

**SUPREME COURT  
OF BRITISH COLUMBIA  
VANCOUVER REGISTRY**

JUL 18 2017

AMENDED PURSUANT TO RULE 16-1(19)(b)(i)  
ORIGINAL FILED JUNE 14, 2017

No. S-175651  
Vancouver Registry

**IN THE SUPREME COURT OF BRITISH COLUMBIA**  
*In the Matter of the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241*

BETWEEN:

OCEAN WISE CONSERVATION ASSOCIATION

Petitioner

AND:

VANCOUVER BOARD OF PARKS AND RECREATION and  
CITY OF VANCOUVER

Respondents

**AMENDED PETITION TO THE COURT**

**ON NOTICE TO:**

VANCOUVER BOARD OF PARKS AND RECREATION  
2099 Beach Avenue  
Vancouver, BC V6G 1Z4

CITY OF VANCOUVER  
453 West 12th Avenue  
Vancouver, BC V5Y 1V4

**AND ON NOTICE TO:**

The Attorney General of British Columbia  
Ministry of Justice  
PO Box 9260 Stn Prov Govt  
Victoria, BC V8W 9J7

The Attorney General of Canada  
British Columbia Regional Office  
Department of Justice Canada  
900 - 840 Howe Street  
Vancouver, BC V6Z 2S9

**This proceeding is brought by the Petitioner for the relief set out in Part 1 below.**

If you intend to respond to this petition, you or your lawyer must

- (a) file a response to petition in Form 67 in the above-named registry of this court within the time for response to petition described below, and
- (b) serve on the petitioner
  - (i) 2 copies of the filed response to petition, and
  - (ii) 2 copies of each filed affidavit on which you intend to rely at the hearing.

**Orders, including orders granting the relief claimed, may be made against you, without any further notice to you, if you fail to file the response to petition within the time for response.**

TIME FOR RESPONSE TO PETITION

A response to petition must be filed and served on the petitioner,

- (a) if you served with the petition anywhere in Canada, within 21 days after that service,
- (b) if you were served with the petition anywhere in the United States of America, within 35 days after that service,
- (c) if you were served with the petition anywhere else, within 49 days after that service, or
- (d) if the time for response has been set by order of the court, within that time.

(1)	The address of the registry is: 800 Smithe Street Vancouver, BC V6Z 2E1
(2)	The ADDRESS FOR SERVICE of the petitioner is:  Nathanson Schachter & Thompson LLP Barristers & Solicitors Suite 750, 900 Howe Street Vancouver, BC V6Z 2M4 Tel: 604-662-8840 Fax: 604-684-1598  Email addresses for service of the petitioner: <a href="mailto:rhordo@nst.bc.ca">rhordo@nst.bc.ca</a> ; <a href="mailto:cohamadarcus@nst.bc.ca">cohamadarcus@nst.bc.ca</a>

(3)	The name and office address of the petitioner's lawyer is:  R.J. Randall Hordo, Q.C., FCI Arb., and M. Caitlin Ohama-Darcus Nathanson, Schachter & Thompson LLP Suite 750, 900 Howe Street Vancouver, BC V6Z 2M4
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**Part 1: ORDERS SOUGHT**

1. A declaration that the amendment to section 9(e) of the Parks Control By-law (the "**Bylaw Amendment**"), enacted by the Vancouver Board of Parks and Recreation (the "**Park Board**") on May 15, 2017, is invalid and of no force and effect, either in whole or in part;
2. An order in the nature of *certiorari*, quashing the Bylaw Amendment;
3. An order in the nature of prohibition, restraining the Park Board from enforcement of the Bylaw Amendment;
4. Interim and interlocutory injunctive relief;
5. An order for costs; and
6. Such further and other relief as counsel may advise and this Court may allow.

**Part 2: FACTUAL BASIS**

***The Vancouver Aquarium***

1. The petitioner, Ocean Wise Conservation Association (the "**Vancouver Aquarium**"), is a self-supporting, not-for-profit society incorporated pursuant to the laws of British Columbia. Prior to June 8, 2017, the Vancouver Aquarium was known as the "Vancouver Aquarium Marine Science Centre".
2. The Vancouver Aquarium operates a marine science centre (the "**Marine Science Centre**") in Stanley Park, in the City of Vancouver. Since opening its doors to the public in 1956, the Marine Science Centre has attracted more than 44 million visitors (1.1 million in 2015; 1.2 million in 2016). It is now home to approximately 50,000 aquatic creatures.

3. Prior to June 8, 2017, the Vancouver Aquarium's mission statement was:

The Vancouver Aquarium is a self-supporting, non-profit society dedicated to effecting the conservation of aquatic life through display, communication, public programming and education, research and direct action.

4. On June 8, 2017, the mission statement was changed to:

Our mission is to inspire the global community to become Ocean Wise by increasing its understanding, wonder and appreciation for our oceans.

5. The Vancouver Aquarium is a global leader among aquariums. Its operations at the Marine Science Centre are accredited by:

- (a) the American Association of Zoological Parks and Aquariums ("AZA"), a non-profit organization dedicated to the advancement of zoos and aquariums in the areas of conservation, education, science and recreation;
- (b) Canada's Accredited Zoos and Aquariums ("CAZA"), the counterpart to AZA in Canada and a non-profit organization whose accreditation is recognized in the Controlled Alien Species Regulation, B.C. Reg. 94/2009, enacted under the *Wildlife Act*, R.S.B.C. 1996, c. 488; and,
- (c) the Alliance of Marine Mammal Parks and Aquariums ("AMMPA"), an international association representing marine life parks, aquariums, zoos, research facilities, and professional organizations dedicated to the highest standards of care for marine mammals and to their conservation in the wild through public education, scientific study, and wildlife presentations.

6. In 2016, the Vancouver Aquarium was one of the first institutions in the world to achieve animal welfare certification from American Humane, a non-profit organization whose sole focus is the welfare of animals.

7. Through its CAZA accreditation, the Vancouver Aquarium also adheres to marine mammal care standards set by the Canadian Council on Animal Care ("CCAC"), a national peer review organization responsible for developing and overseeing the implementation of high standards for animal ethics and care in science. The development of these standards was commissioned by the Department of Fisheries and Oceans Canada ("DFO") in 2014.

8. In its work with aquatic animals, the Vancouver Aquarium is regulated pursuant to federal and provincial legislation, including: the *Prevention of Cruelty to Animals Act*, R.S.B.C. 1996, c. 372; the Controlled Alien Species Regulation, B.C. Reg. 94/2009 enacted under the *Wildlife Act*, R.S.B.C. 1996, c. 488; the *Criminal Code*, R.S.C., 1985, c. C-46; the *Fisheries Act*, R.S.C., 1985, c. F-14; the Marine Mammal Regulations, SOR/93-56; and the *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act*, S.C. 1992, c. 52.
9. The Vancouver Aquarium employs more than 450 people — 390 full-time equivalents — and benefits from the contribution of more than 100,000 volunteer hours on an annual basis. Its operating budget for 2017 is approximately \$40 million.
10. The Vancouver Aquarium generates the vast majority of its revenues from admissions, membership, and retail. These revenues are then invested directly back into the Vancouver Aquarium's operations, including 11% to animal care, 20% to facility operations, and 16% to conservation, research and education (in 2016).
11. Cetaceans are an order of marine mammals that includes whales, dolphins and porpoises. Since 1964, cetaceans have been kept at or beside the Marine Science Centre for display, education and research. By virtue of their size, intelligence and responsiveness, their various species contribute substantially to the Vancouver Aquarium's ability to fulfill its mission.
12. The Vancouver Aquarium has made cetaceans a centrepiece of its efforts to reach out to and engage with the public.

### ***The Park Board***

13. The Park Board is an elected board of seven commissioners established under Part XXIII of the *Vancouver Charter*, S.B.C. 1953, c. 55, as amended.
14. The current Park Board consists of: John Coupar, Casey Crawford, Catherine Evans, Sarah Kirby-Yung, Stuart Mackinnon, Erin Shum, and Malcolm Wiebe (Chair). These seven commissioners were elected for four-year terms beginning on November 15, 2014.
15. Under the *Vancouver Charter*, the Park Board:
  - (a) exercises exclusive jurisdiction and control over permanent public parks, including Stanley Park, in the City of Vancouver, *subject to lease and licensing agreements* pursuant to s. 490(1) permitting persons to occupy buildings or places in a park;

- (b) *in the exercise of its powers*, is entitled to make bylaws for the control, regulation, protection and government of the parks.

***The Parties' Contractual Relationship and the Vancouver Aquarium's Expansion***

16. Since 1955, under agreements with the Park Board on behalf of the City of Vancouver, the Vancouver Aquarium has continuously owned and operated the Marine Science Centre in Stanley Park.
17. Since the early 1990s, whether the keeping of cetaceans in captivity is ethical or not has been a subject of public debate in Vancouver. This debate has been informed by international and domestic campaigns directed against the capture from the wild, keeping and exhibition of whales, dolphins, and porpoises.
18. In 1996, the Vancouver Aquarium became the first aquarium in the world to commit to no longer capturing cetaceans from the wild for display. The last wild-caught cetacean came to the Marine Science Centre twenty-seven years ago, in 1990.
19. The Vancouver Aquarium offered its 1996 commitment to limit its future acquisitions of cetaceans in response to a public campaign, directed to the Park Board. The Park Board accepted the Vancouver Aquarium's commitment and rejected the campaigners' demand that the Park Board enact a bylaw banning the keeping of cetaceans at the Marine Science Centre or that it hold a public plebiscite on the issue. Instead, the Park Board enacted a bylaw limiting but not preventing future cetacean acquisitions and agreed to enter into a memorandum of understanding with the Vancouver Aquarium pledging non-interference with its day-to-day operations.

***(1) The 1999 Licence Agreement***

20. At the beginning of 1999, the cetaceans at the Marine Science Centre were five beluga whales, one killer whale, and one Pacific white-sided dolphin.
21. Pursuant to s. 490(1) of the *Vancouver Charter*, on January 1, 1999, the Park Board on behalf of the City of Vancouver entered into a licence agreement (the "**1999 Licence Agreement**") replacing the previous agreement under which the Vancouver Aquarium owned and operated the Marine Science Centre.
22. The 1999 Licence Agreement includes the following recital:

E. The Park Board and the Society acknowledge, as governing principles of their relationship, that:

- (a) the public has a valid and *bona fide* interest in the purposes for which Stanley Park is used; and  
...
  - (c) the day-to-day administration of the Aquarium shall always properly remain within the Society's control, without interference by the Park Board, unless such interference is permitted or required by this Agreement.
23. By ss. 1 and 3 of the 1999 Licence Agreement, the Park Board grants the Vancouver Aquarium the right and licence to use the lands and premises containing the Marine Science Centre until the earlier of the expiration of a head lease from the Government of Canada and October 30, 2015. (The term of the head lease was subsequently extended in 2007 for 99 years.)
24. By s. 4 of the 1999 Licence Agreement, the Vancouver Aquarium covenants that it will, within the boundaries of the premises covered by the agreement (defined in the 1999 Licence Agreement as the "Premises"):
- (a) operate and manage the Aquarium (and all activities undertaken in connection therewith) in an efficient and businesslike manner;
  - (b) exercise the control, management and operation of the Aquarium through the Board of Governors of the Society, and the Park Board shall be entitled to designate one (1) commissioner as a liaison person who may attend meetings of the Society's Board;
  - (c) install suitable equipment and use the Aquarium for year-round display for public benefit; ...  
...
  - (m) comply with the bylaws of the Park Board and the City of Vancouver which may be in force from time to time governing the conduct and use of park property;
  - (n) not bring into Stanley Park or keep or otherwise maintain in Stanley Park any aquatic mammal of the Cetacean order including, but not limited to, baleen whales, narwhals, dolphins, porpoises, killer whales

and beluga whales, which has been captured or otherwise taken from its natural wild habitat, except that this prohibition shall not apply to:

- (i) captive cetaceans caught from the wild prior to September 16, 1996 and cetaceans born into captivity at any time;
  - (ii) cetaceans which are already being kept or maintained in Stanley Park as of September 16, 1996;
  - (iii) a member of an endangered cetacean species provided that approval for bringing it into Stanley Park has first been obtained from the Park Board; and
  - (iv) an animal that has been captured or otherwise taken from its natural wild habitat for the purpose of rehabilitating it from injury or preventing its death due to stranding provided that its capture or taking and subsequent release to natural habitat is done under the jurisdiction and approval of the federal agency responsible for such decisions, and provided that the Park Board has been informed in as timely a manner as possible by the Society.
- (o) (i) investigate and, where viable, implement alternatives to whale exhibitory and research whale release and whale rehabilitation (and for purposes of this clause it is agreed that "viable" means an alternative to which the Society and the Park Board mutually agree will maintain the financial viability of the Aquarium); and
- (ii) continuing to use means at its disposal to discourage institutions with whom it is exchanging whales to not capture wild whales to replace whales exchanged with the Society; ...



25. Under s. 4(p) of the 1999 Licence Agreement, the Vancouver Aquarium is required to pay to the Park Board \$40,000 annually which could be funded in whole or in part from joint initiatives of the Vancouver Aquarium and the Park Board. No other rent or licence fee is payable under this agreement.
26. By s. 5(c) of the 1999 Licence Agreement, the Park Board covenants that it will:
  - (c) not interfere with the day-to-day administration of the Aquarium unless such interference is permitted or required by this Agreement.
27. Section 11 of the 1999 Licence Agreement provides:

The Society agrees that this Agreement does not create any interest in land in favour of the Society with respect to the Premises. The Park Board agrees that the Society owns the buildings that comprise the Aquarium during the Term (or as it may be extended or as similar agreements are made to replace this Agreement). Upon expiration of this Agreement and if this Agreement is not to be extended or so replaced such that the Society shall no longer use or occupy the Premises then the ownership of buildings (excluding the Society's chattels and any fixtures or exhibits that are similar in nature to a tenant's trade fixtures, all of which may be removed by the Society) that are then on the Premises will automatically transfer to the Park Board.

**(2) *The 2009 Amending Agreement***

28. In 2005, the Vancouver Aquarium began planning an expansion and revitalization of the Marine Science Centre. The project was anticipated to cost \$100 million. The concept for this project featured expanded facilities for the display of beluga whales and dolphins as a centrepiece.
29. The project began with a six-month public consultation, engaging more than 4,000 Vancouver residents in surveys and public meetings. The result of this public consultation showed 89% approval for the proposed expansion and revitalization. Following this public consultation, and in accordance with the terms of the 1999 Licence Agreement, the Vancouver Aquarium sought the Park Board's approval for its project. The Park Board granted its approval for this expansion and revitalization in stages:

- (a) at a special board meeting on November 27, 2006, the Park Board passed a motion approving the Vancouver Aquarium's project concept; and
  - (b) at a regular board meeting on May 28, 2007, the Park Board passed a motion approving the development permit design plans for the expansion.
30. As of 2009, the Parks Control By-law of the Park Board provided:
- 9. ... (e) No person shall bring into any park or keep or otherwise maintain in any park any aquatic mammal of the Cetacean order including, but not limited to, baleen whales, narwhals, dolphins, porpoises, killer whales and beluga whales, which has been captured or otherwise taken from its natural wild habitat, except that this prohibition shall not apply to:
    - (i) captive cetaceans caught from the wild prior to September 16, 1996 and cetaceans born into captivity at any time;
    - (ii) cetaceans which are already being kept or maintained in a park as of September 16, 1996;
    - (iii) a member of an endangered Cetacean species, provided that approval for bringing it into a park has first been obtained from the Park Board; and
    - (iv) an animal that has been injured or is otherwise in distress, and in need of assistance to survive or rehabilitation, whether or not the intention is to release it back into its natural wild habitat.
31. At the end of 2009, the cetaceans at the Marine Science Centre were six beluga whales, three Pacific white-sided dolphins, and one harbour porpoise.
32. In view of the expansion project, effective December 31, 2009, the Park Board on behalf of the City of Vancouver and the Vancouver Aquarium entered into an agreement (the "**2009 Amending Agreement**") amending the 1999 Licence Agreement.

33. Recitals C and D to the 2009 Amending Agreement refer to the proposed plans for the expansion of the Marine Science Centre and an attachment to the 2009 Amending Agreement which identified:

- 1 New, larger pools for dolphins;
- ...
- 3 New, larger pools for beluga whales; ...

34. Recital F to the 2009 Amending Agreement states:

As a result of the approved Expansion the Park Board has agreed to extend the term of the Original Agreement by a period of twenty (20) additional years from the effective date of this Agreement and to modify the Original Agreement to include the Expanded Area in the definition of the Aquarium and to further modify the Agreement to provide that the Society has agreed to pay four percent (4%) of its annual gross revenues from direct, retail food and beverage sales to daytime Aquarium visitors (including alcoholic beverages) to the Park Board and to pay one hundred and seventy thousand dollars (\$170,000) per annum for lost revenues from the existing plaza concession at the Aquarium during that period of this license when the construction of the Expansion is underway;

35. The 2009 Amending Agreement amends the 1999 Licence Agreement as described in Recital F and in other respects, including "... by deleting section 4(n) (as this is now dealt with by a general Park By-law)".

**(3) *The 2011 Amending Agreement***

36. In 2011, the Vancouver Aquarium and the Park Board agreed to modify the expansion plans by reducing the size of the expansion area and modifying the food service arrangements. The Park Board passed a motion approving these revised development design plans at a regular board meeting on April 18, 2011. Like the earlier approved plans, these revised approved plans included larger pools for both dolphins and belugas.

37. Effective September 7, 2011, the Park Board on behalf of the City of Vancouver and the Vancouver Aquarium entered into an agreement (the “**2011 Amending Agreement**”) further amending the 1999 Licence Agreement. The fee payable as described in Recital F to the 2009 Amending Agreement is changed and the Vancouver Aquarium shall pay a licence fee to the Park Board, equivalent to:
- (a) 4% of the Vancouver Aquarium’s Gross Revenue (as defined); and
  - (b) 6% of Gross Revenue in excess of \$2.5 million.
- (4) Implementation of the Expansion Project**
38. The first phase of the Vancouver Aquarium’s expansion and revitalization was completed in 2014. Construction for the second phase — including the construction of an expanded habitat for beluga whales — is scheduled to begin in Fall 2017. Completion of the second phase is anticipated for 2019.
39. Funding for the Vancouver Aquarium’s expansion and revitalization has come from numerous private and public supporters. In 2012, the Province of British Columbia committed up to \$10 million to the Vancouver Aquarium’s expansion project. In the same year, the Government of Canada committed up to \$15 million to the expansion project. The Vancouver Aquarium’s commitment agreement with the Government of Canada expressly contemplates the construction of “[l]arger and deeper pools ... for whales and dolphins”.
40. As of May 31, 2017, the Vancouver Aquarium has spent \$45 million of its \$100-million budget for the expansion project. This includes approximately \$7 million in expenditure dedicated to building improved and expanded facilities for belugas and other cetaceans.

***The Park Board’s 2014 Motion***

41. On April 28, 2014, the Park Board approved a motion titled “A Review of the Practice of Keeping Captive Cetaceans in Stanley Park”, directing its staff to prepare a report on the keeping of cetaceans in captivity at the Vancouver Aquarium.
42. In the recitals to the April 28, 2014 motion, the Park Board stated that “[t]he issue of keeping cetaceans in captivity is increasingly becoming an issue of heightened public interest”. In accordance with that motion, the Park Board staff retained Dr. Joseph K. Gaydos, a wildlife veterinarian and scientist based in California, to conduct a third-party review of the Vancouver Aquarium’s existing cetacean conservation program.

43. In his report to the Park Board, Dr. Gaydos concluded that:
- (a) the Vancouver Aquarium has “an active cetacean stranding and response program”, and “an active research department that seems to make good use of studying captive cetaceans, not only for being able to provide better care and understanding of captive animals, but to a greater extent as suggested by peer-reviewed publications, to benefit our understanding and conservation of cetaceans in the wild”; and
  - (b) “[i]f the Vancouver Aquarium were to no longer house cetaceans they would have the option to continue both their research program and their stranding and response program, but the quality of those programs could be compromised”.
44. At a special meeting convened over three days in July 2014, the Park Board received a report from its staff and a presentation from Dr. Gaydos. The floor was then opened to the 133 delegations who had registered to speak. Many of these submissions focused on issues of animal welfare and the ethics of keeping cetaceans in captivity.
45. On July 31, 2014, nearing the conclusion of this three-day meeting, Commissioner Aaron Jasper (then the Chair of the Park Board) introduced a motion containing four elements:
- (a) the Park Board calls upon the Vancouver Aquarium to continue its international leadership and work with the Board and other relevant partners to undertake a detailed examination of the applicable animal care standards (including those applied by CAZA, AZA, and AMMPA) and the implications of those standards on the behaviour of captive cetaceans. This study should:
    - (i) use all available scientific data to determine if cetacean well-being is possible within the confines of the Vancouver Aquarium’s cetacean compounds; and
    - (ii) be based upon measurable criteria as determined by scientific experts in the field of cetacean biology and behavioural science;
  - (b) the Park Board directs staff to establish an Oversight Committee consisting of animal welfare experts, with the mandate to provide public oversight to ensure the well-being of all cetaceans owned by the Vancouver Aquarium. This Oversight Committee will prepare a bi-annual report to the Park Board on the status and well-being of all cetaceans owned by the Vancouver Aquarium;

- (c) the Park Board directs staff to work with the Vancouver Aquarium to investigate and, where viable, implement alternatives to cetacean exhibition and continue to research cetacean rehabilitation and release; and
  - (d) the Park Board directs staff to prepare and bring forward for enactment by the Board an amendment to the Parks Control By-law to prohibit the breeding of captive cetaceans in Vancouver parks unless, in each particular instance, the captive cetacean is a threatened species and the Oversight Committee, the Park Board, and the Vancouver Aquarium agree that captive breeding is necessary for the survival of such threatened species.
46. In the recitals to the July 31, 2014 motion, the Park Board indicated that it had received emails, public comments, and inquiries from citizens “on all sides of this debate, and all based upon the well-being of the cetaceans at the Vancouver Aquarium”.
47. The July 31, 2014 motion was passed unanimously by all commissioners present to vote.
48. At a regular board meeting on November 24, 2014, Park Board staff presented a proposed amendment to the Parks Control By-law, as directed by the July 31, 2014 motion. As the current Park Board had just recently been elected, the outgoing Park Board directed that a review of the Parks Control By-law be deferred until 2015. The outgoing Park Board also directed staff to conduct further public consultation.
49. The current Park Board took no action on this direction in 2015. As well, no Oversight Committee was established by Park Board staff.

***The Park Board's 2016 Motion and the Vancouver Aquarium's Response***

50. On November 16 and 25, 2016, the Marine Science Centre's two resident beluga whales died. Their deaths were the subject of substantial publicity.
51. At a regular meeting of the Park Board on November 28, 2016, Commissioner Kirby-Yung introduced a notice of a motion resolving that the Park Board:
- (a) support the inclusion of a plebiscite (assent question) on the 2018 municipal election ballot to determine if Vancouver residents support keeping cetaceans at the Vancouver Aquarium's Marine Science Centre;
  - (b) request that the City of Vancouver add this question to the 2018 municipal election ballot, pursuant to s. 130 of the *Vancouver Charter*; and

- (c) write to the Vancouver Aquarium asking it to consider not bringing cetaceans into the Marine Science Centre until after the results of the 2018 plebiscite are received.
52. This motion, titled “Cetaceans at the Vancouver Aquarium”, was formally introduced on January 23, 2017. Following its introduction, the Park Board’s commissioners referred the motion to staff to further investigate and report back on the Park Board’s options “to address concerns regarding cetaceans at the Vancouver Aquarium”.
53. On February 20, 2017, hearing and responding to the Park Board’s expressed concerns about the keeping of cetaceans in aquariums, the Vancouver Aquarium announced its willingness to phase out the display of beluga whales by the end of 2029.
54. The timing of this compromise proposal was planned to coincide with the expiry of the 1999 Licence Agreement, as amended, on December 31, 2029.

***The 2017 Bylaw Amendment***

***(1) Report by Park Board Staff***

55. On March 3, 2017, Park Board staff published a referral report, outlining four possible options that were available to the Park Board:
- (a) call on City Council to include a plebiscite in the 2018 municipal election;
  - (b) accept the Vancouver Aquarium’s February 20, 2017 proposal to phase out the display of belugas by the end of 2029;
  - (c) amend the Parks Control By-law; or
  - (d) maintain the *status quo*.
56. The context for these four possible options was described in the opening paragraphs of the March 3, 2017 report:

With the recent deaths of two Vancouver Aquarium belugas at the Vancouver Aquarium in November 2016, the Park Board has seen a resurgence of public concern regarding cetaceans in captivity. Ongoing protests have been held at Park Board meetings and at the Vancouver Aquarium, multiple online petitions against captivity have been launched, and email campaigns targeting elected Park Board

and City officials have resulted in hundreds of emails received from supporters from both sides of the debate.

57. Concerning the third option (amending the Parks Control By-law), Park Board staff noted that “[p]roposed amendments could range from the low impact changes..., which would include only regulations on breeding and an aligned phase-out target of 2029, to high impact amendments that prohibit wild animal performances and/or call for an outright ban to bringing or keeping any captive cetaceans in Stanley Park”.
58. Park Board staff anticipated that a high level of public engagement would accompany any amendment to the Parks Control By-laws:

Any proposed by-law changes would be processed via the regular public process, with notice of any proposed motion provided to the public in advance, and an opportunity for delegations (including the Aquarium and any other affected parties) to comment on the proposed actions.

**(2) *Special Board Meeting on March 8 and 9, 2017***

59. The March 3, 2017 report came before the Park Board for consideration and discussion at a special board meeting on March 8 and 9, 2017.
60. At this meeting, the Park Board commissioners heard from:
- (a) its staff, outlining the four possible options canvassed in the March 3, 2017 report;
  - (b) the Vancouver Aquarium, concerning its 1996 commitment not to collect cetaceans from the wild, its conservation programs, its expansion and revitalization project, and its February 20, 2017 proposal to phase out the display of belugas by 2029; and
  - (c) 44 other speakers.
61. At the conclusion of these submissions, Commissioner Wiebe (Chair) summarized the four possible options presented by staff in the March 3, 2017 report. Then, before any further discussion by commissioners, Commissioner Mackinnon introduced the following motion:

THAT the Vancouver Board of Parks and Recreation directs staff to bring forward for enactment by the Board, an amendment to the Parks Control By-law to prohibit the importation and display of live cetaceans in Vancouver parks and report back not later than May 15, 2017.



62. Following its tabling, each of the Park Board's seven commissioners spoke in favour of this motion, which was passed unanimously.

**(3) In Camera Board Meeting on March 27, 2017**

63. On March 27, 2017, the Park Board held a further board meeting, convened *in camera*, to consider three possible bylaw options presented by Park Board staff:

1. Not allowing any cetaceans in the park, with an effective date set to allow time for compliance (i.e. requiring the existing cetaceans to be moved to another facility);
2. Allowing the existing cetaceans in the park but prohibiting display;
3. Allowing the existing cetaceans to remain on display, but prohibiting performance.

64. At the *in camera* meeting, Park Board staff presented four considerations concerning the three cetaceans then ~~currently~~ under the Vancouver Aquarium's care in Stanley Park:

- All three are rescues and considered non-releasable;
- All are on display and used for promotional, educational and research purposes;
- No suitable facilities observed at the Vancouver Aquarium that are not on display;
- The smaller cetaceans have expected lifespans under 5 years; the false killer whale is expected to live another 15 years and grow to 6 meters in length.

65. The Park Board proceeded to pass an *in camera* motion. As disclosed in a report from Park Board staff, released to the public on May 9, 2017:

The Board adopted a motion at the In Camera meeting recommending that a proposed by-law be prepared for consideration at a public meeting that reflects the third option, which would allow the three existing cetaceans to remain at the Vancouver Aquarium, but with performances prohibited.

66. None of the above information concerning the March 27, 2017 *in camera* board meeting was made known to the Vancouver Aquarium or the public until May 9, 2017. Even then, only limited content from this Park Board meeting was disclosed.

**(4) Draft Amendment Released on May 9, 2017**

67. In the staff report of May 9, 2017, Park Board staff outlined a proposed amendment to the Parks Control By-law. This amendment read as follows:

A By-law to Amend the Parks Control By-law  
Regarding Cetaceans in Parks

THE PARK BOARD OF THE CITY OF VANCOUVER, in public meeting, enacts as follows:

1. This By-law amends the indicated provisions of the Parks Control By-law.
2. In Section 1, the Park Board:
  - (a) adds in alphabetical order: "CETACEAN" means a marine mammal belonging to the Cetacean order and includes, but is not limited to, baleen whales, narwhals, dolphins, porpoises, killer whales and beluga whales."; and
  - (b) re-numbers the definitions in Section 1 in alphabetical order.
3. The Park Board repeals section 9(e) and substitutes:
  - "(e) no person shall bring a cetacean into a park.
  - (f) no person shall keep a cetacean in a park, except that this prohibition does not apply to cetaceans already in a park on [date of enactment].
  - (g) no person shall produce or present in a park a show, performance, or other form of entertainment, which includes one or more cetaceans."
4. A decision by a court that any part of this By-law is illegal, void, or unenforceable severs that part from this By-law, and is not to affect the balance of this By-law.

5. This By-law is to come into force and take effect on the date of its enactment.

(the “**Draft Amendment**”).

68. In its report accompanying the Draft Amendment, staff noted that the issue of amending the Parks Control By-law was a “complex” one.
69. Staff also noted that the Draft Amendment could be brought forward for “immediate enactment” if approved by the Park Board “after public debate and discussion”.

**(5) Draft Amendment Enacted on May 15, 2017**

70. Without hearing from the Vancouver Aquarium (or other interested persons) on the language and likely effects of the Draft Amendment, the Park Board enacted the Draft Amendment by a vote of six to one at a regular board meeting on May 15, 2017.
71. In advance of May 15, 2017, various individuals from the Vancouver Aquarium registered to speak at the Park Board meeting. The Park Board denied all of these requests to address the commissioners about issues concerning the Draft Amendment and its implications.
72. At the meeting on May 15, 2017, Commissioner Shum — the only commissioner who opposed the Draft Amendment, and the only one sitting as an independent — voiced her concern about the lack of transparency leading up to the vote.
73. All three readings of the Draft Amendment took place within the span of three minutes.

**(6) Current Language of the Parks Control By-Law, ss. 9(e) through (g)**

74. As a consequence of the Park Board’s vote on May 15, 2017, s. 9 of the Parks Control By-law now provides:

9. ... (e) No person shall bring a cetacean into a park.

(f) No person shall keep a cetacean in a park, except that this prohibition does not apply to cetaceans already in a park on May 15, 2017.

(g) No person shall produce or present in a park a show, performance, or other form of entertainment, which includes one or more cetaceans.

75. The word “cetacean” is defined in s. 1 of the Parks Control By-law as “a marine mammal belonging to the Cetacean order and includes, but is not limited to, baleen whales, narwhals, dolphins, porpoises, killer whales and beluga whales”.
76. The words “show”, “performance” or “entertainment” are not defined.

***Cetaceans Currently in the Vancouver Aquarium’s Care***

77. Prior to June 15, 2017, the Marine Science Centre ~~was~~ is currently home to three cetaceans:
- (a) Helen, a Pacific white-sided dolphin with partially amputated pectoral fins who was rescued from entanglement in a fixed fishing net off the coast of Japan and transferred to the Vancouver Aquarium’s care in 2005;
  - (b) Daisy, a Pacific harbour porpoise who was found stranded in 2008 at one month of age on a beach off the coast of Vancouver Island, and rescued and rehabilitated as part of the Vancouver Aquarium’s Marine Mammal Rescue Program; and
  - (c) Chester, a false killer whale who was found stranded at around one month of age on Chesterman Beach near Tofino, B.C., and rescued and rehabilitated as part of the Vancouver Aquarium’s Marine Mammal Rescue Program.

Daisy died at the Marine Science Centre on June 15, 2017. Helen and Chester continue to live together, as they have since June 2015, in the B.C. Wild Coast habitat at the Marine Science Centre.

78. Until June 15, 2017, each of these three animals played ~~plays~~ an important role in the Vancouver Aquarium’s mandate of conservation, helping researchers and the public better understand these animals, how they interact with their environment, and the impact of human activity on marine life. Helen and Chester continue to play these important roles. Each of these animals ~~was~~ has also ~~been~~ deemed to be non-releasable by government authorities.
79. Until June 15, 2017, to care for Helen, Chester and Daisy, the Vancouver Aquarium’s trainers, veterinarians and other staff followed a daily schedule of feeding, exercise, learning, social interaction, and health checks. Providing this care ~~was~~ is necessary to maintain each animal’s well-being. Helen and Chester continue to receive this care.
80. Most of this happens in pools open for public observation. Visitors are able to view many of these activities and to hear explanations and commentary from interpreters and trainers.

***Belugas Currently on Loan from the Vancouver Aquarium to Other Facilities***

81. Prior to November 2016, the Marine Science Centre was also home to several beluga whales.
82. Belugas are an Arctic and sub-Arctic species. Of the six wild beluga populations in Canada, three are endangered, one is threatened, and two are listed as being “of special concern”.
83. The Marine Science Centre is one of seven accredited facilities — including SeaWorld, the John G. Shedd Aquarium, and the Georgia Aquarium — that cares for belugas in North America. These facilities collaborate and manage their operations to ensure that the population of belugas in aquariums is appropriately managed for behaviour, genetics, group dynamics, breeding, and conservation activities.
84. The Vancouver Aquarium owns five belugas that are currently on loan to other facilities:
  - (a) Allua, a female beluga on a breeding loan to SeaWorld San Diego since 2005;
  - (b) Imaq, a male beluga on a breeding loan to SeaWorld San Antonio since 2011;
  - (c) Grayson, a male beluga who was sired by a Vancouver-owned beluga at SeaWorld San Antonio and is now on loan to the John G. Shedd Aquarium in Chicago, I.L.;
  - (d) Qinu, a male beluga who was sired by a Vancouver-owned beluga at SeaWorld San Antonio and is currently on loan to the Georgia Aquarium in Atlanta, G.A.; and
  - (e) Atla, a female beluga who was sired by a Vancouver-owned beluga at SeaWorld San Antonio and remains on loan to that aquarium.
85. As part of a 12-year beluga conservation program, the Vancouver Aquarium has planned to return a small group of belugas to the Marine Science Centre within the next two years. These belugas would live in a new, larger “Canada’s Arctic” habitat when the second phase of the Vancouver Aquarium’s ongoing expansion project is complete.
86. ~~The Vancouver Aquarium’s existing “Canada’s Arctic” habitat is currently empty.~~ On April 20, 2017, the Vancouver Aquarium concluded a five-month investigation into the sudden passing of its two resident belugas, Qila and Aurora. Qila was born at the Marine Science Centre in 1995 (to her mother, Aurora), and lived there until her death on November 16, 2016. Aurora lived at the Marine Science Centre from 1990 until her death on November 25, 2016. The results of the investigation concluded that the cause of death in both belugas was an unknown toxin. Following Qila and Aurora’s deaths, the “Canada’s

Arctic” habitat remained empty until the Vancouver Aquarium opened a new exhibit with Steller sea lions on July 1, 2017.

***Cetaceans as a Key Aspect of the Vancouver Aquarium’s Mandate of Conservation***

***(1) Marine Mammal Rescue Program***

87. Each year, the Vancouver Aquarium’s Marine Mammal Rescue Program saves over 100 sick, injured, or orphaned marine mammals and rehabilitates them for release back into their natural habitat. This includes an average of one to two cetaceans each year.
88. The first stage of rehabilitation for rescued animals occurs away from the Marine Science Centre, at an offsite veterinary hospital at the Port of Vancouver. Rescued cetaceans that require longer-term care must then be transferred from this temporary offsite facility to the Marine Science Centre within Stanley Park.
89. DFO has the exclusive authority to decide whether a stranded cetacean can first be rescued by the Vancouver Aquarium, and then whether that animal can ultimately be released.
90. The Marine Mammal Rescue Program is the only one of its kind in Canada. Aside from donations, funding for its operations comes from the Vancouver Aquarium’s revenues, including admission fees and membership sales.

***(2) Public Education and Engagement***

91. The presence and display of cetaceans at the Marine Science Centre plays a vital role in advancing the Vancouver Aquarium’s mandate of conservation. By involving visitors in the daily program of care for its animals, the Vancouver Aquarium educates members of the public, from British Columbia and abroad, about these animals, their species, the changing marine environment, and the impact of human activities on aquatic life.
92. In the Vancouver Aquarium’s view, education about conservation is vital to public engagement, and vital to the survival of whales, dolphins, and porpoises in the wild.

***(3) Training and Research***

93. The presence of cetaceans at the Vancouver Aquarium’s Marine Science Centre also provides an unparalleled learning opportunity for veterinary students and researchers. More than a dozen veterinary students participate in the Vancouver Aquarium’s fellowship, externship/preceptorship and residency programs each year.

94. Through its cetacean program, the Vancouver Aquarium makes it possible for veterinary students and scientists to gain hands-on knowledge and experience. Training and research in areas as varied as animal physiology, veterinary care, echolocation, and tracking for wild populations takes place at the Marine Science Centre where students and researchers have direct access to living, trained cetaceans.
95. The Marine Science Centre is the only facility in Canada where students and researchers can gain this type of hands-on knowledge and experience with cetaceans under the supervision of a board-certified veterinarian.

***Impact of the Park Board's Ban on the Vancouver Aquarium's Mandate and Operations***

96. If found to be valid and enforceable, the Bylaw Amendment will have significant, adverse impacts on the Vancouver Aquarium's mandate and operations, including:
  - (a) **No more long-term homes for rescued, non-releasable cetaceans in British Columbia.** The Bylaw Amendment will prevent the Vancouver Aquarium from providing a long-term home for sick, injured, and orphaned cetaceans that are deemed to be non-releasable by DFO. As a consequence, rescued, non-releasable cetaceans will face two options: either euthanasia or a stressful and costly transfer to another facility. Apart from the Marine Science Centre in Stanley Park, there are no other facilities in western Canada or the northwestern United States that can provide a home to rescued, non-releasable cetaceans. As a result of the Bylaw Amendment, there is an increased likelihood that DFO will not sanction the rescue and rehabilitation of a cetacean in need of care.
  - (b) **Loss of funds to operate the Marine Mammal Rescue Program.** The Bylaw Amendment will very likely result in a loss of revenues to the Vancouver Aquarium, which will in turn impact the Vancouver Aquarium's ability to fund and carry out marine mammal rescue and rehabilitation. Such a loss of funds will have adverse impacts not only for sick, injured, and orphaned cetaceans, but also for the more than 100 other marine mammals — including seals, sea lions, and sea otters — that require rescue and rehabilitation off British Columbia's coast each year.
  - (c) **Diminished attendance and a resulting loss of revenues.** The Bylaw Amendment will have broader financial consequences than the harm to the Marine Mammal Rescue Program alone. As a result of the Bylaw Amendment, the Vancouver Aquarium could suffer a significant loss in attendance-based revenues. These revenues are necessary to sustain the Vancouver Aquarium's operations as a non-profit organization, to safeguard its financial independence from government

subsidy, and to advance its mandate of conservation. Such loss in revenues could also result in a decrease in annual payments from the Vancouver Aquarium to the City of Vancouver, with consequent expense to taxpayers.

- (d) **Jeopardizing the well-being of the two ~~three~~ cetaceans already in Stanley Park.** The Bylaw Amendment will prevent the Vancouver Aquarium from bringing other non-releasable cetaceans to the Marine Science Centre to provide necessary companionship for the cetaceans already living there. Depending on the scope of its potential application, the Bylaw Amendment will also prevent the Vancouver Aquarium from providing adequate daily care to Helen and Chester, ~~and Daisy~~.
- (e) **Ending the Vancouver Aquarium's beluga conservation program.** Since Qila and Aurora's deaths in November 2016 and until July 1, 2017, the Vancouver Aquarium's existing Arctic exhibit was ~~has been~~ empty. The Bylaw Amendment will prevent the Vancouver Aquarium from returning its existing belugas to Stanley Park, ~~to remedy this absence~~ and to continue to educate visitors and advance scientific knowledge to protect Canada's Arctic and wild populations of belugas whales. As a result of the Bylaw Amendment, alternative plans will have to be made for the Vancouver Aquarium's five existing belugas.
- (f) **Eliminating one of the Vancouver Aquarium's most powerful tools to engage visitors and inspire public awareness and action.** The presence of cetaceans at the Marine Science Centre has been a foundational aspect of the Vancouver Aquarium's mission of conservation and education. The Bylaw Amendment will eliminate the Vancouver Aquarium's ability to engage visitors through the unique experience of seeing and learning from cetaceans first hand. This loss will in turn limit the Vancouver Aquarium's ability to educate and inspire visitors — to better appreciate their connection to the natural world, to better understand the marine environment and the cetaceans that depend on it, and to realize (and take personal actions to limit) the impact of human activities on this environment.
- (g) **Compromising the Vancouver Aquarium's ability to conduct and facilitate research with non-releasable cetaceans.** The presence of cetaceans at the Marine Science Centre has been a vital aspect of the Vancouver Aquarium's research program. The Bylaw Amendment will end the Vancouver Aquarium's ability to carry out and facilitate research with non-releasable cetaceans. This loss will severely impact the Vancouver Aquarium's ability to advance scientific knowledge for the rescue, rehabilitation, and conservation of wild cetaceans.



- (h) **Loss of expertise in cetacean stranding response and long-term care.** The Bylaw Amendment will result in an eventual loss of the Vancouver Aquarium's expertise in cetacean rescue, rehabilitation, and long-term care, and its recognition within the marine science community as a global leader in these areas.
- (i) **Harm arising to the Vancouver Aquarium's staff from the risk of quasi-criminal sanctions.** The Bylaw Amendment will expose the Vancouver Aquarium's trainers and other staff to the uncertainty of possible quasi-criminal sanctions under the *Vancouver Charter* and the Parks Control By-law. Every person who violates the Parks Control By-law, or permits a violation, commits an offence punishable upon conviction by a maximum fine of \$2,000 for each offence.
- (j) **Rendering the second and third phases of the Vancouver Aquarium's planned and approved expansion project obsolete.** As a result of the Bylaw Amendment, the Vancouver Aquarium will need to abandon its existing, approved plans to build a new Canada's Arctic exhibit (phase two) and a new B.C. Wild Coast exhibit (phase three), both of which feature expanded cetacean habitats as a centrepiece. This will jeopardize the Vancouver Aquarium's goodwill, capital funding, timeline, and significant portions of the expansion and revitalization work already complete.
- (k) **Fundamentally altering the permitted uses under the 1999 Licence Agreement.** The Bylaw Amendment fundamentally alters the Vancouver Aquarium's permitted uses under the 1999 Licence Agreement, as amended. This will prevent the Vancouver Aquarium from displaying belugas and other cetaceans, and will prevent the Vancouver Aquarium from carrying out its planned and approved expansion project.
- (l) **Risk of default and civil forfeiture under the 1999 Licence Agreement.** The 1999 Licence Agreement requires that the Vancouver Aquarium "comply with the bylaws of the Park Board ... which may be in force from time to time governing the conduct and use of park property". Breach of this contractual covenant would give the Park Board a right to notify the Vancouver Aquarium of default under the 1999 Licence Agreement and, if that default was not remedied within three months, to terminate the 1999 Licence Agreement. Further, upon termination of the 1999 Licence Agreement, ownership of the Vancouver Aquarium's buildings in Stanley Park would automatically transfer to the Park Board.

### **Part 3: LEGAL BASIS**

A summary of the legal basis for this petition is set out below.

#### ***Jurisdiction to Grant the Relief Sought***

97. The Court has four sources of jurisdiction to grant the relief sought in this petition.
98. First, on an application for judicial review under s. 2(2) of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, the Court may grant:
- ... any relief that the applicant would be entitled to in any one or more of the proceedings for:
- (a) relief in the nature of mandamus, prohibition or certiorari;
  - (b) a declaration or injunction, or both, in relation to the exercise, refusal to exercise, or proposed or purported exercise, of a statutory power.
99. A statutory power includes a power or right conferred by an enactment to make a bylaw: *Judicial Review Procedure Act*, s. 1.
100. Second, on the application of a person interested in a bylaw, the Court may declare that bylaw "void in whole or in part for illegality": *Vancouver Charter*, s. 534.
101. Third, the Court has the power to declare any bylaw that is inconsistent with the provisions of the Constitution of Canada to be of no force and effect: *Constitution Act, 1982*, s. 52(1).
102. Fourth, the Court has the inherent jurisdiction to grant declaratory relief concerning the validity and application of any part of the Parks Control By-law, as well as the proper interpretation of the 1999 Licence Agreement, as amended.

#### ***Bylaw Amendment Is Ultra Vires the Park Board***

103. By virtue of ss. 488 to 491 of the *Vancouver Charter*, the Park Board's power to enact bylaws is constrained by the terms of the 1999 Licence Agreement, as amended.
104. By the 1999 Licence Agreement, as amended by the 2009 Amending Agreement and the 2011 Amending Agreement:

- (a) the operations and management of the Marine Science Centre are the responsibility of the Vancouver Aquarium, and the Park Board is not to interfere except as permitted by the Agreement;
  - (b) animals living at the Marine Science Centre are intended for year-round display, for public benefit;
  - (c) alternatives to keeping whales in captivity are only to be adopted on a basis which the Vancouver Aquarium and the Park Board agree will maintain the financial viability of the Marine Science Centre;
  - (d) the Vancouver Aquarium undertook a \$100-million expansion, and has spent \$45 million to date, expressly on the basis that belugas and other cetaceans would be kept and displayed; and
  - (e) consequent on the Park Board's agreement to the expansion project, the Vancouver Aquarium agreed to pay substantially increased fees to the Park Board.
105. The 2017 by-law amendment is therefore *ultra vires* the Park Board.
106. A municipal body must not exercise the statutory powers conferred on it for any purposes other than those intended by the Legislature.
107. The Bylaw Amendment is plainly intended to and has the effect of stultifying the contractual obligations of the Park Board and the City of Vancouver under the 1999 Licence Agreement as amended, contrary to Part XXXIII of the *Vancouver Charter*.
108. It is impossible to discern a proper public purpose for the Bylaw Amendment.

***Procedural Unfairness***

109. Further, or alternatively, a municipal body owes a duty of procedural fairness in circumstances where the exercise of legislative power is directed at a particular person or at facts pertaining to that person.
110. The scope of this duty depends on several factors, including: the nature of the decision being made and the process followed in making it; the importance of the decision to the individuals affected; and the legitimate expectations of the person challenging the decision.

111. The Park Board owed a duty of procedural fairness to the Vancouver Aquarium and breached that duty by denying its representatives the opportunity to speak at the regular board meeting on May 15, 2017.
112. The Park Board's conduct and staff reports from at least 1996 to May 15, 2017 created a legitimate expectation that the Vancouver Aquarium and its staff would have the opportunity to make public submissions concerning the Draft Amendment.
113. The procedure adopted by the Park Board in enacting the Bylaw Amendment on May 15, 2017 was unfair in that:
  - (a) a majority of the Park Board had come to the conclusion that they wished to prohibit immediately the importation and display of live cetaceans at or prior to their meeting on March 8 and 9, 2017 or, alternatively, at their *in camera* meeting on March 27, 2017, without notice to or hearing from the Vancouver Aquarium;
  - (b) the commissioners arrived at the meeting on May 15, 2017 having prejudged the matter and were unwilling to hear representations at variance with their views; and
  - (c) the commissioners refused to receive submissions from the Vancouver Aquarium and adopted the by-law amendment without debate at the meeting of May 15, 2017.
114. No reasonable Park Board could have enacted the Bylaw Amendment either in the manner adopted by the Park Board or in substance.
115. Municipal bodies do not have a *carte blanche* in exercising their legislative powers. Where no reasonable and informed elected body could have enacted a bylaw, that bylaw will be set aside.
116. Likewise, where a municipal body fails to exercise the requisite degree of diligence, or otherwise demonstrates a lack of good faith, its decision to enact or amend a bylaw will be set aside.

***Subsection 9(g) of the Bylaw Amendment Is Unacceptably Vague***

117. Where a reasonably intelligent person would be unable to determine the meaning of a bylaw and govern their actions accordingly, that bylaw must be set aside for vagueness and uncertainty.
118. The Bylaw Amendment is incapable of interpretation and therefore unacceptably vague.

119. This is especially so given:
- (a) the limits of the Vancouver Aquarium's existing facilities and operations, and the Park Board's acknowledgement of those limits in the May 9, 2017 staff report;
  - (b) the training, exercise, and socialization needs of Helen, Chester, and until her death, Daisy, the ~~three~~ cetaceans ~~currently~~ in the Vancouver Aquarium's care in Stanley Park;
  - (c) the penal consequences for a contravention of the Parks Control By-law;
  - (d) the risk of default and civil forfeiture under the 1999 Licence Agreement; and
  - (e) the Park Board's discretion to enforce the Parks Control By-law.
120. It is not evident, for example, whether the language of the Bylaw Amendment prohibits the display of Helen and Chester, ~~and Daisy~~, or whether the scope of s. 9(g) extends to non-living cetaceans, from plush toys to images of whales. Further, and assuming that the Bylaw Amendment implicitly permits the display of cetaceans, the distinction between display and a "show, performance, or other form of entertainment" is indiscernible.
121. In the alternative, even if the Bylaw Amendment is capable of interpretation, s. 9(g) has no application to the Vancouver Aquarium's existing cetacean program.

***The Bylaw Amendment Violates the Vancouver Aquarium's Right to Free Expression***

122. Further, and in any event, the Bylaw Amendment infringes s. 2(b) of the *Canadian Charter of Rights and Freedoms* by violating the Vancouver Aquarium's right to free expression.
123. Through its cetacean program, the Vancouver Aquarium expresses one viewpoint in a many-sided public — and now political — debate about the ethics of keeping cetaceans in captivity. The Vancouver Aquarium's view is one aimed at demonstrating the capacity of human beings to care for captive, non-releasable cetaceans in an ethical manner, and in a manner that promotes the conservation of wild populations and the marine environment.
124. The Bylaw Amendment limits the Vancouver Aquarium in the expression of this ethical and political position in the foreseeable future.

125. Through its cetacean program, the Vancouver Aquarium also provides a unique education to visitors, students, and researchers. This education is achieved through the first-hand and affective experience of seeing, learning from, and engaging with a living cetacean. This experience conveys many messages: about the animals and their species; about the changing marine environment; and about the impact of human activities.
126. The Bylaw Amendment completely undermines the Vancouver Aquarium's cetacean program, and its ability to educate and engage visitors, students, and researchers.
127. Moreover, the Bylaw Amendment is neither a reasonable nor a justified limit on the Vancouver Aquarium's right to free expression. The Bylaw Amendment cannot be justified under s. 1 of the *Canadian Charter of Rights and Freedoms*.

**Part 4: MATERIAL TO BE RELIED ON**

1. Affidavit #1 of John Nightingale, made on June 12, 2017.
2. Affidavit #1 of Clint Wright, made on June 12, 2017.
3. Affidavit #1 of Catherine Imrie, made on June 13, 2017.
4. Affidavit #1 of Brian Sheehan, made on June 13, 2017.
5. Affidavit #1 of Dolf DeJong, made on June 13, 2017.
6. Affidavit #1 of Martin Haulena, made on June 14, 2017.
7. Affidavit #2 of Clint Wright, made on July 7, 2017.
8. Affidavit #2 of Catherine Imrie, made on July 14, 2017.
9. Affidavit #2 of Martin Haulena, made on July 14, 2017.
10. Affidavit #2 of John Nightingale, made on July 17, 2017.
11. Affidavit #1 of Randolph Pratt, made on July 14, 2017.
12. Affidavit #1 of Lauren Hartling, made on July 17, 2017.
13. Affidavit #1 of Kristyn Plancarte, made on July 16, 2017.
14. Such other affidavits and authorities as counsel may advise.

The petitioner and respondents, Park Board and City of Vancouver (who are represented by the same counsel), estimate that the hearing of the petition will take ~~four (4)~~ three (3) days.

The Attorney General of British Columbia has indicated that it will not be participating.

The Attorney General of Canada has indicated that it will not be participating at this time.

Date: 14 June 2017 (original filing)

Amended date: 18 July 2017

A handwritten signature in black ink, appearing to be 'R.J. Hordo', written over a horizontal line. The signature is stylized with a large loop at the top.

Signature of counsel for the Petitioner  
R.J. RANDALL HORDO, Q.C., FCI Arb.,

***To be completed by the court only:***

Order made

in the terms requested in paragraphs \_\_\_\_\_ of Part 1 of this petition

with the following variations and additional terms:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Date: \_\_\_\_\_

Signature of  Judge  Master

THIS PETITION TO THE COURT is prepared by R.J. RANDALL HORDO, Q.C., FCI Arb., and M. CAITLIN OHAMA-DARCUS, of the firm of Nathanson, Schachter & Thompson LLP, Barristers and Solicitors, whose place of business and address for service is Suite 750 – 900 Howe Street, Vancouver, B.C. V6Z 2M4, telephone (604) 662-8840 and whose email addresses for service are [rhordo@nst.bc.ca](mailto:rhordo@nst.bc.ca) and [cohamadarcus@nst.bc.ca](mailto:cohamadarcus@nst.bc.ca).