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November 17, 2007

Our File: 3621.14

Your File:

The Board of Directors
Owners Condominium Corporation
(Little Bow Resort)

Dear Mr. Hildebrand:

Re: ATV Liability Legal Opinion

The Board has requested our legal opinion with respect to liability issues relating to the use and operation of ATVs or other off-highway vehicles on the condominium common property. We provide that opinion now, considering 3 alternative scenarios as discussed below. Throughout this opinion reference to ATVs is intended to include all vehicles falling within the definition of "off-highway vehicle" in section 117 of the Traffic Safety Act of Alberta, being "any motorized mode of transportation built for cross-country travel on land… or on other natural terrain". This definition specifically includes motor-cycles and all terrain vehicles. In our opinion it also includes golf carts and go-carts, which we understand are also in use at the resort.

Facts:

Little Bow Resort is operated as a condominium pursuant to the *Condominium Property Act.* By-law 37.2 (w) provides that no owner shall "operate snowmobiles, motorcycles or off highway and all terrain vehicles on any Unit or the Common Property". By-law 37.2 (z) provides that no owner shall "park or bring into [the resort]… any motor vehicle (including snowmobiles, motorcycles or off highway and all terrain vehicles) at any time without the prior approval of the Board or its Manager", with exception for two automobiles, trucks or vans on the owner's unit. These by-laws are not currently being enforced. We understand that ATVs are commonly being used on the resort common property and are being operated by people of all ages, including unlicensed drivers. We understand that the Board has been unable to secure confirmation that all ATVs in and operating on the common property are licensed and insured.

The Little Bow Resort is located in the Province of Alberta. The Laws of the Province of Alberta, including the Traffic Safety Act, which governs use of all vehicles, including off highway vehicles, applies on the Little Bow Resort property. The roads within the Little Bow Resort are part of the common property of the resort. They are privately owned and maintained and controlled by the

Condominium Association under the direction of the Board. The Board has the ability and responsibility to regulate activities on all of the common property, including the roads. The Board does not have the authority to permit the provincial laws to be breached on the common property.

The roads in the resort are highways as defined by the Traffic Safety Act of Alberta. Under section 120 of the Traffic Safety Act a person shall not drive an off-highway vehicle on any portion of a highway, except to cross a highway as specifically permitted by the Act. We have previously provided advice regarding steps that could be taken to make the roads in the resort private so that prohibition would not apply on them and we will not repeat that discussion here. We simply highlight here that as long as the roads are highways, the Board does not have legal authority to permit ATV use in contravention of the Traffic Safety Act. Therefore any revision to the by-laws to allow use and operation of ATVs on the roads would require additional steps to be taken to make such use consistent with the Traffic Safety Act.

Also, the Traffic Safety Act requires in section 119 that a person shall not drive or permit another person to drive an off highway vehicle unless there is a subsisting certificate of registration issued in respect of it and it is insured except on their own land or on land owned by some other person who has expressly or impliedly consented to the driving of the off-highway vehicle on their land. Therefore, the general rule is that all such vehicles must be registered and insured, but the Board on behalf of the Condominium Association could consent to off-highway vehicles being driven on the common property of the resort without registration or insurance, which we do not recommend as discussed below.

The Province of Alberta has a Motor Vehicle Accident Claims Act that provides a means to recover of compensation for injury caused by motor vehicle accidents where the vehicles are not insured. It applies to cases where the motor vehicle is required to be registered or where an off-highway vehicle is required to be registered under the Traffic Safety Act. It would not apply to situations where the off-highway vehicle has been permitted to be used without registration or insurance.

Issues:

1. What are the potential liability risks if the Condominium Board:

a) fails to enforce this bylaw;

b) enforces the bylaw; or

c) changes the bylaw and permits use and operation of ATVs on the property?

2. What are the obligations of the directors with respect to enforcing bylaws? Will they be found to be wilfully blind if they do not enforce the bylaws?

3. Would the bylaws, if enforced, apply differently to children or youth compared to adults? Are there specific issues relating to permitting children or other unlicensed people to operate ATVs on the resort property?

4. If the Board changes policy and by-laws to allow use and operation of ATVs, would that be considered a change material to the risk under the condominium corporations insurance policy? Would the insurer have to be informed of that change?

Brief Conclusions:

1. **a)** Currently, as the Board is not enforcing the bylaw, the condominium corporation faces significant exposure to liability resulting from ATV use on the Resort under the *Occupiers' Liability Act*.

b) If the Board did enforce the bylaw, this would dramatically reduce their exposure to liability for a number of reasons. However, there is some risk that choosing to begin to enforce a bylaw, which has not been enforced in the past, could create other difficulties for the condominium corporation.

c) If the Board changes the bylaw and takes other steps to permit use of ATVs, there will be continuing exposure to liability, but it would be less risk that is created by not enforcing the bylaw. The Board can then reduce exposure to liability by taking affirmative steps to regulate the use of ATVs at the Resort.

In all cases the condominium corporation's liability insurance is expected to respond to the claims and indemnify the corporation. However, any claim would be expected to result in reconsideration of premiums and possible loss of further insurance coverage.

2. The Board is not an entity independent of the condominium corporation. Liability of the condominium corporation is liability of the owners. The condominium corporation is not a limited liability company. The condominium corporation's powers and duties are exercised and performed by the Board. It is the Board's responsibility to perform the duties of the corporation, and if the Board fails to perform a duty imposed on them or the corporation, the corporation is potentially liable. The *Condominium Property Act* creates an obligation on the corporation to enforce its bylaws. Thus, by not enforcing a condominium bylaw, the corporation, through the actions of the Board, is in breach of a statutorily imposed obligation. Board members must conduct themselves honestly and in good faith. They would only be personally liable for a loss in the most extreme cases. Personal liability of Board members would not arise from a failure to enforce the ATV bylaw. However it would create liability for the condominium corporation and owners as a whole.

3. The bylaw, if enforced would operate uniformly to children and adults, with only one difference. The effect of this difference is not expected to substantially affect the liability of the corporation. There are additional risks of liability associated with allowing children and other unlicensed people to operate ATVs on the common property.

4. Given the danger presented by ATV use generally, it is likely that revising bylaws or otherwise formally permitting use and operation of ATVs on common property would be considered by the condominium corporation's insurer to be a change material to the risk. At common law, there is no duty to disclose a change material to the risk under an insurance contract during the term of the policy.

There is no statutory condition applicable to a Commercial General Liability Policy which would impose such a duty, as there is under motor vehicle or fire insurance policies. We have not reviewed the condominium corporation's insurance policy wordings. It is possible that a duty to disclose the change may exist in the contract.. Even though there may not currently be a duty to disclose such a change, there would be a duty to disclose the change when the policy is next renewed.

Analysis:

Issue 1. Potential Liability of the Condominium Corporation Relating to ATV Use

I note first that we were unable to find any case law regarding condominium corporation bylaws addressing or restricting the use of ATVs.

Under the law of negligence the condominium corporation could be exposed to liability as a result of a loss flowing from the use of an ATV on the Resort. In any claim of negligence, the plaintiff must prove i) that the defendant owed the plaintiff a duty of care; ii) that the defendant breached the reasonable standard of care required to fulfill that duty to the plaintiff; iii) that the breach of the defendant caused the loss of the plaintiff, with the qualification that the loss cannot be too remote; and iv) the plaintiff must prove that he suffered a loss.

We believe that it would be likely that someone injured by the use or operation of an ATV by themselves or others on the resort common property would succeed in a claim for negligence against the condominium corporation. The condominium corporation clearly owes a duty of care to owners and visitors to the resort. It is expected that a court would be inclined to find that permitting illegal activity such as operation of off-highway vehicles on the roads or common property at the resort would be a breach of the reasonable standard of care. The risk of such a finding is increased when the off-highway vehicle is not registered or insured or if it is operated by an under-age or other unlicensed driver.

If an ATV accident occurs on the common property, any plaintiff would likely not rely solely on the general law of negligence, but would be assisted by the statutory standards created under the *Occupiers' Liability Act* ("the *OLA*"). The *OLA* would apply to a situation where someone was injured on an ATV at the Resort.

The law of occupier's liability is a branch of negligence law and is concerned with the liability of occupiers of the premises to persons who enter those premises. The law of occupier's liability creates a duty of care which is owed by occupiers to visitors. In Alberta, s. 5 of the *OLA* sets out both when a duty of care is created, and what standard of care is owed to a visitor by an occupier:

> An occupier of a premises owes a duty to every visitor on his premises to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there or is permitted by law to be there.

Importantly, s. 6 defines the scope as when the common duty of care, created in s.5, arises and applies. It applies in relation to:

(a) the condition of the premises,

(b) activities on the premises, and

(c) the conduct of third parties on the premises.

Permitting use of ATVs would fall under Section 6 (b) and (c) so that the condominium corporation would very likely be found to have potential liability and the duty and standard of care created by s. 5 would apply to the use and operation of ATVs on the common property of the resort.

Under the *OLA* the duty created is owed by occupiers to visitors. Visitors are defined in s. 1(e) as:

(e) "visitor" means

(i) an entrant as of right,

(ii) a person who is lawfully present on premises by virtue of an express or implied term of a contract,

(iii) any other person whose presence on premises is lawful, or

(iv) a person whose presence on premises becomes unlawful after the person's entry on those premises and who is taking reasonable steps to leave those premises.

Section 1(c) of the *OLA* defines "occupier", and it reads:

(c) "occupier" means

(i) a person who is in physical possession of premises, or

(ii) a person who has responsibility for, and control over, the condition of premises, the activities conducted on those premises and the persons allowed to enter those premises,

and for the purposes of this Act, there may be more than one occupier of the same premises;

The condominium corporation is an "occupier" within the meaning of the *OLA*.

In Alberta, the *Condominium Property Act*, R.S.A. 2000, C-22, ("the *CPA*") allows the condominium corporation to both sue and be sued. Section 25(3) reads:

(3) Without limiting the powers of the corporation under this or any other Act, a corporation may

(a) sue for and in respect of any damage or injury to the common property caused by any person, whether an owner or not, and

(b) be sued in respect of any matter connected with the parcel for which the owners are jointly liable.

This would seem to imply that all of the owners could potentially be jointly liable for any action in negligence, it does not automatically follow that such a section makes them "occupiers" as defined in the *OLA*.

However, s. 47(7)(c) of the *CPA*, may provide a more definitive answer. Section 47(7)(c) reads:

> **47(7)** In addition to placing and maintaining insurance under subsection (1), a corporation shall place and maintain insurance against the following:
>
> > (c) any liability incurred by the corporation arising out of a breach of duty as the occupier of the common property;

As this section mandates the insurance that a condominium corporation must have in place it implies that the corporation is the occupier of the common property. Cases are consistent with that conclusion such as *Frolek v. Condominium Plan Number 842 0001*, [1988] A.J. No. 1136 and *Long v. Owners of Condominium Plan No. 74R40206*, (1979) 2 Sask. R. 212.

For any plaintiff to succeed in an action based on occupier's liability, the following elements must be established: i) that the defendant was an occupier of the premises on which the accident occurred; ii) the defendant breached the standard of care owed to the plaintiff; iii) that the defendant's breach caused the plaintiff's injury; and iv) the plaintiff suffered damage.

From sections 5 and 6 of the *OLA* we know that the corporation owes a duty to all visitors who are partaking in activities upon the common property to ensure that the visitor is reasonably safe. The duty is not absolute. An occupier does not have to guarantee the safety of persons coming on the premises, but is under an obligation to take such affirmative steps as are reasonable in the circumstance to ensure all visitors will be reasonably safe. In determining whether an occupier has discharged its duty in any particular case, it is necessary to apply the test of whether or not the danger was one that was foreseeable.

In *Lorenz v. Ed-Mon Developments Ltd.* 1991 CarswellAlta 49, 79 Alta. L.R. (2d) 193, the Alberta Court of Appeal stated:

> 3 The correct question, then, in deciding whether or not an occupier has been negligent is to ask whether it could reasonably foresee a risk to visitors who exercise ordinary diligence. If the answer is yes, the occupier is negligent even if the plaintiff failed to exercise ordinary diligence.

In order to establish that the occupier should be liable for in negligence, a plaintiff will have to establish that the corporation could have been reasonably foreseen the danger or risk to a visitor exercising ordinary diligence.

Clearly, ATVs pose a risk not only to those who ride them, but also to others on the common property as well. The *Traffic Safety Act* prohibits the operation of ATVs on "highways" which is very broadly defined. No doubt part of the rationale for this prohibition is the recognition of the danger that ATVs pose to their riders and others, especially on roads used by others. The risk or danger presented by ATVs is foreseeable, it creates a real possibility of exposing the corporation to liability for a loss that occurs on the common property.

In the above context, we have examined how decision by the Board to i) not enforce the bylaw, ii) to enforce the bylaw, or iii) to change the bylaw to permits ATVs could affect their ability to discharge the requisite standard of care to ensure the reasonable safety of those at the Resort.

1. a) if the condo Board fails to enforce the bylaw

Of course, any condominium corporation, although a distinct legal entity, and likely an "occupier" of the condominium's common property under the *OLA*, is an incorporeal entity. In *Rushton v. Condominium Plan No. 8820668*, (1997) 202 A.R. 299, 1997 CarswellAlta 457, Master Funduk commented on the relationship between the Board and the corporation:

> 31 The board is not something independent of the condominium corporation. The condominium corporation's powers and duties are exercised and performed by the board: s. 23(3). The board's acts are not the acts of its members. The board's acts are the acts of the condominium corporation.
>
> 32 S. 23(3) creates the "identification theory" found in corporate law, which is discussed in *Montreal Trust Co. of Canada v. ScotiaMcLeod Inc.* (1995), 26 O.R. (3d) 481 (Ont. C.A.). The board of managers of a condominium corporation is roughly the equivalent to a board of directors for a corporation. The identification theory is a concept that the directors merge with the corporation for the purposes of giving the corporation a directing mind and will. Although the corporation is a person in law it is not a natural person so natural people must be the guiding mind and hand of the corporation.

It is the Board's responsibility to perform the duties of the corporation, and if the Board fails to perform a duty imposed on them or the corporation, the corporation is potentially liable. Section 37(1) of the *CPA* creates an obligation on the corporation to enforce its bylaws. It reads:

> **37 (1)** A corporation is responsible for the enforcement of its bylaws and the control, management and administration of its real and personal property and the common property.

In *Devlin v. Condominium Plan No. 9612647*, 2002 ABQB 358, 2002 CarswellAlta 499, Power J. commented, "It is trite law to say that once the rules have been established a unit owner is expected to abide by them and the condominium corporation is obliged to enforce them". Thus, by not enforcing a condominium bylaw, the corporation, through the actions of the Board, is in breach of a statutorily imposed obligation.

Although such a breach of a statutory duty is not an actionable tort in itself, the fact that the corporation has failed to enforce the prohibition against ATVs may weigh heavily as evidence that the corporation has failed to discharge the requisite standard of care mandated in the *OLA* to ensure the reasonable safety of visitors. If an accident was to occur, and the Board was not enforcing the bylaw, it would be very hard to argue that the corporation had done all that it reasonably could in the circumstances to ensure the safety of visitors to the Resort. Any such argument would be inherently weak when the Board was not even enforcing the bylaw prohibiting ATVs, as it was obliged by law to do. This situation is arguably worsened by the fact that the Board's failure to enforce the by-law in this case would amount to permitting illegal activities on its premises.

Unique to Alberta's legislation, s. 5 of the *OLA* qualifies the duty of care imposed on an occupier. For convenience, s. 5 reads:

> An occupier of a premises owes a duty to every visitor on his premises to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe <u>in using the premises for the purposes for which he is invited or permitted by the occupier to be there or is permitted by law to be there.</u>

Thus, an occupier only owes a duty of care to a visitor if the visitor is using the premises for the purposes for which he is invited or permitted. If the Board has knowledge of ATV use on the Resort and they have not taken any actions to enforce the bylaw prohibiting the activity, they will very likely be taken to have consented to the use of ATVs by an implied authorization. Thus, the duty of care created in s. 5 of the *OLA* will apply to all visitors using ATVs, as it is a use permitted by the occupier.

Also unique to Alberta's occupier liability legislation is the distinction between visitors and trespassers. In other provinces, this distinction has been abolished. Section 12 of the *OLA* creates this distinction and reads:

> **12 (1)** Subject to subsection (2) and to section 13, an occupier does not owe a duty of care to a trespasser on the occupier's premises.
>
> **(2)** An occupier is liable to a trespasser for damages for death of or injury to the trespasser that results from the occupier's wilful or reckless conduct.

There may be certain limited circumstances where the *guests* of an owner could be deemed a "trespasser" by engaging in prohibited conduct. It is unlikely that an owner could ever be deemed a trespasser. This is because owners, under s. 1(e)(i) of the *OLA* are "visitors" because they are "entrants as of right" and this is not a status that can change regardless of the activity they engage in. However, the status of their guests may be different. Guests are "visitors" under s. 1(e)(iii), as their "presence on the premises is lawful". It may be possible that if guests engage in activities that are prohibited, by bylaw or otherwise, then their presence would no longer be considered "lawful" and they would cease to be a "visitor" under the *OLA*. From the structure of the OLA, it seems that if someone is not a "visitor" then they are to be considered a "trespasser" as there is no middle ground.

Thus if a person on the Resort was classified as a trespasser, the occupier corporation would only be liable under the *OLA* if the conduct of the corporation is "wilful or reckless". This different standard would make it much more difficult for an injured plaintiff to allege that the corporation should be liable for their damages.

However, because the Board is not enforcing the bylaw, they lose access to this potential shield from liability for losses incurred by the guests of owners using ATVs. If the Board is not enforcing the bylaw, ATV use may not be considered "unlawful" as the Board could be deemed to have allowed ATV use via an implied authorization, as noted above. Without an enforceable prohibition, guests cannot contravene the prohibition nor lose their status as "visitors" and become "trespassers". Until they become "trespassers" they are owed the common duty of care created in s. 5 of the *OLA*.

Therefore, where the Board has a by-law prohibiting use of ATVs that it fails to enforce, and where the use or operation of them is prohibited by provincial law, it is our opinion that any owner or guest injured as a result of use or operation of ATVs would have a strong case against the Condominium Corporation for liability under the *OLA*. A finding of liability would be likely. We recommend against maintaining the bylaw but failing to enforce it. Of the scenarios considered, failing to enforce a bylaw prohibiting ATVs has the greatest risk associated with it.

b) if the condo Board decides to enforce the bylaw

If the Board begins to enforce the bylaw, it would remedy the difficulties explored above. If the bylaw were enforced, the corporation would no longer be in breach of the statutory obligation created by s. 37 of the *CPA*. Enforcing the bylaw would not only decrease the risk of a loss caused by an ATV from occurring, but if such a loss did occur, the Board would be able to demonstrate that they had done everything reasonable in the circumstances, including having a bylaw directed at minimizing the risk and taking active steps to enforce the prohibition established by the bylaw, to ensure the reasonable safety of visitors to the resort. This would greatly diminish the potential liability exposure of the corporation as an occupier under the *OLA*. In our opinion if the bylaw were actively enforced by the Board, the condominium corporation would have a strong defence to any claim against it arising out of use or operation of an ATV on the common property. The only remaining potential argument for liability would relate to the reasonableness of the efforts to enforce the bylaw. The obligation is not to provide perfect enforcement to guarantee that there be no use. The standard is reasonable enforcement.

Above, it was also mentioned that s. 5 contains an important qualification, unique in Alberta's legislation: the duty of care is only owed to visitors who use the premises for the purposes for which he is invited or permitted by the occupier to be there. If the Board takes steps to enforce the bylaw, they will have a very strong argument that any loss caused by ATV use would be the result of an activity that was not allowed, but was expressly prohibited. This would provide the corporation with a strong shield from potential liability.

Also, if the Board enforced the bylaw it is possible that a *guest* using an ATV could be deemed a "trespasser". This again would reduce the potential liability of the corporation for a loss resulting from ATV use. The corporation would only be liable to such a trespasser if the conduct of the corporation were "wilful or reckless". In order to discharge the duty owed to trespassers, the Board would only have to take minimal precautions. This would likely involve acting or investigating complaints of ATV use that are brought to their attention. Of course, practically speaking this reduction in exposure to liability may be minor considering most ATV use would be by owners who are "visitors" under 1(e) as "entrants as of right". "Entrants of right" would not lose this right by simply engaging in a prohibited activity.

In our opinion, enforcing the existing bylaw prohibiting use and operation of ATVs is the scenario that best protects the condominium corporation and owners from liability.

Unfortunately, beginning to enforce a bylaw that the Board has not actively enforced in the past may create other difficulties. In *Metropolitan Toronto Condominium Corp. No 601 v. Hadbavny,* (2001) 48 R.P.R. (3d) 159, 2001 CarswellOnt 3777 it was held that the Board's failure to enforce a bylaw created a situation where the bylaw was effectively unenforceable. In that case, the defendant purchased a unit in a condominium which had a bylaw permitting one pet only. However, at no time did the Board take any steps to enforce this bylaw. It would only enforce a separate bylaw which allowed them to demand the removal of "nuisance" pets. When the Board attempted to enforce the one-pet bylaw against an owner, the court held the bylaw could not be applied against the defendant. A similar result was reached with respect to changes in practise relating to enforcement of bylaws prohibiting hot tubs.

Thus the Board may have difficulty if it now attempts to enforce the bylaw prohibiting ATVs, especially if people bought property at the Resort because of the implied ability to use ATVs there. If the enforcement of the bylaw was protested, it is possible the court could allow some owners to keep using their ATVs, which would create a very difficult situation. However, in our opinion it is possible to distinguish the ATV scenario from those discussed above as those cases did not involve bylaws intended to reduce or eliminate dangerous condition. Furthermore the discussion that has occurred with respect to the ATV bylaw would make it difficult for owners to argue that there was an implied waiver of the bylaw.

c) if the Board changes the bylaw and permits ATVs on the property

If the Board changes the bylaw to permit ATVs, then it is certain that the statutory duty of care created by s. 5 of the *OLA* would apply. The qualification that the duty is only owed to those who use the premises as they are permitted would be irrelevant as the activity would be permitted. However, if a loss did occur as a result of ATV use, the Board would not be faced with the difficult situation of arguing they discharged their duty to the injured party while being in breach of a statutory obligation to enforce the bylaws, as the bylaw they are currently failing to enforce would no longer be in existence. If ATVs were permitted, this would also remove the Board's ability to argue that using any ATV, then a permitted activity, would constitute a non-permitted, uninvited or unlawful use. The corporation could have liability for making the choice to permit this dangerous activity. The potential liability would not be eliminated and would still be greater than if the activity is prohibited by bylaw and the bylaw is enforced. This scenario would expose the corporation to increased liability compared to enforcing the current bylaw.

In order to satisfy the standard of care requiring the Board to ensure the reasonable safety of visitors, the Board should consider other affirmative steps they can take to reduce the risk ATV use presents to visitors. They could consider creating rules that would regulate the use of the ATVs on the Resort. This could include placing signs in appropriate locations warning that ATVs are in use at the Resort and warning that the users assume all risks associated with their use and waive any claims against the corporation, mandating helmet use, mandating registration and insurance of the ATVs, requiring drivers to be qualified and licensed or allowing ATV use only in specially designated areas of the Resort. The condominium corporation would also need to address means of ensuring that they are not expressly permitting illegal activity, which would create a high risk of liability. Therefore they would have to take steps to make use and operation of ATVs on the resort property consistent with provincial law. They should therefore make the roads private as we previously advised. Of course, enforcement of such rules and restrictions would likely pose a difficult logistical problem and reasonable efforts must be made to enforce the rules.

Under s. 7 of the OLA, an occupier is not liable for any risk willingly accepted by a visitor. It reads:

> **7** An occupier is not under an obligation to discharge the common duty of care to a visitor in respect of risks willingly accepted by the visitor.

If the corporation changed the bylaw to permit use, it may want to consider creating a waiver which could be signed by those using ATVs indicating that they acknowledge and accept the risk associated

with ATV use or that they accept the rules and regulations regarding ATV use on the Resort. This would assist with respect to claims made by those ATV users, but it would not assist to the extent that ATV use injures others.

Another means by which to limit the condominium corporation's liability in the event they determine to make changes to permit ATV use is to require ATV users to not only acknowledge and accept the risk to themselves but to indemnify the condominium corporation for any liability it might have to others. This would help to mitigate the risks of liability, but would only be valuable and effective to the extent of any insurance and assets that the ATV user has.

If the corporation decides to permit ATV use, it will have to determine whether it will allow use of ATVs on its property without registration and insurance. The general law of Alberta is that ATVs are to be registered and insured. However, they can be used without registration and insurance on property where the owner specifically permits such use. The requirement of insurance provides significant protection for owners and visitors at the resort such that if they are injured by an ATV they will be able to recover compensation for their injuries from that insurance, or the Motor Vehicle Accident Claims Fund or, to the extent those sources are inadequate, from their own motor vehicle insurance under the SEF 44 Family Protection Endorsement. We do not recommend allowing the use of unregistered, uninsured ATVs on the resort property for this reason. If there is no liability insurance on the ATV, the condominium corporation's liability insurance becomes the primary and possibly the only source of compensation for injured parties.

2. What are the obligations of the directors with respect to enforcing bylaws?

This issue is discussed in 1a) above. To repeat, the Board is not an entity independent of the condominium corporation. The condominium corporation's powers and duties are exercised and performed by the Board. It is the Board's responsibility to perform the duties of the corporation, and if the Board fails to perform a duty imposed on them or the corporation, the corporation is potentially liable. This amounts to a liability of all owners at the Resort. Section 37(1) of the *CPA* creates an obligation on the corporation to enforce its bylaws. It reads:

> **37 (1)** A corporation is responsible for the enforcement of its bylaws and the control, management and administration of its real and personal property and the common property.

In *Devlin, supra,* it was held that "once the rules have been established a unit owner is expected to abide by them and the condominium corporation is obliged to enforce them". Thus, by not enforcing a condominium bylaw, the corporation, through the actions of the Board, is in breach of a statutorily imposed obligation and may be liable to those who suffer a loss as a result of that failure.

Section 28(2) mandates the standard of conduct that is expected of Board members, it reads:

> **2)** Every member of a board shall exercise the powers and discharge the duties of the office of member of the board honestly and in good faith.

In *Rushton v. Condominium Plan No. 8820668*, (1997) 202 A.R. 299, 1997 CarswellAlta 457, the plaintiff, an owner of a condominium unit, experienced water damage and heaving of the cement floor

in her basement. The plaintiff launched a lawsuit against the general contractor, the property manager, and the condominium corporation for negligently failing to correct the problem. The plaintiff moved to amend her statement of claim in order to join board members of the condominium corporation for having breached their duty to the condominium corporation in not diligently ensuring the repairs were carried out. Master Funduk rejected the plaintiff's motion, as there must be a duty arising between the board members and the plaintiff in order for the plaintiff to have a direct cause of action against the board members. A duty owed by the board members to the condominium corporation was not good enough. The duty owed must be to the plaintiff. In denying the personal liability of the directors Master Funduk stated:

> 35 There is no suggestion of any conduct by the board of managers which would be sufficient to cause the members to shed their identity with the condominium corporation and expose themselves to personal liability for the alleged failure of the condominium corporation to remedy the problem. The role of the board was limited to being the directing mind of the condominium corporation.

And then continued:

> 38 If board members can be personally liable in situations such as this no one would agree to be a board member. …where the board members have not shed their identity with the condominium corporation there cannot be a personal liability by them for the condominium corporations failures, either misfeasance or nonfeasance.

It follows that a plaintiff would only have a cause of action against a Board member in situation where the Board member acted in a deceitful, high-handed manner, or there was evidence of bad faith such that the Board member would violate a duty owed directly to an individual plaintiff. The liability for failure to enforce bylaws will therefore rest with the corporation as a whole, not just with the individuals serving on the Board of Directors.

3. ATV use by children

The comments made in 1) b) above would apply to children just as they do to adults with one difference (and again as this difference relates to trespassers, it not likely to have a significant practical effect on liability). Under the *OLA*, children who are trespassing are still owed the same duty and standard of care as lawful visitors. Section 13 of the *OLA* reads:

> **13 (1)** When an occupier knows or has reason to know
>
> (a) that a child trespasser is on the occupier's premises, and
>
> (b) that the condition of, or activities on, the premises create a danger of death or serious bodily harm to that child,
>
> the occupier owes a duty to that child to take such care as in all the circumstances of the case is reasonable to see that the child will be reasonably safe from that danger.

Whether such a duty is discharged is contingent on the specific facts related to the child who suffers a loss. The factors to be considered are listed in s. 13(2):

> **(2)** In determining whether the duty of care under subsection (1) has been discharged, consideration shall be given to
>
> (a) the age of the child,
>
> (b) the ability of the child to appreciate the danger, and
>
> (c) the burden on the occupier of eliminating the danger or protecting the child from the danger as compared to the risk of the danger to the child.

In our opinion permitting the use or operation of ATVs by children or other unlicensed people increases the risks associated with ATV use and may not be considered reasonable by the court. If ATV use is permitted, the risk of liability is greater if children or other unlicensed people are operating them. Furthermore, insurance on the ATV may not be effective when it is driven by a child or unlicensed driver, resulting in loss of some of the protections otherwise available.

4. If the Board allows ATVs, would be it considered a material change in risk under the condominium corporation's insurance policy?

Assuming that the Resort has a Commercial General Liability Policy, it is very likely that changing the bylaw to permit ATVs would constitute a change material to the risk insured for. Whether allowing ATVs is change material to the risk insured for is a question of fact. The trier of fact would have to look at what the policy covers and the context the policy exists within. Given the danger presented by ATV use generally, and the differences in liability exposure in the different scenarios considered and noted in the above analysis, it is likely that any action other than enforcing the current bylaw, which the insurer likely assumes is already occurring, would be considered a change material to the risk.

Generally, insurance contracts require the utmost good faith on behalf of the insured. This is because knowledge of the risk is often only known by the insured. However, at common law there is no duty to disclose a change material to the risk contracted for during the policy. Sections of Alberta's *Insurance Act*, which deal with fire and automobile insurance, contain a number of statutory conditions. One of these conditions makes it an obligation of the insured to promptly notify the insurer of any change material to the risk that is known or within the control of the insured. These statutory conditions would not apply to a CGL policy, as a liability policy, not a fire or automobile policy.

We have not reviewed the condominium corporation's policies of insurance to determine what type of policies they have in place that are relevant or what specific terms are within the policies. It is possible that a condition requiring disclosure of material changes in risk may exist in the Resort's insurance policy, even if it is a CGL and not a fire policy. This would create a contractual obligation (as opposed to a statutory condition) on the Resort to disclose the change to the bylaw to permit ATV use. In any event, if the corporation is not required to disclose the change now, they would very likely have to disclose the change when they next renew their policy, as this would be effectively a new application would require the utmost good faith from the corporation.

Summary and Recommendations

Permitting any use of ATVs on the common property of the resort will increase risk of liability compared to enforcement of the current bylaw and may result in an increase in insurance premiums or create difficulty securing liability insurance for the condominium corporation. The course of action having the greatest risk would be to maintain the current bylaw prohibiting ATVs but to fail to enforce it or to regulate the use of ATVs in any way.

If ATVs are to be permitted at the Resort, the risk can and should be reduced by changing the bylaws to allow the use and to exercise some control or regulation over where, under what circumstances and by whom they will be used. If ATVs are to be permitted, we recommend that the Board require them to be registered and insured and allow them to be operated only by licensed drivers. Other steps must be taken to make use of ATVs on the roads consistent with Provincial law if they are to be permitted. Waivers of liability and indemnities can be obtained from ATV users to mitigate some of the risk associated with ATV use. The insurer should be informed of the intention to allow ATV use and some indication should be obtained as to the effect this will have on the insurability of the condominium corporation and on the insurance premiums.

Yours truly,

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DMS/ds