

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20180404**

**Docket: A-459-16**

**Citation: 2018 FCA 68**

**CORAM: WEBB J.A.  
NEAR J.A.  
LASKIN J.A.**

**BETWEEN:**

**JUN LI YU**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

Heard at Vancouver, British Columbia, on December 6, 2017.

Judgment delivered at Ottawa, Ontario, on April 4, 2018.

**REASONS FOR JUDGMENT BY:**

**WEBB J.A.**

**CONCURRED IN BY:**

**NEAR J.A.  
LASKIN J.A.**

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**REASONS FOR JUDGMENT**

**WEBB J.A.**

[1] This is an appeal from a judgment of the Tax Court of Canada rendered orally on November 3, 2016 and signed on November 21, 2016 (2016 TCC 276). Justice Boyle of the Tax Court dismissed the appellant's appeal from the assessment that had been issued under section 160 of the *Income Tax Act*, R.S.C. 1985 (5th Supp.), c.1 (ITA) in relation to certain amounts that were transferred to him from Yan Siang Yu, the appellant's sister-in-law.

[2] Since the appellant and Yan Siang Yu do not deal with each other at arm's length, section 160 of the ITA would allow the Minister of National Revenue (Minister) to assess the appellant for the tax liability of Yan Siang Yu if property is transferred to the appellant by Yan Siang Yu and provided that the assessment is limited to the lesser of the amount of the tax debt of Yan Siang Yu (as determined under that section) and the amount by which the fair market value of the property transferred exceeds any consideration given for such property.

[3] For the reasons that follow I would dismiss this appeal.

I. Background

[4] Yan Siang Yu was reassessed for her 2006, 2007 and 2008 taxation years to include unreported income of \$395,587 for each of these taxation years. Gross negligence penalties were also assessed. The unreported income related to a marijuana grow operation that Yan Siang Yu was carrying on at her property located in Vancouver, British Columbia. These reassessments were issued on August 4, 2010. Subsequent reassessments increased the liability of Yan Siang Yu. The appellant does not dispute these reassessments or that Yan Siang Yu has an outstanding liability under the ITA in relation to these reassessments in excess of the amounts transferred to him.

[5] In the reply that was filed with the Tax Court, the Minister made the following assumptions related to the transfer of a total amount of \$119,500 from Yan Siang Yu to the appellant:

<b>Date</b>	<b>Amount</b>
January 18, 2010	\$2,000
January 21, 2010	\$100,000
February 23, 2010	\$7,500
March 22, 2010	\$10,000
Total:	\$119,500

[6] These are the transfers that are relevant for the purposes of this appeal. At the time of these transfers, the Appellant was married to Yan Siang Yu's sister. In the reply that was filed in the Tax Court proceeding, the Minister had assumed that the appellant had previously been married to Yan Siang Yu. This was not disputed by the appellant.

[7] Prior to the transfers referred to above, on or about May 21, 2009, the police executed a search warrant at the residence of Yan Siang Yu and located 959 marijuana plants and an electrical diversion to the grow operation at her residence.

[8] Therefore, the transfers in question took place after the police had discovered the marijuana grow operation of Yan Siang Yu and before she was reassessed for unreported income in relation to this operation.

[9] At the hearing before the Tax Court, there was no dispute that the transfers of funds in question were made by Yan Siang Yu to the appellant. It was the position of the appellant that these funds had been received by his mother-in-law from the sale of her house in Vancouver and that his mother-in-law gave this money to Yan Siang Yu to hold in trust. One of the beneficiaries of this trust, according to the appellant, was the appellant's wife. The appellant stated that when

he received the funds from Yan Siang Yu, he sent them to his wife in China who was looking after their son, who was ill.

[10] The appellant's mother-in-law is a widow in her 70s who does not speak English. It is the appellant's position that in accordance with Chinese custom, she had appointed Yan Siang Yu (her eldest daughter) as the person responsible for her money.

[11] The only document that was introduced at the Tax Court hearing was a statement from HSBC Bank confirming the transfers from Yan Siang Yu to the appellant of \$2,000 and \$100,000 as listed in paragraph 4 above. These transfers were not in dispute.

[12] There were four witnesses who testified at the hearing – the appellant's mother-in-law, the appellant, Yan Siang Yu, and the appellant's wife. All of the witnesses testified through a translator. The only evidence that would have been relevant in relation to the creation of the trust was the oral evidence of these witnesses.

[13] While counsel for the appellant was examining the appellant he requested an adjournment so that he could discuss certain matters with his client. The Tax Court judge declined this request and the examination continued without an adjournment.

[14] The Tax Court judge concluded that there was insufficient evidence to establish the existence of a trust that had been settled with the appellant's mother-in-law's money and dismissed the appeal.

## II. Issues

[15] Although the appellant identified four issues in his memorandum of fact and law, there are essentially two issues that are raised in this appeal. One issue is whether the Tax Court judge erred in not allowing an adjournment during the appellant's examination-in-chief to allow his counsel to talk to him. The other issue is whether the Tax Court judge erred in concluding that there was insufficient evidence to establish the trust.

## III. Standard of review

[16] The standard of review for any question of fact or mixed fact and law (with no extricable question of law) is palpable and overriding error. (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235). For any alleged breach of procedural fairness by the Tax Court judge, the question is simply whether there was such a breach (*Carleton Road Industries Association v. Sanford*, 2015 NSCA 95, 366 N.S.R. (2d) 104 at para. 22).

## IV. Analysis

### A. *Procedural Fairness*

[17] The issue that the appellant raised in relation to the denial of the adjournment request is a question of procedural fairness. At the hearing before the Tax Court judge, the position of counsel for the appellant was that he had a right to request this adjournment so long as cross-examination had not commenced. This statement is repeated in the appellant's memorandum. However, the source of this right is not identified by the appellant.

[18] It would appear that counsel for the appellant was referring to the *Code of Professional Conduct for British Columbia* adopted by the Law Society of British Columbia in 2013. Section 5.4-2 of this Code provides, in part, that:

**5.4-2** Subject to the direction of the tribunal, a lawyer must observe the following rules respecting communication with witnesses giving evidence:

- (a) during examination-in-chief, the examining lawyer may discuss with the witness any matter;
- (b) during cross-examination of the lawyer's own witness, the lawyer must not discuss with the witness the evidence given in chief or relating to any matter introduced or touched on during the examination-in-chief;
- (c) upon the conclusion of cross-examination and during any re-examination, with the leave of the court, the lawyer may discuss with the witness any matter;

...

(emphasis added)

[19] The general rule related to discussions with a witness during examination-in-chief is subject to the direction of the tribunal (the Tax Court in this case). Therefore, there is no absolute right under this Code to have an adjournment to discuss any matter with a witness while that witness is being examined in chief.

[20] In this case, the appellant was unable to identify any document that he wanted to introduce or any question that he wanted to ask but was prevented from doing so. Therefore, there is no basis for any claim of a breach of procedural fairness.

B. *Factual Determination*

[21] With respect to the establishment of the trust, this is a question of fact or mixed fact and law in this case. In his memorandum, the appellant submitted that the Court should take into account the fact that the appellant's mother-in-law is from China and that there are cultural differences between Canada and China. In paragraph 7 of his memorandum, the appellant posed the following question:

[t]he question really was, was the handling of this matter in the Chinese way of the \$100,000 contrary to Section 160 of the *Income Tax Act*?

[22] To the extent that the appellant is suggesting that the law of trusts should be different because the appellant's mother-in-law is from China, I do not accept this proposition. If a trust is to be established in Canada, it must be established in accordance with the laws of Canada. The requirements to have a valid trust are set out in *Waters' Law of Trusts in Canada*, 4th ed., (Toronto, Ontario: Carswell, 2012), by Waters, Gillen & Smith, at page 140:

For a trust to come into existence, it must have three essential characteristics. As Lord Langdale M.R. remarked in *Knight v. Knight*, in words adopted by Barker J. in *Renahan v. Malone* and considered fundamental in common law Canada, (1) the language of the alleged settlor must be imperative; (2) the subject-matter or trust property must be certain, (3) the objects of the trust must be certain. This means that the alleged settlor, whether he is giving the property on the terms of a trust or is transferring property on trust in exchange for consideration, must employ language which clearly shows his intention that the recipient should hold on trust. No trust exists if the recipient is to take absolutely, but he is merely put under a moral obligation as to what is to be done with the property. If such imperative language exists, it must, second, be shown that the settlor has so clearly described the property which is to be subject to the trust that it can be definitively ascertained. Third, the objects of the trust must be equally and clearly delineated. There must be no uncertainty as to whether a person is, in fact, a beneficiary. If any one of these three certainties does not exist, the trust fails to come into existence or, to put it differently, is void.

(the footnote references have been omitted)



[23] Therefore, the issue is whether the three certainties, as described above, exist in this case. The appellant, in this appeal, has to show that the Tax Court judge committed a palpable and overriding error in finding that the evidence that was submitted during the hearing was not sufficient for him to conclude that these three certainties existed and that there was a trust.

[24] A palpable and overriding error is a high standard for the appellant to meet on appeal. In *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352, Justice Wagner, writing on behalf of the majority, described a palpable and overriding error:

- 38** It is equally useful to recall what is meant by "palpable and overriding error". Stratas J.A. described the deferential standard as follows in *South Yukon Forest Corp. v. R.*, 2012 FCA 165, 4 B.L.R. (5th) 31, at para. 46:

Palpable and overriding error is a highly deferential standard of review ... . "Palpable" means an error that is obvious. "Overriding" means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.

- 39** Or, as Morissette J.A. put it in *J.G. v. Nadeau*, 2016 QCCA 167, at para. 77 (CanLII), [TRANSLATION] "a palpable and overriding error is in the nature not of a needle in a haystack, but of a beam in the eye. And it is impossible to confuse these last two notions."

[25] The Tax Court judge was not satisfied that the evidence that was before him established the existence of the trust. In my view, there is no basis to interfere with this finding. The only document that was introduced at the hearing was the document from HSBC Bank Canada related to two transfers of funds from Yan Siang Yu to the appellant. These transfers were not in dispute. There were no documents to establish the proceeds that the mother received from the sale of her house nor was there any explanation provided to explain why the appellant's mother-

in-law would give significant sums to her eldest daughter to hold in trust for her sister after the police had searched her house and discovered the marijuana grow operation and at a time when Yan Siang Yu was presumably facing criminal charges.

[26] An example from the transcript will illustrate the difficulties with the evidence that was submitted in this matter. When counsel for the appellant was examining the appellant's mother-in-law in chief, questions were posed in relation to the sale of her house. However, there was no indication of when the house was sold. The first reference to a date appears in the following exchange:

**Q** Oh, all right. And in 2012, was your second daughter, was she in China taking care of the child?

**A** Yes.

**Q** Right. And her husband is Mr. Jun Li Yu.

**A** Yes.

**Q** And he's the man sitting here behind?

**A** Yes.

**Q** Right. Now when did your husband die?

**A** It's been more than ten years.

**Q** Was there any money owing in China for medical treatments, when he died?

**A** Yes.

**Q** Yes. And of that \$100,000 that you gave -- you had your second daughter - - well I don't know if I've established this yet. I think she said you know -- okay.

Now, you gave -- before I ask that. Did you tell us that you gave your oldest daughter \$100,000? Or more?

**A** I asked her to give \$100,000 to the second daughter.

**Q** Right. And what was that money to be used for?

**A** For medical bills.

**Q** The medical bills for your grandson?

**A** Yes.

[27] The second daughter is the appellant's spouse. It would appear from these questions and answers that the testimony of the appellant's mother-in-law was that the appellant's wife was in China with her son in 2012. It also appears that the appellant's mother-in-law was stating that money was to be sent to the appellant's wife in China for medical bills for the grandson. It is far from clear whether the appellant's mother-in-law was referring to a transfer of \$100,000 in 2012 or 2010 since the only year to which there is any reference is 2012. The transfers in issue in this case took place in 2010, not 2012.

[28] In cross-examining the appellant's mother-in-law, counsel for the Crown attempted to clarify the timing of certain events. The cross examination commenced with the following question:

**Q** Mrs. Yu. Mrs. Yu, in 2010, you were living on 46<sup>th</sup> Avenue?

**A** Only for a very short period of time.

[29] The house on 46<sup>th</sup> Avenue was the property that, according to the appellant, was sold. It was the proceeds from the sale of this house that were allegedly used to settle the trust. The first transfers in question occurred on January 18, 2010 for \$2,000 and January 21, 2010 for \$100,000.

[30] When the cross examination continued in relation to the transfer of money from the appellant's mother-in-law to Yan Siang Yu the following exchange took place:

**Q** Yan Siang Yu had a bank account there?

**A** Yes.

**Q** You gave her money in 2010?

**A** I don't quite remember the time but after I sold the house I gave her the money that's left.

[31] The appellant's mother-in-law testified that for "a very short period of time" in 2010 she was living in the house at 46<sup>th</sup> Avenue. It is possible that the closing could have been held in early January 2010 and \$100,000 was transferred from the appellant's mother-in-law to Yan Siang Yu on or before January 21, 2010. However, if this was the case why did the appellant's mother-in-law not simply state that she gave the money to Yan Siang Yu at or almost immediately after the closing? The concern is that any document that could have established when the closing of the sale of the property located at 46<sup>th</sup> Avenue occurred would be a document that is within the control of the appellant's mother-in-law. However, no such document was introduced at the hearing. Instead, there were only vague references to transfers of funds from the appellant's mother-in-law to Yan Siang Yu on unspecified dates, which in her examination-in-chief appear to refer to transfers in 2012.

[32] The Tax Court judge, in paragraph 23 of his reasons, referred to a number of other inconsistencies and concerns with respect to the evidence that was presented. In paragraph 24 of his reasons, the Tax Court judge stated that :

**24** In these circumstances, I am simply unable to conclude on a balance of probabilities that the Appellant's mother-in-law set \$100,000 or \$119,500 or any other amount aside in trust for her second daughter. There is simply insufficient credible and consistent testimony to allow me to conclude that is what probably happened, and what I have is uncorroborated by virtually any written evidence.

[33] In my view he did not commit any palpable and overriding error in making this finding.

[34] As a result I would dismiss this appeal, with costs.

"Wyman W. Webb"

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J.A.

"I agree

D. G. Near J.A."

"I agree

J.B. Laskin J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**APPEAL FROM A JUDGMENT OF THE TAX COURT OF CANADA, DATED  
NOVEMBER 21, 2016, NO. (2014-3960(IT)G)**

**DOCKET:** A-459-16

**STYLE OF CAUSE:** JUN LI YU v. HER MAJESTY THE  
QUEEN

**PLACE OF HEARING:** VANCOUVER,  
BRITISH COLUMBIA

**DATE OF HEARING:** DECEMBER 6, 2017

**REASONS FOR JUDGMENT BY:** WEBB J.A.

**CONCURRED IN BY:** NEAR J.A.  
LASKIN J.A.

**DATED:** APRIL 4, 2018

**APPEARANCES:**

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