Citation: Maple Ridge v. Meyer
2000 BCSC 902

Date: 20000608
Docket: A972072
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

THE CORPORATION OF THE DISTRICT OF MAPLE RIDGE

PLAINTIFF

AND:

LINDA ANNE MEYER

DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE Ron **HOLMES**

(IN CHAMBERS)

Counsel for the Plaintiff:	Barry Williamson and Francesca Marzari
Counsel for the Defendant:	David G. Butcher
Date and Place of Hearing:	February 21 and 22, 2000 Vancouver, B.C.

APPLICATION:

[1] The defendant Ms. Meyer applies pursuant to Rule 18A for a dismissal of the plaintiff Maple Ridge's application for injunctions to prevent her being present in a Maple Ridge Park, or a Park facility, unless clothed by opaque apparel which covers her nipples and aureole. Specifically that would prevent her bathing top-free in Maple Ridge's Leisure Center swimming pool as being in violation of Section 3A of the District's By-Law 3414-1984 ["Park By-Law"].

PARK BY-LAW:

[2] The stated purpose of the Park By-Law is "... to regulate, govern and manage park property and recreational facilities of the ... District ...".

[3] On June 24, 1997 Council passed Amending By-Law 5600-1997 to add a new regulation to the Park By-Law titled "dress code", and numbered Section 3A.

[4] Section 3A reads:

> 1 Subject to subsection (3) of Section 3A, all persons shall be clothed in Parks;
>
> 2 "Clothed" means that males and females shall fully cover the genital area with opaque apparel and that females over the age of eight

(8) years shall fully cover all portions of their nipples and aureole with opaque apparel.

3 Subsection (1) and (2) shall not apply to changing, dressing and washrooms in Parks or to areas in Parks designated and scheduled by the Maple Ridge/Pitt Meadows Parks and Leisure Services Commission for use for art and drawing programs in respect of which models may pose as part of the program offered to the public.

GROUNDS FOR APPLICATION:

[5] The defendant alleges Section 3A of the Park By-Law is *ultra vires* as it seeks to regulate matters of criminal law exclusively within federal jurisdiction.

[6] The defendant alternatively takes the position that if the Park By-Law is valid it discriminates against females over the age of eight years, violates Ms. Meyer's right to freedom of expression contrary to Sections 2(b) and 7(1), and is discriminatory based on sex and age contrary to Section 15(1) of the *Canadian Charter of Rights and Freedoms*.

FACTS:

[7] The Maple Ridge Park By-Law regulates the use of parks in the District. The Park By-Law is both general and comprehensive. By-Law provisions address littering, carrying weapons, disorderly conduct, defacing foliage, injuring animals, starting fires, advertising within parks, vandalism,

prohibiting unlicensed vending in a park, erecting structures, digging, parking, and hours of access.

[8] The Park By-Law provides that a person whose conduct is considered undesirable may be excluded from the park. A person that has breached a Park By-Law may be removed from the park.

[9] The Park By-Law provides that a breach is an offence punishable upon summary conviction and a person in breach is liable to a penalty pursuant to the *Offence Act*, R.S.B.C. 1996, c.338. The maximum penalty provision under the *Offence Act* is a fine of $2,000 and six months' imprisonment.

[10] The Amending By-Law was passed June 24, 1997 in anticipation of the defendant asserting publicly that she would attend and bathe bare-breasted at the Leisure Center pool.

[11] It is of significance however that the impugned amendment is intended to have general application to all areas of Maple Ridge parks. It is inserted under the Section "A" of the Park By-Law titled "General Park Regulations". Specifically it was not placed within Section "B" of the Park By-Law titled "Swimming Pool Regulations".

[12] The defendant was issued a ticket for breach of Section 3A of the Park By-Law on July 1, 1997 when she appeared at the Leisure Centre swimming pool without a bathing suit top and refused management requests to comply with the Park By-Law by covering the tips of her breasts.

[13] I was advised prosecution of the Park By-Law offence has been adjourned pending the hearing of this action.

[14] In furtherance of her protest against prohibition in Section 3A of the Park By-Law Ms. Meyer attended bare-breasted on several further occasions at the Leisure Centre Pool in the summer of 1998. She was not charged in respect of those occurrences.

[15] The affidavit evidence filed by Maple Ridge of several women present on an occasion of Ms. Meyer's attendance at the pool falls generally within one of two categories.

[16] Some deponents do not approve of females baring their breasts at the community pool. This form of disapproval appears based upon the morality of her conduct.

[17] The second group generally appears to denounce the public baring by Ms. Meyer of her breasts at the pool on the basis it is inappropriate in the presence of children and inimical to

values regarding body privacy parents wish to instill in young females.

[18] I do not find on the evidence that Ms. Meyer's removing her top was in itself disruptive of the usage of the pool, however, the publicity that surrounded her announced appearance to challenge the Park By-Law attracted the press which in turn was disruptive of normal pool decorum.

[19] The evidence also indicates that on one occasion Ms. Meyer's top-free attendance was embarrassing to some young girls present and spoiled the atmosphere of their birthday party outing at the pool.

[20] The police and provincial prosecutor's office have declined further involvement in the enforcement of Section 3A of the Park By-Law and suggested Maple Ridge seek enforcement by injunctive relief in this Court.

[21] It appears that historically the authorities considered being top-free in the community pool, or elsewhere in municipal parks, as unlawful under the *Criminal Code*'s nudity, indecency or obscenity provisions. Perhaps it was considered to come within the rubric of the Park By-Law titled "Disorderly Conduct" which concerns a person acting in an "...offensive manner".

DIVISION OF POWERS:

[22] The Maple Ridge Park By-Law was enacted under the authority of the District to regulate the use of its parks and services and derives from powers granted by the province under Sections 610 and 517 of the *Municipal Act*.

[23] The Amending By-Law states the motivating purpose of Council in enacting the Section 3A dress code was "... to ensure that as many persons in the community as possible feel welcome and are comfortable in using the public recreational facilities in the community."

[24] It is difficult however to reconcile that benign stated purpose motivating the amendment when one considers the previously referred to background to the impugned Amending Park By-Law.

[25] There does not appear from the evidence any attempt to regulate or segregate usage of the pool by having adult times, family times, times for children, or like divisions. Regulation of that nature might have reduced the discomfort or embarrassment reported by some persons at Ms. Meyer being top-free in the presence of pool usage by families or children.

[26] In ***R. v. Racette***, [1988] 2 W.W.R. 318 at 327 (Sask.C.A.) the Court approved of the necessity to examine the effect of the impugned statute and noted several criteria that may be taken into account in a determination of the character or substance of the legislation. Relevant factors include the legislative scheme and history of the enactment, the state of the law prior to the enactment and the defect it was designed to correct.

[27] The key to classification of a law in respect of division of federal or provincial power under Sections 91 and 92 of the *Constitution Act, 1867* is to identify at commencement the "matter" of the subject legislation. The "matter" of a law is its leading feature, essence, or dominant purpose and has historically been referred to as the "pith and substance".

[28] Courts must apply consideration of policy along with legal principle. The task requires a combination that balances legal skill, respect for established rules and plain common sense. The approach must be flexible and not technical. Although the dominant purpose, or aim of legislation, often provides the key to constitutional validity, taking into account purpose and effect can be of importance. [***R v. Morgentaler***, [1993] 3 S.C.R. 463 at 481-83].

[29] Federal and provincial legislative jurisdiction may overlap in certain areas. The present circumstances require consideration of this possibility.

[30] ***Rio Hotel Ltd. v. New Brunswick (Liquor Licensing Board)***, [1987] 2 S.C.R. 59 illustrates this "double aspect" doctrine: legislation for one aspect and purpose may fall within Section 92 and for another aspect and purpose may come within Section 91.

[31] ***Rio Hotel***, *supra*, although on its facts deals with the power of a province to prohibit nude entertainment under liquor licensing regulations, is helpful for analysis in determination of the "matter" of the Park By-Law.

[32] Maple Ridge contends it is simply regulating "dress code" at its pool to best provide a service to local citizens. However, the subject of nudity also has a moral aspect that is clearly a matter for the criminal law.

[33] In ***Rio Hotel***, the Court held mere duplication does not constitute direct conflict and that federal legislation "...will only be paramount when there is a direct conflict with relevant provincial legislation."

[34] As Dickson C.J.C. stated:

> The double-aspect doctrine will apply whenever the contrast between the relative importance of the federal and provincial characteristics of a particular subject matter is not sharp.

[35] It is of import to the decision in ***Rio Hotel*** that the control by the province was in relation to the provincially issued liquor license and no direct conflict with the *Criminal Code* provisions regarding nudity arose:

> Although there is some overlap between the licence condition precluding nude entertainment and various provisions of the *Criminal Code*, there is no direct conflict. It is perfectly possible to comply with both the provincial and the federal legislation. Moreover, the sanction for breach of the provincially imposed licence conditions is suspension or cancellation of the liquor licence. No penal consequences ensue for the nude entertainer or for the holder of the licence. Under the relevant *Criminal Code* provisions, the primary object is obviously to punish entertainers and proprietors who breach the prohibitions on public nudity. I cannot say that the federal characteristics of this subject-matter are palpably more important than the provincial characteristics. The provincial regulatory scheme relating to the sale of liquor in the province can, without difficulty, operate concurrently with the federal *Criminal Code* provisions.
>
> [***Rio Hotel***, p.667].

[36] I do not find this reasoning has similar application here. Section 3A of the Park By-Law imposes criminal sanction on Ms. Meyer and makes her liable to fine and imprisonment.

It goes directly to the issue of nudity by exposure of the female breasts.

[37] Some caution must therefore be exercised in respect of the body of case law dominating in this area which often addresses the ability of provinces to control licensing concerning consumption and marketing of alcohol in conjunction with entertainment involving adult nudity.

[38] The dominant purpose of the Park By-Law centers upon maintenance of a level of appropriate conduct, propriety or decorum of users of the park facilities is conducive to the orderly operation of public facilities for the use and enjoyment of local citizens.

[39] In ***Rio Hotel***, Estey J. in his separate but concurring reasons, referred with approval to lower Court decisions in which he considered the provincial regulation in issue was directed at the orderly operation of licensed premises.

> Conduct which would detract from the efficiency and orderliness of these operations was either the grounds for the cancellation of the license or for process in the criminal courts of the provincial offence established in support of the provincial regulation.
>
> [***Rio Hotel***, p.673].

[40] In ***Re Sharlmark Hotels Ltd. and Metro Toronto*** (1981), 121 D.L.R. (3d) 415 (Ont.Div.Ct.) a by-law prohibiting entertainers in adult entertainment parlors from exposing particular areas of their bodies was held not to address *Criminal Code* matters, despite consideration of the specific nudity provisions of the *Criminal Code*.

[41] The issue here concerns whether there is a:

> ... subtle but discernible distinction between criminal legislation and regulation established to support and promote the operation of valid provincial legislative object.

as referred to by Estey J. in ***Rio Hotel***, at p.673, in reference to ***Sharlmark***.

[42] I cannot accept counsel for Maple Ridge's suggestion there is a fair analogy in minimum dress standards directed to female nudity being upheld as a valid provincial legislative object in respect of entertainment in licensed premises compared with regulations concerning standards of dress for females requiring breasts being covered while in a public park.

[43] The legislation enacted by Section 3A of the Park By-Law purports to enact a stricter standard regarding nudity by a top-free female than does the *Criminal Code*. It imposes

strict liability and removes important defenses permitted in the criminal law including the fundamental defense of showing a lawful excuse.

[44] Certainly provincial legislation aimed at prevention of crime is constitutionally valid [***Bedard v. Dawson***, [1923] S.C.R. 681, 40 C.C.C. 404 (S.C.C.); ***Perry v. Vancouver City*** (1990), 48 B.C.L.R. (2d) 342 (B.C.S.C.)]. That however is not the issue here. The District concedes that it is not crime prevention that underlies the purpose behind Section 3A of the Park By-Law.

[45] Neither does Maple Ridge seek to uphold the impugned Section 3A of the Park By-Law under specific enumerated subsections of Section 92 such as the regulation of business or being in the interests of health or safety.

[46] Where under a provincial law an offence is created which infringes upon the field of criminal law it will be found *ultra vires*. In ***Westendorp v. The Queen***, [1983], 1 S.C.R. 43, 2 C.C.C. (3d) 330 a by-law purporting to regulate city streets created an offence of being on a street or approaching a person on a street for the purposes of prostitution was held to be *ultra vires* as over-reaching and offending against the division of power.

[47] Laskin C.J.C. found:

> ... consideration of the by-law is to establish a concurrency of legislative power, going beyond any double aspect principle and leaving it open to a Province or to a municipality authorized by a Province to usurp exclusive federal legislative power. If a Province or municipality may translate a direct attack on prostitution into street control through reliance on public nuisance, it may do the same with respect to trafficking in drugs. And, may it not, on the same view, seek to punish assaults that take place on city streets as an aspect of street control!
>
> [***Westendorp***, *supra*, p.338]

[48] I have concern that the ***Westendorp*** context is not too far removed from the circumstances presently before the Court. The regulation of top-free females in public venues was until recent history generally conceded to be the purview of the criminal law. It was considered an issue touching on public morals. It was perceived as a matter involving indecency or offensive conduct. That field of law is here transplanted to a By-Law intended for governance of local parks.

[49] The law concerning the appearance of top-free females in public places has been recently considered and defined. The mere act of public nudity is not an offense. [***R. v. Jacob*** (1996), 112 C.C.C. (3d) 1 (Ont.C.A.)].

[50] I do not accept a direct link has been demonstrated between the provisions of Section 3A of the Park By-Law and the public's enjoyment of public property.

[51] Where the effect and purpose of a regulation is indistinguishable from the provisions in the *Criminal Code*, or does nothing more than "stiffen" the provisions of the *Criminal Code* it will be found ***ultra vires***. [***R. v. Racette***, *supra*, ***McNeil v. Nova Scotia Board of Censors***, [1978] 2 S.C.R. 662; ***Prestige Video v. Victoria***, [1982] 6 W.W.R. 507 (B.C.S.C.)].

[52] In my view both in effect and purpose Section 3A of the Park By-Law is an attempt to stiffen the existing *Criminal Code* provisions aimed at nudity, indecency and/or obscenity.

CRIMINAL LAW OF NUDITY:

[53] Sections 173 and 174 of the *Criminal Code* deal with nudity and indecent acts:

> S.173(1) Every one who wilfully does an indecent act
>
> (a) in a public place in the presence of one or more persons, or
>
> (b) in any place, with intent thereby to insult or offend any person,

is guilty of an offence punishable on summary conviction.

(2) Every person who, in any place, for a sexual purpose, exposes his or her genital organs to a person who is under the age of fourteen years is guilty of an offence punishable on summary conviction.

S.174(1) Every one who, without lawful excuse,

(a) is nude in a public place, or

(b) is nude and exposed to public view while on private property, whether or not the property is his own,

is guilty of an offence punishable on summary conviction.

(2) For the purposes of this section, a person is nude who is so clad as to offend against public decency or order.

(3) No proceedings shall be commenced under this section without the consent of the Attorney General.

[54] Indecency is not defined in the *Criminal Code*. It is to be measured on an objective, national, community standard of tolerance. The standard of tolerance is not defined by what Canadians think it is right for them to see, rather it is what they would not abide other Canadians viewing. [***Towne Cinema Theatres Ltd. v. The Queen***, [1985] 1 S.C.R. 494].

[55] In ***R. v. Jacob***, *supra*, a woman who walked bare-breasted on a city street and then reclined top-free on the front step to her home was acquitted on appeal of committing an indecent

act. The Court found the baring of her breasts was not harmful to anyone. There was nothing degrading or dehumanizing in her conduct. The Court noted anyone who was offended was not forced to look.

[56] There is force to the defendant's argument that the impugned Section 3A of the Park By-Law by requiring women to cover their nipples and aureole while in a District park or recreation facility creates a stricter standard regarding nudity than exists in the *Criminal Code*. It imposes strict liability, is not subject to a community standard of tolerance test, and in the breach can lead to imprisonment. It also purports to criminalize the conduct of girls as young as nine years of age.

[57] I do not find in the evidence support for the view that the parks could not operate in orderly fashion if a female were to bare her breasts in a circumstance that did not offend criminal laws of nudity. The evidence suggests the Section 3A amendment to the Park By-Law was more a reaction to a frustration that the criminal law was not supporting the moral standards in regard to females who chose to bare their breasts in public that some Maple Ridge citizens desired.

[58] The Park By-Law in issue does not illustrate the clear valid provincial object that was found in ***Ontario Adult***

Entertainment Bar Association of Toronto (1997), 188 C.C.C. (3d) 481, 35 O.R. (3d) 161, or cases of similar circumstance. The evidence in ***Ontario Adult Entertainment***, *supra*, indicated "lap dancing" created health and safety risks for dancers and the activity could encourage the commission of crimes.

[59] I find Section 3A to be lacking a clear provincial object, and taken in context of events existing at the time of its enactment suggests a colourable attempt to regulate morality and thus displace the federal jurisdiction in respect of criminal law.

[60] In my view, the "matter" or "pith and substance" of Section 3A of the Park By-Law places it within federal legislative competence as being a matter for the criminal law. It is not a matter which can be fairly described as property and civil rights [*Constitution Act*, s.92(13)] or a matter of a local and private nature [s.92(16)].

[61] I accept that the enforcement of a Park By-Law offence under the *Offence Act* does not lead to a characterization of a federal criminal law power. Provinces have an express ancillary power to impose punishment for the purpose of enforcing valid provincial laws under s.92(15) of the *Constitution Act*.

[62] Neither does the fact a valid by-law may be enforced with penal consequence aid in discovery of whether the by-law itself is *inter vires* the enacting jurisdiction.

[63] I find that the impugned Section 3A of the Park By-Law is *ultra vires* the legislative competence of Maple Ridge and the plaintiff is entitled to a declaration to that effect. I consider that in light of this finding I should not comment upon further issues of whether the Park By-Law if validly enacted would infringe upon Ms. Meyer's *Charter* Rights.

[64] The defendant's 18A application is allowed.

[65] I was advised the parties agree the counterclaim in this action be dismissed.

[66] I am unaware of any agreement of the parties regarding costs. In the absence of agreement to the contrary the defendant is entitled to her costs on Scale 3.