HOUSE OF COMMONS
CHAMBRE DES COMMUNES
CANADA

Standing Committee on Justice and Human Rights

JUST • NUMBER 058 • 2nd SESSION • 41st PARLIAMENT

EVIDENCE

Tuesday, December 9, 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)): I call this meeting to order.

Pursuant to the order of reference of Friday, October 24, 2014, we're dealing with Bill S-2, an act to amend the Statutory Instruments Act and to make consequential amendments to the statutory instruments regulations.

We are joined for the first hour by three witnesses. We have Ms. Proud from Consumer Health Products Canada. From the Standards Council of Canada, we have Mr. Walter and Mr. Girard. From the Canadian Council of Criminal Defence Lawyers we have Ian McCuaig.

Thank you for joining us. You'll each have approximately 10 minutes to give us your view on this piece of legislation. Then we'll do a round of questions.

Based on the order presented in front of us, we'll start with Ms. Proud from Consumer Health Products Canada.

Mrs. Karen Proud (President, Consumer Health Products Canada): Thank you very much.

Good afternoon, Mr. Chair and ladies and gentlemen of the committee.

My name is Karen Proud and I am the president of Consumer Health Products Canada. For those of you who don't know us, we're the trade association that represents the companies that make evidence-based over-the-counter medications and natural health products. These are products you find in medicine cabinets in every Canadian home. From sunscreens and vitamins to pain relievers and allergy medications, people use consumer health products to maintain their health and manage their minor ailments. This is a fundamental part of self-care that is vital to the health of Canadians and to the sustainability of our health care system.

I'm very pleased to be here today to speak in support of Bill S-2 and want to thank the committee for the opportunity.

In our opinion this bill is important in two ways. It provides express authority for departmental regulatory authorities to utilize an important tool in the drafting toolbox where currently there exists ambiguity. More importantly, it creates efficiencies and flexibilities within the regulatory process that are necessary to keep pace with the rapid rate of change in the regulatory environment.

The bill also contains a number of safeguards that have been put in place to ensure that the use of these new authorities is in line with current regulatory practices. While we certainly support safeguards related to ensuring accessibility and maintaining official languages, we would call into question the limitations that this bill imposes on regulatory authorities when it comes to referencing documents they produce internally.

As it stands today, this bill would not allow departments to use dynamic references for documents they produce themselves or produce with a person or body in the federal public administration. We think this is a bit short-sighted. Our members' products are currently regulated under the Food and Drugs Act. The act, which was amended in 2012 through the budget implementation bill, Bill C-38 and again this past fall with Bill C-17, gives the Minister of Health the authority to incorporate by reference any document, regardless of its source, either as it exists on a particular date or as amended from time to time. The Safe Food for Canadians Act, which passed in November 2012, has similar broad authorities for incorporation by reference.

It may surprise the committee to hear that we fully support providing regulatory authorities with these broad authorities under the proper circumstances. Under the Food and Drugs Act, our members rely on the fact that the department can incorporate by reference documents that it produces, which change over time. For example, the “Compendium of Monographs” is a document produced by Health Canada and incorporated by reference into the natural health products regulations. It allows new product applicants to reference the data contained in the monographs to support the safety and efficacy of their products rather than providing evidence for ingredients that are already known to be safe and efficacious when used under the conditions specified in the monographs. This significantly reduces the regulatory burden for industry and helps speed the evaluation of applications without compromising safety and efficacy requirements.

One of the biggest challenges with regulation is to maintain flexibility within the system to adapt to changing environments, so why tie the hands of regulators? Why not, instead, ensure that they have the tools they need and create a system of checks and balances to ensure that these tools are used responsibly? We recommend removing the limitations that are contained in Bill S-2 but ensuring that there is proper oversight so that these authorities, both in this bill and as they exist in other legislation, are used consistently and in the spirit in which they were intended by Parliament.

Specifically, we ask that the Treasury Board Secretariat be tasked to immediately develop guidance in the form of a cabinet directive that must be followed by departments when exercising the authority to incorporate by reference. We would also suggest that the Standing Joint Committee on Scrutiny of Regulations broaden its mandate to look not only at regulatory instruments but at the departments' adherence to Treasury Board guidance. With these two things in place, we feel departments will have access to an important regulatory tool with the proper oversight.

While I understand that the clause-by-clause review of this bill will take place immediately following this round of testimony, I do hope that you will consider our proposals. I look forward to any questions you may have.

Thank you.

● (1535)

The Chair: Thank you, Ms. Proud.

Our next presenter is from the Standards Council of Canada.

Mr. Walter, the floor is yours.

Mr. John Walter (Chief Executive Officer, Standards Council of Canada): Thank you very much, Mr. Chair and members of the committee. I appreciate an opportunity to bring the viewpoint of the Standards Council of Canada and provide our comments in support of Bill S-2.

I'm going to give you a little background on myself personally, because I've been involved in the standards field for close to 25 years. I was appointed as the CEO of the Standards Council of Canada five years ago. Prior to that I was the vice-president for standards development of the Canadian Standards Association, and I was responsible for the development and maintenance of probably 3,000 codes and standards.

Prior to that I worked for the Government of Ontario for 30 years. The last 10 years, I worked as an assistant deputy minister of a technical standards division in the government and I was also the president and CEO of the Technical Standards & Safety Authority. For that last 10 years I was responsible for referencing many national, regional, and international standards into Ontario regulations.

Incorporation by reference has great significance to the entire network of organizations and individuals involved in standardization. I talk about standardization in both senses of the term. Standardization includes the development of standards, but also the testing of products by accredited certification bodies.

Technical standards are among the external documents most often cited by Canadian regulators. SCC monitors the use of standards in regulations by federal departments and agencies. In May of this year, our inventory included 1,118 standards that are referenced in federal regulations. There are a number of departments and agencies that make the greatest use of standards in those regulations: health, transport, environment, natural resources, the Canadian Food Inspection Agency, industry, and Employment and Social Development Canada.

Generally standards are referenced because they provide specifications and guidance to protect the health and safety of Canadians or to safeguard the environment. Examples of standards incorporated by reference in federal regulations include such things as laminated safety glass used in glass enclosures and balconies—you'll be aware of some court cases regarding the use of laminated safety glass—leak detection in fuel tanks, storage and transportation of explosives and dangerous goods, or the certification of organic foods.

In addition to those federal departments, there are thousands of referenced standards in provincial regulations. When you add in the standards referenced in Canada's model codes—and those model codes are the building, fire, and energy codes—you begin to comprehend the magnitude and consequences of the issues being addressed by this bill today.

There are now eight standards development organizations accredited by the Standards Council to develop standards in Canada. To maintain that accreditation, they must develop standards through a formal, rigorous process that is based on internationally accepted guidelines, including the World Trade Organization's code of good practice. That's a process that promotes open, transparent, and inclusive standards development. This is important to understand as you consider the ramifications in this bill.

The first step of the process is to create and maintain standards development committees that consist of a balanced matrix of representatives from affected stakeholder groups. That means that those people represent a combination of interests, expertise, perhaps even countries or regions. The valuable point at this stage, as you understand, is that no single group can dominate the agenda nor decide the outcome of the standard. Content is developed by the group through consensus.

Once consensus is achieved, the draft document is posted for public review and comment. Every comment must be examined and resolved by the technical committee; therefore, the outcome is much more accepted than if the rule were drafted by one group alone.

In addition, the developer of these standards is required to assess the need for revisions to the documents at least once within a five-year period. Many standards are in almost constant review and revision.

● (1540)

Federal regulators are among the experts participating in standards development committees. They're an integral part of the balanced matrix of interest that I mentioned. To give you a sense of scale, there are probably close to 365 federal government employees who actively participate in the development of just international standards. Those international standards are at ISO, the International Organization for Standardization; IEC, the International Electrotechnical Commission; or ITU, the International Telecommunications Union. That's just at the international level. Many hundreds more also participate in specific Canadian standards development activities for hundreds of standards that find their way into regulations.

Standards developed by either Canadian or international organizations can be submitted to SCC for approval as national standards of Canada. National standards of Canada provide regulators with clear confirmation, a stamp of approval you might add, that Canadian conditions and requirements have been appropriately considered. For a standard to become a national standard of Canada, public consultation with Canadians is required. NSCs must be made available in both official languages.

Although it is clear that many standards are incorporated by reference in federal regulations, our concern is that we've noted many challenges and inconsistencies in the methods by which incorporation by reference is currently being employed. Both the static and ambulatory methods of incorporation are currently being used. Both have merits in their own right. Unfortunately, we believe that the rationale and approach to a selection of a method of incorporation are not always understood or consistently applied by departments.

Each method has certain particularities which should be evaluated in the context of the rationale for citing that reference. For example, an important consideration would simply be, did the regulator participate in the technical committee of the standard in question?

For these reasons, and I'd like to support the earlier speaker, we believe that a government-wide policy or guideline, probably by Treasury Board, that provides guidance to regulators on the appropriate considerations is needed. We have witnessed first-hand the many benefits to Canadian regulators of using the drafting technique of incorporation by reference. For example, they leverage existing credible infrastructure without incurring additional costs, resources, or time.

But for the system to work, we believe that the references to standard and federal regulations need to be up to date and that standards used by regulators across jurisdictions need to be aligned when possible. This isn't just an issue for the Government of Canada. It's an issue for the 13 provincial and territorial governments.

Aligning regulatory requirements to regional or international standards is a way for regulators to establish compliance requirements without introducing additional red tape. That's because Canadian industry certifies many products to regional or international standards in order to access global markets.

In addition, referencing the latest available version of a standard in a regulation can contribute to higher levels of protections for Canadians. That's because new standards as a rule set the bar higher in terms of safety and performance.

In conclusion, it is evident to us that standardization represents a necessary and valuable complement to Canada's regulatory framework. Standards must be updated on a regular basis to reflect rapid changes in technologies, markets, and safety requirements. Therefore, it makes sense to equally modernize Canada's legislative framework to ensure that references to standards in federal regulations are accurate and reflect the latest available edition.

That's why we support this bill.

Thank you.

● (1545)

The Chair: Thank you for that presentation from the Standards Council of Canada.

Our next presenter is from the Canadian Council of Criminal Defence Lawyers.

The floor is yours, sir.

Mr. Ian McCuaig (Lawyer, Canadian Council of Criminal Defence Lawyers): Thank you.

Good afternoon, Chair, and members of the committee.

I am here today as a representative of the Canadian Council of Criminal Defence Lawyers.

The council was formed in November 1992 to offer a national voice and perspective on criminal justice issues. Since the organization's inception, the council has intervened in important cases before the courts of this country, has been invited by the federal government to consult on major pieces of criminal legislation, and has been often asked by the media to comment on current issues.

Our representatives have appeared before the Senate Standing Committee on Legal and Constitutional Affairs, the House of Commons Standing Committee on Justice and Human Rights, and the Standing Committee on Public Safety and Emergency Preparedness.

The current board has representatives from all ten provinces and three territories.

On behalf of the council, I would echo support at least for the spirit of Bill S-2, but I am going to go on and explain a possible concern from a criminal justice point of view.

I consulted a little bit with some of the more accomplished criminal justice lawyers before I came to make this appearance and I can tell you, not very many criminal justice lawyers spend a lot of time thinking about incorporation by reference. However, that doesn't mean that it's not an important and actually really interesting issue from a criminal justice perspective.

Looking at the existing act, if you read the preamble it says:

> An Act to provide for the examination, publication and scrutiny of regulations and other statutory instruments

From a criminal justice point of view, that's an important function that this act has, because if you're going to hold people accountable, they have a right to know the law. One of the functions of the Statutory Instruments Act is that it lets people know the law. It gives scrutiny to regulations and it stipulates that they be published in certain ways.

Furthermore, it goes on in section 17 of the existing act to specify the rights of access. It specifies that people have a right to both inspect and obtain copies of regulations.

There is also noted in the act exceptions to the process for making regulations, in section 20, which explains exceptions for publication and different mechanisms for oversight. But even the exceptions provided for by section 20 have oversight because those exceptions have to be defined in the regulations to the Statutory Instruments Act.

What we have is an act that provides for some oversight of the development of regulations. It provides that people will be aware of those regulations once they're developed. The thing is that a lot of the regulatory offences that are defined are defined by regulations, either fully or at least partly.

When you look at the amendments, a combination of a few of them together creates an interesting effect, especially in proposed section 18.1 of the bill, which allows for an ambulatory incorporation by reference.

Proposed sections 18.3 and 18.4 ensure that these documents will be accessible, but it allows that they not be published in the *Canada Gazette*, which is the normal way that regulations are publicized.

Proposed section 18.6 actually creates an interesting exception. It limits the liability for offences related to incorporated materials if those materials are not accessible. A lot comes down to this word "accessible", but it doesn't seem to be really adequately defined; in fact, it doesn't seem to be defined at all. So we actually now have a built-in excuse where ignorance of the law is an excuse, but we don't really have a standard for what constitutes whether a person was made aware of the regulation or the incorporated document. This obviously could wind up in front of a court with an argument over what constitutes "accessible".

● (1550)

Also raised in the legislative summary and some of the debate that's occurred on this already is the notion that there doesn't seem to be a requirement for incorporated documents to be available in French as well as in English. Normally, regulations must be published in both languages. For incorporated materials it doesn't seem that requirement exists.

The other thing is, in a normal regulation-making process, for the translations, obviously, there's quality control, so that we can be sure the French and the English versions are consistent. In a document that does exist that's incorporated by reference and that's available by a third party, there is really no oversight that the French or English or possibly other language versions will have the kind of consistency that a regulation has.

Current practice includes incorporation by reference of documents that are actually published by organizations outside Canada. I've brought along an example for you. The ozone-depleting substances regulations, published pursuant to the Canadian Environmental Protection Act, incorporate the following definition:

> "Protocol" means The Montreal Protocol on Substances that Deplete the Ozone Layer, published by the United Nations Environment Programme....

The regulations go on in part 1, controlled substances:

> This Part applies to (a) a controlled substance within the meaning of the definition in paragraph 4 of Article 1 of the Protocol, as clarified by Decision I/12A, as amended from time to time;

It's incorporated on an ambulatory basis.

Section 4 of the regulations says:

> No person shall import or export a controlled substance from or to a State that is not a Party.

If you go back to the Canadian Environmental Protection Act, section 272(1) creates an offence. That offence has consequences that start in the tens of thousands of dollars and goes up to the millions of dollars and can result in years, in some cases three years, in prison.

What we have is a regulatory offence created through regulation, which incorporates a document that is published by an organization that exists outside of Canada completely beyond the oversight of the Canadian government.

Obviously, in the case of something like the Montreal Protocol, there are some clear advantages to that. This is a well-known organization, the UN, and this is an example of international treaties that have been successful. This is the hallmark of international treaties and there's really little reason to doubt the quality of the work these people do.

But we live in a world where we are negotiating more and more international agreements on more and more subjects. We're negotiating agreements on trade, the environment, and all kinds of things. To give you an example, if you follow in the press the development of the Trans-Pacific Partnership—and there's not really a lot of, I think, reliable information about it—there's a suggestion that it might be required, if we were to sign onto it and other countries sign onto it, to implement sanctions against the breaking of digital locks.

We might have a situation where we create an offence relative to a negotiated trade agreement and that offence again is related to a document that is beyond the control of the Canadian government. As you can see with the Montreal Protocol, it's implemented on an ambulatory basis, and I think that's a reason to just pause for a minute and take some concern. The legal principles that you might run up against in a case like that are the rule of law, which suggests that we should establish a normative order of clear principles for people to follow.

Section 7 of the charter suggests that ambiguity in the law is a problem, and from an administrative law perspective you could run up against the principles of procedural fairness with a situation like that.

Those are my remarks.

Thank you.

● (1555)

The Chair: Thank you for those comments.

We'll now go to the round of questioning.

We're going to start with the New Democratic Party.

Madam Péclet, the floor is yours.

[*Translation*]

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

I want to thank the witnesses for coming to enlighten us on all this.

My first question is for you, Mr. Walter. According to the simultaneous interpretation, you said that standards developed by Canadian or international organizations can be submitted to SCC for approval.

Is that an obligation or simply an option? Are all incorporations of international standards into regulations submitted to SCC, or is that done only on a voluntary basis?

[*English*]

Mr. John Walter: Thank you, that's a good question.

No, it's a decision of the organization developing the standard as to whether they would go through our process and be designated a national standard of Canada.

[*Translation*]

Ms. Ève Péclet: As I said, this is an example. If a legislative authority decided to adopt a piece of legislation, as in the example Mr. McCuaig gave, and incorporated legislation, should the international organization or the Canadian government come to you? Which authority should ask you for accreditation?

[*English*]

Mr. John Walter: Let me back up a little bit. It will always be the authority of the government department or the government that wants to use the standard. We have found that there are hundreds of standards adopted into federal regulation now from organizations all over the world. More and more, Canada is moving to international standards, so on the specific Canadian standards, the numbers are decreasing fairly rapidly because it doesn't help Canada's competitiveness to develop standards only for this country.

We accredited an additional four standards development organizations over the last three years in Canada. They are encouraged to have their standards go through the process to become national standards of Canada. But let's be clear; internationally, ISO, the International Organization for Standardization, standards are recognized around the world. They are accredited to a specific code of good practice. They are meant to be used around the world, but it will always be the authority of the department as to how those standards are used, whether they're used with or without revision. So the government never loses control regardless of how they're referenced in regulation.

● (1600)

[*Translation*]

Ms. Ève Péclet: According to the report of the Standing Joint Committee for the Scrutiny of Regulations, the ambulatory incorporation by reference of international documents could result in certain regulations not being scrutinized by Parliament.

If international criteria were adopted, would there be a follow-up? For instance, if legislation from another Parliament was incorporated and was then subject to several amendments owing to changes of government, laws or criteria, would a follow-up be conducted? If that was incorporated in an ambulatory manner, all the amendments would also be incorporated.

Does the accreditation you provide apply to a specific standard at a given time or does it also include all the amendments made afterwards to those standards or legislation?

[*English*]

Mr. John Walter: You're absolutely right in that there are concerns whether it's an international standard...whatever document, any document that you've referred to. That's why we believe very strongly that there needs to be Treasury Board guidelines set up so that there are certain processes. All of this is happening already. Those standards are already being adopted one way or the other across the government. Our position is let's modernize the system but let's make sure the rules are in place so that if it is ambulatory.... And the questions you raised are absolutely correct. What is the process to ensure that we don't adopt an international standard that doesn't fit for Canada? There needs to be a process whereby the department that's going to adopt the standard perhaps has been involved internationally. That's possible; that's always through us. There are ways to ensure that the standard is referenced in regulations to Canada's advantage.

Ms. Ève Péclet: Thank you very much.

[*Translation*]

My last question is for you, Mr. McCuaig, as your presentation really focused on the definition of the term “accessible”.

An accessibility criterion is being imposed on all legislative and departmental authorities, but no definition is provided. That is somewhat problematic.

If a department or a regulatory authority had the obligation to publish regulations incorporated by reference—ambulatory or not—would the fact that fees are charged hurt that accessibility criterion? Let's say you were pleading a case before a court. Would that negatively affect this accessibility criterion?

[*English*]

The Chair: You have about 30 seconds to answer that question.

Mr. Ian McCuaig: The current act certainly already provides that the government can charge for access to scrutinize or for printed copies of regulations. The only question is that these documents that are incorporated by reference seem to be excused entirely. They have to be accessible, but we don't know what that means.

The Chair: Mr. Calkins from the Conservative Party, the floors is yours.

Mr. Blaine Calkins (Wetaskiwin, CPC): It might have been a translation issue, but I thought I heard Ms. Péclet, in her question to you, Mr. Walter, say that this bill would allow legislative changes to occur by incorporation by reference, and I would like some clarification. It is my understanding this legislation is the purview of Parliament, and the incorporation by reference would only be effective when it comes to regulations. I'm just wondering if I'm missing something here or if that was lost in translation somewhere.

Is there anybody here that can clarify that?

Mr. John Walter: I'm not an expert.

Mr. Michel Girard (Vice President, Strategy, Standards Council of Canada): Well, in terms of standards, yes, I've yet to see standards incorporated in the legislation. Standards are incorporated by referencing regulations.

● (1605)

Mr. Blaine Calkins: I appreciate that. I want to make sure that we actually understand what we're talking about at the table because this is actually something that's outside the purview normally of this particular committee.

Just for edification, to see if I have this right, without incorporation by reference, if Canada had ever wanted to change its regulatory environment to match something that an international governing body or council or standardization agency might have had, we would have basically taken a copy-and-paste approach into the regulatory approach, put it into part I of the *Gazette*, gone through the time period, and then put it into part II. That was how we would have changed the regulations, right?

Incorporation by reference is like the Internet. It creates a hyperlink from the regulatory body that's allowed through the legislation, as Mrs. Proud was talking about, with some of the legislation, and it hyperlinks right to a document that somebody else might be in charge of, which I think you, Mr. Walter, rightly pointed out, usually involves a very credible oversight. Usually Canadians are involved in all of these kinds of things, which improves the efficiency and efficacy of the regulatory process, yet it still goes through the gazetting process. Do I understand that correctly?

Mrs. Proud, is that how that would still work?

Mrs. Karen Proud: Sorry, it would not go through the gazetting process if the document changed, but originally when you're incorporating something by reference into regulation, that original incorporation—

Mr. Blaine Calkins: That original document would.

Mrs. Karen Proud: —goes through the regulatory process as we see it today. The thing that changes is if you have a dynamic reference. Changes to that document do not.

Mr. Blaine Calkins: This is why, when we click on a hyperlink some months after we've last gone to a website, sometimes the page that we thought was going to be there isn't there, and it's changed and it's been updated appropriately.

Do I have this correct? Is that how that works?

Mr. Ian McCuaig: It doesn't necessarily go through the gazetting process in the first case either. In fact, the proposed amendments specifically excuse documents that are incorporated by reference from being published in the *Gazette*. So the reference—

Mr. Blaine Calkins: Could you give me an example, Mr. McCuaig? I know you brought that up as part of proposed section 18.4 and it was part of your concern in your testimony. I'd be curious to find out how that would happen.

Mr. Ian McCuaig: The reference to the document would go through the gazetting process. The document itself wouldn't necessarily be published in the *Gazette*. We would know that it was being referred to, but the document itself is—

Mr. Blaine Calkins: The hyperlink would be posted in the *Gazette*, and it would be up to Canadians to follow the hyperlink to wherever it's posted in order to get the information. Is that correct?

Mr. Ian McCuaig: Precisely.

Mr. Blaine Calkins: Okay, but it's still posted. It still goes through some form or semblance of a gazetting process.

Is there any concern from any of you on the panel right now as far as this hyperlinking is concerned? I'll call it “hyperlinking” and we'll call it “incorporation by reference”. They're static and dynamic—or ambulatory, I guess, is what we're calling it. So an ambulatory one would mean that as soon as somebody else updates their web page, or their reference, or their codex, or their compendium, or their annex, or their schedule, then it automatically becomes the law of Canada in a dynamic or ambulatory.... But in the static one, what would set that process apart in our legislative changes that we're going through here right now insofar as the gazetting process and the oversight process are concerned?

Mr. John Walter: If it was a static process to reference a standard, it would reference a particular standard that had been produced and it would say, “That is the standard for Canada: this date, this version”. It could be updated and nobody would have changed it.

Mr. Blaine Calkins: It would be updated by whatever the governing body might perhaps be, but the standard that Canada has adopted is still linking to that one page that's cached in memory, so to speak, when we accepted that through the gazetting process.

Do I understand that correctly?

Mr. John Walter: Yes.

Mr. Blaine Calkins: Mr. Walter, as a member of Parliament who passes legislation, my purview is legislation. The government's purview, through its orders in council, is the regulatory environment. It goes through cabinet, committees, things that we would never see. We might hear about, debate, or discuss those things, and put pressure on the government to change regulations from time to time.

My concern is, and you brought this up in your testimony, that the federal governing body, the oversight body, is Parliament. You said, sir, in your past experience that some of the incorporation that you have done has actually involved the incorporation of provincial, municipal, or even regional types of regulations.

I'm asking you, sir, in your opinion, do you think that the devolution of that responsibility to a provincial or a regional level has enough safeguards in place to make it into the federal regulatory approval process without going through the gazetting process?

Mr. John Walter: That's a complicated question.

Let me put it to you this way. I only speak of standards. I'm not speaking about other documents that would be referenced in regulation. The standards system is really quite solid.

To address your comments directly, my concern is not the static or ambulatory referencing. I think that's happening now. We need guidelines to clarify what that is.

The challenge that would need to be addressed in those guidelines is that the department that is responsible for that regulation, for referencing any standard into that regulation, needs to stay on top of the standards development process. As the standards development process continues, and they're revising it on a regular basis, and they're coming back, it should not be a surprise to the department that's using it. If it isn't, then that's where the problem is.

Mr. Blaine Calkins: From an oversight perspective as a member of Parliament, what kind of assurances can you give me?

Those are very valid and legitimate concerns, that we are devolving some of the authority that we may have as parliamentarians for the oversight of legislation and the regulatory process to an outside agency that would receive unknown or unreported quantifiable levels of scrutiny in so far as how they would let Parliament know.

Are you suggesting that Treasury Board should develop guidelines for reporting to Parliament or reporting to cabinet? How would you see that happening?

Mr. John Walter: To be clear, sir, it's already happening. It's not as if this is a change. It's not like an outside agency that's adopting these into regulation. It's a government department. It's within the control of the government forever.

I would still come back to the need for Treasury Board to develop guidelines so it's done consistently. It's being done across the government now inconsistently, so let's do it consistently.

I'll give you a lecture about fine bubble technology standards after this is all over. If the Japanese bring in a new standard for fine bubble technology ahead of Canada, we'd better make sure that we're on that development committee, that we understand what's coming back into this country, and we adopt it as fast as we possibly can. That's why we need to stay on top of the issues, but we need guidelines to make sure we do it properly.

● (1610)

The Chair: Mr. Casey.

Mr. Sean Casey (Charlottetown, Lib.): Ms. Proud, if I understood your opening statement, you're supportive of the legislation, but you don't think it goes far enough, in that ambulatory incorporation by reference should be more widely available.

Would that be a fair synopsis of what you said?

Mrs. Karen Proud: Yes, that's absolutely correct.

Mr. Sean Casey: If we expand the use of ambulatory incorporation by reference, where's the oversight? Where are the safeguards? Where are the protections?

I'll be quite blunt. My concern is that we've seen time and again in other contexts this government do things indirectly that they cannot do directly. I'm concerned about subdelegation.

Mrs. Karen Proud: Well, I think that's precisely the concern that's trying to be addressed through Bill S-2, and in my words, tying the hands of departments to be able to use ambulatory references. As we recommend, we don't think the proper oversight exists right now for the practice that is going on right now of incorporation by reference. We appreciate the practice that's going on right now with incorporation by reference and we want to see it continue, but we think Treasury Board should have put in place a long time ago guidance in the form of a cabinet directive to departments dictating how they are to use these authorities.

We recommend that the Standing Joint Committee on Scrutiny of Regulations be able to look at regulations in the context of how they were made and not just at the instruments themselves, in order to provide that additional oversight. Without those things in place, we too have concerns about the broad authority given to departments, but we recognize that it is authority that is very important but needs oversight.

Mr. Sean Casey: What would those Treasury Board guidelines look like? What would be the key elements?

Mrs. Karen Proud: Similar to the cabinet directive on lawmaking that the Treasury Board has put out, it would dictate to departments the sorts of consultation that need to take place before a document could be incorporated by reference, the sorts of documents that can be incorporated by reference, the types of reviews that need to take place, things like that to make sure that departments are really carrying out the spirit of the authorities that are given to them. We think these guidelines should be developed in consultation with industry and with Canadians, so that we're all well aware of what departments should be doing.

As an example, the Canadian Food Inspection Agency just closed consultations on how they plan to use their authorities of incorporation by reference, which they were given in a broad way when the Safe Food for Canadians Act passed. Our question is why just the food inspection agency is coming up with guidelines; why are there not guidelines for all departments?

● (1615)

Mr. Sean Casey: Thank you.

Mr. McCuaig, you talked about the problem with the lack of clarity around the definition of accessibility. Given the absence of any definition in the statute, we're left to see how that term has been judicially considered. Are there some seminal cases that give us some guidance on what we might expect there?

Mr. Ian McCuaig: I did not find anything in the way of cases regarding accessibility from the perspective of criminal liability. It's really a novel kind of concept. As I mentioned, I don't think this has really been considered by a lot of criminal lawyers. I don't know that anyone has actually run up against this.

Obviously there is no standard.... Accessibility is a new concept in these amendments, so there isn't really anything in the way of precedent that exists to define it.

Mr. Sean Casey: Do you want in on that, Mr. Walter?

Mr. John Walter: Yes.

There has been a huge amount of discussion internationally on accessibility, and there are all sorts of different options. Accessibility in some countries means freely available; in other countries it means available on a website. There are two test cases, in the United States and in Israel, in which the Supreme Court of Israel has ruled that accessibility to a standard means that it is accessible on a website to be read page by page, with no ability to copy, etc.

It is probably one of the biggest issues facing international standards development, because if the standards were made free, then nobody would develop them.

There are other processes. In Canada, some of the maritime provinces have banded together to make certain standards under the ministry of labour or occupational health and safety free to people in those provinces, but the provinces pay. Accessibility is a wide open topic, but there are all sorts of ways to address it internationally.

Mr. Sean Casey: Thank you.

I wonder, Mr. Walter, whether you could respond to the example that Mr. McCuaig gave in his opening statement with respect to the possibility of someone's being liable for a regulatory offence as a result of something like the Montreal Protocol or a trade agreement, something that was promulgated outside of Canada.

Do you have any thoughts on that?

Mr. John Walter: My only thoughts would be that it could be promulgated outside of Canada as any number of standards are, but unless they're referenced into law within this country, they don't have any standing in that law. I'm not sure how anyone could be found guilty of breaching something that was in place in Europe. I'm not an expert in criminal law. I'm an expert in standards.

Mr. Sean Casey: Thank you.

You indicated that in the standards development process, federal bureaucrats are extensively involved both domestically and internationally. That for me raises an issue: where federal bureaucrats are involved in the standards-making process of a third party, ambulatory incorporation by reference is available, but where they're exclusively involved, it isn't. Do you see the—

Mr. John Walter: I'm not exactly sure what you mean by exclusively, sir.

Mr. Sean Casey: If a regulation is solely within the control of a department, then ambulatory incorporation by reference is not available, but if that same person, that same bureaucrat, that same department that is involved in putting together a regulation, sits on a standards committee, then static incorporation by reference is permitted.

Mr. John Walter: Let me try and clarify that. If a department sets up its own regulation, it does it under its own rules. It wouldn't qualify as a standard from our point of view. That's simply a regulation.

Where the federal staff, civil servants, sit on any kind of standards committee, national, regional, international, they are one of sometimes 20, sometimes 200 people who bring the technical expertise to that committee. When that standard is developed, we use the word "voluntary" because it has no effect in law until a government says it has some kind of reference in regulation.

Whether it's static or ambulatory makes no difference. Our point is that if federal regulators are involved in the standards that are important to this country and they are ready to bring them back in for referencing as soon as they are published, it brings an advantage to Canada. It also ensures that we have Canadian experts who sit on those committees and are comfortable that they are the right standards for Canada.

● (1620)

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

There are two segments left, of five minutes each. Our next questioner is Mr. Albas from the Conservative party.

You have five minutes, Mr. Albas.

Mr. Dan Albas (Okanagan—Coquihalla, CPC): It's a pleasure to be here with you today. Thank you very much to our witnesses for your participation in today's hearing.

I'd like to go through a couple of the concerns that have been raised particularly around subdelegation and accessibility.

I think, Mr. Walter, you put it best that if Canada enters into an international convention or into a free trade agreement, it comes back to Canada and it becomes Canadian law only after it's been passed by Parliament, unless Parliament has previously delegated that authority to the Governor in Council or to an individual minister.

Is that correct?

Mr. John Walter: Yes.

Mr. Dan Albas: As far as subdelegation goes, any hints that we're giving away our sovereignty—it's Parliament, or in the case that the authority is given to the Governor in Council or to a particular minister—is ultimately the basis of whether that law applies in Canada. If we say, "The new standard in this particular field is X", we're the ones who decide that and if we want to change it at any point to Y, there are processes for that. Ultimately the power of Canadian law bears down on that authorization by Parliament.

Is that correct?

Mr. John Walter: Yes, it is.

Mr. Dan Albas: Thank you very much. I appreciate hearing that.

Mr. McCuaig, is anyone on your council in administrative law, or is it criminal law mainly?

Mr. Ian McCuaig: It's criminal law mainly. There's quite an overlap. A lot of what criminal lawyers do these days ends up being administrative law and regulatory law.

Mr. Dan Albas: Sure.

Now in regard to accessibility, have you ever seen any electrical codes?

Mr. Ian McCuaig: Yes.

Mr. Dan Albas: You seem like a talented gentleman—and very smart by the way—but do you think that you could read and understand those technical codes? Is that meaningful to anyone?

Mr. Ian McCuaig: Could I?

Mr. Dan Albas: Yes.

Mr. Ian McCuaig: Well, possibly, but I studied engineering for a while.

Mr. Dan Albas: The point I'm making here is that accessibility depends not only on whether it's in a language that you understand.... By the way, all regulations, orders, and directives are in both official languages in Canada. That's the law.

Again, accessibility to a large extent also depends on your specialty. Is that not correct?

Mr. Ian McCuaig: I don't think that's really the sense that accessibility is being used here.

Mr. Dan Albas: Well, for example, I could access those standards and I could pay for those standards, as Mr. Walter said, because there's an agency that is good enough to look at those and accumulate those and say that they are the standards for Canada to keep people safe. But whether or not someone could use any of the information, I think, would be highly dependent on the individual. Is that not correct?

Mr. Ian McCuaig: Well, from a criminal liability point of view, though, what we're really interested in is whether there is a stable, predictable standard against which behaviour can be measured. In the case of an electrical code, sure there is, because you're either qualified to go out and wire a house or you're not. If you're not, you've got a problem and, if you are, you can understand the standards.

Mr. Dan Albas: I think you understand that my point is there is a great degree of what someone might consider to be accessible.

Mr. Ian McCuaig: But the problem that I was talking about in the way of accessibility is knowing when the standard has changed.

Mr. Dan Albas: Sure. For example, under proposed section 18.3 which you raised:

> The regulation-making authority shall ensure that a document, index, rate or number that is incorporated by reference is accessible.

I imagine that the Bank of Canada or Statistics Canada, or in some cases a group that is accredited by the Standards Council of Canada, for example, the Bank of Canada, will probably keep track of the index of inflation. Is that correct?

● (1625)

Mr. Ian McCuaig: Oh, yes, but that's absolutely beyond the kind of thing that I would be—

Mr. Dan Albas: Would you say that the Bank of Canada is accessible about those and—

Mr. Ian McCuaig: Oh, yes, absolutely. For any government or related institution in Canada, I don't think there are any problems with accessibility on that.

Mr. Dan Albas: Just last, in the point of proposed section 18.6, it does say specifically "that an administrative sanction". Administrative means, obviously not the Criminal Code, but it means an administrative sanction that is authorized under the regulation. So I can understand.... Let's remind ourselves that this does not exist right now, and the fact is that, if there was incorporation by reference to a particular—

Mr. Ian McCuaig: A Canadian Environmental Protection Act offence is the exact kind of administrative sanction that this is talking about—

Mr. Dan Albas: But that does not exist right now.

Mr. Ian McCuaig: No, it does exist right now. It's in the Canadian Environmental Protection Act and it's in the regulations and it's—

Mr. Dan Albas: But if you read proposed section 18.6, it specifically says it can be if under certain conditions.

Mr. Ian McCuaig: Oh, absolutely, I agree. This exception is—

The Chair: Okay, thank you very much for those questions and answers.

Our final questioner for this afternoon is Madam Boivin from the NDP.

[*Translation*]

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

I think this group of witnesses has done a good job of identifying the concerns.

What I have gathered from your respective testimony, Ms. Proud, Mr. Walter and Mr. McCuaig, is that everyone agrees on Bill S-2, An Act to amend the Statutory Instruments Act and to make consequential amendments to the Statutory Instruments Regulations.

We understand the idea of modernization and how quickly regulations, agreements and similar documents are prevailing in Canada. Of course, this process is not easy. I listened with interest to the questions of my colleague, Mr. Albas, as both of us were sitting on the Standing Joint Committee for the Scrutiny of Regulations at the same time. Other individuals around this table have perhaps also been members of that committee.

To outside observers, that committee may appear to be the most useless of all, but that is because those individuals don't understand what happens in the committee. Once on the inside, however, we understand that this committee is probably the most important one, after the Standing Committee on Justice and Human Rights. That's at least how I see things. That is where the necessary parliamentary scrutiny and control take place.

One of the issues the joint committee has always raised concerning ambulatory incorporation by reference

[*English*]

—that's "ambulatory", in English—

[*Translation*]

was accessibility. We are talking about accessibility and using the term "otherwise accessible". However, the term "accessible" is not very clear, and I'm not sure that "otherwise accessible" is any clearer. It's a matter of determining how it would be possible to apply the power granted under the Statutory Instruments Act.

How can we ensure that this verification will be done in a parliamentary context?

Correct me if I'm wrong, but I think regulations incorporated by reference can still be reviewed and analyzed. However, that is a bit elusive. That's one of the problems.

Isn't this a way to bypass the role and work of our joint standing committee, here in the House of Commons.

You also talked about the need to have

[*English*]

what you call Treasury Board guidelines on what it is. We need definition of accessibility, knowing about the changes.

This is an approval of Bill S-2, but with a big caveat that we still need this. Will it work without those guidelines or is it going to be a free-for-all in a very short time?

The Chair: Who would you like to answer that question?

Ms. Françoise Boivin: I want the answer from everybody.

The Chair: Who would like to start?

Madam Proud.

Mrs. Karen Proud: I'm happy to start off. Maybe I'll start with your second question first.

As we're all aware, this is a practice that is going on currently. Incorporation by reference is a tool that is being used by many departments. A dynamic or ambulatory reference is being used, and —I speak on behalf of my organization and my members—so far it works fine. The sky has not fallen, and we have not had major issues, and frankly, incorporation by reference has solved a lot of problems that we have had in the past.

This being a very broad and perhaps new authority for many departments, without the oversight that we're all, I think, suggesting in some shape or form, it could be problematic.

Inconsistency is one thing that drives industry crazy. Inconsistency in how governments apply things that are the same in different ways drives us crazy. Without the oversight and without the guidance from Treasury Board, we're going to run into the sort of situation sooner rather than later in which departments are picking and choosing how they do incorporation by reference.

It's very important that we have that oversight before these authorities are being used widely, especially within departments that have not had the experience using them that some of the departments we deal with have had and have so far done quite well with.

● (1630)

The Chair: Mr. Walter, a succinct answer would be great.

Mr. John Walter: I agree with what she said. Is that succinct enough?

The Chair: It's succinct.

Mr. John Walter: Let me add very quickly to it. You spoke about the ability of Parliament or of committees to oversee the use of changes to regulations. I can only tell you that the standards world is changing faster than I've ever seen in the last 20 years. To keep up with new technology, new standards are being brought forward all the time.

I can only repeat Ms. Proud's assertion that the guidelines are needed to help ensure that the right processes are followed. Incorporation by reference is absolutely 100% necessary. We just have to make sure we do it consistently.

Ms. Françoise Boivin: I do think everybody agrees on that.

My only fear is that it was already very hard to get the information at the scrutiny committee, and sometimes it was the ministry that was taking six months, nine months, a year even, to give the committee the information that they needed. I'm thinking that when you don't know where the information is, it might be complicated.

The Chair: Thank you very much for those questions.

Thank you to our witnesses.

We're going to suspend in one moment, but before we do, we have budget requests for Bill S-2 and Bill S-221.

Those budgets have been moved.

(Motions agreed to)

The Chair: Thank you very much.

We will suspend for a few minutes as we switch over to the next panel.

● (1630)

(Pause)

● (1635)

The Chair: Ladies and gentlemen, I'm going to call this meeting back to order.

We're in our second half, and we've been joined by our justice officials to talk about the clause-by-clause study.

Madame Boivin had asked me previously if she could have the floor, so I'm giving it to her.

[*Translation*]

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

You will recall that, on Thursday, almost two weeks ago, following a motion moved by Mr. Casey regarding the Supreme Court's appointment process, I proposed another motion. I gave the government the benefit of the doubt. I was twice told by the committee's government members that they might support my motion. So I did this in good faith, and I am sure everyone has done the same and invested the necessary efforts.

However, I will use the few minutes I have to plead with the Conservative members on this committee. They are Dan Albas, Blaine Calkins, David Wilks, Robert Goguen, Bob Dechert and our chair, Mike Wallace. To my knowledge, we make our own decisions. The motion I put forward reads as follows:

[*English*]

> That the Committee undertake a study on the best transparent process for the nomination of judges in all courts under federal jurisdiction, including the Supreme Court of Canada; and that the Committee reports its findings to the House.

[*Translation*]

If I may say so, I think that this is a common-sense motion. I'm not saying that because I moved it, but because I think it is non-partisan. It does not prejudge the decision the committee may make following its consideration and imposes no time pressure.

I am very aware of the government's agenda and the bills before this committee. Nevertheless, this is a relevant study in light of what we have experienced since 2011, when I became a member of this Parliament. A number of appointments have been made to the Supreme Court since then. However, there are many vacant positions in the superior courts of various provinces. The staffing of those positions is already included in the budget. I think it is time to do something about this.

In Quebec, we lived with Bastarache Commission in a specific context. We have reviewed the way appointments are made to try to be as non-partisan as possible, in order to ensure to do exactly what the Minister of Justice constantly answers when I ask him about this during House of Commons question periods. I also think that this is truly at the forefront of the accessibility to the justice system issue. The impression Canadians have of justice and the actual justice system is also something to consider. There is often nothing worse than impressions and rumours that do not reflect reality.

When people start to believe that their justice system is somewhat partisan—whether or not that is true—it may be time to stop and reconsider. Studies were carried out on this issue over 10 years ago. Attempts were made to operate in a certain way, but those attempts were interrupted in the middle of the process. All sorts of suggestions have been made, but even specialists do not agree on those issues.

I have no preconceived ideas. Of course, I have some ideas, but I am still hoping that we will someday manage to find a system that, as the minister says, will bring together the most qualified people—in other words, a system where people would not have the slightest doubt about the individual hearing their case.

As all lawyers around this table know, there is nothing more frustrating than having to tell your client, in court, that the day will be difficult because of anything having to do with the judge. We should at least be able to count on complete judicial impartiality. That would actually be good for judges, as well, since they are the primary targets of any public criticisms.

The message I would like to send through this motion is that it is time to at least commit to beginning the process. Although the Department of Justice and the Minister of Justice do not agree, and neither does the Prime Minister, as we often say, committees are masters of their responsibilities, their own procedure and their files.

At some point, we have to stand behind our comments. I think that, if we are independent, despite the Conservative majority, we have to have the courage of our convictions when we believe in something. I think this study is necessary. Some specialists are already considering this, and all sorts of seminars are being held.

It seems to me that, as our constituents' leaders and representatives, we should not be trailing behind all the constitutional experts, lawyers and commentators of the country. We should rather be at the forefront and should undertake this study. I dare hope that my colleagues will vote on the basis of their own convictions and acknowledge the common sense underlying this motion.

We may not even have the time to carry out the study, given all the files we have to consider. However, the Standing Committee on Justice and Human Rights should at least commit to undertake this study, whenever it can find the time, or to commission specialists to carry it out, so that people from all backgrounds, across the country, can submit briefs to us on this issue. I think that goes without saying.

We all know that this is the Governor in Council's prerogative. However, all party leaders have practically committed to make changes and to make the process as open and transparent as possible. However, we see that this has not really happened. That may be the best method, but a study on the topic should at least be carried out again.

This is the motion I am putting forward.

● (1640)

The Chair: Thank you, Ms. Boivin.

[*English*]

Our next speaker to this motion is Mr. Goguen.

[*Translation*]

Mr. Robert Goguen (Moncton—Riverview—Dieppe, CPC): I want to thank my colleague for her motion. This is obviously a very large-scale motion. It calls for us to review the judicial appointment process, not only in the Supreme Court, but in all courts under federal jurisdiction. Yes, we know full well that this is the prerogative of the Governor in Council.

I am wondering whether it would not make more sense to move this motion in the House on an opposition day.

This issue, which is very touchy, should be debated in that arena, in my opinion. That way, the context would be entirely democratic and less restrictive than in this committee.

[*English*]

As you've mentioned with regard to the schedule, and I mean this quite frankly, voting on this would be somewhat theoretic because we now have two government bills, three private members' bills, and a study. Certainly a study of this nature.... I mean, we're studying the nomination of all judges, not just Supreme Court judges, and that would take a vast number of witnesses and sessions. It's just something that we're never going to get through before the next election.

Quite frankly, the motion would be academic, and despite the merit of it, I don't see it happening.

The Chair: Madame Boivin.

[*Translation*]

Ms. Françoise Boivin: I would like to come back to the issue of opposition days and respond to my colleague. Opposition days are fine and good, but during some of the past opposition days, we had little time to carry out a study. And the government does decide when opposition days are to be held.

We all have our opinion on what would be the best system, and I do not think I have the monopoly on the truth. The idea underlying the motion is to carry out a study. That means we would hear from witnesses of all backgrounds. They could be former judges, university professors, constitutional experts or average Canadians with an opinion on the matter.

In Quebec, we managed to obtain the Commission of Inquiry into the Appointment Process for Judges in Quebec, or the Bastarache Commission. It didn't take 15 years, but a certain number of hearings had to be held. The commissioner, a former justice of the Supreme Court, managed to establish guidelines that have helped free the judicial appointment process in Quebec from accusations of partisanship.

To be totally honest, whether we are part of the government or not, I don't want us to be seen as peddlers of influence. I can feel some of that here. I repeat, we are all striving—since these are the words the minister is constantly using—for excellence. If we are striving for excellence, the political side of the issue fades in importance. Maybe this wouldn't take as much time as you think and would not require the testimony of 150 witnesses.

People think that this will not be heard. Our colleague Mr. Leef, a member for Yukon, sponsored a bill on fetal alcohol spectrum disorder. I do not want my bill to be set aside while I am being told that it will be studied. If that's what you are telling me, I am a bit surprised. I am taking note of the fact that my colleague Mr. Goguen, Parliamentary Secretary to the Minister of Justice, is telling us that, given everything we have to do, we will not have enough time to conduct this study, which would, therefore, be theoretical. We are being told that the study will be more complex. When it's to the Conservatives' benefit, they use this type of argument, but when it is not, they say the opposite. It's a bit hard for me to accept such arguments given the context.

When we had to study part 17—I think—of the Criminal Code, which concerned the language of the accused, trials and so on, it took some time, but we managed to get it done. I do not want to hear that kind of argument in situations where we think something is worthwhile. Tell me that this doesn't make sense, that you already have another process, or whatever, but don't tell me that we don't have the time. Let's adopt this and send a clear message. This is what we think should be done. If we manage to conclude the study before election is called, so much the better, if not, it won't be the first time a bill has died before an election campaign. It will be happily brought back later on. I could list pretty much all the private member' bills that are before the House at one stage or another and that are at their 18th version.

Mr. Chair, with all due respect, this is not a very convincing argument. We get the impression that the government probably doesn't want to review the process. Democracy is all very well, and you will vote as you like. Nevertheless, it seems to me that this heartfelt appeal is coming from many sources, but a comprehensive response is once again lacking.

I don' know whether people have read *La Presse* of November 29, like me. The newspaper said something along the following lines:

> Former justices of the Supreme Court of Canada are calling for the creation of a new process for selecting judges who will sit on the country's highest tribunal.

These are not some dummies; these are people the current government often selects as heads of commissions. Some people actually disagree with that approach, as it emphasizes the status of former Supreme Court justices. Their opinion should not be heard only when it benefits us. Those people are calling for the creation of a new process. I find it interesting that they don't all agree on this. It's just like all of us around the table; we don't all have the same idea.

● (1645)

The other day, Mr. Casey put forward a motion that called for a fully public process—with lists and so on. His colleague Mr. Cotler, a former minister of justice, calls for a different type of system. Someone else might be in favour of another approach. That is where we are. This shows what we need to do. At the very least, we should send the message that we believe that, given everything that is happening, it is time to look into this matter.

Just so the government would not feel like too much of a target, I was not talking only about the Supreme Court of Canada. I felt very generous the day I came up with this. The whole appointment process can become beneficial. In fact, the same issue comes up when it comes to appointments to superior courts, courts of appeal and other tribunals.

This is not aimed at a specific tier, but I think the same principles should apply as a result.

● (1650)

[*English*]

The Chair: *Merci, madame*.

Mr. Toone, the floor is yours.

Mr. Philip Toone (Gaspésie—Îles-de-la-Madeleine, NDP): Thank you.

[*Translation*]

I certainly agree with my fellow member, Ms. Boivin.

With all due respect to Mr. Goguen, I don't think holding an immediate debate in the House is the answer. That isn't necessarily the best place to have the debate since we wouldn't have the benefit of hearing from witnesses. We wouldn't have the opportunity to ask subject matter experts questions. There is nothing stopping an opposition motion from being proposed, but I think the right place to thoroughly study the matter is here, in committee.

[*English*]

I think the appetite is there for it. The recent developments concerning the Supreme Court, in which the process wasn't the same as it had been for Justice Wagner, I think bears some reflection; it behooves this committee to take a few moments to determine whether that was really the method that it wants to replicate.

It's a recent phenomenon. We haven't been doing this kind of review for very long. The Chrétien government was the first to bring it up. They didn't have time to strike the committee, of course, but they tried. We've now had a couple of occasions in which the Prime Minister has opened the process to a more transparent procedure than we had here. I find it unfortunate that the last time we were unable to have one.

I take good note of Madam Boivin's comment that the motion doesn't only mention the Supreme Court. I think, as she said, this is an attempt to try to broaden the interventions and also an attempt to give us an opportunity to hear from as many people as possible about where we need to go next. But I hear from people back home, from a number of people, that the process we have in place of just having the Governor in Council make the determination simply isn't sufficient.

Do we want to go all the way to the American system, in which the Senate has to ratify every decision? I don't know. I certainly have a problem with the way the Americans are doing it right now. But there was a famous judge—Cohn, I think it was—in the States, who made the interesting comment, “Don't tell me what the law is; just tell me who the judge is.” We need to be able to give some sort of solid foundation whereby people can have more faith in their justice system.

I have a problem with judges being appointed who just come out of nowhere. We have recently had the appointment to the Supreme Court of a judge whom nobody had expected. The person didn't have any experience as a judge. She certainly has had a very interesting career as a lawyer, but her point of view regarding many of the important questions today is simply not known. We're going to have to wait to see what happens.

I've made it clear that I'm actually quite pleased with the nomination, if only because the individual comes from the Gaspé. I think that's definitely a plus.

But I think it's important that we take it beyond this; that we have some very solid grounds whereby to expose what a judge's experience is and what we might expect from them come the decision-making process. The confidence people have in our judicial system depends on more transparency.

A number of witnesses have a lot to offer at this level. I don't know how much time would be required.... I take good note that this committee has a lot of responsibilities and that a number of bills have to be processed through the committee. That's certainly a responsibility that has to be taken seriously, but there's no reason that time can't be negotiated such that the various bills have all the time available to them. I'll add to that the fact that this committee has shown a willingness to meet outside of normal hours of procedure, if required. Maybe this is a case in which it might be required as well.

Regardless, the process is important. I think we need to answer to the Canadian public that the House of Commons is going to ensure that the nominations that the Governor in Council makes will be appointments that people can have great faith in right from the get-go. Right now the question is there, whether people can have confidence in those nominations. I think they will have; I think time will prove it.

● (1655)

Nothing makes that clearer than the advantage of doing things out in the open. Fresh air gives everybody a little bit more confidence in the process.

The process that we have here today, where a judge is named by Governor in Council, and only by Governor in Council, I don't think is sufficient. There are an awful lot of jurists who have made that clear. I think that we should take good heed.

We have to ensure that the Canadian public is going to have as much faith as possible in our process. I don't think the process that was recently seen in this place was adequate. I don't think that just announcing an appointment is a process that we want to replicate. I suspect that the Canadian public expects more of us.

If there's one task that I suspect the Canadian public expects of us, it is to ensure that the Supreme Court and our justice system are truly independent of the executive and the legislative branches. The only way to know that is if we hear from them before they're appointed. We need to hear from those individuals themselves. We didn't get the chance to do it recently and I think that was a grave mistake.

We need to ensure that people have confidence in the system. In Quebec we've tried that with the Bastarache commission. We also have shown great interest in ensuring that the public has faith in our judicial system, especially with recent decisions regarding people accused in criminal cases that have certainly pushed the limits of the confidence people have in our justice system. The Quebec government took the steps necessary to ensure the public's concerns are addressed.

I don't think we did the same thing here. That was a shame and we should probably take the opportunity to learn from our mistakes and improve on them. This would be a good start.

I don't think it would require all that much time. I would really like to see it done. If we go by the fixed date election cycle, we have until October. It's not like we don't have any time; we have close to a year. Even with all the bills ahead of us, there's plenty of time. I don't think we should discount that. We should take this responsibility seriously.

Madam Boivin's motion has a lot of merit. I personally would like to see it adopted.

The Chair: Madame Péclet.

[*Translation*]

Ms. Ève Péclet: Thank you, Mr. Chair.

I'd just like to add my two cents to the discussion. And, in fact, Mr. Chair, I'll keep my remarks as brief as possible.

Since the parliamentary secretary is suggesting that we proceed by way of an opposition motion, I hope he'll be able to answer my question. If the opposition were to put forward a motion to allow the Standing Committee on Justice and Human Rights to undertake a study on the process for the nomination of judges, would the government support it? I think that's a question worth asking.

Just a bit of history here, and I think the minister was quite clear on the matter. Prior to the Conservative government's election in 2006, no process for the nomination of judges existed. I think everyone agreed that we needed to do something about that. The Conservatives tried to put in place a process, which unfortunately did not work. Even the minister came here and told the committee that the process had unfortunately failed.

So I think the question that needs to be asked is this. What do we do in that case? No process used to exist, and the one that was put in place ended up not working. Does that mean we are simply going to go along with having no process in place? If so, the Conservatives would be going back on their promise to establish a more public and inclusive process. It would be a shame to go back to how things were prior to 2006 and to be deprived of any process at all. At least the government had a desire to establish a process. And, according to the minister, that process did not work. So it needs to be improved, reviewed or completely overhauled. If the government votes against our motion today, is it likely that it will change its mind in the House and that the outcome will be different? What will the government say? Will it say that the process it put in place did not work? Will it say that it tried but wasn't successful, and so it is better to have no process at all?

That would be pretty disappointing. But it would save the government a lot of headache, given the heat it took for its nomination of Judge Nadon. It was repeatedly criticized on the issue. As for the validity of the nomination process, I think it is in the best interest of every parliamentarian to try to achieve the best process possible.

Are the Conservatives telling us that, because the process they tried to put in place failed—we can all agree that it was less than perfect—we are going to go back to the days when no process existed at all, putting an end to any further democratic debate on the matter, which affects vital institutions? That would be quite disappointing, indeed. In a nutshell, I would just like the government to explain one thing. If it does not want to undertake this study, what message does that send to Canadians? Does the government not want to establish a process because it wasn't successful? Is it better to go back to how things were?

When I go back to my riding and my constituents ask me what we are going to do about the nomination of judges, am I going to have to tell them that, unfortunately, the government no longer cares to fix that problem?

That is frustrating for a young person like me, who studied law and sees the benefit of reviewing how judges are appointed and how our democratic institutions operate. It's frustrating for young people of my generation to see that the government tried to establish a process, which, by its own admission, did not work. We are in a black hole right now.

Thank you.

● (1700)

[*English*]

The Chair: Before I go to Madam Boivin, we have officials here for another half an hour. Do we think we're going to get to the...? Yes? Okay.

Madam Boivin.

Ms. Françoise Boivin: Am I the last speaker?

It's going to be very short.

[*Translation*]

My colleagues made some good points. Having participated in two of the last three nomination processes, I would just make a minor correction. The same process was followed for the nominations of both Judge Wagner and Judge Nadon. In the first case, everyone was unanimous in terms of being satisfied with the outcome of the process. In the second case, however, everyone was unanimous in their dissatisfaction with the outcome of the process. The nomination even gave rise to a Supreme Court challenge and subsequent ruling. We may have been on the right track, but somewhere along the way, something went wrong. So it would be a good idea to take another look at it.

Picking up on what my fellow member just said, I have to say it would be unfortunate if my Conservative friends were to throw in the towel after making such a collective and significant effort to come up with a better process.

What a shame it would be to throw in the towel now, given that the Conservatives widely criticized how previous governments had handled the matter over the years. I agree with my fellow member on that point. We weren't raised that way. As the saying goes,

[*English*]

“If at first you don't succeed, try, try, try again”.

[*Translation*]

I think we were almost there. As my colleague, Philip Toone, said, it wouldn't take very long and we could always negotiate some time to do it, even if we had to meet outside normal committee hours. Robert and I sat on the Ad Hoc Committee on the Appointment of Supreme Court of Canada Justices that met during the summer. I was on it for two summers. We also did an intensive study of the prostitution bill at that time. Given that we're dealing with an institution as important as the Supreme Court of Canada, not to mention all other federal courts, I would think we could find a bit of time to do this study.

Although we can't reveal what the committees discussed, we may have a good idea about how to improve the process so we don't make the same mistakes.

It may not be as complicated as the government is suggesting. As I have already mentioned, this is an issue of interest to many. Conferences have been held on the subject. Let's not let others dictate what we should put in place. Let's show some leadership here.

That is my final word on the subject.

● (1705)

[*English*]

The Chair: Thank you very much.

We'll now vote.

Ms. Françoise Boivin: A recorded vote, please.

(Motion negatived: nays 5; yeas 4)

The Chair: Thank you for that discussion. We'll go now to the clause-by-clause consideration of Bill S-2, an act to amend the Statutory Instruments Act.

We have four amendments, and they all deal with clause 2, but pursuant to Standing Order 75(1) consideration of clause 1, the short title, is postponed until the end.

(On clause 2)

The Chair: We start with amendment NDP-1.

Madame Péclet, you would like to speak to it.

[*Translation*]

Ms. Ève Péclet: The first amendment basically reiterates what the Standing Senate Committee on Legal and Constitutional Affairs did. The amendment addresses questions raised by the Standing Joint Committee on Scrutiny of Regulations.

The amendment has two parts. The first concerns section 18.1. All it does is clarify the definition of the term "document" as it applies to that section. According to the analysts, any document or federal law would also include the standards and regulations. So that is the first part.

The second part seeks to establish guidelines. We discussed that at length in our first hour. It would authorize the governor in council to establish guidelines, which are quite important. As we've discussed, we are sort of in legal limbo given the absence of any guidelines on the use of incorporation by reference.

[*English*]

The Chair: Mr. Dechert.

Mr. Bob Dechert (Mississauga—Erindale, CPC): Mr. Chair, the government does not support this amendment.

This amendment would have the effect of limiting the material that could be incorporated by reference pursuant to this proposal to only federal and provincial legislation. The amendment fails to recognize the vast array of material that is already incorporated by reference and would make the legislation far less responsive and modern, in our opinion. The amendment would mean that the standards developed as part of the national standards system of Canada could not be incorporated pursuant to this authority, nor could the standards that are developed internationally.

For example, the standards that are developed by the standards development organizations under the umbrella of the Standards Council of Canada, whom we just heard from, such as the Canadian Standards Association and the Canadian General Standards Board, or any international standards-writing organization such as the International Organization for Standardization, ISO, certain international agreements, internationally accepted rules, such as the generally accepted accounting principles and legislation of other jurisdictions, including the United States and the European Union, all of which currently exist as incorporated by reference in various regulations, would be limited and prevented by this amendment were we to adopt it.

Standards represent a significant amount of the material that is key to responsive, effective regulations, and is essential to achieving goals of regulatory alignment in cooperation and protecting the health and safety of the public. The effect of the amendment would leave much of the outstanding legal issues with respect to the scrutiny of regulations report unresolved which was a main purpose of this legislation.

For all those reasons, Mr. Chair, we will not be supporting this amendment.

● (1710)

The Chair: Madame Boivin.

[*Translation*]

Ms. Françoise Boivin: To the point made by my colleague, Mr. Dechert, I would defer to our experts from the Department of Justice.

Would the amendment proposed by my colleague, Ms. Péclet, limit enabling legislation, such as the agreement with the European Union or the legislation of another jurisdiction? Would the amendment exclude that authority from Bill S-2 and prevent regulators from being able to incorporate documents by reference in a regulation?

Ms. Jacinthe Bourdages (General Counsel and Director, Advisory Services and Legislative Revision Group, Legislative Services Branch, Department of Justice): On a case-by-base basis, a department could sponsor a specific piece of enabling legislation for that type of incorporation, but it would be excluded from the framework legislation, Bill S-2.

Ms. Françoise Boivin: Yes, it would be excluded from the overarching legislation.

Ms. Jacinthe Bourdages: Precisely.

Ms. Françoise Boivin: I just want to make sure we're clear in case there are any misunderstandings.

Bill S-2 is meant as framework legislation. Everyone it applies to has the authority to incorporate documents by reference in regulations.

My colleague's amendment seeks to limit that authority to provincial and federal legislation, but there is nothing stopping other things from being included. My colleague told us that the purpose of the bill is to allow that. And the government is still free to do that if it wishes. If the government wants to proceed through incorporation by reference in some specific cases, all it has to do is introduce legislation to that effect. As I see it, that approach would afford us better oversight.

Ms. Jacinthe Bourdages: Yes, it would be necessary to specifically establish enabling legislation on a case-by-case basis, instead of having that option automatically, as Bill S-2 seeks to provide for.

Ms. Françoise Boivin: Thank you.

[*English*]

The Chair: Mr. Dechert.

Mr. Bob Dechert: I have one further point, Mr. Chair.

The officials did provide us an example last week under the softwood lumber products export permit fees regulations, which incorporate by reference the consumer price index published by the U.S. Department of Labor and Bureau of Labor Statistics. That's an example of something that would be prevented, as I understand it, if we were to adopt this amendment.

The Chair: Madame Boivin.

Ms. Françoise Boivin: I'm not saying the reverse of what my colleague is saying. I'm saying that instead of doing it with a blanket law like Bill S-2, there's nothing to prevent the government from doing the same things but specifically through specific legislation. This is what I call the more lazy way, the more easy way.

My years in politics tells me that the easy way is not necessarily always the best way for Canadians. That's the dilemma we have. We have the scrutiny of regulations committee which says they're not against incorporation by reference, an ambulatory way. They're just saying that they think it would be more accurate and more respectful of the jurisdiction of Parliament to do it on a case-by-case basis.

We know where we need it. We know where it would be efficient. It would be clearer and fairer for Canadians to do it that way than to just cover it with a big blanket, and go and do whatever.

The Chair: Madame Péclet.

Ms. Ève Péclet: Just to answer the parliamentary secretary, actually, the example that was given by the official would fall under subsection (3) of proposed section 18.1, which says in English:

> The power to make a regulation also includes the power to incorporate by reference an index, rate or number....

It does not specify "documents". The amendment only refers to proposed section 18.1 in subsections (1) and (2), which specifically use the word "document".

The example that the parliamentary secretary gave would fall under proposed subsection (3), and not under proposed subsections 18.1(1) and (2), which is what we're trying to amend right now.

The Chair: Is there anything further on NDP-1?

(Amendment negatived [See *Minutes of Proceedings*])

● (1715)

Ms. Françoise Boivin: Could we record every...?

The Chair: Do you want a recorded vote? We certainly can.

Ms. Françoise Boivin: It's for posterity. I don't want to be reproached on anything.

The Chair: Yes.

Mr. Dan Albas: On a point of order, Mr. Chair, we had a vote. You called it out. This should apply going forward.

Ms. Françoise Boivin: That's okay, so for the next one just...

The Chair: All right. We operate in a relatively friendly way in this committee normally, but that's okay.

We have NDP-2.

Ms. Ève Péclet: Dan Albas hasn't been here for a while.

[*Translation*]

Amendment NDP-2 follows through on changes recommended by the Standing Joint Committee on Scrutiny of Regulations. In one of its notes, the committee makes the following statement regarding rules and foreign legislation: "For these reasons, it is submitted that the ambulatory incorporation by reference of foreign legislation should not generally be permitted." That does not pertain to static references, only ambulatory ones.

The committee pointed to the problems that ambulatory references can cause. I asked Mr. Walter about that. He said they limited Parliament's options, preventing parliamentarians from having any oversight over changes incorporated in a dynamic or ambulatory way into a Canadian law, because those changes are automatically part of the legislation without necessarily being subject to parliamentary oversight.

That was my rationale.

[*English*]

The Chair: Mr. Dechert.

Mr. Bob Dechert: Mr. Chair, the government does not support this amendment.

The impact of this amendment would be that a regulation-making authority could not rely on this legislation to incorporate incidental documents such as documents that provide technical precision on the regulatory rules, for example, test methods. The proposed authority in Bill S-2 already limits the incorporation of documents generated by a regulation-maker to a static or fixed incorporation by reference, which already removes any subdelegation of authority. This amendment would mean that many documents that are not amenable to regulations would have to be converted into regulatory language. The amendment would also foreclose the possibility that a regulation-maker could translate unilingual documents and then incorporate by reference a bilingual standard, for example. This would be counterproductive in our view to encouraging regulation-making authorities to go above and beyond minimum language rights obligations.

For those reasons, Mr. Chair, we'll not be supporting this amendment.

The Chair: Madame Boivin.

[*Translation*]

Ms. Françoise Boivin: That sounds a lot like the argument used against amendment NDP-1, prompting me to ask our Department of Justice experts the same question.

Nothing would prevent the regulation-making authority from having that ability, if the enabling legislation provided for it. Am I wrong?

Ms. Jacinthe Bourdages: That is correct. In the case of a specific piece of enabling legislation, if it does not appear in Bill S-2, the regulator would have to establish that missing authority by way of case-specific legislation.

Ms. Françoise Boivin: So the onus would be on the government to provide for that authority when introducing legislation. It is faster and easier, because it has to pass the legislation regardless. The legislation has to be passed before there can be any regulatory authority.

I don't see what is so complicated about adding a section that provides for incorporation by reference related to the delegation of regulatory powers. As I see it, it would take just one extra line.

Ms. Jacinthe Bourdages: Existing enabling legislation would actually have to be amended. As mentioned, incorporation by reference already exists and is widely used. In many cases, existing enabling legislation would need to be amended in order to establish the authority specifically. So it would require amendments being made to existing pieces of legislation.

Ms. Françoise Boivin: You make a good point.

I know we discussed it a little bit the last time, but it bears repeating that, to be on the safe side, section 18.7 was included because it does somewhat confirm the validity of this approach. That being said, the issue should perhaps be debated.

Some argue that it does not cause any problems; while others, on the contrary, believe it should be provided for in the enabling legislation. Either way, it's done. So we make a correction and cover everything by way of section 18.7, which reads as follows:

● (1720)

[*English*]

> 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.

[*Translation*]

So it covers previous cases.

Ms. Jacinthe Bourdages: It covers precisely those cases where the authority for incorporation by reference had not been expressly laid out but where the procedure was still being used given the government's position that it was possible to do so.

As I mentioned on Thursday, what it also does is end the legal uncertainty, in light of the impasse between the government and the Standing Joint Committee on Scrutiny of Regulations. The idea was really to introduce legal certainty around the current use of incorporation by reference.

[*English*]

The Chair: Madame Péclet.

[*Translation*]

Ms. Ève Péclet: Thank you for clarifying that.

I should emphasize a point that nearly all the witnesses agreed on. While I understand the government's position that it is not consistent with current practice, the absence of any guidelines or oversight mechanism is still problematic. In fact, the bill was introduced to clarify certain aspects of the act, but it does not provide for an oversight mechanism, and that's a problem.

Nothing is stopping Parliament from subsequently introducing guidelines and a procedure. Part of the first amendment sought to do just that. With an oversight mechanism in place, ambulatory incorporation by reference of all kinds of regulations would not be problematic at all.

But as things stand, no clear mechanism exists. The witnesses in our previous panel—and I'm not referring to the Department of Justice officials—made this point. It is simply a matter of clarifying the accessibility issue. Legislation should not include amendments that are not subject to the same oversight that all of the country's regulations are, the reason being it would simply go against the principle of transparency.

[*English*]

The Chair: Mr. Albas.

Mr. Dan Albas: Mr. Chair, I just wanted to point out to the honourable member across the way that the permanent referral of all regulations, orders, and directives goes to the scrutiny of regulations committee. Specifically that is why it raised concerns about the use of incorporation by reference in certain cases, which is the raison d'être of this bill.

I would like to reassure the member that the parliamentary committee will still continue to look at these things to make sure they are being done correctly.

The Chair: Madame Péclet.

Ms. Ève Péclet: Point noted, but this amendment was actually, literally proposed by the mixed committee on regulations. I'm just answering the questions that were raised by the committee members in their letter sent to the minister; that's all.

(Amendment negatived: nays 5; yeas 4 [See *Minutes of Proceedings*])

The Chair: We are on amendment NDP-3.

Madame Péclet.

[*Translation*]

Ms. Ève Péclet: We've talked a lot about the definition of accessibility. This amendment simply has to do with establishing certain guidelines around the accessibility of documents. The way things are now, no such guidelines exist.

The idea here is to set some guidelines for departments using incorporation by reference. The amendment reads as follows:

> "accessible, in particular by retaining a copy of it and making it available to the public."

That would broaden the definition of accessibility, and likely make things clearer for those who pointed out that the definition of what constitutes an accessible document was lacking.

To my mind, if we are going to pass legislation that imposes a requirement—in other words, accessibility—we should at least provide some guidelines defining that requirement.

● (1725)

[*English*]

The Chair: Mr. Dechert.

Mr. Bob Dechert: Mr. Chair, the government does not support this amendment. A power to issue guidelines should not be included in the bill. The government inherently has the power to issue administrative guidelines on any matter and does not need express power in legislation.

Moreover, the effect of this proposal would likely be to create a regulation-making power to issue guidance by order. This is entirely different from the creation of administrative guidance. The government encourages regulation-making authorities to be transparent in their regulatory proposals.

As to why choices to incorporate by reference certain documents are being proposed, Health Canada and the Canadian Food Inspection Agency are examples of departments that have created public documents on this topic, and it is not necessary, in our view, for a power to be granted to issue administrative non-binding guidelines.

For those reasons, we will not be supporting this amendment.

(Amendment negatived: nays, 5; yeas, 4 [See *Minutes of Proceedings*])

The Chair: On amendment NDP-4, the last amendment, we have Madame Péclet.

Ms. Françoise Boivin: I'm sure they'll change their minds.

[*Translation*]

Ms. Ève Péclet: I studied various pieces of legislation in place around the country, as well as the world, and I read the joint committee's recommendations. According to the committee, where standards emanating from independent third parties are incorporated by reference, there is no reason why the regulation-making authority should not be responsible for making the necessary arrangements to obtain permission to make that standard available to the public free of charge.

The committee is referring to the government's responsibility around ensuring accessibility. As far as regulations incorporated by reference are concerned, whether in the case of provincial, federal or international legislation, it should be free for people to consult them. And I'm not talking about getting a copy, but actually consulting them.

[*English*]

The Chair: Mr. Dechert.

Mr. Bob Dechert: Mr. Chair, the government does not support this amendment. The government encourages regulation-makers to ensure that material is accessible in many ways. In some cases, a reasonable fee for the purpose of accessing incorporated material is acceptable. This in no way precludes copies from being made available for consultation or for viewing through other innovative and flexible mechanisms that result from partnerships with standards development organizations such as the Canadian Standards Association.

Other jurisdictions still respect copyright in incorporated standards and do not require the standard to be free in order to incorporate it, for example, the United States, New Zealand, and various provinces of Canada. Regulation-making authorities will not charge a fee for consultation of incorporated documents that they have on hand.

(Amendment negatived: nays, 5; yeas, 4 [See *Minutes of Proceedings*])

The Chair: We will now move to the vote on clause 2.

Do you want to do it on division or do you want a recorded vote?

Ms. Françoise Boivin: I want a recorded vote on everything. I'd be afraid that I'd change my mind and somebody would jump in and [*Inaudible—Editor*].

The Chair: Okay. Thank you very much. That's good enough.

(Clause 2 agreed to: yeas 5; nays 4)

(Clause 3 agreed to: yeas 5; nays 4)

(Clause 4 agreed to: yeas 5; nays 4)

● (1730)

The Chair: Shall the short title carry?

(Short title agreed to: yeas 6; nays 3)

The Chair: Shall the title carry?

(Title agreed to: yeas 6; nays 3)

The Chair: Shall the bill carry?

(Bill agreed to: yeas 5; nays 4)

The Chair: Shall the chair report the bill back to the House?

Some hon. members: Agreed.

An hon. member: On division.

The Chair: Ladies and gentlemen, that takes care of Bill S-2.

I want to thank everyone for their participation today. Merry Christmas to everyone, and a big hand for the staff who look after us here. Thank you very much. In fact, I had an idea that was brought to me for the staff who help us here. I got them a turkey cookie, as was recommended, so here you go.

That's it. The meeting is adjourned.