Australia-New Zealand Scrutiny of Legislation Conference

INCORPORATION BY REFERENCE IN CANADIAN FEDERAL DELEGATED LEGISLATION: CONTENTION, CONCERNS AND POSSIBLE REFORM

Andrew J. Kania , LL.M., M.P.

Parliament of Canada
Joint Chairman, Standing Joint Committee for the Scrutiny of Regulations

Canberra
July 6-8 2009

INCORPORATION BY REFERENCE IN CANADIAN FEDERAL DELEGATED LEGISLATION: CONTENTION, CONCERNS AND POSSIBLE REFORM

Introduction

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. Of course rather than reproducing it word for word, the regulation-maker can simply refer to the title of the document. The legal effect of this "incorporation by reference" is typically described as being to write the words of the incorporated document into the regulation just as if it had actually been reproduced.

In Canada, the incorporation by reference of an existing document has always been considered no more than a drafting technique, and a regulation-maker need not be granted any specific power in order to resort to this technique. This is usually referred to as "closed" or "static" incorporation by reference, and there are many examples of the use of the technique throughout Canadian federal regulations. Static incorporation by reference results in the incorporation of the relevant material as it exists at the time it is made part of the regulation. If the material is amended after its incorporation, the amendment will not be automatically incorporated. A regulation-making authority wishing to adopt a subsequent amendment to the referentially incorporated material will have to amend the incorporating regulation. In the absence of language to the contrary, it is presumed that material incorporated by reference in federal delegated legislation is incorporated as it read at the time of its incorporation, in other words that the incorporation by reference is static.

An enabling provision may also confer on a regulation-making authority the power to incorporate by reference future amendments to existing material. More and more often, federal statutes expressly provide in the enabling statute that regulations may be made incorporating material "as amended from time to time" (referred to variously as an "open", "ambulatory", "dynamic" or "rolling" incorporation by reference). Once material is incorporated "as amended from time to time", any change to the incorporated material will automatically become part of the incorporating regulation.

The increasingly frequent use of incorporation by reference, as well as the widening variety of the types and sources of incorporated material, has been accompanied by an ongoing dispute between the Standing Joint Committee for the

Scrutiny of Regulations and the Department of Justice as to the applicable principles governing its use.

Delegation

In Canada, issues relating to incorporation by reference have primarily been viewed in the context of Parliament's choice as to who is to exercise the delegated law-making power. It has always been the position of the Joint Committee that absent an express grant of authority or a clear indication to the contrary in the enabling statute, the incorporation by reference of external material is proper only where a fixed text is incorporated, as opposed to a text "as amended from time to time". This is based on the view that to allow automatic amendment is to permit someone other than Parliament's delegate to in effect make legislation. The body amending the incorporated material will determine the content of the regulations, and not the authority on whom the power to make the regulations has been conferred. The author of the incorporated document has been given the power to change the law by changing the document, without any notice to or review by the regulation-making authority. In effect, the power to make regulations has been subdelegated.

The current position taken by the Department of Justice, however, is apparently that open incorporation by reference involves no element of subdelegation of legislative powers. This conclusion is drawn chiefly from an analysis of certain court decisions of the Supreme Court of Canada concerning the "inter-delegation" of powers between the federal and provincial governments and concerning constitutional language requirements.

As used in constitutional law, "delegation" refers to the delegation of federal power to the provinces, or of provincial power to the federal level of government. Such a delegation of legislative power has been held by the courts to be unconstitutional on the ground that it disturbs the allocation of powers between the federal and provincial governments. In the context of subordinate legislation, however, the notion of subdelegation is concerned with the relationship between the delegate possessing regulation-making powers and the authority that has delegated these powers. A delegate can only possess those powers conferred on it by the delegator. There can be no doubt that a delegator may confer on its delegate the power to in turn subdelegate the power to someone else. The question to be answered in each instance is whether there has in fact been a conferral of such a power. Issues of subdelegation are merely aspects of the broad question of whether a delegate is acting within the scope of the delegate's authority.

This characterization has led the joint committee to adopt the view that the power to incorporate by reference future amendments to incorporated material can be conferred by drafting the enabling provision in a sufficiently broad manner. For example, if the regulation-making authority is given a power to "prescribe" or "fix"

safety standards for the transportation of dangerous goods, subsequent amendments to the material originally incorporated will have to be included in the incorporating regulation by way of amendments to the regulation. On the other hand, a power to make regulations "respecting" safety standards for the transportation of dangerous goods is broader, and a regulation providing that it includes future amendments to the incorporated document could be considered to be a regulation "respecting" such standards.

In contrast, the federal government has claimed that the conferral of a power to make regulations always carries with it the power to incorporate by reference external materials as they are amended from time to time. Support for this is said to be found in the judgment of the Supreme Court of Canada in *Reference re Manitoba Language Rights (No.3)*, [1992] 1 S.C.R. 212, a case dealing with the application of constitutional language requirements to referentially incorporated documents. It is argued that the same grounds justifying the incorporation by reference of existing material in only one official language will also justify the open incorporation by reference of external material in regulations, regardless of the terms of the relevant enabling powers. For the Committee, however, this ascribes to the reasoning of the Court a scope it simply does not have.

The Supreme Court in *Reference re Manitoba Language Rights (No.3)* identified the incorporation by reference of technical standards "as amended from time to time" as being a situation in which the impracticality of maintaining an authoritative translation was likely to be a *bona fide* reason for incorporation without translation. This of course presumes that a particular open incorporation by reference of such a standard was authorized by the relevant enabling legislation in the first place. In referring to the examples of incorporation by reference in the legislation of Manitoba that were provided in evidence, the Court expressed no view on their validity or the relevant principles pertaining to the use of the techniques embodied in the examples provided. These matters were simply not before the Court. In fact, both the specific examples of open incorporation by reference mentioned by the Court were enacted pursuant to enabling powers that explicitly authorized incorporation by reference of external material "as amended from time to time". Any question as to whether open incorporation by reference of the standards in question was permitted had already been conclusively answered by the legislature.

Several other court decisions have been cited which are claimed to lend support to the position advanced on behalf of the government. In the Committee's opinion, none of these can be taken as standing for the proposition that in every case a delegate may use open referential incorporation. As well, there are Canadian court decisions which have held that an open incorporation by reference did constitute an unlawful subdelegation of authority. Moreover, in a great many statutes Parliament has expressly conferred the power to make regulations incorporating external documents "as amended from time to time". Accepting the position advanced by the government would lead to the conclusion that such

provisions are completely unnecessary. The Department of Justice has countered that this reflects nothing more than an "inconsistent" drafting practice.

In its Report No. 80, tabled in December, 2007, the Joint Committee explained in detail the reasons for its conclusion that the incorporation of external material into regulations "as amended from time to time" should, in the absence of clear authority, be seen to be improper and illegal. For the Committee, the only relevant issue is whether in each specific instance the delegate has been given the power to make open incorporations by reference. The question is not so much whether this is labelled a subdelegation, but simply whether such a power has been granted by Parliament.

Accessibility

While most of the attention given to incorporation by reference in Canada has dwelt on the delegation aspect, there is of course another area of concern entirely, namely access to the law. This aspect has received relatively little attention in Canada, although it has been the primary focus in some other jurisdictions. While incorporated material becomes part of the incorporating regulations, the actual text of that material must be found elsewhere. There are in fact a great many documents that are incorporated by reference in Canadian federal regulations that are not "accessible" on any reasonable interpretation of this term. Numerous standards developed by private organizations are only available upon purchase, and may carry a significant price. Others are so obscure as to be virtually untraceable. While government departments and agencies may well have copies of all of these standards and other documents, no attempt is made to make the public aware of this or to provide any information as to where within the department they reside, even assuming they are available to be consulted by the public. Such concerns are heightened where material is incorporated "as amended from time to time". Even if one has access to a particular standard, if that standard is incorporated "as amended from time to time", how is one to know whether the copy is current?

By way of example, the *Marine Transportation Security Regulations* incorporate, "as amended from time to time", the *Seafarers' Training Certification and Watchkeeping Code*. Even with the assistance of the Library of Parliament, an up-to-date copy of this Code could not be obtained on loan. Copies may be purchased through the International Maritime Organization, and the Department of Transport presumably has a copy. This level of availability clearly falls short of acceptable standards of accessibility to the law.

Proposed Codification

As was mentioned at the outset, it is not unusual for individual Canadian federal statutes to expressly grant power to make regulations incorporating external documents "as amended from time to time". In a number of jurisdictions, the

further step has been taken of enacting a general rule permitting open incorporation by reference. Other jurisdictions have legislated to expressly prohibit open incorporation by reference in the absence of explicit authority. Elsewhere, standard clauses dealing with incorporation by reference have been developed that may be inserted in individual bills. Indeed, a general legislative approach has also been taken at the provincial level in Canada. Since 2001 the Manitoba *Interpretation Act* has provided that the power to make regulations "respecting a matter" may be exercised by incorporating by reference codes or standards "as amended from time to time". This is of course consistent with the Committee's position that a power to make regulations "respecting" a matter is on its own terms sufficiently broad to permit the inclusion of future amendments to a referentially incorporated document. A stricter approach is reflected in the Ontario *Legislation Act, 2006*, which provides that a reference to a document incorporated by reference "is a reference to it as it read when the provision containing the reference was most recently enacted, made or amended." In other words, incorporation by reference is to be static. This was apparently considered to reflect that open incorporation by reference gives rise to the question of subdelegation, and must therefore be explicitly authorized. In 1995, a proposed new federal *Regulations Act* would have authorized the incorporation by reference of a document "as amended from time to time" unless another Act of Parliament expressed a contrary intention. The Bill, however, did not proceed past First Reading.

In the government's response to the Committee's Report No. 80, the Minister of Justice proposed that a legislative solution be pursued to resolve the impasse between the Department of Justice and the Committee, and to "clarify" the principles governing the use of ambulatory incorporation by reference in federal regulations.

At present, the only enabling provisions with which a regulation-making authority is concerned when it enacts a regulation are those setting out its regulation-making powers. The use of the technique of incorporation by reference does not constitute an exercise of a distinct power and therefore the limits of what can be incorporated by reference are clear: they are the limits that are dictated by the statutory provisions empowering the authority to make regulations. Whether the authority drafts the actual text of the regulation or decides to incorporate material by reference, it must act within the limits of the statutory grant of authority. The enactment of general provisions governing incorporation by reference could raise questions as to whether they are intended to constitute autonomous powers or are subject to the terms of the enabling statute pursuant to which the regulatory authority is enacting the incorporating regulation. For example, a power to make regulations "prescribing" a standard would not now permit an ambulatory incorporation by reference of an external standard. Would the existence of general provisions permitting ambulatory incorporation by reference then broaden the scope of that power, or must those general provisions be read together with the enabling power pursuant to which the regulation that will referentially incorporate a standard is made, so that when it incorporates specifications

by reference it is still governed by the limits of the enabling power in that regard? The provisions proposed in 1995 stated that ambulatory incorporation by reference was permitted unless a contrary intention was expressed in another statute. Precisely what would have constituted the expression of a contrary intention? This question should be expressly addressed in any general legislation governing the use of incorporation by reference. For example, a simple statement that the power to make regulations "respecting a matter" may be exercised by incorporating by reference codes or standards "as amended from time to time" could provide clarity without being seen to broaden the circumstances in which ambulatory incorporation by reference is permitted.

In assessing the desirability of this sort of blanket approach, it should be kept in mind that the result of the incorporation by reference of material as amended from time to time is that Parliament's delegate is in effect selecting someone else to perform a part of its law-making function. This is so regardless of whether this is seen as constituting a subdelegation *per se*. To rely on the fact that the incorporating regulation sets out the rule that the incorporated document must be followed, and that therefore that document is merely "technical" is clearly too formalistic an analysis. It could be argued that Parliament should retain control over the individual circumstances in which this authority is appropriately exercised. This would continue the approach whereby Parliament itself decides on a case-by-case basis, having regard to the nature of the legislation, when a regulation making authority can referentially incorporate documents "as amended from time to time".

On the other hand, the conclusion could be reached that there can be little objection to the enactment of general provisions permitting open incorporation by reference so long as the incorporation by reference of material "as amended from time to time" is limited to open incorporation of such things as technical standards. Whether at the end of the day this is considered a desirable change or not, there is clearly a need to address in some manner the uncertainty and inconsistency that characterizes the use of the technique of incorporation by reference in federal legislation at present.

While one expects that the government's preferred option would be to provide that incorporation by reference of material as amended from time to time is in all circumstances permissible, such an approach would be unacceptable, as it simply ignores the various concerns associated with the use of the technique. Bearing in mind all of the foregoing, it is suggested that any general legislation governing the use of ambulatory incorporation by reference in federal regulations should reflect a consideration of the following issues:

1. Sources and Types of Material

Material Originating With the Regulation-maker

In general, ambulatory incorporation by reference of administrative documents generated internally by the federal government should not be permitted in federal delegated legislation. Where material to be referentially incorporated originates with the regulation-making authority itself, there is the additional danger that this technique may be used to circumvent the regulatory process by the incorporation of substantive rules of conduct. Moreover, the ambulatory incorporation by reference of such internally produced material in effect transforms a legislative power conferred by Parliament into an exercise of administrative discretion. Where it is considered essential to permit the ambulatory incorporation by reference of this type of material, express provision should be made in the enabling statute on a case by case basis.

Other Domestic or Foreign Legislation

Arguably, there may be less cause for concern in the case of the incorporation by reference of other federal legislation or of provincial legislation. This involves the incorporation of rules made by domestic bodies exercising independent legislative powers. In addition, the concerns over access to the law to which incorporation by reference gives rise are mitigated by the publication requirements of the jurisdiction enacting the incorporated legislation. It may therefore not be particularly objectionable to extend a general power of ambulatory incorporation by reference to the incorporation of other federal or provincial statutes and regulations.

The same considerations, however, would not necessarily pertain to foreign legislation. Access to such legislation will naturally be more difficult, and it is unlikely such legislation will be enacted in both of Canada's official languages. As well, drafting standards and practices will vary widely internationally. For these reasons, it is submitted that the ambulatory incorporation by reference of foreign legislation should not generally be permitted.

Technical Standards Created by Independent Expert Bodies

In addition to technical standards established by organizations representing a particular industry, and other independent bodies such as the Canadian Standards Association, international conventions and agreements that establish technical standards may also reflect the work of experts and organizations operating independently of any particular government, and would therefore fit into this category as well.

Here subdelegation becomes a significant issue, in that a non-legislative body will effectively be determining the content of the law. Problems of access to the law are also more acute in connection with these types of documents. In Ontario for example, these

concerns have been recognized, and the *Legislation Act, 2006* provides that all incorporations by reference of such documents are static.

The Committee has adopted something of a middle ground, based simply on a reading of the enabling power relied on in each particular instance. As has already been noted, in its view the only question is whether the sort of subdelegation reflected in an ambulatory incorporation by reference has been authorized by Parliament, and thus a power to make regulations "respecting" (as opposed to "prescribing" or "fixing" a particular matter) could be seen to permit a regulation providing that it includes future amendments to an incorporated document. This is consistent with the approach followed in Manitoba, where this has been codified. Were the same course followed federally, it would remain the case that specific statutes could still provide that regulations may be made incorporating material "as amended from time to time" in instances where the general rules might not permit it. Such an approach may be preferable, as it provides clarity while preserving what the Committee sees as the principles that are at present applicable to ambulatory incorporation by reference.

2. Access to Incorporated Material

As noted earlier, concerns relating to access to the law are compounded where material is incorporated "as amended from time to time", in that members of the public may have difficulty ascertaining whether a particular version is current. Yet even in the case of static incorporation by reference, it is necessary to look elsewhere in order to ascertain the full text of the law. If a regulation-maker wishes to incorporate a document by reference, there can be no objection to an obligation to keep a copy of that document, and to make it available to the public. Steps should also be taken to make the public aware that this is so. While in many cases material incorporated by reference can be made available on government websites, copyright issues may arise where the material originates with independent third parties. In any event, it is not sufficient merely to provide an address where a referentially incorporated document can be obtained (such as a head office of the body that created the material). The head offices of certain entities whose material is referentially incorporated are located outside Canada and are not readily accessible to a significant portion of the affected or interested public.

Where open incorporation by reference is to be permitted, provisions should also be put in place to require the regulation-maker to ensure that the current version of an incorporated document is readily available to the public, as are all previous versions that were incorporated. Consideration should be given to the establishment of a central registry and repository of incorporated documents.

3. Defence Against Conviction for Contravention in Connection with Incorporated Material

It seems self-evident that no person should be liable to punishment for contravening a provision of a regulation that incorporates material by reference unless the material in question is readily accessible. This protection should extend not just to fines and imprisonment, but to all sanctions, including suspension or cancellation of licences or permits. A person whose licence, upon which their livelihood depends, is cancelled due to a contravention of a regulation that referentially incorporates some other inaccessible document may not consider those consequences any less significant than a fine.

Such a defence would mirror the defence currently set out in the *Statutory Instruments Act* against conviction for contravention of an unpublished regulation.

4. Exclusion of Incorporated Material from the *Statutory Instruments Act*

While it would seem to be the case in any event, it may be thought appropriate to expressly provide that material incorporated by reference in a regulation does not itself become a regulation, in the sense of being subject to the regulatory process (i.e. examination, registration and publication under the *Statutory Instruments Act*) by virtue of its incorporation. At the same time, such material should be subject to full parliamentary scrutiny. Documents created for other than legislative purposes may not meet the standards of clarity and precision expected of delegated legislation. More importantly, incorporated material must itself come within the scope of the enabling authority permitting the incorporating regulation. It may be desirable to add whether a particular incorporation by reference is appropriate and the incorporated material sufficiently clear and available to the criteria for the parliamentary scrutiny of delegated legislation.

Conclusion

There are a number of legitimate reasons for the use of incorporation by reference. These include the need for federal-provincial cooperation, the value of relying on technical standards developed by non-governmental bodies and harmonization of standards and requirements internationally. Globalization aside, in Canada there is always considerable impetus to establish regulatory standards and regimes that are consistent with those of the United States, by far our largest trading partner. From a purely bureaucratic perspective, there is also administrative convenience in not having to reproduce documents, and ambulatory incorporation by reference removes the need to amend the incorporating regulation each time the incorporated material is revised. Moreover, ambulatory incorporation of material generated by the regulation-maker is frequently justified as being a more "flexible" approach. What this really means is that it allows rules to be imposed without having to go through the regulatory process. Given all of these factors, it is not surprising that in recent years, there has been a

noticeable increase in the use of incorporation by reference in Canadian federal delegated legislation.

Parliamentary scrutiny of delegated legislation was in large part a response to the realization that one result of the economic and social demands of the modern state was that the power to establish authoritative rules had increasingly been turned over to the executive branch of government. At the same time, Parliament had a duty to ascertain that the delegated powers are exercised in a manner that complies with the letter and spirit of the delegating statute. In many ways, we have now moved into a "post-regulations" era, with more and more rules of conduct found, not in acts of Parliament, not in regulations, but in other documents. Incorporation by reference, in particular ambulatory incorporation by reference, is of course only one aspect of this. The use of this technique, however, gives rise to issues concerning the preservation of Parliament's choice as to the delegate to whom it confers law-making powers, the form by which the resulting measures are to be established, and access to those measures by the persons required to comply with them. Whether this cries out for comprehensive statutory rules governing the use of incorporation by reference may be an open question. There is no doubt, however, that recourse to this technique will only increase. While the justification for legislation dealing with the use of incorporation by reference is usually couched in terms of the clarity and certainty it provides, the concerns arising from its use must be addressed as well.