

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

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

On May 25, 2018, the Standing Joint Committee for the Scrutiny of Regulations (the “Joint Committee”) issued its Report No. 92 relating to accessibility of documents incorporated by reference in federal regulations, in reply to the Government Response to Report No. 90 presented in the Senate on October 25, 2017, and in the House of Commons on July 19, 2017.

In accordance with Rule of the Senate 12-24(1), the Joint Committee requested that the Government table a complete and detailed response in the Senate and, in accordance with Standing Order 109 of the House of Commons, a comprehensive response in the House of Commons.

The Government appreciates the Joint Committee’s sustained interest in these matters and is pleased to present its Response to the Report of the Joint Committee.

The Government believes that incorporation by reference is a powerful tool that is required in order to ensure that Canada has an agile, modern, and competitive regulatory system. At the same time, the Government is committed to ensuring that documents that are incorporated by reference in federal regulations are accessible to Canadians for reasons of transparency, access to justice in both official languages, and rule of law.

The Government continues to believe that amending the *Statutory Instruments Act*, as was recommended by the Joint Committee in Report No. 90, 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. The Government also continues to be of the view that the creation of a registry would not necessarily enhance accessibility without duplication or without limiting the flexibility to take advantage of new methods of granting access to documents.

It should also be noted that the regulation-making authority must ensure that the incorporated document is accessible at all points in time as required under section 18.3 of the *Statutory Instruments Act*.

As officials from the Department of Justice explained in their appearance before the Joint Committee on April 25, 2018:

While our respective views on what the *Statutory Instruments Act* requires in respect of accessibility differ, we understand and share the Committee’s continued interest on the accessibility of incorporated materials.

The issue of accessibility is one that the Government has considered carefully. As was stated during the passage of the *Incorporation by Reference in Regulations Act* in 2015, given the wide array of materials incorporated by reference in federal regulations, Parliament made the decision to adopt a flexible approach to what is meant by “accessible”. A balance has been struck – the approach adopted in the *Statutory Instruments Act* clearly makes the obligation express and binding. The flexible approach also ensures that this is a technology-neutral requirement and that prescriptive requirements are avoided so as to avoid barriers to innovation.

That being said, the government’s position is that material is accessible if, with a reasonable amount of effort, a regulated person can obtain a copy of the document, and the document itself is understandable [our translation].

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For example, in cases where the incorporated material is provincial legislation, then the regulation-making authority need not take many steps to ensure that it is accessible. In cases where the document that is incorporated by reference is generated by the regulation-making authority itself, then the document will most likely always be available without charge, easily accessible on the Department’s website and in both official languages. While some materials are subject to copyright protection and may require a fee to access, in many cases, these standards which can be purchased may also be available without any cost for “view-only” or “read-only” access, or the regulation-making authority may take other steps to ensure that the document is accessible.

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The government also holds that a document must be incorporated in both official languages unless there is a legitimate justification (or “legitimate reason”) to incorporate in only one official language. Examples of legitimate justification include a technical standard that is continually changing, meaning that translation would be too complex, or where the standard implements harmonization or cooperation arrangements between governments [our translation].

Although the Government maintains its position on the meaning of accessibility in the *Statutory Instruments Act*, the Government welcomes the opportunity to carefully consider the additional recommendations made in Report No. 92 to improve accessibility. The Department of Justice is committed to working with the Treasury Board of Canada Secretariat to explore the development of policy guidance related to the use of incorporated documents in support of the *Cabinet Directive on Regulation*. This work is ongoing and will also include consideration of the Joint Committee’s new recommendations in Report No. 92. The Government looks forward to reporting back to the Joint Committee as this work progresses and anticipates being able to provide an update to the Joint Committee before the end of 2018.

The accessibility of documents that are incorporated by reference is an important issue affecting all Canadians. Continued engagement with Parliamentarians who sit on the Joint

Committee, as well with as other interested parties, is necessary to ensure that the Government can develop meaningful and relevant guidance to support greater accessibility, while at the same time ensuring that Canada's regulatory system promotes the health, safety and security of Canadians and the environment and is agile, effective, and competitive.

The Government respectfully submits this document as its Response.