M E M O R A N D U M

September 30, 2006

To: DMS

From: EC

Re: Little Bow Resort Roads and the Use of ATVs

You asked that I research whether the common roads in Little Bow Resort, which are owned by the Condo Corporation, are considered "highways" under the *Traffic Safety Act* (Alberta). In particular, the Condo Corporation would like to know how to control and limit its potential liability, that is, what measures can be taken to ensure that the resort roads are not "highways" thereby legally permitting the use of ATVs on these private roads.

Conclusion:
The *Traffic Safety Act*, Part 6, governs the use of all-terrain vehicles ("ATVs") and prohibits their use on "highways" as defined in the Act. Although the Condo Corporation owns all of Little Bow Resort's common property, including the roads, if there are absolutely no mechanisms in place to restrict public access to the resort then the roads will be caught by the definition of "highway". In the result, the use of ATVs on such "highways" would generally be illegal. While there is no guarantee that particular measures can ensure that a road will not be considered a "highway", if the Condo Corporation can demonstrate that the roads are: a) not for or actually used by the general public and b) actually controlled by the Condo Corporation, then it is likely that the road will not fall within the definition of "highway" and the use of ATVs will be legal so long as Part 6 of the Act is adhered to.

1. Do the common roads in the resort or the one road into the resort fall within the definition of "highway" under the *Traffic Safety Act*? If so, what measures can be taken to ensure that a privately owned road is not a "highway" governed by the *Traffic Safety Act*?

A "highway" is defined in section 1(p) as:

> "any thoroughfare, street, road, trail, avenue, parkway, driveway, viaduct, lane, alley, square, bridge, causeway, trestleway or other place or any part of any of them, **whether publicly or privately owned, that the public is ordinarily entitled or permitted to use for the passage or parking of vehicles"**

It is clear from the above definition that private ownership is not definitive of the question of whether a road constitutes a "highway" as such, it is necessary to look to case law to determine how the courts have defined the term.

In *R v. Fox* (1979) 20 A.R. 451, the Alberta Court of Appeal addressed the issue of how to determine if a particular road constituted a "highway". Justice Haddad first looked to the **"nature, purpose and locale of the road".** This approach was more recently applied in the criminal division of Alberta Provincial Court in *R v. Ear,* [1987] A.J. No. 1402, where the court was asked to determine whether a particular road on a First Nation Reserve was included in the definition of "highway" identical to the definition in the *Traffic Safety Act*. In that case, the Band Administrator testified that the road was for the exclusive use of

band members and was financed and maintained by the band. Furthermore, all visitors were required to report to the band office to obtain a permit or verbal permission to travel on the reserve roads, otherwise they were considered trespassers and asked to leave. While the reserve had no resident enforcement officer and thus permits were not generally issued, visitors were still required to obtain permission before travelling on the reserve, which was made clear by signs posted at the entrance of the reserve.

In the case of Little Bow Resort, assuming that the roads are on the resort and for the exclusive use of resort residents and guests, and that they were constructed and are maintained at the expense of the Condo Corporation then this assists in demonstrating that the nature and purpose of these roads is not for the benefit of the general public.

The next stage of analysis in *Ear* also followed *Fox* by determining the **meaning of "public"**. In *Fox,* the court held that "public" was equivalent to the term "general public" and that if the use of a highway is confined to a limited class then it cannot be considered a "highway" which the "public is ordinarily entitled to or permitted to use". In *Ear,* although several ranchers could come and go from the reserve without permission and a non-native hockey team used the arena on the reserve without needing permission to use the roads on each occasion, the court still found that the public was not "ordinarily entitled" to the roadways and that those individuals were only a limited class of the general public.

Little Bow Resort and its private roadways are also for a limited class of people, the residents and tenants and for a limited class of the general public i.e. residents' guests and visitors. If there is designated parking for residents and designated parking for visitors, the use of special parking permits issued by the Condo Corporation could serve as evidence of this.

More recently, the Court of Queen's Bench in *R v. Plume,* [2003] A.J. No. 371 also dealt with the issue of whether a particular road on a reserve could be considered a "highway". Again, following *Fox,* Justice Mahoney applied the principles above and formulated a two-part test with both steps involving questions of fact as follows:

1) Does the general public have actual use of the road and if so, to what degree?
2) Does the owner of the road exert actual control over its use and if so, to what degree?

Although Justice Mahoney found that there was a permit system in place, and agreed that the use of a permit system or any other control system to regulate the use of the road such as, signs, barriers and trespassing charges may bring a road outside the definition of a "highway", he distinguished the case from *Fox* and *Ear* on the grounds that in this case the permit system was not at all enforced. Justice Mahoney agreed with the principle in *Fox* that if the road was used only by a limited class of people for whose benefit the road was created, then this did not constitute use by the general public. However, if the general public has almost unlimited access and use of the road it will be viewed as a "highway". For example, in the case of *Rosentneter v. Fuerst* (1957) 10 D.L.R. (2d) 521, the Ontario High Court determined that a road build and maintained by a hydro company was a "highway" despite the fact that a pass was required before a vehicle could use the road since permission had never been refused and the road was often sued by the general public.

Although most of the cases referred to involve the analysis of roads within First Nation Reserves and different Alberta statutes they are analogous for two reasons. First, the definition of "highway" in all the statutes mentioned above are identical. Second, as the trial judge stated in *Plume*, whether or not a road is "highway" is a question of fact and all roads on any given reserve are not the same and courts in similar cases have come to different conclusions i.e. *Plume* and *Ear*. In the result, the Condo Corporation can apply the same principles to its roads in order to attempt to remove them from the definition of "highway".

In the result, it is recommended that Little Bow Resort place signs at every entrance to the resort advising the public that it is private property and that all visitors must obtain a permit to bring their vehicles onto

the resort. Otherwise, if any member of the general public can drive onto the property and park on the property then the roads may be considered "highways". With a permit system in place, the individual residents can manage it by issuing to each resident two passes for their visitors. On the other hand, if the Condo Corporation has an office on the premises, visitors can be asked to sign-in to received a pass once the office has confirmed which resident they are visiting. Additionally, it is recommended that all residents' vehicles should also be registered with Condo Corporation and identified by a sticker or pass on their dash. Finally, the Condo Corporation will have to enforce this permit system and be able to demonstrate that unmarked vehicles are removed from the property or asked to leave. Signage to the effect that vehicles without a permit will be towed will assist in demonstrating the Condo Corporation's enforcement mechanisms.

2. If the roads are not "highways", can the Condo Corporation legally permit the use of ATVs on the resort roads?

Under the *Traffic Safety Act,* an ATV, which is included in the definition of "off-highway vehicle" can be driven on private property which the public does not ordinarily use. Moreover, ATVs can be driven without registration or insurance if it is being driven on land owned by the driver or on land owned by another person who expressly or impliedly consented to the driving of the vehicle on their land. The latter situation is one which the Condo Corporation should avoid. Rather, to reduce potential liability, the Condo Corporation would be wise to ensure than any off-highway vehicles driven on resort property is registered and insured. Furthermore, the Condo Corporation must be careful not to permit resort residents or guests to drive off-highway vehicles in contravention of the *Traffic Safety Act* since, according to s.120 the Condo Corporation can be at fault. In the result, if the Condo Corporation decides to permit the use of ATVs on its roads, it is recommended that it devise by-laws mirroring the requirements of Part 6 of the Act to minimize any liability under the aforementioned section.

Research:
The Canadian Statute Citations – Alberta – *Traffic Safety Act,* R.S.A 2000, c. T-6.
The Canadian Encyclopaedic Digest – Vol. 16 Highways and Vol. 23 Motor Vehicles
The Canadian Abridgement – Vol. R19 Highways
QL searches – [definition of highway], [traffic safety act & highway], [ATV & highway], [condominium & highway]

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