

# Rectification not available for excessive capital dividend

by: Florence Marino B.A., LL.B., TEP  
Vice President, Tax & Estate Planning

---

In *Pyxis Real Estate Equities Inc. v. Canada (Attorney General)*, 2025 ONCA 65 the Ontario Court of Appeal overturned the granting of rectification of certain corporate resolutions for the payment of capital dividends through a chain of corporations.

## The facts

The originator corporation had plenty of CDA and was capable of paying capital dividends well in excess of the amount declared (\$1.4 million). However, one of the corporations in the chain had a CDA deficit (of \$323,893) which meant that it was incapable of paying a capital dividend for the full amount of the dividend declared. In fact, the CRA determined that the dividend it paid exceeded its CDA balance and that a 60% tax was owing on the excess under Part III of the Act.

## At trial

At the trial level, rectification was allowed to permit the originator corporation to increase the amount of the capital dividend declared (to \$1,723,893) so that the ultimate shareholder could receive \$1.4 million as a tax-free capital dividend when paid through the chain. The Court of Appeal disagreed.

## On appeal

The Court cited the Supreme Court of Canada in *Canada (Attorney General) v. Fairmont Hotels Inc.*, 2016 SCC 56 as follows: “While... a court may rectify an instrument which inaccurately reflects a party’s agreement respecting what was to be done, it may not change the agreement in order to salvage what a party hoped to achieve.” Rather, the Court found that “the agreement here was for \$1.4 million tax-free capital dividend to be paid. The corporate resolutions that were signed documented the payment of that dividend. In other words, they accurately reflected that agreement. The fact that the agreement did not result in the intended fiscal objective of being tax-free, or tax neutral, is not a basis

for granting rectification.”

It also cited *Canada (Attorney General) v. Collins Family Trust*, 2022 SCC 26, in support for the statement “that the mere fact that a tax objective is not achieved by an agreed transaction is not a proper ground to grant rectification.”

### **Lessons to learn**

The use of rectification in tax cases is limited to situations where the executed documents fail to accurately record the parties' agreement. It can't be used where the documents reflect the agreement but the parties later find out that it results in an adverse tax outcome.

In this case, the history of the CDA balances was not thoroughly reviewed by the accounting advisors and a memo was prepared that instructed the declaration and payment of \$1.4 million in capital dividends through the whole chain. Rectification is not a solution for not doing your homework.

TOMPKINSights

### **FOOTNOTE:**

*This publication is protected by copyright. Tompkins Insurance is not engaged in rendering tax or legal advice. TOMPKINSights contains a general discussion of certain tax and legal developments and should not be construed as tax or legal advice.*

*Should you wish to discuss this or any other TOMPKINSights article, please contact [florence@tompkinsinsurance.com](mailto:florence@tompkinsinsurance.com)*