

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

AND:

**THE BRITISH COLUMBIA SOCIETY FOR THE PREVENTION OF CRUELTY TO
ANIMALS and THE VANCOUVER HUMANE SOCIETY**

PROPOSED INTERVENORS

AMENDED NOTICE OF APPLICATION

Names of Applicants: The British Columbia Society for the Prevention of Cruelty to Animals and the Vancouver Humane Society (the “**Applicants**” or “**Proposed Intervenor**s”)

TO: **Ocean Wise Conservation Association** (the “**Petitioner**”)
c/o Nathanson Schachter & Thompson LLP
Barristers & Solicitors
Suite 750, 900 Howe Street
Vancouver, BC V6Z 2M4
Attn: Mr. R. J. Randall Hordo, Q.C. and Caitlin Ohama-Darcus
Email: rhordo.nst.bc.ca and cohamadarcus@nst.bc.ca

AND TO: **Vancouver Board of Parks and Recreation and City of Vancouver** (the “**Respondents**”)
c/o JFK Law Corporation
Barristers and Solicitors
340 – 1122 Mainland Street
Vancouver, BC V6B 5L1
Attn: Mr. Tim Dickson
Email: tdickson@jfkllaw.ca

TAKE NOTICE that an application will be made by the Applicants to the presiding judge or master at the courthouse at 800 Smithe Street, in the City of Vancouver, in the Province of British Columbia on 11/SEP/2017 at 9:45 a.m. for the orders set out in Part 1 below.

Part 1: ORDERS SOUGHT

1. An Order that The British Columbia Society for the Prevention of Cruelty to Animals and the Vancouver Humane Society (collectively, the "Applicants") be granted leave to intervene in this Petition on the following terms:

- a. written argument will not exceed 20 pages; and
- b. oral argument will not exceed 1 hour.

2. An Order that no costs be ordered for or against the Applicants for this Application, and if this Application is granted, that no costs be awarded against the Applicants at the hearing of the Petition; and

3. Such further and other relief as this Honourable Court deems just.

Part 2: FACTUAL BASIS

I. Summary of the Case at Bar

1. This is an application by The British Columbia Society for the Prevention of Cruelty to Animals ("BC SPCA") and the Vancouver Humane Society ("VHS"), collectively the "Applicants", to intervene in the judicial review of the following petition brought by the Ocean Wise Conservation Association ("Vancouver Aquarium") against the Vancouver Board of Parks and Recreation ("Vancouver Park Board") and the City of Vancouver ("City").

2. Over the last two decades, the keeping of cetaceans in captivity, including at the Vancouver Aquarium, has been passionately debated by people on both sides of the issue, namely those in favour of, versus those opposed to, captivity.

3. In recent years, the Vancouver Park Board attempted to amend its Parks Control Bylaw ("Parks Control Bylaw") in regard to the keeping of cetaceans on Vancouver park lands.

4. In the year, 2014, the Vancouver Park Board passed a resolution (“Resolution”) directing City staff to bring back for enactment an amendment to the Parks Control Bylaw that would prohibit the breeding of cetaceans on Vancouver park lands (among other amendments).
5. The Vancouver Aquarium filed a Petition for judicial review of the Resolution. Ultimately, the Petition was not pursued. There was a change in local government and the Resolution was never acted upon.
6. In the year, 2015, Hana (a Pacific white-sided dolphin) died at the Vancouver Aquarium. This was followed by the deaths of Jack (a harbour porpoise) in August, 2016, Qila (a beluga) on November 16, 2016, and Aurora (Qila’s mother) nine days later. (Daisy, a harbour porpoise, died on June 15, 2017, one day after the Petition was filed).
7. These deaths sparked another public debate about the ethics and science of keeping cetaceans in captivity. Between the end of the year, 2016 to May, 2017, the Vancouver Park Board again considered amendments to the Parks Control Bylaw.
8. After providing an open consultation period, on May 15, 2017, the Vancouver Parks Board voted, six to one, in favour of amending the Parks Control Bylaw by prohibiting the keeping of cetaceans on Vancouver parks lands, amongst other amendments (collectively, the “Bylaw Amendment”).
9. On June 14, 2017, the Vancouver Aquarium filed a Petition, and later an Amended Petition on July 18, 2017, seeking a declaration that the Bylaw Amendment is invalid and of no force and effect, and an order in the nature of *certiorari*, quashing the Bylaw Amendment on the following main grounds:
 - a. That the Bylaw Amendment is *Ultra Vires* the Vancouver Park Board. Specifically, it argues that by virtue of the *Vancouver Charter*, SBC 1953, c.55 (“*Vancouver Charter*”), sections 488-491, the Vancouver Park Board’s power to enact the Bylaw Amendment is constrained by the terms of a (1999) license agreement between the Vancouver Aquarium and the Vancouver Park Board.
 - b. The Vancouver Park Board breached its duty of procedural fairness that it owed to the Vancouver Aquarium.

- c. That the Bylaw Amendment is unacceptably vague in that it is unclear whether the amendment is in relation to plush toys, computer imagery or live cetaceans.
- d. That the Bylaw Amendment violates the Vancouver Aquarium's right to freedom of expression.

10. On August 4, 2017, the Vancouver Park Board and City (collectively, "Respondents") filed a Response defending the Bylaw Amendment on the following main grounds:

- a. The Bylaw Amendment is *Intra Vires* the Vancouver Park Board. Specifically, the Respondents say that the license agreement does not remove or diminish the Vancouver Park Board's power to pass the Bylaw Amendment. They say that the *Vancouver Charter* authorizes them to enter into license agreements, and that the legislation does not empower the Vancouver Park Board to constrain the bylaw making powers of future boards by way of an agreement.
- b. The process which the Vancouver Park Board used was fair and it did not breach any duties of procedural fairness.
- c. The Bylaw Amendment is not vague, and is perfectly capable of interpretation.
- d. The limitation on freedom of expression, if any, is justified.

11. The Applicants' proposed intervention is limited only to their perspective on the *Intra Vires* argument, as it relates to the consideration of animal welfare.

II. The BC SPCA

Legal Status

12. The BC SPCA was formed by an Act of the Provincial Legislature in the year 1895. It is a society that is "continued with perpetual succession and a corporate seal", pursuant to section 3 of the *Prevention of Cruelty to Animals Act*, RSBC 1996, c. 372 ("PCA"). The BC SPCA is a not-for-profit organization, with a registered charitable status.

13. The BC SPCA is the only animal welfare organization in British Columbia which has the authority to enforce laws relating to animal cruelty and to prepare cases for Crown Counsel for the prosecution of individuals who inflict suffering on animals. The BC SPCA's interest in the welfare of wild animals at the Vancouver Aquarium extends from the BC SPCA's legal duty to enforce the *PCA* for any wildlife in captivity in the province.

Mission and Values

14. The BC SPCA's mission is to protect and enhance the quality of life for domestic, farm and wild animals in British Columbia.

15. The organization's vision is to inspire and mobilize society to create a world in which all animals enjoy, as a minimum, five essential freedoms: (1) freedom from hunger and thirst; (2) freedom from pain, injury and disease; (3) freedom from distress; (4) freedom from discomfort; and (5) freedom to express behaviours that promote well-being.

(collectively, the "Five Freedoms").

Programs and Services

16. The BC SPCA provides a wide range of services, including in-shelter care, enforcement of animal cruelty laws through investigations into cases of animal cruelty and neglect, advocacy on animal-related issues, educating the public on animal welfare issues, and wildlife rehabilitation. Further details are contained in the Affidavit #1 of Craig Daniell, sworn August 31, 2017 ("Daniell Affidavit") at paragraphs 11 to 20.

The BC SPCA's Work with the Vancouver Aquarium Marine Mammal Rescue Centre

17. Despite the BC SPCA's opposition to the Vancouver Aquarium's captive cetacean program, the BC SPCA has financially supported the Vancouver Aquarium's Marine Mammal Rescue Centre ("MMRC"). The BC SPCA's Chief Scientific Officer also supervises UBC students who participate in a MMRC practicum program. Further details are contained in the Daniell Affidavit, at paragraph 22.

III. The VHS

Legal Status

18. The VHS is a not-for-profit and registered charity, incorporated pursuant to the *Business Corporations Act*, SBC 2002, C. 57.

Mission and Values

19. The VHS' guiding principles include that all living beings have an intrinsic value and that the interests and needs of non-human animals must be respected. It promotes public awareness of animal protection problems, especially local ones, educates the public about the fair, careful and humane treatment of animals, and it is actively engaged with law makers to ensure animal protection is considered in the implementation of laws. Further details are contained in the Affidavit #1 of Debra Probert, sworn August 30, 2017 ("Probert Affidavit") at paragraphs 4 to 7.

Programs and Services

20. The VHS is not, nor does it run, a shelter. Rather, it is a Vancouver-based organization that dedicates its time to various projects to further its purposes. Currently, the VHS' priorities lie in the areas of farmed animals, companion animals, captive exotic animals and animals used in entertainment, and wild animals. Within this framework, the VHS has campaigned against the use of captive and performing animals, including cetaceans. Further details are contained in the Probert Affidavit at paragraphs 8 to 14.

IV. The Nature of the Interests: The Applicants' Positions on Captive Cetaceans

21. The Applicants recognize that cetaceans are highly complex, sentient and social animals. The Applicants have had long-standing positions opposing the capture, confinement and breeding of marine mammals for entertainment or "educational display". They fully support the ban on keeping cetaceans in captivity.

22. The Applicants' positions are grounded in the belief that the Five Freedoms can not be obtained by keeping cetaceans in captivity, as well as on evidence-based information, using the best available scientific and professional knowledge about the welfare of animals. Further details are contained in the Probert Affidavit at paragraphs 15 to 22, and the Daniell Affidavit at paragraphs 23 to 28.

V. The Applicants' Involvement in the Captive Cetaceans Issue

23. Due to the growing concerns raised by the Applicants' supporters, members of the public and the scientific community over the last two decades, the Applicants have been actively engaged in trying to end cetacean captivity. Further details are contained in the Probert Affidavit at paragraphs 23 to 26, and the Daniell Affidavit at paragraphs 29 to 31.

VI. The Applicants Support the Bylaw Banning Captive Cetaceans

24. The Applicants' concerns over captive cetaceans stem from their belief that cetaceans are complex, sentient, social and intelligent animals that should not be kept in concrete tanks. They say that captivity goes against the core of their values, including the protection of the Five Freedoms for all animals.

25. The Applicants' mandates include speaking up, and educating the public on issues involving animal protection and welfare. An important part of this role is to also communicate with elected officials before they make decisions that can impact the welfare of animals. The Applicants believe that elected officials should consider animal welfare as part of their considerations when enacting bylaws, and laws, that can impact animals.

26. If the impugned bylaw is struck down, the Applicants are concerned that it would send a chilling message that animal protection and/or welfare should not be considered when elected officials draft laws, including laws that impact animals. In their view, this would set a very dangerous precedent that would limit their ability to influence the drafting and implementation of laws affecting animals.

VII. The Applicants' Proposed Argument

27. If the Applicants are granted intervenor status they will make the following joint submissions.

Impugned Bylaw is Intra Vires the Park Board

28. In enacting the Bylaw Amendment, the Vancouver Park Board is acting within its legislative capacity. It must be able to exercise that authority in the public interest, which includes the consideration of the humane treatment of animals.

29. The purpose of the *Vancouver Charter*, SBC 1953, c.55, is to ensure that the City provides for the good rule and government of the City. Listening to the overwhelming support of the electorate to ban cetaceans in captivity on Vancouver park lands is consistent with this legislative purpose.

Vancouver Charter, SBC 1953, c. 55, s. 189.

30. A broad and purposive approach is used in interpreting municipal legislative decisions. The Vancouver Park Board is right to approach this issue in a manner that gives effect to public and scientific views about the humane treatment of animals.

United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City), 2004 SCC 19, paragraph 6; *International Bio Research v. Richmond (City)*, 2011 BCSC 417 ("*International Bio Research*"), paragraphs 32-33

31. The City is permitted, and indeed obliged, to consider larger public interest issues in exercising its authority. These public interest issues include broader social, economic and political factors that are relevant to the electorate.

Catalyst Paper Corporation v. Corporation of the District of North Cowichan, 2012 SCC 2 ("*Catalyst*"), paragraphs 19, 30

32. In this case, the broader social and political factors include a consideration of the changing circumstances. For the last two decades, there has been a growing scientific perspective, also supported by growing numbers of the public, that it is inhumane to continue cetacean captivity. In exercising its legislative authority, the Vancouver Park Board can not fetter future Vancouver park boards; it must be able to use its power to respond to changing circumstances, which in this case is the evolving attitude toward the humane treatment of animals. Further, the Vancouver Charter, does not permit a park board to fetter a future park board's power to legislate over matters of future public interest.

33. The Vancouver Park Board extensively consulted with members of the public and scientists.

34. Many of the submissions, as illustrated in the Report, were that keeping cetaceans in captivity is inhumane, and it does not further educational or conservation goals.

35.—After listening to, and reviewing, the relevant information, the Vancouver Park Board decided to ban cetaceans in captivity on Vancouver park lands. The Vancouver

~~Park Board is entitled to deference, and this enactment does not constitute a decision that no reasonable elected municipal council could have made.~~

~~*Catalyst*, paragraph 24~~

~~36:35. In the exercise of its legislative authority in the public interest, the City is right to include the consideration of the humane treatment of animals in light of the growing public sentiment and scientific knowledge.~~

~~37:36. Ultimately, the courts must respect the responsibility of elected representatives to serve the people who elected them and to whom they are ultimately accountable.~~

~~*Catalyst*, paragraph 19~~

~~38:37. Even if the impact of the impugned bylaw is harsh on the Vancouver Aquarium, the Vancouver Park Board was entitled to consider the countervailing arguments of animal welfare.~~

~~*Catalyst*, paragraphs, 34-35~~

~~39.—Further, the impugned bylaw amendments were made for a valid municipal purpose, namely the Vancouver Park Board passed the bylaw amendments because of its concern over the welfare of animals. The Park Board needs to have only one proper purpose for the impugned bylaw to be valid, even if members of the Park Board may have had other motivations.~~

~~*International Bio Research*, paragraphs 44-49~~

~~40:38. Lastly, the Applicants also ask this Court to consider the bigger picture. As the Honourable Chief Justice of Alberta noted (in dissent) in *Reece et al v. The City of Edmonton*, 2011 ABCA 238 at para 90~~

Since the rights adopted for the benefit of animals are limited, courts should not diminish the full import of animal protection laws by creating unnecessary barriers to those seeking to ensure compliance with them. Animals...cannot commence lawsuits on their own to protect themselves. They must rely on humans to give voice to the truly voiceless. Thus, courts should take a generous, not impoverished, approach to the grant of public interest standing for those attempting to enforce the restrictive animal rights that do exist.

41.39. This case raises a significant issue in relation to the humane treatment of animals. Given that the ones who are truly affected by the Bylaw Amendment are the cetaceans, the Applicants say that the Vancouver Park Board properly exercised its legislative authority when it considered the humane treatment of cetaceans. This is also consistent with the broader and purposive approach that is now used in interpreting municipal legislative decisions.

Part 3: LEGAL BASIS

I. General Principles on Intervention Applications

1. This application is brought pursuant to Rule 8-1 of the BC Supreme Court Rules and the inherent jurisdiction of this Court.
2. Intervention is more likely to be permitted in proceedings concerned with issues of public law.

International Forest Products Ltd. V. Kern, 2000 BCSC 1087, paragraph 20

3. The granting of intervenor status is a discretionary order that is subject to the following principles:
 - a. The applicant has a direct interest in the litigation;
 - b. Where the applicant does not have a “direct” interest in the litigation, the court must consider whether the applicant has a public interest in a public law issue;
 - c. the applicant can make a valuable contribution or bring a different perspective to a consideration of the issues on appeal that differs from that advanced by the parties;
 - d. Whether the case has a dimension that legitimately engages the interests of the proposed intervenor; and
 - e. If there are concerns with the intervention, such as the expansion of the issues, duplication of argument, or uniqueness of perspectives, such concerns can be addressed through the terms of a Court order.

Halalt First Nation v. British Columbia (Environment), 2012 BCCA 191, paragraphs 5 and 7; *Friedmann v. MacGarvie*, 2012 BCCA 109, paragraphs 12-19; *Garcia v. Tahoe Resources Inc.*, 2016

4. Factors weighing against granting intervenor status include the possibility that an intervenor will expand the scope of the proceeding by raising new or immaterial issues, or create an undue burden or injustice for the parties in the proceedings.

Faculty Association of the University of British Columbia v. University of British Columbia, 2008 BCCA 376, paragraph 15

II. Nature of Interest

5. The BC SPCA and the VHS are two Vancouver-based and prominent animal welfare and protection organizations.

6. The Applicants do not have a direct interest in the litigation, in the sense that the outcome of the proceedings will affect their legal rights. But, both organizations have a genuine public interest to speak on issues affecting the welfare of animals.

7. One of the main goals of the BC SPCA and the VHS is to advance, and advocate for, the humane treatment of animals.

8. In this case, the keeping of cetaceans in captivity raises issues of animal welfare. Specifically, both organizations believe that cetaceans are complex, highly sentient and social creatures, and who should not be confined to small concrete tanks.

9. Both the BC SPCA and the VHS base their position on the growing body of evidence that shows that cetacean captivity imposes needless suffering. Both organizations have a long history of being involved in this issue, and specifically advocating for the end of cetacean programs in aquariums, including at the Vancouver Aquarium. They also made submissions to the Vancouver Park Board before it drafted the Bylaw Amendment.

10. As such, the BC SPCA and the VHS have a legitimate public interest to be involved in this Petition.

40.

III. The BCSPCA and the VHS Will Add a Valuable Contribution and Different Perspective

11. In the Applicants' view, the key public law question raised by this Petition is whether the welfare of animals may, or should, be a factor that elected officials consider when drafting laws that affect animals.

12. The main argument that the Applicants propose to make is that the City is acting within its legislative capacity, and must be able to exercise that authority in the public interest, which includes the consideration of the humane treatment of animals.

13. Specifically, the Vancouver Park Board is right to consider the evolution of public awareness, and growing scientific evidence, that support a ban on cetacean captivity.

14. The city extensively consulted with members of the public and scientists and after an extensive process passed the bylaw. The bylaw reflects the growing scientific consensus, also supported by growing numbers of the public, that it is inhumane and unethical to continue cetacean captivity. In the Applicants' view, it would be contrary to the public interest for the Vancouver Park Board to not enact bylaws that reflect these changing circumstances.

15. If the impugned bylaw is struck down, both the BC SPCA and the VHS are concerned that it would send a chilling message to elected officials that the welfare of animals should not be considered when drafting laws that involve animals. In their view, it would also limit their ability to influence the drafting and implementation of laws affecting animals.

16. The Applicants also ask this Court to consider the bigger picture. As the Honourable Chief Justice of Alberta noted (in dissent) in *Reece et al v. The City of Edmonton*, 2011 ABCA 238 at para 90

Since the rights adopted for the benefit of animals are limited, courts should not diminish the full import of animal protection laws by creating unnecessary barriers to those seeking to ensure compliance with them. Animals...cannot commence lawsuits on their own to protect themselves. They must rely on humans to give voice to the truly voiceless. Thus, courts should take a generous, not impoverished, approach to the grant of public interest standing for those attempting to enforce the restrictive animal rights that do exist.

17. Given that the ones who are truly affected by the Bylaw Amendment are the cetaceans, the (animal protection and welfare) Applicants, on behalf of the cetaceans, have a genuine public interest to provide an important perspective that includes animal welfare within the current context of a legal dispute. Namely, that the Vancouver Park Board properly exercised its legislative authority when it considered the humane treatment of cetaceans. This is also consistent with the broader and purposive approach that is now used in interpreting municipal legislative decisions.

IV. The Proposed Submissions Will Assist the Court

18. This case raises a significant issue in relation to the humane treatment of animals. The Applicants have extensive expertise in animal welfare and protection, and the captive cetacean issue. This expertise will assist the court by bringing an appropriate focus that is otherwise not before it.

19. The proposed argument is limited to a discreet legal issue between the parties: whether the Bylaw Amendment is *ultra* or *intra vires* the Vancouver Park Board.

20. The BC SPCA and the VHS bring a unique perspective that focusses on the interests of animals within the context of a jurisdictional dispute between the parties.

21. The Applicants will not expand the issues or complicate the proceedings. They will also not file any new evidence, nor be longer than necessary.

22. In case there are concerns with the Applicants' intervention, the Applicants will abide by any Court order made by this Honourable Court.

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Debra Probert, sworn on August 30, 2017, and filed on September 1, 2017.

2. Affidavit #1 of Craig Daniell, sworn on August 31, 2017, and filed on September 1, 2017.

3. Such further material as counsel may advise.

The Applicants estimate that the application will take 1 hour.

____ This matter is within the jurisdiction of a master.

X This matter is not within the jurisdiction of a master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

- (a) file an application response in Form 33,
- (b) file the original of every affidavit, and of every other document, that
 - (i) you intend to refer to at the hearing of this application, and
 - (ii) has not already been filed in the proceeding, and
- (c) serve on the applicant 2 copies of the following, and on every other party of record on copy of the following:
 - (i) a copy of the filed application response;
 - (ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
 - (iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7.

Date: September 16, 2017



Signature of lawyer for the Applicants
Rebeka Breder

This NOTICE OF APPLICATION is prepared and delivered by Rebeka Breder of Breder Law Corporation, whose place of business and address for delivery is 401 – 73 Water Street, Vancouver, BC V6B 1A1, 604.449.0213. (File No. BL435.00001)