

Standards incorporated by reference in the legislation – the Canadian context. 1/2

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Standard and legislation – the ISO perspective:

“6.6.1.1 A document does not in itself impose any obligation upon anyone to follow it. However, such an obligation may be imposed, for example, by legislation or by a contract. In order to be able to claim compliance with a document, the user needs to be able to identify the requirements he/she is obliged to satisfy.” (5)

Documents: International Standards, Technical Specifications or Publicly Available Specifications, Technical Reports or Guides. (5)

Standard incorporated by reference in the legislation – the legal aspect.

In most cases, regulatory regimes comprise a complex structure of rules, guidelines, compliance policies, controls over the exercise of discretion, and historical practices and traditions. The rules are usually mandatory, and are based either on statutes (laws) or on regulations made under enabling powers found in statutes (laws).

Governments can use the standards development process to create a number of the components of a regulatory structure, including both the mandatory rules found in statutes or regulations and the non-mandatory guidelines that are sometimes used to elaborate the rules.

Incorporating standards into the regulatory regime is in legal term incorporation by reference. Keyes (6) defines

“Incorporation by reference is a drafting technique for providing that legislative text, notably executive legislation, includes material (text, information or concepts) expressed elsewhere. The material is included without reproducing it within the legislative text. The material is not only *referenced*, it is also *incorporated* into the text.”

Keyes (6) lists the different materials that may be incorporated by reference.

1. Another provision from the same legislative text,
2. Provisions from some other legislative text enacted in the same jurisdiction,
3. Legislative texts from another jurisdiction;
4. Non-legislative material such as technical standards or international agreements.

Methods for incorporating standards in law are detailed by Industry Canada (4). Standards may be incorporated into law in several ways:

1. Incorporated directly into statutes (i.e. the statute reproduces the wording of the standard),
2. Incorporated by reference into statutes (i.e. the statute refers to a particular standard, but does not reproduce the wording of the standard)
3. Reproduced directly in regulations,
4. Incorporated by reference into regulations,
5. Used as guidelines to elaborate rules found in statutes or regulations.

Keyes (6) emphasizes that the legal effect of incorporation by reference is that the incorporated material has the same binding legal effect as the legislative text and is enforceable. However the incorporated material shall express enforceable mandatory criteria and mandatory requirements; it shall not contain only recommendations.

Keyes (6) describes two types of incorporation: the static and the ambulatory. The static or fixed reference refers to a specific edition of the material as CSA-Z259.10-M90, 90 referring to the 1990 edition. Any subsequent change to CSA-Z259.10 is not referenced; the incorporated original version still applied despite new editions. The ambulatory or dynamic or rolling reference refers to the current edition as CSA-Z259.10 at the time when the legislative text is used.

Subdelegation:

Pigeon (7) explains the legal principle “*Delagatus non potest delegare*”. An authority delegated to a person cannot be transferred (subdelegated) to somebody else. According to this legal principle, does the incorporation by reference is a subdelegation of the regulatory authority to a standardization committee? According to Keyes (6) it depends.

Keyes (6): “Subdelegation does not occur when material is incorporated by reference as it exists at a particular date or time (*static* references). The material is fixed by the maker of the incorporating executive legislation when it is made and no one else can alter what has been incorporated.” “Some courts have recognized the validity of ambulatory incorporation by reference of material produced by independent bodies in the exercise of their own powers or for their own purposes”.

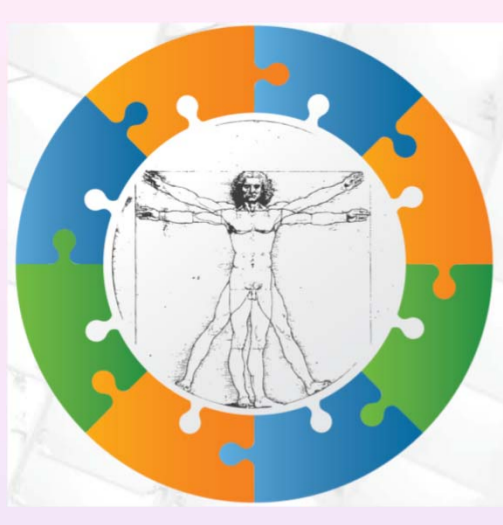
According to Industry Canada (4), incorporation by reference is an acceptable subdelegation because standardization committees are operating under the rules of equilibrium of interest, the consensus rules for adoption and openness to outside comments. This is the theory.

Our opinion

Our opinion is that with the ambulatory reference, the legislator or the regulator transfers his responsibility for writing a specific aspect of the regulation to an external group not subjected to the rules applicable to laws and regulations making. If the reference material is a standard, the technical committee of standardization has the full authority to modify the requirements and implicitly changes the regulation. Keyes (6) underlines “there may also be concerns about a loss of control by the incorporating legislator over the content of his legislation”. Industry Canada (4) sees standardization committee working under the consensus rules as group covers by a procedure similar to the regulation writing. To discuss that issue, we will describe the theoretical procedure for a standardization committee in Canada.

References

- (1) ARTEAU, J. 2008 *Un équipement de protection individuelle (EPI) conforme à la norme XYZ : pourquoi et comment le reconnaître ?* (in French) (*A personal protective equipment PPE in compliance with standard XYZ : why and how*). Ministère du travail du Québec. Regard sur le travail vol.5 no.2, p.46-48. https://www.travail.gouv.qc.ca/fileadmin/fichiers/Documents/regards/regards_travail/regardstravail-vol05-02.pdf
- (2) BNQ 9950-099-2010 *Consensual Standardization – Policy and Rules of Procedure*. Bureau de normalisation du Québec.
- (3) CSA-SDP-2.2-98 Canadian Standards Association *Directives and guidelines governing standardization, Part 2: Development process*. Amendment 2003
- (4) Industry Canada. *Standards systems. A guide for Canadian regulators*. Strategic Policy Branch Industry Canada, Government of Canada. Cat. No. lu70-4/5-2004
- (5) ISO/IEC. *Directives Part 2 Rules for the structure and drafting of International Standards*. 2011
- (6) Keyes, J.M. 2010 *Chapter 12. Incorporating by reference in Executive legislation*. Lexis Nexis. 2nd edition.
- (7) Pigeon, Louis-Philippe *Rédaction et interprétation des lois*. (in French) (*Writing and interpreting laws*) Publications du Québec. 3e édition. 1986



Standards incorporated by reference in the legislation – the Canadian context. 2/2

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	Theory (principles)	Reality
Standard	document, established by consensus and approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for activities or their results, aimed at the achievement of the optimum degree of order in a given context (5) Note: Standards should be based on the consolidated results of science, technology and experience, and aimed at the promotion of optimum community benefits.”(5)	How an optimum degree of order could be achieved if the participation is not balanced? How the standard could be based on the consolidated results of science if the results are produced by one group of interest namely the manufacturers? Government and public organizations do not have any more the resources to produce independent scientific results as a consequence of drastic budget reduction.
Effective consultation - Balanced representation	The membership of committees is balanced in four groups of interest: users, manufacturers, regulators and general interest, and the number of members per group are also balanced. The largest group size is less than the total of the two smallest groups, so that one group of interest is not dominating. In Canada, the membership is also balanced geographically.	Technical committees have a balanced membership on paper. But the real issues are participation and influence. “In addition, SDO-run processes will not always provide for an appropriate balance of interests. Because they rely on voluntary input, SDO-run consensus processes can favour large business interests over those of small businesses or public interest groups who are less able to afford the resources necessary to participate effectively. Standards often focus on highly technical issues and many non-governmental organizations (NGOs) have minimal technical expertise and few resources. As such, they too may not be in a position to participate effectively in SDO-run processes.” (4)
Effective consultation - Balanced participation	One of the most effective ways to monitor and, if appropriate, influence the content of a standard is to participate on the technical committee. (4)	“In some cases, non-governmental organizations (NGOs) have complained that their requests to participate as voting members have been denied. In most cases, however, NGO participation problems relate to a lack of funding for preparation and travel.” (4) The users' group is composed by employers and workers' unions. Workers' unions have limited financial resources; their priorities are to fight against salary reduction, against social security reduction. In fact, they are not participating. See “Benefits and costs of action”.
Effective consultation - Balanced influence	“A well-informed participant can have considerable influence over decisions and play an important role in informing and persuading fellow committee members.” (4)	Often users and regulators do not have a large expertise on the subject. Regulators are subjected to large budget decrease as well as the salary of regulators' employees. The salaries of regulators' employees are 20% to 25% lower than the equivalent private sector. Therefore experts are moving from regulators to private employers and are leaving regulators with less qualified employees. “Standards often focus on highly technical issues and many NGOs have minimal technical expertise and few resources. As such, they too may not be in a position to participate effectively in SDO-run processes.” (4)
Effective consultation - Public input	“Technical committees also circulate drafts of the standards for at least 60 days to interested persons and technical experts. Committees must consider and respond to all comments received.” (4)	The discussion and working documents are not public. A member of the public is not allowed to assist as observer unless be invited by the chairman. While the parliament committee who discusses new laws are open to the public. The public input takes place at the final stage, before the final vote. Even if standard development organizations SDO publish announcement for the public review, it is very exceptional that a comment from outside the committee is received. The announcement is published on the web of the SDO not in regular newspaper. “The resulting use of a growing number of international standards reduces the opportunity for most Canadians to be meaningfully consulted and involved in the standards development process. While this trend may emphasize the need for Canadian SDOs and governments to be involved in international standards development, it limits opportunities for public consultation and input.” (4)
Effective consultation - Consensus based decision (4)	CSA (3) has numerical requirements for approval: “9.4.1 All voting members have the obligation to vote. 9.4.2 To meet the numerical criteria required for approval a) the affirmative votes shall constitute at least 50% of the total voting membership; and b) the affirmative votes shall constitute at least two-thirds of the votes cast.” BNQ (2) has a more stringent rule in Clause 4.6.6 “A draft consensual document is considered approved when the percentage of positive votes corresponds to at least 75% of the total positive and negative votes, and the percentage of positive votes by each interest group equals or exceeds 50%.”	These rules meet the definition of consensus, “substantial agreement. Consensus implies much more than a simple majority, but not necessarily unanimity.” This step is designed to ensure compliance with process requirements (e.g. balanced representation and consensus) rather than to re-evaluate technical or substantive content. “Government participation in the SDO consensus process can promote the consideration of public interest concerns. Government, by its very participation, can thus help ensure that the appropriate range of interests is considered in the consensus process.” (4) But with the drastic budget reductions, all these nice principles are disappearing. Regulators' members are present 1 over 3 meetings while manufacturers are present at each meeting.
Benefits and costs of action (4)	“The standards development process will address some relevant considerations at a pragmatic level: – the business representatives on the technical committee will take into account economic considerations, in particular, the impact on business, – the mandatory public review will also allow for consideration of some economic and employment-related impacts, – because they can be amended more easily than regulations, standards can provide a flexible means of responding to rapidly evolving technology.” (4)	What about social impacts? Public review: For a small-medium manufacturer, for not profit organisation representing the users, for an association representing workers, this participation is costly and could be an obstacle to participation. “amended more easily than regulations”: government reduce its spending.
Legal requirements (4)	See the introduction on incorporation by reference and subdelegation.	Generally in regulations the reference to standards is static: “the protective footwear shall comply with CSA-Z94.1-1992 Protective footwear”. Because regulations are not modified frequently, the reference becomes obsolete 5 years or less after its publication. The users are not able to buy products certified to the referenced standard e.g. CSA-Z94.1-1992 because products are certified under the current edition of the standards. Sometimes this situation is causing problems in court. (1)
Clear and comprehensible language (4)	“As with regulations, standards are intended to be clear and comprehensible to their intended audience, among other things, ... standards: – include statements identifying the intended coverage of the subject and use of the standard, – be based on requirements that are stated as far as possible in measurable terms, – be formulated in terms of performance to avoid inhibition of design or innovation and, at the same time, to facilitate objective measurement of conformity.” »(4) However the incorporated material (the standard) shall express enforceable mandatory criteria and mandatory requirements; it shall not contain only recommendations. (6) Keyes.	These criteria are satisfied. The rules for drafting standard are clear and adopted by every SDO (2, 3, 5).
Accessibility (4)	“Regulators must ensure that the public has easy access to the standards to which regulations refer.” (4) When a regulation incorporates a standard by reference (i.e. refer to the title of the standard, but not reproduce its text), the public has to obtain a copy of the standard to understand the relevant regulatory requirements. Copies should be available under reasonable terms to any person. (4)	CSA standards referenced in regulations could be view free of charge on the website of CSA “OHS View Access”. New standard not incorporated and standards from other SDOs are not in “OSH View Access”. “Access may also be affected by cost and a lack of availability resulting from copyright protection.” “Restrictions that privately held copyright may place on access to incorporated material are a matter to be considered by the person or body making the incorporating legislation” (Keyes (6)). If you purchase your own copy, the costs is high; as example, there are 14 standards on the fall protection PPE in Canada, 18 in Europe. In Canada, it costs around 1400 cdn dollars (900 Euros). A basic fall arrest system costs around 300 Canadian dollars (200 Euros). In the appendices of these standards, there is useful information for the users on use and limitations of the equipment.
Accountability (4)	“The use of the standards development process to develop the standard does not relieve the government of responsibility for the regulation. Furthermore, when the government uses the standards development process rather than drafting a regulation internally, it must continue to ensure that the public participation process is acceptable from a regulatory perspective. “The government is also accountable for implementing the regulatory regime and establishing adequate compliance and enforcement systems.” (4)	“the government must continue to ensure that the public participation process is acceptable from a regulatory perspective.”(4) This is an important question. The observations of the reality concerning effective consultation, balanced representation, balanced participation, balanced influence and public input lead to a strong hypothesis that the criteria are not satisfied.
Development and maintenance costs (4)	“Most SDOs are non-profit organizations, and therefore seek only to recover their costs” which “can be as high as hundreds of thousands of dollars”. “These costs do not include most experts and multistakeholder input, which is voluntary”.(4)	As example, in Canada, a typical 2,5 day meeting (4 day including travel time) costs 2000 cdn dollars for the travel expenses and 3000 cdn dollars for the direct salary and social fees. The members are generally head of research and development division, experts, etc with a high salary. Before and after the meeting, some work shall be done, 3 more days, for 3000\$. Total per meeting: 8000\$. 3 meetings per year and it is now 24 000\$. (16 000 Euros). The costs for an active committee member are high and prohibitive for some stakeholders (4). To develop a performance standard, test shall develop; again the costs are very high. The standard should be based on the consolidated results of science. Government and public organizations do not have any more the resources to produce independent scientific results as a consequence of drastic budget reduction. Therefore the results are produced by one group of interest namely the manufacturers. “As the use of international standards increases, participation in all of the relevant standards development bodies may become a significant financial and logistical challenge, even to Canada's largest businesses and the government.”(4)
Timeliness (4)		Some standards need many years to be developed, particular with complex systems.
Government commitments to the use of a standard		Governments use standards in regulations in order to save money.
Government participation on technical committees	“One of the most effective ways to monitor and, if appropriate, influence the content of a standard is to participate on the technical committee. Although government participation does not entail veto power, the government may have considerable resources and expertise with which to support participation on a committee, if it desires. A well-informed participant can have considerable influence over decisions and play an important role in informing and persuading fellow committee members.” (4)	Copy from “Balanced influence”: Often regulators do not have a large expertise on the subject. Regulators are subjected to large budget decrease as well as the salary of regulators' employees. The salary of regulators' is 20% to 25% lower than the equivalent private sector. Therefore experts are moving from regulators to private employers and leave regulators with less qualified employees.

BNQ: Bureau de normalisation du Québec
CSA: Canadian Standards Association
NGO: non-governmental organizations
SDO: standards development organizations

References

- (1) ARTEAU, J. 2008 *Un équipement de protection individuelle (EPI) conforme à la norme XYZ : pourquoi et comment le reconnaître ?* (in French) (*A personal protective equipment PPE in compliance with standard XYZ : why and how*). Ministère du travail du Québec. Regard sur le travail vol.5 no.2, p.46-48. https://www.travail.gouv.qc.ca/fileadmin/fichiers/Documents/regards_travail/regardstravail-vol05-02.pdf
- (2) BNQ 9950-099-2010 *Consensual Standardization – Policy and Rules of Procedure*. Bureau de normalisation du Québec.
- (3) CSA-SDP-2.2-98 Canadian Standards Association *Directives and guidelines governing standardization, Part 2: Development process*. Amendment 2003
- (4) Industry Canada. *Standards systems. A guide for Canadian regulators*. Strategic Policy Branch Industry Canada, Government of Canada. Cat. No. Iu70-4/5-2004
- (5) ISO/IEC. *Directives Part 2 Rules for the structure and drafting of International Standards*. 2011
- (6) Keyes, J.M. 2010 *Chapter 12. Incorporating by reference in Executive legislation*. Lexis Nexis. 2nd edition.
- (7) Pigeon, Louis-Philippe *Rédaction et interprétation des lois*. (in French) (*Writing and interpreting laws*) Publications du Québec. 3e édition. 1986