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Emerging Trends in Instrument Choice Incorporation by Reference

Jacqueline J. Kuehl
Senior Counsel

Transport Canada Regulations Section
Legislative Services Branch

This deck is for information purposes only and is not a legal opinion



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.

✗ 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



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:

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