

# Legislative Architecture: Building with the Spoken Word

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## Background

The Department of Justice maintains a web-accessible database containing the official version of Canada's federal laws (the [Justice Laws Website](#)). This database is accessible free of charge through the internet in both official languages.

In 2010 the Federal Court, in *Jodhan v. Canada (Attorney General)*<sup>1</sup>, concluded that the federal government was in violation of section 15 of the *Canadian Charter of Rights and Freedoms* because of its failure to enforce its own standard, the Common Look and Feel for the Internet: Standards and Guidelines (the "CLF"). The CLF dictated how all of the federal government's web sites were to appear. The court gave the government 15 months in which to upgrade its web sites.<sup>2</sup> Subsequently the Federal Court of Appeal upheld the decision on all points relevant to the issues raised in this paper.<sup>3</sup>

Essentially, the position of the applicant Donna Jodhan was that, as someone who is visually impaired, she was unable to access government informational and transactional services online. The government's CLF has been in force since 2001 and was intended to ensure that persons who are visually impaired have access over the internet to government information and services. Some of Mr. Justice Kelen's conclusions are worth considering in the specific context of legislative drafting. He stated that:

the visually impaired have not been "reasonably accommodated" because they allegedly can obtain the same information available online by other channels, namely in person, by telephone and by mail. These other channels are difficult to access, less reliable and not complete. Moreover, they fail to provide the visually impaired with independent access or the same dignity and convenience as the services online. The Supreme Court of Canada makes unequivocally clear that such alternatives do not constitute "substantively equal" treatment; and

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<sup>1</sup> 2010 FC 1197

<sup>2</sup> The court made specific note that this order did not apply to historical and archived information that is stored in a database and which "the government shall retrieve and provide in an accessible format upon request."

<sup>3</sup> 2012 FCA 161

that for the blind and visually impaired, accessing information and services online gives them independence, self-reliance, control, ease of access, dignity and self-esteem. A person is not handicapped if she does not need help. Making the government online information and services accessible provides the visually impaired with “substantive equality”. This is like the ramp to permit wheelchair access to a building. It is a ramp for the blind to access online services.

From this it seems clear that the courts will reject any claim that legislation can be adequately accessed by the visually impaired through means other than the internet such as traditional paper using Braille. In other words, in the current era in which economic efficiency is being driven at least in part by the movement of information over the internet, governments will have no choice but to ensure that their laws web sites are as fully accessible as reasonably possible to persons who are visually impaired.

## Standard on Web Accessibility

In response to the *Jodhan* decision and effective August 1, 2011, Treasury Board put in place the new Standard on Web Accessibility ([SWA](#)). The express purpose of this policy is to ensure that the federal government’s public-facing web sites are as accessible as possible to persons who are visually impaired. Its application is mandatory for all departments across the federal government and, with some exceptions, it requires compliance in respect of all of the web content for which they are responsible. This policy comes into effect over a period of time with higher priority web content having earlier deadlines. The Justice Laws Website had a high priority and was required to be compliant by February 29, 2012. This policy required the Department of Justice to ensure that all of the content on the Justice Laws Website, along with other Justice web sites, complied with the requirements of the latest version of the Web Content Accessibility Guidelines (WCAG 2.0).<sup>4</sup>

Treasury Board has specified exclusions from the requirements of this policy. These are set out in Appendix B to the SWA. To date there is only one exclusion that is relevant to our work as drafters and that is in respect of complex maps. The SWA states that the list of exclusions is to be reviewed and updated annually by Treasury Board.

Under the terms of the SWA a short alternate text description is all that is needed to satisfy the requirements. However, in the context of a web site that is an official version of statutes and regulations (whether federal or otherwise) compliance with a policy such as the SWA may not be enough to make the legislation and regulations truly accessible to someone who is visually impaired. In other words there is a distinction that may be made between content being

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<sup>4</sup> This is a set of international standards for ensuring that websites are designed to maximize access by persons with disabilities (<http://www.w3.org/TR/WCAG/>).

compliant with a policy such as the SWA and being truly accessible to visually impaired persons using screen-reader software. This may leave a government open to future challenges under subs. 15(1) of the Charter. To minimize this risk, drafters in general should strive to the higher standard wherever possible.

## Screen-reader Software

People who are visually impaired can use screen-reader software, the best known being JAWS (Job Access With Speech), to access web sites. This software takes the html-coded text of a website and reads it aloud to the user. It is important to understand how this works in practice. The software will simply read the coded text as if it was a person reading from left to right and from top to bottom and will even read out punctuation, formatting changes<sup>5</sup> and all of the details of the content and structure of tables and schedules. Unlike someone looking at the web site whose brain will automatically use visual clues to structure the content, the software is incapable of organizing the material so as to identify what is the most important and what is not and what is the relationship between elements of the content.

Drafters should be aware that there are also things that screen-reader software is incapable of reading at all. These include maps, images, graphs and any textual content that has been reproduced in a regulation or statute as an image (prescribed forms being a common example).

In practice, this means that content that is not in compliance with the SWA (*i.e.* in practice content that cannot be read by screen-reader software) must be accompanied by an alternative text description that describes the non-compliant content in a way that allows the person using the software to be able to understand the content.

## Department of Justice Response

### The existing web site

Beginning shortly after the introduction of the SWA, Justice worked with client departments to ensure that the existing content of the Justice Laws Website complied with it. This effort required us to seek the assistance of our various client departments who are functionally responsible for the statutes and regulations in question in order to ask for their input in the development of the alternate text descriptions. This was a substantial effort and required considerable resources at a time when many departments were putting resources toward ensuring the compliance of their own web sites.

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<sup>5</sup> Italics, bolding, underlining, etc.

We identified and then corrected instances of non-compliance, typically by one of two approaches.

The first, and preferable approach, was to replace the non-compliant content with an alternative that is readable by screen-reader software. A typical example is a formula that was originally placed on the website as an image. This can often be easily converted to a coded text which looks the same to the eye (and for which no amendment to the legislation is required) but which screen-reader software is capable of reading.

The second approach was to add alternate text descriptions that are embedded in the html code used to present the information contained in the website. Further details on this process are presented below. These alternate text descriptions are not seen by web browsers as a normal part of the legislative text and therefore do not present any problems of appearing to alter the legislation as it was originally enacted.

There were problems that showed up in the process of bringing the web site into compliance. One issue was that of what to do with legislation that is essentially spent. Needless to say, in the current fiscal environment, there was no interest in expending valuable resources on spent legislation (this exercise did provide us with an incentive to clean up some of our database). There were judgement calls to be made about whether some very old legislation should be archived instead of being upgraded.

The Department of Justice has successfully met the requirements of the SWA within the time period required by the court in *Jodhan*.

## **Moving forward**

The Legislative Services Branch has issued a directive to give drafters guidance in dealing with drafting issues as they arise. A public version of this directive, in both official languages, is attached to this paper for use by conference attendees or others who are interested in this issue.

Changes to the content of most government web sites are easier to make than they are to our Justice Laws Website given the process required to produce the statutes and regulations that end up on that web site. Therefore, for the Justice Laws Website, it is easier to ensure that the content is SWA compliant at the drafting stage rather than later when the database management team is adding the enacted law to the web site. We certainly discovered that in the process earlier this year of bringing the existing content on the web site into compliance.

From a drafter's perspective it is important to clarify who has responsibility when issues of this nature arise. Given that in general the responsibility of drafters extends to the drafting of legislation, the determining of its legality and legal implications of it, non-legal texts<sup>6</sup> are not

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<sup>6</sup> Such as the explanatory texts that accompany orders and the Regulatory Impact Analysis Statement

drafted by legislative counsel although they may be reviewed by them to ensure that they accurately reflect the legislation.

However, because the point of this exercise is ensuring accessibility to the law by those who are visually impaired, under the terms of the directive, clients are responsible for providing, in both official languages, suggested alternate text descriptions or instructions for developing them while legislative counsel are responsible for drafting the alternate text descriptions and ensuring that they reflect the non-compliant content. Legistic revisors and jurilinguists are responsible for reviewing the text at the same time as the rest of the draft. All drafts that use an alternate text description and any other less common features such as schedules, tables, and forms are reviewed by the Branch's Information Management Services team for technical correctness (in the sense of the software coding used in the text).

## **Alternate Text Descriptions**

In general, the best approach is to avoid content that cannot be read by screen-reader software. This is not to say that this approach should be dictating the content of a draft bill or regulation. In fact, if an image, graph, formula or map that cannot be read by screen-reader software is clearly the best means of setting out a required rule in a legislative text then that is the approach that should be taken. An alternate text description will then have to be provided. Ultimately the decision on whether to use content that cannot be read by screen-reader software and supply an alternate text description is a judgement call that the legislative drafter must make.

Given that the objective is to make legislation web sites as accessible as possible to the visually impaired, these alternate text descriptions must present the information in a manner that effectively conveys as much of the meaning as possible to someone who is using screen-reader software. Ideally the alternate text description should convey all of the information needed to permit that person to understand and comply with the law. There are circumstances where writing these descriptions will be easier than others. For example, a prescribed form that is contained as an image in a schedule to a regulation can almost always be reduced to its actual content in the alternate text description. However, a complex map is usually very difficult to accurately describe in textual form.

Alternate text descriptions can consist of a short description, a long description or a hyperlink to the website of the department that is administratively responsible for the law in question. The hyperlink solution works only if the departmental website contains all of the required elements and is fully readable by screen-reader software.

Typically a long description is used when the actual content of the map, image or graph can be captured in what is essentially the equivalent, by way of screen-reader software, of a verbal description. A short alternate text description should be used when it is all that is needed or

when a long description cannot capture the essence of the image in question and it is not possible to create an approach that will make the content accessible to someone using screen-reader software. It should also be used when the content merely illustrates what is otherwise already included in the legislative text. If an image is not necessary then this means that it adds nothing essential to the legislation and at the most only a short alternate text description would be necessary to alert the reader using screen-reader software to this fact (in fact, one can argue that if the image is not necessary then why should it be included at all?).

Ultimately there will be content that cannot be read by screen-reader software and cannot be adequately reduced to an alternate text description. An excellent, and fairly common, example is the complex maps for which the SWA specifically provides an exclusion.<sup>7</sup> It is virtually impossible, in today's technological environment, to provide a map that may be read by screen-reader software or a textual description that will adequately provide all of the required information. Less common, but equally difficult are prescribed images used to warn of radiation hazards<sup>8</sup> and drawings used to illustrate how certain objects need to be safely constructed or assembled.<sup>9</sup> Sometimes it may at best be possible only to describe the function of the image. In such cases, short alternate text descriptions will satisfy the SWA requirements but will still not be readable by screen-reader software and legislative counsel should consider advising clients that there may be some risk of court challenges based on the *Jodhan* decision and subsection 15(1) of the Charter. In the current state of the law that risk may be difficult to quantify.

## Conclusion

It is important to remember that we do not want the process of trying to make web content accessible to visually impaired persons to have an impact on the substantive content of the law. At the same time, as drafters, we must keep in mind the substantial responsibility that we have of ensuring that the law is accessible as possible to the public. One can easily think of this as an exercise in readability, something that all drafters have certainly become more aware of over the last 10 to 15 years.

In respect of the Justice Laws Website, we can say with confidence that the vast majority of statutes, regulations and orders on the Justice Laws Website are fully accessible to the visually impaired and that the federal Department of Justice has internal mechanisms in place that will ensure that we are able to minimize the amount of content that cannot be accessed by someone who needs to use screen-reader software. To the extent that there are still instances of

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<sup>7</sup> See the schedules to the [Gully Marine Protected Area Regulations](#) (SOR/2004-112) for examples.

<sup>8</sup> An example is an image required to be used in certain locations to indicate a radiation hazard (see Schedule 3 to the [Radiation Protection Regulations](#), SOR/2000-203).

<sup>9</sup> A typical example of this is the images contained in Schedule 7 to the [Motor Vehicle Restraint Systems and Booster Seats Safety Regulations](#) (SOR/2010-90).

inaccessible content of which we may be unaware, we intend to address them as soon as they come to our attention.

Ultimately this is a human rights issue and Justice has decided that the best approach to this problem is to ensure that our product, draft bills and blue-stamped regulations, is as accessible, once on the Justice Laws Website, to visually impaired persons as possible. We believe that the best approach is to be out in front on this issue rather than waiting for what will otherwise be inevitable court challenges. There is still room for improvement, complex maps being the obvious example, but this is dependent more on advances in technology than on changes that we can make within our current level of technology.