

IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Columbia North Realty Company, Re, 2005 NSSC 212

Date: 20050714
Docket: S.H. 250793
Registry: Halifax

IN THE MATTER OF: The *Companies Act* of Nova Scotia, being Chapter 81 of the Revised Statutes of Nova Scotia, 1989 and amendments thereto

- and -

IN THE MATTER OF: The application of Columbia North Realty Company for an Order of rectification pursuant to subsection 44(2) of the *Companies Act* and the inherent equitable jurisdiction of this Honourable Court

Judge: The Honourable Justice C. Richard Coughlan
Heard: July 14, 2005 (in Chambers), at Halifax, Nova Scotia
Decision: July 14, 2005 (Orally)
Written Release: July 28, 2005
Counsel: Bruce S. Russell, Q.C., for the Applicant

Coughlan, J.: (Orally)

[1] This is an application for an order pursuant to s. 44.2 of the *Companies Act* and the inherent equitable jurisdiction of this Court for an order of rectification as follows:

- a. an order rectifying article 17 of the Articles of Association of the Applicant to permit reduction of share capital through redemption, repurchase or acquisition of common shares;
- b. an order permitting rectification of the share register of the Applicant to reflect issuance of common shares retroactive to and allocable to the two contributions of the Applicant's 99% shareholder, made in 1997 and 1999;
- c. an order permitting by way of rectification the redemption of such common shares sufficient to allow payment by the Applicant to its 99% shareholder of \$5,000 as of February 23, 1999, and of \$1,500,000 as of May 6, 2002, in each instance as return of paid up capital (and thus not taxable) by the Applicant to the 99% shareholder;
- d. an order permitting the Applicant and other relevant parties as reasonably necessary to do all acts and execute all documentation reasonably necessary in the view of the Applicant to carry out and give full legal effect to the foregoing rectification orders.

[2] Columbia North Realty Company was incorporated January 7, 1997. The order sought would retroactively rectify the Articles of Association and Share

Register of Columbia, as well as other actions taken by the Company in years prior to 2005, which result in the reduction of income tax payable by the Company.

[3] In discussing the effect of a superior court order Robertson, J.A., in giving the majority opinion in *Dale v. R.*, [1997] 3 F.C. 235 (F.C.A.), stated at p. 258:

... Counsel for the taxpayers now relies on the decision of the Supreme Court of Canada in *Wilson v. R.*, [1983] 2 S.C.R. 594, to support the argument that the Minister and Tax Court are bound by the terms of the Nova Scotia order. That decision establishes the general rule that an order of a superior court cannot be attacked collaterally unless it is lawfully set aside. ...

[4] The order sought affects the tax payable by the Applicant in previous years. An order of this Court would be binding on all, including the Minister of National Revenue, unless appealed. It is appropriate the Minister be given notice of the application in order to have an opportunity to make submissions to the Court.

As Robertson, J.A. stated in *Dale v. R.* at p. 259:

It seems only logical that a court would decline the invitation to grant a retroactive order which has the clear legal effect of rewriting fiscal history. Assuming that such an order were granted then it would be proper to ask whether the Minister is entitled to ignore it for taxation purposes. One might be tempted to permit an attack on the ground of fiscal revisionism where it could be shown that the order was obtained by non-disclosure or misrepresentation. More likely than not revisionist orders will be obtained on consent, or in circumstances where it is likely that the tax ramifications of the order were not placed squarely before

the judge, or where the judge was obviously sympathetic to the taxpayer's situation. ...

[5] Notice of the hearing is to be given to the Canada Revenue Agency and/or the Minister of National Revenue.

Coughlan, J.