

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20230622**

**Docket: A-127-22**

**Citation: 2023 FCA 146**

**CORAM: WOODS J.A.  
LOCKE J.A.  
LEBLANC J.A.**

**BETWEEN:**

**SHENGDI CHEN**

**Appellant**

**and**

**HIS MAJESTY THE KING**

**Respondent**

Heard at Toronto, Ontario, on June 22, 2023.  
Judgment delivered from the Bench at Toronto, Ontario, on June 22, 2023.

**REASONS FOR JUDGMENT OF THE COURT BY:**

**LEBLANC J.A.**

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**REASONS FOR JUDGMENT OF THE COURT**  
**(Delivered from the Bench at Toronto, Ontario, on June 22, 2023).**

**LEBLANC J.A.**

[1] The appellant, Ms. Chen, appeals a decision of the Tax Court of Canada (*per* Sommerfeldt J.), delivered orally on May 12, 2022. In its decision, the Tax Court upheld the decision of the Minister of National Revenue (the Minister) which dismissed Ms. Chen's

application for a \$24,000 GST/HST tax rebate in relation to her purchase of a newly constructed house in May 2018.

[2] Ms. Chen's application was dismissed on the ground that it did not meet all of the conditions for being entitled to the then called new housing rebate for Ontario. Those conditions are set out in subsection 254(2) of the *Excise Tax Act*, R.S.C. 1985, c. E-15 (the Act). Relevant to this appeal are the conditions set out in paragraphs 254(2)(a), (b) and (g). According to these provisions, a new housing rebate is payable by the Minister where:

- a) a builder of a single unit residential complex or a residential condominium unit makes a taxable supply by way of sale of the complex or unit to a "particular individual" (paragraph 254(2)(a));
- b) at the time the "particular individual" becomes liable or assumes liability under an agreement of purchase of a new house entered into between the builder and the "particular individual", that individual is acquiring the house "for use as the primary place of residence of the particular individual or a relation of the particular individual" (paragraph 254(2)(b));
- c) in the case of a single unit residential complex, the "particular individual"—or a relation of that individual—is the first person to occupy that unit at any time after substantial construction is completed (paragraph 254(2)(g)).

[3] Central to Ms. Chen's dispute with the Minister is the notion of "particular individual" which, at the time Ms. Chen purchased her new house, meant that if the supply of a residential unit complex was made to two or more individuals, "all of those individuals as a group" would be, as per subsection 262(3) of the Act, the "particular individual" for the purposes of subsection 254(2).

[4] As she remained a university student at the time of purchase and was only set to commence her new employment after taking possession of her new home, Ms. Chen was unable to get financing for the balance of the purchase price owed to the builder as the financial institutions she had contacted were requiring that more people be added to the title.

[5] Ms. Chen obtained financing when her godparents accepted to be added to the title. However, for the Minister, this had implications with respect to Ms. Chen's new housing rebate application because Ms. Chen's godparents now formed, with Ms. Chen, the "particular individual" referred to in paragraphs 254(2)(a), (b) and (g), and were, as a result, also required to meet the eligibility conditions set out therein. Since Ms. Chen's godparents, to whom she is not related within the meaning of the Act, had no intention of occupying or inhabiting Ms. Chen's newly acquired house as their primary place of residence and never occupied it when possession was granted, the Minister determined that Ms. Chen was not entitled to the new housing rebate.

[6] Before the Tax Court, Ms. Chen argued that her godparents' participation in the purchase of her new home had been organized in such a way that they were to be excluded from the definition of "particular individual", with the result that she was the only one qualifying as a

“particular individual” for the purposes of subsection 254(2). Since she met both conditions set out in paragraphs 254(2)(b) and (g), she claimed the Minister had no choice but to provide the tax rebate. In particular, Ms. Chen contended that she and her godparents, by signing a declaration of trust prior to the closing of the purchase agreement whereby the godparents accepted their interest in the property in their capacity of trustees for Ms. Chen, had created a bare trust. The bare trust, according to her, had the effect of bringing her godparents outside the reach of the definition of “particular individual”.

[7] Although sympathetic to Ms. Chen’s situation, the Tax Court felt bound by the decision of this Court in *Canada v. Cheema*, 2018 FCA 45, [2018] 4 F.C.R. 328 (*Cheema*), which it discussed at length. It dismissed Ms. Chen’s appeal, conceding that this outcome was “regrettable and unfortunate” given section 254’s purpose to ensure that the GST does not pose a barrier to affordable housing, and considering the lack of retroactivity of amendments brought to the legislation in 2021 that would have otherwise benefited Ms. Chen. On the actual merits of the bare trust argument, the Tax Court was not satisfied that the trust arrangement put in place by Ms. Chen and her godparents qualified as a bare trust, and in any event, underscored that the issue of whether a bare trust had been created was, as stated by the decision of the majority in *Cheema*, an irrelevant consideration in this case as subsection 254(2) provides, according to *Cheema*, no exception for trustees (*Cheema* at para. 94).

[8] Before this Court, Ms. Chen, relying heavily on the dissenting opinion in *Cheema*, claims that the Tax Court erred in concluding that no bare trust existed between her and her godparents, and in determining that her godparents were “particular individuals” for the purposes

of subsection 254(2). She further claims that the Tax Court committed a reviewable error in dismissing her appeal after having acknowledged that the intent of section 254 was to allow the new housing rebate for individuals who are unable to afford a new house on their own and need a second unrelated person to guarantee the payment of the purchase price.

[9] We are all of the view that the decision of the majority in *Cheema* is dispositive of the issues raised by Ms. Chen and that her appeal, therefore, cannot succeed.

[10] It is trite law that in the interests of certainty, consistency and predictability of the law, the Court normally follows its prior decisions (*Miller v. Canada (Attorney General)*, 2002 FCA 370 at para. 9 (*Miller*); *Feeney v. Canada*, 2022 FCA 190 at para. 16). Indeed, decisions of a panel of this Court are decisions of the Court as a whole. Therefore, when a panel of appellate judges speak, they do so not for themselves, but for the Court. This is reflected in the principle of horizontal *stare decisis*, which dictates that decisions of a panel of an appellate court bind future panels of that court (*Tan v. Canada (Attorney General)*, 2018 FCA 186, [2019] 2 FCR 648 at para. 24). This is no different when there is a dissenting opinion. Here, the decision binding on this panel is the opinion of the majority in *Cheema*, not the opinion of the dissenting judge (*R. v. Kirkpatrick*, 2022 SCC 33 at para. 257).

[11] It is only in “exceptional circumstances” that the Court will overrule the decision of another panel. This will generally occur when “the previous decision is manifestly wrong, in the sense that the Court overlooked a relevant statutory provision, or a case that ought to have been followed” (*Miller* at para. 10).

[12] We see no such exceptional circumstances here. In the end, Ms. Chen invites us to prefer the dissenting opinion in *Cheema*, which she claims is more consistent with what Parliament intended when it established the new housing GST rebate. Again, this is not our role. Ms. Chen's task was to demonstrate that the opinion of the majority in *Cheema* is manifestly wrong. She essentially claims that the majority's reasons were undermined by amendments that were brought to the Act in 2021. However, this argument falls well short of the mark as *Cheema* was decided, as it had to be, in light of the law as it stood at the time it was decided. Moreover, there is no indication, and Ms. Chen has not pointed to any, that the 2021 amendments were made strictly for clarification purposes. Also, Ms. Chen complains that the majority in *Cheema* misinterpreted paragraph 254(2)(a) which, according to her, supports her argument that she was the only "particular individual" for the purposes of the new housing rebate regime. That provision was fully discussed by the majority and we do not see any error that would justify this panel to depart from that decision. In sum, Ms. Chen has not persuaded us that the majority decision is manifestly wrong or that meaningful distinctions can be drawn between her situation and the situation that prevailed in *Cheema*.

[13] Therefore, the Tax Court cannot be faulted for relying on this jurisprudence and for stating that, as much as it would have liked to have found a way for Ms. Chen to be successful, it could not ignore the opinion of the majority. That decision, which the Tax Court had no choice but to follow, made it clear that the rebate was, at the relevant time, "intended only for occupants or relatives of occupants" (*Cheema* at para. 103). The fact that someone was acquiring a new house only as a trustee and with no beneficial interests in the property was of no consequence; there was no exception for trustees (*Cheema* at paras. 93-95). What mattered at the time,

according to the majority, was “the relationship of the person acquiring the [house] to the builder—one of purchase and sale—[...], not the relationship between co-purchasers” (*Cheema* at para. 94). This is dispositive, in our view, of Ms. Chen’s arguments relating to the alleged existence of a bare trust and the application of the definition of “particular individual” to her godparents.

[14] We see no merit as well in Ms. Chen’s argument that the Tax Court committed a reviewable error in dismissing her appeal while at the same time acknowledging that she was someone who, one would think, the legislation was intended to benefit. In *Cheema*, the majority warned that “[w]hile we might personally support the purpose behind the new housing rebate, we cannot allow that support to extend the rebate beyond the authentic meaning of the section”, and “‘supplant’ clear language or ‘[...] create an unexpressed exception to clear language’” (*Cheema* at para. 74). The Tax Court was well aware of that warning as evidenced by the fact that, although it found the outcome of Ms. Chen’s appeal “regrettable and unfortunate”, it nevertheless dismissed her appeal because it could not “get around the *Cheema* case”. It was not an error on the part of the Tax Court to express some sympathy to Ms. Chen in rendering judgment.

[15] At the outset of the hearing, Ms. Chen sought leave to file new evidence, which according to her, would support her claim that the Tax Court erred in concluding that no bare trust existed at the time of closing of the purchase agreement. That evidence is the deed of sale, dated May 24, 2023, whereby her godparents transferred to her their interests in the house for no



consideration. Given the conclusion we have reached on the merits of this appeal, this request is denied.

[16] For all these reasons, and despite all the sympathy one may feel for Ms. Chen, we are all of the view that the present appeal must be dismissed without costs.

"René LeBlanc"

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J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-127-22

**STYLE OF CAUSE:** SHENGDI CHEN v. HIS  
MAJESTY THE KING

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** JUNE 22, 2023

**REASONS FOR JUDGMENT OF THE COURT  
BY:** WOODS J.A.  
LOCKE J.A.  
LEBLANC J.A.

**DELIVERED FROM THE BENCH BY:** LEBLANC J.A.

**APPEARANCES:**

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