



ISSN 1710-9442

Legislative Assembly
of Ontario

First Session, 39th Parliament

Assemblée législative
de l'Ontario

Première session, 39^e législature

**Official Report
of Debates
(Hansard)**

Thursday 26 February 2009

**Journal
des débats
(Hansard)**

Jeudi 26 février 2009

**Standing Committee on
Justice Policy**

Apology Act, 2009

**Comité permanent
de la justice**

Loi de 2009 sur
la présentation d'excuses

Chair: Lorenzo Berardinetti
Clerk: Susan Sourial

Président : Lorenzo Berardinetti
Greffière : Susan Sourial

Hansard on the Internet

Hansard and other documents of the Legislative Assembly can be on your personal computer within hours after each sitting. The address is:

<http://www.ontla.on.ca/>

Index inquiries

Reference to a cumulative index of previous issues may be obtained by calling the Hansard Reporting Service indexing staff at 416-325-7410 or 325-3708.

Le Journal des débats sur Internet

L'adresse pour faire paraître sur votre ordinateur personnel le Journal et d'autres documents de l'Assemblée législative en quelques heures seulement après la séance est :

Renseignements sur l'index

Adressez vos questions portant sur des numéros précédents du Journal des débats au personnel de l'index, qui vous fourniront des références aux pages dans l'index cumulatif, en composant le 416-325-7410 ou le 325-3708.

Hansard Reporting and Interpretation Services
Room 500, West Wing, Legislative Building
111 Wellesley Street West, Queen's Park
Toronto ON M7A 1A2
Telephone 416-325-7400; fax 416-325-7430
Published by the Legislative Assembly of Ontario



Service du Journal des débats et d'interprétation
Salle 500, aile ouest, Édifice du Parlement
111, rue Wellesley ouest, Queen's Park
Toronto ON M7A 1A2
Téléphone, 416-325-7400; télécopieur, 416-325-7430
Publié par l'Assemblée législative de l'Ontario

LEGISLATIVE ASSEMBLY OF ONTARIO

ASSEMBLÉE LÉGISLATIVE DE L'ONTARIO

STANDING COMMITTEE ON JUSTICE POLICY

COMITÉ PERMANENT DE LA JUSTICE

Thursday 26 February 2009

Jeudi 26 février 2009

The committee met at 1400 in committee room 1.

The Vice-Chair (Mr. Jeff Leal): We will bring this meeting of the Standing Committee on Justice Policy to order. We have four things to handle this afternoon. First of all, we've got to deal with three subcommittee reports—sorry, Mr. Kormos?

Mr. Peter Kormos: Please don't apologize.

The Vice-Chair (Mr. Jeff Leal): Very good for a Thursday afternoon.

Mr. Peter Kormos: It's simply not necessary.

I listened to the very passionate and articulate declaration by the Minister of Agriculture this morning in response to a question, from my colleague Mr. Miller, about how really it's all about buying Ontario agricultural products. This has rotted my socks for years here; it's not the first time I've raised this on a point of order. I don't know about where you come from, but I'm a little further south from you and we don't grow oranges in Niagara. They don't even grow them down there along Lake Erie. What's the—

The Vice-Chair (Mr. Jeff Leal): Point Pelee.

Mr. Peter Kormos: Point Pelee, Pelee Island. They don't grow oranges there, either. For the life of me, why we can't demonstrate by practice here at the assembly and use everything, including the fruit juices, that is Ontario-based produce just blows my mind and contradicts everything the minister says and everything that we all agree on. This is not a good example. These shouldn't be in committee rooms; they shouldn't be for sale downstairs in the cafeteria. We should be selling produce that's made in Ontario, grown in Ontario.

The Vice-Chair (Mr. Jeff Leal): Mr. Kormos, perhaps not a point of order, but a very interesting comment on the refreshments and beverages we serve here ..and the fine clerk sitting beside me here, Susan, will certainly make note of that and we'll see what we can do on that one.

I could share a story about Mr. Whelan when he was agriculture minister, but I won't. I'll tell you sometime.

Mr. Peter Kormos: Did he have his hat on or off?

The Vice-Chair (Mr. Jeff Leal): Had it off.

SUBCOMMITTEE REPORTS

The Vice-Chair (Mr. Jeff Leal): Now we've got to handle the business of committee. Ms. Broten will deal

with the first subcommittee report, dated November 5, 2008. Ms. Broten, please.

Ms. Laurel C. Broten: This is a summary of the decisions made at the subcommittee on committee business.

Your subcommittee on committee business met on Wednesday, November 5, 2008, to consider the method of proceeding on Bill 108, An Act respecting apologies, and recommends the following:

(1) That the committee clerk, with the authority of the Chair, post information regarding the committee's business one day in the following publications: the National Post, the Globe and Mail, the Toronto Star, the Toronto Sun, L'Express, the Lawyers Weekly, and Ontario Reports.

(2) The committee clerk will also post information regarding the committee's business on the Ontario parliamentary channel and on the committee's website.

(3) That interested people who wish to be considered to make an oral presentation on Bill 108 should contact the committee clerk by 12 noon on Monday, December 8, 2008.

(4) That on Monday, December 8, 2008, the committee clerk provide the subcommittee members with an electronic list of all requests to appear.

(5) That after the list of requests to appear has been distributed to the subcommittee, the subcommittee meet to determine all aspects of the public hearings (presenters, dates, locations, times, duration of presentations etc.) and of the clause-by-clause consideration.

(6) That legislative research prepare background material and arguments for and against the legislation, as described in academic journals, and a survey on apology statutes in other jurisdictions.

(7) That the committee clerk, in consultation with the Chair, be authorized, prior to the passage of the report of the subcommittee, to commence making any preliminary arrangements necessary to facilitate the committee's proceedings.

The Vice-Chair (Mr. Jeff Leal): Thank you Ms. Broten. Comments or questions? All in favour? Carried.

Ms. Broten, please, the December 9, 2008, subcommittee report.

Ms. Laurel C. Broten: Thank you. This is a summary of decisions made at the subcommittee on committee business.

Your subcommittee on committee business met on Tuesday, December 9, 2008, to consider further the

method of proceeding on Bill 108, An Act respecting apologies, and recommends the following:

(1) That the committee clerk post a notice regarding the deadline for written submissions on the Ontario parliamentary channel and on the committee's website.

(2) That the committee clerk contact the 11 groups and individuals who have requested to appear and ask them to submit written comments.

(3) That the deadline for written submissions be 5 p.m. Tuesday, February 17, 2009.

(4) That written submissions be distributed to committee members electronically and upon receipt.

(5) That legislative research prepare a summary of all written submissions received.

(6) That, after the deadline for written submissions has passed, the subcommittee meet to determine a date/dates for clause-by-clause consideration of the bill.

(7) That the committee clerk, in consultation with the Chair, be authorized, prior to the passage of the report of the subcommittee, to commence making any preliminary arrangements necessary to facilitate the committee's proceedings.

The Vice-Chair (Mr. Jeff Leal): Thank you, Ms. Broten. Comments or questions? All in favour? Carried.

Ms. Broten, the one dated February 23, 2009.

Ms. Laurel C. Broten: This is a summary of decisions made at the subcommittee on committee business.

Your subcommittee on committee business met on Monday, February 23, 2009, to consider further the method of proceeding on Bill 108, An Act respecting apologies, and recommends the following:

(1) That the committee hold one day of clause-by-clause consideration during its regular meeting time on the afternoon of Thursday, February 26, 2009.

(2) That the deadline, for administrative purposes, for filing amendments be 12 noon, Wednesday, February 25, 2009.

(3) That the committee clerk, in consultation with the Chair, be authorized, prior to the passage of the report of the subcommittee, to commence making any preliminary arrangements necessary to facilitate the committee's proceedings.

The Vice-Chair (Mr. Jeff Leal): Thanks very much. Comments or questions? All in favour? Carried.

APOLOGY ACT, 2009

LOI DE 2009 SUR

LA PRÉSENTATION D'EXCUSES

Consideration of Bill 108, An Act respecting apologies / Projet de loi 108, Loi concernant la présentation d'excuses.

The Vice-Chair (Mr. Jeff Leal): We'll now go to clause-by-clause consideration of the bill. Are there any comments, questions or amendments to any section of the bill and, if so, to which section? We'll start with section 1. There are no amendments proposed for section 1. Shall section 1 carry?

Mr. Kormos, please. Debate?

Mr. Peter Kormos: Thank you, yes. This isn't going to last a whole lot of time this afternoon. The bill's not lengthy. This and obviously section 2 are the two key parts of the bill and the ones around which, if there was to be controversy, that controversy would be focused.

I want to thank Mr. Charlton for compiling the material that he did. I'm pretty familiar with the literature on apology legislation and on the sociological stuff, *Mea Culpa* among others, that has been written about it.

I don't dispute, on behalf of New Democrats, the meaningfulness of an apology, the extent to which it can remedy those damages that can't be compensated monetarily. Anybody who has been in a relationship, married or not, knows full well that an apology not only just may save a relationship but at times can be critical to saving a relationship, and some people learn that the hard way. Indeed, the literature talks about what constitutes the most meaningful apology. I've talked at times about the five key elements of an apology; I'm not going to repeat them here.

1410

You've heard me say, on behalf of New Democrats, that we agree that the simple apology should not be admissible as evidence of liability. I'm going to explain it one more time. I can go to any one of you and apologize for the death of a family member: "I'm sorry." That doesn't mean I'm in any way, shape or form responsible for it.

As a doctor, I can go to a patient and say, "I'm just truly sorry that you have this post-operative infection." That doesn't in any way, shape or form constitute probative evidence of liability. In fact, to allow it to be introduced—what is it that those lawyers say? The prejudicial value may overcome the probative value. Not so much a judge—some judges, maybe—but a jury, for instance, might read something into it that isn't there. You can be very sorry about somebody's misfortune, injury or loss, monetary or otherwise, without being liable or responsible for it.

So I have no quarrel with the common sense, because what this is—although it isn't an amendment to the Evidence Act, it could well be—is the exclusion of evidence. I'd suggest that most judges would exclude "I'm sorry" in any event, either in their own minds in determining liability or in terms of giving that evidence to the jury.

What I find incredibly difficult about this whole premise is that it also excludes from evidence an admission of liability, as long as you say, "I'm sorry." So, to me, there's a big difference between walking up to a pedestrian whose legs have been broken at a crosswalk after I've mowed them down, walking up to them and saying, "I'm sorry this happened"—there could be any number of reasons why it happened, none of which would be liability on my part. He or she might have been walking against the red light. I could still be very sorry. I would be. If I ever hit a pedestrian, I'd be very sorry. Whether it was their fault or mine, I'd still be very sorry. There's a

difference between that and saying that to, let's say, a person who was walking against a red light, and staggering out of my car and saying, "I'm sorry that I mowed you down because I'm drunk as a skunk and I went through the red light." It just doesn't make sense to exclude that admission of liability as evidence of liability. As you folks know, in the United States there's a potpourri of apology legislation; you've read the material. A good chunk of it only excludes the bare "I'm sorry," and I say for good reason.

Now, the other part of "I'm sorry" and "I admit liability" is that, and if you read the submissions—I'm sure everybody did—after the RAO, page 6, it's noted in that submission that an apology during the course of settlement, even an admission of liability during the course of settlement, is privileged information. It cannot be used in court. If it's in the course of a mediation, whether it's the court-ordered mediations here in Toronto or whether it's parties who choose to go before a mediator—mediations and settlement discussions are all about parties being entitled to be very frank and candid, including being able to say, not just "I'm sorry," but "We know we did it." Then you proceed from there. That cannot be entered as evidence. That's privileged communication. The law is very clear on that.

That's why, I've got to tell you, Dr. Barbara Landau gave me a call. She's been here working, and I'm familiar with her work and the literature she's published and the work that she does here in Toronto as a mediator, amongst other things. I talked to her and Heather Swartz, the head of the Ontario ADR association. They were very concerned that the bill wasn't going to pass. I said, "Don't worry; the bill is going to pass. I won't be voting for it, but the bill will pass," because they understand the effectiveness of an apology and admissions of liability in the course of mediation, but they also understood that mediation is privileged, that it isn't admissible in any event; that is, with the mediator, whether it's two lawyers exchanging letter, whether it's two lawyers sitting in a pre-trial conference with the judge, the whole nine yards.

I personally am very troubled that we would deny a plaintiff the most obvious evidence, and that is an admission of liability: I was drunk and I shouldn't have been driving that fast. The observation by the RAO—and I like nurses; I respect their association. On page 4, they make reference to writings by Russell Getz, who's defending the uniform apology act: "Russell Getz cautions against overstating the role of an apology in proving liability. He writes that requiring plaintiffs to prove their case on the facts is not an undue hardship and an apology, or its absence, is rarely determinative." Well, I agree. You see, the RAO has a motive for supporting this legislation, and I'll get to that in just a second.

An apology is rarely determinative—I agree. An admission of liability is very determinative. The suggestion that somehow plaintiffs don't have any trouble proving their cases is a pretty strong leap. I'm talking about, I suppose, as often as not, plaintiffs in motor vehicle accident cases—innocent victims. A pedestrian all alone,

a bicyclist all alone, when there aren't people standing by, is often left with their version versus the other party's version. Judges and/or juries are put in very difficult positions. The test is but balance of probabilities and that means there's a whole space in the middle that's vacant and the teeter-totter can shift heavily this way or heavily that way, yet an admission of liability, it seems to me, would be a very effective form of evidence. Not the apology—that should be excluded—but an admission of liability. And trust me, plaintiffs do have hard times proving their cases to the point where they often simply give up and settle for far less than what the damages actually are.

I'm also worried about the phenomenon of cynical apologies, contrived apologies. Ms. Elliott spoke about this when she spoke about this bill on second reading. It's become part of the norm of mediation practice and teachings. Fisher and Ury, what's it called? Getting to Yes. And that principle of negotiation—principle, my foot. Because while they talk about interests, they also talk about using every tactic available to you, including an apology. They talk about an apology as a tactic, and it is. In a settlement process, a defence lawyer, if he or she thinks that an apology to the victim may soften them up—because look at the position victims are in. And I'm not talking about two weeks' worth of whiplash, I'm talking about something lifelong, because that's what you sue for nowadays, right? It's got to be a catastrophic injury. So they've been in pain, their life has been destroyed, they've been waiting months and months, maybe years, and they've been living on a pittance on the no-fault portion of insurance, if that hasn't been cut off as a means of pressuring them to settle. They're in that mediation room and they're ready to give up in any event. Emotionally, these people are just wrecks, and you get somebody affecting: "I'm so sorry. I identify. I empathize. We're just so sorry." At that point, the emotional impact of that can be very potent if the apology is but a tactic.

1420

Finally, people talk about apologizing but not wanting to be liable for their conduct. Horse feathers. What kind of culture are we creating? I want to create a culture or live in a culture where people are accountable for their misbehaviour. I don't want to protect wrongdoers from being responsible. For Pete's sake, that's the wrong direction. If you cause somebody injury, you should be apologizing. You should be fessing up and you should be paying.

The motivators behind this are the insurance industry. That's who motivated it in the United States, especially the health—you see the submission from the insurer for physicians, doctors and the Ontario Hospital Association. This is all because they make reference to the fact that where we have apology acts, we have lower settlements. This is not the United States. We don't have multi-million-dollar settlements or awards in Canada. We've got the Supreme Court of Canada trilogy of cases. Ms.

Broten knows about that. We have remarkably strong caps on pain and suffering—again, sadly strong caps.

I'm sorry, my friends. I understand the phenomenon of apologies. I understand the emotional and psychological impact. I understand their value, but I don't think any of that supports this legislation. The mediation community says, "We need this legislation." I said, "You know darned well you don't." There's been litigation about the privilege of mediation sessions and the compellability of a mediator. Courts have been pretty clear. I can't say very clear. Courts are never very clear, but pretty clear that a mediator is not compellable as a witness. And then I'm going to have a little more to say because there's an interesting amendment coming from, of all people, the Advocate's Society.

These are my concerns. I suspect the bill is going to pass. I know the OBA supports it, the mediators support it, the insurance companies and the medical profession support it because of course they're scared to death of liability and settlement and the costs associated with it. I, quite frankly, am amazed that the plaintiffs' bar—because it was well advertised—was not more responsive. We have nothing from the plaintiffs' bar, and I say God bless. They've been given fair warning, because I know for sure, dollars to doughnuts, I'm going to get a phone call, or one of you are, saying, "What the heck is going on? I've been preparing my case based on the admission of liability by the defendant."

I'm going to be voting against this section.

The Vice-Chair (Mr. Jeff Leal): Further debate on section 1? Ms. Broten, please.

Ms. Laurel C. Broten: I'll just speak very briefly. I certainly hear Mr. Kormos's perspective and I'll just take a brief moment to reiterate that I think the rest of us around the table come at it from a different perspective. We know and have observed and have been apprised of situations where people and organizations are reluctant to apologize after an accident or incident of wrongdoing out of a fear that that apology would be used as evidence of liability in a civil court proceeding. In so many instances, the ability to offer a sincere apology without legal consequences can and has been an impetus for the resolution of disputes inside/outside of court and lengthy, costly lawsuits.

Having been apprised of the work that was done in the development of this legislation with some very respected members of the plaintiffs' bar and having heard from those individuals that they too shared this perspective—among others, Jamie Trimble, who is the president of the Ontario Bar Association. His statement is: "An apology should not be something that can be used in a lawsuit later on to establish the liability of another party, nor should it be able to be used by one party to prevent the ability of another to seek justice."

As Mr. Kormos said, there is a long-standing history with respect to the exclusion of exchanges that transpire in the context of settlement or mediation and the steps that we are taking here will not in any way affect that, but we are moving forward with confidence that we will

assist some cases in seeking resolution. The history of the evidence that we are seeing emerging in the US is that there is some strong empirical evidence that apologies can reduce litigation and promote early resolution of disputes. That's the goal that we have in mind today.

The Vice-Chair (Mr. Jeff Leal): Thanks very much, Ms. Broten. Mr. Kormos, please?

Mr. Peter Kormos: Again, the reference is to apologies, not apologies and admissions of liability. I find that interesting.

Having said that, I find it passing strange—Ms. Broten doesn't call the shots here—that the government of Ontario, using the deep pockets of the provincial treasury, is litigating, and undoubtedly spending a whole lot of money, and forcing the plaintiffs to spend a whole lot of money, in the SARS case, forcing them into appeals and utterly prepared to go all out.

I'm an advocate of settlement. I believe that alternative dispute resolution is oftentimes preferable to the court process, but I don't believe in settlement at any cost. Also, I believe that settlements can have a peculiar view of mediation; I think that mediation should ensure that settlements are just settlements and not desperation settlements. But it's interesting that the government of Ontario, sponsor of this legislation, right now is forcing victims of SARS to spend a fortune in legal fees, and spending a fortune in legal fees themselves, when in fact they should be sitting down with those same plaintiffs and negotiating a settlement. And if it takes saying "I'm sorry" to get them receptive to the prospect of settlement, then for Pete's sake, say "I'm sorry." Perhaps they're waiting for this legislation.

The Vice-Chair (Mr. Jeff Leal): Thank you very much.

Mr. Peter Kormos: Recorded vote, please.

The Vice-Chair (Mr. Jeff Leal): Any further discussion? A recorded vote has been requested. All in favour of section 1?

Ayes

Broten, Brownell, Elliott, Naqvi, Rinaldi, Sousa.

Nays

Kormos.

The Vice-Chair (Mr. Jeff Leal): Section 1 carries.

Section 2: Mrs. Elliott, please; you have an amendment?

Mrs. Christine Elliott: I move that subsection 2(3) of the bill be struck out and the following substituted:

"Evidence of apology not admissible

"(3) Despite any other act or law, evidence of an apology made by or on behalf of a person in connection with any matter is not admissible in any civil proceeding, administrative proceeding or arbitration as evidence of the fault or liability of any person in connection with that matter, unless the apology is made after a proceeding or

arbitration with respect to that matter has been commenced by the issuance of a claim, notice of hearing, notice of arbitration or similar document.”

Mr. Chair, if I may say, this is in response to a recommendation that was made by the Advocate’s Society. It’s a slight variation on the amendment that was proposed by them. I am supporting this because of the concern that I have had throughout this process between the use of this and its ability to effect settlements, if sincerely made, versus it being used as just a tool for settlements

I understand and appreciate the comments that Mr. Kormos has made and I certainly have struggled with them myself, but in my view what this proposed amendment does is to distinguish between apologies made before a proceeding is brought and apologies made afterwards. Certainly, if an apology is made in advance and is a sincere attempt to settle the issue and to really be truly sincere in that respect, that’s fine; it won’t be used. Once an action has been commenced, clearly there is an indication that the person intends to proceed with it and therefore there’s no reason why an apology should not be admitted as evidence of liability in that situation. That’s why I’m proposing this, and I think it is a way of dealing with weeding out insincere apologies.

1430

The Vice-Chair (Mr. Jean-Marc Lalonde): Thank you, Ms. Elliott. Further discussion? Ms. Broten, please.

Ms. Laurel C. Broten: Thank you very much, Chair. The government will not be supporting this amendment. Those who follow litigation proceedings know that there can be months or years that transpire between the issuance of a claim or a notice of hearing and the ultimate resolution. We don’t want to reduce the opportunity for the advancement of meaningful apologies and resolutions of the matter sometime during that proceeding. There may be instances where, as the result of statutes of limitations, proceedings are commenced quickly in order to preserve the rights, and parties can continue to enter into discussions.

In the next few moments I will be putting forward a government resolution with respect to section 2 which will speak somewhat to these same issues.

The Vice-Chair (Mr. Jeff Leal): Mr. Kormos, please.

Mr. Peter Kormos: It’s a most interesting amendment. I’ll tell you why I think so. The apology of course is not just an apology. An apology includes an admission of liability, in a way. We’ve created this artificial apology by virtue of section 1. An apology isn’t just, “I’m sorry.” The apology is, “I shot your dog, and I smothered your grandmother, and I’m sorry.”

The Vice-Chair (Mr. Jeff Leal): Gosh.

Mr. Peter Kormos: That’s an apology, by definition, because it’s an apology with an admission of liability. What the Advocate’s Society has done is realize that with this legislation there’s the risk that in the course of examinations for discovery, a person could, under oath, say, “I shot your dog and I smothered your grandmother, but I’m sorry,” and that sworn evidence would not be admissible as an admission of liability. Ms. Elliott can correct me if

I’m wrong in terms of understanding what the Advocate’s Society is getting at.

And I’m not talking about the Advocate’s Society; I’m talking about what they’re addressing: What a ludicrous proposition, that a defendant could admit to the misconduct under oath and, as long as “I’m sorry” is attached to it, it’s not admissible. Wow. That, to me, is a doubly repugnant proposition.

Ms. Broten has two babies; she’s busy. But I’m surprised that she didn’t comment on the fact that an admission of liability made in the heat of the moment could sometimes be an inaccurate admission of liability. Did I put that fairly? Could I advance that argument on your behalf?

Ms. Laurel C. Broten: Certainly you may.

Mr. Peter Kormos: That’s right. I acknowledge that, but of course that still doesn’t counter my argument, because a person is always entitled to rebut that and say, “No, I was so harried, and I felt so bad about the person that I thought it must have been my fault, until I found out that in fact they were crossing against the red light as a pedestrian.” But here a person could, under oath, in an examination for discovery, admit to the wrongdoing, admit to being drunk as a skunk, admit to loading the shells into the rifle, and the Advocate’s Society is concerned that as long as he or she, under oath, says, “But by the way, I’m sorry,” that evidence is inadmissible. Isn’t that an absurdity, Chair? What do you think?

The Vice-Chair (Mr. Jeff Leal): I’m listening intently to your remarks, Mr. Kormos.

Mr. Peter Kormos: It strikes me as an absolute absurdity. I indeed support this amendment. It doesn’t undo the damage, but it avoids some of those just bizarre scenarios that leave people walking away from a courthouse, after paying tens or hundreds of thousands of dollars in legal fees, shaking their heads, saying, “Justice doesn’t exist in this province.”

The Vice-Chair (Mr. Jeff Leal): Any further discussion on this amendment? Do you want a recorded vote?

Mrs. Christine Elliott: Yes, please

Ayes

Elliott, Kormos.

Nays

Broten, Brownell, Naqvi, Rinaldi, Sousa.

The Vice-Chair (Mr. Jeff Leal): The amendment is defeated.

Ms. Broten, you have one.

Ms. Laurel C. Broten: I move that section 2 of the bill be amended by adding the following subsection:

Exception:

(4) However, if a person makes an apology while testifying at a civil proceeding, including while testifying at an out-of-court examination in the context of the civil

proceeding, at an administrative proceeding or at an arbitration, this section does not apply to the apology for the purposes of that proceeding or arbitration.

The government advances this amendment as a clarification. We do not think that the court would have excluded that evidence in the context of the litigation proceeding itself, but in response to the submissions being advanced by the Advocate's Society, and as a mechanism to ensure that in circumstances where a formal process of evidence collection is under way, that that evidence can be brought forward.

The Vice-Chair (Mr. Jeff Leal): Thank you. Further discussion? Mr. Kormos, please.

Mr. Peter Kormos: I'm troubled by the failure to utilize the amendment proposed by the Advocate's Society. The Advocate's Society are senior litigation lawyers in the province, both the plaintiff and the defence bar, aren't they Ms. Elliott? So these are people who know their stuff. They're the best-paid lawyers in town, I bet you. Some of them have been on the government's own \$800-an-hour payroll from time to time.

I just would ask Ms. Broten why the government prefers its version, which purports to address the same thing, and not the Advocate's Society's, which seems to have the capacity to be a little broader.

Ms. Laurel C. Broten: The Advocate's Society amendment, in line with that being advanced by Ms. Elliott, where the application of the act to apologies would not be allowed where legal claims has commenced: Is that the amendment you're referring to—the back one?

Mr. Peter Kormos: Yes.

Ms. Laurel C. Broten: It's our view that this could possibly limit the benefit of the act's incentive to apologize and create a circumstance whereby wrongdoers would consult with their counsel before apologizing, a circumstance where there can certainly be, as indicated earlier, a long time between the start of a proceeding and a trial, a period where apologies may be helpful outside of formal settlement discussions.

At the same time, if during the context of an examination for discovery or other a witness brings forward that evidence, that evidence is appropriately within the context of the proceedings, and certainly not in keeping with the intension of true, honest, genuine apologies, which come from a human interaction—for example, between Ms. Elliott and myself, where I would apologize to her.

It's not a very sensitive form of apology when you're being cross-examined under oath. So we're giving a clear distinction between those two human interactions: one being very human, being one that could help the healing process, and the other which is clearly a discussion within the context of litigation.

The Vice-Chair (Mr. Jeff Leal): Mr. Kormos, please.

Mr. Peter Kormos: It's interesting, because it raises the spectre of there being press regulations. Is there regulation-making power in this bill? There being regulations—well, there could always be amendments, or

perhaps a chart, saying, "If the apology is accompanied by tears, it ranks as a one-star apology; if it's accompanied by copious, you know, gasping, hysterical crying, then it's a three-star; if the person offers to sever their own left arm, like an eye for an eye and a tooth for a tooth, then it's a five-star apology."

Ms. Broten, I enjoy you, but you were talking about the sincerity of an apology. Are we going to start judging this? We want face-to-face apologies? Look, with that argument, what about a person in examination for discovery, because I trust that the out-of-court examination is specifically designed to talk about discovery. What if the person just collapses?

You're too young to remember Perry Mason—Raymond Burr was a Canadian actor. He always got the accused. It was only a 30-minute show, too. This isn't Law and Order, where it's an hour, and oftentimes they lose, as you know, on Law and Order. But Perry Mason, within 30 minutes—Hamilton Burger would be the other lawyer.

The Vice-Chair (Mr. Jeff Leal): He always lost, Hamilton.

Mr. Peter Kormos: Perry Mason would get the witness, the accused, the defendant, to break down and say, "I confess," in a mere 30 minutes. In a mere 30 minutes, Perry Mason would get the person to confess and break down.

1440

To be fair, what if, in an examination for discovery—and I'm arguing your case now—you had a defendant, a car driver, who says, contrary to the advice of the insurance company lawyer, "I just can't take this anymore. I can't take the lies." I'm channelling one of those Perry Mason cross-examinations. "I can't take the lies. I'm just so sorry I've been wracked with guilt. I did it. Can't we settle this?" You're saying on the first hand, about your amendment, about the Advocate's Society proposition, that people should be able to say that, and you're saying you want it to be sincere. How could it be more sincere than if it was under oath? And that's an apology, an admission of guilt long after the incident. You're no longer rattled—you've been in a car accident, I suspect. You're rattled. It's such a weird phenomenon; you're rattled. They're no longer rattled, they just can't take the insurance companies' lying anymore, because insurance companies, of course, lie their butts off to protect their interests. They just can't take it anymore; they don't care what the insurance company lawyer told them. They're going to say, "No. I'm wracked with guilt. I'm sorry. I just want to settle this."

You still want to use that, notwithstanding your support for Bill 108, as an admission of liability that's admissible in court. What more sincere apology and admission of liability could there be in a person under oath, especially if they cried a lot? The whole thing: the Kleenex, the mucus, the tears, the gasping, the sniffing. You don't want your bill to apply to that? I guess not.

I'm going to support this amendment, because I think it helps to remedy some of the dangers proposed by the—

The Vice-Chair (Mr. Jeff Leal): Any further discussion? All in favour of the amendment? It is carried.

Shall section 2, as amended, carry?

Mr. Peter Kormos: Recorded vote, please.

The Vice-Chair (Mr. Jeff Leal): All in favour of section 2, as amended?

Ayes

Broten, Brownell, Elliott, Naqvi, Rinaldi, Sousa.

Nays

Kormos.

The Vice-Chair (Mr. Jeff Leal): Section 2 carries.

There are no amendments to section 3. Shall section 3 carry?

Mr. Peter Kormos: One moment.

The Vice-Chair (Mr. Jeff Leal): Mr. Kormos, please?

Mr. Peter Kormos: This is the crux of the issue. This is the exclusionary rule. This is the ultimate harm, here. This is what says it's not admissible. Good, probative evidence is not admissible, evidence that a person has the opportunity to refute or recant under oath. Good, probative evidence is not admissible. If I can't support this, I can't support the other sections, can I?

Recorded vote.

The Vice-Chair (Mr. Jeff Leal): Any further discussion on section 3? A recorded vote has been requested.

Ayes

Broten, Brownell, Naqvi, Rinaldi, Sousa.

Nays

Kormos.

The Vice-Chair (Mr. Jeff Leal): Section 3 carries.

Ms. Broten, you have a new section, section 3.1.

Ms. Laurel C. Broten: Yes.

I move that the bill be amended by adding the following section:

“Acknowledgement, Limitations Act, 2002

“3.1 For the purposes of section 13 of the Limitations Act, 2002, nothing in this act,

“(a) affects whether an apology constitutes an acknowledgment of liability; or

“(b) prevents an apology from being admitted in evidence.”

The Vice-Chair (Mr. Jeff Leal): Discussion? Ms. Broten, please.

Ms. Laurel C. Broten: This arises out of advice from the OBA and speaks directly to the circumstance whereby a debt may be acknowledged. Section 13 of the Limitations Act reads: “If a person acknowledges liabil-

ity in respect of a claim for payment of a liquidated sum, the recovery of personal property, the enforcement of a charge on personal property or relief from enforcement of a charge on personal property, the act or omission on which the claim is based shall be deemed to have taken place on the day on which the acknowledgment was made.”

If the acknowledgment is advanced in combination with an apology, this section continues to have that acknowledgment apply in the context of not having a conclusion to the limitation period.

The Vice-Chair (Mr. Jeff Leal): Discussion? Mr. Kormos.

Mr. Peter Kormos: What we're saying is that this prevents—or triggers an extension of the limitation period; is that right?

Ms. Laurel C. Broten: Yes; will continue to trigger the extension.

Mr. Peter Kormos: Talk about wanting to have it every which way. They want admissions of liability to—and I think the example used was, “I'm sorry; I owe you the money,” in the submission that was put to you. “I'm very sorry I haven't paid you, but I'll pay in two months,” triggering the commencement of the limitation period. Is that correct?

Ms. Laurel C. Broten: Triggering the continuation of the limitation period, yes.

Mr. Peter Kormos: The expansion?

Ms. Laurel C. Broten: Expansion. Certainly, in keeping with, I would suspect, all of our views, that if an individual advances recognition or acknowledgement of a debt owed, the current Limitations Act allows that the limitation commences as of that day and recontinues, and if that's combined with an apology, we should expect it to be no different.

Mr. Peter Kormos: Wait a minute. Help us with section 13—this applies only to a debt, not to a personal injury. That's not fair, is it?

Ms. Laurel C. Broten: Certainly, on the advice of the OBA, we felt that this is a responsible approach to the mechanism of limitations periods surrounding the repayment and claims for personal debt.

Mr. Peter Kormos: Chair?

The Vice-Chair (Mr. Jeff Leal): Mr. Kormos, please?

Mr. Peter Kormos: This is Alice in Wonderland. The Mad Hatter is romping through this room. The government wants to protect the interests of a creditor when it comes to liability, but not the interests of a person who's been maimed, an innocent victim, about whom there are still limitation periods. There was just an act passed a few years ago where there was an attempt to universalize the time frame.

I'm going to vote against this, just on principle. It's consistent with what I believe, that admissions of liability should be admissions of liability, whether you say you're sorry or not. It's absurd that the government would allow this to be applied to Household Finance Corp., if there is such a company anymore, or whatever those people are

who charge outrageous 28% interest rates. It would allow them to benefit from an apology with an admission of liability, but it wouldn't allow a person who was maimed. This is nuts. This is the world upside down.

The Vice-Chair (Mr. Jeff Leal): Mrs. Elliott, please?

Mrs. Christine Elliott: I agree with Mr. Kormos. I can't understand why there would be a distinction drawn for the two types of situations. It makes no sense to me either.

The Vice-Chair (Mr. Jeff Leal): Ms. Broten?

Ms. Laurel C. Broten: I would conclude simply by saying that it would—certainly in the government's perspective, we do not want to see the establishment of a rule whereby someone in the context of acknowledging a debt and simply apologizing for not paying can result in the extinction of rights that have been established in the context of the Limitations Act and longstanding principles with respect to that debt recovery.

The Vice-Chair (Mr. Jeff Leal): Mr. Kormos, please?

1450

Mr. Peter Kormos: What about acknowledging a personal injury? Look—and I'm being deadly serious—what about a rapist, against whom a victim would surely have a civil claim, although it's not advanced as often as it should be, where the limitation period is running right up against the wire, and the rapist, for whatever reason wants to apologize and admit liability? On principle, I'm voting against it. This is outrageous stuff. I appreciate Ms. Broten's best efforts to explain it; I really do. It's not easy.

Recorded vote, please, sir.

The Vice-Chair (Mr. Jeff Leal): Okay. Shall section 3.1 carry?

Ayes

Broten, Brownell, Naqvi, Rinaldi, Sousa.

Nays

Elliott, Kormos.

The Vice-Chair (Mr. Jeff Leal): It carries.

Section 4, the commencement of the bill: Shall it carry? All in favour? Carried.

Shall section 5, the short title of the bill, carry?

Mr. Peter Kormos: Mr. Chair?

The Vice-Chair (Mr. Jeff Leal): Mr. Kormos, please.

Mr. Peter Kormos: I'm going to have to vote against this. It isn't an apology act. It's an exemption of admissions of liability act. I'm going to be voting against this, and asking for a recorded vote.

The Vice-Chair (Mr. Jeff Leal): Mrs. Elliott, do you have any comments?

Shall the short title of the bill carry?

Ayes

Broten, Brownell, Elliott, Naqvi, Rinaldi, Sousa.

Nays

Kormos.

The Vice-Chair (Mr. Jeff Leal): The short title of the bill carries.

That concludes our deliberations this afternoon.

Interjections.

The Vice-Chair (Mr. Jeff Leal): Just one second. Sorry.

Ms. Laurel C. Broten: A few more steps.

The Vice-Chair (Mr. Jeff Leal): Oh, very good.

Shall the title of the bill carry? Carried.

Shall Bill 108, as amended, carry?

Mr. Peter Kormos: Recorded vote, please.

The Vice-Chair (Mr. Jeff Leal): Okay.

Shall Bill 108, as amended, carry?

Ayes

Broten, Brownell, Elliott, Naqvi, Rinaldi, Sousa.

Nays

Kormos.

The Vice-Chair (Mr. Jeff Leal): It carries.

Shall I report the bill, as amended, to the House?

Mr. Peter Kormos: Debate, please.

The Vice-Chair (Mr. Jeff Leal): Sure. Go ahead, Mr. Kormos.

Mr. Peter Kormos: This is one the shortest committee processes I've ever been involved in. Look, I want to thank research for putting this stuff together. I want to thank Dr. Landau and Heather Swartz, who took the time to call me directly about this.

This is the sort of stuff in the States that's been driven by the insurance industry. Somehow, in Canada we've picked up on it. I for the life of me don't know how people got drawn into this. It's almost like this vortex, this support for this proposition. It all sounds so nice; it all sounds so warm and fuzzy: "Ooh, let's apologize." Why not flowers and chocolates in addition to an apology; or "I'll give a little bit of jewellery at the same time"?

We're talking here about dealing with some of the most ruthless institutions in our society: the insurance industry. These guys are not nice people. They're ruthless. These guys don't give a tinker's damn about injured victims. Their concern is about the bottom line. I remember that old television commercial, "You're in good hands with Allstate"—yeah, until they squeeze.

Why this government would accommodate that industry beats me. If it were really just about mediation, then the government would codify some of the rulings

that have been made and ensure that any communication by statute, not just relying upon the common law, would make it clear that any communications made in the court, including admissions of liability made in the course of a mediation process, whether it's a court-ordered mediation or otherwise, or any settlement process, are privileged and inadmissible. If that was really the motive here, I could live with it. It would be codifying the common law, and there's nothing, I suppose, wrong with that, except if you're a fan of common law and you understand that it's a growing thing, you may be treading where you shouldn't. You should just let the common law adjust and adapt.

But this is about the insurance industry. It's about the Ontario Hospital Association wanting to cover their butts. Yes, you bet your boots that in jurisdictions there are lower settlements. What's good about lower settlements? I don't know why people insist that that's a good thing, because what it usually means is that an injured party—and again we're not talking about a sprained finger or a slip and fall, we're talking about catastrophic cases; we're talking about paraplegics and quadriplegics, and worse. We're talking about in the context of litigation, not in the context of marital disputes that are being mediated, perhaps, marital conflicts or neighbour conflicts; we're talking about in the course of litigation where people are seeking money as a remedy. That's all we've got to offer in our society. The apology doesn't fix the wound.

Eddie Greenspan in his column in the Toronto Sun—I was mad at him the week before because he trashed unions, and then he redeemed himself, in my eyes, because he wrote a column about the apology. He said, "Don't apologize; just give me the money." Here we are talking about apologies but we're not talking about responsibility.

We should be passing legislation tuning up the insurance companies. You know what they do. They drag cases out. First they deny the claim, and then a certain percentage of people just drift away. They deny the claim, and then at some point they stop no-fault payments. Then more people drift away. They deny the claim, and then people have to retain lawyers, and good lawyers are busy enough, so people exhaust all of their resources on lawyers and then they drift away. Then they get them into the mediation process down at FSCO, and they use the mediation process as a free kick at the can when it comes to discovery, or to bully the plaintiff, or to somehow lowball the plaintiff so that the plaintiff begins to doubt the value of their own claim.

Ms. Broten is right: These cases can stretch on for years; that's an entirely different problem. We should be spending time addressing that rather than this legislation. Then they get the plaintiff to take whatever they can, because by then the lawyer hasn't been paid for two years. The utility of a courtroom becomes far less effective because these are all perilous things. That's why we encourage people to settle, because a settlement that's negotiated is easily a far more effective thing than

depending upon the judge to make a ruling, because you've got to tell your client, "Look, I think we've got a good case, but anything can happen in that courtroom." You can get Judge Gans. What would happen then? Did you read about him this morning? Read the latest report. What a beaut, huh, Ms. Broten? Boy. The federal judicial council found that to be acceptable behaviour—incredible. But you could get Judge Gans, and I suppose if you're not white, the tables might be turned on you right off the bat.

Interjection.

Mr. Peter Kormos: Exactly. Read the report.

So here we are with a bill that at the end of the day is at the behest and request of the insurance industry, a greedy, inhuman, inhumane, selfish, voracious, a literal parasite on society—the insurance industry. And this government's backing them. You know I can't support the bill.

The Vice-Chair (Mr. Jeff Leal): You want a recorded vote of this?

Mr. Peter Kormos: I leave it at that. Yes, sir, please.

Ms. Laurel C. Broten: Chair?

The Vice-Chair (Mr. Jeff Leal): Ms. Broten, please.

Ms. Laurel C. Broten: Yes, I'll just conclude very briefly by responding to Mr. Kormos. Catastrophic injuries are currently litigated and will continue to be litigated, but there are circumstances whereby an apology, in combination with a damage payment or claim, may be helpful in the healing of individuals. I know that you, as counsel, and myself as plaintiff's counsel in many instances, do know that it is helpful for victims to heal when the harm done to them is acknowledged. That's what the step that we are trying to move forward with respect to this apology act speaks to. It will promote that healing and remove what is, in many instances, an artificial barrier that is put in place when good people make mistakes and want to apologize.

Mr. Peter Kormos: Ms. Broten, that's exactly what I'm saying: Apologize and then settle and pay the money. There's nothing wrong with that at all. I have no qualms about the insurance companies apologizing, as long as they pay out. This is all about effecting a lower rate of settlement, a lower quantum of settlement. That's what the research shows in the United States. It's all about expediting a settlement. Read Owen Fiss.

The Vice-Chair (Mr. Jeff Leal): Any further discussion? Mr. Kormos has asked for a recorded vote.

Ms. Elliott?

Mrs. Christine Elliott: I would just like to make a final comment that I do have significant concerns about this legislation. I very much appreciate the comments made by Mr. Kormos, but I'm prepared to support it because I do believe that there is some merit in the value of a sincere apology, in certain types of cases particularly. For that reason, I'm prepared to support it.

The Vice-Chair (Mr. Jeff Leal): Any further discussion? Shall I report the bill, as amended, to the House?

Ayes

Brotten, Brownell, Elliott, Naqvi, Rinaldi, Sousa.

Nays

Kormos.

The Vice-Chair (Mr. Jeff Leal): It carries.

That concludes the deliberations of the justice committee this afternoon. Thank you very much for your cooperation.

The committee adjourned at 1501.

CONTENTS

Thursday 26 February 2009

Subcommittee reports	JP-251
Apology Act, 2009, Bill 108, <i>Mr. Bentley</i> / Loi de 2009 sur la présentation d'excuses, projet de loi 108, <i>M. Bentley</i>	JP-252

STANDING COMMITTEE ON JUSTICE POLICY

Chair / Président

Mr. Lorenzo Berardinetti (Scarborough Southwest / Scarborough-Sud-Ouest L)

Vice-Chair / Vice-Président

Mr. Jeff Leal (Peterborough L)

Mr. Lorenzo Berardinetti (Scarborough Southwest / Scarborough-Sud-Ouest L)

Mrs. Christine Elliott (Whitby–Oshawa PC)

Mr. Peter Kormos (Welland ND)

Mr. Jeff Leal (Peterborough L)

Mr. Dave Levac (Brant L)

Mr. Reza Moridi (Richmond Hill L)

Mr. Lou Rinaldi (Northumberland–Quinte West L)

Mr. John Yakabuski (Renfrew–Nipissing–Pembroke PC)

Mr. David Zimmer (Willowdale L)

Substitutions / Membres remplaçants

Ms. Laurel C. Broten (Etobicoke–Lakeshore L)

Mr. Jim Brownell (Stormont–Dundas–South Glengarry L)

Mr. Yasir Naqvi (Ottawa Centre / Ottawa-Centre L)

Mr. Charles Sousa (Mississauga South / Mississauga-Sud L)

Clerk/ Greffière

Ms. Susan Sourial

Staff / Personnel

Ms. Vanessa Yolles, legislative counsel