



ONTARIO
BAR ASSOCIATION
A Branch of the CANADIAN BAR ASSOCIATION

300-20 rue Toronto Street
Toronto, Ontario M5C 2B8
416-869-1047 1-800-668-8900
Fax/Télécopieur: 416-869-1390
www.oba.org

January 26, 2009

Lorenzo Berardinetti
Chair
Standing Committee on Justice Policy
99 Wellesley Street West Room 1405
Whitney Block
Queen's Park
Toronto, ON M7A 1A2

Dear Chair:

On behalf of the Ontario Bar Association (OBA) I am pleased to provide you with our submission on the proposed amendments to *Bill 108, Apology Act, 2008*.

The OBA represents more than 18,000 lawyers in each practice area and region across Ontario making us well positioned to offer advice on this important issue.

I trust you will find the enclosed submission both informative and helpful.

Yours truly,

Jamie Trimble
President
Ontario Bar Association



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**ONTARIO BAR ASSOCIATION
WORKING GROUP ON
*BILL 108, APOLOGY ACT, 2008***

Submitted on *January 26, 2009*

Submitted by:

Jamie Trimble
President
Ontario Bar Association

Bernard S. Morrow
Co-Chair
OBA Working Group
On the Apology Act

R. Lee Akazaki
Co-Chair
OBA Working Group
on the Apology Act

Submitted to:

Standing Committee on Justice Policy
99 Wellesley Street West Room 1405
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About the Ontario Bar Association

The Ontario Bar Association (OBA) is a branch of the Canadian Bar Association, an organization of lawyers formed to provide support by the profession to the profession so that it may render better service to its members and the public. The OBA represents 17,000 practicing lawyers, non-practicing lawyers, law professors, law students and judges. It is unique among professional associations for lawyers in Ontario in that its members are drawn from virtually every practice area and from every region.

Introduction

Not surprisingly, a remedial statute which proposes to take hold of a basic element of human interaction has also captured our members' interest. Our members recognize that the bill will be launched into uncharted waters of judicial interpretation. Ultimately, they are comforted to some extent by the fact the legislation will render apologies inadmissible in many contexts, but the parties will be free to litigate the facts to which they refer. Nor can the legislature regulate the sincerity of apologies. A genuine apology is a social virtue. An insincere one can aggravate conflict. It is up to the apologizer to get it right and to make it right.

Legislators must be sensitive to the importance of apologies to groups to whom historical injustices have been committed. The Government of Ontario is to be commended for the introduction of this bill. However, it must also ensure that the legislation, debates, discussion, and promotion, do not unintentionally undo the moral and political effect of apologies to Aboriginal peoples, here and abroad.

It is important not to stop at the role that apologies can play in the prevention and resolution of civil conflicts. The OBA urges the Government of Ontario to explore the role apologies and other instruments of reconciliation can play in achieving and enhancing restorative justice programs to which it is committed (e.g. Youth Justice Committees) or may become committed in the future, and to ensure that the legislation does not have the unintended consequence of undermining these initiatives.

Ultimately, this is an exciting development in the law of dispute resolution in Ontario. The OBA stands ready, willing and able to provide input on substantive issues arising from the bill, informed by a diversity of opinion. In view of its prior support for the private member's bill, the recommendations below are technical in nature.

Recommendations:

Section 1

The phrase, “admit fault or liability or imply an admission of fault or liability...” is grammatically repetitive, and should be tightened up to read: “admit or imply an admission of fault or liability...”

Section 2

Apologies figure in the substantive law of defamation. Bill 108 will likely not be interpreted in such a way that it will interfere with the Libel and Slander Act, R.S.O. 1990, c. 12, sections 9 and 20. However, those familiar with the Uniform *Apology Act* are aware that it was not intended to affect criminal law or provincial offences, but the drafters of Bill 108 have considered it prudent to insert an express exclusion. The OBA working group had similar concerns relating to the Libel and Slander Act.

The apparent intent of Bill 108 is to avoid application to the law of damages. It is possible that specific reference to the Libel and Slander Act may not add clarity. However, in order to avoid unnecessary litigation and confusion, the OBA Working Group calls for an amendment to the Libel and Slander Act by providing a specific exemption from the *Apology Act* for sections 9 and 20. In order to avoid ambiguity or conflict with the paramountcy provision in subsection 2(3) of the *Apology Act*, the exemption in the Libel and Slander Act should expressly state that “mitigation of damages” does not come within the ambit of the words, “fault or liability” in the *Apology Act*.

It is understood that Bill 108 differs from the Uniform Law Conference of Canada (ULCC) model in not referring to the Limitations Act, 2002, S.O. 2002, c. 24, Sch. B, s. 13, because the drafters did not want to allow debtors to avoid restarting the limitation period for an acknowledged debt, by apologizing for not paying or for being late in paying. The OBA Working Group was alerted to the possibility that if apologies are not considered admissions of liability, the judicial construction could very well be that debtors can avoid the restarting of the limitation period by saying, for example, 23 months after a loan starts, “I am very sorry I haven’t paid you, but I’ll pay in 2 months.” As with the above exemption for the Libel and Slander Act, the appropriate measure to prevent this undesired result, without interfering with the framework of Bill 108, would be to provide for the exemption in the Limitations Act, 2002. As with the Libel and Slander Act, in order to avoid ambiguity or conflict with the paramountcy provision in subsection 2(3) of the *Apology Act*, the exemption in the Limitations Act, 2002, s. 13, should expressly state that “acknowledgement of liability” does not come within the ambit of the words, “admit or imply an admission of fault or liability” in the *Apology Act*.

Working Group Members

Lee Akazaki – Co Chair

Bernard Morrow – Co-Chair

Kevin Scullion

Flora Lê

Dan Abrahams

Jean Nelson

Kenning Marchant

Barry Leon

Issack Derchansky

Barb MacFarlane

Roseanna Vaughan

Sonya Diesberger

Jennifer Hunter

Timothy Sullivan

Deborah Anshell

Joanna Chadwick

Sean Kennedy

Ruth Gottfried

Maxime Faille