



**INCORPORATION BY
REFERENCE AS A MODERN
REGULATORY TECHNIQUE:
BENEFITS AND BURDENS**

**PERSPECTIVE OF COUNSEL TO
A LINE MINISTRY**

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OVERVIEW OF PRESENTATION

- Pre-emptive approaches to increase accessibility of documents
- Other approaches to increase accessibility of documents
- Tracking incorporated documents
- When incorporated documents change
- Enforcement

PRE-EMPTIVE APPROACHES TO INCREASE ACCESSIBILITY OF DOCUMENTS

- Access and understanding is key to successful implementation
- When considering incorporation by reference - see what can be done to leverage access to incorporated documents:
 - Case study - *Securities Transfer Act, 2006, S.O. 2006, c. 8*
 - Development of 'uniform' Securities Transfer Act included a provision providing that certain rules adopted by a clearing agency governing rights and obligations trumped the Act and other agreements
 - In 2006, clearing agency rules were not easy to obtain and often required expensive subscription services
 - As proposal for Act was developed, negotiations with the Canadian Securities Administrator led to free and public availability of rules

OTHER APPROACHES TO INCREASE ACCESSIBILITY OF DOCUMENTS

- Look for other opportunities to facilitate access
 - Subject to necessary approvals, can relevant part of the document be posted elsewhere?
 - Can an advocate for the use of a standard be used as an ally to facilitate increased access to a standard?
 - Can access be facilitated through government offices?

TRACKING INCORPORATED DOCUMENTS

- *Legislation Act, 2006*, S.O. 2006, c. 21, Sched. F sets out requirement to ensure incorporated documents past and present are readily available to the public

Access to incorporated document and earlier versions

62.(4) When a document is incorporated by reference as described in subsection (1), the Minister responsible for the administration of the Act under which the regulation is made shall take steps to ensure that,

(a) the incorporated document is readily available to the public, on and after the day the regulation or amending regulation containing the reference is filed under Part III (Regulations); and

(b) the incorporated document and any earlier versions of it that were previously incorporated into the regulation or into a predecessor of the regulation remain readily available to the public.

TRACKING INCORPORATED DOCUMENTS

- In Ontario, other pieces of legislation may also impose tracking requirements pre-dating the *Legislation Act, 2006*
- May be counterintuitive to Ministry staff to continue to track and post old documents because of a drive to maintain current information on Ministry websites and purge outdated materials
- Maintaining that old information critical to ensure accurate knowledge of the law at a point in time

TRACKING INCORPORATED DOCUMENTS

- Standing Committee on Regulations and Private Bills, First Report 2014:
 - *Nutrient Management Act, 2003*
 - General Regulation (O. Reg 267/03) incorporates several documents by reference
 - Subject to inquiry from Standing Committee on Regulations and Private Bills about status of incorporated documents
 - Ministry updated website to include historical versions

WHEN INCORPORATED DOCUMENTS CHANGE

- Does the *Legislation Act, 2006* address the need to make sure rolling incorporations are readily available to the public?
- Some legislation providing for rolling incorporation requires some form of publication for an amendment to a document to come into effect:
 - *Animal Health Act, 2009* s.65(5) –publish notice of the amendment in The Ontario Gazette
 - *Environmental Assessment Act* s.42(2)- publish of a notice of the amendment in The Ontario Gazette or in the registry under the Environmental Bill of Rights, 1993
 - *Health Protection and Promotion Act* s.7(7) - publish notice of the amendment and transmit the notice to each board of health
- Many pieces of legislation do not set requirements

WHEN INCORPORATED DOCUMENTS CHANGE

- Positive obligation to publish serves as trigger for Ministry review, with consequences if amendments to documents are not tracked
- Where no positive obligation exists, should there be a duty to provide notice of a change?

WHEN INCORPORATED DOCUMENTS CHANGE

- What if the document evolves in a manner inconsistent with government policy?
- What if the document evolves in a manner that is inconsistent with Constitution, Regulation Making Authorities or trade rules?

ENFORCEMENT – JUDICIAL NOTICE

- Courts required to take Judicial Notice of Incorporated Documents
- R v. St. Lawrence Cement 60 O.R. (3rd) 712 (ONCA)
 - EPA regulation governing car emission standards adopted by reference MOE Drive Clean Guide as amended from time to time
 - At trial court acquitted defendant because Ministry failed to “prove” the Guide – held that the author of the Guide had to be present to authenticate it
 - Decision affirmed on appeal
 - ONCA overturns decision – holds that court erred by not taking judicial notice of the document – as required by ss. 5 (4) of the Regulations Act (now s. 29 of Legislation Act)
 - “The effect of incorporation by reference is that the material incorporated is considered to be part of the text of the legislation.”

ENFORCEMENT – CAUTIONS

- While the courts will take judicial notice of incorporated documents, the documents do need to be accessible
- Be aware of “nesting” as a potential issue.
 - Legislation incorporates one document by reference
 - The incorporated document itself refers to other standards

ENFORCEMENT – CAUTIONS

- Consequences of failure to update standards or comply with notice requirements that trigger updates to standards
 - Industry continues to evolve and use new standard
 - Legislation continues to incorporate old standard because condition for transition to new standard has not been met
 - Especially relevant when a given activity is acceptable under one version of the standard, but not under another version - Unlikely enforcement actions could be maintained in this case

ENFORCEMENT – CAUTIONS

- Proceeding with enforcement activities when incorporated documents change
- Not unlike other situations where policy changes and legislative standards are amended
- Progressive compliance a useful tool (education → prosecution)
- Charge screening plays an important role
 - All charges screened based on reasonable prospect of conviction and public interest
 - If reasonable prospect of conviction, may still be an interest in discontinuing a prosecution if it is in the public interest to do so
 - Multiple factors considered in examining public interest, including:
 - Gravity or triviality of the incident
 - Prevalence of the type of offence and any related need for specific and general deterrence
 - Staleness of alleged offence, or likely length and expense of the trial when considered in relation to the seriousness of the offence

QUESTIONS?

