

Cameras allowed in securities commission hearing

By DONALEE MOULTON

The British Columbia Securities Commission has taken a step in an unusual direction, opening its doors to a CTV camera crew given the greenlight to capture on video a controversial case involving an alleged Ponzi scheme.

"It's rare for most legal proceedings to be televised. It's almost unheard of for a trial-level court to allow cameras in," said Christopher Wirth, counsel with Keel Cottrelle in Toronto.

The hearing has taken place and the securities commission is scheduled to deliver its decision in the matter on Tuesday, Oct. 20. CTV did send cameras and televise coverage of the event.

The CTV application to film the hearing was sparked by public concern and outrage over the alleged fraudulent activities.

"The general public has an interest in seeing what is happening in a high-profile case, and of course, the facts of certain cases will be educational to the public," said Gordon Johnson, a commercial litigation lawyer with Borden Ladner Gervais in Vancouver.

"Broadcasting the facts of an alleged scam can help members of the public learn to watch for red flags in their own affairs. This kind



WIRTH

of public interest protection is important to commissions."

The case in question involves Thomas Arthur Williams, owner of the Global Group of Companies, who is charged with investor fraud and operating a Ponzi scheme.

Williams allegedly took loans from investors and put the funds in financial contracts. To help him raise money, Williams allegedly signed agreements with individuals known as finders who received a commission for introducing him to investors. The finders raised approximately \$11.7 million from

roughly 123 investors between February 2007 and April 2010.

Through the course of last spring the securities commission settled charges with several of the finders.

Williams allegedly promised investors that his loan agreements would be shielded from securities laws, that they would provide returns of at least two per cent interest a month (and potentially higher), and that the funds would be protected.

But none of the investments produced any returns, the securities commission contends. As well, Williams invested about \$5.8 million of the investor funds with individuals and companies linked to people with a history of criminal or regulatory securities fraud, a fact he did not share with investors, the securities commission alleges.

Despite the welcome mat the commission rolled out for broadcast media in this case, it is unlikely cameras will become routine in security hearings.

"There is no doubt that the commission has the jurisdiction to allow cameras in a proper case. Where there is some grey area for commission panels who receive such applications is how to balance the advantages and disadvantages," said Johnson.



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The advantages include transparency and accountability. Allowing hearings to be televised gives the public access to information in a timely manner about an issue that is relevant to them. However, cautioned Wirth, the facts of the case may not be compelling.

"With administrative hearings, there is a lot of routine evidence and documents. What is of interest to the public is only a small portion of what goes on. What the public is used to seeing on TV is rare in actual trials and even rarer in administrative hearings."

The presence of cameras also changes behaviour.

"People start to act so as to present a certain image and this is not always consistent with what they would do if they were just presenting the case to the hearing panel," noted Johnson, adding that, "Witnesses may be more reluctant to attend if their evidence might be widely seen."

Privacy and confidentiality of information are also issues. In its approval of the CTV request for filming, the BCSC put in place several restrictions including that any witness, lawyer or other participant who did not wish to be recorded did not have to be.

Financial information is a cornerstone of many security hearings and care is necessary to reduce exposure to financial records, either inadvertent or deliberate. Some documents will contain personal information about individuals involved in the proceeding, but there could also be information about completely innocent third parties. "Exposing the records of an unconnected third party in a room with a handful of people, which happens every day, is not the same as exposing the same records for broadcast," noted Johnson.

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Taxpayer rights bill missing teeth



TAX
VIEWS

By
Vern
Krishna

Canadians may be forgiven for thinking that they have a constitutional right to understand legislation that 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 enjoy an equivalent Bill of Taxpayer Rights. Indeed, conspicuously absent from the weekly tax pronouncements of the leaders of the political parties is the absence of any mention of taxpayer rights.

Tax law is incomprehensible to the majority of the population, but the so-called “working classes” are not a protected group under the *Charter of Rights and*

Freedoms. Since 1935 at least, it has been a foundational principle of Anglo-Canadian law that taxpayers are entitled to arrange their affairs to minimize tax. The principle, known as the *Westminster* principle from a 1935 House of Lords decision, justifies tax reduction and planning. Thus, we start with the premise that tax reduction is perfectly legitimate, unless the *Income Tax Act* specifically prohibits the transaction.

Unfortunately, Canada did not entrench property rights in our *Charter* in 1982, and Canadians are paying the price of the exclusion through statutory erosion of the *Westminster* principle. Prime Minister Pierre 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.

Instead, after a much publicized national road tour by the Conservative party in opposition, the Conservative government came to power in 1984 and announced the *Declaration of Taxpayer Rights*, which contained fifteen 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 many rights and protections in matters of income tax, no government has ever enacted it into law.

Relying on the document, an individual sought a judicial declaration to prevent the federal government from functioning in tandem 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 explain her rights and obligations under the *Income Tax Act*. She rightly 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 with her 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 the taxpayer’s frustration with unduly complicated fiscal legislation, it was unable to grant her any relief.

Faced with such judicial challenges, the government replaced its Declaration and announced a new Taxpayer Bill of Rights in 2007. The bill 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 its predecessor declarations. Although the bill acknowledges the *Westminster* principle, it removed any references to consti-

tutional protection of rights in income tax law.

The government also appointed a taxpayers’ ombudsman to 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 minister on departmental transgressions of the bill, but has no power to intervene on specific files and remedy wrongs.

The Bill of Rights has no legal force. It allows taxpayers to engage in legitimate tax reduction, but without any constitutional protections. Canadians who do not understand tax law are not entitled to protection because they are not a “protected minority” under the *Charter*. If anything, they are the unprotected majority whom the political leaders conspicuously ignore.

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Whether Ontario will follow suit an open question

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Rolling out the red carpet for camera crews is also not as easy as it sounds. A myriad of administrative details must be addressed. Where will camera operators stand so they don’t interfere with the proceeding but can still film it? Are cords and plugs safely out of harm’s way? This is in addition to obtaining consent from all witnesses involved.

“In this day and age, the public and the media want more, but no one is going to go to these lengths if the case is not of high interest,” Wirth said.

The BCSC executive director consented to the request from CTV in this case, but generally the administrative burden may make commission staff less eager to invite broadcast media into hearings on an ongoing basis. As well, there is usually no advantage to the accused to have their face and the details of their alleged crime shared with the viewing public. In the case before the commission, all the respondents, Williams and 11 finders objected to having any cameras in the hearing.

“The only party who is generally going to ask for this is the media,” Wirth said.

The B.C. securities commission has allowed cameras inside a hearing in the past. From 1994 to

1996, broadcast media covered the insider trading hearing of Herb Doman, who was accused of, among other things, giving then-premier Bill Bennett and his brother Russell a heads-up that Doman’s company was not being sold as planned to a U.S. firm.

All three men were sanctioned for insider trading.

Now two decades later, the door has been opened further and expectations among media, the public and others may well be that a standing invitation has been extended to film securities hearings, at least in B.C.

Many people are waiting to see how the Ontario Securities Commission will respond when the first application to film proceedings is made in the province.

“On future cases, anyone looking to have access will rely on this case. It’s fairly persuasive,” said Wirth.

If cameras become more common in securities hearings, safeguards will need to be built in, said Johnson.

“You should expect to see, for example, terms to protect against the broadcast of information about individuals who are not parties to the proceeding and terms to prevent cameras from broadcasting the notes that counsel are referring to while presenting their positions.”

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