The Bar's Turn

February 14, 2011

At a legal function last week I heard the often quoted lines from King Henry VI "The first thing we do, let's kill all the lawyers." Lawyers are quick to point out that this is speech by a villain. The plan is that once the lawyers are gone, there will be no impediment to villainy: there will be no one to assert rights.

I warmed to my theme: the unintended consequences of promoting mediation at the expense of the traditional civil trial system.

If mediation supplants rights-based dispute resolution, this does not mean villanry, but it does mean that a generation later, the machinery for asserting rights (civil trial lawyers and judges, judicial precedent) will likely be rusty and broken.

There can be no doubt that there must be an alternative to the standard civil trial method of dispute resolution. It is not for everyone. Mediation must be a realistic option.

But it is equally true that the traditional trial process must remain a parallel, viable option for those who choose to assert their rights.

A vibrant trial system is also essential for mediation to work: mediation depends on the ability to enforce rights economically and promptly if no settlement is reached. Otherwise it is merely spear rattling, and it favours the sophisticated, solvent defendant.

There are two prerequisites to a healthy trial process. The first stems from the simplest law of economics: the cost must be proportionate to the risk. The second is that it must be possible to get a dispute in front of an impartial judge or jury, within a reasonable time after a party has requested it, and without unnecessary procedural obstacles.

If lawyers can't deliver the first, then the second doesn't matter. If the judicial system can't deliver the second, then the lawyers will be unable to deliver the first.

But the judicial system has delivered. The 2010 amendments to the Ontario rules of procedure, including the new rules of summary judgment and proportionality, have created a yawning opportunity for the bar to serve the public better than has been possible for years. It is now possible to carve out the key issue in a case and get it in front of a judge for trial. There are new, powerful grounds to prevent abusive litigation through attrition.

It is the bar's turn now.

WeirFoulds LLP

www.weirfoulds.com

Toronto Office
4100 – 66 Wellington Street West
PO Box 35, TD Bank Tower
Toronto, ON M5K 1B7

Tel: 416.365.1110
Fax: 416.365.1876

Oakville Office
1320 Cornwall Rd., Suite 201
Oakville, ON L6J 7W5

Tel: 416.365.1110
Fax: 905.829.2035