



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

**RESPONSE TO PETITION**

**Filed by:** Vancouver Board of Parks and Recreation and City of Vancouver (the  
"petition respondents")

THIS IS A RESPONSE TO the petition filed 14 Jun 2017.

**Part 1: ORDERS CONSENTED TO**

The petition respondents consent to the granting of the orders set out in the following paragraphs of Part 1 of the petition: None.

**Part 2: ORDERS OPPOSED**

The petition respondents oppose the granting of the orders set out in paragraphs 1-6 of Part 1 of the petition.

**Part 3: ORDERS ON WHICH NO POSITION IS TAKEN**

The petition respondents take no position on the granting of the orders set out in the following paragraphs of Part 1 of the petition: None.

## **Part 4: FACTUAL BASIS**

### ***The Park Board and the Aquarium***

1. The Vancouver Board of Parks and Recreation (the "Park Board" or the "Board") was established in 1890 as a committee of the recently-formed City of Vancouver (the "City"). Its original purpose was to manage Stanley Park, which had just been created. The Park Board is now an independent elected board under the *Vancouver Charter*, S.B.C. 1953, c. 55, and is the only elected body of its kind in Canada.
2. Stanley Park is legally owned by the federal government, but the City leases it under 99-year lease agreements, the last of which was formed in 2007. The City has designated Stanley Park a "permanent public park". Pursuant to section 488(1) of the *Vancouver Charter*, the Board therefore has "exclusive possession of, and exclusive jurisdiction and control of" Stanley Park. Section 490 of the *Vancouver Charter* empowers the Board, in the name of the City, to licence any person to occupy land within a permanent public park.
3. The Vancouver Aquarium was founded by the Vancouver Aquarium Marine Science Centre (which, like the physical facility, will be referred to as the "Aquarium") in the mid-1950s. Since that time, the Aquarium has occupied land in Stanley Park pursuant to a succession of licence agreements, amendments and renewals made with the Park Board over the years.
4. As the Aquarium is located in a City park, it has long been regulated by the Board. For instance, since at least 1985 all of the Aquarium's licences from the Board have expressly noted the Board's exclusive possession of, and exclusive jurisdiction and control over, Stanley Park, and they have all contained the Aquarium's covenant to "abide by and comply with the by-laws of the Park Board and the City which may be in force from time to time governing the conduct and use of the park property". Since 1999 the Aquarium's licence agreement with the Board has also stated, under the heading "governing principles", that the public has a valid and *bona fide* interest in the purposes for which Stanley Park is used.
5. Stanley Park, which is called by some the best urban park in the world, is often described as symbolizing Vancouver. The Board's planning for the park regularly attracts significant public attention and debate, including, for instance, by members of the public who seek more development in the park to support

recreational activities and by those who envision a wild forest refuge in the city and advocate for a conservationist approach.

6. The Aquarium is a respected institution that makes important contributions to education and marine conservation, to Stanley Park, and to civic life in Vancouver and the region more generally. In particular, the Aquarium has played a significant role in fostering understanding and appreciation for marine life and our oceans, as well as in research and conservation initiatives, such as the OceanWise Sustainable Seafood Program, marine mammal rehabilitation, the BC Cetaceans Sighting Network, the Great Canadian Shoreline Cleanup, and stellar sea lion research.
7. The Board has long supported the Aquarium's broad mission and has sought to manage Stanley Park in a manner that facilitates visits to the Aquarium, while balancing the range of interests other constituents have in the park.

***Overview of the public debate over the Aquarium's keeping of cetaceans in captivity***

8. The Aquarium was the first aquarium in the world to keep an orca, which was captured from the wild in 1964 and came to be called Moby Doll. The Aquarium thereafter owned and displayed a number of orcas until 2001, when its last remaining orca, Bjossa, was transferred to SeaWorld in San Diego.
9. The Aquarium first displayed belugas in 1967, when it acquired two belugas that were accidentally caught in an Alaskan fishery. Other belugas (including Aurora, who died in November 2016) were captured near Churchill, Manitoba, while still others (including Aurora's calf, Qila, who also died in November 2016, nine days before her mother) were born into captivity. The Aquarium continues to own five belugas, all of which are currently living in other aquariums.
10. The Aquarium has also kept and displayed narwhals, dolphins and porpoises. When the Board passed the amendment to the Parks Control By-law on May 15, 2017 (the "2017 By-law Amendment"), the Aquarium was home to a Pacific white-sided dolphin, a harbour porpoise and a false killer whale (a member of the dolphin family). The harbour porpoise has since died.
11. The keeping of cetaceans in captivity, including at the Aquarium, has long been controversial. At first, much of the opposition focused on the practice of capturing cetaceans from the wild, which appeared to some to be both inhumane and inconsistent with concern for the conservation of wild populations. As discussed

below, faced with this public pressure, in 1996 the Aquarium gave its binding commitment to discontinue the practice.

12. The other means by which aquariums may acquire new cetaceans – by breeding them in captivity or by keeping cetaceans that have been rescued and are deemed non-releasable – have in the last two decades also become controversial. These practices have generated substantial and sustained public debate about whether it is ethical to keep cetaceans in captivity, given such factors as their intelligence and social sophistication, and the spatial needs to perform the kinds of behaviours that are normal for them in the wild.
13. As a consequence of that public debate, a number of aquariums worldwide have resolved to discontinue the practice of keeping cetaceans for display, and the Senate of Canada is currently considering a bill (S-203) that would prohibit the keeping of cetaceans in custody except for the purposes of care and rehabilitation.
14. As set out below, in respect of the Aquarium this debate has played out in large part before the Board, because of its jurisdiction over Stanley Park. This debate has been particularly vigorous since the mid-1990s, to the point that it was likely a significant factor in the last Board election, in 2014.

#### ***1990s: No Capture Restriction***

15. Beginning in 1995, some individuals and animal welfare groups urged the Board to ban outright the keeping of cetaceans in captivity in Vancouver parks and to order the release of all cetaceans within the parks. That push followed the closure of the Vancouver Zoo, which was situated adjacent to the Aquarium.
16. The discussions in 1995 arose when the Aquarium addressed with the Board its need for more space in Stanley Park to establish a marine mammal rehabilitation centre. Various delegations to the Board spoke in opposition to that suggestion, in part because of concerns that an expansion of the Aquarium's footprint would lead to the importation of more whales into captivity within the park. The Board ultimately resolved in late 1995 that any request by the Aquarium for a space expansion should be put to public referendum. Some Board Commissioners and members of the public advocated that, as part of any such referendum, the City's voters should be asked if they are in favour of more whales and dolphins being brought into Stanley Park. That debate continued into 1996, and transformed into a consideration of whether the Board should prohibit performances and other entertainment including cetaceans or prohibit the importation and keeping of newly-acquired cetaceans in City parks.

17. Within that debate, the points raised by those advocating for restrictions on the keeping of cetaceans in City parks included:
  - (a) Research on cetaceans in captivity is of little benefit;
  - (b) Too many whales die at a young age while in captivity;
  - (c) Stranded whales and dolphins should be left in or returned to their natural environment, instead of being rescued and placed in captivity;
  - (d) Aquariums simply cannot replicate a whale's natural environment, which suffer from space and sound deprivation;
  - (e) New media forms can produce the same benefits for people wishing to learn more about whales; and
  - (f) The incarceration of whales for entertainment and profit is cruel and inhumane.
18. The Aquarium's statements in response – which it made particularly through its Director, Dr. John Nightingale – included the following:
  - (a) The Aquarium resolved in 1992 that it would never again capture live orcas and it has placed a moratorium on acquiring more beluga whales; any changes to this pledge would be discussed with the Park Board;
  - (b) The Aquarium would be economically unstable without the draw of the orcas for visitors;
  - (c) The orcas cannot be reintroduced to the wild;
  - (d) The Aquarium is a leader in its commitment to education and provides hands-on educational programs;
  - (e) Nothing can replace a first-hand visit to the Aquarium to view the whales; and
  - (f) While living in the facility is not the same for the whales as living in the wild, it is a trade-off so that other benefits can be realized.
19. Ultimately, in response to pressure from the Board and the public, the Aquarium committed not to accept any more cetaceans – including belugas, dolphins and porpoises – that had been captured from the wild after the Board's special meeting on September 16, 1996, subject to certain exceptions, including for rehabilitation

and release. That "No Capture Restriction" was included by the Board in its Parks Control By-law at section 9(e), by way of an amendment passed on November 4, 1996, as follows:

(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 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 with the approval of the federal agency responsible and provided that the Park Board has been informed in as timely a manner as possible.

20. In 1996, the Board and the Aquarium also added the No Capture Restriction to the Aquarium's licence agreement, and in 1997 they set out further aspects of their relationship in a memorandum of understanding. These provisions were incorporated in 1999 into a new licence agreement (the "1999 Licence Agreement"). The 1999 Licence Agreement remains in force to day, subject to amendments made in 2009 and 2011.
21. The recitals to the 1999 Licence Agreement set out "governing principles" for the relationship between the Board and the Aquarium, including that:
  - (a) The public has a valid and *bona fide* interest in the purposes for which Stanley Park is used; and
  - (b) The day-to-day administration of the Aquarium shall always properly remain within the Aquarium's control, without interference from the Park Board,

unless such interference is permitted or required by the 1999 Licence Agreement.

22. The 1999 Licence Agreement contains covenants on the part of the Aquarium, including that it will:
- (a) Clause 4(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";
  - (b) Clause 4(n): comply with the No Capture Restriction;
  - (c) Clause 4(o): investigate and, where viable, implement alternative to whale exhibitory and research whale release and whale rehabilitation ("viable" is stated to mean an alternative to which the Aquarium and the Park Board mutually agree will maintain the financial viability of the Aquarium); and continue to discourage institutions with which the Aquarium is exchanging whales not to capture wild whales to replace the whales exchanged with the Aquarium.
23. The 1999 Agreement also sets out certain Park Board covenants at clause 5, which include, at subparagraph (c), the requirement that the Board "not interfere with the day-to-day administration of the Aquarium unless such interference is permitted or required by this Agreement".

***2000s: Aquarium expansion proposal***

24. In 2006, the Aquarium came to the Board with a proposal to expand its facilities and take up new land in Stanley Park. That proposal triggered another intense debate over the Aquarium's keeping of cetaceans in captivity – one in which the Aquarium again participated vigorously. The Board ultimately decided to approve the Aquarium's proposed expansion and the Aquarium later successfully applied to the City for development permits to actually carry out the expansion.
25. During this process in 2006, the Board resolved to amend the No Capture Restriction only modestly and not to impose further substantive restrictions. The Board did decide, however, not to include the No Capture Restriction in future licence agreements with the Aquarium, and instead to maintain that restriction only in the Parks Control By-law, expressly in order to allow for future amendments to the by-law – including to ban the display of cetaceans – at any time. The Board's concern was that, if the No Capture Restriction continued to be included within the licence agreements with the Aquarium, then the Board might be restricted in its

power to add further restrictions on the keeping of cetaceans in captivity. The Board also resolved to review these restrictions in 2015.

26. Consistent with the Board's 2006 resolutions, when the Aquarium's licence was amended in 2009 (the "2009 Agreement"), the No Capture Restriction was removed. The 2009 Agreement removed the No Capture Restriction from clause 4(n) of the 1999 Agreement with the explanation that "this is now dealt with by a general Park By-Law". The 2009 Agreement did not delete or modify section 4(m) of the 1999 Agreement, which requires the Aquarium to "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". The Aquarium signed the 2009 Agreement and accepted the terms and conditions within it. The Aquarium acknowledged that an amendment to the cetacean provisions of the Parks Control By-law could have "a significant economic and financial impact on the Aquarium."

**2014: Breeding ban considered**

27. By the spring of 2014 the debate about cetaceans in captivity had flared up around the world, fueled in part by the documentaries *The Cove* (2009; about dolphin hunting in Japan) and *Blackfish* (2013; about orcas kept in captivity by SeaWorld). In Vancouver, a petition was started in February of 2014 calling for a ban on the importation of additional cetaceans into Stanley Park; by April it had 11,000 signatures. The issue was also the subject of significant media attention.
28. At the end April 2014 the Board directed its staff to report back on the Aquarium's current cetacean program in comparison to other aquariums. Board staff then retained Dr. Joseph Gaydos to undertake a factual comparative review; the ethical aspects of keeping cetaceans in captivity were not part of his mandate.
29. The Board considered the Gaydos report at a special meeting that commenced on July 26, 2014. It heard from speakers – including the Aquarium – over two nights, and on July 31, 2014 passed a unanimous resolution:
  - (a) Calling upon the Aquarium to conduct a large-scale cetacean welfare study;
  - (b) Directing staff to establish an Oversight Committee consisting of animal welfare experts, which would report to the Board bi-annually on the status and well-being of cetaceans owned by the Aquarium;
  - (c) Directing staff to work with the Aquarium to investigate and, where viable, implement cetacean exhibition and to continue to research cetacean rehabilitation and release; and



- (d) Directing staff to bring back for enactment an amendment to the Parks Control By-law to prohibit the breeding of captive cetaceans in Vancouver parks, unless the captive cetacean is a threatened species and the Oversight Committee, the Board and the Aquarium agree that captive breeding is necessary for the species' survival.
- 30. The Aquarium filed a petition for judicial review of that resolution, and the Board filed materials in response. Ultimately, however, the petition was not brought on for hearing because the resolution was never acted upon. In the municipal election held on November 15, 2014, a majority of the Commissioners elected were associated with the Non-Partisan Association ("NPA"), which did not support the Board's July 31 resolution. One of the Commissioners associated with the NPA – Sarah Kirby-Yung – served as the Aquarium's Vice President of Marketing and Communications from 2008 to 2010.
- 31. Consistent with the majority of the Commissioners' position in the election, the Board took no action to implement the July 31 resolution, including with respect to the breeding ban. Commissioner Coupar, the new Board Chair, did advise the Aquarium, however, to recognize the growing public sentiment against keeping cetaceans in captivity and voluntarily implement measures to address it.

***2017: Parks Control By-law amendment***

- 32. At the beginning of 2015, seven cetaceans were living at the Aquarium: Qila and Aurora (belugas), Hana and Helen (Pacific white-sided dolphins), Jack and Daisy (harbour porpoises) and Chester (a false killer whale). The Aquarium also owned five belugas on loan to other aquariums in the United States (SeaWorld and the Georgia Aquarium), including one called Nanuq.
- 33. In 2015, Hana died at the Aquarium and Nanuq died at the Georgia Aquarium. This was followed by the deaths of Jack in August of 2016, Qila on November 16, 2016 and Aurora (Qila's mother) nine days later. The Aquarium's investigation could only determine that an unknown toxin was responsible for the deaths of Qila and Aurora.
- 34. As of November 25, 2016, the only three cetaceans living at the Aquarium were Helen, Daisy and Chester. Daisy has since died, on June 15, 2017.
- 35. At a regular Board meeting on November 28, 2016, the Board's Chair, Commissioner Kirby-Yung, gave notice of a motion that the Board call for the City to hold a plebiscite, to be held during the 2018 municipal election, on whether Vancouver residents support keeping cetaceans at the Aquarium, and that the

Board write to the Aquarium to ask it to consider not bringing cetaceans back into the Aquarium until the results of the 2018 plebiscite are received. That motion was then introduced at the Board's regular meeting on January 23, 2017, but the Board decided instead to direct its staff to report back with information on the process of holding a plebiscite and to outline other options for the Board to consider.

36. Before reporting back to the Board, the Board's General Manager, Malcolm Bromley, had a number of meetings in February of 2017 with representatives of the Aquarium, including its now President and Chief Operative Officer, Dr. John Nightingale, and its Vice President and Aquarium General Manager, Dolf Dejong. Mr. Bromley advised the Aquarium of the general options on which he anticipated reporting back to the Board; he indicated that, in light of the increased public concern over cetacean captivity following the deaths of the belugas, he thought it possible the Board would decide to ban the practice; and he urged the Aquarium to take voluntary action to address the public concern about the practice in a manner similar to the development in 1996 of the ban on the capture of wild cetaceans.
37. At these meetings in February of 2017, the Aquarium disclosed to Mr. Bromley the proposal it planned to make to the Board, and which it subsequently announced publicly on February 20, 2017. Briefly put, the Aquarium proposed to bring a non-breeding group of belugas back into the Aquarium but to discontinue their display (but not the display of other cetaceans) by 2029, the end of the Aquarium's lease with the Board. In the meantime, the Aquarium would refocus its attention on research with the belugas. Mr. Bromley expressed the view that this plan did not sufficiently address the concerns of the Commissioners and of many members of the public about the practice of keeping cetaceans in captivity, and he urged the Aquarium to present a more ambitious plan in that regard.
38. The staff report called for at the January 23 meeting was completed and made public on March 3, 2017, in advance of a special Board meeting on March 8, 2017 that had been called to consider the issue of cetaceans in captivity. The March 3 report set out four options for the Board's consideration: 1) asking City Council to call a plebiscite on the matter; 2) accepting the Aquarium's February 20 proposal; 3) amending the Parks Control By-law, including to impose an outright ban on the keeping of cetaceans in City parks; and 4) accepting the *status quo*. With respect to the third option – amending the Parks Control By-law – the staff report anticipated a further Board meeting to address the nature of the amendment, but ultimately that became unnecessary in light of the Board's resolution on March 9, 2017.

39. The Board received numerous submissions in writing in advance of the March 8 special meeting. In particular, the Aquarium submitted a letter from Dr. Nightingale with various enclosures, a letter from Clint Wright, the Aquarium's Executive Vice President and Chief Operating Officer, and a number of other materials. In his letter to the Commissioners, Mr. Wright urged the Commissioners to accept the Aquarium's proposal. He observed that "[y]ou have a difficult decision before you" and he stated that "[t]he Vancouver Parks Board is being watched internationally, this is a chance to show leadership and sober political positioning – immediately ending the display does nothing to help the individual animals and may actually be very detrimental to the wild populations" (underlining added).
40. The special meeting on March 8 and 9, 2017 began with Mr. Bromley and the Deputy General Manager summarizing the staff report and answering questions from the Commissioners. The Board then heard from the Aquarium, represented by Dr. Nightingale, Dr. Martin Haulena (the Head Veterinarian) and Derral Moriyama (then the Chair of the Aquarium's Board of Directors). The Aquarium made a presentation and then answered the Commissioners' questions; all told, that delegation last approximately an hour and a half.
41. The topics addressed in the Aquarium's written materials, presentation and answers to the Commissioners' questions included:
- (a) The conservation value of the research conducted on cetaceans at the Aquarium, and the impact a ban on keeping cetaceans in captivity would have on the Aquarium's research activities;
  - (b) The value of keeping cetaceans in order to engage visitors inspire in them a conservation ethic;
  - (c) The safety of the cetaceans at the Aquarium in light of the recent deaths;
  - (d) The well-being of cetaceans kept in captivity, given their behaviours in the wild, such as their migration ranges and diving depths);
  - (e) Details on the state of the Aquarium's expansion;
  - (f) Details relating to the Aquarium's February 20 proposal, including:
    - (i) The means and appropriateness of keeping the belugas from breeding;
    - (ii) Whether the proposal to discontinue display after 2029 applied to all cetaceans or only belugas;

- (iii) Where the belugas would go after 2029; and
  - (iv) Adjustments to the Aquarium expansion to accommodate the February 20 proposal;
  - (g) The impacts that an immediate ban on cetaceans in Stanley Park might have on the Aquarium's rescue centre, including the inability to provide a long-term home for non-releasable cetaceans and the loss of expertise in cetacean rescue and care; and
  - (h) The potential financial impact on the Aquarium of an immediate ban on cetaceans in Stanley Park, including possibly diminished attendance a decline in revenue, and a resulting reduction in funds to operate the rescue centre.
42. Following the Aquarium's presentation, the Board heard from 41 other speakers, of whom 11 spoke in support of the Aquarium keeping cetaceans in captivity, 29 spoke against, and one was neutral but urged that the question be put to a plebiscite. The main topics addressed by these speakers included:
- (a) The value of the research conducted at the Aquarium, and whether it is necessary to be able to perform research in a controlled setting, as opposed to conducting it only in the wild;
  - (b) Whether visitors to the Aquarium can be similarly and appropriately engaged through means other than seeing live cetaceans;
  - (c) The need to let the public express its opinion in a plebiscite;
  - (d) Whether a by-law amendment to ban the keeping of cetaceans in captivity should provide an exemption for non-releasable cetaceans;
  - (e) Whether an Oversight Committee should be formed to supervise the management of cetaceans at the Aquarium;
  - (f) The potential and limitations of establishing a marine reserve and/or sea pens to keep non-releasable cetaceans; and
  - (g) Possibilities for using some of the funds earmarked for the Aquarium's expansion to expand the rescue centre instead.
43. Following the speakers, Commissioner Mackinnon moved 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.

44. Each of the Commissioners then spoke, providing his or her views on the motion. Ultimately the motion was carried unanimously.
45. On a number of occasions following the special meeting Mr. Bromley requested further information from the Aquarium to assist him in drafting the by-law amendment. The Aquarium did provide some input in the form of oral conversations and written letters, but the thrust of it continued to be that the by-law should not be amended, that the Aquarium's keeping of cetaceans in captivity had the public's support, and that the Board should accept the Aquarium's February 20 proposal.
46. Following the special meeting on March 8 and 9, Mr. Bromley also visited the Aquarium, accompanied by Aquarium staff, to better understand the facilities in which cetaceans were kept to assist him in bringing forward the by-law amendment for enactment. From that visit he determined that the Aquarium did not have the necessary facilities to enable it to keep cetaceans over the long term without displaying them to the public.
47. On March 27, 2017, Mr. Bromley and legal counsel met with the Board *in camera* to obtain its instructions with respect to how the amendment to the Parks Control By-law should be drafted in light of the three cetaceans then being kept at the Aquarium. The Board was presented with further information staff had gathered since the March 9 resolution:
  - (a) All three cetaceans are rescues and are considered non-releasable;
  - (b) All are on display and are used for promotional, educational and research purposes;
  - (c) No suitable facilities were observed at the Vancouver Aquarium that are not on display; and
  - (d) The smaller cetaceans have expected lifespans of under 5 years; the false killer whale is expected to live another 15 years and grow to 6 meters in length.
48. The Board was then presented with three options in respect of these three cetaceans:

- (a) 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);
  - (b) Allowing the existing cetaceans in the park but prohibiting display; or
  - (c) Allowing the existing cetaceans to remain on display, but prohibiting performance.
49. The Board, by the adoption of a motion, recommended to staff that it draft the by-law amendment to reflect the third option.
50. The proposed by-law amendment was brought forward for enactment at a regular Board meeting on May 15, 2017. In advance of that meeting, staff posted a report on May 9, 2017 setting out the background to the by-law amendment and its recommendation. The May 9 staff report included the information about the March 27 *in camera* meeting set out above.
51. Between March 9 and May 15, the Board received a large number of written communications, on both sides of the issue, and the Aquarium, its supporters and animal welfare advocates made numerous statements in the media. To the extent that those communications and statements in the media concerned the substance of the proposed amendment to the Parks Control By-law, they focused on the same topics addressed in the special meeting on March 8 and 9.
52. The Board received a number of requests from members of the public to speak at the May 15 meeting, but the Board Chair concluded that the Commissioners had received sufficient information to make its decision. At the meeting, each of the Commissioners spoke to the proposed by-law amendment; some of them had prepared remarks, while others did not. In contrast to her vote in favour of the March 9 resolution, Commissioner Shum spoke against the by-law amendment; the other Commissioners spoke in support. The 2017 By-law Amendment was enacted by a vote of six Commissioners in favour and one against.

## **Part 5: LEGAL BASIS**

1. As set out under the subheadings below, none of the Aquarium's arguments provides a sound basis for interfering with the Board's May 15 amendment to the Parks Control By-law. That amendment is the result of the legislative function of a democratically-elected body, which, after a fair process, made a decision wholly consistent with the statutory powers granted to it. The Aquarium's petition should be dismissed.

***The by-law amendment is intra vires the Board***

2. The Board has express statutory authority to enact the 2017 By-law Amendment. Section 491 of the *Vancouver Charter* empowers the Board to pass, amend and repeal by-laws from time to time in the exercise of any of its powers and for the regulation of the parks and the people within them, including specifically with respect to “the exclusion from any of the parks, or any part thereof, of any animal”. The Board’s powers include its general and exclusive jurisdiction and control of all permanent parks under section 488, and its specific power under section 489 to provide for “establishing, maintaining, and operating in any of the parks places for the confinement, exhibition, and accommodation of animals, fish, birds, reptiles, and other creatures which may be objects of interest to the public, and making a charge therefor”.
3. The Aquarium Licence Agreement does not remove or diminish the Board’s power to pass the 2017 By-law Amendment. The *Vancouver Charter* authorizes the Board to enter into licence agreements, but does not empower the Board to constrain the by-law making powers of future Boards by way of an agreement. The Board’s legislative function, as provided for in section 491, is separate and independent from its business powers, including its power to licence the occupation of park land.
4. Further, the various licence agreements entered into by the Aquarium state that the Aquarium must comply with Board by-laws, which include the Park Control By-law. None of these agreements, including the current Aquarium Licence Agreement, provides any assurance to the Aquarium that the Park Control By-law would not be amended to restrict or prohibit the keeping or display of cetaceans in City parks. To the contrary, as part of its 2006 decision to approve the expansion and renew the licence agreement, the Board resolved to review the Parks Control By-law in 2015, with a view to considering whether it should be amended. In 2006, the Board also required the removal of the No Capture Restriction from the 1999 Agreement precisely in order to allow for “the possibility of discontinuing display of cetaceans at any time” in the future; consequently, by virtue of its amendment in 2009, clause 4(n) of the Aquarium Licence Agreement was deleted, with a note explaining that “this is now dealt with by a general Park By-Law”.
5. At all relevant times – including during the Board’s approval of the Aquarium’s expansion proposal in 2006 – the Aquarium knew that the issue of cetaceans in captivity remained an issue of significant public concern and debate; it knew that the Board was not foreclosing the Board’s future consideration of the issue; it knew that the Board could amend the Parks Control By-law to address the issue; and it

knew that the Aquarium would be required to comply with any amendments. The Aquarium's awareness of the implications of the Board's by-law making power is evidenced by the Aquarium's expression of concern over the deletion of clause 4(n) from the Aquarium Licence Agreement; when delivering the signed 1999 Agreement, Dr. Nightingale observed that "[m]aterial adverse changes to the content of this section by reason of a change of a By-Law by a future Park Board may have a significant economic and financial impact on the Aquarium." Despite the risk inherent in operating in a City park in the context of an ongoing public debate over a controversial activity, the Aquarium accepted the terms and conditions of the Aquarium Licence Agreement and pushed forward with its expansion.

6. It is plain from the record that the Board enacted the 2017 By-Law Amendment out of the public's concern for the welfare of the cetaceans at the Aquarium and the Board's conclusion that the public no longer found the confinement of animals of such intelligence and sociability to be justifiable or consistent with the values underlying the Board's management of Stanley Park. The Aquarium's contention that the Board intended to stultify the Aquarium Licence Agreement is without any support in the record.

***The Board's process was fair***

7. The 2017 By-law Amendment constituted the exercise of a legislative power for which there is no statutory requirement of a public hearing. Accordingly, if the Board was under a duty of procedural fairness, the content of that duty was at the lower end of the spectrum. Nonetheless, the Board accorded the Aquarium a robust opportunity to be heard on whether cetaceans should be banned from City parks, which opportunity the Aquarium took up through oral and written submissions. The Aquarium understood that the Board was considering whether the importation of cetaceans into City parks should be banned immediately, as opposed to the 2029 timeframe for the removal of belugas from Stanley Park that the Aquarium had proposed.
8. In their consideration of cetaceans in captivity in Stanley Park, all of the Commissioners acted conscientiously, diligently and with open minds, and through their own process and the processes of former Boards they were well informed about the issues.
9. The question of whether cetaceans should be kept in captivity in Stanley Park has been debated at the Board for decades, with extensive involvement by the Aquarium. That debate has been driven by public concern for the welfare of the cetaceans at the Aquarium, the ethics of keeping cetaceans in captivity, and the



practice's inconsistency with the values embodied in Stanley Park. The previous Board resolved in 2014 to ban the breeding of cetaceans in City parks and thereby reduce the presence of cetaceans in Stanley Park, but a majority of the current Commissioners did not support that decision. It is clear, however, that the five recent deaths of cetaceans at the Aquarium – including deaths by unknown cause – had a significant impact on the public debate, which ultimately shifted the views of many of the Commissioners.

10. The 2017 By-law Amendment enacted by the Board is entirely within the range of possible reasonable outcomes of the exercise of its statutory powers.

***Subsection 9(g) of the Parks Control By-law is not vague***

11. As with any law, a municipal by-law will only be found to be impermissibly vague if it is incapable of providing an adequate basis for legal debate as to what is prohibited and what is not. A law is not vague just because it is difficult to interpret; it is vague only if it *cannot* be interpreted when it must be applied to a particular set of facts.
12. Subsection 9(g) is perfectly capable of interpretation. Some aspects of its interpretation will be simple matters: contrary to the Aquarium's assertions, it is plain and obvious that the by-law does not apply to "non-living cetaceans", such as images and plush toys, and that it does not prohibit the display of cetaceans.
13. Some other matters – such as the scope of "show, performance, or other form of entertainment" – cannot be determined with exacting precision in advance of actual experience with the amended by-law. However, subsection 9(g) puts the Aquarium and others on notice by delineating an area of risk: practices involving cetaceans where the dominant purpose is the entertainment of visitors are likely to contravene the subsection, whereas practices that are necessarily inherent in the display or keeping of cetaceans will not. The subsection gives more than sufficient guidance for legal debate and is therefore not impermissibly vague.

***The limitation on freedom of expression is justified***

14. The Aquarium has participated in the many-sided public and political debate about the ethics of keeping cetaceans in captivity for decades and the 2017 By-law Amendment in no way prohibits the Aquarium from continuing to do so. Instead, the amendment embodies the evolution of that public and political debate, as determined by the statutory body charged with responsibility for such decisions.

15. The Aquarium's main argument as to a limitation on its freedom of expression is circular. The Aquarium argues it needs to be able to continue to keep cetaceans in captivity in order to participate in the debate about whether it is ethically acceptable to keep cetaceans in captivity. This is a practical debate; it is about whether keeping cetaceans in captivity should or should not be permitted in Stanley Park. The Aquarium's argument, if accepted, would stifle that debate by precluding it from ever leading to a decision not to permit the practice.
16. The Aquarium's secondary argument is that the bylaw amendment undermines its ability to educate and engage visitors, students and researchers. The amendment does limit the Aquarium's activities in this regard to some degree, but far from "completely", as the Aquarium argues. The Aquarium still has available to it a whole range of media through which to teach visitors about cetaceans – including video – but it will be limited in its use of actual live cetaceans.
17. The 2017 By-law Amendment's limitation of the Aquarium's expression is relatively minor and is wholly justified. The Board amended the by-law in furtherance of pressing public concerns about the welfare of the cetaceans, the ethics of keeping of cetaceans in captivity (especially for entertainment), and the practice's inconsistency with the values underpinning the management of the City's parks (and Stanley Park in particular). The 2017 By-law Amendment responds to those concerns, accommodates the Aquarium's interests by grandfathering existing cetaceans and allowing display, and advances the public's objectives far more than it limits the Aquarium's expression.

#### **Part 6: MATERIAL TO BE RELIED ON**

1. Affidavit #1 of Malcolm Bromley, made on 04/Aug/2017.

The petition respondents estimate that the application will take 4 days.

Date: 04/Aug/2017



Signature of Lawyer for Petition  
Respondents  
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