated.

Recommendations

The Joint Committee considers that certain obligations flow from the fundamental principles of the Rule of Law and Responsible Government in Canada. Namely, citizens must be reasonably able to ascertain their legal rights and obligations, and an exercise of legislative power ought to be available for examination by all those who are interested.

The Joint Committee has in recent years observed an increasing frequency of incorporation by reference of documents into federal regulations. At the same time, the incorporation of documents has not been subject to clear or consistent requirements for accessibility.

As the availability of incorporation by reference presents significant advantages over the current regulation-making process in terms of efficiency and responsiveness, it should be expected that the use of incorporation by reference will only continue to grow as time goes on.

With the foregoing in mind, while the Joint Committee welcomes the new requirement in section 18.3 of the *Statutory Instruments Act* that material incorporated by reference be made accessible, the Joint Committee is of the view that this requirement must include, in order to be effective, the following safeguards:

Recommendation 1

That the *Statutory Instruments Act* be amended in order to require that incorporation by reference should be used only where it would be impracticable to do otherwise. Further, that regulation-making authorities should be required to state in the Regulatory Impact Analysis Statement accompanying the instrument the reasons why avoiding the incorporation by reference was considered impracticable.

Recommendation 2

Recognizing that Francophones and Anglophones must have equal access to the law, that the *Statutory Instruments Act* be amended to require incorporated materials to be made available in both official languages.

Recommendation 3

That the *Statutory Instruments Act* be amended to require that regulation-making authorities make all incorporated materials available for consultation by the public, free of charge, including all former versions of the incorporated materials.

Recommendation 4

That the *Statutory Instruments Act* be amended to establish a central repository for incorporated materials and require regulation-making authorities to provide, on an annual basis, a list of all incorporated documents.

In accordance with Standing Order 109 of the House of Commons, the Standing Joint Committee for the Scrutiny of Regulations requests the Government to table a comprehensive response to this Report in the House of Commons.

A copy of the relevant Minutes of Proceedings and Evidence (*Issue No. 16, First Session, 42nd Parliament*) is tabled in the House of Commons.

Respectfully submitted,

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Joint Chairs

APPENDIX A

New Zealand Legislation Act 2012

51 Requirement to consult on proposal to incorporate material by reference

(1) Before an instrument incorporating material by reference in reliance on section 49 is made, the chief executive must—

(a) make copies of the material proposed to be incorporated by reference (the **proposed material**) available for inspection during working hours for a reasonable period, free of charge, at the inspection sites; and

(b) state where copies of the proposed material are available for purchase; and

(c) make copies of the proposed material available, free of charge, on an Internet site maintained by or on behalf of the administering department, unless doing so would infringe copyright; and

(d) give notice in the *Gazette* stating—

(i) that the proposed material is available for inspection during working hours, free of charge, and stating the places at which it can be inspected and the period during which it can be inspected; and

(ii) that copies of the proposed material can be purchased and stating the places at which they can be purchased; and

(iii) if applicable, that the proposed material is available on the Internet, free of charge, and stating the Internet site address; and

(e) allow a reasonable opportunity for persons to comment on the proposal to incorporate the proposed material by reference; and

(f) consider any comments made.

(2) The chief executive—

(a) may make copies of the proposed material available in any other way that he or she considers appropriate in the circumstances; and

(b) must, if paragraph (a) applies, give notice in the *Gazette* stating that the proposed material is available in other ways and giving details of where or how it can be accessed or obtained.

(3) The chief executive may comply with subsection (1)(c) (if applicable) by providing a hypertext link from an Internet site maintained by or on behalf of the department to a copy of the proposed material that is available, free of charge, on an Internet site that is maintained by or on behalf of someone else.

(4) The references in this section to material include, if the material is not in an official New Zealand language, as well as the material itself, an accurate translation in an official New Zealand language of the material.

(5) A failure to comply with this section does not invalidate an instrument that incorporates material by reference in reliance on section 49.

(6) For the purposes of subsection (1)(c), a chief executive may not rely on section 66 of the Copyright Act 1994 as authority to make the proposed material available on an Internet site.

52 Access to material incorporated by reference

(1) This section applies if an instrument incorporating material by reference in reliance on section 49 is made.

(2) The chief executive must—

(a) make the material (the **incorporated material**) available for inspection during working hours free of charge at the inspection sites; and

(b) state where copies of the incorporated material are available for purchase; and

(c) make copies of the incorporated material available, free of charge, on an Internet site maintained by or on behalf of the administering department, unless doing so would infringe copyright; and

(d) give notice in the *Gazette* stating—

(i) that the incorporated material is incorporated in the instrument and stating the date on which the instrument was made; and

(ii) that the incorporated material is available for inspection during working hours, free of charge, and stating the places at which it can be inspected; and

(iii) that copies of the incorporated material can be purchased and stating the places at which they can be purchased; and

(iv) if applicable, that the incorporated material is available on the Internet, free of charge, and stating the Internet site address.

(3) The chief executive—

(i) may make copies of the incorporated material available in any other way that he or she considers appropriate in the circumstances; and

(ii) must, if paragraph (a) applies, give notice in the *Gazette* stating that the incorporated material is available in other ways and giving details of where or how it can be accessed or obtained.

(4) The chief executive may comply with subsection (2)(c) (if applicable) by providing a hypertext link from an Internet site maintained by or on behalf of the administering department to a copy of the incorporated material that is available, free of charge, on an Internet site that is maintained by or on behalf of someone else.

(5) The references in this section to material are to—

(i) material incorporated by reference in the instrument; and

(ii) if the material is not in an official New Zealand language, the material itself together with an accurate translation in an official New Zealand language of the material.

(6) A failure to comply with this section does not invalidate an instrument that incorporates material by reference.

(7) For the purposes of subsection (2)(c), a chief executive may not rely on section 66 of the Copyright Act 1994 as authority to make the incorporated material available on an Internet site.