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Emerging Trends in Instrument Choice Incorporation by Reference

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Overview

- What is incorporation by reference and what is it not?
- How can incorporation by reference address common client complaints?
- How is incorporation by reference an "emerging trend"?





What it is – What it is Not

✓ IS:

Justice Legal Policy Statement – Incorporation by Reference in Regulations (June 2, 2000)

> Incorporation by reference is a drafting technique for providing that a regulation includes material contained in another document without reproducing the material word for word within the text of the regulation.

X IS NOT:

- Mere reference
- Expansion of an enabling authority







Types of Incorporation by Reference

- Ambulatory / Static
- External / Internal







Legal Issues

Four main legal issues:

- Subdelegation
- Regulatory Process Requirements
- Accessibility and Intelligibility
- Official Languages







Expediting the Regulatory Process

- Do not have to reproduce voluminous material BUT
 - Not ready-made for regulations (must include interpretive provisions)
- Does not go through the regulatory process BUT
 - Legal review
 - Documents must be accessible
- Ambulatory changes effected without regulatory amendment





Flexibility

- Multiple means to achieve regulatory objectives
- Multiple regimes applicable to the same subject matter

Example:

Government Property Traffic Regulations

6.(1) ...no person shall operate a vehicle on a highway otherwise than in accordance with the laws of the province and the municipality in which the highway is situated.





Accessibility and Intelligibility

- Stakeholder participation in the development of the law through standard-setting organizations or industry associations
- More familiar language and structure

BUT

Creates a patchwork regulatory regime





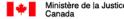


Legal Effect

Is an integral part of the regulation, has binding legal effect and is judicially enforceable

BUT

- Not clear what enabling authority is necessary
- Continuing debate: is ambulatory incorporation by reference subdelegation?



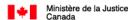




The Emerging Trend

- Incorporation by reference of internal documents
 - When is it acceptable?
 - Technical versus core rules
 - Advice to clients:
 - Static incorporation by reference
 - Limiting the context
 - Legal and drafting requirements
 - Resource implications
 - Roles and responsibilities
 - Central agencies

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Incorporation by Reference – The Technique

From the reader's perspective:

- 1. The Act (general framework)
- 2. The regulation (general framework)
- 3. The International Convention
- 4. The regulation interpretive provisions
- 5. The international standards
- 6. The regulations interpretive provisions
- 7. The internal document technical rules
- 8. The regulations core regulatory rules





Incorporation by Reference – The Instrument

From the reader's perspective:

- The Act (general framework)
- 2. The regulation (general framework)
- 3. The International Convention
- 4. The international standards
- The internal document that sets out core and technical rules implementing the Convention and standards



