



The Honourable / L'honorable Jody Wilson-Raybould, P.C., Q.C., M.P. / c.p., c.r., députée
Ottawa, Canada K1A 0H8

JUL 19 2017

Senator Joseph A. Day
Harold Albrecht, M.P.
Joint Chairs
Standing Joint Committee for the Scrutiny of Regulations
c/o The Senate, Ottawa, K1A 0A4

Dear Honourable Joint Chairs:

**Re: Government Response to Report No. 90 – Accessibility of Documents
Incorporated by Reference in Federal Regulations**

I am pleased to enclose the Government Response to your Committee's Report No. 90 – *Accessibility of Documents Incorporated by Reference in Federal Regulations* which has been tabled in the House of Commons.

Thank you for your sustained attention to this matter.

Respectfully,

A handwritten signature in blue ink, appearing to read 'JWR', enclosed within a large, loopy blue oval.

The Honourable Jody Wilson-Raybould

Enclosures (2)

GOVERNMENT RESPONSE TO THE SECOND REPORT OF THE STANDING JOINT COMMITTEE FOR THE SCRUTINY OF REGULATIONS

Government's Response to Report No. 90 (Accessibility of Documents Incorporated by Reference in Federal Regulations)

Introduction

On March 9, 2017, the Standing Joint Committee for the Scrutiny of Regulations (the "Joint Committee") issued its Report No. 90 relating to accessibility of documents incorporated by reference in federal regulations, which was presented to the House of Commons on March 23, 2017. In accordance with Standing Order 109 of the House of Commons, the Joint Committee requested that the Government table a comprehensive Response in the House of Commons.

The Government appreciates the Joint Committee's sustained interest in the matters of incorporation by reference in federal regulations and is pleased to present its Response to the Report of the Joint Committee in the following pages.

As was noted in the Report, the *Statutory Instruments Act* was amended in June 2015 (through the *Incorporation by Reference in Regulations Act*) to establish a general authority to incorporate by reference in regulations and to require incorporated material to be accessible.

Meaning of Accessibility

The Government agrees that the requirement in subsection 18.3(1) for the regulation-making authority to ensure that materials are accessible was a positive development. The Government does not agree, however, with the position held by the Joint Committee as to the meaning of "accessible".

By adopting the wording in section 18.3, Parliament chose to provide the regulation-making authority with the flexibility to determine how the obligation of ensuring "accessibility" would be met rather than imposing rigid requirements. Because the types of materials that are incorporated by reference are diverse, Parliament chose to enact the provision in this manner to ensure that the requirements were adaptable to the nature of the document. In many instances, the steps that the regulation-making authority would need to take to ensure that the material is accessible would be minimal. For example, provincial law is often incorporated by reference and is already readily accessible. Material that is generated by the government can be easily accessed on the internet. Other material such as standards is often accessed directly through the standards-writing organization itself.

During Parliament's consideration of the proposed amendments to the *Statutory Instruments Act*, the Government expressed its position that material is accessible if, with a reasonable amount of effort, the person who is affected can obtain a copy of the document. The Government does not agree that the requirement to ensure that material is accessible results in a requirement that all material be available for free in every instance. At the time these amendments were enacted, already over a thousand standards developed by independent standards organizations were

incorporated by reference in federal regulations. Almost always, these standards are copyrighted by standards development organizations and may involve a fee. It is the Government's position that this does not render the document inaccessible. Had Parliament intended to alter the authority of regulation-makers to continue to avail themselves of the expertise of standards development organizations where any fee is not unreasonable, Parliament would have done so clearly. Accessibility continues to be assessed on a case by case basis when any incorporation by reference is proposed. Regulation-making authorities are charged with the obligation to ensure that they take active steps where needed.

Official Languages Requirements and Incorporated Documents

The Government also does not agree that the requirement to ensure that a document is accessible requires that the material that is incorporated must be bilingual in all circumstances. As the Joint Committee has summarized, the Supreme Court of Canada found, in the *Reference re Manitoba Language Rights*, [1992] 1 S.C.R. 212, that it is constitutionally permissible, where there is a *bona fide* (or "legitimate") reason, to incorporate by reference unilingual material in a legislative instrument. This leading decision is directly applicable to the analysis of when it is appropriate to incorporate by reference unilingual material in regulations. During the passage of the amendments to the *Statutory Instruments Act*, the Government stated its position that the requirement of accessibility was not intended to alter the application of these constitutional requirements. Material is incorporated by reference in federal regulations in both official languages, unless there is a *bona fide* reason not to do so. Such reasons include inter-governmental cooperation between the federal government and all provinces (some of which enact their legislation in one official language only) as well as the other factors described in the Joint Committee's Report.

Enactment of section 18.3 was needed to clearly identify that the requirement to ensure accessibility rests with the regulation-making authority. It did not alter constitutional requirements in respect of the incorporation by reference of unilingual material. Furthermore it did not alter the authority to incorporate by reference the over 1300 standards that were already incorporated by reference in existing federal regulations at the time, many of which are unilingual, or the authority to incorporate by reference provincial legislation where it is essential for intergovernmental cooperation in Canada.

Recommendations and Next Steps

The Government agrees that accessibility of documents and respect for official languages are important factors to determining whether incorporation by reference is an effective tool for regulatory objectives. The Government is of the view that amending the *Statutory Instruments Act* is not necessary to respect constitutional requirements. The recommended amendments would be overly restrictive of incorporation by reference, which is essential to effectively achieve key government priorities such as regulatory alignment with the provinces and territories or for international cooperation on matters of trade.

Finally, given the diverse nature of materials incorporated in federal regulations and the fact that much of it is already readily available, it is not clear that in all cases a registry would actually enhance accessibility without duplication or without limiting the flexibility of the regulation-

making authorities to take advantage of innovative methods of granting access to documents. Nevertheless, the Government recognizes that policy direction to regulation-making authorities could further enhance accessibility. Justice intends to engage Government partners to explore opportunities to do so. This will include collaboration with the Treasury Board of Canada Secretariat to provide supplemental policy guidance on the use of incorporation by reference in light of that department's ongoing review of the *Cabinet Directive on Regulatory Management* and the policy suite that supports it.

Conclusion

The Government appreciates the Joint Committee's ongoing interest in incorporation by reference in regulations and the opportunity its Report provides for further considering the issues associated with this regulatory technique. Although the Government disagrees with the positions in the Joint Committee's report concerning the need to amend further the *Statutory Instruments Act*, it acknowledges that policy direction to regulation-making authorities could enhance the Government's commitment to accessibility.

The Government respectfully submits this document as its Response.