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## WHO IS RESPONSIBLE FOR PAYING THE STRATA'S DEDUCTIBLE?

By: RBS

When the source of damage to strata common property emanates from a specific strata unit, the question of who is responsible for paying the strata's insurance deductible can lead to tension between the strata and the owner of the source unit. In recent years, it has been common practice for stratas to successfully charge their insurance deductibles to the source unit owner, relying on the *Strata Property Act* and case law precedent. However, rulings of the Civil Resolutions Tribunal ("CRT") have questioned the practice of charging back deductibles to unit owners. The granting of leave to appeal in, *The Owners, Strata Plan BCS 1589 v. Nacht et al*, 2018 BCSC 455 of a recent CRT ruling in *The Owners, Strata Plan BCS 1589 v. Nacht et al*, 2017 BCCRT 88, will give the BC Supreme Court an opportunity to clarify this common area of dispute.

### THE FACTS

The CRT is an online tribunal which has the jurisdiction to resolve small claims disputes under \$5,000 and strata property disputes of any amount. Since 2016, it has issued 171 decisions relating to a broad range of strata property disputes, including payment of strata fees or fines, enforcement of strata bylaws such as noise, pets, parking and rental restrictions, and financial responsibility for repairs of strata units and strata common property.

In *Nacht*, a water leak occurred in a strata lot which caused \$87,000 in damage to other strata units and strata common property. The cost of the damage was covered by the strata's insurer, but the strata was responsible for the \$25,000 deductible. The strata paid the deductible and then attempted to charge back the deductible to the unit owner, relying on s.158(2) of the *Strata Property Act*. The unit owner refused to pay the deductible and the strata brought the claim to the CRT. The CRT ruled in favour of the unit owner, finding that as a result of the strata bylaws, "*proof of negligence on the part of the owners is required for the strata to recover its insurance deductible from the owners*". The Strata has been granted leave to appeal by the BC Supreme Court.

### THE CRT RULING

Section 158(2) of the *Strata Property Act* provides that a strata corporation can sue an owner in order to



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recover the deductible portion of an insurance claim if the owner is “responsible” for the loss or damage that gave rise to the claim. Past case law such as *Wawanesa Mutual Ins. Co. v. Keiran*, 2007 BCSC 727 and *Mari v. Strata Plan LMS 2835*, 2007 BCSC 740, have long stood for the proposition that negligence does not have to be established and responsibility falls to the unit owner when the unit is identified as the source.

In this particular case, the strata bylaw 4.4 (a) read: “An owner must indemnify and save harmless the strata corporation from the expense of any maintenance, repair or replacement rendered necessary to the common property, limited common property, common assets or to any strata lot **by the owner’s act, omission, negligence or carelessness.**”

The CRT found that, despite the existence of bylaw 4.4 (b) – which stated that bylaw 4.4(a) “does not limit, in any way, the ability of the strata corporation to sue an owner pursuant to section 158(2) of the Act – bylaw 4.4 (a) had in fact narrowed the application of s.158(2) of the *Strata Property Act*, with the result that the strata would have to establish that the unit owner was negligent in order to charge back the deductible portion of the insurance claim. In reaching its decision the CRT relied on *Strata Plan LMS 2446 v Morrison*, 2011 BCPC 519, which had a bylaw with similar wording to bylaw 4.4(a), and found that the standard to be applied in determining the owner’s responsibility for loss or damage was one of negligence, rather than “responsible for”. As there was no evidence of negligence, the CRT ruled in favour of the unit owner and the strata sought leave to appeal the ruling to the BC Supreme Court.

## LEAVE TO APPEAL

In order to be granted leave to appeal of a CRT decision the appellant must establish that there are questions of law arising from the CRT decision and that it is in the interests of justice and fairness for the BC Supreme Court to hear the appeal.

The BC Supreme Court considered these criteria and decided that the CRT decision had raised important questions of strata law including the interpretation of the *Strata Property Act*, strata bylaws and past strata case law. The BC Supreme Court also noted that it was satisfied that it was in the interest of justice and fairness for the Court to hear the appeal due to the fact that “[e]ach question is of such importance that it would benefit from being resolved by this Court to establish a precedent.”

The appeal can be expected to be heard in approximately six to twelve months.

## PRACTICAL CONSIDERATIONS

The *Nacht* case emphasizes the CRT’s role in influencing and establishing strata law. The pending ruling of the BC Supreme Court will provide guidance and clarity on the law of strata deductibles, including the





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interpretation and application of s.158 of the *Strata Property Act*, the interaction of the *Strata Property Act* with the strata's bylaws, and the precedential value of past case law such *Strata Plan LMS 2446 v Morrison*, 2011 BCPC 519. It is advisable that strata management companies, underwriters and brokers keep apprised of the future BC Supreme Court decision and continue to keep in mind the impact and importance of the CRT in resolving strata disputes.



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