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LEGISLATIVE SUMMARY

Bill S-2:

An Act to amend the Statutory Instruments Act and to make consequential amendments to the Statutory Instruments Regulations

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

Legislative Summary of Bill S-2
(Legislative Summary)

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CONTENTS

LEGISLATIVE SUMMARY OF BILL S-2: AN ACT TO AMEND THE STATUTORY INSTRUMENTS ACT AND TO MAKE CONSEQUENTIAL AMENDMENTS TO THE STATUTORY INSTRUMENTS REGULATIONS

1 BACKGROUND

Bill S-2, An Act to amend the Statutory Instruments Act and to make consequential amendments to the Statutory Instruments Regulations (short title: Incorporation by Reference in Regulations Act), was introduced in the Senate and received first reading on 22 October 2013. Bill S-2 was previously introduced in the 1st Session of the 41st Parliament as Bill S-12, which died on the *Order Paper* when Parliament was prorogued on 13 September 2013. At the time, Bill S-12 had already been adopted by the Senate and was awaiting second reading in the House of Commons.

According to the summary included in the tabled bill, Bill S-2 amends the *Statutory Instruments Act* in the following ways:

- it provides for the express power to incorporate by reference in regulations;
- it imposes an obligation on regulation-making authorities to ensure that a document, index, rate or number that is incorporated by reference is accessible; and
- it provides that a person is not liable to be found guilty of an offence or subjected to an administrative sanction for a contravention relating to a document, index, rate or number that is incorporated by reference unless certain requirements in relation to accessibility are met.

The summary notes that Bill S-2 also makes consequential amendments to the *Statutory Instruments Regulations*.

During study of Bill S-12, the then Minister of Justice, the Hon. Rob Nicholson, indicated that the bill "is a response to the concerns expressed by the Standing Joint Committee on Scrutiny of Regulations and aims to create the necessary legal certainty around the use of [incorporation by reference]."[1]

1.1 THE *STATUTORY INSTRUMENTS ACT*

The *Statutory Instruments Act*[2] sets out the formalities of the process for creating rules of law through regulations. As suggested by the *Federal Regulations Manual*, it is particularly important to have a process for ensuring that regulations are written and communicated in such a way that members of the public clearly know their rights and obligations, given the proliferation of regulations in recent years:

> There are, at the federal level alone, approximately 3,000 regulations comprising over 30,000 pages, compared with some 450 statutes comprising about 13,000 pages. Furthermore, departments and agencies submit to the Regulations Section on average about 1,000 draft regulations each year, whereas Parliament enacts about 80 bills during the same period. The executive thus plays a major role in setting rules of law that apply to Canadian citizens.[3]

The Act and the *Statutory Instruments Regulations*[4] set out three basic requirements for making regulations: legal examination, registration, and publication in the *Canada Gazette*.

In general,[5] as per subsection 3(2) of the Act, a proposed regulation must be *examined* by the Clerk of the Privy Council, in consultation with the Deputy Minister of Justice, before it is made to ensure that:

> (*a*) it is authorized by the statute pursuant to which it is to be made;
>
> (*b*) it does not constitute an unusual or unexpected use of the authority pursuant to which it is to be made;
>
> (*c*) it does not trespass unduly on existing rights and freedoms and is not, in any case, inconsistent with the purposes and provisions of the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights*; and
>
> (*d*) the form and draftsmanship of the proposed regulation are in accordance with established standards.

Once a regulation has been made, it must be transmitted to the Clerk of the Privy Council within seven days for *registration* (sections 5 and 6 of the Act).[6] Regulations generally come into effect on the day of registration.[7]

Regulations must be *published* in the *Canada Gazette* within 23 days after registration (subsection 11(1) of the Act).[8] The Privy Council Office's *Guide to Making Federal Acts and Regulations* notes that publication is tied to the constitutional principle of the rule of law: "the terms of the law must be knowable, not secret. If a regulation is not published, people cannot be presumed to have had any way of finding out what their rights and responsibilities were under it."[9] Subsection 11(2) of the Act provides that "[n]o regulation is invalid by reason only that it was not published in the *Canada Gazette*," but also that, generally speaking, "no person shall be convicted of an offence consisting of a contravention of any regulation that at the time of the alleged contravention was not published in the *Canada Gazette*."

The Act also provides for parliamentary oversight of such delegated legislation, through referral to the parliamentary committee "established for the purpose of reviewing and scrutinizing statutory instruments" (section 19 of the Act). The Standing Joint Committee on Scrutiny of Regulations reviews regulations on the basis of criteria approved at the beginning of each session of Parliament. These criteria currently include whether the regulation "is not authorized by the terms of the enabling legislation or has not complied with any condition set forth in the legislation," whether the regulation "is not in conformity with the *Canadian Charter of Rights and Freedoms* or the *Canadian Bill of Rights*," and whether the regulation "appears for any reason to infringe the rule of law."[10]

As noted in the Privy Council Office's *Guide to Making Federal Acts and Regulations*, "[w]hen the [Joint] Committee finds a problem with a statutory instrument, it tells the regulation-making authority and suggests solutions."[11] The Joint Committee may make a report to both Houses of Parliament containing a resolution to the effect that a regulation, or part of a regulation, should be revoked. This "disallowance" procedure was added to the Act through amendments in 2003, and has been used sparingly.[12]

1.2 Incorporation by Reference

Incorporation by reference, as explained by John Mark Keyes in *Executive Legislation*, "is a drafting technique for providing that a legislative text … includes material (text, information or concepts) expressed elsewhere. The material is included without reproducing it within the legislative text."[13]

Different types of materials may be incorporated by reference. For example, a legislative text may incorporate another provision from the same text, provisions from another legislative text enacted in the same jurisdiction, legislative texts of another jurisdiction, or non-legislative texts such as technical standards or international agreements.[14]

In addition, incorporation by reference can be either "open" or "closed."

"Closed" or "static" incorporation by reference incorporates the document *as it exists at the time* into the regulation. According to Keyes, "[w]ith static references, changes made to the material (including repeal) after its incorporation by reference do not affect the operation of the incorporating legislation. It continues to incorporate the original version despite the subsequent changes."[15] In other words, the regulation would have to be amended to incorporate the amendments to the incorporated document.

This is to be distinguished from "open," "ambulatory," "dynamic," or "rolling" incorporation by reference, which automatically incorporates subsequent amendments to the incorporated document into the regulation.

One of the advantages of incorporation by reference is that it can be used to avoid duplication, so that the regulation-making authority does not have to reproduce the incorporated material in its entirety. As well, Keyes notes that incorporation by reference may promote harmonization: "This is particularly important in terms of seeking interjurisdictional harmonization, for example to facilitate transactions or activities that cross borders."[16]

There are potential disadvantages to incorporation by reference as well, notably that the reader must consult more than one source in order to understand the text in its entirety, and there may be costs involved in accessing copyrighted material that is incorporated by reference. There may also be other difficulties in accessing the incorporated material, although Keyes notes that the potential for hyperlinking between documents may help reduce these difficulties.[17] An additional consideration is that, under certain circumstances, material incorporated by reference may not be available in both official languages.[18]

1.3 The Joint Committee's 2007 Report and the Government Response

In 2007, the Standing Joint Committee on Scrutiny of Regulations tabled a report setting out its views on certain issues related to the concept of "incorporation by reference." The Joint Committee began with an explanation of the concept:

> When Parliament confers a power to make regulations, the regulation-maker usually exercises this power by drafting the text of the regulation to be enacted. The regulation-maker may also decide that the contents of an

> existing document are what should be used in the regulation it intends to enact. One way to make the contents of such a document part of the text of the regulation would be to reproduce it word for word in the regulation. Alternatively, the regulation-maker can simply refer to the title of the document in the regulation. The contents of the document will then be said to be "incorporated by reference." The legal effect of incorporation by reference is to write the words of the incorporated document into the regulation just as if it had actually been reproduced word for word. The incorporation by reference of an existing document is no more than a drafting technique, and a regulation-maker need not be granted any specific power in order to resort to this technique. This is referred to as "closed" or "static" incorporation by reference.[19]

The Joint Committee's position on "open" or "ambulatory" incorporation by reference, however, was that for open incorporation by reference to be proper, there should be an express grant of that authority in the enabling provision, for example by providing that regulations may be made incorporating material "as amended from time to time."

The Joint Committee went on to explain the principle behind the distinction in its approach to "open" and "closed" incorporation by reference:

> It is rooted in the rule against subdelegation (often stated by the Latin maxim *delegatus non potest delegare* – "a delegate cannot delegate"), which reflects the legal principle that a person to whom a power to legislate has been delegated may not redelegate that power to someone else unless clearly authorized to do so by law. In relation to regulations, this means that a given authority, whether it be the Governor in Council or a minister, board, commission or some other authority, that is empowered by statute to make regulations must not, in the absence of a clear grant of power to do so, purport to authorize another person or body to act in its stead. This is intended to protect the legislator's choice as to who is to exercise the delegated power. It has always been the view of the [Joint] Committee that the incorporation by reference of external material into regulations "as amended from time to time" amounts to a subdelegation of regulation-making power, in that it will be the body amending the incorporated material, and not the authority on whom the power to make the regulations has been conferred, that will determine the content of the regulations.[20]

This authorization for open incorporation by reference could arise from an enabling Act that expressly granted the authority to incorporate documents "as amended from time to time,"[21] or through the use of other language that has been interpreted as being sufficiently broad to permit ambulatory incorporation by reference. In particular, the Joint Committee noted the difference between the power to make regulations "respecting" a matter, and the power to make regulations "fixing" or "prescribing" something:

> [I]f the regulation-making authority is given a power to "prescribe" or "fix" safety standards for the transportation of dangerous goods, subsequent amendments to the material originally incorporated will have to be included in the incorporating regulation by way of amendments to the regulation. On the other hand, a power to make regulations "respecting" safety standards for the transportation of dangerous goods is broader, and a regulation providing that it includes future amendments to the incorporated document could be considered to be a regulation "respecting" such standards.[22]

The Joint Committee noted that a bill introduced in 1995, applicable to regulations in general rather than to regulations under a particular Act, would have clearly stated that material "may be incorporated by reference … as the material exists at a particular date or as amended from time to time,"[23] but that bill did not proceed past first reading.

The Joint Committee then turned from the issue of whether open incorporation by reference is *authorized* to concerns about the *accessibility* of material incorporated by reference:

> Of course, incorporation by reference also gives rise to concerns relating to accessibility to the law, in that although incorporated material becomes part of the regulations, the actual text of that material must be found elsewhere. Such concerns are heightened where material is incorporated "as amended from time to time," in that members of the public may have difficulty ascertaining precisely what the current version is at a particular point in time. Where open incorporation by reference is to be permitted, provisions should also be put in place to require the regulation-maker to ensure that the current version of an incorporated document is readily available to the public, as are all previous versions that were previously incorporated.[24]

In its response to the Joint Committee's report, the Government disagreed that ambulatory incorporation by reference necessarily entails the subdelegation of legislative power, but acknowledged that "recourse to incorporation by reference might benefit from further clarification in legislation."[25] With respect to the accessibility of incorporated documents, the Government noted that "the rule of law itself requires that the law be accessible," and stated that in all instances where incorporation by reference is used, whether the incorporation is static or dynamic, "the policy of the Government is to emphasize the importance of ensuring the accessibility of incorporated documents, not only at the time that the material is incorporated but also during the time that the regulation remains in force."[26]

2 DESCRIPTION AND ANALYSIS

Clause 1 of Bill S-2 gives the short title of the bill, the Incorporation by Reference in Regulations Act. Clause 2 adds sections 18.1 to 18.7 to the *Statutory Instruments Act*, under the heading "Incorporation by Reference." Clauses 3 and 4 amend the French versions of the Act and the *Statutory Instruments Regulations*.

2.1 CLAUSE 2: INCORPORATION BY REFERENCE

The most significant changes made by clause 2 of the bill are discussed below.

2.1.1 THE POWER TO INCORPORATE BY REFERENCE

Subsection 18.1(1) states that the power to make a regulation includes the power to incorporate in it by reference a document or part of a document either as it exists on a particular date or as amended from time to time. This covers both static and ambulatory incorporation by reference, and appears to apply regardless of whether the power is to make a regulation "respecting" or "prescribing" a matter, or otherwise. This power is subject, however, to the limitation in subsection 18.1(2).

The limitation in subsection 18.1(2) relates to documents produced by the regulation-making authority, either alone or jointly with a person or body in the federal public administration. In essence, a document produced by the regulation-making authority itself can be incorporated by reference into a regulation only if it:

> (*a*) contains only elements that are incidental to or elaborate on the rules set out in the regulation and is incorporated as it exists on a particular date;
>
> (*b*) is reproduced or translated from a document, or part of a document, produced by a person or body other than the regulation-making authority, with any adaptations of form or reference that will facilitate its incorporation in the regulation; or
>
> (*c*) is a regulation.

The intent of the provision set out in paragraph 18.1(2)(*a*) appears to be to ensure that the regulation-making authority cannot circumvent the regular procedure under the *Statutory Instruments Act* by making the substance of a regulation in a separate document, which it then incorporates by reference into its own regulation without the usual requirements of registration, publication, etc. This paragraph limits the incorporation by reference of the regulation-making authority's own documents to those that set out details, rather than substance, and to the versions of those documents that exist on a particular date, rather than as amended from time to time.

Paragraph 18.1(2)(*b*) appears to be the broadest of the exceptions to the limitation. It permits the incorporation by reference of any document "produced by the regulation-making authority" that is "reproduced or translated from a document, or part of a document, produced by a person or body other than the regulation-making authority," with any adaptations of form or reference to facilitate its incorporation into the regulation. Although this paragraph does not specify whether the provision contemplates closed and/or open incorporation by reference, it seems likely that it would be interpreted as permitting both, on the following basis: paragraph (*a*) is explicitly limited to the document "as it exists on a particular date" and so if the intent were to limit paragraph (*b*) in the same manner, Parliament would likely have said so.

The intention behind the exception in paragraph 18.1(2)(*c*) appears to be that a regulation should already have been subject to the regular procedure under the *Statutory Instruments Act*, and so it could be incorporated by reference without compromising the oversight process. Although this paragraph, too, is silent as to whether closed and/or open incorporation by reference is contemplated, it should be noted that if the incorporated regulation is subsequently amended, those amendments should themselves be subject to the regular process under the Act, independent of the regulation's incorporation into another regulation. In this manner, open incorporation by reference of the regulation-making authority's own regulation would likely not give rise to concerns with respect to oversight or accessibility.

Subsection 18.1(3) states that the power to make a regulation also includes the power to incorporate by reference "an index, rate or number" established by Statistics Canada, the Bank of Canada, or a person or body other than the regulation-making authority. This subsection, like subsection 18.1(1), explicitly refers to either open or closed incorporation by reference. This section appears to be intended to respond to the

Joint Committee's concerns that the specific power to make a regulation "prescribing" something such as a fee is not broad enough to authorize the open incorporation into a regulation of an index or a rate that is set and adjusted by another body.[27]

Subsection 18.1(4) expands the meaning of the term "regulation-making authority" for the purposes of subsections 18.1(2) and 18.1(3). If the regulation-making authority is the Governor in Council or the Treasury Board, then "regulation-making authority" includes:

> (i) the minister who recommends the making of the regulation,
>
> (ii) the minister who is accountable to Parliament for the administration of the regulation, and
>
> (iii) any person or body – other than Statistics Canada and standards development organizations accredited by the Standards Council of Canada – for which either of those ministers is accountable to Parliament.

If the regulation-making authority is a minister, then "regulation-making authority" includes "any person or body – other than Statistics Canada and standards development organizations accredited by the Standards Council of Canada – for which that minister is accountable to Parliament." This appears to be intended to prevent the incorporation by reference into a regulation of materials produced under the same minister, although it does not appear to restrict the incorporation by reference of materials produced by other federal departments and bodies.

Section 18.2 states that the powers "conferred" by section 18.1 "are in addition to any power to incorporate by reference that is conferred by the Act under which a regulation is made and that section does not limit such a power." It appears that, where there are narrower incorporation by reference powers under a specific enabling Act, section 18.1 enlarges them, while where there are broader incorporation by reference powers under a specific enabling Act, section 18.1 does not narrow them.

2.1.2 Accessibility

Proposed subsection 18.3(1) of the Act imposes an obligation on the regulation-making authority to ensure that a document, index, rate or number that is incorporated by reference is "accessible." This term is not defined, and the bill does not set out specific requirements for the regulation-making authority to meet to ensure accessibility (for example, with respect to cost, official languages, or availability on the Internet).

Under subsection 18.3(2), if the regulation-making authority is the Governor in Council or the Treasury Board, then the minister who is accountable to Parliament for the administration of the regulation is responsible for ensuring that the incorporated material is accessible.

2.1.3 Procedural Requirements

Proposed section 18.4 states, for greater certainty, that a document, index, rate or number that is incorporated by reference into a regulation "is not required to be transmitted for registration or published in the *Canada Gazette* by reason only that it is incorporated by reference." This appears to reflect the understanding that one of the advantages of incorporation by reference is that the formal requirements of the Act with respect to registration and publication may not need to be met.

Further, this provision appears to *permit* the publication of such incorporated materials, while stating that such publication "is not required." Finally, subsection 18.4 seems to attempt to close a potential loophole with respect to incorporated materials that should, in their own right, be subject to the requirements of the Act. Incorporated materials are not required to be registered and published by reason *only* that they are incorporated by reference; however, if materials are required to be registered and published *independently* of their incorporation by reference, then they are not exempted from those requirements by virtue of this section.

2.1.4 Exception to Liability

Section 18.6 states that:

> [a] person is not liable to be found guilty of an offence or subjected to an administrative sanction for any contravention in respect of which a document, index, rate or number – that is incorporated by reference in a regulation – is relevant unless, at the time of the alleged contravention, it was accessible as required by section 18.3 or it was otherwise accessible to that person.

In essence, this provision protects against a person being penalized for contravening an unknowable regulatory provision. For there to be liability, either the incorporated document, index, rate or number must be "accessible as required by section 18.3" – under which the accessibility obligation rests with the regulation-making authority – or it must be "otherwise accessible" to the person. As with section 18.3, there is no indication of what "accessible" means, nor is there an indication of what counts as "*otherwise* accessible."

This provision is similar in purpose to subsection 11(2) of the Act, which protects against conviction for an offence of contravening a regulation that was not published in the *Canada Gazette*, with certain exceptions.

2.1.5 Confirmation of Validity

Under section 18.7, the validity of an incorporation by reference "that conforms with section 18.1" that was made before section 18.1 comes into force is "confirmed."

The intent of this section appears to be to avoid disputes about the validity of certain earlier incorporations by reference. The section says only that the validity of those earlier incorporations by reference is "confirmed"; it does not purport to retroactively validate them.

2.2 CLAUSES 3 AND 4: "*AUTORITÉ RÉGLEMENTAIRE*"

Clauses 3 and 4 of the bill amend the French versions of the Act and the Regulations, to replace various instances of the phrase "*autorité réglementante*" with the phrase "*autorité réglementaire*." This appears to be a terminological matter that does not change the substance of the law.

NOTES

1. Senate, Standing Committee on Legal and Constitutional Affairs, *Evidence*, 1st Session, 41st Parliament, 5 December 2012.
2. *Statutory Instruments Act*, R.S.C. 1985, c. S-22. Section 2 defines terms including "regulation" and "statutory instrument."
3. Department of Justice Canada, *Federal Regulations Manual*, 1998, p. 3.
4. *Statutory Instruments Regulations*, C.R.C., c. 1509.
5. Certain regulations are exempt from the regular requirements of examination, registration, and/or publication. See, in particular, *Statutory Instruments Act*, paras. 20(*a*), 20(*b*) and 20(*c*), and *Statutory Instruments Regulations*, ss. 3, 7 and 15.
6. Registered regulations can be found at Privy Council Office, *Orders in Council Database*.
7. *Interpretation Act*, R.S.C. 1985, c. I-21, s. 6(2). Note that under section 9 of the *Statutory Instruments Act*, some regulations may come into force prior to registration.
8. Published regulations can be found at Canada Gazette, *Part II: Official Regulations*. Note that consolidated regulations can be found at Department of Justice, *Consolidated Regulations*.
9. Privy Council Office, "Part 3 – Making Regulations," *Guide to Making Federal Acts and Regulations*, 2nd ed., 2001, p. 187.
10. For the full list of current criteria, see Standing Joint Committee on Scrutiny of Regulations, *Mandate*.
11. Privy Council Office (2001), p. 188.
12. Bill C-205: An Act to amend the Statutory Instruments Act (disallowance procedure for regulations), S.C. 2003, c. 18. For more on the procedure and history of disallowance, including when the procedure was available only under the Standing Orders of the House of Commons rather than in the Act, see "Revocation of a Statutory Instrument," in Audrey O'Brien and Marc Bosc, eds., *House of Commons Procedure and Practice*, 2nd ed., House of Commons, 2009.
13. John Mark Keyes, *Executive Legislation*, 2nd ed., LexisNexis Canada Inc., 2010, p. 447.
14. See, for example, John Mark Keyes, "Incorporation by Reference in Legislation," *Statute Law Review*, Vol. 25, No. 3, 2004, p. 181; and Jacques Desjardins and Josée Legault, "L'incorporation par renvoi dans l'exercice du pouvoir réglementaire à l'échelon fédéral," *The Canadian Bar Review*, Vol. 70, No. 2, June 1991, p. 247.
15. Keyes (2004), p. 183 (citation omitted).
16. Ibid., p. 181.

17. Keyes (2010), pp. 448–449. Keyes also notes the following four factors from case law with respect to the accessibility of incorporated material (see Keyes [2004], p. 191):

    - how clearly it is identified in the incorporating provision,
    - how difficult it is to find out where to obtain copies,
    - whether the copies are in fact available and, if there are multiple versions of the material, whether copies of the pertinent one are available,
    - whether the material is subject to copyright and whether a charge must be paid to obtain copies.

18. *Reference re Manitoba Language Rights*, [1992] 1 S.C.R. 212; Keyes (2010), pp. 465–469. For a bulleted list of advantages and disadvantages, see Keyes (2004), pp. 194–195.

19. Standing Joint Committee on Scrutiny of Regulations, *Second Report*, 2nd Session, 39th Parliament, December 2007.

20. Ibid.

21. The Joint Committee gives the example of subsection 32(5) of the *Canada Shipping Act, 2001*, S.C. 2001, c. 26, which read at the time as follows: “Material may be incorporated by reference as amended from time to time.”

22. Standing Joint Committee on Scrutiny of Regulations (2007).

23. Bill C-84: An Act to provide for the review, registration, publication and parliamentary scrutiny of regulations and other documents and to make consequential and related amendments to other Acts, 1st Session, 35th Parliament (first reading version, 26 April 1995), s. 16(5).

24. Standing Joint Committee on Scrutiny of Regulations (2007).

25. *Government Response to the Second Report of the Standing Joint Committee for the Scrutiny of Regulations*, 10 April 2008.

26. Ibid.

27. See, for example, the Joint Committee’s discussion of the *Environmental Assessment Review Panel Service Charges Order*, SOR/98-443, and the *Cost Recovery Regulations*, SOR/2012-146 (Standing Joint Committee for the Scrutiny of Regulations, *Evidence*, 1st Session, 41st Parliament, 18 October 2012). Although the Joint Committee did not consider the authority to “prescribe” a fee broad enough to incorporate a fluctuating rate determined by a third party, it was satisfied with the authority granted under section 83(*f*) of the new *Canadian Environmental Assessment Act, 2012* (S.C. 2012, c. 19, s. 52): the Governor in Council may make regulations “prescribing the way in which anything that is required or authorized by this Act to be prescribed is to be determined.”