Legislative Summary **LS-425E**

BILL S-41: THE LEGISLATIVE INSTRUMENTS RE-ENACTMENT ACT

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LEGISLATIVE HISTORY OF BILL S-41

HOUSE OF COMMONS		SENATE	
Bill Stage	**Date**	**Bill Stage**	**Date**
First Reading:	12 June 2002	First Reading:	5 March 2002
Second Reading:	12 June 2002	Second Reading:	20 March 2002
Committee Report:	12 June 2002	Committee Report:	4 June 2002
Report Stage:	12 June 2002	Report Stage:	5 June 2002
Third Reading:	12 June 2002	Third Reading:	11 June 2002

Royal Assent: 13 June 2002

Statutes of Canada 2002, c.20

N.B. Any substantive changes in this Legislative Summary which have been made since the preceding issue are indicated in **bold print.**

Legislative history by Peter Niemczak

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BACKGROUND

A. Overview

Bill S-41, the *Legislative Instruments Re-Enactment Act*, was introduced in the Senate on 5 March 2002 by the Honourable Sharon Carstairs, Leader of the Government in the Senate, on behalf of the Minister of Justice and Attorney General. The purpose of the proposed Act is to ensure the validity of legislative instruments, more commonly referred to as regulations or delegated legislation, that were made in only one language although they may, or may not, have been published in both official languages.

Section 133 of the *Constitution Act, 1867* requires that federal legislation be printed and published in both official languages. In two decisions, in 1979 and 1981, the Supreme Court of Canada found that section 133 also applied to certain regulations and legislative instruments, and that the section presupposed that such instruments would be enacted, as well as published, in both official languages. Bill S-41 has two purposes: (1) to re-enact in both official languages legislative instruments that were enacted in one language, but published in both official languages; and (2) to allow for the re-enactment of legislative instruments that were enacted in one language but not published, or published in only one language.

In the Senate, the Standing Committee on Legal and Constitutional Affairs ("the Senate Committee") made a number of significant amendments to Bill S-41, perhaps the most far-reaching of which was the inclusion of a rigorous review process for the implementation and operation of clause 4, the most discussed aspect of the Bill. Clause 4 applies to statutory instruments which were (1) enacted in only one official language and

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* Notice: For clarity of exposition, the legislative proposals set out in the Bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both Houses of Parliament, receive Royal Assent, and come into force.

also (2) either published in only one official language or not published at all because they were exempted from the usual publication requirements. The original version of the clause gave the Governor in Council a large degree of discretionary authority to deal with such instruments, and the Senate Committee circumscribed this discretion by amendments:

- **clarifying that the reference to "unpublished" instruments applies only to instruments which were exempted by law from publishing requirements, and does not save instruments which should have been published but were not;**
- **specifying that a person cannot be convicted of contravening an instrument re-enacted under clause 4 unless the act occurred after the instrument was published in both official languages;**
- **adding a provision that any legislative instrument to which section 4 applies is repealed six years after the Act comes into effect unless it has been repealed and re-enacted under the provisions of clause 4; and**
- **limiting the definition of legislative instruments to instruments enacted before the coming into force of section 7 of the *Official Languages Act* on 15 September 1988.**

The Committee report was tabled on 4 June 2002, and the Bill, as amended, was passed by the House of Commons on 12 June 2002.

B. The Report of the Standing Joint Committee for the Scrutiny of Regulations

Bill S-41 is generally agreed to be, at least in part, a response to a report of the Standing Joint Committee of the Senate and the House of Commons for the Scrutiny of Regulations ("the Joint Committee"), tabled on 10 October 1996. The Joint Committee's Third Report of the 35th Parliament (No. 59) found that the *Public Lands Mineral Regulations*, C.R.C., c. 1325, made on 25 June 1969, were invalid because they had been enacted in English only, contravening section 133 of the *Constitution Act, 1867*.

The Joint Committee also concluded that at least four other sets of regulations, all made before 1969, could be found similarly invalid. The Joint Committee did not attempt to estimate the total number of regulations involved, but noted that a 1992 letter from the Deputy Minister of Natural Resources, commenting on the *Public Lands Mineral Regulations*, C.R.C.,

c. 1325, suggested that the question of the applicability of section 133 to federal regulations "could eventually bring into question the validity of hundreds of federal regulations."

The Deputy Minister had defended the validity of the regulations on the grounds that there had been a "consensus among the authorities in 1969 that section 133 did not apply to regulations" and that the courts would be swayed by evidence that the government had acted in good faith.

> We are also of the opinion that the courts, in evaluating the good faith of the Governor in Council, would be inclined to attach some value to the fact that, in addition to printing and publishing these Regulations in French and English in 1969, the Governor in Council also included these Regulations in the 1978 CRC [Consolidated Regulations of Canada], which has the force of law in both official languages since it is deposited, printed and published in both languages. We are convinced that if there are still doubts about the validity of what was done in 1969, the 1978 consolidation process would be considered legally adequate to correct the situation resulting from the language requirements of section 133.

The Joint Committee Report did not accept these arguments, and concluded that a breach of section 133 in the regulation-making process invalidated the affected regulations. The fact that the government may have acted in good faith could not cure the invalidity, nor could a consolidation under the *Statute Revision Act*.

On 18 March 1997, the Minister of Justice and Attorney General of Canada responded to the Joint Committee Report, reaffirming the position of the Government that the "five regulations – all made between 1958 and 1969 – are in compliance with s. 133 because they are all part of the 1978 *Consolidation of Regulations of Canada*." Over the next several years, an exchange of correspondence took place between the Minister of Justice and the Chairs of the Joint Committee. Essentially, both sides maintained their position, but in December 1999 the Minister of Justice broached the idea of removing "any uncertainties regarding the validity of federal regulations or other legislative instruments which are still in force today." While the Government remained of the opinion that the regulations in question were constitutionally valid and in compliance with section 133, "at least as a result of their being included in the 1978 *Consolidation of Regulations of Canada*," the Minister took note of the Joint Committee's concerns and advised that she had "requested officials in my department to further study the

issues you have raised and to suggest ways to remove any uncertainties regarding the validity of federal regulations and other legislative instruments still in force today."

On 3 January 2002, the General Counsel for the Standing Joint Committee for the Scrutiny of Regulations wrote to the Minister of Justice, noting that the Joint Committee had heard nothing further about the proposed study or any remedial measures. Therefore, the Joint Committee had decided to invite the Minister to appear before the Joint Committee to explain the Government's position on the following issues:

- whether regulations made in one language only are constitutionally valid if they are made in good faith;
- whether the consolidation process can validate a regulation made in one language only; and/or
- whether regulations made in one language only are invalid *ab initio*.

C. Section 133 of the *Constitution Act, 1867*

Section 133 of the *Constitution Act, 1867* sets out the equality of the English and French languages in Parliament, in the legislature of Quebec, in the federal courts and in the courts of Quebec. It also explicitly states that "the Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both [English and French]." Since 1982, there have also been constitutional guarantees in section 16(1) of the *Constitution Act, 1982*, confirming the equality of status of the two official languages "as to their use in all institutions of the Parliament and government of Canada," and section 18(2), confirming that the "statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative." However, section 133 of the *Constitution Act, 1867* remains the section interpreted by the courts and it is this section at issue in Bill S-41. The decisions of the Supreme Court of Canada touching on section 133 arise largely from that Court's consideration of Quebec and Manitoba legislation (section 23 of the *Manitoba Act* is virtually identical to section 133), but the Court has made it abundantly clear that its decisions apply equally to federal legislation and legislative instruments.

According to the Supreme Court of Canada, the purpose of section 133 was "to ensure full and equal access to the legislatures, the laws and courts for francophones and anglophones alike" (*Re Manitoba Language Rights*, [1985] 1 S.C.R. 721, para. 31). However,

the two linguistic versions must also be of equal authority, whether it is legislation or legislative instruments at issue. In *Re Manitoba Language Rights*, the Supreme Court summarized previous decisions on section 133 as having three aspects:

- section 133 requires not just bilingual printing and publication, but bilingual enactment;
- the English and French texts must be equally authoritative; and
- there is a requirement of simultaneity in the use of both languages in the enactment process.

Proposed legislation is, and always has been, tabled in both official languages. Consequently it is passed in both official languages and the two linguistic versions are of equal authority. However, prior to 1969, when the first *Official Languages Act* was passed, the situation was not so clear with respect to regulations and other legislative instruments, and it was generally assumed that section 133 did not apply. However, in 1979, the Supreme Court of Canada, in *Attorney General of Quebec* v. *Blaikie et al*, [1979] 2 S.C.R. 1016 (*Blaikie No. 1*), held that section 133 also governed delegated legislation. This was followed by *Blaikie No. 2*, [1981] 1 S.C.R. 312, which refined the argument:

> Legislative powers so delegated by the Legislature to a constitutional body which is part of itself must be viewed as an extension of the legislative power of the Legislature and the enactments of the Government under such delegation must clearly be considered as the enactments of the Legislature for the purposes of s. 133 of the B.N.A. Act.
>
> It is true that the above-mentioned conventions of the Constitution were well-established in 1867 and the delegation of legislative powers to the Executive was not then unknown. But such delegation was used sparingly and almost by way of exception. The exception has now become the rule in some matters to the point where a large and important part of the laws in force in the Province [of Quebec] consists of regulations made by the Executive ... The requirements of s. 133 of the B.N.A. Act would be truncated … should this section be construed so as not to govern such regulations.(1)

(1) *Attorney General of Quebec* v. *Blaikie et al*, [1981] 1 S.C.R. 312 (*Blaikie No. 2*), pp. 319-321.

D. Chronology of Legislation Dealing with Regulation-making and Statutory Instruments

The *Statutory Orders and Regulations Order,* 1947, included the first provision for the publication in Part II of the *Canada Gazette* of "all proclamations, orders, rules and regulations of a legislative character or of an administrative character, having general effect or imposing a penalty." The *Statutory Orders and Regulations Order, 1949*, continued the publication provisions, and required the Clerk of the Privy Council to publish in English and French the first Consolidation of regulations. The Foreword to the *Statutory Orders and Regulations, Consolidation, 1949,* noted that "the systematic publication of statutory orders 'of general or widespread interest or concern' is a fairly recent development":

> Care has been taken to ensure that all orders and regulations having general effect have been included. Orders, regulations and by-laws that are of local importance only and certain orders, etc., having general effect which are readily available from some other official sources have been excluded.

According to section 8(2) of the 1949 Order, all statutory orders made by the Governor in Council or the Treasury Board were to be submitted to the Governor in Council for re-enactment prior to publication in the Consolidation.

The *Regulations Act*, S.C. 1950, c. 50, required "every regulation-making authority [to], within seven days after it makes a regulation, transmit copies of the regulation in English and in French to the Clerk of the Privy Council" (section 3). Copies of such regulations, as well as of regulations made by the Governor in Council or the Treasury Board, were recorded and numbered by the Clerk of the Privy Council. Every regulation was to be published in English and in French in the *Canada Gazette* within thirty days after it was made (section 6).

The *Official Languages Act*, 1969, for the first time clearly established that all rules, orders, regulations, by-laws and proclamations that are required to be published by or under the authority of an Act of Parliament must be made and published in both official languages. Section 4 states:

> All rules, orders, regulations, by-laws and proclamations that are required by or under the authority of any Act of the Parliament of Canada to be published in the official gazette of Canada shall be made or issued in both official languages and shall be published accordingly in both official languages.

Although the first *Official Languages Act*, assented to on 9 July 1969, guaranteed that future *published* legislative instruments would be compliant with the Supreme Court of Canada interpretation of section 133, the status of regulations made in one language prior to that date was not so clear. Also at issue was the status of delegated legislation that is not required to be published in the *Canada Gazette*.

Two subsequent pieces of legislation affected the regulation-making structure. The *Statutory Instruments Act*, S.C. 1970-71-72, c. 38, further refined the regulation-making process, although the Governor in Council has the power to exempt regulations from the provisions of section 5(1), the transmission of regulations to the Clerk of the Privy Council, and section 11(1), publication in the *Canada Gazette*, under certain circumstances.

Finally, the *Official Languages Act*, 1988, refined the wording of the requirement to reflect the intervening court decisions with greater precision. Section 7 of that Act reads, in part, as follows:

> *Legislative instruments*
>
> 7. (1) Any instrument made in the execution of a legislative power conferred by or under an Act of Parliament that
>
> (a) is made by, or with the approval of, the Governor in Council or one or more ministers of the Crown,
> (b) is required by or pursuant to an Act of Parliament to be published in the *Canada Gazette*, or
> (c) is of a public and general nature
>
> shall be made in both official languages and, if printed and published, shall be printed and published in both official languages.
>
> *Instruments under prerogative or other executive power*
>
> (2) All instruments made in the exercise of a prerogative or other executive power that are of a public and general nature shall be made in both official languages and, if printed and published, shall be printed and published in both official languages.

DESCRIPTION AND ANALYSIS

A. Clause 1 – Short title

The short title of the Act is the *Legislative Instruments Re-enactment Act*. The full title is *An Act to re-enact legislative instruments enacted in only one official language*.

B. Clause 2 – Definitions

Clause 2 sets out the definition of three phrases: "enacted," "government publication" and "legislative instrument." "Enacted" is defined as including "issued, made and established." The courts have used various terms to describe the point at which a regulation becomes effective, and this broad definition of "enacted" is presumably to ensure that all circumstances are caught.

"Government publication" means the *Canada Gazette* or "any other official publication of the Government of Canada in which legislative instruments were published." Although regulations which are published are now invariably published in the *Canada Gazette,* this definition covers off the possibility that there may be regulations prior to 1950 that were published in some other instrument.

The definition of "legislative instrument" is a broad one, designed to be consistent with both *Blaikie No. 1* and *Blaikie No. 2*. In *Blaikie No. 2*, the Supreme Court of Canada concluded:

> Section 133 of the British North America Act applies to regulations enacted by the Government ... a minister or a group of ministers and to regulations of the civil administration and of semi-public agencies ... which, to come into force, are subject to the approval of that Government, a minister or a group of ministers. Such regulations are regulations or orders which constitute delegated legislation properly so called and not rules or directives of internal management.

However, there is still, and probably always will be, a grey area as to precisely which instruments section 133 applies to. Given the complexity of modern government, no single definition is likely to resolve 100 percent of the possible situations clearly, and there will always be some degree of judgement involved in deciding when an Order in Council, for example, is of an executive or administrative nature rather than a legislative instrument.

The Senate Committee amended the definition of "legislative instrument" so that it applies only to instruments enacted before the coming into force of section 7 of the *Official Languages Act* on 15 September 1988. Section 7 requires instruments made in the execution of a legislative power to be made in both official languages and, if printed or published, printed and published in both official languages.

C. Clause 3 – Instruments published in both languages

Clause 3 deals with the concerns raised by the Joint Committee Report. The Department of Justice remains of the view that any defect in the enactment of regulations has been corrected by the 1978 Consolidation of Regulations, and that clause 3 is for greater certainty. Regardless, clause 3 automatically re-enacts, in both official languages, any legislative instrument that was originally enacted in one language only but at the same time published in both official languages. The re-enactment in two languages is deemed to come into force retroactively, on the same day as the coming into force of the original regulation in one language.

It is worth noting that this is not the first time that federal legislation has retroactively validated regulations having a procedural flaw. In 1928, an Act was passed "relating to the submission to Parliament of certain Regulations and Orders in Council," declaring that certain regulations passed under five Acts had "the same force and effect as if they had been approved by both Houses of Parliament as required by said Acts respectively."

D. Clause 4 – Instruments not published or published in one language

Clause 4 is designed to allow the Government to "tidy up" any outstanding problems with legislative instruments. Although it refers to both "instruments not published" and instruments "published in only one official language," it seems reasonable to assume that it is primarily directed at the issue of instruments not published. Certainly since the *Regulations Act* of 1950, there should be no legislative instruments published in one language only. There may, however, be instruments enacted in only one official language which were not published at all. There may also be a class of instruments not caught by the present interpretation of the *Statutory Instruments Act* or the *Official Languages Act* that a future court decision will nonetheless find to be instruments to which section 133 applies. **The Senate Committee amended clause 4(1) to clarify that the reference to an instrument that "was not published**

at the time of its enactment" **is limited to instruments "exempted by law from the requirement to be published in a government publication." In other words, clause 4 is not intended to save instruments which should have been published, but were not.**

Whereas clause 3 automatically re-enacts the relevant legislative instruments, clause 4 is discretionary. For example, if the government makes a good faith judgement that a specific instrument is not subject to the requirements of section 133 only to find a court disagreeing with that judgement some years later, clause 4 would allow the Governor in Council to retroactively re-enact the challenged instrument in both official languages.

Clause 4(2) confirms that a repealed and re-enacted legislative instrument is retroactive to the day that it was originally enacted.

Clause 4(3) states that no person shall be convicted of an offence in relation to a re-enacted instrument unless either (a) the offence occurred after the re-enacted instrument was published in both official languages or (b) reasonable steps were provably taken to bring the substance of the original instrument to the attention of the person charged with the offence before the offending action occurred. The latter condition is very similar to section 11(2)(b) of the *Statutory Instruments Act*, which deals with unpublished regulations. **The Senate Committee removed clause 4(3)(b), ensuring that no person could be retroactively convicted for contravening a re-enacted instrument.**

Clause 4(4) gives the Governor in Council the discretion to re-enact a legislative instrument even when the power under which the instrument was originally enacted no longer exists, or the office or body that originally enacted the instrument no longer exists. If this section were absent, actions taken under legislation that has since been repealed could be called into question if a court decided that section 133 applied to the instrument.

Clause 4(5) ensures that any such re-enactment can be done expeditiously, without repeating any procedural requirements in the applicable legislation.

Clause 4(6) requires that a re-enacted regulation be published in the *Canada Gazette*, unless it is in a class referred to in subsection 15(3) of the *Statutory Instruments Regulations*. Subsection 15(3) deals with regulations of which the publication could, in the opinion of the Governor in Council, be injurious to the conduct of federal-provincial affairs, the conduct of international affairs, the defence of Canada or any allied state, and the detection, prevention or suppression of subversive or hostile activities.

The Senate Committee felt there should be a time limit on the discretionary repeal and re-enactment of legislative instruments. A new clause 4(7) was added, stating that any legislative instrument coming within the scope of clause 4 will be automatically repealed six years after Bill S-41 comes into effect, unless it has been re-enacted in both official languages. This six-year period is consistent with the time-frame of the Ministerial review and report to both Houses of Parliament on the implementation and operation of section 4.

E. Clause 5(1) – Deeming and citation

Clause 5 deals with technical matters to ensure that there are no gaps between the original instrument and a re-enacted instrument. The re-enacted instrument is deemed to be, and to have always been, the instrument it replaces. If it is re-enacted under clause 3, it is cited in the same manner as the original instrument. If it is re-enacted under clause 4, it may be referred to by its title in either official language. The holder of an office, or a body, that has the power to amend or repeal the original legislative instrument, also has the power to amend or repeal the re-enacted instrument.

F. Clause 6 – Both Versions Equally Authoritative

As Bill S-41 was originally introduced, clause 6 dealt with an exemption from the *Statutory Instruments Act*. The Senate Committee renumbered this as clause 8, and added a new clause 6 affirming that the English and French versions of a re-enacted instrument are equally authoritative.

G. Clause 7 – Repealed Instrument not Revived

A new clause 7, added by the Senate Committee, clarifies that Bill S-41 will not revive any legislative instrument that has already been repealed, or otherwise ceased to have effect.

H. Clause 8 – Exemption

Clause 8 of the Bill, as amended, was clause 6 of the original Bill, and deals with the relationship between re-enacted instruments and the *Statutory Instruments Act*. Clause 8 states that the *Statutory Instruments Act* does not apply to an instrument

re-enacted under clause 3, or to a regulation which repeals and re-enacts a legislative instrument under clause 4. Such re-enacted instruments and regulations will, however, be referred to the Standing Joint Committee on Regulatory Affairs.

I. Clause 9 – Review and Report

Clause 9 of the Bill, added by the Senate Committee, provides for a comprehensive review of the implementation and operation of clause 4 of the Bill. The Minister of Justice will have five years after the coming into force of the Act to complete the review, and a further year to report to both Houses of Parliament.

The report would include a description of the process used to identify the relevant legislative instruments; a list of the legislative instruments that have been so identified and repealed and re-enacted; and a list of legislative instruments that have been identified, but not repealed and re-enacted. An exception would be made for legislative instruments exempted from publication by section 15(3) of the *Statutory Instruments Regulations*, which covers regulations which could reasonably be expected to be injurious to the conduct of federal-provincial affairs or international affairs, the defence of Canada, or the detection and prevention of subversive or hostile activities. In such cases, the report by the Minister would have to set out only the number of such regulations identified and dealt with.

COMMENTARY

Bill S-41 is designed to resolve any uncertainty as to the status of various regulations, primarily those made prior to 1969 in one language only but published in two languages. Although it is not clear how many such regulations there may be, clause 3 should address the specific concerns expressed by the Joint Committee in its third report. The most contentious aspect of the legislation as originally proposed was clause 4, which vested a large discretionary authority in the Governor in Council with respect to the re-enactment of legislature instruments that either were not published or were published in one language only. **However, the amendments approved by the Senate Committee considerably limit the discretionary authority that clause 4 would have vested in the Governor in Council, and should remove most concerns.**