Vern Krishna: Canada needs a Charter of taxpayer rights

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Magna Carta was the product of a tax revolt. Canadians need a Charter to protect them from Parliament's taxation powers, Vern Krishna writes. Matt Cardy/Getty Images files

Canadians listening to the electoral promises of tax gifts to come may be forgiven for thinking that they have a constitutional right to understand the laws Parliament enacts to collect their taxes.

However, 800 years after 25 barons forced King John of England to sign Magna Carta, the fundamental cornerstone of constitutional restraints on taxation, Canadians do not even enjoy a minimal Charter of Taxpayer Rights. Conspicuously absent from the electoral pronouncements of the leaders of the political parties, is the absence of any mention of taxpayer rights.

Since 1935 at least, it has been a foundational principle of Anglo-Canadian law that a taxpayer is entitled to arrange his affairs to minimize tax. Named after an important 1935 House of Lords decision involving the Duke of Westminster, the "Westminster principle" is the bedrock of tax planning and minimization. Thus, we start with the premise that tax reduction is perfectly legitimate, unless specifically prohibited. The right to organize one's affairs is subject to one caveat: taxpayers must first understand the law.

It is a truism that tax law is incomprehensible to the majority of Canadians. However, taxpayers as a class are not a protected group, as Canada did not entrench property rights in the Charter of Rights and Freedoms in 1982. Prime Minister Pierre Elliot Trudeau excluded property rights from the Charter to appease Saskatchewan, which was concerned that such rights would open the door to constitutional attacks on its extensive social programs. Canadians must pay the price of the exclusion through statutory erosion of the Westminster principle.

When Brian Mulroney's Progressive Conservative government came to power in 1984, it announced the lofty sounding Declaration of Taxpayer Rights. The Declaration contained 15 bland platitudes – such as: "You are entitled to courtesy and considerate treatment"

and “an impartial review” by a court, as if these rights should ever be in doubt in a democratic society governed by the rule of law. Although the Declaration proclaimed that the Constitution and laws of Canada entitled taxpayers to rights and protections in matters of income tax, no government has ever enacted the document into law.

Relying on the document, an individual sought a judicial declaration to prevent the federal government from functioning in tandem both as a tax litigator and as a tax collector in relation to her tax affairs. She also claimed that she had a legitimate expectation that the government would make a reasonable effort to provide taxpayers with information about the Income Tax Act. The Federal Court dismissed her claim, saying that the taxpayer was not entitled to substantive rights under the doctrine of legitimate expectations. The taxpayer left court with no better understanding of the doctrine than when she arrived.

The taxpayer then argued that since she was a member of the “working class” (which she defined as all employees working for wages or paid on an hourly basis), her Charter rights were violated because she did not have the economic resources to access specialists, such as tax lawyers and accountants, who could even explain her rights and obligations under the Income Tax Act. She complained that the Act is incomprehensible to the vast majority of Canadians, and that they warrant constitutional protection. In a refreshing display of judicial candour, the Tax Court agreed that the tax statute is indeed incomprehensible. However, incomprehensibility of legislation is not the test for Charter relief. Although the court expressed its sympathy for her frustration with unduly complicated fiscal legislation, it was unable to grant her any relief.

Faced with judicial challenges, the government replaced its Declaration in 2007 and announced a new Taxpayer Bill of Rights, which enumerates a series of 16 fundamental rights, and a five-part commitment to small businesses. It includes the same noble sentiments – such as courteous service and fairness in administering the Income Tax Act – as it predecessor declarations. Although the Bill acknowledges the Westminster principle, it carefully removed any references to constitutional protection of rights in income tax law.

The government also appointed a Taxpayers’ Ombudsman, who would act as an independent and impartial officer at arm’s length from the Canada Revenue Agency. Nevertheless, while proclaiming independence, the Ombudsman reports to the CRA’s Minister on departmental transgressions of the Bill, but has no power to intervene on specific files and remedy wrongs.

We are left with a Bill of Rights that has no legal force. It allows taxpayers to engage in legitimate tax reduction, but without any constitutional protections. In the result, we must rely on the English Westminster principle to arrange our fiscal affairs. Canadians who do not understand tax law are not entitled to protection because they are not considered a “protected minority” under the Charter. Indeed, if anything, they are the unprotected majority whom the political leaders conspicuously ignore, except to buy their votes during elections.

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