

Queen's Park Update

Bill 108 – Apology Act, 2008



Christine Elliott, MPP Whitby - Ajax

On October 7, 2008, The Honourable Chris Bentley, Attorney General of Ontario introduced Bill 108, the Apology Act, in the Legislature. This Bill had previously been introduced in April, 2008 as a Private Member's Bill by David Oraziotti, the Member from Sault Ste. Marie, had passed second reading and been referred to the Standing Committee on Justice Policy.

Essentially, the Act enables a person to apologize without incurring liability in a civil proceeding, administrative proceeding or arbitration. It also allows a person to apologize without voiding, impairing or otherwise affecting a contract of insurance or indemnity. Additionally, it cannot be used as a confirmation or acknowledgement of a cause of action to extend a limitation period. It does not apply to criminal proceedings or to proceedings pursuant to the Provincial Offences Act.

"Apology" for the purposes of this Act is defined, in section 1, as "an expression of sympathy or regret, a statement that a person is sorry or any other words or actions indicating contrition or commiseration, whether or not the words or actions admit fault or liability or imply an admission of fault or liability in connection with the matter to which the words or actions relate".

It is important to note that this Act covers not only expressions of sympathy, but also admissions of fault. In this respect it mirrors the Uniform Apology Act, which was recommended by the Uniform Law Conference of Canada in September, 2007. Similar legislation was passed in British Columbia in May, 2006, Saskatchewan in May, 2007, and Manitoba in November, 2007. An Apology Act was brought forward as a Private Member's Bill in the Yukon in 2007, but was "negatived" at second reading in April, 2008.

The principal argument in favour of apology legislation is the healing and restorative power of a sincere apology, and its ability to resolve disputes in a way that no monetary award ever could. A Discussion Paper on Apology Legislation prepared by the Ministry of the Attorney General in British Columbia commented that: "When we act in a way that results in harm to another, an apology is seen to be an appropriate ethical response. It is also recognized that an apology can have a therapeutic impact on the person injured, facilitating the healing process and the process of reconciliation and closure. Anecdotal evidence from those involved in dispute resolution and litigation is clear that an apology can go a long way toward resolving a dispute. In fact, mediators report that, for many plaintiffs, a sincere apology is the most valuable part of a settlement."

Studies have also suggested that apologies can prevent litigation and bring about early and cost-effective dispute resolution, particularly with respect to medical malpractice actions. Thirty-five states in the United States have some form of apology legislation and the American Journal of Pharmaceutical Education noted in 2003 that 37% of patients and family members would not have commenced a malpractice action had there been an apology and a full explanation.

Conversely, the British Columbia Discussion Paper noted that in some cases apologies could "create an emotional vulnerability in some plaintiffs who may accept settlements that are inappropriately low".

There is also a concern that apologies could be trivialized and become meaningless if the person apologising knew that a lawsuit could be avoided simply by using a "boilerplate" apology.

The Apology Act has been endorsed by numerous associations, including the Canadian Patient Safety Institute, the Ontario Medical Association, the Ontario Hospital Association, the Registered Nurses Association of Ontario and the College of Physicians and Surgeons of Ontario. Some members of the Bar are critical of the Act, however, for having the potential to prevent meritorious lawsuits from proceeding because of the use of insincere apologies and an imbalance of power between the plaintiff and the defendant.

The Apology Act recently passed second reading and has been referred to the Standing Committee on Justice Policy. It is anticipated that committee hearings will commence within the next few months.

I would encourage all members of the OBA to contact the OBA Public Affairs department and provide their input to the OBA multi-Section *Apology Act* Working Group. The members of the Committee will appreciate your input as part of the OBA submission.

View the Ontario Bar Association's
recent submissions at
www.oba.org/submissions