



HOUSE OF COMMONS
CHAMBRE DES COMMUNES
CANADA

Standing Committee on Justice and Human Rights

JUST • NUMBER 057 • 2nd SESSION • 41st PARLIAMENT

EVIDENCE

Thursday, December 4, 2014

Chair

Mr. Mike Wallace

Standing Committee on Justice and Human Rights

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• (1530)

[English]

The Chair (Mr. Mike Wallace (Burlington, CPC)): Ladies and gentlemen, let's call this meeting to order. Pursuant to the order of reference of Friday October 24, 2014, in front of us today we have Bill S-2, an act to amend the Statutory Instruments Act and to make consequential amendments to the Statutory Instruments Regulations.

We have a number of folks from the Department of Justice who are going to give us a presentation. Since Ms. Pledge has the word "Senior" in front of her name.... Who's the lead here?

Madam, if you would like to introduce yourself and your teammates, the floor is yours for 10 minutes.

Ms. Jacinthe Bourdages (General Counsel and Director, Advisory Services and Legislative Revision Group, Legislative Services Branch, Department of Justice): Mr. Chair, I am Jacinthe Bourdages, and I'm general counsel and director at the legislative services branch. With me are my colleagues Patricia Pledge, senior counsel, also in the legislative services branch, and Bernard Auger, general counsel at the same branch.

Thank you, Mr. Chair.

[Translation]

Thank you for the opportunity to speak to you about Bill S-2, Incorporation by Reference in Regulations Act. As its title indicates, this bill concerns a drafting technique, incorporation by reference, which is used in legislative texts, most frequently in regulations.

Incorporation by reference is a technique currently used in the drafting of legislation, which allows, by a simple reference to a document made in the regulation, to conceptually incorporate the content of that document, without reproducing its text. The content of that document then acquires the force of law and forms as much a part of the regulatory scheme as the text of the regulation itself.

Incorporation by reference can be either static or dynamic. In the case of static incorporation, only the version of the document that is cited in the regulation is incorporated, as if it were frozen in time. Any modifications made to that document after the regulation has incorporated it would not be included in the regulatory scheme. In the case where it is desirable that these changes be incorporated, it would be necessary to modify the regulation in order to make reference to a subsequent version of the document.

In the case of dynamic incorporation by reference, the changes made to the document that has been incorporated in the regulation form part of the regulatory scheme without the need to modify the

regulation. In other words, the subsequent amendments made to the document are automatically integrated into the regulatory scheme.

Incorporation by reference of documents of many types in diverse federal regulations is already widespread. Among the different types of documents currently incorporated by reference, one can find provincial and territorial laws, the laws of other jurisdictions, international and national standards, as well as technical documents created by different departments. Incorporation by reference is already expressly authorized in more than 60 federal acts.

[English]

Bill S-2 proposes to amend the Statutory Instruments Act to create a general authority for the use of a technique of incorporation by reference in the regulations, which would complement all existing regulation-making authorities found in acts of Parliament. It is also important to clarify that this bill does not seek to validate retroactively anything that the government did not consider already to be authorized.

In general, under this legislative proposal, material that is generated independently of the government could be incorporated either statically or as amended from time to time.

However, the authority to incorporate documents produced by the regulation-making authority alone or jointly with another federal entity would be more limited. In most cases, those documents would only be able to be incorporated statically and only if the content of the document is limited to that which is incidental to or elaborates upon the rules already contained in the regulations. This ensures that the technique of incorporation by reference is not used to circumvent the regulatory process or to subdelegate the legislative power to government officials.

This bill also makes it clear that certain types of rates and indicators, such as the CPI, the consumer price index, or the prime rate, the Bank of Canada rate, can be referenced in regulations. This precision has been brought because those elements are not, per se, documents.

This bill also imposes an obligation on regulation-makers to ensure that the material incorporated by reference is accessible. It also provides that no person can be convicted of an offence or suffer an administrative sanction in the event that the incorporated document was not accessible.

In addition, Bill S-2 clarifies that the requirements of registration and publication would not apply to the incorporated material, but that material is still examined as part of the obligations under the Statutory Instruments Act and remains subject to scrutiny by the Standing Joint Committee on Scrutiny of Regulations.

● (1535)

Bill S-2 in no way alters obligations with respect to official languages. Unless there is a legitimate reason for unilingual incorporation by reference, material must be incorporated in both official languages. This is a constitutional requirement now, and it remains unchanged by this legislation.

While Bill S-2 is important, it must still be put in perspective. Ambulatory incorporation by reference is already widely used in federal regulations. As a result, Bill S-2 simply provides expressly for the authority to use a drafting technique that is consistent with the government's current legal practice on this matter. Bill S-2 does not confer authority to simply incorporate by reference without constraints. The use of the technique, like any aspect of the regulation-making authority, is shaped by the enabling statute under which the regulations are made.

Bill S-2 is intended to confirm the existence of the legal foundation for the use of this drafting technique.

[Translation]

Thank you, Mr. Chair.

We are now ready to answer the committee's questions.

[English]

The Chair: Thank you, Madam, for that presentation.

We're going to questions now. Our first questioner from the New Democratic Party is Madame Péclet.

[Translation]

Ms. Ève Péclet (La Pointe-de-l'Île, NDP): Thank you.

You answered my questions in part, specifically when you talked about bilingualism.

If an incorporated document were unfortunately not published in both official languages—a guilty verdict or an administrative sanction, for example—what would happen with the criteria? Would that mean that the sanction would not be possible until the incorporated document were published in both languages? Would there be a delay? That is what I would like to know.

Ms. Jacinthe Bourdages: As for accessibility, the Supreme Court has already established that, in certain cases, it is acceptable for a document not to be bilingual. Take principles for international cooperation, for example, or a document that is so highly technical it cannot be translated.

Accessibility deals more with physical access to the document and its intelligibility than with official languages. However, it is important to mention that nothing in this bill changes Canada's linguistic obligations. This bill could not amend those linguistic obligations because the obligations are quasi-constitutional and constitutional, and this is an ordinary act. It is therefore not possible to amend those rights with this bill.

● (1540)

Ms. Ève Péclet: Thank you very much for that answer. So that would be something for a court to decide if ever there were a conflict.

Bill S-2 grants quite broad authority to use incorporation by reference. The guide to making federal acts and regulations indicates that everything to do with regulations really must be considered by the parliamentary committee of which my colleague was a joint chair, in 2011, I believe. They examine all cases of incorporation by reference in real depth. There is a mechanism for oversight, accountability and transparency. But Bill S-2 grants quite broad authority to use incorporation by reference, either ambulatory, dynamic, or static, as you mentioned. How can we be sure that the same oversight mechanism is applied to the regulations and to the incorporation by reference at the same time?

This is a huge project. It does not just apply to a department, but to all agencies and all authorities with the power to do this. How are we going to make sure that, at the Standing Joint Committee on Scrutiny of Regulations, we determine which mechanism will be used? Will it be the same? How are we going to make sure that both are at the same level of oversight and transparency?

Ms. Jacinthe Bourdages: Thank you for the question.

Mr. Chair, I would say that regulations that are incorporated by reference are examined to the same extent as the regulations themselves. When regulations are examined under section 3 of the Statutory Instruments Act, the documents that are incorporated by reference would be examined in the same way at the same time. That is the stage at which the criteria set out in section 3 of the Statutory Instruments Act would apply to the documents incorporated by reference.

In the pre-publication period for regulations in Part I of the *Canada Gazette*, those involved or interested will have the opportunity to see whether or not documents have been incorporated by reference, to be able to have access to those documents and to see what they contain. If they have concerns, they can make them known to the regulation-making authority.

As for the standing joint committee, it will have access to the documents like any member of the public and will be able to make any concerns known in the same way.

Ms. Ève Péclet: Actually, my last question deals with access to those documents.

In the three criteria you listed, we read, and I quote: "...provides for the express power to incorporate by reference in regulations", and that the documents are valid only if they are "accessible". Except that there is no definition of accessibility.

In some Senate transcripts, I have read words such as "online", but accessibility is not defined. That could lead to confusion. Really, this is about the validity of a reference. What would the definition of accessibility be and should it be included in the act?

Ms. Jacinthe Bourdages: For documents, there are various kinds of incorporation by reference.

It can involve provincial or federal legislation, or the legislation of another country, indexes, numbers, internal documents, and standards. Incorporation by reference can take many forms. It is important to realize that what is accessible in one case may vary; it depends on the sector being regulated. What is accessible in one case may not necessarily be accessible in another. So it would be extremely risky to find a definition that applies equally to each regulatory sector.

We consider that documents need to be accessible with a minimum of effort. Even so, you need a certain degree of effort to access federal legislation and regulations.

• (1545)

[English]

The Chair: I'm sorry, but that's the time, more than the time.

Thank you very much for those questions and answers.

Our next questioner is Mr. Calkins from the Conservative Party.

Mr. Blaine Calkins (Wetaskiwin, CPC): Thank you, Chair.

I have a number of questions. I would imagine that you'll know where I'm coming from with a lot of these.

Incorporation by reference has basically static and dynamic...I know these things. When the government signs on to an international agreement or ratifies a treaty, or whatever the case might be, we are then a party that's bound to that agreement. That governing authority or agency that's responsible for it, whether it's the governing council or whatever the case might be, has of course probably a Canadian interest in that.

Are there any cases where the Government of Canada does any incorporation by reference now where there isn't a representative or Canada is not party to the governing process of that regulation-making body?

Ms. Jacinthe Bourdages: Perhaps I'll let my colleague Patricia respond to that question.

Ms. Patricia Pledge (Senior Counsel, Advisory and Development Services Section, Legislative Services Branch, Department of Justice): International treaties of course can be implemented in various ways. One way we do implement international obligations is through incorporation by reference.

I'm not personally aware of incorporating treaties that we may not have ratified. Is that your question?

Mr. Blaine Calkins: Not ratified, but where we may not have a seat at the table for the ongoing continuation of the regulation-making authorities, where an international treaty might create a body that does that. Would there be a situation where Canada's interests wouldn't be represented at the table?

Ms. Patricia Pledge: I don't have the information to answer that question.

Mr. Blaine Calkins: It's a tough question, I know. These things are quite complicated.

Given that the current practice that the Government of Canada uses is an ad hoc process... You are saying the Government of Canada already uses incorporation by reference when it comes to

these things, that they are all done on an ad hoc basis, and they would all be in that particular case static because they would have to go through the process.

If something is dynamic it means that, as soon as the regulating body makes the change in the regulations—and if it has already gone through the *Gazette* process and has been approved by legislative change that's brought about here—the moment the legislative body makes a decision and changes that regulation through a dynamic reference, it is instantly the law of the land in Canada.

Do I understand that correctly?

Ms. Jacinthe Bourdages: Mr. Chairman, I would like to say that it's important to realize that incorporation by reference is a tool that can be used and it's a choice. So if the regulation-making authority decides to use it then there is a choice between static and ambulatory.

It doesn't have to be the vehicle by which Canada decides to implement treaties. It's always a choice.

Mr. Blaine Calkins: Say for example we adopt incorporation by reference dynamically to the Canadian building code of standards through the governing party. As soon as the Canadian safety association or the Canadian building code standards are automatically updated that would mean that those things would not have to necessarily go through the same ad hoc practice of being incorporated on an annual basis, which is the efficiency that this bill would provide the government with. Do I understand that correctly?

Ms. Jacinthe Bourdages: Yes.

Mr. Blaine Calkins: Is there any situation right now in the Government of Canada where the governing body or the regulation-making agency would be considered a lesser governing body than the Government of Canada? By that I mean maybe a provincial statute or regulation or a provincially regulated body or something that's done at the municipal level or something that would be considered lesser in stature than a national governing body or an international governing body.

Ms. Jacinthe Bourdages: Mr. Chairman, I am not aware of these situations. But again it's a choice that the regulation-making authority would exercise when deciding to use the technique or not. If the regulation-making authority wants to have full control of those instances I guess it would not use incorporation by reference. Again, it's important to realize that it's always a choice to have recourse or not to this tool that is a drafting technique.

Static incorporation by reference might be preferable in some instances such as the one you mentioned. We are not aware of situations where this would have caused any problems. It's also important to realize that in almost 30 years of the use of incorporation by reference there is very little case law on this, which seems to be proof that the system is working well. It's not something that is really litigated.

So I would say, to address your concern, that it's important at the time that the regulation-making authority that is considering whether to use incorporation by reference or not see if it has concerns of the type you are mentioning. Are we concerned with an international body making its decisions? Most of the time Canada is a part of these international bodies, it has fair notice, and it takes years of negotiation so there are opportunities for discussion.

• (1550)

Mr. Blaine Calkins: I agree.

In the 30 years or so of experience that we've had already doing this under the ad hoc process that we already use, have there been any situations whereby the Government of Canada or the legislative body of Parliament, or whatever the case might be, has had to retract or undo anything that was inadvertently done by incorporation by reference?

Ms. Jacinthe Bourdages: We are not aware of any such cases, no.

Mr. Blaine Calkins: Thank you.

The Chair: Thank you very much.

Our next questioner is from the Liberal Party.

Mr. Casey, the floor is yours.

Mr. Sean Casey (Charlottetown, Lib.): Thank you, Mr. Chair.

I'm concerned that this bill will allow government and/or bureaucrats to do something indirectly that they can't do directly. I'll tell you why I'm concerned about that. We've had before this committee Bill C-13, the cyberbullying bill. The cyberbullying bill proposed to codify an immunity for telecoms that lawfully cooperated with police. This came about after a failed attempt to try to get warrantless access. So when it looked like the government wasn't going to be able to get warrantless access, they gave an immunity to the telecoms and then through another statute broadened the group of people to whom that would apply. So instead of going directly at it they found another way.

Here's where I'm coming from. If the government or bureaucrats want to see a change that they may not be able to get through a more rigorous route like the joint scrutiny of regulations committee, like the normal legislative process, they can find a way to have a body that has available to it open incorporation by reference and to put it through that way. Do you understand my concern?

Ms. Jacinthe Bourdages: Mr. Chairman, I think I understand the member.

Mr. Sean Casey: Should I be concerned?

Ms. Jacinthe Bourdages: I understand the concern, but I think it's important to realize that Bill S-2 does not expand on the use of this regulatory authority that is incorporation by reference, which is already, as we've said, broadly used.

As for internally produced documents—that's by the regulators—it would be limited to documents that elaborate upon the main rules of conduct. This is to avoid concerns like the ones you mentioned.

For the external incorporation by reference, Bill S-2 codifies, if you will, the current practice. This is in cases where the documents already exist for an independent purpose that has nothing to do with

the regulatory process. They just use the expertise that exists elsewhere to replicate the expertise in the regulations themselves, without having to reprise the content and instead of building the expertise in-house.

I think it's important to realize that this bill, as I was saying in my speech, does not expand on enabling authorities. It's an aspect of the regulatory power, but it's an aspect like any other aspect of the regulatory power. It still needs to be exercised within the four corners of the enabling authority. It needs to be brought back into that perspective.

• (1555)

Mr. Sean Casey: If I understand you correctly, I shouldn't be concerned, because they're allowed to do it that way now and this doesn't change that. What I mean by this is that a government initiative, or an initiative that's being championed by the bureaucracy, could pursue the path of least resistance by finding a sympathetic external organization that has the benefit of open incorporation by reference, such as the chartered accountants for general accepted accounting principles, or such as the entities that produce building codes or fire codes. They could convince that organization that this change should be made within your standard, or within your principles, and thereby achieve a governmental or a bureaucratic goal another way.

What you're saying is that it's possible to do that now and it will still be possible once this bill is passed. Is that it?

Ms. Jacinthe Bourdages: Not exactly. What I would say about it is that incorporation by reference is one aspect of the regulatory power, and we always have to go back to the main enabling power to see what that authorizes. It needs to be exercised within the four corners of the authority, and it's a case-by-case analysis of what that power entails and authorizes. We need to remind ourselves of that.

In terms of standards, there are a lot of consultations that go on before a standard is authorized and approved. Domestically, of course, Canada is a member of the CSA, but there are various interests that are being put forward, and it's a very consultative process whereby every stakeholder has a say in what ultimately becomes the standard that is recognized as the best standard. That's why it's being put forward as a standard. It's very consensus based. There are various stakeholders that work together on coming to a consensus on what's the best standard that could be used, always with the goal of having the best expertise to have it reproduced in the regulations.

Mr. Sean Casey: It's been suggested, certainly in debate and probably in other sectors, that one way to deal with the accessibility challenge, or the lack of clarity around what that means, would be a central Internet portal where all documents that are incorporated by reference in federal legislation would be there and available and accessible. Is that realistic? Could it be legislated?

Ms. Jacinthe Bourdages: Mr. Chairman, the option to have a registry is an option, but consideration should be given to the implications of that. The implications would be the creation of such an infrastructure and also the fact that there's no one-size-fits-all in terms of accessibility, because of the variety and the broad scope of regulators, of the fields that are regulated, and of the types of documents that are so incorporated.

For instance, provincial legislation and other Canadian legislation is already vastly accessible by any standard and often in the vast majority of cases there's nothing left to do—

Mr. Sean Casey: The static stuff is the easy stuff. It's the open stuff that's trickier.

Ms. Jacinthe Bourdages: But I would say that even with open stuff, often stuff is already—

Mr. Sean Casey: Sorry, that's not a very good—

Ms. Jacinthe Bourdages: But it's sometimes already available at the primary source and it could add a layer of heaviness to have this registry. It might actually be slower to get access to the registry, rather than going online to find a document.

The Chair: Thank you very much.

Thank you for those questions and answers.

From the Conservative Party, Mr. Dechert, it's your turn.

Mr. Bob Dechert (Mississauga—Erindale, CPC): Thank you, Mr. Chair.

My understanding of the regulatory process here is that if there is any concern by any member of the public, they can raise that concern. Certainly, any member of Parliament can raise that concern and it would then be referred to the scrutiny of regulations committee. So in any situation that Mr. Casey might be concerned about, he or any member of the public could apply to have that dealt with by the scrutiny of regulations committee.

If there were a situation where someone thought that the government of the day was overreaching its legislative authority by incorporating something by reference, presumably that would then go before the scrutiny of regulations committee.

Secondly, it's my understanding that there aren't any regulations under the Criminal Code, so that is not a situation where the Criminal Code of Canada would be amended by an incorporation by reference to another statute, or a standard that is developed by another body.

My first question to you has to do with accessibility. Bill S-2 imposes an obligation on the regulation-making authority to ensure that a document, index rate, number, or whatever it is that's incorporated by reference, is accessible, but it doesn't provide a definition of “accessible”. What, in your opinion, is meant by the term “accessible”? Perhaps you could give us some examples of that.

• (1600)

Ms. Jacinthe Bourdages: Thank you.

Mr. Chair, it is true that accessibility is not defined in the bill. As I mentioned earlier, it would be very challenging to try to come up with a definition. Given that there are so many different incorporated documents, different regulatory fields, what's accessible in one case might not be accessible in another case.

In some cases “accessible” will mean that it's available online free of charge. In other cases it can mean it's accessible at a reasonable price. So it really depends on the situation and on the regulators and on the people who are affected by the regulation. It would be very challenging to try to find a one-size-fits-all in terms of accessibility.

The regulators have a high incentive to have the documents accessible, because if they are not they won't be able to prosecute successfully, and we have a provision about that in proposed subsection 18.6 of the bill.

It's also important to realize that regulators want compliance with their regulations, and accessibility is something that would be considered at the time of the decision to use the technique or not. If the document is not accessible, that would be a reason to not use incorporation by reference. If it is accessible, then it's a factor that plays in favour of using the technique. There are really vast areas and vast types of incorporation by reference documents, so it basically means having access to a copy of the document with a minimum of effort.

Mr. Bob Dechert: Right.

Certainly, as a matter of commercial legal drafting I am familiar with this concept. It was often the case in situations where I would be negotiating and drafting commercial documents that would continue in force for many years, so often it made it much more efficient to incorporate by reference a standard, a rate, or a process by which something is determined, perhaps standards for the production of a type of product.

But we would typically only incorporate by reference those sorts of things where there was a known process for the development of the rate or the standard and there was some kind of public input to the development of that standard that the parties to the agreement could participate in.

Do the regulation-making authorities look at the same kinds of criteria when deciding whether to incorporate something by reference?

Ms. Jacinthe Bourdages: Yes, the regulators take into consideration different types of factors, like the one you mentioned, like the one about accessibility—is this document easily accessible? There are different factors that they look at to make sure that the use of the technique is appropriate in their field. The factors that Mr. Calkins was mentioning earlier could be valid factors as well. Here, again, there's a need for flexibility because it really depends on the regulated field and the realities of the regulatees, and of their regulators as well. There are a variety of factors that are considered when making the decision to use the technique or not.

• (1605)

Mr. Bob Dechert: For example, you mentioned the consumer price index, and I understand that's a basket of commonly purchased items. The things that are included in that basket of items change from time to time. I believe it's done by the Bank of Canada, is it not?

Ms. Jacinthe Bourdages: Yes.

Mr. Bob Dechert: There's a process, so people can understand how that works. That would be an example.

You also mentioned in your comments that it helps to promote interjurisdictional harmonization. We have a big concern in Canada about harmonization of various laws and regulations between provinces and the federal jurisdiction. I know you've given us some examples here in writing. Could you take us through an example of where this kind of incorporation by reference could help with the harmonization of provincial and federal standards?

Ms. Jacinthe Bourdages: Yes. Perhaps I'll let my colleague Patricia walk you through the examples that were provided.

Ms. Patricia Pledge: We did provide you four examples of current incorporations by reference to highlight the types of materials that are incorporated currently and the different ways that they may be most commonly used.

On the first page, you'll see there's an example of the Fort William First Nation Sawmill Regulations. These are regulations made under the First Nations Commercial and Industrial Development Act. It is a way of harmonizing federal and provincial legislation with respect to resource development on first nations lands. It's an example whereby we've made a federal regulation that incorporates by reference the bilingual laws of Ontario and makes them applicable to the first nations reserve in question where the development is going on.

You mentioned the CPI. That's an example we've included as well on the last page. It's included in the federal Softwood Lumber Products Export Permit Fees Regulations, and it's part of the factoring of fees in that regulation. You'll see it also makes a reference to the U.S. Department of Labor's Bureau of Labor Statistics there, too. So it's a perfect example of how it can be used effectively to harmonize between jurisdictions, not just federal and provincial but also Canada and the United States.

Mr. Bob Dechert: Okay, thank you.

The Chair: Thank you very much. Thank you for those questions and answers.

Our next questioner is from the New Democratic Party, Madam Boivin.

[Translation]

Ms. Françoise Boivin (Gatineau, NDP): Thank you, Mr. Chair.

My thanks also to the three witnesses for joining us today. Anyone listening to us at the moment probably does not understand a great deal about this bill. This discussion is extremely technical.

[English]

The Chair: Hold on, Madam Boivin, we can't hear your English version.

Okay, thank you.

[Translation]

Ms. Françoise Boivin: I would like to ask some preliminary questions.

Am I wrong to say that Bill S-2 is an exact copy of Bill S-12? It deals with exactly the same thing, not a comma has been changed.

You say that you are just putting on paper what already existed. I have read the Senate evidence and debates. Correct me if I am wrong, but I read that dynamic incorporation by reference has been

used 170 times since 2006 and that, in most cases, this was done without express authorization from Parliament.

I imagine that is the motivation behind clause 18.7. It reads:

18.7 The validity of an incorporation by reference that conforms with section 18.1 and that was made before the day on which that section comes into force is confirmed.

Clause 18.7 is a default clause, in a way. According to the department's interpretation, things have been done correctly and legally. However, you will all agree that the Standing Joint Committee on Scrutiny of Regulations does not necessarily share that opinion. According to the committee, the enabling legislation must specify the express right to use dynamic incorporation by reference. Also according to the committee, I believe that is the way in which we must proceed rather than coming up with a bill like this, which is more of a hodge-podge that makes it possible to act in that way basically at any time. I will not say that it can be done in any way, but it can be done at any time, as long as the criteria in Bill S-2 are met.

Ms. Jacinthe Bourdages: Mr. Chair, Ms. Boivin is right to mention that Bill S-2 is the result of a long debate between the government and the Standing Joint Committee on Scrutiny of Regulations. Putting an end to that debate is really one of the main objectives of the legislation because the government and the Standing Joint Committee on Scrutiny of Regulations were deadlocked. Sometimes they agree, sometimes they disagree on some points. On this point, there was disagreement between the government and the Standing Joint Committee on Scrutiny of Regulations. As has correctly been pointed out, the committee considered that any dynamic incorporation by reference not expressly authorized is invalid.

• (1610)

Ms. Françoise Boivin: Ms. Bourdages, did they not say more than that, that in fact it had to be expressly mentioned in the enabling legislation?

Perhaps this is because I have made my way, as my colleague said, to the Standing Joint Committee on Scrutiny of Regulations. But, if I understand correctly, for you, this act will be enough to give the authority. The question becomes "who will have the power to enact sections 18.2 and 18.3?" I will come back to that.

This explicitly authorizes the government to operate in that way. It was my understanding that the members of the committee—and I was not one of them at the time—preferred each act to have its own provision allowing it.

Far be it from me to start the debate on this issue again, although I think it is an interesting one. The bill seems to be very technical and very routine. We hear all the time that, in a world with piles of legislation and where regulations and requirements change quickly, we have to find modern ways of working. I have nothing against being modern, believe me, but neither must we forego our legal duty to check the regulations thoroughly. I can understand why the members of the joint committee had a problem with this.

As it is, analyzing regulations is very complex. It is not just regulations created by dynamic incorporation by reference. Imagine when they start trying to trace regulations back. That is what they are going to have to do. I doubt that they will create a registry in which all regulations by dynamic incorporation can be found. It will be a really mind-numbing task. It is not as if there were tons of people doing that research for us. The risk is that this will complicate the situation.

Sometimes, I have a problem with some of the government's legislation. Is it constitutional? Does it comply with our Charter? You have to chuckle when you look at the amended text of Bill S-2. It includes a new section, made up of clauses 18.1 to 18.7, but we must not forget section 3 of the Statutory Instruments Act. This states that the Clerk of the Privy Council must, among other things, verify legality and compliance with the Charter.

My concern about the creation of this kind of dynamic incorporation by reference is this. I know that, in the Senate, there were a lot of debates on accessibility, and the degree to which documents will be accessible. There is also the question of the legality behind the regulations that are passed.

My other concern is the following. Some time ago, Minister Nicholson appeared before a Senate committee. He gave some examples on international security. As others have mentioned, this will involve a lot of treaties, regulations and international standards. Let us not delude ourselves, the minister himself mentioned that it was a desired outcome, and that would certainly be true in this regard. This may well have repercussions for our people. They have to be able to handle it all.

In addition, your argument on bilingualism absolutely did not convince me. It is true that the Supreme Court said what it had to say on the matter. This concerns me even more because it means that we are in danger of having a huge number of regulations incorporated by reference that come from external treaties with countries that do not have the same obligations for bilingualism as Canada does. To my mind, that is a bit of a concern.

• (1615)

[English]

The Chair: That wasn't really a question.

If you could be very succinct in trying to answer that...

Ms. Jacinthe Bourdages: I'll try to be. There are many points in there; I'll try, though.

[Translation]

Under this bill, the government is proposing to amend the Statutory Instruments Act precisely because section 3 of that act is always relevant and that it also applies to documents that are incorporated by reference.

Of course, at the same time, section 3 deals with the limit of the power of regulations and documents that are incorporated by reference, as well as with Charter obligations. Documents incorporated by reference, just like the regulations into which they are incorporated, must be submitted to those tests. You are quite right to mention that.

As for the Standing Joint Committee on Scrutiny of Regulations, it is possible that members do not agree with the direction of Bill S-2. However, as I understand it, they do agree that dynamic incorporation by reference should henceforth be expressly authorized.

I believe that they would like dynamic incorporation to be limited to Canadian provincial legislation. That is a question of direction, but I feel that they do agree that, in legal terms, if Bill S-2 becomes law, that part of the issue will be solved.

[English]

The Chair: Thank you very much.

Thank you for those answers to that speech.

Mr. Dechert, the floor is yours.

Mr. Bob Dechert: Thank you, Mr. Chair.

Madame Bourdages, you mentioned in your opening comments that this legislation in your opinion is very similar to the current practice of regulation-making authorities in Canada. Does this expand in any way on what currently happens in terms of incorporation by reference?

Ms. Jacinthe Bourdages: This legislation provides for a *cadre*. It's in the general application, if you will, but it does not expand on our current practice. There are some statutes that go further than Bill S-2. These are statutes, obviously, that were enacted by Parliament. There are statutes that don't go as far as Bill S-2.

Bill S-2 provides that for those statutes that didn't say anything about incorporation by reference, this will be the guide for them. It merely codifies the position of the government on incorporation by reference.

Mr. Bob Dechert: So in fact we're now providing at least some guidance—

Ms. Jacinthe Bourdages: Some guidance, yes, as to the use of the device.

Mr. Bob Dechert: —whereas previously there was none.

Ms. Jacinthe Bourdages: There was some in some acts, and as a result of the long debate with the SJC some regulators pursue having their statutes amended to provide express authorization for incorporation by reference. That is why we have about 66 acts that already do so.

Mr. Bob Dechert: Is it fair to say this will then standardize the practice over all the statutes of Canada?

Ms. Jacinthe Bourdages: Not necessarily; for those organizations that have nothing in their enabling legislation, yes it will, but this is a default position.

Mr. Bob Dechert: It doesn't replace what's in another statute with respect to—

Ms. Jacinthe Bourdages: No, and that's why we have a provision that says that if the statutes have less or nothing, this governs; if they have more, their statute governs.

Mr. Bob Dechert: In your opinion, is it better to have some guidance about incorporation by reference or to have it wide open, as it is in some statutes?

Ms. Jacinthe Bourdages: One of the novel aspects of this legislation is, I would say, the obligation to have documents accessible. That's a first. It was a common law principle.

Mr. Bob Dechert: So that's protection for the public.

Ms. Jacinthe Bourdages: Yes. That makes it mandatory for regulators to have the documents accessible. It enshrines this common law principle in legislation.

The other novel aspect is the provision about the defence, that if the documents are not accessible, regulators won't be able to have a successful prosecution of the regulatees. So those two provisions are —

Mr. Bob Dechert: Again, that's protection for the public that doesn't currently exist.

• (1620)

Ms. Jacinthe Bourdages: Right.

Mr. Bob Dechert: It would seem to me, then, that on the balance of probabilities it makes sense to adopt some form of standard regulation of this process of using incorporation by reference, rather than continue the way we have been doing in the past, which is that some statutes have it, wherever legislators have specifically allowed for it, and many do not, but the regulators use it in any event.

You mentioned that there hasn't been much case law on incorporation by reference, in your experience. Do you know of any? Can you tell us what happened in any of those cases?

Ms. Jacinthe Bourdages: There are a few—three or four—of them. I'll let my colleague Patricia speak about them.

Mr. Bob Dechert: Okay. What period of time was that over? Maybe she could tell us what level of court it went to.

Ms. Patricia Pledge: Of course on the issue of unilingual incorporation by reference, the highest decision we have would be from the Supreme Court of Canada in 1992, the Manitoba language reference, which really set out the parameters for when it is acceptable to incorporate material that is unilingual. That is really the highest level of court.

There are other court decisions. One of the highest would be from the British Columbia Court of Appeal from about 20 years ago, which set out the principle that documents that are incorporated by reference don't need to be published in the *Canada Gazette* and registered.

There is a case called *Scott* that dealt with reciprocal enforcement of family law orders and incorporation of provincial legislation. Again that was probably almost 20 years ago.

There is the odd case in which a document that had been incorporated by reference needed to be interpreted, but it is very rare. There is very limited case law at all to provide guidance on this, and no judicial guidance, which is why the government and the standing joint committee have not agreed on the principles that apply to this.

Mr. Bob Dechert: There have been no cases, for example, of somebody alleging that a particular level of government exceeded its constitutional jurisdiction by incorporating something by reference.

Ms. Patricia Pledge: There are constitutional interdelegation cases that relate to how the federal government and the provincial

governments deal with their shared constitutional responsibilities. But they are not directly on point when it comes to incorporation by reference of the type that Bill S-2 proposes to be enabled here. So there's no case of that nature directly on point.

Mr. Bob Dechert: So in your opinion does this add protection for the public or does it open up possibilities that governments could do things in the shadows of regulation that they would be unlikely to do in the bright spotlight of Parliament?

Ms. Patricia Pledge: As my colleague mentioned, one of the main drivers behind the tabling of this legislation was to settle the dispute between the government and the Standing Joint Committee on the Scrutiny of Regulations, because we did not agree as to when incorporation by reference could be used or could not be used on an ambulatory basis.

One of the benefits or implications of this bill is that it will set a legal baseline. It will confirm the legal authority to do what the government had relied on the common law to support and the SJC had insisted be expressly authorized by each individual act of Parliament. So the benefit of enacting Bill S-2 is that there will be a solid expressed legal basis for the use of the technique.

Mr. Bob Dechert: Do you believe this bill meets the request of the scrutiny of regulations committee in their report?

Ms. Patricia Pledge: As my colleague Madam Bourdages said, it will settle the issue as to whether or not incorporation by reference has been expressly authorized by Parliament. It will firmly settle that.

The standing joint committee has submitted a brief in the Senate, and they do not agree that the bill should be as large as it is and apply as widely. I don't want to misrepresent that point. They would take a different approach, as Madam Boivin has indicated, a case-by-case approach.

But it will settle the legal debate on when it can and cannot be used.

Mr. Bob Dechert: Thank you.

The Chair: Thank you for those questions and answers.

Our next questioner is Madam Péclet.

[Translation]

Ms. Ève Péclet: My question follows up on the ones I asked about the oversight mechanism.

You told me that, when the joint committee looks at regulations, it will also look at incorporating the regulations. However, that only applies in the cases where the legislative authority is the one that makes the inclusion directly in the regulations, not when we are dealing with non-governmental organizations or foreign legislation. Basically, that is a problem. Let me give you an example.

Paragraph 18.1(3) reads as follows:

(3) The power to make a regulation also includes the power to incorporate by reference an index, rate or number—as it exists on a particular date or as it is varied from time to time—established by Statistics Canada, the Bank of Canada or a person or body other than the regulation-making authority.

It seems to me that the definition of the words “a person or body” is extremely broad in this case. As Ms. Pledge said, the scope of an act goes far beyond a simple examination of the regulations by the joint committee. We are talking here about a regulation-making authority that could incorporate other regulations without consultation in any case. It could even be an external organization, a foreign one. Perhaps I am wrong, but I believe that we may well be authorizing connections with no consultation or oversight mechanism.

Do you not find that the words “a person or body” should be better defined and have a meaning that is less broad? In some situations—as many witnesses in the Senate pointed out—our national standards could be changed by organizations without the slightest consultation.

• (1625)

Ms. Jacinthe Bourdages: Mr. Chair, I would like to thank the hon. member and suggest she refer to the last example of incorporation by reference that we provided.

It clearly illustrates the application of subsection 18.1(3) that you referred to. In this type of context a number, an index or a rate could be applied. We refer here to the consumer price index. These numbers and these rates, which are very easily accessible, are published by Statistics Canada, so by the government. Needless to say, they are published in both official languages

In practice, if this number, rate or coefficient was incorporated by reference in a regulatory provision, as is the case here, once the regulation is published in Part 2, the Standing Joint Committee for the Scrutiny of Regulations would study the document incorporated by reference, in the same way that it would review other provisions of the regulation.

In practice that is how it would work.

Ms. Ève Péclet: I understand. This is one example of many. However, as far as I know, the words “a person or body” are not defined restrictively enough. It could really be any kind of body.

A careful reading of section 18.4 shows that this does not necessarily require registration or publication, unless the incorporation was dynamic or changing.

In other words, does this really respect the conditions of the manual on acts and regulations, which requires that it be registered and published?

Ms. Jacinthe Bourdages: Mr. Chair, I would say to the hon. member that the following distinction needs to be made.

The documents incorporated by reference will not be published in the *Canada Gazette*. The idea underlying incorporation by reference is primarily not having to publish the incorporated documents.

However, the regulations that incorporate documents by reference will continue to be published in the *Canada Gazette*, which is what will allow people to know whether incorporation by reference has occurred. Part 1 of the *Canada Gazette* provides them with the opportunity to express their concerns. In Part 2, the Standing Joint Committee for the Scrutiny of Regulations can review these documents. The committee could even do so in Part 1, like any other citizen.

Indeed, there is no obligation to publish documents incorporated by reference, but they will have to be accessible through another mechanism.

• (1630)

Ms. Ève Péclet: Let's look at the example you just gave. If we included the U.S. Department of Labor and so on, they would never be required to publish this. I understand that it's available on the Internet, but there would still be an accessibility issue. If they are not required to publish or register these standards, the average Canadian would not have access to it.

Ms. Jacinthe Bourdages: There would be access through mechanisms other than the *Canada Gazette*. It might be through a website or something else. Technology is constantly changing. There might even be an iPad app. We might one day have an application that will make the documents accessible. It's always important to remember that the regulatory authorities have every interest in providing access to these documents because they want their regulations to be applied.

[English]

The Chair: Okay. Thank you very much.

There is nothing from the Conservatives, so the last name I have on the list is Madame Boivin.

[Translation]

Ms. Françoise Boivin: Thank you, Mr. Chair.

I do not wish to make a speech.

[English]

These are my concerns, seriously, because I studied this in depth.

The Chair: I didn't say it wasn't a good speech.

Ms. Françoise Boivin: It's always a good speech, in my case, but anyway....

[Translation]

During Senate debates, a number of interesting issues have been raised. As I can see in the conclusion, the recommended amendments were not adopted in the Senate either. I would like you to tell us about that.

In a letter to the Minister of Justice in 2009 on incorporation by reference, the Standing Joint Committee for the Scrutiny of Regulations established a distinction between four types of documents. You have spoken about them.

There are documents related to federal or provincial legislation. That is not as complex because they are more accessible and in collections. There are also regulatory documents that are more difficult to find and interpret, particularly foreign legislation. Lastly, there are documents drafted by non-governmental organizations.

The committee had requested that this type of catchall section allowing regulation by dynamic reference concern only regulations that apply to federal and provincial legislation.

Could you explain to the members of this House committee why this suggestion was not accepted?

You could have done so for the others, with specific things that would alert people, such as with foreign legislation or a particular perspective. Still, we are giving the power. I have nothing against giving this power. I want that to be very clear. It's just the method used that I am questioning.

Ms. Jacinthe Bourdages: According to the government, when external documents from another agency without a link to the regulatory process are incorporated by reference, it is considered that it is for a legitimate reason and that Canada can seek out any expertise that exists elsewhere and use it.

The joint committee wanted that because it saw a problem with subdelegation, that the government did not agree with. I think that is why it wanted to have just dynamic legislation.

Ms. Françoise Boivin: That delegation would have a direct impact by causing us to lose some of our democratic power, in a way. An external agency would be given a power over us.

Ms. Jacinthe Bourdages: It's important to remember that incorporation by reference is a choice, not an obligation. There are different ways to implement our international obligations. We can do it through legislation, incorporation by reference or routine regulations. The regulatory authorities have a range of choices. Incorporation by reference is just one tool of many and is not mandatory. If concerns like this exist, they need to be studied conscientiously when deciding whether to use incorporation by reference.

These agencies and entities do not develop these regulations for their future incorporation by reference. They would do it anyway. Then, it is up to Canada to decide whether it wants to benefit from their expertise through incorporation by reference. The government can also choose to pass legislation to fulfill its obligations.

• (1635)

Ms. Françoise Boivin: In any event, we will see in due time the impact this will have on Canadians if this is not accessible. The courts will have to explain what the words "otherwise accessible" mean. If it was almost impossible to be informed or if someone was not aware, it would not have a negative impact on citizens. We understand that.

Section 18.7 still bothers me a little because it validates actions taken. In your introduction, you said:

[English]

It "does not expand" what is already used.

[Translation]

Perfect. This is still happening. Correct me if I'm wrong, but the section validates the past, just in case.

Ms. Jacinthe Bourdages: Indeed, it's important to mention that this provision is not a retroactive provision. Its purpose is simply to confirm the government's position on the matter.

Had it not been for section 18.7, the joint committee could have insisted on the fact that certain regulations should be republished or should be subject to retroactive legislation. This provision was added to avoid that legal uncertainty.

It is also to put an end to potential debate. In fact, in other cases, we had to legislate to retroactively validate certain regulations. Some regulations had to be republished at the request of the standing joint committee. So it was to ensure a certain legal certainty with respect to what already exists and to the practice of incorporation by reference.

Ms. Françoise Boivin: My last question concerns bilingualism.

Ms. Pledge said that, with respect to case law, if a document is too complex or too lengthy, there is no obligation to provide it in both official languages. I understand that. However, if the document comes from outside, from a country that does not have the same bilingualism rules as Canada, is it automatic that the regulation will never appear in both languages? I hope that isn't what you said.

Ms. Jacinthe Bourdages: That isn't what we said. Sometimes, the regulatory authorities translate the documents themselves so that there are two versions and the regulated persons can have better access.

Obviously, the decision to translate a document comes under the regulatory authority. However, harmonization and international co-operation or even a highly technical document are usually considered by the Supreme Court to be acceptable reasons for a unilingual version. A unilingual document is sometimes acceptable so as not to compromise the unique nature of the expertise of the document that will be incorporated by reference.

Ms. Françoise Boivin: Take for example a French-speaking individual who has an English document and understands none of it. Would that not be an acceptable reason, even if we aren't required to produce it in both languages? This might be justification for not complying with what is in the regulation.

Ms. Jacinthe Bourdages: Accessibility does not really apply to official languages. For example, if a court decided that there was a real reason for not having the document available in both languages, I imagine that the case would go forward. However, if it was proven that there was no legitimate reason for unilingual incorporation by reference, the person could not be found guilty, in effect.

• (1640)

[English]

The Chair: Thank you very much.

Thank you, officials, for being here today. Thank you for those answers.

We will be dealing with this item again on Tuesday. We have three guests who have confirmed that they are coming to speak to it. My goal is that if we can get through the witnesses—this is a four-clause bill—we may do clause-by-clause at the end of the meeting.

There may be another motion coming that we'll deal with at the time, but we'll see if we can get through. We'll definitely get the witnesses through.

If you have any amendments that you're planning, it would be great if you would bring them forward. You obviously can move amendments at the table based on the presentations that we have, and

if we are not able to get through clause-by-clause, it will be the first item of business when we get back after the Christmas break, because I'm not planning on having a meeting on Thursday afternoon at 3:30 to 5:30. I'm not sure the House will be sitting at that particular time, so we'll see. That will be my Christmas present to the committee.

With that, if there is nothing else, we will see you on Tuesday. Thank you very much.

The meeting is adjourned.

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