Business & Careers

The supply side of the access to justice argument

Vern Krishna
Tax Views

Access to justice: Three words that are the repeated theme of speeches by legal luminaries and politicians to bar association meetings bemoaning the high cost of legal fees that make justice inaccessible to middle income Canadians.

The conventional solution proffered is that lawyers should reduce their fees and governments should increase legal aid, neither of which is likely to occur in the near future. Opening up the profession may better serve the public interest.

The price of legal services in a market economy is a function of the demand and supply of such services. Both of these variables pressure legal fees in Canada.

The demand for legal services is escalating as governments become more intrusive and churn out complex legislation covering just about every aspect of one's life. The doctrine that everyone is presumed to know the law is intellectually stimulating, but does not help ordinary Canadians. The *Income Tax Act*, for example, is probably the extreme of volume and complexity. At 3,000 pages and expanding annually — most recently in the March 21 Budget — the law changes rapidly and affects sixteen million taxpayers.

Procedural complexity, oppressive presumptions, prolonged litigation, and concerns of professional negligence contribute to advancing legal fees and the increasing number of self-represented litigants. It appears difficult for governments to digest that self-represented litigants increase the cost of administration of justice, which taxpayers ultimately pay. Thus, directly or indirectly, taxpayers pay the price of complex and voluminous legislation.

Things are not much better on the supply side of legal services. The legal profession is self-regulated and controls the admission of lawyers to practise. Law societies say that they regulate legal services in the "public interest" and must ensure the competence of lawyers. The argument is valid, but it is not sufficient to control the supply of competent lawyers.

Canadian law schools are constrained by government financing and fee restrictions from increasing their intake of law students. Canadians shut out of domestic law schools must go elsewhere to obtain a common law degree. Australia and England, for example, have opened their doors to Canadian students, but at a price: they must pay foreign tuition fees, which can be as high as $30,000 a year plus living and travel expenses.

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>
> **Vern Krishna**
> Borden Ladner Gervais

Foreign-educated graduates face increasing barriers upon their return to Canada. Graduates with a first class degree (top 2 per cent) from London University, for example, have to write seven additional examinations and have had some of their graduate courses from Canadian law programs discounted for accreditation purposes. Similarly, graduates from Ivy League schools, with three years of experience on Wall Street and a job with prestigious firms on Bay Street, have had to struggle with the Law Society of Upper Canada's rules on admission to the bar.

In contrast, Canadian graduates can go to the United States and enter any state bar simply by passing the same examinations required of all American graduates. Canadian lawyers can go to England and qualify as a solicitor upon writing only two examinations. Here at home, lawyers trained in the civil law of Quebec can move to common law Canada without hindrance, but a Canadian lawyer trained in the common law of England cannot.

Expanding the role of paralegals to provide routine services could also assist many middle-income individuals manoeuvre the legal maze. Paralegals are increasingly better educated. Some community colleges now offer four-year degree programs in law, which should permit their graduates to expand the scope of legal services that they provide.

Arizona State University College of Law, which ranks 26th overall among all U.S. law schools, plans to become the first North American law school to offer a three-year degree that will provide substantive education in both U.S. and Canadian law. ASU hopes that its graduates will qualify to practise in both countries. To be sure, they will be entitled, upon passing the requisite state bar examination, to practice in the United States. The Federation of Law Societies of Canada, however, signals that ASU graduates will not have an easy entry into the Canadian legal profession. They will have to restudy Canadian law and have to write multiple substantive examinations.

The battle over constraining the supply of legal services has a chequered history in Canada.

In *Andrews*, for example, the Law Society of British Columbia, attempted to make citizenship a prerequisite for entry into the bar. The Supreme Court of Canada held the rule violated the equality provisions of the *Charter of Rights and Freedoms*.

In *Black*, the Law Society of Alberta attempted to prevent the establishment of inter-provincial law firms from practising in Alberta. The Supreme Court of Canada disagreed. The rule infringed the mobility rights guaranteed by the *Charter*.

In *Mangat*, the Law Society of British Columbia attempted to restrict immigration consultants from practising before federal Immigration and Refugee Board tribunals without being called to the B.C. bar. The Supreme Court struck down the rule.

Three strikes should be enough to send the message that provincial self-regulation of lawyers cannot create unreasonable barriers for access to the legal profession. Enhancing access to the profession will increase the supply of lawyers and promote access to justice.

Vern Krishna is counsel to Borden Ladner Gervais and executive director of the University of Ottawa's Tax Research Centre. vkrishna@blg.com, @VernKrishna

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