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Safe and Sorry: Apologies in Canada

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Canadian apology laws preclude courts, tribunals, and arbitrators from finding that an apology is an admission of liability. However, there are limits to the protection that apology laws afford. Consider the limitations when advising your client whether or not to make an apology, as well as when and how any apology should be made.

A sincere and well timed apology can be a powerful dispute resolution tool—it can overcome an impasse, it can often resolve a dispute, or it can be a critical part of a settlement in a mediation or arbitration proceeding. Yet, counsel often advise their clients against apologizing for fear that an apology will be seen as an admission of liability, particularly in front of an arbitrator who might rely on the apology when determining the award.

In response, a number of commonwealth jurisdictions have introduced apology legislation that limits the evidentiary impact of an apology in adjudicative proceedings, including arbitration. As of 2014, thirty six states in the United States, the United Kingdom, six states and two territories of Australia, and most Canadian jurisdictions have adopted apology legislation.

The scope and reach of the apology legislation varies. In the United States, relatively few states have adopted broad apology legislation that applies to any type of civil action. Most legislation is limited to malpractice or accidents and protects only expressions of sympathy or regret, but not the admission of fault. Australian statutes tend be broader, covering all civil actions, although some states have a few specific exceptions for matters such as defamation or sexual assault. With the exception of New South Wales and the Australian Capital Territory, an apology does not include an admission of fault.

In Canada, before the enactment of apology legislation, some apologies were already protected, such as admissions made without prejudice and apologies tendered during a confidential dispute resolution process such as mediation. By adopting apology legislation, most Canadian jurisdictions (AB, BC, MB, NL, NU, ON, PE, SK) now explicitly preclude parties from relying on an apology as evidence of liability in civil matters. The provincial apology laws are predominantly based on the Uniform Law Conference of Canada *Uniform Apology Act*.[1] With the exception of PEI, whose apology legislation is limited to healthcare,[2] the *Uniform Apology Act* adopted in other provinces and territories, covers all types of civil disputes and has a broad effect and offers full protection of both expressions of sympathy and admissions of fault and liability. Additionally, an apology is not "admissible in any court as evidence of the fault or liability of the person in connection with that matter."

Based on their interpretation of apology legislation, Canadian courts and tribunals have rendered decisions that make it clear that apologies do not constitute proof of liability.[3] Arbitrators are bound by apology laws in the same manner. However, while the apology legislation creates a framework that facilitates apologies and protects parties from their negative effect, it does not provide an absolute protection. The legislation defines an apology as an "an expression of sympathy or regret, a statement

[1] http://www.ulcc.ca/en/2013-victoria-bc/119-josetta-1-en-gb/uniform-actsa/apology-act-presentation-dexcuses/1425-apology-act-2.
[2] *Health Services Act*, RSPEI 1988, c H-1.6, http://canlii.ca/t/5266p.
[3] See for example *Danicek v Alexander Holburn Beaudin & Lang*, 2010 BCSC 1111; *Bilan v Wendel*, 2010 SKPC 148; *Robinson v Cragg*, 2010 ABQB 743; *DP v PB*, 2011 CanLII 11785 (ON HPARB); *Sleightholm v Metrin and another (No. 3)*, 2013 BCHRT 75; *Dupre v Patterson*, 2013 BCSC 1561.

that a person is sorry or any other words or actions indicating contrition or commiseration." The legislation, therefore, protects apologies, but not the statements that are not considered apologies within the meaning of the apology legislation. For example, extraneous statements that are not a part of an apology, such as statements regarding restitution or repayment of debt,[4] or any factual admissions[5] may be used as evidence of liability.

The protection of the apology legislation does not extend to mediation. However, the scope of the settlement privilege[6] would cover apologies tendered in mediation proceedings.

Accordingly, a sincere and well timed apology can be a powerful dispute resolution tool, but it has to be drafted properly in order to be protected by the relevant apology legislation. In particular:

Time it right: An apology offered early on may make an emotional breakthrough and assist the parties in reaching a settlement. A late apology may not only hinder the dispute resolution process, but may be given less weight.[7] More importantly, in certain cases, such as defamation, courts may look at the timing of an apology when awarding damages.[8]

Phrase it right: An apology that provides both an expression of regret and an admission of fault or liability will be protected by the relevant apology legislation. Statements that go beyond this, such as factual admissions, will not be protected by the apology legislation.

Deliver it right: It goes without saying that an apology that is not genuine or sincere, even when drafted properly, will not assist the dispute resolution process.

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[4] See, for example, *Cardinal Meat Specialists Limited v Zies Food Inc.*, 2014 ONSC 1107.
[5] *Robinson v Cragg*, 2010 ABQB 743.
[6] *Union Carbide Canada Inc. v Bombardier Inc*., 2014 SCC 35, [2014] 1 S.C.R. 800.
[7] *Law Society of Upper Canada v Mireille Simon Jocelyne Marie Landry*, 2014 ONLSHP 9.
[8] *Whitehead v Sarachman*, 2012 ONSC 6641 (CanLII) in which the trial court found that the actions of the Respondent were defamatory, but awarded a lower amount of damages in light of an apology that was made.