

Standards as Elements of the Regulatory Regime

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The Standards Council of Canada (SCC) has identified over 5,000 references to standards in Canadian federal, provincial, and territorial regulations. Regulators have long recognized that standards are a valuable resource when drafting legislation. In June 2015, the Government of Canada passed the *Incorporation by Reference in Regulations Act* to provide legal certainty that incorporation by reference can be used in federal regulations. Incorporation by reference is a drafting technique whereby regulators are given the discretion to reference independent materials, such as standards, documents and indices, in legislative text.¹ The referenced material becomes a binding part of the regulation without the need for it to be reproduced, either in whole or in part.

Why Do Regulators Use Standards in Regulation?

In Canada, policy makers can include a broad range of instruments when drafting government regulations. Research conducted by the Treasury Board Secretariat shows that using a mix of instruments often improves outcomes. A package of instruments can be successfully used to benefit quality of life, national competitiveness, and environmental protection. Standards are one such instrument that can provide relevant technical information that may be too complex or onerous to repeat within the regulations themselves.²

Regulators opt to include standards and conformity assessments (often a verification that a standard has been met) in regulations because they are an efficient and effective means of meeting regulatory objectives. There are a number of reasons to use standardization as a complement to regulations:

- Standards are developed through a consensus-based process, which is designed to balance the interests of diverse stakeholders;
- Standards that are regional or international support global supply chains;
- Standards are cost-effective, reliable, and relatively easy to review and update;
- Standards are written in a language that corresponds to the needs of industry,

and they provide the administrative convenience of reflecting the latest scientific trends in innovation and technologies;³

- Utilization of standards in regulation supports a coherent regulatory system that can foster innovation and technological advancement;
- Conformity assessment procedures support regulatory enforcement and monitoring by demonstrating compliance with legislation and performance against industry benchmarks;⁴
- Conformity assessment procedures support trade and economic growth when there are mutual recognition agreements in place that provide for international acceptance of results produced by equivalent standardization bodies around the world;⁵ and
- Accredited conformity assessment services are a publicly trusted, efficient, and in many cases less costly alternative to government-administered inspection or verification.

The process for developing standards helps to ensure their utility within government regulations. When used as a complement to regulation, standards are essential for safeguarding the health and safety of Canadian citizens. They also help to ensure market access for Canadian products by certifying compatibility, both domestically and internationally.⁶

As SCC CEO John Walter has said, “given the vast array of benefits, the referencing of standards in regulations is an essential tool for every government. A failure to reference standards in regulations will result in a failure by that government to deliver their mandate.”

How Can Regulators Use Standards in Regulation?

For regulators to fully leverage the benefits of incorporating standards in regulation, the “*how*” is critical. There are a number of different ways in which government regulators can reference voluntary standards in regulations. Based on a department’s regulatory environment and the content of

the standard referenced, regulators must choose which drafting option is best suited to achieve their regulatory objectives.

Perhaps the most straightforward method is simply to refer to the standard directly within the regulatory text. A direct reference provides certainty that the standard is mandatory and legally binding. However, if a regulator anticipates that the referenced standard will need to be revised on a schedule that is distinct from regular updates to the regulation, they may opt for an *indirect reference*. Indirect references occur when a specific standard is referenced in an official information source that is external to the regulatory text (list, manual etc.). The external source may be published by the regulator or an external body; however, the reference to the external source is controlled by the regulator.⁷ Using indirect references is easier for regulators because they only need to modify or update the reference to a standard in an external source, rather than undertake a full regulatory update.

Whether regulators reference a standard directly in a regulation or indirectly in an external document, in each case they must decide on the form the reference should take. Specifically, references to standards can be static, semi-ambulatory, or ambulatory. A *static* (or dated/fixed) reference specifies the date the standard was issued. This provides absolute certainty about which version of a standard is referenced and must be complied with to meet the requirements of a regulation. The downside of static references is that they do not take into account amendments to standards. If a regulator wants to ensure that changes to a specific standard are incorporated in the regulation they can use a *semi-ambulatory* reference. Semi-ambulatory references include the issue date and a statement such as “as amended from time to time.”⁸

Semi-ambulatory references are useful to account for changes to an existing version of a standard; however, they will not address new versions of a standard. If regulators want to ensure that they are always referencing the latest version of a standard, they can use an *ambulatory* reference (also known

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as a dynamic, open, rolling, or undated reference). Ambulatory references identify the standard without mentioning the issue date; rather, the reference should include the phrase the “latest edition of” to clearly indicate that the latest edition of the standard is being referenced. This type of drafting method is considered to be more flexible as standard amendments, subsequent editions, or any other type of a modification is incorporated into a regulation. Sectors experiencing rapid and evolving technological development tend to necessitate equally rapid standards development. In these instances, static and semi-ambulatory references would become quickly outdated. As a result, ambulatory referencing in these particular scenarios are suggested to be more effective for regulators.⁹

Static, semi-ambulatory, and ambulatory references each have merits and disadvantages. Regulators need to consider the reference in the context of the legislation and determine which method best serves the needs of the regulation and the public. Regardless of the drafting method used, regulators also need to be particular in what they reference. In Canada, the *Cabinet Directive on Regulatory Management* (CDRM) provides oversight and direction on the regulatory reform process for all federal departments and agencies.¹⁰ With respect to the use of standards in regulations, the CDRM specifies some of Canada’s obligations under the World Trade Organization Technical Barriers to Trade Agreement. This includes the requirement for regulators to use international standards, guidelines, and recommendations as a basis for technical regulations and conformity assessment procedures, where such international standards meet the intended regulatory objective.¹¹

The requirement to use international standards is intended to support international trade. Canada is a trade-dependent nation. In 2015, sixty-five percent of Canada’s Gross Domestic Product (GDP) was attributed to international trade.¹² In addition, standards have been estimated to impact eighty percent of global trade.¹³ Consequently, by ensuring that Canadian regulations effectively reference current and aligned standards, regulators can increase the potential for Canadian businesses to access and be competitive in global markets.

What Challenges Exist When Using Standards in Regulation?

Despite the many reasons for considering standards as a complement to regulations, barriers still exist that have prevented their wider use. Less than ten percent of Canadian regulations incorporate standards by reference.¹⁴ SCC has been monitoring the use of standards in federal and some provincial/territorial regulations since 2010. Through this initiative, SCC collaborates with Canadian federal, provincial and territorial governments to raise awareness about the value of standardization as a complement to regulations and to assist in identifying standardization solutions. SCC has also worked to enhance communication between standards development organizations and regulators to facilitate the efficient and effective use of standards in regulation. By monitoring and examining standards incorporated by reference in regulation, SCC has identified common policy and legal challenges that are not addressed by the *Incorporation by Reference Act*.

With respect to the specific standards referenced in regulations, two challenges exist: the currency of the standard and the referencing approach. Standards continually evolve based on a maintenance cycle that is not harmonized with the life cycle of regulations. Regulators can find it challenging to ensure they are always referencing the latest edition of a standard. Standards that are maintained and remain technically valid facilitate trade, improve marketplace competitiveness, and contribute to protecting the health, safety, and security of Canadians.¹⁵ Ultimately, government regulators rely on national, regional, and international standards as a way to support public policy and regulatory objectives.

Secondly, referencing standards in regulation requires precision. Errors in the standard number, date, or title can lead to confusion around what is actually being referenced. In Canada, regulators have options for how to reference standards (for example, direct or indirect and static, semi-ambulatory, or ambulatory referencing). Clarity around the reference methodology is necessary to ensure certainty in what is being referenced. SCC, with the assistance of the Canadian Department of Justice, is in the midst of producing guidelines on incorporation by reference to assist government regulators in

this process. Accurate references safeguard the ongoing relevance of standards as a viable element of the regulatory regime.

As discussed, the mechanics of referencing standards can pose a challenge. SCC, as Canada’s national standards body, has proposed strategies that can address the major challenges experienced in referencing standards in regulation. There are, however, broader concerns that are, at least partially, outside of SCC’s purview. Specifically, there have been debates in Canada on the legal issues that pertain to incorporation by reference. The debate on these issues has been ongoing since the early 1990s. The discussions have evolved around two primary issues: sub-delegation of power and accessibility concerns.¹⁶ The Standing Joint Committee for the Scrutiny of Regulations and the Department of Justice have been working closely to find applicable solutions to address these two issues.

With respect to sub-delegation of power, the primary point of debate centers on who is authorized to exercise the delegated law-making power. If a regulator uses an ambulatory reference, any updates to the standard are automatically incorporated in regulation without necessitating the regulators oversight. The question then arises, does this delegate authority to the publisher of the standard? The Department of Justice has previously argued that material developed independent of the regulation-making authority *does not* constitute a sub-delegation of power. In fact, the *Incorporation by Reference Act* indicates that regulators can reference independent materials as they exist on a particular date (a static or dated reference to a standard), or as they vary from time to time.¹⁷ Arguably, varying from time to time could be interpreted as an ambulatory reference to a standard. The debate between the Department of Justice and the Joint Committee on the sub-delegation of power has not been addressed in part due to the Supreme Court of Canada’s open-ended decisions regarding “inter-delegation” of power between provincial and federal governments.¹⁸

Accessibility is another area of concern. When materials are incorporated into regulation, the actual text needs to be located elsewhere. In all cases where independent material is incorporated by reference, the policy of the Government of Canada is to highlight the importance of ensuring that

these documents are accessible in accordance with the *Incorporation by Reference Act*.¹⁹ The *Act* specifies that users cannot be held accountable or liable for failure to comply with a reference to an independent material that is deemed inaccessible.²⁰ Similar to the issue of sub-delegation of power, what constitutes accessible (in terms of cost, location of documents, and other factors) remains an ongoing topic of discussion and debate between the Department of Justice and the Joint Committee, as well as between political parties in the House of Commons.

Some SCC-accredited SDOs have taken the initiative to ensure that standards that are referenced in regulations are accessible to the public. For example, CSA—in collaboration with Canadian federal, provincial and territorial governments—has launched a *View Access* initiative to increase the accessibility of CSA standards incorporated by reference in government regulations pertaining to occupational health and safety, energy efficiency, and the transportation of dangerous goods. This online platform allows registered users to view the full content of standards in English and French through CSA's website.²¹ This initiative will help businesses, consumers, regulators, and other affected stakeholders to become informed of the obligations and requirements that fall under the law. These are important initiatives; however, at present there is no comprehensive strategy to ensure the accessibility of standards referenced in Canadian federal, provincial, and territorial regulations.

Final Thoughts

There are a number of reasons why standardization is used in Canada to pursue regulatory and public policy objectives. Ultimately, the real value of using existing standardization solutions as a complement to regulation is that it allows governments to leverage prevailing resources, knowledge, and the expertise of Canada's extensive standardization network without incurring any additional costs. When referenced appropriately, standards and conformity assessment provide regulators with an option to reduce administrative burden, improve government services, enhance coordination

and cooperation among federal departments, respond to regulatory compliance, and address the needs of Canadian businesses.

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