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Lawyer not liable for client's payment of foreign buyer's tax on North Vancouver property

By James R.G. Cook

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James R.G. Cook
Partner
416.865.6628
jcook@grllp.com

In *Tellini v. Bell Alliance*, [2022 BCCA 106 \(CanLII\)](#), the British Columbia Court of Appeal reversed a trial judge's decision that found the defendant lawyer and law firm liable for the plaintiff's obligation to pay foreign buyer's tax on a property in North Vancouver.

The plaintiff (Tellini) and her common law partner (Cedroni), moved to Canada from Brazil in 2015. Ms. Tellini decided to buy a home and paid the down payment with her own money. While she wanted to be the sole registered owner and mortgagor, Ms. Tellini's bank (HSBC) would not approve the mortgage loan unless both she and Mr. Cedroni were on title and bound by the mortgage. The property was subsequently registered in their names as joint tenants along with a mortgage to HSBC.

In 2016, the couple separated and negotiated a settlement under which Mr. Cedroni agreed to transfer his half interest in the property to Ms. Tellini in exchange for \$74,000. Ms. Tellini transferred \$35,000 to Mr. Cedroni and the remaining balance of \$39,000 was

to be set off against lump sum payments that he was to have paid for child support.

Ms. Tellini further agreed to assume responsibility for the mortgage and to ask HSBC to release Mr. Cedroni. She applied for a new loan in her name alone and HSBC issued a loan commitment that would remain open for three months, expiring on March 13, 2017.

At the time, Ms. Tellini was not a permanent resident of Canada and accordingly any purchase of property was potentially subject to a "foreign buyer's tax" of 15% levied on a "foreign national" as defined in the British Columbia [Property Transfer Tax Act](#) (the "[Act](#)").

Ms. Tellini retained a newly-called real estate lawyer employed at the defendant law firm, who advised that the foreign buyer's tax would apply to the transfer of the property from Mr. Cedroni if the transfer was completed before Ms. Tellini became a permanent resident. The firm calculated the foreign buyer's tax payable to be approximately \$54,000.

Ms. Tellini asked HSBC if they would increase the amount of her approved mortgage loan by \$60,000 to cover the foreign buyer's tax, but HSBC would not do so unless she submitted an entirely new application. This would have required a new appraisal of the property and resulted in a three-month interest penalty along with a potentially higher interest rate on the new mortgage. Ms. Tellini decided to stay with her approved mortgage from HSBC and to borrow the funds to pay the foreign buyer's tax from a friend (whose name she could not recall at trial).

In January 2017, the law firm registered the transfer of Mr. Cedroni's interest. Ms. Tellini paid foreign buyer's tax based on the property's 2016 notice of assessment.

On March 15, 2017, the British Columbia government enacted a retroactive exemption to the foreign buyer's tax, effective on August 2, 2017. Under the [Act](#), a refund of foreign buyer's tax became available for persons who purchased property within one year of becoming a permanent resident.

In January 2018, Ms. Tellini's property was reassessed, resulting in a further foreign buyer's tax liability of \$23,492, which Ms. Tellini paid. Ms. Tellini obtained permanent resident status on February 27, 2018, and she applied for a refund of the foreign buyer's tax. However, because the transfer of Mr. Cedroni's interest was registered on January 16, 2017, her application for a refund was denied.

Ms. Tellini then sued the lawyer and her firm, alleging that she would not have had to pay the foreign buyer's tax but for their negligence.

After a trial, the Supreme Court of British Columbia [determined](#) that the defendant lawyer

and firm had fallen below the standard of care by, amongst other things, failing to advise Ms. Tellini about her options, including the possibility of waiting to transfer or register the transfer of the property. The court [ordered](#) that the defendants pay \$74,700 to Ms. Tellini as damages for the foreign buyer's tax that she had to pay under the [Act](#).

In July 2022, the British Columbia Court of Appeal [allowed](#) the defendants' appeal and set aside the trial judge's decision. In their decision, the appellate court focused on the central issue—whether the lawyer's alleged failure to advise Ms. Tellini to wait to file the transfer caused her to suffer the loss of \$74,700. In the Court of Appeal's view, while the legal services the defendants provided were not without fault, the other mistakes found by the trial judge did not result in any loss or injury to Ms. Tellini.

The Court of Appeal's decision turned on the legal concept of "causation" that must be established to prove the well-established test for negligence as set out by the Supreme Court of Canada in *Mustapha v. Culligan of Canada Ltd.* [2008 SCC 27](#), *Clements v. Clements* [2012 SCC 32](#), and *Nelson (City) v. Marchi* [2021 SCC 41](#). In that regard, a plaintiff must show that the loss resulting from the negligent error was a "reasonably foreseeable" consequence.

Essentially, Ms. Tellini was required to prove that but for the defendants' advice she would have avoided the foreign buyer's tax liability by waiting to complete the transfer until she became eligible for the refund. Accordingly, she needed to prove that her liability to pay the tax was a reasonably foreseeable consequence of the lawyer's alleged failure to advise her to wait. As a preliminary matter, the Court of Appeal noted that Ms. Tellini's liability to pay the tax

was not a liability that arose because of the lawyer's advice but from her status as a "foreign national" under the [Act](#) at the time of the transfer. There was no expert or other evidence of any way in which the transaction could have been restructured to save the tax.

In the circumstances, therefore, the only alternative step that could have been taken by Ms. Tellini at the time would have been to wait to file the transfer documents until she became eligible for the rebate. With the acuity of hindsight, it was clear that Ms. Tellini only needed to wait until February 27, 2017 (one year before she became a permanent resident). However, because of the March 13, 2017, deadline for her mortgage commitment from HSBC, the court's view was that Ms. Tellini would not have delayed beyond that date.

Further, there was no finding that Grewal tried to discourage Ms. Tellini from simply waiting in the hope that her status would soon change.

The Court of Appeal commented that if the government's intention to introduce a retroactive exemption had been publicized prior to the date the transfer was filed, an argument of foreseeability might well have been made. But notice of the legislative change was not published until eight days *after* the expiry of HSBC's loan commitment and did not come into force until August 2, 2017.

The Court of Appeal concluded that the trial judge erred in failing to consider the question of legal causation or remoteness, set aside the judgment, and dismissed the action.

Of interest to professionals, and not determinative of the appeal, the British Columbia Court of Appeal also commented that the trial judge had incorrectly weighed all the credibility issues in favour of Ms. Tellini due to the lawyer's failure to

take notes of significant conversations. While the failure to take notes may fall below the standard of a reasonable lawyer, the court questioned whether it was fair to disbelieve the lawyer's evidence solely because of that failure, thus denying the lawyer the opportunity of convincing the court of the truth of her testimony in defence of the claim.

At the end of the day, however, the decision turned on the lack of causal proximity between the lawyer's allegedly tortious conduct in January 2017 and the plaintiff's loss of opportunity to claim a refund under an amendment to a regulation that was not yet in existence nor publicized. The decision affirms that a finding of a breach of a duty of care does not end the question of whether a defendant was negligent but that it is necessary to consider what losses, if any, were reasonably foreseeable as a result of the error.

Contact us

If you have a litigation matter and are in need of legal advice, please do not hesitate to contact [James Cook](#), at 416.865.6628 or jcook@grllp.com.

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