FTR Now

Integrated Accessibility Regulation Proposed Under the AODA

Date: September 10, 2010

On September 2, 2010, the Ontario Ministry of Community and Social Services proposed an Integrated Accessibility Regulation (the "proposed Regulation") under the *Accessibility for Ontarians with Disabilities Act, 2005* ("*AODA*"). The proposed Regulation would combine three accessibility standards into one – information and communication, employment and transportation. In addition, the proposed Regulation includes detailed compliance time frames, as well as a schedule of administrative monetary penalties that could be imposed on organizations that do not comply with the *AODA*'s accessibility standards.

When finalized and made into law, the proposed Regulation will have a significant impact on organizations in Ontario that provide goods or services to the public and have at least one employee. All employers should review its content in detail. In this *FTR Now*, we review the proposed Regulation and what it may mean to your organization.

THE *AODA* IN A NUTSHELL

As you may be aware, the purpose of the *AODA* is to break down the barriers that prevent or limit persons with disabilities from participating in a variety of activities in Ontario – including employment, receipt of goods and services, transportation, the built environment and information and communication – through the enactment of accessibility standards that will be enforceable as law. The *AODA* complements the requirements under the *Human Rights Code* and other laws that protect disabled persons from discrimination or harassment. Its objective is to have organizations take proactive measures to address accessibility issues related to employees, customers and other members of the public.

BACKGROUND TO THE PROPOSED REGULATION

Over the past few years, standards development committees have been meeting and developing five different accessibility standards under the *AODA*. The Customer Service Accessibility Standard has been passed, and organizations in the broader public sector are already required to comply with its requirements, while organizations in the private and not-for profit sectors must be in compliance by January 1, 2012. The four remaining standards – information and communication, employment, transportation and built environment – have yet to be passed into law, although they are all at various stages of development.

While the standards development process was underway, there were increasing calls for the government to harmonize the standards. The problem stemmed from the fact that each standard was being developed by a separate committee, and there appears to have been little meaningful communication between the committees. This led to standards being proposed that contained overlapping obligations, as well as compliance time frames that were inconsistent as between the various standards. One common area of complaint related to training requirements, which were a part of each standard, yet there was little guidance as to how an organization could consolidate the various training requirements so as to maximize the efficiency of its compliance efforts. In his review of the *AODA*, Mr. Charles Beer also highlighted the need for harmonization of the standards and of the compliance time lines as a key way to help ensure greater compliance with the standards being developed.

Clearly, the government has listened to this input. In its response to Mr. Beer's report, the Ministry of Community and Social Services announced that it would be consolidating three standards into one, to be enacted in a single regulation (information and communication, employment and transportation). Furthermore, it expects to integrate the Customer Service standard into this single harmonized standard by 2013.

With respect to the proposed Built Environment standard, just before the publication of this *FTR Now*, the government posted on its website the final proposed Accessible Built Environment Standard as developed by the committee. From the response to the Beer report, however, it appears that the government will be integrating many of its provisions into the *Building Code*, and the remaining provisions will be integrated into the single harmonized standard. In the response to the Beer report, there was no time line provided for the integration of the Built Environment standard. We will not consider the Built Environment standard further in this *FTR Now*, but you may access the new materials by clicking here.

OVERVIEW OF THE PROPOSED REGULATION

As described above, the proposed Regulation is a harmonization of three of the proposed accessibility standards – information and communication, employment and transportation. It has been released by the government in draft form in order to solicit public input (details on how organizations can make submissions will be set out at the end of this *FTR Now*). It contains a variety of sections, some of which contain provisions that apply to all three subject areas, and some of which are specific to a subject area. We will review each in turn.

GENERAL OR COMMON REQUIREMENTS

As part of the harmonization process, the government has identified a number of requirements that were common to each of the three original proposed standards, and we will summarize some of the key common elements in this section.

First, the proposed Regulation would establish the following five classes of organizations:

- Government of Ontario
- Broader Public Sector – 50+ employees
- Broader Public Sector – 1-49 employees
- Private and Not-for-Profit Sectors – 50+ employees
- Private and Not-for-Profit Sectors – 1-49 employees

The division of organizations into these classes has at least two key implications. First, generally speaking, the government and the broader public sector organizations would have to comply with the proposed Regulation sooner than the private and not-for-profit sectors. Second, smaller private and not-for-profit sector organizations would be exempt from a number of requirements, including compliance reporting requirements.

We note that this division is still not entirely consistent with the division of organizations subject to the Customer Service standard, where the dividing line is set at twenty employees, and not fifty. This inconsistency may be addressed when the full harmonization of the standards occurs in 2013.

A second key common element would be the requirement of most organizations to “establish, maintain and implement” policies that must describe how the organization will meet the requirements of the various accessibility standards and must contain a statement of commitment for meeting the needs of persons with disabilities in a timely manner.

There are additional policy-related obligations placed on different classes of employees (for example, government and broader public sector organizations would be required to have policies on how they will consider the needs of persons with disabilities when procuring or acquiring goods and services), and small private and not-for-profit organizations would not be required to develop **written** policies (whereas all other organizations would require written policies that could be made available in an accessible format, upon request).

A third common element is the requirement to develop accessibility plans that set out how the organization will achieve the accessibility requirements within the projected time lines. This would not apply to smaller private and not-for-profit organizations.

In addition, all organizations would be required to provide training on the requirements of the accessibility standards to all employees, volunteers, persons who provide services on behalf of the organization, and persons who participate in developing the policies, practices and procedures of the organization.

Other common elements of note are the proposed requirements to implement an accessible feedback process and to provide "prepared emergency and public safety information in an accessible format, upon request, where this information is available publicly".

ACCESSIBLE INFORMATION AND COMMUNICATIONS REQUIREMENTS

The proposed Regulation provides that this aspect of the standard would focus on accessible information and communications relating to the provision of goods and services.

There would be a general requirement that, where information was not available on an accessible website, the information would need to be made available, upon request, in an accessible format and with appropriate communications supports. There would be consultation obligations with the person with disabilities making the request, as well as an obligation to notify the public of the availability of accessible formats and communications supports. With respect to alternative formats, a note to draft indicates that this would require organizations to have the means to provide the information as soon as possible, once a request is made.

Where documents are required to be provided, organizations would have a general obligation to notify the public that the document is available upon request.

With respect to websites, where an organization controls the site, the web content or web-based applications and it is technically feasible to do so, the organization would be required to make its internet website(s) conform with an international standard: W3C WCAG 2.0, initially at Level A and subsequently increasing to Level AA. (For the government, this obligation would extend to its intranet as well.)

The obligations to make websites accessible would initially apply to new websites and new web content, but would subsequently apply to existing websites and web content. Online materials published prior to 2012 would need to be made available in an accessible format, upon request.

The proposed Regulation also contains numerous obligations for educational and training materials provided by public or private elementary, secondary and post-secondary institutions or by training institutions. These obligations include providing training or education materials in an accessible format where prior notification of need is given, and, upon request, providing student records and program-related materials in an accessible format and within the same time line as other persons receiving the same records or information.

There are also specific requirements related to:

- training that must be provided to educators;
- producers of educational and training materials; and
- educational and public libraries.

ACCESSIBLE EMPLOYMENT REQUIREMENTS

The employment-related requirements are similar to those that were in the earlier versions of the draft standard. See, for example, our summary of the "Final Proposed Employment Accessibility Standard" in the November 3, 2009 *FTR Now*. As before, this aspect of the proposed Regulation would apply only to paid employment, and would exclude a variety of volunteer, co-op or high school work experience placements.

The effect of the proposed Regulation would be to require a more formalized approach to accommodation than some employers may be used to applying, as well as a more proactive approach to accommodation throughout the entire employment process.

With respect to recruitment of employees, the proposed Regulation would require employers to notify applicants that accommodations will be provided in the recruitment process, as well as to make assessment and selection materials available in an accessible format, upon request. Moreover, successful applicants would have to be informed of the employer's accommodation procedures.

Other obligations would include:

- collaboration with employees on accessible information formats and communications supports;
- where electronic information systems are not accessible, the provision of the inaccessible information in an accessible format and with necessary communications supports;
- development and provision of individualized workplace emergency information to employees with disabilities;
- communication to employees about how the employer supports persons with disabilities in the workplace, including how job accommodations would be provided; and
- development of documented individual accommodation plans, upon request (this would not apply to small private or not-for-profit organizations).

The proposed Regulation includes guidelines on the content of individual accommodation plans, which would have to assess employees on an individual basis, identify the accommodations being provided and the time lines within which they are being provided. Plans would also have to include individualized emergency information, where appropriate. There are more extensive guidelines on the accommodation process, including such matters as employee participation in the development of a plan, outside evaluations, involvement of a bargaining agent, etc.

Employers would also be required to develop a return to work procedure that would apply where there was no statutory procedure in place (i.e. that would apply to non-WSIB return to work situations).

In addition, the proposed Regulation would require employers to take into account an individual's accommodation needs or individual accommodation plan when making performance management, career development or redeployment decisions.

TRANSPORTATION REQUIREMENTS

Due to space constraints, we will not address the proposed transportation standards in any detail. However, it is important to note that the proposed Regulation contains detailed requirements that would apply to the following types of transportation services:

- conventional transportation;
- specialized transportation;
- public school transportation;
- other transportation services;
- ferry services; and
- taxi services.

Excluded from the proposed scope are volunteer or faith-based transportation services, federally regulated transportation services, emergency response vehicles and amusement park rides.

Any organization that undertakes any transportation services should carefully review the proposed requirements of the standard.

PROPOSED COMPLIANCE ENFORCEMENT INITIATIVES

The government is also proposing the creation of Administrative Monetary Penalties (or “AMPs”) that it could impose on organizations and individuals that do not comply with the standards. An AMP is a type of administrative fine that does not result in an offence or prosecution, but can be imposed by a government officer and be enforced through the regulatory tribunal overseeing the *AODA*.

The government is proposing a range of AMPs that would be available depending on the consideration of two factors: (1) the compliance history of the individual or corporation; and (2) the severity of the impact of the violation. For corporations, the AMP could range from $500 to $15,000, with the maximum AMP being issued on a daily basis for the most egregious violations. For individuals and organizations that are not corporations, the AMP could range from $200 to $2,000, again with the maximum AMP being issued on a daily basis for the most egregious violations.

PROPOSED COMPLIANCE TIMELINES

The proposed compliance timelines are rather complex, as they differ for organizations in the five different classes described earlier in this review. Some general principles are worth noting.

First, as a general rule, the government would be required to comply with the various elements of the proposed Regulation before the broader public sector, which, in turn, would be required to comply either at the same time as or before the private and not-for-profit sectors. Within this basic framework, larger organizations would generally have to comply before smaller ones.

Second, many of the compliance timelines have been considerably extended beyond what was initially proposed by the committees (which many organizations had protested were quite unrealistic). Thus, for example, the requirement to have new internet websites and web content on those sites conform to WCAG 2.0 level A would apply to the government in 2013, the broader public sector in 2014 and the private and not-for-profit sectors (50+ employees) also in 2014. However, the stricter Level AA requirement would not begin to apply for several years afterward.

The government has produced a helpful chart to assist organizations to determine which specific standards would apply to each class of organization, and when.

DESIGNATION OF THE LICENCE APPEAL TRIBUNAL

The proposed Regulation also indicates that the government is proposing to designate the Licence Appeal Tribunal (“LAT”) as the tribunal to which directors’ orders can be appealed under the *AODA*. Given that directors can issue general compliance orders with respect to compliance with the accessibility standards, this designation provides the LAT with significant enforcement powers under the statute. The government has highlighted the LAT’s experience with handling appeals related to whether businesses have met various prescribed standards; however, it is not clear whether the LAT has much experience in human rights matters, which can be expected to arise in appeals under the *AODA*.

SOME CONCLUDING THOUGHTS

The proposed Regulation promises to significantly affect how employers and other organizations do business and conduct their affairs. With its publication, most of the key pieces are now in place for the *AODA* to come into full force. For affected employers, this may well be the last chance to provide input before these accessibility standards are finalized.

In considering the *AODA*’s standards, employers must keep in mind that the *Human Rights Code* will continue to apply, and compliance with an *AODA* standard is no guarantee that an employer’s duty to accommodate to the point of undue hardship has been satisfied. Moreover, the *AODA* does not really provide for a mechanism by which an individual may complain that

an organization is not complying with the accessibility standards. We anticipate that it will take some time before the full parameters of the interaction between the *AODA* and the *Code* will be understood, and before a clearer picture of the full range of enforcement avenues has been established.

Employers have until October 16th to submit comments on the proposed Regulation, which can be found at the following link:

http://www.ontariocanada.com/registry/view.do?postingId=4142&language=en

If you have any questions about the *AODA* and how it might impact your organization, please contact Paul Broad at 519.931.5604, Leola Pon at 416.864.7294 or your regular Hicks Morley lawyer.

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