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Apology Legislation and the Effective Use of Apology in Dispute Resolution and Reconciliation

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Within the last decade provincial and territorial policy makers have enacted "Apology Legislation" into their statutory regimes. Apology Legislation allows a party to facilitate an expression of remorse and regret, without the fear that this expression will be later used to their detriment in litigation. This article will speak to the history of apology legislation, the benefits of apologies in the mediation arena, and the necessary components of an effective apology.

Within the last decade, there has been a trend toward apologies from celebrities and politicians in the public arena, as well as various Truth and Reconciliation Commissions. However, lawyers are trained to guard against clients unwittingly giving away legal entitlements, and in the legal arena there has always been concern that an apology can be misunderstood as an admission of liability. As a result, apologies have not been fully embraced within the legal culture.

The civil justice system has attempted to address these concerns by enacting apology legislation that puts into place legal protections around apologies. British Columbia was the first province to enact such legislation in 2006 with the stated purpose to "make the civil justice system more accessible, affordable and effective" and to "promote early and effective resolution of disputes by removing concerns about the legal impact of an apology."

In 2007, the Uniform Apology Act was proposed by the Civil Section of the Uniform Law Conference of Canada, which recommended that Canadian provinces enact legislation with similar wording as B.C.'s Apology Act. A broad definition of apology was recommended to strengthen the usefulness of apologies in the resolution of disputes and in the furtherance of interpersonal reconciliation. At present, seven provinces and one territory (British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Nova Scotia, Newfoundland and Labrador, and Nunavut) have adopted full apology legislation, with Prince Edward Island and New Brunswick adopting apology protections for medical professionals.

Regardless of apology legislation, in the mediation context, which typically requires agreement that discussion is confidential and without prejudice, apologies are generally protected from being used as

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an admission of liability. This is important, as a meaningful and genuine apology can set the right tone in a mediation and assist in more constructive communication. Further, an apology can improve understanding and often help to overcome impasse in negotiations.

Studies have shown that an effective and full apology can pave the way for a successful negotiation and improve negotiation outcomes. According to research by professor Jennifer Robbennolt of the University of Illinois, the acceptance rate for a settlement offer with a full apology was 73 per cent, as opposed to 52 per cent without an apology.

For an apology to be beneficial and effective, it must be genuine and sincere and contain some key elements. These include:

i. *Recognition*, which requires identifying specifically the offence, acknowledgement that it was wrong and appreciation of the harm done

ii. *Remorse* requires a sincere expression of regret, expressed both verbally and in body language, for the harm done;

iii. *Responsibility* requires an acceptance and acknowledgment of accountability for causing the harm;

iv. *Repentance* requires a demonstration of regret, shame and humility and is important for rebuilding trust;

v. *Reform* requires a focus on the future with a clear plan for improved behaviour.

An ineffective apology, however, can often be worse than no apology. Professor Robbennolt's studies also found that an offer with an ineffective or partial apology had an acceptance rate of only thirty five per cent — significantly lower than the no-apology acceptance rate.

If an apology is inadequate or insincere, it can feel dismissive to the offended person and may escalate the conflict. To prevent an ineffective apology, avoid using the word "if " because it casts doubt about any offence being caused at all; avoid placing blame on the offended person or a third party; avoid being vague, abstract and impersonal; and avoid going on and on once all key elements of an apology have been stated.

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The timing of an apology is also critical and may determine its success. An apology should be given within a reasonable time. If too much time passes, the apology may be seen as not genuine and motivated for other purposes.

Mediators can play an important role in assisting parties to prepare a well-constructed apology and support and mediate the apology between the parties. A mediator is in a unique position to determine the needs and expectations of the parties in relation to an apology, including what is important to the offended person and their specific needs and interests. Legal counsel in a mediation process can also be of assistance to parties with respect to apologies in various ways. In doing so, it is important for the lawyer to recognize their client's own needs, which are often broader than financial and legal concerns. Often the offended person is seeking more, such as emotional redress or the healing of a relationship. As well, the lawyer for the offender needs to appreciate that the giving of an apology may not only increase the chance of settlement but also possibly lower the financial burden for his client.

It is thus important for lawyers to recognize and be supportive of their client's need to either give or receive an apology and provide advice and assistance in the crafting, delivery and acceptance of an apology.

Mediation creates a climate where apology and reconciliation are attainable goals. Research has demonstrated that an apology can break down barriers and improve negotiation outcomes. A sincere and full apology is the key to success and the mediator and legal counsel can all play an important role in the effectiveness of an apology.

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