Minister of Justice
and Attorney General of Canada

Ministre de la Justice
et procureur général du Canada

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. 91 – Marginal Notes

I am pleased to enclose the Government Response to your Committee's Report No. 91 – *Marginal Notes* which has been tabled in the House of Commons.

Thank you for your sustained attention to this matter.

Respectfully,

The Honourable Jody Wilson-Raybould

Enclosure (1)

Canada

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

Government's Response to Report No. 91 (Marginal Notes)

On March 9, 2017, the Standing Joint Committee for the Scrutiny of Regulations (the "Joint Committee") issued its Report No. 91 relating to marginal notes, 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 is pleased to present its Response to the Report of the Joint Committee in the following pages.

In Report No. 91, the Joint Committee draws attention to its views on the new layout adopted for federal legislation in January of 2016 and in particular to its concern about the repositioning of marginal notes in the new layout. The Joint Committee's view is that moving the marginal notes in existing consolidated legislation from the margin of the page to the body of the legislative text turned the notes into headings. It asserts that since headings, unlike marginal notes, form part of the enactment in which they appear, this repositioning changed their status and their role in statutory interpretation. This, according to the Joint Committee, added new elements to the legislation and altered its meaning. The Government's view is that the repositioning of the marginal notes did not change their status nor did it affect their role in statutory interpretation.

Section 14 of the *Interpretation Act* states that marginal notes, along with the historical references at the end of sections or other divisions of an enactment (which also appear inside the body of the legislative text) form no part of the enactment and are inserted for convenience of reference only. Section 14 was added to the federal *Interpretation* Act in 1947 and codified the common law rule respecting marginal notes as understood at the time by both British and Canadian courts. That rule had nothing to do with the location of the notes on the page, but was based on the fact that the notes were not voted on by Parliament and therefore could not express legislative intent. In addition, because they were added as signposts to guide readers through the text, the courts were concerned that they might not be reliable as aids to interpretation.

Given the anomalous role of marginal notes in the legislative process and their limited function, the Government believes that the term "marginal notes" in section 14 of the *Interpretation Act* is properly understood to refer to notes that are added to legislation for convenience of reference only and are seen but not voted on by Parliament. When the consolidated Acts and regulations were converted to the new layout in January of 2016, notes moved from the margin to the body of the text continued to meet this description and therefore remain subject to section 14.

While section 14 codifies the common law rule that marginal notes do not form part of an enactment, it does not say they may not be relied on in statutory interpretation. It is certainly true that in 1947 courts determined legislative intent solely on the basis of wording that was considered part of the enactment. On this approach to statutory interpretation, the exclusion of marginal notes meant they were inadmissible as aids to interpretation. However, this approach has long been repudiated by the Supreme Court of Canada in favour of the so-called modern

approach. Under the modern approach, interpreters are to consider the entire context of legislation, which includes marginal notes and headings, regardless of whether technically they are labelled intrinsic or extrinsic by the applicable *Interpretation Act*.

As the Joint Committee points out in its Report, marginal notes were first relied on in interpretation by the Supreme Court of Canada some 30 years ago in *R. v. Wigglesworth*, [1987] 2 S.C.R. 541. While cautioning that notes should not receive much weight, Wilson J. nonetheless took them into account in her interpretation of section 11 of the *Canadian Charter of Rights and Freedoms*. In subsequent case law, marginal notes have been relied on in interpreting both provincial and federal legislation. For recent examples from Supreme Court of Canada judgments, see *R. v. D.L.W.*, 2016 SCC 22, [2016] 1 S.C.R. 402, at para. 30, 38-39; *R. v. Summers*, 2014 26, at para. 43; *R. v. A.D.H.*, 2013 SCC 28, at para. 71.

Canadian case law thus establishes that marginal notes are admissible aids to interpretation, to be relied on for whatever light they might shed on a given interpretive issue. Even though they are admissible, however, because of their function as signposts and their brevity, they are often ignored or, if relied on, assigned minimal weight by the courts. This treatment of marginal notes is in keeping with the functional construction rule, explained by Sir Francis Bennion, the leading Commonwealth authority on statutory interpretation, as follows: "the significance to be attached by the interpreter to any component of an Act must be assessed in conformity with its legislative function" (*Bennion on Statutory Interpretation*, 6th ed., p. 690). Since the function of the notes did not change when the new layout was introduced, there is no basis for assigning them a different role or weight in statutory interpretation.

The Government's position is supported by the judgment of the House of Lords in *R. v. Montilla*, [2004] UKHL 50, which considered the significance to be attributed to marginal notes after they were administratively repositioned within the body of United Kingdom legislation by the Office of Parliamentary Counsel. The Government does not rely on this judgment for the proposition that marginal notes have the same status and weight as headings. That is not the case in Canada. What the judgment establishes is that moving notes added for convenience from the margin of the page to the body of the legislative text did not change their status or their role in interpretation:

> Then there are the headings to each group of sections and the side notes, or marginal notes, to each section. The legislation which is in issue in this case was considered and published with sides notes in the old form. In fact the side notes are side notes no longer. In 2001, due to a change in practice brought about by the Parliamentary Counsel Office, they were moved so that they now appear in bold type as headings to each section in the version of the statute which is published by The Stationery Office: see *Bennion, Statutory Interpretation*, 4th ed (2002), p 636. They appear in that form in the Bills that are presented to Parliament, and they also appear in that form in amendments which propose the insertion of new clauses into the Bill. But it remains true that, as Lord Reid said in *Chandler v Director of Public Prosecutions*, [1964] AC 763, 789, these components of a Bill, even in their current form, are not debated during the progress of a Bill through Parliament. They are part of the Act when it has been enacted and they are descriptive of

its contents. But they are unamendable: *Bennion*, pp 608, 635-636.

> The question then is whether headings and side notes, although unamendable, can be considered in construing a provision in an Act of Parliament. Account must, of course, be taken of the fact that these components were included in the Bill not for debate but for ease of reference. This indicates that less weight can be attached to them than to the parts of the Act that are open for consideration and debate in Parliament. ... They are there for guidance. They provide the context for an examination of those parts of the Bill that are open for debate.[1]

The Government does not rely on *R. v. Montila* to claim that marginal notes have the same status and weight as headings. Rather the judgment establishes that their status and weight did not change when they became section headings because they continued to function as guidance and to play the same role in the legislative process. This reasoning does not depend on the status and weight of headings in either Canada or the United Kingdom.

Because the changes in the new layout were purely formal and designed to enhance access to the law by Canadian citizens, converting the consolidation to the new layout was authorized under section 28 of the *Legislation Revision and Consolidation Act*.

The Government acknowledges, however, that "marginal notes" is no longer an appropriate label for notes that are aligned with the body of the legislative text. For this reason, and to address the concerns of the Joint Committee, the Government is currently and diligently looking at options to clarify matters, including those suggested by the Joint Committee in its Third Report. It is confident that a satisfactory solution will be found.

The Government respectfully submits this document as its Response.

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[1] *Supra*, at para. 31-34. Emphasis added.