NEWS Release

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ACCESSING ACCESSIBILITY UNDER THE *BUILDING CODE*, THE AODA AND THE OHRC

It is a given that during the life-cycle of a lease, commercial landlords and tenants can expect at least one of the parties to undertake some type of renovation. They will consult their lease terms to evaluate their rights, but they must also navigate through the tangled web of the *Building Code Act, 1992 ("Building Code")*. In light of recent amendments to the *Building Code*, landlords and tenants should be aware of whether a particular renovation they are considering could trigger new accessibility requirements.

The *Building Code*, the AODA and New Accessibility Requirements

Although the *Building Code* has included barrier-free design provisions since 1975, the *Accessibility for Ontarians with Disabilities Act, 2005* (the "AODA") was the driving force behind the recent accessibility requirements in the *Building Code* (a regulation under the *Building Code Act, 1992*). These new provisions were drafted to consolidate all accessibility requirements for buildings in one code. The new accessibility requirements in the *Building Code* came into force on January 1, 2015 with the goal of achieving accessibility for Ontarians with disabilities by 2025. The effect of the AODA cannot be understated as it not only affects the *Building Code* but also impacts the delivery to the public of goods, services, facilities, accommodation, employment, structures and premises.

Section 3.8 of the *Building Code*

Section 3.8 of the *Building Code* contains the new requirements. They include universal washrooms, barrier-free paths of travel, adaptable seating and power door operators, to name just a few features. These accessibility requirements are the ones that most landlords and tenants will be required to consider when planning their renovations. They do not have retroactive effect; existing buildings do not have to be fitted with the new accessibility features. However, the new requirements apply to most newly constructed buildings as well as to buildings more than five years old where *extensive* renovations will take place.

Basic and Extensive Renovations

The *Building Code* distinguishes between renovations that are *basic* and those that are *extensive*. *Basic* renovations involve construction that maintains the existing performance level of all or part of an existing building; they avoid triggering the accessibility requirements under section 3.8. By contrast, *extensive* renovations under Part 11 of the *Building Code* must comply with section 3.8, if the proposed construction: (1) is within an existing suite area that is greater than 300 square metres (3,229 sq.ft.) of space; (2) involves installations of new interior walls/floor assemblies or new ceilings; and (3) is within a building's main floor area located within 200 mm (7.84 inches) of the nearby ground floor (**or** in a floor area that is accessible by an elevator from the building's main floor area that is located within 200 mm (7.84 inches) of the nearby ground floor). The legislator's rationale for the third prong was that, with assistance, someone in a wheeled mobility device could enter a building if the elevation from the outside ground floor to the main floor entrance were less than 200 mm (7.84 inches). Notably, all three tests must be met to qualify as an extensive renovation that triggers the enhanced accessibility requirements under section 3.8 of the *Building Code*. Building owners and tenants alike must review their renovation plans to determine whether the requirements under section 3.8 will apply.

Building Permits and Scope of Renovations

Since renovations sometimes require a building permit, the distinction between *basic* and *extensive* renovations must be understood relative to the impact of this difference on their issuance. The Chief Building Official is obliged to issue a building permit unless the AODA, the *Building Code* or any other applicable law is contravened. If there is disagreement between the building permit applicant and the Chief Building Official concerning whether a basic or extensive renovation is contemplated,

a delay or eventual denial of issuance of a permit may ensue until the matter is resolved.

Basic and *extensive* renovations were under consideration in a case recently decided by the Building Code Commission ("BCC"). The BCC is an adjudicative body that decides disputes (typically between a building permit applicant and the Chief Building Official). The case was between Mike Petrus (the "Applicant") and the Chief Building Official Jeff Mernard (the "Respondent") and concerned a ceiling and floor assembly renovation. The questions posed to the BCC related to multiple potential breaches of the *Building Code*, including a question of whether proposed rear ceiling renovations were *extensive,* thus triggering the various accessibility requirements of the *Building Code* for the entire renovation. The BCC decided that the rear ceiling renovations did not have an existing ceiling finish and that the ceiling was not "substantially removed" from the existing structure. Therefore, the rear ceiling portion of the renovation was deemed to be a basic renovation and the floor assembly was not required to comply with requirements of section 3.8 of the *Building Code*. This case suggests how renovations may be interpreted in connection with the new accessibility requirements under the *Building Code,* and also highlights the fact that the analysis can be complex and yield surprising results.

Lease Obligations

Tenants and landlords must turn their minds to their lease obligations vis-à-vis the AODA and the *Building Code*. Any representations or warranties regarding compliance with laws and regulations must be carefully thought through. May a landlord safely represent that a leased premises complies with the AODA or the *Building Code*? May or should it warrant or covenant that the leased premises will comply, given that the tenant could be the one to pursue extensive renovations that could trigger a compliance requirement? Who will pay for those renovations to be compliant with accessibility requirements? These are just some of the questions that must be considered when negotiating lease terms that involve potential renovations.

Canadian Human Rights Act* and Ontario's *Human Rights Code

Even if the *Building Code* and the AODA are complied with, all landlords and tenants should be aware of potential human rights complaints under Ontario's *Human Rights Code* and the *Canadian Human Rights Act* as they relate to accessibility to their buildings. Under both pieces of legislation, employers have a duty to accommodate persons with disabilities. However, the tribunals recognize that accommodation is not possible in all situations. An employer or service provider can claim undue hardship when accommodations, because of a policy, practice, by-law or building renovation, would cost too much or create risks to health and safety. There is no set formula for exceptions to accommodation requirements. The resulting uncertainty necessitates that all landlords and tenants do their own careful review of potential violations and consider solutions for each person who may require additional building accessibility.

ANNOUNCEMENT

Daoust Vukovich LLP is pleased to welcome **ANDREW JOHNSTON** to the firm as an associate lawyer in the area of commercial leasing. Andrew is a graduate of Osgoode Hall Law School and was admitted to the Ontario Bar in 2016. Andrew is also a graduate of Michigan State College of Law and was called to the New York State Bar in 2015. He can be reached at: 416-479-4357 (ajohnston@dv-law.com).

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