



STANDING JOINT COMMITTEE FOR THE SCRUTINY OF REGULATIONS

The Standing Joint Committee for the Scrutiny of Regulations
has the honour to present its

FOURTH REPORT

(Report No. 92 - Accessibility of Documents Incorporated by Reference in Federal Regulations – Reply to the Government Response to Report No. 90)

Pursuant to its permanent reference, section 19 of the *Statutory Instruments Act*, R.S.C. 1985, c. S-22, and the order of reference approved by the Senate on March 22, 2016 and by the House of Commons on March 24, 2016, and further to the Government Response to its Second Report (Report No. 90) presented in the Senate on October 25, 2017, and in the House of Commons on July 19, 2017, the Joint Committee wishes to respond and draw the attention of the Houses to its further recommendations relating to the accessibility of documents incorporated by reference in federal regulations. A copy of the [Second Report \(Report No. 90\)](#) of the Standing Joint Committee for the Scrutiny of Regulations and of the [Government Response](#) to that Report are attached.

Report No. 90 was occasioned by the 2015 enactment of subsection 18.3(1) of the *Statutory Instruments Act*, which states:

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

The Joint Committee considered the meaning of “accessible” and set out recommendations in its Report No. 90 concerning the accessibility of documents incorporated by reference in federal regulations. The Joint Committee considers that in order to be accessible, documents incorporated by reference must be available in

both official languages and free of charge, and that all previous versions of the document must be available.

The Joint Committee found the Government Response to Report No. 90 – in which all of the Joint Committee’s recommendations were rejected – to be unsatisfactory. Accordingly, at its meeting of October 19, 2017, the Joint Committee asked that the Department of Justice provide, before the end of the calendar year, a list of all documents incorporated by reference in federal regulations along with an indication of the official languages in which each document is available and the cost, if any, to obtain it. The purpose of requesting the list was to determine the extent to which incorporated documents are currently accessible to the Canadian public.

After a number of delays, the Department of Justice provided two lists of documents incorporated by reference in federal regulations, on April 19, 2018. One of the documents, referred to as the “long list,” contains 268 pages of unverified data with regard to the four biggest regulation-making authorities. A summary review of this list quickly identified several errors. Accordingly, beyond demonstrating the prevalence of incorporation by reference in federal regulations, the usefulness of this list is questionable.

The second list, known as the “short list,” includes verified information in respect of only 25 of the approximately 1,750 federal regulations listed in the *Consolidated Index of Statutory Instruments* as of December 31, 2017. This represents approximately 1.4% of all federal regulations. The Department could not provide any assurance that the small sample of regulations was randomized; accordingly, the short list is not a representative sample of regulations. Based on the information the Department has provided to date, no broad conclusions can be drawn about the accessibility of documents incorporated by reference into federal regulations.

Departmental officials appeared before the Joint Committee on April 26, 2018. The officials admitted to the incompleteness and lack of usefulness of the information in the lists that had been provided, but described the exercise of constructing the list as “an instructive one.”

The Joint Committee questioned these officials on the Department’s role in examining the incorporation of documents into regulatory instruments. While the decision to incorporate a document belongs to the regulation-making authority, the Department of Justice advises on the accessibility of incorporated documents, taking into consideration matters of cost and language. This examination is conducted on a case-by-case basis and is not made public. Departmental officials were questioned further on the steps taken to ensure accessibility, and their testimony can be summarized as follows:

- Officials were unable to identify any steps that are taken to enhance the accessibility of unilingual documents incorporated by reference.

- Officials were unable to identify any criteria used to assess the reasonableness of the cost of a document.
- Officials appeared unprepared to pursue wide-scale adoption of means to mitigate the cost of incorporated documents.
- As was the case with the Government Response, officials did not address the issue of access to prior versions of incorporated documents. Officials acknowledged that it is sometimes impossible to obtain copies of historical versions of documents even though it may be necessary in order to understand the law.
- From the lists provided by the Department, several instances were identified of documents that were withdrawn from circulation and therefore completely unavailable despite continuing to be incorporated in a regulation.
- It appears there is no formal mechanism to ensure that incorporated documents are accessible on an ongoing basis.
- When questioned on the absence of a mechanism to ensure the ongoing accessibility of incorporated documents, ministerial officials suggested that members of the public who discover that an incorporated document is not available could choose to draw that fact to the attention of the relevant department.

Based on the new information provided in the lists and through the testimony provided by the departmental officials, the Joint Committee wishes to make the following further recommendations on the accessibility of documents incorporated by reference into federal regulations.

Recommendation 1: That the Government examine means of minimizing the incorporation by reference in federal regulations of unilingual documents and of documents available only at a cost.

Recommendation 2: That the Government develop a directive, applicable to all regulation-making authorities, which includes the following requirements:

- That the accessibility of documents incorporated by reference be examined from

the point of view of the end user of the regulations;

- That when examining the accessibility of documents incorporated into a regulation, the cumulative effect of the incorporation of multiple documents in a single regulation be considered, including consideration of the total cost to obtain all incorporated documents;
- That uniform, objective and transparent criteria be applied in examining the reasonableness of the cost for obtaining one or more documents incorporated by reference in a regulation; and
- That a regulation-making authority provide justification, in the Regulatory Impact Analysis Statement accompanying a regulation, for the incorporation of any document that is not in Canada's two official languages or that is available only at a cost.

Recommendation 3: That the Government adopt a uniform and proactive approach for assessing the accessibility of documents incorporated by reference, at the time of drafting and on an ongoing basis, including by imposing on regulation-making authorities an annual reporting requirement.

Conclusion

Materials incorporated by reference into federal regulations are no less a part of Canadian law than the regulations themselves. They enunciate Canadians' rights and responsibilities. Contraventions of the law can lead to the loss of privileges and to penal sanctions. The principle of the Rule of Law requires that the law be ascertainable by the people governed by it. In the Joint Committee's considered opinion, this principle is not currently met.

The Joint Committee considers the accessibility of documents incorporated by reference to be a matter of great importance. It is committed to pursuing the issue until it is satisfied that the Government has taken appropriate steps to ensure that incorporated documents are accessible. To that end, the Joint Committee reiterates its

recommendations set out in Report No. 90 and makes the further recommendations set out in this report.

Pursuant to Rule 12-24(1), the Senate requests a complete and detailed response from the Government to this report, with the Minister of Justice being identified as minister responsible for responding to the report.

In accordance with Standing Order 109 of the House of Commons, the Standing Joint Committee for the Scrutiny of Regulations requests that the Government table a comprehensive response to this report in the House of Commons.

A copy of the relevant Minutes of Proceedings and Evidence ([*Issue No. 36, First Session, Forty-second Parliament*](#)) is tabled in the House of Commons.

Respectfully submitted,

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Joint Chairs

Enclosures