IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Skinnydipper Services Inc. v. City of Surrey,*** 2007 BCSC 1625

Date: 20071108
Docket: S073360
Registry: Vancouver

Between:

Skinnydipper Services Inc.

Petitioner

And

City of Surrey and Laurie Cavan

Respondents

Before: The Honourable Mr. Justice Williamson

Reasons for Judgment

Counsel for the Petitioner	Jay N. Spiro
Counsel for the Respondents	David R. Bennett
Date and Place of Hearing:	October 18, 2007 Vancouver, B.C.

Prolegomenon

[1] For those who came of age in the 1960s, skinnydipping would hardly seem to be a threat to the moral fibre of western civilization. Not so, however, for some of the good burghers of Surrey. When a local newspaper published a story that the Newton Wave Pool, a public facility in Surrey, was being used by a group of nudists or naturists for a late night private members only nude swim, they balked.

[2] Indeed, many in the community called employees of Surrey to express their outrage. Some of the complainants, according to the affidavit evidence filed, said that not only did they think the nudist event was an inappropriate use of a community resource, they added that if it continued, they would never use the Newton Wave Pool again.

[3] One is reminded of Dysart J.'s description of the complainants in ***Mitchell v. Martin and Rose*** (1925), 1 W.W.R. 500 (K.B.) at p. 501, where he wrote that they were "annoyed and angered by what they saw and heard, and shocked by what they had neither seen nor heard, but suspected".

[4] The Community Services Coordinator for Surrey received these complaints and deposed that it was his job to "resolve them where possible".

[5] As a result, one week after the newspaper article mentioned above, the General Manager of Community and Leisure Services informed the nudist group that their rental permits, which had been booked for one night a month for a further five months, were cancelled.

[6] Not long after, on March 31, 2003, the Federation of Canadian Naturists, the group who had been renting the pool for late night private skinnydipping, received a letter from the City of Surrey stating that the Surrey Council had considered the matter at a closed council meeting, in itself rather odd in a democracy, and had affirmed the action of the staff in cancelling the pool rental agreement.

The Application

[7] In this application the petitioner, Skinnydipper Services Inc. (“Skinnydipper”), seeks a declaration that a section of the Surrey Parks, Recreation and Cultural Facilities Regulation By-law is *ultra vires*, as well as a number of other remedies including the following:

> 4) Further or in the alternative, a declaration that the decision of Laurie Cavan, General Manager of Parks, Recreation and Culture (the “General Manager”) to refuse to issue and to grant the Petitioner a permit for the use of the Newton Wave Pool, under Section 73 of the Parks Bylaw is patently unreasonable;

5) A declaration that the General Manager's refusal to provide the Petitioner with written permission under Section 75 of the Parks Bylaw to hold private nude swims, contrary to Section 42 of the Parks Bylaw, is patently unreasonable;

6) An Order in the nature of mandamus that the General Manager grant the Petitioner a facility use permit for the Newton Recreation Centre (Newton Wave Pool) in order to hold private nude swims at the times and dates requested by the Petitioner, or the next available openings.

Facts

[8] The facts in this matter are not in dispute. The nudist group had been using the pool one night a month throughout 2002 and in early 2003. The swim took place late in the evening. Only members of the group were permitted to attend. The facility's windows, which would have permitted members of the public to observe the event, were covered over with an opaque material.

[9] The evidence discloses that similar events, with similar arrangements, take place in both the City of Vancouver and in North Vancouver.

[10] The petitioner says that the decision of the General Manager of Parks, Recreation and Culture to cancel the nudist group's permits was patently unreasonable. Further, the

petitioner submits that he By-law upon which she relied is *ultra vires* the City of Surrey.

[11] Surrey submits that the criteria considered were entirely reasonable and that because it is bound by provincial regulations concerning swimming pools, the impugned By-law is not *ultra vires*.

Reasons for the Cancellation

[12] On June 26, 2006, after one of the members of the nudist group incorporated a company to provide services for members of the community who wish to participate in nude swims (the petitioner), the General Manager of Parks, Recreation and Culture wrote to the petitioner setting out four reasons why the permits were cancelled and no further permits would issue. These reasons are:

> 1. The Newton Revitalization Project does exist and falls under the umbrella of the Social Well Being Plan for the City of Surrey. We want to be able to provide more opportunities for late night youth activities therefore Friday and Saturday nights are unavailable.
>
> 2. There is a health concern with the rental proposal in regards to the cleaning procedures in the pool facility. The equipment in the facility, such as benches, slides; weight room equipment, and chairs are on a cleaning and maintenance program established with the intent that users are in proper bathing and fitness attire.

3. Lifeguards and staff are not hired on the understanding of guarding swims where the users were not wearing proper bathing attire. Due to this, and in communication with our Human Resources Department, we have established that our staff will be unable to guard a swim whereby the users are not in suitable bathing attire.

4. Facility rental for the activity would contravene the City of Surrey Parks, Recreation and Cultural Facilities Regulation By-law, 1998, No. 13480.

Discussion

[13] I will deal with each of these. First, Surrey took the position that the pool was required for late night youth activities and was unavailable on Friday and Saturday nights, the nights that the skinnydippers wished to use the pool. However, Surrey concedes that this is no longer a factor and, if there were no other reasons to cancel the permits, such evenings would be available.

Health Concern

[14] Second, Surrey took the position that there is a health concern. This was apparently based upon a regulation which has been passed pursuant to provincial legislation, the ***Health Act***, R.S.B.C. 1996, c. 179 and its regulations. One of the regulations, *Swimming Pool, Spray Pool and Wading Pool Regulations*, B.C. Reg. 289/72, s. 73, states as follows:

> 73 Every swimming pool manager shall ensure that:
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> (1) only persons in clean bathing attire, the owner of the pool and his servants or agents and persons mentioned in part 12 of these regulations are allowed to enter the pool area, except as otherwise provided in these regulations.

[15] Counsel informed me that Part 12 has been repealed. This means that only the owner of the pool, and his servants or agents, and persons in clean bathing attire may enter pools.

[16] Hence, Surrey says that s. 42 of its Parks, Recreation and Cultural Facilities Regulation By-law is necessary if Surrey is to conform to provincial legislation. Surrey interprets the words “clean bathing attire” as meaning not that bathing attire must be clean, but that it must be worn.

[17] Section 42 of Surrey’s Parks, Recreation and Cultural Facilities Regulation By-law, 1998, No. 13480, states:

> ***Bathing Beaches and Swimming Pools***
>
> **Dress**
>
> 42. No person shall enter or bathe in any water at any bathing beach or in any swimming pool without being clothed in proper bathing attire.

[18] I have concluded that Surrey has incorrectly divined the meaning of Regulation 73(l). The regulation is passed pursuant to the ***Health Act***. The mischief that is the object

of this provincial legislation is unhealthy conditions in swimming pools. Persons who would enter a swimming pool with unclean bathing attire would pose a risk to health.

[19] It is not enough to simply look at the three words “clean bathing attire”. One must construe those words in view of the goal of the underlying statute. This has long been the law. See, for example, Lord Greene in ***Re Bidie***, a decision of the English Court of Appeal, reported at [1948] 2 All E.R. 995 at 998 where his Lordship said:

> The real question which we have to decide is what does the word mean in the context in which we find it here, both in the immediate context of the sub-section in which the word occurs and in the general context of the Act, having regard to the declared intention of the Act and the obvious evil that it is designed to remedy.

[20] I take that to be the law today. The intention of the legislation, and the obvious evil that it is designed to remedy, is the health risk resulting from persons entering pools in dirty bathing attire.

[21] There is no evidence in the material before me that there is any health risk to persons entering a swimming pool not wearing bathing attire. Indeed, there is evidence to the contrary. The representative of the petitioner wrote to the Fraser Health Authority in 2003 inquiring whether the Health

Department had any health concerns regarding the use of pools by patrons not wearing bathing attire. In a letter dated February 20, 2003, which is in evidence, the Public Health Inspector for the Fraser Health Authority wrote to the representative of the petitioner saying that the Health Department "is not aware of any health concerns with respect to the use of pool facilities and bathing without swimming attire".

[22] Surrey counters that this letter is three years old and is of little value in 2007. I am not persuaded. There is no evidence before me to suggest that somehow nude bathing is a health hazard now, although it was not in 2003.

Lifeguard Staff

[23] The third reason given by Surrey was that they "established that our staff would be unable to guard a swim whereby the users are not in suitable bathing attire". This however, is contradicted by Surrey's own affidavit evidence. The Community Services Coordinator at the Newton Wave Pool deposed that when the pool was rented out for private use by those who would skinnydip, he sought volunteers from the lifeguard staff. He deposed that whether to work the event was completely at the employee's option. He deposed that there were a sufficient number of volunteers "so as to

adequately staff (sic) the nudist event with lifeguards". Finally, and importantly, he deposed that "this particular administrative challenge" did not require the cancellation of any nudist swims that occurred at the Newton Wave Pool in 2002 or 2003.

[24] Surrey also submitted that there was a problem because those lifeguards who were not willing to act as lifeguards when there were nude swimmers would be treated unfairly as they would both lose overtime and would lose out on gaining hours in seniority. I am not persuaded by this. By that logic, if a lifeguard was of a particular religious group that objected to working on the Sabbath, be it Saturday or Sunday, then Surrey would have to close the pools on that day so as to not deprive those persons of the right to overtime or advances in seniority because of their religious beliefs. I do not find that a reasonable justification for cancelling the permits.

Constitutionality

[25] Finally, Surrey says that to allow the nudists to swim in the City's pool would be contrary to the By-law quoted above stating that no person shall enter or bathe in any swimming pool without being clothed in proper bathing attire.

[26] I conclude that this By-law is *ultra vires* the Surrey City Council. The field of determining proper attire in the context of nudity has been occupied by Parliament. Section 174 of the ***Criminal Code*** reads as follows:

> 174. (1) **Nudity** Every one who, without lawful excuse,
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> (a) is nude in a public place, or
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> (b) is nude and exposed to public view while on private property, whether or not the property is his own,
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> is guilty of an offence punishable on summary conviction.
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> (2) **Nude** For the purpose of this section, a person is nude who is so clad as to offend against public decency or order.
>
> (3) **Consent of the Attorney General** No proceedings shall be commenced under this section without the consent of the Attorney General.

[27] I observe, then, that nudity is defined by Parliament. The offence in the ***Code*** does not apply to persons who are on private property and not exposed to public view. This is the situation, according to the evidence, when the nudist group used the Newton Wave Pool, just as it is when similar groups use pools in other cities or municipalities.

[28] It is not open to a municipal council to extend a definition of something criminal to include circumstances excluded by Parliament.

[29] In ***Maple Ridge (District) v. Meyer***, 2000 BCSC 902, 77 B.C.L.R. (3d) 169, the defendant was issued a ticket for breach of a by-law when she attended a district swimming pool wearing nothing above her waist. R. Holmes J. found the by-law was an attempt "to stiffen" the ***Criminal Code*** provisions concerning nudity, indecency and/or obscenity. He concluded it was *ultra vires* the legislative competence of Maple Ridge. He noted, in para. 56, that the impugned by-law:

> ...imposes strict liability, is not subject to a community standard of tolerance test, and in the breach can lead to imprisonment.

[30] The same could be said of the Surrey By-law at issue here. The By-law has penal consequences. Section 83 of the By-law states:

> Any person who violates any of the provisions of this By-law shall upon summary conviction, be liable to a penalty of not less that $50 and not more that $2,000 plus the cost of the prosecution, or to a term of imprisonment not exceeding three (3) months, or both.

[31] I note in passing that the defendant in ***Maple Ridge*** was appearing as she did in public, in contrast to the nude swim here conducted in controlled circumstances of privacy.

Ruling

[32] For all of the above reasons, I conclude that s. 42 of the City of Surrey Parks, Recreation and Cultural Facilities Regulation By-law, 1998, No. 13480 is *ultra vires* the legislative competence of the City of Surrey, and that the decisions to cancel the nudist group's permits and to decline to rent pool facilities to the petitioner are patently unreasonable.

[33] The petitioner will have its costs at Scale B.

"Williamson J."