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Date: June 30, 2011

Vern Krishna

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Noticeably absent in the torrent of tax giveaways during the recent election was any discussion of access to justice for lower and middle class Canadians.

Access to justice is a hot topic for political speeches—particularly when the subject is legal aid for criminal and family law. There are, however, also millions of Canadians without access to justice in an area of law that affects their daily lives: lower and middleincome individuals embroiled in tax, Canada pension and employment insurance disputes with big government.

Unfortunately for these individuals, the *Charter of Rights and Freedoms* does not apply to tax law. The *Charter* does not protect property rights, which affect “ordinary” Canadians.

The high cost of legal services in tax law—a function of market economics, complexity of the subject, professional malpractice risk and escalating overhead costs—puts the resolution of tax disputes beyond the reach of most people. Thus, increasing numbers of individuals must represent themselves before the Tax Court of Canada and in the Federal Court of Appeal.

These self-represented litigants impose substantial indirect costs on the judicial system—courts, judges, administrative staff and Crown counsel.

The rules of the game in tax disputes are stacked against the taxpayer. The minister of national revenue’s tax assessment is presumed to be correct, unless the taxpayer can establish otherwise. Discharging the burden of proof can be expensive for individuals, who must fight against the collective resources of the Canada Revenue Agency and the Department of Justice, both of which will drag their feet as the daily compounding interest costs on the assessment mount and ultimately break the

taxpayer.

The high cost of legal services is exacerbated by the minimal cost recovery even if the taxpayer wins his or her case. For example, in litigation for less than \$50,000 in taxes, the tariff cost recovery is about \$2,200. This amount covers filing fees, examination for discovery, trial preparation, a one-day hearing and after-judgment services.

Try getting a first year lawyer to do it for that amount. Regardless of ultimate victory, faced with litigation risk in the Tax Court of Canada, an individual must weigh whether it is even worth taking on the government, paying high legal fees and, even if successful, recovering only a minimal fraction of costs.

The government writes the rules and ensures that it reaps the benefits from minimal cost recovery for successful taxpayers. The tariff lowers the cost of government legal services, which protects the federal budget. The low tariff also means that the individual must pay the difference between her lawyer's actual fees and any cost recovery. Thus, faced with the possibility of loss (litigation risk) and escalating daily compound interest on any unpaid tax assessment, many individuals capitulate or represent themselves.

Capitulation means complete victory for the tax department. Self-representation, involving a statute as complex as the *Income Tax Act*, allows junior government lawyers to use the taxpayer as a punching bag for practice. They smell the blood of victory even before the trial starts. The cost savings of minimal cost recoveries translate into increased hidden costs of self-representation.

Tax promises have a short lifespan and are forgotten for four years. Some, however, have an interminable gestation period: five years in the case of the income splitting and TFSA proposals and then only if we have eliminated the deficit. However, tax disputes with government are enduring and, sometimes, unending. Unfortunately, the late former prime minister Pierre Elliot Trudeau was not concerned about economic issues and decided to sacrifice property rights from the *Charter*.

Ultimately, the hidden costs of denying access to legal services are about fairness and justice for all. Loss of respect for a tax system ends in blatant avoidance and escalating enforcement costs. Perhaps someone will raise the access issue in the next election?

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