

Price of Justice should not be so dear for Canadian taxpayers

David Douglas Robertson

It has been a persistent and growing problem: The cost of legal services is beyond the financial reach of average Canadians and small businesses.

In 2007, the Toronto Star estimated the cost of a three-day civil trial to be \$60,738 – that’s more than the average Canadian annual household income!

Canada’s Chief Justice Beverley McLachlin has noted time and again, “middle income Canadians are hard hit, and often left with the very difficult choice if they want access to justice, they must put a second mortgage on their home, or use funds set aside for a child’s education or for retirement. The price of justice should not be so dear.”

As a consequence, more individuals are going it alone. In Ontario, 42 per cent of all litigants in family law matters are self-represented. In the Tax Court of Canada, 44 per cent of all cases involve self-represented taxpayers; for the Tax Court’s informal procedure cases, that number soars to 87 per cent.

Given Canada’s tax laws are the most complex pieces of legislation in the country and the fact that the Canada Revenue Agency is always represented in court by a qualified tax lawyer, the inequality and inequities of the system are obvious.

As a tax lawyer formerly with the federal Department of Justice and now in the private sector, I routinely witness the stress and frustration faced by individual taxpayers and small businesses when confronted with the combination of a tax reassessment and high legal fees.

Take Vincent and Debbie West¹ for example. Vincent’s a consultant. Debbie ran a small but successful art gallery. When Debbie became pregnant with twins, she shut her gallery to raise her two children.

Two years after their birth, the CRA audited Debbie. So with two toddlers at home she dealt with a CRA auditor at her kitchen table asking about receipts and invoices from three and four years prior.

When the auditor left, he presented Debbie with two reassessments: One for income tax totaling \$50,000 and one for GST totaling \$30,000.

Devastated, stressed, and panicked, Vincent and Debbie ended up in my office. Long story short, we successfully reversed both reassessments, but now instead of an \$80,000 tax bill, they faced \$20,000 in legal fees, which, over time, they managed to pay.

Unfortunately, their story is not over. Given that Vincent paid the professional fees and pursuant to paragraph 60(o) of the Income Tax Act, such fees are deductible, he claimed the legal fees as a deduction in filing his income tax return.

¹ Their names have been changed to protect confidentiality.

The CRA denied his \$20,000 deduction on the basis they had reassessed Debbie, not him. The fact that two prior decisions of the Tax Court of Canada confirm Vincent's right to the deduction seemed lost on the CRA as well.

Recently, Justice John Gomery addressed the issue of access to Justice for the middle class, noting, "I don't think the legal profession is giving the proper attention to the problem and it's suicidal, the direction that we're going now."

Numerous solutions have been suggested: Lawyers should drop their rates; the government should create a national legal services plan; the Courts should train and assist individuals to represent themselves. The Canadian Bar Association advocates for eliminating GST and PST on legal services.

After years of thinking "someone should do something", I realized that as a tax lawyer, I am a cause in the matter. If the legal and accounting professions couldn't solve the problem, why should we expect the government or someone else to do so? So I undertook to find a solution.

The result: The Canadian Tax Audit Protection Plan – a specialized legal services plan designed to provide average Canadian taxpayers with up to 15 hours of legal services in the event that they are audited or reassessed by the CRA.

The Plan is simple. A taxpayer or their accountant first files their income tax return. They will go to www.ctapp.ca, complete a membership application, and in exchange for a membership fee starting at under \$20, they become a member of the Plan.

If their tax return is audited or reassessed within three years (the CRA's normal reassessment period), they are entitled to up to 15 hours of legal services – two hours during the audit, four hours to assist with filing of a Notice of Objection, and nine hours to appeal to the Tax Court of Canada.

To qualify for membership, the taxpayer must be up-to-date with their tax filings, cannot currently be under audit, or have any outstanding tax dispute with the CRA.

An individual's membership fee is based, in part, on the taxpayer's sources of income and the types of deductions and credits they claim. For employees and pensioners, the membership fee starts at just under \$20. For individuals who are self-employed, investors, and those with rental income, membership fees start at just under \$50.

Compare these fees to the legal profession's current fee structure where a lawyer requests an up-front retainer of \$5,000 or more to take on a case, and then bills at hourly rates that, for tax specialists, can be as high as \$900/hour.

The Plan is provided by Sixth Sphere Services Professional Corporation, a law corporation licensed by the Law Society of Upper Canada.

Acting as counsel to Sixth Sphere is The Honourable R.D. Bell. From 1991 to 2006, Mr. Bell sat as a judge with the Tax Court of Canada. He was previously a founding partner of the Alberta tax law firm Bell Felesky Flynn, and a former Chancellor of Brandon University, and started his career as counsel to the Department of National Revenue.

The Plan is designed to complement, not compete with, the services provided by a taxpayer's accountant or financial planner. Consider that when the CRA audits a

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taxpayer, it is represented by an auditor who is an accountant, but who also has access to the advice, assistance, and support of the more than 250 tax lawyers employed by the federal Department of Justice. The Canadian Tax Audit Protection Plan's goal is to ensure that in the event of an audit, its members have the same combination of accounting and legal talent backing them.

The Plan also has a significant benefit for the accounting and financial planning professions: The possibility of extending the confidentiality of solicitor-client privilege to discussions between these professionals and their clients.

Normally, discussions between a taxpayer and their accountant are not subject to solicitor-client privilege. However, communications between a client and their accountant may be subject to solicitor-client privilege if the information shared is for the purpose of the accountant obtaining legal advice on behalf of their client.

Fundamentally, we believe that by working together, the legal and accounting professions can not only make access to Justice a reality for all Canadians, but also ensure that all Canadian taxpayers receive fair and equal treatment from Canada's tax system.

For more information and details about The Canadian Tax Audit Protection Plan, please visit our website at www.ctapp.ca.

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