



Greetings from the Executive and Board of the IATJ.

Attached hereto is a paper on pro bono in Canada by former Chief Justice Donald Bowman of the Tax Court of Canada, presently with Dentons LLP. Former Chief Justice Bowman has completed a comprehensive review of the pro bono programs that are available in Canada which I am sure you will find of interest.

I also want to take this opportunity to again invite you to the 5th Assembly of the IATJ which is presently in the planning stages and is going to be held in Washington, D.C. on October 23 and 24, 2014. Registration forms for the conference as well as hotel particulars, et cetera, will soon be placed on our website and we invite you to show your interest as soon as possible by booking your hotel registrations at one of the many hotels which will be listed as well as registering as soon as possible. I am sure the program which has yet to be finalized will certainly pique your interest. Attached is a list of the preliminary program. You will note that there are four judicial topics and four technical topics, so I am sure you will find something which will be of interest and help you in your adjudication duties in your jurisdiction. The Organizing Committee is chaired by Special Chief Judge Peter Panuthos of the United States Tax Court, with support of Judge Wim Wijnen of the Netherlands, Judge Friederike Grube from Germany and Justice Randall Bocoock from the Tax Court of Canada. The Committee is in the midst of the planning for the conference and are always looking for panellists or presenters. If you find any of these topics of such interest to you that you wish to be a planner or presenter, please contact any of the committee members to express their interest. Their individual contact particulars are as follows:

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We are in the process of completing the Tax Treaty Jurisprudence Summaries from each of our member countries and they will go on our website as and when we receive same. I am sure you will find these summaries helpful in carrying out your judicial duties. As well, we are developing links to courts which have members in the IATJ and this will be a new development to the IATJ website.

Again, I wish to thank you for your continued support for the IATJ by your continued membership, and invite you to participate in any and all of the activities and conferences sponsored by or in which the IATJ participates.

Kindest personal regards,

E.P. Rossiter, President

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**PRO BONO REPRESENTATION, LEGAL AID AND THE SELF-
REPRESENTED
LITIGANT IN THE TAX COURT OF CANADA**

**INTERNATIONAL ASSOCIATION OF TAX JUDGES
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Introduction

The three topics mentioned in the title of this paper are separate but closely related aspects of the practice in and the jurisdiction of the Tax Court of Canada (“TCC”).¹

All three aspects result from a phenomenon that, over the past couple of decades, has grown significantly. Lawyers have priced themselves out of the market. The average middle class person simply cannot afford to retain a lawyer to represent him or her in a tax court. For example, a taxpayer with a \$50,000 dispute with the Canada Revenue Agency (“CRA”) could easily have legal fees in the TCC in excess of that amount. If the taxpayer is in the “General Procedure” and if he loses he may also have costs awarded against him. If the matter is appealed to the Federal Court of Appeal and if the taxpayer wins the case, if he has a lawyer, only a fraction of the actual legal costs paid by the taxpayer are awarded to him. If he loses, the costs awarded against him in favour of the tax authorities can be crippling. This situation is wholly unacceptable. It is a fundamental tenet of the Canadian system of justice that taxpayers from every economic level of society are entitled to access to justice and to the courts. This obviously includes the right to dispute assessments of tax by the tax authorities. The right to challenge assessments is given in the taxing statutes, particularly the *Income Tax Act* (“ITA”) and *Excise Tax Act* (“ETA”). The extensive jurisdiction given to the TCC to resolve such challenges is illusory and chimerical if the average taxpayer cannot afford to retain legal expertise that will enable him to avail himself of procedures that are needed to obtain redress.

Three alternatives should be considered by a taxpayer when faced with an assessment of tax under the ITA or the ETA:

- (a) Legal aid;
- (b) *Pro bono* representation; and

¹ I should like to express my appreciation for the assistance and suggestions I have received from my colleagues at Dentons, Timothy Fitzsimmons, Barbara Grossman, Shaira Nanji, David Spiro and Douglas Stewart in the preparation of this paper. I am, however, solely responsible for the opinions (and indeed errors) found in the paper.

(c) Self-representation.

Legal Aid

The first alternative, legal aid, can be dealt with very quickly. Legal aid (*i.e.*, legal fees paid by the state) is available in different provinces in Canada for a number of legal issues, particularly criminal defence. Legal aid is not available in any province or territory in Canada for the purpose of contesting or appealing an income tax assessment or an amount assessed under a federally imposed *Goods and Services Tax* (“GST”) or *Harmonized Sales Tax* (“HST”), which is a form of value added tax. Prosecutions in provincial courts for tax fraud or criminal tax evasion are beyond the scope of this paper.

Pro bono Representation

Pro bono (*pro bono publico* – for the public good). This generally refers to representation of a taxpayer by a lawyer who charges no legal fee or only a reduced legal fee. It is traditionally provided by lawyers to taxpayers who are of low income who cannot afford legal fees. The practice is becoming increasingly widespread simply because middle class taxpayers are, with surprising frequency, faced with the need to undertake or defend against legal proceedings when the cost of such proceedings can lead to their financial ruin or even bankruptcy.

Nonetheless, *pro bono* representation in tax appeals is relatively uncommon. One can only speculate that the reasons for the infrequency of *pro bono* representation in the TCC may include the following:

(a) There may be a perception that if a taxpayer has a dispute with the CRA he probably has sufficient resources to dispute the assessments in court;

(b) There may, rightly or wrongly, be an assumption that the taxpayer has engaged in some questionable tax avoidance scheme;

(c) There may be the thought that the taxpayer is using some “loophole” in the tax system to achieve some undue tax advantage. I might say that the term “tax loophole” is bandied about with a certain reckless abandon to describe something seen as fiscally unsavoury. In over 50 years of practising tax law, both as counsel and as a tax judge, I have yet to encounter an acceptable definition of “tax loophole”. It probably implies a glaring fiscal lacuna the existence of which the CRA has neither discovered nor suspected. In my experience such gaps exist only in the realm of tax mythology. They do not arise inadvertently or through absent-mindedness; or

(d) Some individuals may, surprisingly, think that the CRA is entitled to sympathy because it is displaying benevolence, magnanimity and restraint in dealing with

the taxpayer. I can say that after practising tax law on both sides of the fiscal barrier, including 17 years as a tax court judge, I have yet to see any basis for such a presumption. If anyone needs protection against the zealotry of dedicated revenue officials, it is the small taxpayer caught up in the toils of a system he does not understand.

Why then is there an urgent need for lawyers and law firms, particularly those with tax expertise and litigation skills, to become more actively involved in cases in the TCC? A number of reasons come to mind:

(a) Tax litigation, whether it involves large issues or small ones, is complex and difficult. Tax issues are among the most complex in litigation and they may involve a multitude of legal problems – trusts, corporations, family law, constitutional law, contract law, partnership law and commercial law. The average individual, whether acting for the Crown or the taxpayers, and indeed, many judges, will have difficulty in analyzing such issues in tax matters. They need skilful and knowledgeable guidance;

(b) The fees charged by tax counsel are among the highest in the legal profession;

(c) Crown counsel and the officials of the CRA frequently have neither the skill nor the expertise or the inclination to analyse the complex issues that arise in tax cases or to develop legal or factual grounds that may assist the taxpayer;

(d) It is by no means unheard of for tax judges to ignore issues that arise or dispose of cases that are badly argued or presented on the basis of erroneous analyses;

(e) In the TCC even the procedures, quite apart from the analysis of substantive tax issues, are complex and can be daunting. This can apply to the powers and jurisdiction of the TCC. Certain administrative law remedies have, anomalously, been left to the Federal Court. The difference in the jurisdiction between the two courts has given rise to extensive legal proceedings in both courts. If both practitioners and the courts have difficulty distinguishing between the respective powers of the two courts, the untrained layman can be forgiven for endorsing Mr. Bumble's observation on legal asininity; and

(f) While it is not inconceivable for the officials of the CRA to treat taxpayers compassionately and with understanding there is no basis for assuming that they will. Income tax has an impact on a vast number of Canadians, far more than the Criminal Code. Taxpayers need someone to protect them from the CRA, to stand as a knowledgeable barrier between them and the tax gatherer. Taxpayers cannot count on the courts to do so or necessarily to want to do so. Moreover, by the time the matter gets to court the die is cast and irreparable damage may have already been done.

Pro bono work by lawyers in Ontario is not regulated or particularly organized.² It is left to the individual lawyers or law firm. One example of *pro bono* work by lawyers in Canada is found in the firm in which I am counsel, Dentons Canada LLP. In tax litigation for example four or five lawyers in the Toronto office have organized representation by students at the University of Toronto Faculty of Law in Tax Court disputes in the informal procedure. It should be mentioned that the “informal procedure” under the Tax Court rules involve smaller tax cases in which the amount of tax in issue is under \$12,000. In such cases, unlike in the general procedure, a taxpayer can be represented by anyone, whether or not a member of the bar. The practice in this firm is to have the students who have chosen to represent the appellants to meet with the lawyers in Dentons who act as trainers and mentors for the students. We go over the pleadings and the available documents and suggest what further documents may be necessary and whether other witnesses should be subpoenaed and called to testify. We help define the issues, raise further arguments that may be available and suggest areas where a compromise or settlement may be possible. We also suggest that the students meet with the litigants and subject them to rigorous cross-examination before the trial. It is essential that the appellants be taken through the notices of appeal and the replies and that every statement in the pleadings be scrutinized with particularity. Generally a second meeting with the students before the actual trial is held and the appellants will again be cross-examined by the students.

The somewhat informal, hit-or-miss, system in Canada should be compared with the formalized system of *pro bono* representation in the United States. The United States *pro bono* system tax is formal and complex. It is too extensive and complicated for me to deal with it in this paper, but anyone interested in pursuing the system in the United States should read the paper of Keith Fogg, Professor, Villanova School of Law (Tax Lawyer, Volume 67, No. 1) “Taxation with Representation: The Creation and Development of Low-Income Taxpayer Clinics”. Such clinics have been set up throughout the United States by many law schools. Law schools, Congress and the United States Tax Court are all actively involved in the LITC program. Several years ago I attended a conference of the United States Tax Court in Virginia and I was struck by how advanced the LITC system was in the United States and how vital a role such clinics play in the development of tax jurisprudence in the United States Tax Court.

² There are two organizations that provide some organization and coordination of *pro bono* work: PBLO (*Pro Bono* Lawyers of Ontario) and PBSC (*Pro Bono* Students of Canada). Both of these organizations are active in providing cooperative assistance in *pro bono* work. One initiative that has been promoted by the PBLO and the TCC is the concept of duty counsel who come to the TCC and are available if needed by unrepresented taxpayers and provide legal assistance or advice. The program still has some considerable distance to go.

The *pro bono* system in Canada, if it can be called a system, while a significant beginning, has a long way to go before it reaches the organization, sophistication and effectiveness of the system in the United States.

The Unrepresented Litigant

Despite the existence in Canada of some form of *pro bono* representation in tax cases the most significant number of tax cases in the informal procedure in the Tax Court of Canada are argued by unrepresented taxpayers.

My observation is that many of the Department of Justice (“DOJ”) counsel, particularly junior lawyers, believe that it is their duty to win against unrepresented taxpayers at all costs using technical arguments that more senior counsel would not deign to employ. Such overly aggressive tactics may in part be attributable to the erroneous misconception that the CRA is the “client” of the DOJ. It is not. The DOJ has under its enabling legislation full authority with respect to the carriage of all federal Crown litigation. Many DOJ counsel appear not to have heard the self-evident proposition that the Crown neither wins nor loses a case, and that its sole function is to ensure that justice be done.

The gravity of the problem of the unrepresented litigant in the TCC is eloquently emphasized by the Chief Justice of the Tax Court, the Honourable Gerald J. Rip, in *Pytel v. The Queen*, 2010 DTC 1025 (T.C.C.) where he observed as follows:

41 I wish to add several words to these reasons.

42 The vast majority of informal appellants in this Court act for themselves or are represented by persons without any legal background. This, the Tax Court has in common with all other Canadian courts. Employees of the Tax Court try to assist the appellants and prospective appellants in getting their appeal to trial. The Court has produced a video describing the conduct of an appeal. Judges try to help the taxpayers subject to their limits of judicial impartiality. Nevertheless taxpayers and their lay representatives are often intimidated by the process and are unable to fully prosecute the appeals. This is what happened here.

43 I am informed that the Legal Aid programs of the provinces do not provide assistance to taxpayers who cannot afford legal representation in income tax appeals. The rationale, I could only guess, is that if a person has a tax problem, the person must have money. There are appeals before the Court that are family related matters, such as Canada Child Tax benefits, and if disputed before a Family Court judge, may entitle the parties to legal aid. There are also appeals claiming medical expenses, Unemployment Income benefits, Canada Pension Plan benefits, among others, that impact upon low income persons.

44 A need for taxpayers to be better prepared for their appeals before this Court is obvious. Legal Aid programs must consider extending their assistance to taxpayers, notwithstanding current budgeting issues. Dealing with a government bureaucracy, the CRA, for example, and then with a court is very stressful even on the most experienced persons. Unjust tax assessments may cause strain on the family relationship and ought to be challenged with public support when appropriate. Law firms and law schools also have the capacity to help.

45 Law firms could contribute in solving this problem by having its lawyers assist low income taxpayers “pro bono”. Law schools may encourage students interested in tax and in litigation to have programs offering assistance to taxpayers contesting an assessment. This would sensitize potential tax lawyers to the fact that there are low income taxpayers with real tax problems and these taxpayers require legal assistance,

notwithstanding the amount of tax or that their problem is not one of sophisticated tax planning. The Court would be happy to co-operate with firms and law schools interested in assisting low income tax appellants.

It may be taken from these passages from the reasons for judgment of Chief Justice Rip that there are three ways in which lawyers can assist impecunious or unrepresented litigants:

- (a) They can advise the litigant how to present his case without professional representation;
- (b) They can represent the litigant themselves; and
- (c) They can advise law students on how they can effectively represent an unrepresented litigant in the Tax Court. The law students are not entitled to represent a litigant other than in the Tax Court and only in the informal procedure.

Since it is unlikely that any law firm has the resources to send qualified lawyers into court to represent all impecunious litigants, as a practical matter the most useful function that a lawyer can perform is to advise an unrepresented litigant how he or she should present his or her case. Advice on the effective presentation of a case, while obvious to an experienced litigator, is generally unknown to the average untrained litigant. Such advice would include the following:

- (a) Defining the issues;
- (b) Brevity in presenting *viva voce* evidence;
- (c) Brief, effective and lethal cross-examination;
- (d) Presentation and use of documentary evidence;
- (e) Brevity in argument;
- (f) Avoidance of inane or frivolous *Charter of Rights* or constitutional arguments. They rarely succeed and often detract from the substantive merits of the taxpayer's position;
- (g) Effective reference to legal authorities;
- (h) Avoidance of senseless objections;
- (i) Avoidance of ill-conceived attacks on the good faith or integrity of CRA officers; and

(j) Handling rude, arrogant and unfair judges and unduly confrontational or adversarial Crown counsel.

If an unrepresented litigant takes all of the above points to heart he will be well ahead of the average Crown counsel.

I would strongly urge lawyers in private practice to expand significantly their participation in *pro bono* work in tax cases. They have, I suggest, an ethical and social duty to do so.