Appeal No. SSAB 18-2015
Date: June 3, 2016

Indexed as: BCSSAB 18 (1) 2015

IN THE MATTER OF THE *SAFETY STANDARDS ACT*
SBC 2003, Chapter 39

AND IN THE MATTER OF an appeal to the
British Columbia Safety Standards Appeal Board

BETWEEN:	**Cable Wake Park Ltd.**	**APPELLANT**
AND:	**British Columbia Safety Authority**	**RESPONDENT**

Reasons For Decision

Introduction

[1] This is an appeal of Compliance Order No. CO-2015-0035 (the "Compliance Order") issued to by the Respondent to the Appellant on September 10, 2015. The Appellant operates a cable wake park (the "Wake Park") in Kelowna, British Columbia. The Compliance Order requires the Appellant to immediately cease operation of the Wake Park until the Appellant is able to demonstrate full compliance with all relevant provisions of the Safety Standards Act, .S.B.C. 2003, c. 39 (the "Act"). The Appellant submits that its operation of the Wake Park is not governed by the Act and that accordingly, the Respondent does not have jurisdiction over its operation of the Wake Park. The Appellant states that the Wake Park should only be regulated by the governing bodies for wake boarding and its insurance providers. The Respondent disagrees and states that the Wake Park falls within the definition of an amusement device as defined by the Act and accordingly, falls within the ambit of the Respondent's jurisdiction over public safety. Accordingly, the Respondent requests that the Appellant's appeal be dismissed.

Issues

[2] The issue before the Board is whether the Compliance Order was appropriately issued by the Respondent. Accordingly, the Board must determine whether the Wake Park is a regulated product as defined by the Act and its associated regulations. To do so, the Board must determine the following:

> a) Whether the Wake Park falls within the definition of an "amusement ride" in the Act; and;
>
> b) If so, whether the Wake Park is exempt from the Act and its associated regulations by operation of section 18(2)(j) of the Elevating Devices Safety Regulation (the "EDSR"), which exempts "recoil tethered rides".

Position of the Parties

The Appellant's Position

[3] As stated above, the Appellant operates a Wake Park. The Appellant opposes the issuance of the Compliance Order and requests an order from the Board stating that the Wake Park is not covered by the legislated safety structure set out in the Act and further that the Wake Park is not within the jurisdiction of the Respondent. The Appellant states that the Wake Park should only be regulated by the governing bodies for wake boarding and its insurance providers.

[4] In support of this position, the Appellant filed two videos showing the operation of the Wake Park and written submissions.

[5] The Appellant states, and the videos submitted show, that cable skiing is a way to water ski or wakeboard with the skier's rope and handle pulled by an electrically-driven cable rather than a motor boat. The Appellant states that the mechanism consists of two cables running parallel to one another at various lengths with the speed of the main cable being up to 38 kilometers per hour with the most common speed being 28 kilometers per hour. The Appellant states that the cable is generally suspended 10 to 20 feet above the water. The motor is a 24 horsepower 3 phase SEC – Single drive motor that moves cables between a motor tower and deflection tower.

[6] The Appellant states that the rider is in control of their own pathway over the water and that this pathway is never constant, duplicated or fixed with each individual rider dictating their own individual path and speed based on their personal preference. Further, the Appellant states that the riding area is not defined but limited to riders' abilities and skills as the rider is never attached to the cable, but chooses to hold on with his or her hands, directs the pathway his or herself and can freely release at any time being fully responsible for his or her own path over the water. Accordingly, the Appellant states that the installation does not fall within the definition of "amusement ride" as defined by the EDSR, stating that a rider is not "conveyed or directed over or through a fixed course or within a defined area" when using the installation.

[7] Rather, the Appellant states that the specific purpose of the installation is as a water sports training system, which includes waterski, wakeboard, wakeskate and surf; all sports under consideration for participation in future Olympic games and regulated by the National Waterski and Wakeboard Association, which oversees, governs and insures such Wake Park systems. In further support of its position, the Appellant states that unlike amusement or entertainment based rides, which provide little to no training or instruction prior to utilization of the apparatus, the Cable Park provides a trained instructor of up to 30 minutes before any rider gets to use the apparatus. The Appellant also states that there have been no fatalities within the 60 year history of such apparatus' use.

[8] In the alternative, the Appellant states that if the Wake Park is found to be an amusement device within the meaning of the EDSR that it is exempt from the Act and its associated regulations by operation of section 18(2)(j) of the EDSR, which exempts recoil tethered rides (bungee) from operation of the legislation. In support of this position, the Appellant referred to a second video filed with the Board in this appeal, which video shows how a rider of the installation can launch from the water surface by way of a loading line.

[9] Further, the Appellant states that as the installation provides only the mechanism of movement needed to waterski or wakeboard, just like a boat, that boats must then be considered and regulated in the same manner by the Respondent. The Appellant also states that nothing is gained by having the Wake Park regulated by the BCSA. In this

regard, the Appellant states that it has paid fees totaling nearly $5000.00 and has received only two site inspections over the past four years, none of which it says have improved the maintenance and enhancement of public safety as it relates to the operation of the Wake Park.

[10] Finally, the Appellant requests the right to formally request a change to the designation for fee scheduling as the appropriate fee schedule applies to the Wake Park. In particular, the Appellant requests to not be designated as a “major ride” if it is in fact found to be an amusement ride under the EDSR, stating that the Wake Park is not akin to large rides like ferris wheels, etc.

The Respondent’s Position

[11] The Respondent seeks to have the Appeal dismissed and states that the Compliance Order was appropriately and reasonably issued in accordance with the provisions of the Act and its associated regulations. In this regard, the Respondent states that the Provincial Safety manager’s decision to classify the Wake Park as an amusement ride within the meaning of the Act was correct, or in the alternative, reasonable. In support of its position the Respondent filed the Affidavit of Jason Gill, Provincial Safety Manager, sworn February 1, 2016 (the “Gill Affidavit”) and written submissions.

[12] The Respondent states that the Appellant does not dispute that it failed to correct various non-compliances identified on certificates of inspection dated July 4, 2014 and September 17, 2014 (the “Certificates of Inspection”) and that accordingly, the Compliance Order was appropriately issued to the Appellant.

[13] The Respondent states that the Certificates of Inspection and resulting Compliance Order were issued based on a determination that the Wake Park is an “amusement ride” within the meaning of the Act and the EDSR, and is therefore a regulated product. In this regard, the Respondent states that both “Amusement Ride” and “Passenger Ropeway” are subsets of “elevating device” in the EDSR and that the Wake Park could fall under either definition. The Respondent states that the Provincial Safety Manager determined upon a review requested by the Appellant that given the

less expensive permitting requirements for amusement rides and the recreational nature of the Wake Park that the Respondent would classify the Wake Park as an amusement device rather than a passenger ropeway under the EDSR. This is supported by Mr. Gill's sworn testimony as set out in the Gill Affidavit.

[14] With respect to the Appellant's assertion that if the Wake Park is in fact an amusement ride that it qualifies for an exemption under the EDSR as a "recoil tethered ride (bungee)" the Respondent states that there are two problems with this argument. First, they state that the evidence provided by the Appellant suggests that use as a bungee is only one method of using the Wake Park rather than an innate feature of the installation. The Respondent notes that in the normal course the installation can be used without a "bungee" launch and by using a standard tow rope. Second, the Respondent state that it is the nature of any installation as a whole and not simply the type of rope that may be used which determines an installations classification. In this regard, the Respondent states that the predominant feature of the Wake Park installation is that it tows riders through a defined course using cables and a motor and that while occasional use of a bungee launch is used, it is not the defining feature of the installation. Instead the Respondent states that the predominant motion is provided by the user being pulled along the cable.

[15] Finally, the Respondent states that the Appellant's argument that the Wake Park should only be governed by the sports' governing bodies does not have any legal relevance as it overlooks the fact that the reason the wake park installation is considered a regulated product is the nature of the installation itself (ie. motor, gears, cables) and not the manner in which it is used (to tow wakeboarders, etc.)

[16] With respect to the Appellant's submission regarding the applicability of the Fee Schedule, the Respondent states that the Board lacks jurisdiction to deal with such argument.

Analysis

[17] The facts are not at issue in this appeal. The Appellant does not deny that it has not complied with the deficiencies set out in the Inspections that led to the issuance of the Compliance Order. Accordingly, as stated above the questions that must be

determined are whether the Wake Park falls within the definition of an “amusement ride” in the Act; and; if so, whether the Wake Park is exempt from the Act and its associated regulations by operation of section 18(2)(j) of EDSR which exempts “recoil tethered rides”.

Section 1 of the EDSR defines “amusement ride” as follows:

> “amusement ride” means a combination of components that carries, conveys or directs an individual over or through a fixed course or within a defined area for the purpose of amusement or entertainment, and includes a recreational railway;

[18] While the evidence submitted to the Board by the Appellant shows that an individual using the installation at the Wake Park does not travel over a fixed course, there is little question that a rider does travel within a defined area. For example, there are limits to the range in which a rider may travel while using the installation. Those limits are strictly defined by the length of tow rope attached to the moving cables. The rider cannot operate outside that area. Accordingly, the Board finds that the Wake Park falls within the definition of “amusement ride” as set out in the EDSR.

[19] Finding that the Wake Park does fall within the definition of “amusement ride” set out in the EDSR, the Board must now determine whether the Wake Park is exempt pursuant to section 18(2) of the EDSR. Section 18(2) of the EDSR states as follows:

> The following amusement rides are exempted from the application of this regulation:
>
> (a)….
> (j) recoil tethered rides (bungee)….

[20] The evidence submitted indicates that when used in a certain manner (ie. when a rider uses a loading line to launch him or herself from the water) that the installation could be considered a recoil tethered ride. However, the evidence before the Board does not support that this is the primary functionality of the installation. It is clear from both the Appellant and Respondent’s submissions, and particularly from the video evidence provided by the Appellant, that the primary movement of the installation is to tow riders in much the same way a motor boat tows a water skier. Accordingly, the

exemption does not apply as in its standard form the installation is not a “recoil tether ride”.

[21] A review of the applicable legislation indicates that the Wake Park does fall within the jurisdiction of the Respondent. However, as submitted by the Respondent, the Board notes that the Wake Park could also appropriately be captured by the definition of “passenger ropeway” in the EDSR and defers to the Provincial Safety Manager’s discretion to determine which category within the legislation ought to apply to the Wake Park. In respect to such deference the Board notes that the Provincial Safety Manager applied the definition with the lowest rate of fees and that there is no requirement for the Provincial Safety Manager to do so. In fact, in the future, the Board can envision scenarios where the application of “passenger ropeway” may be more appropriate than “amusement device” given the size and scope of potential future installations, etc.

[22] The Board wishes to address the Appellant’s submission that the Wake Park ought not be governed by the Respondent given that it is governed by the National Waterski and Wakeboard Association. In this regard, the public safety system of inspection established by the Act has a mandate to maintain and enhance public safety. Due to the existence of such a system, consumers in British Columbia assume that proper permitting and inspection of regulated products takes place. The assertion that belonging to a national sporting association is an acceptable substitute for the provincially mandated safety system is not supportable. There is a Canadian Snowsports Association and Skate Canada, among numerous other national sporting associations. The ski hills and ice rinks that provide the venue for the sports governed by these associations are not exempt from regulation and neither should the Wake Park.

[23] For the reasons set out above, the Board finds that the Compliance Order was reasonably issued by the Respondent and orders the Appeal dismissed.

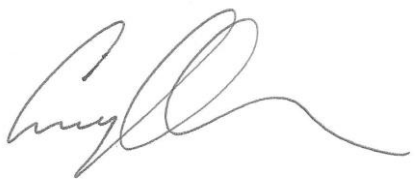
[24] Given the outcome of the Appeal, the Board wishes to address the Appellant’s request to change the designation it falls under with respect to the fee schedule for amusement rides. The Board acknowledges the Respondent’s position that the Board lacks jurisdiction to deal with such matters, but respectfully disagrees with the Respondent’s position. While the Board has no jurisdiction to interfere with the fees set by the Provincial Safety Manager, decisions of the Safety Manager where the set fees

are applied to particular regulated products are within the jurisdiction of the Board. In other words, where it is a question of the fee itself, the Board lacks jurisdiction, but when it is a question of whether the Provincial Safety Manager applied a fee schedule correctly, the Board has jurisdiction.

[25] In any event, the Board finds that the fee schedule applied in this case is correct. The Appellant submits that the Wake Park should not be included with more complex rides like ferris wheels, etc. However, ferris wheels operate on much the same mechanism as the tether rope system found in the Wake Park's installation – a single motor. Further, the various categories to choose from are as follows: major rides, kiddie rides, inflatables, waterslides, zip lines, and train rides. Given the choices, there is no other reasonable category to place the Wake Park as it is not a kiddie ride, inflatable, waterslide, zip line or train ride. Accordingly, the Board finds that the categorization applied by the Provincial Safety Manager in the Compliance Order is appropriate. Notably, as set out above, the Wake Park could also be categorized as a passenger ropeway. In such an event, the applicable fees for the Wake Park would be even higher than they are as currently categorized. It is clear upon review that the Respondent has worked within its mandated limits to assist the Appellant when it comes to the financial impact of regulation.

Conclusion

[26] The appeal is dismissed.



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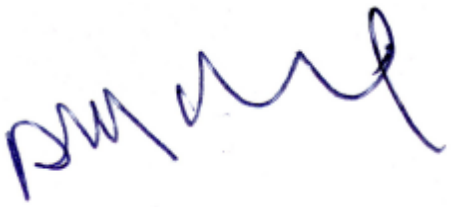

D. Martin Vine
Member, Safety Standards Appeal Board