No. S-175651
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

OCEAN WISE CONSERVATION ASSOCIATION

PETITIONER

AND:

VANCOUVER BOARD OF PARKS AND RECREATION and CITY OF VANCOUVER

RESPONDENTS

AND:

ANIMAL JUSTICE CANADA and ZOOCHECK

INTERVENERS

SUBMISSIONS OF THE INTERVENERS, ANIMAL JUSTICE CANADA AND ZOOCHECK

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A. OVERVIEW

1. Animal Justice Canada and Zoocheck (collectively, the "**Interveners**") are national animal advocacy organizations with broad and growing membership bases comprising tens of thousands of Canadians. They have intervened in this Petition because they are deeply concerned about the Petitioner's submission that a bylaw protecting the health and well-being of animals, which was in large part the product of vigorous and sustained political expression and advocacy, infringes its freedom of expression.

2. The Petitioner (the "**Aquarium**") challenges a Park Board bylaw (the "**Bylaw**") which provides, *inter alia*, that "No person shall bring a cetacean into a park" (s. 9(e)).

3. In challenging this aspect of the Bylaw, the Aquarium is asserting a constitutional right to bring cetaceans into Vancouver parks and keep them captive in its tanks. It says this constitutional right arises by virtue of the freedom of expression guarantee in section 2(b) of the *Charter of Rights and Freedoms*. The Interveners challenge this position for three reasons.

4. First, a purposive approach to section 2(b) demonstrates that the act of keeping cetaceans in captivity is not "expression" for the purpose of section 2(b). The purpose of section 2(b) of the *Charter* is to ensure "unobstructed access to the diffusion of *ideas*", to ensure "that we can convey our *thoughts* and *feelings* in non-violent ways without fear of censure".[1] It is meant to protect the communication of thoughts, ideas, feelings and opinions.

5. The Bylaw – and in particular section 9(e) – does not in any way impact the Aquarium's ability to convey thoughts, ideas, feelings, or opinions; nor does it limit the ability of the Aquarium to participate in a public debate about the ethics of keeping cetaceans in captivity. The Bylaw merely prevents the Aquarium from engaging in conduct harmful to animals.

6. Of course, every law prohibits or regulates conduct in some way, and laws preventing persons from engaging in certain conduct will limit their ability to "express" support for that conduct by engaging in it. But the mere fact that a law restricts conduct does not mean it violates section 2(b).

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[1] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 SCR 927 ("***Irwin Toy***") at 968-70.

7. For this and other reasons the purposive application of section 2(b) limits its scope to the protection of conduct which *in itself* seeks to convey meaning. Activities which are not in themselves expressive are not protected.

8. This important distinction has been articulated in numerous cases concerning the scope and application of section 2(b). For example: while *advertising* on tobacco products is expression capable of section 2(b) protection, the *sale* of tobacco products is not;[2] while *advocating* for the decriminalization of marijuana is protected expression, the possession or sale of marijuana itself is not "expressive activity";[3] and while *solicitation* for the purpose of prostitution is protected expression, the act of keeping a common bawdy-house is not.[4]

9. *Advertising*, *advocating*, and *soliciting* are all communicative activities that convey a discernible meaning – the speaker's thoughts, ideas, and opinions. By contrast, selling, possession, or keeping are purely physical acts that are themselves devoid of expressive content.

10. It is important to maintain this distinction – between acts that are themselves communicative, and acts about which a person may want to subsequently communicate or which may facilitate future communicative activities – because otherwise every act would be treated as "expression", and thus every law would constitute a *prima facie* breach of the *Charter* and require a section 1 justification.

11. Such an interpretation of 2(b) would undermine the rule that it must be interpreted purposively; it would overshoot the purpose of freedom of expression and trivialize the right.

12. Second, the Interveners submit that even if the keeping captive cetaceans is a *prima facie* expressive activity, it is nevertheless excluded from section 2(b) protection. This is because the *form* of such "expression" is sufficiently harmful that it is unworthy of *Charter* protection.

13. Courts have drawn a distinction under section 2(b) between restrictions on the *content* of communication, versus restrictions on the *form* of communication – that is, the *means* through

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[2] *Rosen v. Ontario (Attorney General)*, [1996] O.J. No. 100; see also e.g. *R. v. Ludacka*, 28 O.R. (3d) 19, [1996] O.J. No. 743; *Stenzler v. Ontario College of Pharmacists*, [1998] O.J. No. 681.

[3] *R. v. Normore*, [2005] A.J. No. 543.

[4] *Reference re ss. 193 and 195.1(1)(C) of the Criminal Code*, [1990] 1 SCR 1123 ("***Prostitution Reference***").

which a thought or idea is communicated. While the expression of particular ideas, views, thoughts, or opinions, will not be excluded from protection on the basis that the message or content of the communication is harmful, section 2(b) does not protect expression conveyed through a number of *forms* incompatible with shared social values, including violence, threats of violence, conduct intimately connected to violence, property damage, or other forms of expression that are deemed unworthy of protection.

14. As was demonstrated over the course of the Park Board's process leading up to the Bylaw's enactment, captivity of complex mammals in confined spaces inflicts profound harm and suffering upon them. The Interveners submit that even if captivity constitutes a form of "expression", it is sufficiently harmful to be excluded from section 2(b) as a form of expression that is unworthy of *Charter* protection.

15. Third, the Aquarium's submission that it is simply seeking to participate in what all parties recognize as an ongoing social and political debate is untenable. It is not participation in the debate that the Aquarium seeks, but rather constitutional protection for its own view at the expense of rendering futile the expression of all opposing viewpoints, including that of the Interveners. It is tautological and unacceptable to say that "in order to participate in the debate about the ethics of conduct X, we require a constitutional right to engage in conduct X".

16. The Interveners respectfully submit that each of the arguments summarized above independently provides a sufficient basis for the conclusion that bringing cetaceans into Vancouver parks and keeping them captive in tanks is not itself constitutionally protected conduct. However, considered cumulatively, they reveal that the conduct regulated simply does not fall within "the interests [section 2(b)] was meant to protect."[5]

B. ARGUMENT

(a) Section 9(e) of the Bylaw Does Not Restrict Expression

17. Bringing cetaceans into Vancouver parks and keeping them in tanks does not itself communicate or express an idea, thought, opinion, or feeling. The Aquarium remains free to

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[5] *R. v. Big M Drug Mart Ltd.*, [1985] 1 SCR 295, at para. 116 ("***Big M Drug Mart***").

advocate for its practices, to educate the public with respect to its views, and to engage in all forms of communicative activity.

18. The Aquarium says that performing the act of keeping cetaceans in captivity is itself expressive, because by engaging in this conduct it implicitly expresses "one viewpoint" in a debate: that the activity itself is capable of being done in an ethical manner.[6]

19. With respect, on a purposive approach to section 2(b) this cannot be enough to engage section 2(b) protection. Engaging in *any* conceivable activity or course of conduct could be said to "express" the view that such activity is capable of being done in the manner in which it is being done, or to convey the message that the person engaging in the activity believes it is ethical or something worth doing.[7]

20. This is why the Supreme Court has said that "(t)o bring [an] activity within the protected sphere, the plaintiff would have to show *that it was performed to convey a meaning*."[8]

21. The Aquarium's assertion is similar to that made in *Rosen v. Ontario (Attorney General)*, in which the appellant asserted that the act of selling tobacco products was protected by section 2(b). The Ontario Court of Appeal disagreed, holding as follows:

> With great respect to the appellants, I find untenable the argument that the sale of tobacco products in a pharmacy constitutes a form of expression. We are not considering advertising for sale as in *Irwin Toy*, or even displaying for sale as in *Greenbaum*; we are discussing the bare sale of a consumer product. Prohibitions against the sale of particular products from certain types of retail outlets have been commonplace in this jurisdiction and, whatever other criticisms have been levelled at this type of regulation, it has never been suggested that this regulatory action infringes freedom of expression. Nor could it. The act of selling tobacco products does not by itself convey any meaning.
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> (…) Absent any intention to convey a message, I fail to see how s.2(b), which is intended to ensure that everyone can manifest their thoughts, opinions and beliefs, can be engaged. Nor can I agree that the appellant Rosen can gain s.2(b) protection for his sale of tobacco

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[6] Petition to the Court, dated June 14, 2017, at para. 123.

[7] *Prostitution Reference*, *supra* at 1184 ("almost all human activity combines expressive and physical elements", for instance, "sitting down expresses a desire not to be standing").

[8] *Irwin Toy*, *supra* at 969.

> products by relying on the mixed message others choose to read into his activity in their efforts to promote the legislation.[9]

22. Of course, as with any conduct, observers may derive some implicit meaning from the sale of tobacco products, which could then be attributed to the vendor. The seller of tobacco products, for instance, may be taken to implicitly "communicate" the idea that a product is for sale, and to implicitly "express" the idea that the consumption of the product is a worthwhile or enjoyable activity, but that it not sufficient to garner section 2(b) protection.[10]

23. The Aquarium also argues that keeping cetaceans in captivity *facilitates* genuinely expressive activity, for instance, its educational communications to patrons.[11] A similar argument was made and rejected in *R. v. Hughes*, in which a Calgary resident challenged a bylaw restricting him from keeping hens on his property. Mr. Hughes stated that keeping urban hens was necessary to his "expression" on matters of food production and sustainability. The Court disagreed that this was sufficient to bring the conduct within the scope of 2(b):

> [111] Participation in an activity that is prohibited or restricted by a municipal bylaw, or a provincial or federal law, does not necessarily take on the characteristic of an activity engaged in "to convey a meaning."... While an activity could have multiple purposes, Hughes' activity, in my opinion, does not fall within a sphere protected by freedom of expression. Hughes' activity of keeping urban hens does not have expressive content.[12]

24. The distinction between "purely physical" activities, and genuinely expressive activities that may be associated with those physical acts, has long be maintained in the section 2(b) jurisprudence. For example, in the *Prostitution Reference*, the entire Supreme Court – though dissenting on other issues – agreed that while a restriction on solicitation infringed section 2(b), a

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[9] *Rosen, supra* at paras. 13, 15; see also *Stenzler v. Ontario College of Pharmacists* (1998), 107 OAC 218 (Ont Div Ct), at para. 11.

[10] While the Court in *Rosen* noted that the claimant did not allege that he was attempting to convey a meaning by the selling of tobacco products, the Court held that it may be that "even had the appellant Rosen intended to convey a message by his sale of tobacco products that the sale would only constitute expression if it could be said a member of the consumer public could reasonably perceive that message in the mere sale of tobacco products by the appellants".

[11] See, e.g., paragraphs 471 of the Aquarium's Argument dated September 18, 2017.

[12] 2012 ABPC 250.

restriction on keeping "a common bawdy-house" did not because it placed "no constraints on *communicative activity in relation to* a common bawdy-house."[13]

25. Likewise, section 9(e) of the Bylaw does not restrict communicative activity in relation to bringing cetaceans into Vancouver parks and keeping them captive. Rather, it seeks simply to avoid the harmful consequences of keeping cetaceans captive, and it does so by regulating that physical activity directly. The Aquarium is not restricted from communicating its views regarding the ethics of keeping cetaceans in captivity by any means whatsoever, nor is the act of keeping cetaceans performed in order to convey meaning.

26. Of course, there is no question that keeping a bawdy house may *facilitate* expressive activities. It gives persons an opportunity to come together and communicate about sexual conduct and express themselves sexually. It also serves as a focal point for societal debate, as people may seek to debate the ethics of sex work, or related zoning restrictions or requirements. But that is not sufficient to ground a section 2(b) right to engage in the act in question.

27. Again, if section 2(b) were to be construed so widely as to include all forms of conduct which may implicitly convey a message to observers, or about which a person may want to subsequently express a message, it would capture all conduct in which a person may choose to engage.

28. Such a broad approach to freedom of expression would trivialize the *Charter* protection for genuinely expressive activity. Accordingly, while courts are generous in interpreting section 2(b), such generosity must remain subordinate to the purpose of the right. As the Supreme Court observed in *R. v. Grant*, commenting on *Charter* interpretation generally:

> [17] While the twin principles of purposive and generous interpretation are related and sometimes conflated, they are not the same. The purpose of a right must always be the dominant concern in its interpretation; generosity of interpretation is subordinate to and constrained by that purpose (…). While a narrow approach risks impoverishing a *Charter* right, an overly generous approach risks expanding its protection beyond its intended purposes. In brief, we must construe the language of ss. 9 and 10 in a generous way that furthers, without overshooting, its purpose….[14] [Emphasis added]

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[13] *Supra* at 1134 and 1206. [Emphasis added]

[14] 2009 SCC 32.

29. Granting the Aquarium a constitutional right to bring cetaceans into Vancouver parks and keep them in tanks would impermissibly privilege generosity of interpretation at the expense of the actual purposes underlying section 2(b). While there is no question that the Aquarium engages in many genuinely expressive activities, the mere act of keeping cetaceans – like the mere sale of tobacco products – is not one of them.

30. As Professor Grégoire Webber has explained, when the scope and content of rights becomes overly exaggerated, then virtually no "strength, urgency, conclusiveness or special purpose" is achieved in determining that a "right" has been violated. Rather, the fact that what is labelled a "right" has been infringed becomes a mere practical consideration among many others in determining whether such interference is "justified".[15]

31. These concerns were articulated in the section 2(b) context by the BC Court of Appeal in *Canadian Newspapers Co. v. Victoria (City)*, in which the Court addressed the City of Victoria's rejection of an application to place newspaper vending boxes on city property:

> I think it is important to consider carefully the scope of the freedom of expression as it applies in this case since failure to do so may have the effect of trivializing this fundamental freedom. It is all too easy to accept all suggested infringements and limitations as incursions on fundamental freedoms and democratic rights and then to justify them through the application of s. 1 of the *Charter*. If that easy course is followed it will give s. 2 and perhaps other sections of the *Charter* a penumbra of trivia which will obscure the real substance of the freedoms and rights.[16]

32. It is submitted that the concerns of the Supreme Court in *R. v. Grant* and the Court of Appeal in *Canadian Newspapers* are what animate the body of cases that have considered that certain potential "infringements" of section 2(b) are so trivial that they do not merit serious consideration, even if they may be taken to implicitly convey or facilitate genuinely expressive activities.

33. For example, in *Port Moody, District 43, Police Services Union v. Police Board*, the BC Court of Appeal commented:

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[15] Grégoire Webber, *The Negotiable Constitution: on the limitation of rights* (Cambridge: Cambridge University Press, 2009), at pp. 121-122 ("**Webber**").

[16] (1989), 40 BCLR (2d) 297; and see the discussion following the quoted paragraph 16 ("***Canadian Newpapers***"). Cited approvingly in *R. v. Richards* (1994), 88 BCLR (2d) 334 (BCCA), at paras. 21-25.

> In *Irwin Toy*, Chief Justice Dickson said that an everyday task, like parking a car, might sometimes have an expressive content so as to raise a possibility of a s. 2(*b*) challenge. By that I consider that what was meant was that what was involved in the task was not only the task itself but a conveyance of expressive content or form by the context or circumstances in which the task was carried out. At p. 969, Chief Justice Dickson said: "For example, an unmarried person might, as part of a public protest, park in a zone reserved for spouses of government employees in order to express dissatisfaction or outrage at the chosen method of allocating a limited resource." I understand that such an act could have both content and form as expression. But it is impossible to separate parking as protest from parking as parking, if parking as protest is claimed once the ticket is placed on the windshield. And in my opinion an *Oakes* analysis under s. 1 would be entirely inappropriate in assessing the parking prohibition. These types of cases may be cases of expression but in my opinion they are not cases of constitutionally protected freedom of expression. They are too trivial.[17]

34. Similarly, in *Shell Canada*, a company argued that a Vancouver bylaw restricting commercial trade with companies in Apartheid South Africa was unconstitutional on freedom of expression grounds. Of course, engaging in such activities could be *implicitly* expressive in any number of ways, and might facilitate communicative activates or generate public discourse more generally. Nevertheless, the majority did not bother to address the expression claim, while the four-judge minority held that such restrictions did not violate section 2(b), because any expressive content "is so trivial as not to merit serious scrutiny."[18]

35. The absurdity of the claim that the mere act of keeping cetaceans in captivity is a constitutionally protected form of "expression" is revealed when looked at from a different perspective. For instance, some animal activists have taken the extreme step of freeing captive animals, albeit unlawfully. Just as the Aquarium sees the keeping of cetaceans as the "ultimate expression" of its support for that practice, the freeing of captive animals could be another person's "ultimate expression" of the view that complex mammals should not be enclosed in small confined spaces.

36. The reason that every issue of public policy does not devolve into this type of insuperable constitutional stand-off is that a purposive understanding of freedom of expression does not extend to all acts which might implicitly convey meaning or facilitate expressive activity. It is

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[17] 54 BCLR (2d) 27, at para. See also *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 SCR 231 ("***Shell Canada***").

[18] *Shell Canada*, *supra* at 263.

respectfully submitted that the keeping of cetaceans is conduct which itself is not expressive, and therefore falls outside of section 2(b).

(b) The violence exception to section 2(b) takes the Bylaw outside its scope

37. The Interveners submit that even if the act of keeping cetaceans is itself held to be a non-trivial attempt to convey meaning, it is nevertheless excluded from protection under section 2(b) because the form of the expression causes physical and psychological harm to cetaceans.[19]

38. This so-called "violence" exception raises two issues that the Interveners respectfully submit ought to be treated separately. The first, and indeed most important, is whether expression which takes the form of violence to animals can ever fall under this exception. The second question is whether the exception applies in the present circumstances.

(i) *Application to animals*

39. Courts have long recognized that violence, threats of violence, conduct intimately connected with violence, property damage, and other forms of conduct that are offensive to shared values are not protected by section 2(b).[20] For instance, in *Dolphin Delivery*, the Supreme Court stated that "freedom [of expression], of course, would not extend to protect threats of violence or acts of violence. It would not protect the destruction of property, or assaults, or other clearly unlawful conduct".[21]

40. The rationale for this exclusion has been articulated in various ways, but courts have generally held that such conduct is inimical to the values underlying section 2(b), that it undermines the rule of law, and that it is simply not "worthy of protection."[22]

41. It is critical to understand the scope of this exception to constitutionally protected expression. As explained in *Montreal (City)*, conduct that falls within this exception "is not

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[19] Again, this is particularly the case with respect to section 9(e) of the Bylaw.

[20] *Irwin Toy*; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 SCR 573 at 588 ("***Dolphin Delivery***"); *R. v. Khawaja*, 2012 SCC 69, at paras. 70-74 ("***Khawaja***").

[21] *Dolphin Delivery*, *supra* at 588.

[22] *Khawaja*, *supra* at paras. 70-74

excluded because of the message it conveys (no matter how hateful) but because the method by which the message is conveyed in not consonant with *Charter* protection".[23]

42. That is, the Courts will not exclude expressive activities from the protection of 2(b) because the *content* of the message being conveyed is hateful, unpopular, repugnant, or otherwise harmful. While there is no doubt that the *content* of certain expression may cause various kinds of harm or damage (e.g. reputational, financial, psychological, emotional), these harmful impacts fall to be considered under section 1.

43. However, where the form of the expression itself causes physical harm or is offensive to shared values, it will be excluded from constitutional protection, lest that conduct be conferred "unacceptable legitimacy".[24]

44. This point was recently articulated by the Ontario Court of Appeal in *Bracken v. Fort Erie*. The Court of Appeal noted that the scope of the exception "has not received much attention", and therefore provided some guidance on when it should be applied:

> [30] Although some might find it difficult to understand the rationale for excluding violence categorically at the s. 2(b) stage rather than dealing with it in the s. 1 analysis, to give acts of violence even defeasible protection under s. 2(b) would give them an unacceptable legitimacy: Grégoire Webber, *The Negotiable Constitution: on the limitation of rights* (Cambridge: Cambridge University Press, 2009), at p. 122. It would be tantamount to declaring that Canadian constitutional morality is open to the proposition that an individual's self-expression through acts of violence could, in some conceivable circumstances, take priority over the public good of protecting persons by restraining acts of violence. Note that violence is not unprotected under 2(b) because the content of the expression in unpalatable, or because a person is expressing unpopular views or opinions. It is restricted because of the *form* of the expression, and in particular the fact that the expression is carried out through harmful conduct. That is why the scope of section 2(b) can and must be informed by broader societal values, and a consideration of whether certain conduct is worthy of *Charter* protection.[25]

45. Accordingly, in determining whether this exception can apply to harmful conduct committed against animals, the Interveners respectfully submit that the Court should have regard to our society's evolving attitudes towards animals, and how this evolution has manifested in Canadian and international law.

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[23] *Montreal (City) v. 2952-1366 Quebec Inc.*, 2005 SCC 62, at para. 60.

[24] *Bracken v Fort Erie (Town)*, 2017 ONCA 668, at para. 30 ("***Bracken***").

46. For example, in a lengthy dissenting opinion in *Reece v. Edmonton (City)*, Chief Justice Fraser of the Alberta Court of Appeal observed that over time the law has moved away from the view that animals are property to be used and abused and humans see fit, towards a recognition that "humans have a moral and ethical obligation to treat animals humanely."[26]

47. Justice Abella, dissenting in *R. v. D.L.W.*, cited Chief Justice Fraser's remarks in *Reece* before referencing the "transformed legal environment consisting of more protection for animals."[27] Similarly, in *R. v. Alcorn*, the Alberta Court of Appeal unanimously dismissed an appeal of a sentence for the *Criminal Code* offence of committing cruelty to an animal. In upholding a sentence of 20 months imprisonment and 3 years probation – the accused having strung up a cat by its hind legs and cut its throat so it bled to death – the Court observed that:

> By enacting s 445.1 of the *Criminal Code*, which allows the Crown to proceed by indictment and imposes a maximum sentence of 5 years' imprisonment, Parliament recognized, and intended that courts also recognize, that cruelty to animals is incompatible with civilized society: see, generally, Peter Sankoff, Vaughan Black & Katie Sykes eds, *Canadian Perspectives on Animals and the Law* (Irwin Law, 2015).[28]

48. The Alberta Court of Appeal considered it "pertinent to note" Chief Justice Fraser's dissenting comments in *Reece* to the effect that "a civilized society should show reasonable regard for vulnerable animals. Sentient animals are not objects."[29] This recognition is increasingly supported by the law in other countries, as well.[30]

49. As Parliament and the courts have recognized, engaging in cruelty to animals is incompatible with civilized society. Therefore, imposing serious physical or psychological harm on animals as a *means* of expressing an idea, thought, or view, is a *form* of expression that is sufficiently incompatible with shared social values to be excluded from constitutional protection.

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[25] *Bracken, supra* at para. 29. [Emphasis added]

[26] 2011 ABCA 238, at para. 42

[27] 2016 SCC 22, at para. 141.

[28] 2015 ABCA 182, at para. 42 [*Alcorn*].

[29] *Alcorn, supra* at para. 41.

[30] See e.g. Introduction to Symposium on Global Animal Law (Part I): *Animals Matter in International Law and International Law Matters for Animals*, by Anne Peters, Director at the Max Planck Institute for Comparative Public Law and International Law Heidelberg (Germany) and Professor of International Law at the Universities of Basel, Heidelberg, and Berlin.

50. For instance, a person may want to put on a 'performance' in which a dog is mutilated for spectators. On a broad, expansive approach to section 2(b), that could constitute an "expressive activity". The performance might be done with the purpose of "expressing" the view that animals are unworthy of moral consideration, to "convey" the idea of human mastery over animals, or merely to amuse or "entertain" spectators.

51. However, it would also clearly amount to abject animal cruelty, even if done for an expressive purpose. It is respectfully submitted that, like violence against humans, this would be a *form* of "expression" that offends our society's values, and is therefore unworthy of protection.

52. It is important to note that a finding that a particular *form* of expression is not constitutionally protected does not otherwise restrict an individual's ability to convey thoughts, views, feelings, or opinions in relation to that activity. Persons are always free to engage in expressive activities about the ethics of using animals in various ways, or to seek to amuse or entertain their spectators through any lawful means.

53. But the Interveners submit that to award harmful conduct towards animals with section 2(b) protection – even if a section 1 analysis would lead to a quick dismissal of the right claimed – would demean the *Charter* right.[31] Accordingly, at least some forms of harm to animals are sufficiently offensive to "broader societal values" that they are unworthy of *Charter* protection, and therefore fall outside the scope of section 2(b).[32]

(ii) *Application to the present circumstances*

54. In its written argument, the Aquarium does not dispute that violence against animals can, in appropriate contexts, be excluded from section 2(b) protection on the above grounds. Rather, it argues that the conduct in question (the keeping of cetaceans) is not comparable to other forms of violence that have been held to be excluded from 2(b) protection.

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[31] Webber, *supra* at pp. 121-122.

[32] *Bracken*, at paras. 28-31.

55. The Interveners agree that the discussion in *R. v. Steele*[33] is useful, insomuch as it clarifies that Canadian judicial interpretations of the word "violence" have tended to focus on the *harm* caused by the conduct in question, rather than the *force* applied.

56. Thus, as with threats of violence, the application of this exception does not even require physical force being applied to fall within the exception. The question is always whether the court can conclude that the means by which an idea is conveyed, because of its harmful impact, is the type of conduct that is unworthy of constitutional protection.

57. On this basis, the Interveners submit that the Aquarium's views of the merits or consequences of its conduct are not relevant in determining whether that conduct falls within the exception. Rather, the court should look to the demonstrable impact of its conduct on the intelligent and sentient beings subjected to it.

58. On this point, the Park Board was presented with extensive evidence regarding the profound physical and psychological harms suffered by cetaceans who spend their entire lives held captive in concrete tanks for public display.[34] And the strength of this evidence, it is submitted, justified the Park Board's decision to implement the Bylaw.

59. But even putting that evidence aside, the Interveners submit that the fact that captivity in small tanks causes severe and profound harm to cetaceans is an inescapable inference from facts that can be established by judicial notice:[35]

(a) Though humans have barely begun to understand the cognitive lives of animals, we do know that cetaceans are intelligent, complex and sentient creatures;

(b) We know that cetaceans in the wild travel hundreds of kilometers and reside in complex social groups; and

(c) We know that cetaceans at the Aquarium live in small tanks a minute fraction of the size of the range over which they would live in the wild.

60. The Aquarium presumably would not dispute any of the above facts. And it is submitted that these simple observations lead to an inference – or perhaps a presumption – that cetaceans

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[33] [2014] 3 SCR 138. Referred to by the Aquarium at paragraph 475 of its Argument dated September 18, 2017.

[34] See, e.g., Exhibit 66 to Affidavit #1 of Malcolm Bromley, made August 4, 2017.

[35] *R. v. Spence*, 2005 SCC 71, at para. 53.

suffer in captivity, perhaps in ways similar to a person or child who is confined in a small, enclosed space for the rest of their natural life.

61. Reaching this conclusion does not require the Court to take a position on the legality or wisdom of permitting or prohibiting the keeping of cetaceans, or even to endorse the view that the conduct in question is self-evidently "wrong" (although the Interveners would stridently argue that to be the case). The only implication of a finding that keeping cetaceans captive in small tanks is deeply harmful to them would be that it is not a constitutionally protected *means* of conveying expression. The Interveners respectfully submit that based on the record before the Park Board, and/or facts of which this court may take judicial notice, the court should conclude that keeping captive cetaceans – even if it might otherwise constitute expression – is not protected by section 2(b) because of the harm it causes to cetaceans.

(c) The Aquarium seeks not to participate in debate, but rather constitutional protection for its own view

62. The Aquarium's claim to a constitutional right to bring keep captive cetaceans also fundamentally undermines the purpose of section 2(b) because it would render meaningless and futile the expression of those who oppose such conduct and advocate for restrictions on it.

63. The Aquarium asserts a constitutional right to engage in conduct – bringing cetaceans into Vancouver parks and keeping them captive in tanks – on the basis that the morality and legality of this conduct is the subject of ongoing democratic debate. This type of social and political expression lies at the very core of section 2(b); it is valued because it fosters and informs decisions of politically accountable bodies, like the Park Board.[36] The Aquarium, like all others, should have its right to engage in that debate through communicative and expressive activity assiduously protected.

64. But an interpretation of section 2(b) that goes beyond protecting the Aquarium's expressive activities, and in fact grants constitutional protection for the very conduct at issue in the debate, would not foster democratic deliberation and decision-making; rather it would effectively end that debate altogether.

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[36] *Harper v. Canada (Attorney General)*, 2004 SCC 33 at paras 10-23, and the cases cited therein.

65. The whole purpose of this debate is to determine, as a democratic society, whether keeping captive cetaceans should be permitted in light of its profound physical and psychological implications for the complex mammals it affects. Both the Aquarium and its critics are entitled to seek to persuade members of the public, and public representatives, of their own view. But acceding to the Aquarium's submission would render the expression of those who disagree with the Aquarium meaningless, undermining the values underlying freedom of expression.

66. As the Ontario Court of Appeal has held: "freedom of expression guarantees our right to express disagreement with government regulation; it does not guarantee the right to be free from government regulation with which we disagree."[37]

C. CONCLUSION

67. As noted to at the outset, while the Interveners submit that each of the three broad arguments set out above operates independently to direct that the Aquarium's claim to a section 2(b) right must fail, these arguments can also be considered cumulatively.

68. That is, even if transporting and keeping captive cetaceans is considered "expressive" in some constitutionally cognizable sense, the extent of the expressive interest in the conduct itself is limited, if not trivial. And even if the "violence exception" does not strictly apply to this conduct to remove it from section 2(b) protection, it must be recognized that it does cause some significant degree of harm.

69. Accordingly, at most the Aquarium has identified a limited and narrow expressive interest in harmful conduct that, if granted *Charter* protection, would undermine the purpose of section 2(b) by effectively ending the ongoing political debate on the ethics of keeping captive cetaceans. Taken together, these considerations reveal that the right claimed by the Aquarium is simply too far afield from what section 2(b) was intended to protect to be recognized.

All of which is Respectfully Submitted,

September 26, 2017

Lawyers for the Interveners

[37] *Rosen v. Ontario (Attorney General)* (1996), 131 DLR (4th) 708, at paras. 13, 15 [*Rosen*] at para. 20.