Focus

ALTERNATIVE DISPUTE RESOLUTION

Strategic 'sorry'

Acceptance rate higher when offender apologizes, but it has to be genuine

Pamela Large Moran

In recent years, 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 lead to 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 have enacted full apology legislation with the key rationale being to promote dispute resolution.

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 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 an 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:

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

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

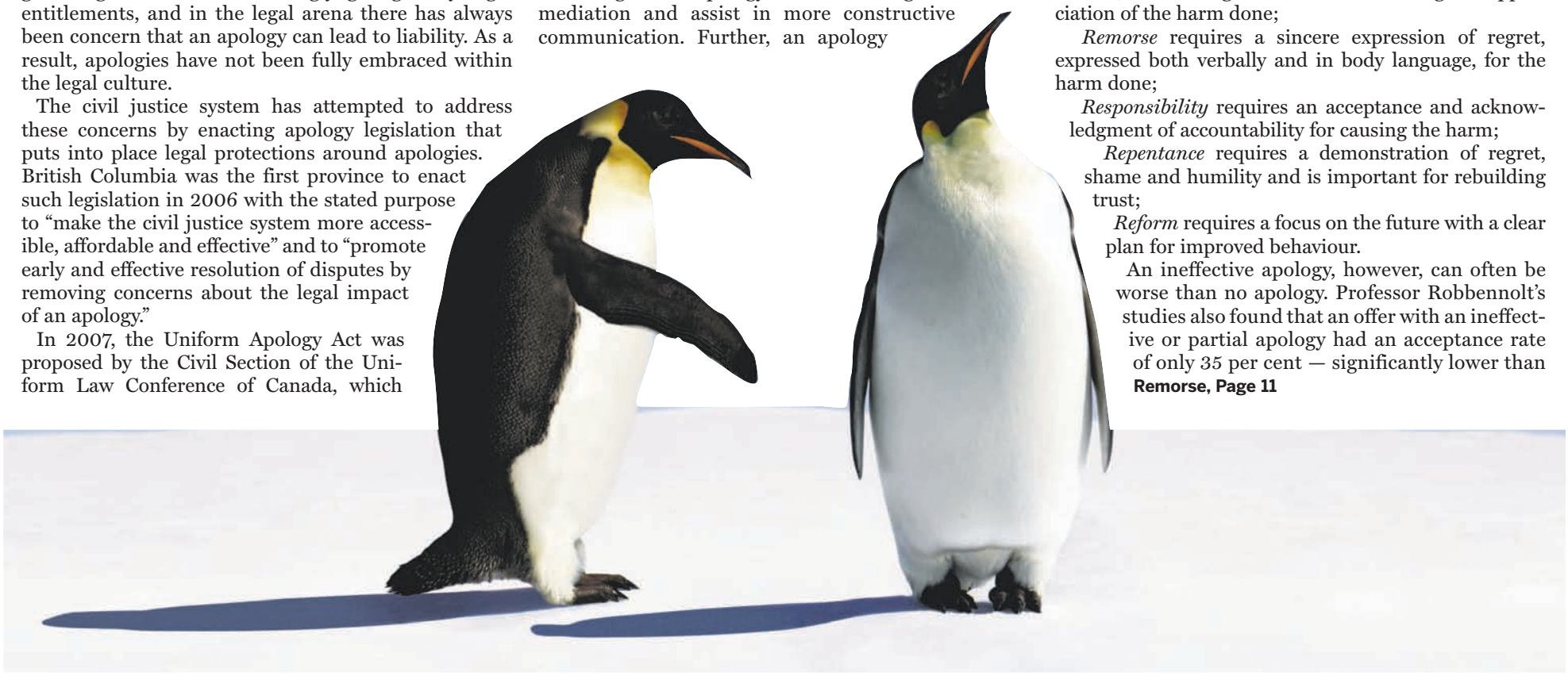
Responsibility requires an acceptance and acknowledgment of accountability for causing the harm;

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

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 35 per cent — significantly lower than

Remorse, Page 11



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Focus

ALTERNATIVE DISPUTE RESOLUTION

Construction resolution utilizes experts

Keith Bannon

Increasingly, dispute review boards are playing an important role in construction projects both in Canada and internationally, as parties appreciate the assistance of neutral experts with a familiarity with their projects who are able, on a quick and informal basis, to provide non-binding recommendations that divert disputes from what could otherwise become protracted and costly disputes.

Overview

A dispute resolution board (DRB) is set up in the contract documents at the outset of a project. Typically, it consists of one to three members who are agreed upon by both parties or selected through a nomination process. Members are selected for their subject matter expertise and, thus, experts are rarely called over the course of the board's deliberations. They familiarize themselves with the project and its key participants, and often conduct site visits at which parties make presentations to the board (Chern on Dispute Review Boards (Oxford: Blackwell Publishing, 2008) and F.E.A. Sander et al, 19 C.L.R. (2d) 194.).

Once a formal dispute has arisen, either party may refer the matter to the board; however, in rare cases, the board may intervene on its own, without the parties' consent. Hearings are held as soon as possible and the board has full control over admissibility of evidence and the manner in which it is presented. Rules of legal procedure do not apply, nor are boards based on the principle of fairness in the presentation of evidence. However, a code of ethics has been developed for DRBs (Chern; R.M. Matyas et al, Construction Dispute Review Board Manual, (New York: McGraw Hill, 1996)).

A DRB must issue written reasoned recommendations within a short, prescribed period of time. Such recommendations are not binding. If a party refuses to accept a recommendation, the contract usually provides for recourse to some further dispute resolution process to occur after substantial performance or, in some cases, total completion of the project. A party's failure to accept the board's recommendation does not in itself entitle the other party to stop performance (Chern).

> "[Dispute resolution boards] have proved to be a tremendous asset to parties wishing to advance their projects while resolving contentious issues before they develop into full-blown disputes.
>
> **Keith Bannon**
> Glaholt

Costs

Despite the early involvement of board members, the costs of DRBs appear to be significantly less than those involved in litigation, or even adjudication. A three-person dispute board typically costs between 0.05 and 0.3 per cent of total project costs, with member fees falling between $1,000 and $2,000 a day. The costs depend on the time required for the hearing, and to prepare written recommendations (Chern; Matyas et al).

Trends

A telling factor in the use of DRBs is the size of the projects for which they are employed. While DRBs are often thought to be feasible only for major projects, they are actually most often used for projects with a volume of less than $100 million (Chern).

Critiques

While DRBs are frequently hailed as a cost-effective alternative to litigation, this dispute review mechanism is not perfect. The non-binding quality of recommendations issued by the board can be a weakness, given that dissatisfied or, more crudely, "losing" parties can proceed to seek a second decision from the courts.

In addition, while the informal nature of DRB hearings is often cited as one of its strengths, the absence of procedural rules can result in a lack of confidence in the board's recommendations. The absence of lawyers at DRB hearings has been said to be a weakness, particularly where contractual interpretation and complex points of law are involved. DRBs have been criticized for appearing to place equities before contract provisions or the facts of the dispute in making recommendations.

Conclusion

Despite these concerns, DRBs have proved to be a tremendous asset to parties wishing to advance their projects while resolving contentious issues before they develop into full-blown disputes. Through DRBs, parties utilize the skills of experts in the relevant field, who have direct knowledge of the project and the interests of stakeholders, to preserve the relationship and, ultimately, ensure the success of the project.

Keith Bannon is a partner with Glaholt, practising in construction litigation, and authored "Recent Developments in Alternative Dispute Resolution" in Review of Construction Law. The author would like to thank Safia Lakhani, Student-at-law for her assistance.

Remorse: Avoid using the word 'if' and placing blame on a third party

Continued from page 10

the no-apology acceptance rate. If it is inadequate or insincere, an apology 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.

The timing of an apology is also critical and may determine the outcome. An apology should be given within a reasonable time. If too much time passes, the apology may be seen as not genuine and motivated by 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 environment 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.

Pamela Large Moran is a former Toronto litigator who now practices as a mediator and arbitrator based in Atlantic Canada. She is past vice-president of the ADR Institute of Canada.

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