IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Ocean Wise Conservation Association v. Vancouver Board of Parks and Recreation,* 2018 BCSC 196

Date: 20180209
Docket: S175651
Registry: Vancouver

Between:

Ocean Wise Conservation Association

Petitioner

And

Vancouver Board of Parks and Recreation and City of Vancouver

Respondents

And

Animal Justice Canada and Zoocheck

Intervenors

Before: The Honourable Mr. Justice Mayer

Reasons for Judgment

Counsel for Petitioner:	R.J.R. Hordo, Q.C. G.B. Gomery, Q.C. M. Ohama-Darcus
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Place and Date of Trial/Hearing:	Vancouver, B.C. October 2-5, 2017; December 7-8, 2017
Place and Date of Judgment:	Vancouver, B.C. February 9, 2018

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Summary of Decision

[1] On May 15, 2017 the Respondent, the Vancouver Park Board, passed a bylaw amendment applicable to parks within its jurisdiction, prohibiting the movement of whales to parks, the keeping of whales at parks (excluding whales which were already in a park on May 15, 2017) and the production or presentation in a park, of a show, performance or other form of entertainment involving whales. The only park within the jurisdiction of the Vancouver Park Board where whales are kept is Stanley Park, the home of the Marine Science Centre.

[2] On June 14, 2017, the Petitioner, Ocean Wise Conservation Association, operators of the Marine Science Centre, filed an application for judicial review challenging the validity of the bylaw amendment on a number of grounds – the primary ground being that it was not within the jurisdiction of the Vancouver Park Board under its enabling statute, Part XXIII of the *Vancouver Charter,* S.B.C. 1953, c. 55, to pass the bylaw amendment as it conflicts with the terms of its 1999 Licence Agreement, as amended, which granted it the right to operate the Marine Science Centre in Stanley Park through until 2029.

[3] Ocean Wise Conservation Association says that if the bylaw amendment is upheld, it will effectively wind down the captive whale program, which to date has had a number of conservation benefits, including but not limited to its education and research programs and its whale rescue program. The Vancouver Park Board argues that the bylaw amendment is the product of a policy decision made in consideration of animal welfare and public ethics.

[4] The question of whether whales should be kept in captivity for any purpose is a contentious and emotional one. On the facts of this case and in consideration of the legal issues which arise in this petition, it is not for this court, at this time, to evaluate the ethics of doing so. It is the job of this court to first consider whether the Vancouver Park Board had the authority to pass the Bylaw Amendment, in light of the commitments it made in the 1999 Licence Agreement and in consideration of its powers under Part XXIII of the *Vancouver Charter.*

[5] Held: The Vancouver Park Board was empowered under Part XXIII of the *Vancouver Charter* and in particular ss. 488(6) and 490(1) to enter into a lease or licence over lands within permanent parks under its jurisdiction, which could partially fetter its bylaw making power under s. 491(1). Pursuant to the 1999 Licence Agreement, as amended, the Park Board granted the Ocean Wise Conservation Association the right to operate the Marine Science Center in Stanley Park until 2029 and agreed that during this period it would not interfere in the day to day to administration of the Vancouver Aquarium. The bylaw amendment conflicts with both of these covenants. As a result the bylaw amendment is not enforceable against the operations of Ocean Wise Conservation Association at the Marine Science Centre.

Introduction

[6] Stanley Park is a jewel in the heart of Greater Vancouver. The park is owned by the federal government and leased to the City of Vancouver pursuant to a 99-year lease, which was renewed in 2007. It has been designated as a permanent public park by the City of Vancouver, pursuant to s. 488.(5) of the *Vancouver Charter*, S.B.C. 1953, c. 55, as amended.

[7] The Vancouver Board of Parks and Recreation (the “Park Board”) was originally established in 1890 as a committee of the City of Vancouver to manage the recently created Stanley Park. Stanley Park, as are all public parks in Vancouver, is administered by the Park Board. The Park Board is established under Part XXIII of the *Vancouver Charter* and is comprised of an independent elected board, consisting of seven commissioners. It is the only elected body of its kind in Canada.

[8] The Ocean Wise Conservation Association, a non-profit society (the “Vancouver Aquarium”) operates the Marine Science Center at Stanley Park. Since it opened its doors in 1956, the Marine Science Centre has been a major attraction for people living in the lower-mainland and visitors from throughout the rest of British Columbia, Canada and around the world.

[9] The Marine Science Centre currently occupies lands within Stanley Park pursuant to the 1999 Licence Agreement, which was amended in 2009 and 2011. The 1999 Licence Agreement, as amended, grants the Vancouver Aquarium the right to use the lands in Stanley Park for the purpose of operating the Marine Science Centre until the agreement expires in 2029.

[10] Cetaceans, including whales, dolphins and porpoises, have been kept and displayed at the Marine Science Centre continuously since at least 1967. The Marine Science Centre is the only facility located in a park under the jurisdiction of the Park Board that keeps cetaceans. The keeping and display of cetaceans at this facility has been controversial for many years and has resulted in changes to the Vancouver Aquarium's policies and the Park Board's Parks Control Bylaw.

[11] In 1992, the Vancouver Aquarium adopted a policy committing not to capture orcas from the wild. In 1996, this commitment was extended to prohibit the capture of any cetaceans from the wild, with limited exceptions.

[12] The no wild capture commitment incorporated into the 1996 Licence Agreement (which resulted in a corresponding amendment to section 9(e) of the Parks Control Bylaw) was as follows:

> 1. Effective September 16, 1996, the Agreement shall be amended to include the following provision after section 4(k) of the Agreement:
>
> > "4. (l) not bring into the Aquarium or keep or otherwise maintain in the Aquarium 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 in captivity at any time;
> >
> > (ii) cetaceans which are already being kept or maintained in the Aquarium as of September 16, 1996;
> >
> > (iii) a member of an endangered cetacean species, provided that approval for bringing it into the Aquarium has first been obtained from the Park Board; and

> (iv) an animal that has been captured or otherwise taken from its natural 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 by the Association."

[13] Accordingly, since 1996 any newly acquired cetaceans have either been bred in captivity in other facilities or were taken from the wild for rehabilitation and remained in captivity on the basis that they were no longer releasable.

[14] On May 15, 2017, the Park Board amended s. 9 of the Parks Control Bylaw to prohibit the bringing of any cetaceans into Vancouver parks, the keeping of cetaceans at Vancouver parks, and the production and presentation of shows, performances or other forms of entertainment involving cetaceans (the “Bylaw Amendment”). Sections 9(e) through (g) of the Parks Control Bylaw now provide as follows:

> 9 (e) No person shall bring a cetacean into a park.
>
> (f) No person shall keep a cetacean in a park, except that this prohibition does not apply to cetaceans already in a park on May 15, 2017.
>
> (g) No person shall produce or present in a park a show, performance, or other form of entertainment, which includes one or more cetaceans.

[15] The Vancouver Aquarium says that the Bylaw Amendment will:

a) prevent the Vancouver Aquarium from bringing in other non-releasable cetaceans to the Marine Science Centre to provide necessary companionship to cetaceans already living there;

b) potentially prevent the Vancouver Aquarium from providing adequate daily care to cetaceans remaining at the Marine Science Centre – such as feeding, physical exercise, learning, social interaction and health checks – as most of this happens in pools open for public observation;

c) eliminate, as a result of the prohibition against display, a powerful tool for visitor engagement and pro-conservation learning;

d) compromise the Vancouver Aquarium's ability to conduct and facilitate research with non-releasable cetaceans and train and educate the next generation of veterinarians and researchers;

e) prevent the Vancouver Aquarium from providing a home for rescued, non-releasable cetaceans; and

f) result in a significant financial loss from attendance based revenues, which may impact the Vancouver Aquarium's ability to carry out marine rescue and rehabilitation or other programs, and impact its financial viability.

[16] The Vancouver Aquarium challenges the validity of the Bylaw Amendment on a number of grounds. First, it says that pursuant to the commitments made in the 1999 Licence Agreement, as amended – which include the right to use lands in Stanley Park for the purposes of operating the Marine Science Center and the commitment of the Park Board not to interfere in its day to day administration – that it was not within the jurisdiction of the Park Board to enact it. In addition, the Vancouver Aquarium argues that the procedure that was followed by the Park Board in enacting the Bylaw Amendment was fatally flawed, that the Bylaw Amendment infringes on the Vancouver Aquarium's (and obviously its staff's) freedom of expression rights. Finally, it argues that the Bylaw Amendment provisions prohibiting shows, performances or entertainment, are so vague that they are not capable of enforcement.

[17] The Park Board says that the Bylaw Amendment is reflective of a policy decision of the democratically elected Park Board Commissioners to prohibit the keeping and display of cetaceans, and was validly enacted and should be upheld.

Relief Sought

[18] In this petition the Vancouver Aquarium seeks the following orders:

a) a declaration that the Bylaw Amendment is invalid and of no force and effect;

b) an order in the nature of *certiorari*, quashing the Bylaw Amendment;

c) an order in the nature of prohibition, restraining the Park Board from enforcement of the Bylaw Amendment;

d) interlocutory injunctive relief; and

e) an order for costs.

[19] The Vancouver Aquarium says that this court has the jurisdiction to grant the relief sought pursuant to s. 2(2) of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, s. 524 of the *Vancouver Charter*, s. 52(1) of the *Constitution Act, 1982,* and through its inherent jurisdiction.

Issues

[20] The Vancouver Aquarium does not seek to challenge the Park Board's ability to enact the Bylaw Amendment, in and of itself. It challenges the Bylaw Amendment on the basis that it is fundamentally at odds with the covenants made in the 1999 Licence Agreement, as amended. Accordingly, the Vancouver Aquarium argues that enactment of the Bylaw Amendment by the Park Board was not a proper exercise of the powers delegated to it under the *Vancouver Charter* and is therefore *ultra vires* (beyond the authority of) the Park Board and invalid.

[21] The problem I have with the issue as framed by the Vancouver Aquarium is that the prohibitions in the Bylaw Amendment apply to any park or park facility under the jurisdiction of the Park Board. The Vancouver Aquarium objects, and in my view only has standing to object, to the application of the Bylaw Amendment to the Marine Science Centre at Stanley Park and not to its application elsewhere.

[22] Accordingly, I have re-cast the issues suggested by the Vancouver Aquarium as follows:

Issue No. 1: Is the Park Board's power to enact the Bylaw Amendment constrained by the 1999 Licence Agreement thereby making the Bylaw Amendment invalid to the extent that it impacts the Vancouver Aquarium?

Issue No. 2: If the answer to Issue No.1 is no, then should the Bylaw Amendment be quashed anyway on the basis that:

a) the process adopted by the Park Board in enacting the Bylaw Amendment did not meet the standard of procedural fairness owing to the Vancouver Aquarium; or

b) the Bylaw Amendment constitutes an unreasonable and unjustifiable limit on the Vancouver Aquarium's freedom of expression rights under the s. 2(b) of the *Charter*.

Issue No. 3: In any case, should s. 9(g) of the Bylaw Amendment be quashed on that basis that it is so vague as to be incapable of interpretation?

[23] The parties submit and I agree, that if I decide that the Bylaw Amendment is *ultra vires* the Park Board, that is invalid to the extent that it impacts the Vancouver Aquarium, that I need not make a finding with respect to the remaining issues.

[24] For the reasons that follow I find that the Bylaw Amendment is invalid to the extent that that impacts the Vancouver Aquarium's operations at the Marine Science Centre. Accordingly, although the parties provided extensive facts and made substantial arguments with respect the issues of procedural fairness, freedom of expression and vagueness, it is not necessary to outline such facts and argument in my reasons. In addition, I wish to thank the intervenors, Animal Justice Canada and Zoocheck, who made submissions with respect to the issue of whether the Vancouver Aquarium's s. 2(b) freedom of expression rights have been violated.

Background

[25] I will begin by setting out background facts relevant to the authority of the Park Board to enforce the Bylaw Amendment against the Vancouver Aquarium.

Establishment of the Park Board - Part XXIII of the *Vancouver Charter*

[26] The Park Board was established, in its most recent statutory incarnation, pursuant to s. 485 of the *Vancouver Charter*, which reads as follows:

> 485. A board of commissioners, to be known as the "Board of Parks and Recreation" or "Park Board", shall be elected as hereinafter provided … The Board has the legal capacity to exercise the powers bestowed upon it …

[27] Section 488(1) of the *Vancouver Charter* grants the Park Board "… exclusive possession of, and exclusive jurisdiction and control of all areas designated as permanent public parks in the City [of Vancouver]…". This includes Stanley Park and the Marine Science Centre.

[28] Sections 488(6) and (7) of the *Vancouver Charter* define possession of, exclusive jurisdiction, and control as follows:

> 488. …
>
> (6) Subject to the provisions of section 490, possession of, and exclusive jurisdiction and control of real property includes the authority to determine how such real property shall be used, what fees or rental charges shall be levied and … what improvements shall be made thereon …"
>
> (7) Exclusive jurisdiction and control of parks and the property comprising them also includes the power to prohibit the selling of anything, and the provision of services or performances of any type without the permission of the Board. In granting permission, the Board may impose such terms and conditions as it deems appropriate.

[29] Subsection 490(1) sets out the Park Board's leasing and licencing power:

> 490(1) … the Board, in the name of the City, may by lease, licence, or any other agreement, permit any person to occupy any building or place or any part thereof in a permanent public park, on such terms as to remuneration or otherwise as to the Board may seem expedient. Such agreements shall contain a provision providing for the termination thereof if such park ceases to be a permanent public park pursuant to the provisions of subsection (1) of section 488.

[30] Section 491(1) sets out the Park Board's general Bylaw making power, which includes the power to make Bylaws concerning the exclusion of animals:

> 491(1) In the exercise of any of its powers, the Board may from time to time pass, amend, and repeal by-laws (not inconsistent with any by-law passed by City Council) to be observed in the parks, or any of them, for the control, regulation, protection, and government of the parks and of persons who may be therein, including
>
> **Excluding animals, etc.**
>
> (a) the exclusion from any of the parks, or any part thereof, of any animal or vehicle;
>
> …

The 1999 Licence Agreement

[31] The Vancouver Aquarium has occupied the Marine Science Centre since 1955 under a series of licence agreements with the Park Board[1]. The current licence agreement, the 1999 Licence Agreement, was entered into on January 1, 1999, amended in 2009 and 2011, and will expire in 2029.

[32] Recital E of the 1999 Licence Agreement sets out the following relevant governing principles of the parties' relationship:

> E. The Park Board and [Vancouver Aquarium] acknowledge, as governing principles of their relationship, that:
>
> (a) the public has a valid and bona fide interest in the purposes for which Stanley Park is used; and
>
> …
>
> (c) the day-to-day administration of the Aquarium shall always properly remain within the [Vancouver Aquarium's] control, without interference by the Park Board, unless such interference is permitted or required by this Agreement.

[33] Pursuant to Section 3 of the 1999 Licence Agreement the Park Board granted the Vancouver Aquarium the following rights over the lands at Stanley Park on which the Marine Science Centre is located:

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[1] These include the licence agreements made on August 7, 1955, September 1, 1960, August 10, 1966, May 15, 1970, September 10, 1985 and January 1, 1999.

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3. Subject to the provisions and conditions herein contained and to the performance of the [Vancouver Aquarium] of its obligations hereunder, the Park Board does hereby grant to the [Vancouver Aquarium] the right and licence to use those lands and premises …. to operate the Aquarium thereon pursuant to this Agreement during the Term and all extensions thereof.

[Note: In the reasons to follow I will refer to the grant of rights at Section 3 as the "use provision".]

[34] Pursuant to Section 4 of the 1999 Licence Agreement the Vancouver Aquarium covenanted to:

4. …

(c) install suitable equipment and use the Aquarium for year-round display for public benefit;

…

(h) not make or permit or suffer to be made any additions or alterations to the Aquarium requiring a development permit, without first obtaining a development permit, and to obtain approval of the Park Board to any proposed design prior to applying to the City for a development permit;

…

(m) comply with the bylaws of the Park Board and the City of Vancouver which may be in force from time to time governing the conduct and use of park property;

…

(n) not bring into Stanley Park or otherwise maintain in Stanley Park any aquatic mammal of the Cetacean order including, but not limited to, baleen whales, narwhals, dolphins, porpoises, killer whales and beluga whales, which has been captured or otherwise taken from its natural wild habitat, except that this prohibition shall not apply to:

(i) captive cetaceans caught from the wild prior to September 16, 1996 and cetaceans born into captivity at any time;

(ii) cetaceans which are already being kept or maintained in Stanley Park as of September 16, 1996;

(iii) a member of an endangered cetacean species provided that approval for bringing it into Stanley Park has first been obtained from the Park Board; and

(iv) an animal that has been captured or otherwise taken from its natural wild habitat for the purpose of rehabilitating it from injury or preventing its death due to stranding provided that its capture or taking and subsequent release to natural habitat is done under the jurisdiction and approval of the federal agency responsible for such

> decisions, and provided that the Park Board has been informed in as timely a manner as possible by the Society.
>
> (o)…
>
> (i) investigate, and where viable, implement alternatives to whale exhibitory and research whale release and whale rehabilitation (and for purposes of this clause it is agreed that "viable" means an alternative to which the Society and the Park Board mutually agree will maintain the financial viability of the Aquarium); and
>
> (ii) continuing to use means at its disposal to discourage institutions with whom it is exchanging whales to not capture wild whales to replace whales exchanged with the Society;
>
> (p)…
>
> (i) pay annually to the Park Board … the sum of Forty Thousand dollars ($40,000.00) either in cash or profits to the Park Board from joint Society/Park Board initiatives …

[35] Pursuant to Section 5(c) of the 1999 Licence Agreement the Park Board covenanted that it would “not interfere with the day-to-day administration of the Aquarium unless such interference is permitted or required by this Agreement.”

[Note: In the reasons to follow I will refer to Section 5(c) as the “non-interference provision”.]

Approval of the Vancouver Aquarium’s Expansion Plans

[36] In the early 2000’s the Vancouver Aquarium began planning a major revitalization and expansion of the Marine Science Centre with an estimated cost of approximately $100 million (the “Expansion Plan”). When the Vancouver Aquarium brought its design for the Expansion Plan to the Park Board for approval in early 2006 it was contemplated that the expansion would include the creation of larger outdoor pools for beluga whales, Steller sea lions, and dolphins, and construction of an upgraded public plaza, a new food concession and new public washrooms.

[37] Between July 2006 and May 2007, Park Board staff completed a number of technical review studies and extensive public consultations were carried out by it and the Vancouver Aquarium. Some animal welfare advocates and members of the public vigorously opposed the Expansion Plan and called for a public referendum on

whether cetaceans should be kept in captivity at all. Throughout this period the parties discussed potential amendments to the 1999 Licence Agreement and Section 9 of the Parks Control Bylaw, although no changes were made at that time.

[38] At a regular board meeting on May 28, 2007 the Park Board voted to approve the Expansion Plan and the Vancouver Aquarium subsequently applied for and then received its development permit from the City on November 14, 2008.

The 2009 and 2011 Licence Amending Agreements

[39] To give effect to the Expansion Plan approval made in 2007, the Vancouver Aquarium and Park Board entered into the 2009 Amending Agreement, effective December 31, 2009. Relevant changes in the 2009 Amending Agreement included the following:

a) it extended the licence term from 2015 to 2029;

b) it significantly increased the licence fees and fixed annual fees paid by the Vancouver Aquarium to the Park Board;

c) it expanded the footprint of the Marine Science Centre to accommodate the Expansion Plan; and

d) it deleted the contractual no wild capture restriction (previously s. 4(n)) on the basis that these limitations were already contained within the Parks Control Bylaw.

[40] The 2009 Amending Agreement did not delete or modify the Vancouver Aquarium's covenant to comply with the bylaws of the Park Board and the City of Vancouver, the Vancouver Aquarium's covenant to investigate and implement alternatives to whale exhibitory and research whale release and whale rehabilitation, so long as both the Vancouver Aquarium and the Park Board mutually agreed that such alternatives were viable from a financial standpoint and the non-interference provision.

[41] As a result of a revision by the Vancouver Aquarium to the expansion concept plan, decreasing the footprint of the previously approved Expansion Plan by some 20%, the parties concluded the 2011 Amending Agreement, effective September 7, 2011. Other than reducing the footprint, the only other noteworthy change was another significant increase in the fees to be paid by the Vancouver Aquarium to the Park Board.

Steps Leading to the Enactment of the Bylaw Amendment

[42] By the Spring of 2014 the debate over the ethics of keeping cetaceans in captivity had flared up again. In July 2014 the Park Board passed a resolution, which among other things, required staff to draft an amendment to the Parks Control Bylaw prohibiting the breeding of captive cetaceans unless the cetacean was a threatened species and it was agreed that breeding was necessary for the species' survival. The Vancouver Aquarium commenced legal proceedings challenging the resolution which in the end did not proceed as the Bylaw amendment had not been completed before a new slate of Park Board commissioners was elected in November 2014 and the July 2014 resolution was never acted upon.

[43] After the death of the Marine Science Centre's two resident belugas from unknown causes in November 2016, on January 23, 2017 the Park Board passed a motion directing staff to prepare a report on the feasibility of placing a plebiscite on the 2018 Municipal Election Ballot asking Vancouver residents whether they supported the keeping of cetaceans at the Marine Science Centre.

[44] In February of 2017 the Vancouver Aquarium, after attempting to negotiate an alternative solution with the Park Board, made public the proposal they had recently made to the Park Board, which if accepted would see an end to the display of beluga whales at Marine Sciences Centre by the end of 2029 – but would authorize the return of non-breeding belugas to the facility from other aquariums.

[45] At a special meeting on March 9, 2017 the Park Board considered 4 options with respect to the Vancouver Aquarium cetacean program including:

a) calling on City Council for a plebiscite in the 2018 municipal election;

b) accepting the Vancouver Aquarium's February 2017 proposal to phase out the display of belugas by 2029;

c) amending the Parks Control Bylaw; or

d) doing nothing – maintaining the status quo.

[46] A motion was made that Park Board staff "bring forward for enactment by the Board, an amendment to the Parks Control Bylaw to prohibit the importation and display of live cetaceans in Vancouver parks and report back not later than May 15, 2017". The motion passed unanimously.

[47] At an *in camera* (confidential) meeting on March 27, 2017, apparently after Park Board staff realized that it would not be possible to avoid displaying cetaceans at the Marine Science Centre, the Park Board passed a motion, somewhat revising the motion passed earlier in March, recommending that a proposed Bylaw be prepared which would allow the three existing cetaceans to remain, but prohibiting performances.

[48] At a regular meeting on May 15, 2017 the Park Board passed the Bylaw Amendment which is the subject of this petition. By this time the Vancouver Aquarium had invested $45 million on the Expansion Plan, including $7 million in sunk-costs, dedicated to new and larger facilities for belugas and other cetaceans. The second phase of construction, which had been scheduled to begin in September 2017, is now on hold.

Issue No. 1: Is the Park Board's power to enact the Bylaw Amendment constrained by the 1999 Licence Agreement thereby making the Bylaw Amendment invalid to extent that it impacts the Vancouver Aquarium?

[49] Answering this question requires a determination of the following sub-issues:

a) Did the *Vancouver Charter* provide the Park Board with the statutory authority to contractually fetter its ability to enact bylaws which conflict with the use and non-interference provisions of the 1999 Licence Agreement?

b) If the answer to the above question is yes, does the 1999 Licence Agreement fetter the Park Board's ability to enact bylaws which conflict with the use and non-interference provisions of the 1999 Licence Agreement?

Summary of the Vancouver Aquarium's Argument on Statutory Authority

[50] The Vancouver Aquarium argues that, read as a whole, Part XXIII of the *Vancouver Charter* expresses a clear legislative intent to bind the current Park Board to leasing and licencing agreements entered into by previous boards. It says that the legislative history of the *Vancouver Charter* assists in determining this intention and points to the following changes made to the *Vancouver Charter* by the Province through the *Vancouver Charter Amendment Act, 1978*:

a) The removal of the 5-year limitation on the term for which leases, licences or other agreements for the use of park property could be granted allowing the Park Board to enter into such agreements for any length of time, subject to termination if the park ceased to be a permanent public park;

b) The addition of section 488(6) which made the Park Board's exclusive jurisdiction and control of real property (which includes the authority to determine how such real property shall be used, what fees or rental charges shall be levied and what improvements can be made on it) subject to the provisions of section 490, which section provides the Park Board with the power to enter into lease or licence over permanent public parks on such terms as to remuneration or otherwise as to the Board may seem expedient.

[51] The Vancouver Aquarium argues that the effect of the 1978 amendments was to provide the Park Board the authority to enter into long term lease or licence agreements for lands within permanent public parks and by doing so prevent a future Park Board from undoing or undermining those agreements through the enactment of bylaws. Applied to the facts of this matter, the Vancouver Aquarium argues that the *Vancouver Charter* authorized the Park Board to enter into the 1999 Licence Agreement, as amended, which includes agreeing to the use and non-interference provisions, and therefore to subordinate its s. 491(1) Bylaw making power to these provisions.

[52] The Vancouver Aquarium says that while this amounts to a partial contractual fettering of the Park Board's s. 491.(1) bylaw making powers, that ss. 488.(6), 490(1) and 491(1), read together in their grammatical and ordinary sense and harmoniously with the scheme and history of Part XIII of the *Vancouver Charter*, evidence a clear intent on the part of the Legislature to permit the Park Board to do so.

[53] The Vancouver Aquarium distinguishes between Parliament and the provincial legislatures, that as sovereigns have a power to legislate which is only constrained by constitutional limits and municipal governments. It argues that Canada and British Columbia, for example, may legislate away their contractual obligations – whereas a municipality may be constrained in doing so. It suggests that this is more the case with the Park Board, which is a body subordinate to the City of Vancouver.

[54] In this case the Vancouver Aquarium argues that the Vancouver Park Board, as it was authorized to do by s. 490 of the *Vancouver Charter*, contractually constrained itself from enacting the Bylaw Amendment when it agreed to the use and non-interference provisions in the 1999 Licence Agreement. The only limitation on the Park Board's licencing power is that it must set licence terms which expire when a park is no longer a permanent public park.

Summary of the Park Board's Argument on Statutory Authority

[55] The Park Board says that the *Vancouver Charter* does not include the requisite express statutory authorization for the Park Board to enter into an agreement which fetters its legislative powers – which is the power it was exercising when it enacted the Bylaw Amendment.

[56] The Park Board says that without an express statutory authorization to fetter its legislative powers, any agreement that purported to do so would be *ultra vires* the Park Board. It refers the reasons of Lebel J. at para. 65 of the decision in *Pacific National Investments Ltd. v. Victoria (City),* 2000 SCC 64:

> …Unless there is legislation expressing a public policy permitting it to do so, a municipality may engage in business and proprietary contracts, but it cannot agree to terms that fetter its legislative power.

[57] It also refers to the decision of the Alberta Court of Appeal in *A.R.W. Development Corporation v. Beaumont (Town)*, 2011 ABCA 382, at para. 35 that:

> … a municipal contract that effectively fetters a municipality's legislative discretion is *ultra vires* unless the enabling legislation expressly authorizes the fettering[.]

[58] The Park Board says that in enacting the Bylaw Amendment and in particular the restriction on bringing cetaceans into Stanley Park, it was exercising a core legislative power – being its ability under s. 491(1)(a) of the *Vancouver Charter* to exclude animals, which includes cetaceans, from parks under its jurisdiction. It describes this power, in language which is consistent with that used in reasons in *Kell-Erny's Enterprises v. Dyck* (1987), 11 B.C.L.R. (2d) 164 (C.A.) (discussed below), as part of the its "statutory birthright" and seeks to distinguish this power from the exercise of a business or proprietary power such as entering into a lease or licence pursuant to ss. 488(6) and 490(1).

[59] The Park Board argues that s. 488(6) of the *Vancouver Charter* does not subordinate the Park Board's s. 491 bylaw making power to its lease making power in s. 490(1) – as the latter section allows it to enter into a lease or licence on terms

as to remuneration or otherwise as “to the board may seem expedient” - which in this case includes preserving its bylaw making power under s. 4(m) of the 1999 Licence Agreement.

[60] The Park Board disputes the Vancouver Aquarium’s argument that the combination of ss. 488(6), 490(1) and 491(1) evidence a clear intent on the part of the Legislature to permit such fettering. It argues that if the Legislature had in fact intended to provide the Park Board with the ability to fetter its s. 491(1) bylaw making power by contract, it would have stated that intention far more clearly and directly. The Park Board provides the following examples of things the Legislature could have done:

> a) it could have placed language in s. 491 itself, expressly stating that the Board’s Bylaw making power is subject to licence agreements signed under s. 490;
>
> b) it could have included language in s. 490 describing the constraining effect it intended on agreements under that provision to have on the s. 491 power; or
>
> c) it could have included a wholly additional provision, specifically stating that Board Bylaws do not apply to portions of park property subject to Licence agreements except to the extent permitted by those Licence agreements.

[61] The Park Board points to other examples in the *Vancouver Charter*, where the Legislature provided a clear authorization for the City to fetter its bylaw making power including the following: section 565.2 which provides that City Council may only amend housing agreements with landowners regarding the provision of affordable and special needs housing (which agreements I note require the enactment of a bylaw to be entered into in the first place) through a subsequent bylaw adopted with the consent of the property owner; and subsection 592(3) which provides that a heritage revitalization agreement entered into with the owner of a

heritage property prevails over a City bylaw or permit referred to in subsection 592(2)(b).

[62] The Park Board also points to the following example in the s. 516(5) of the *Local Government Act,* R.S.B.C. 2015, c.1 which creates a specific legislative carve-out preventing bylaw amendments which conflict with phased-development agreements:

> **Phased development agreements**
>
> 516 …
>
> (5) Subject to subsection (6), if the specified zoning bylaw provisions or the specified subdivision servicing bylaw provisions are amended or repealed while the agreement is in effect, those changes do not apply to the development unless the developer agrees in writing that the changes apply.
>
> …

[63] The Park Board says that the Legislature did not include any such specific exemptions from the application of its s. 490 bylaw making power in Part XXIII of the *Vancouver Charter* because that was not its intention. As a result the Park Board says that its Bylaw making power in s. 491 is not fettered by licence agreements entered into pursuant to s. 490 and therefore, that the Vancouver Aquarium's *ultra vires* argument must fail. Finally, it says to the extent that the 1999 Licence Agreement does fetter the Board's authority to enact the Bylaw Amendment, those provisions would be *ultra vires* and of no force and effect.

Summary of Vancouver Aquarium's Argument on Contractual Fettering

[64] The Vancouver Aquarium says that the Park Board was well aware of the requirement for commercial certainty and that the parties sought to balance this interest with the public's desire to end the capture of wild cetaceans in drafting the 1999 Licence Agreement and the 2009 and 2011 amendments. It provided the following examples of the parties' intention, in the lead up to the adoption of the 1999 Licence Agreement:

a) The following comments made by a Park Board Commissioner Chesman at the meeting of the Park Board on September 30, 1996, during which the Park Board passed a motion that the parties negotiate amendments to the 1985 Licence Agreement to include a "no wild (cetacean) capture" commitment to be incorporated into a bylaw amendment:

> …the issue regarding the Aquarium began before July 14, it is his hoped [sic] that there could be some solution tonight. It is time for a resolution in the public interest. The resolution must begin with the lease between the Aquarium and Park Board, the construction of this resolution requires an understanding of and commitment to basic principles. It must be understood that as long as the Aquarium occupies public land, the public has a legitimate interest of the activities which take place there. For the Park Board it is important for us to recognise that the Aquarium ought to have the security of knowing its rights and obligations on that land. The Aquarium to reflect public interest have legally bound itself to no wild whales. The Park Board acknowledges the Aquarium's right to a secured lease term by negotiating with the Aquarium those issues which have posed difficulties throughout the current lease.
>
> [Emphasis added]

And;

b) The Memorandum of Understanding entered into by the parties on December 8, 1997 which included for the first time the Park Board's commitment not to interfere in the day to day administration of the Marine Science Centre, a mutual commitment to negotiate, in an addendum or renewals to the licence agreement then in force, provisions dealing with the Vancouver Aquarium's right to acquire wild cetaceans under certain circumstances and a commitment by the Vancouver Aquarium to investigate and implement alternatives to keeping whales, only if the parties mutually agreed such alternatives were financially viable.

[65] The Vancouver Aquarium says that the 1999 Licence Agreement, as amended, when read as a whole, plainly contemplates the ongoing display of cetaceans at the Marine Science Centre and the Vancouver Aquarium's associated

right to manage and operate the Marine Science Centre free from interference from the Park Board for the duration of the Licence. In particular, it points to the following:

a) the parties' decision to maintain the requirement in s. 4(o) that the Vancouver Aquarium had to agree to the financial viability of alternatives to cetacean captivity;

b) the drawing of the premises showing pools for the display of cetaceans, including an "existing killer whale habitat" and a "proposed beluga whale habitat";

c) the extension of the term of the licence to 2015; and

d) the inclusion of the non-interference provision (s. 5(c)).

[66] With respect to the 2009 and 2011 amending agreements, the Vancouver Aquarium says that in these amendments the Park Board reiterated its approval of the Vancouver Aquarium's multi-year expansion and revitalization project. In particular, the 2009 amendment extended the term of the 1999 Licence Agreement from 2015 to 2029, expanded the footprint of the Marine Science Centre to accommodate the Expansion Project and substantially increased fees payable for use of Stanley Park lands. In addition, the 2009 Amendment preserved the 1999 covenant that the parties would have to agree on implementation of "viable" alternatives to whale exhibitory and research whale release and whale rehabilitation. The Vancouver Aquarium argues that it can only be concluded that both sides were mutually committed to achieving long term commercial certainty through the 1999 Licence Agreement, as amended in 2009 and 2011.

[67] The Vancouver Aquarium points to Recital E(c) to the 1999 Licence Agreement which acknowledged, as a governing principle, that the Park Board would not interfere in the day to day administration of the Marine Science Centre. This acknowledgement is included as a covenant under Section 5(c) in which the Park Board agreed that it would not to "interfere with the day to day administration of

the Aquarium unless such interference is permitted or required by this Agreement". In addition, the Vancouver Aquarium highlighted the use provision (Section 3) which grants the Vancouver Aquarium the right and licence to use lands in Stanley Park to operate the Aquarium during the term of the licence and any extensions.

[68] The Vancouver Aquarium argues that the Bylaw Amendment conflicts with the general grant set out in Section 3 of the right to use lands and Stanley Park, the parties' agreement under Subsection 4(o) that implementation of alternatives to the exhibition of cetaceans at the Marine Science Centre required the parties to agree to the viability of any alternatives, and with the non-interference provision at Section 5(c). It says that by prohibiting the importation, keeping and display of cetaceans that the Bylaw Amendment will:

a) interfere with the Vancouver Aquarium's operations and management of the Marine Science Centre;

b) fundamentally alter the Vancouver Aquarium's permitted uses under the 1999 Licence Agreement, as amended;

c) disregard the parties' express agreement that implementation of alternatives to whale exhibitory at the Marine Science Centre can only happen if the Vancouver Aquarium and the Park Board have mutually agreed that such alternative will maintain the financial viability of the Aquarium; and

d) undo the Park Board's express approval of the Vancouver Aquarium's $100 million expansion and revitalization project.

[69] The Vancouver Aquarium says that the Park Board's bylaw making power in Section 4(m) of the 1999 Licence Agreement cannot be construed as imposing an obligation on it to comply with the Bylaw Amendment. Rather it says that that the logical inference is that the parties, while acknowledging the Park Board's general bylaw making power in Section 4(m), intended that only bylaws which did not in pith

and substance effect the terms agreed to in the licence, would be valid – otherwise the use and non-interference clauses are rendered meaningless. It argues that the interpretation of the 1999 Licence Agreement advocated by the Park Board, which is that the bylaw making power at s. 4(m) carries such weight that the non-interference covenant at s. 5(c) yields to it, does not make sense.

[70] The Vancouver Aquarium does not argue that use and non-interference covenants prevent the Park Board from enacting Bylaws which incidentally impact the operations of the Marine Science Centre. Rather, it says that that they prevent the Park Board from passing bylaws which in pith and substance defeat the purposes of the licence and that this includes the Bylaw Amendment.

Summary of the Park Board's Argument on Contractual Fettering

[71] The Park Board also points to Recital E to the 1999 Licence Agreement arguing that the recitals include an acknowledgement by the parties of certain "governing principles of their relationship", 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 Society's control, without interference by the Park Board, unless such interference is permitted or required by this Agreement."

It argues that these recitals confirm the parties' understanding that the Park Board could enact Bylaws which conflict with the terms of the 1999 Licence Agreement, including the Bylaw Amendment.

[72] The Park Board says that the following two actions taken at a November 27, 2006 board meeting also support an inference that the Park Board intended and understood that the 1999 Licence Agreement would not fetter its authority to restrict or even prohibit cetacean captivity:

a) the Park Board resolution to remove Section 4(n), the no capture restriction, from the 1999 Licence Agreement and to retain clause 4(m),

the bylaw making clause, which demonstrates that the Board had specifically preserved its ability to restrict cetacean captivity and display in the future, by bylaw; and

b) the Park Board resolution stating that "it is the Board's intention that in 2015 the board review the Parks Control Bylaw relating to captive cetaceans."

[73] The Park Board also refers to the cover letter of Dr. Nightingale, President and CEO of the Vancouver Aquarium enclosing the signed 2009 Amendment to the 1999 Licence Agreement, in which he criticized the Park Board's unilateral decision to delete clause 4(n) and said "[m]aterial adverse changes to the content of this section by reason of a change of a Bylaw by a future Park Board may have a significant economic and financial impact on the Aquarium." The Park Board suggests, in effect, that this signifies an acquiescence on the part of the Vancouver Aquarium to the Park Board's Bylaw making power.

[74] The Park Board says that the 1999 Licence Agreement does not fetter the Park Board's Bylaw power but to the contrary, it expressly preserves it by requiring the Aquarium, at Section 4(m), 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".

[75] The Park Board denies that there is an inconsistency between the Bylaw Amendment and Section 5(c) of the 1999 Licence Agreement as the Bylaw Amendment does not concern "day-to-day administration" but rather implements a policy decision based on animal welfare and public ethics that has an indefinite time horizon. In addition, the Park Board denies that there is inconsistency between the Bylaw Amendment and Section 4(o) – the requirement that the parties agree to what is a viable, from a financial standpoint, alternative to whale exhibition and research. It suggests that this clause simply requires the Vancouver Aquarium to go out and implement self-directed measures to maintain its financial viability.

[76] The Park Board says if the Bylaw Amendment constitutes interference with "day-to-day administration" of the Marine Science Centre, then it is expressly permitted by clause 4(m). During submissions I put the following question to counsel for the Park Board:

> **The Court:** If your argument is accepted, the potential impact to the [Marine Science Centre] is far more broad. You are suggesting that there was no basis [for the Vancouver Aquarium] to think that the Park Board would establish a bylaw that would prevent [it] from operating the [Marine Science Centre]. They could establish a bylaw that would have a catastrophic effect … in other words, [the Vancouver Aquarium] signed an agreement that could be overridden at any time …. they should have known that the Park Board could effectively pass a bylaw that shuts them down?
>
> **Mr. Dickson:** Yes. They entered into the Licence Agreement understanding that the Board has legislative authority through its bylaws under s. 491, including with respect to exclusion of animals from parks, we have to impute that they understood .. they clearly did understand … that the Board has the legislative power. They entered into the Licence Agreement with the Board on that basis. They are not entering into a licence agreement with a private party. They are entering into a licence agreement with a democratically elected government.

[77] The essence of the Park Board argument, as I see it, is that notwithstanding the use and non-interference clauses, the Park Board's bylaw making power at section 4(m) is a trump card – which can be used to override any provision in the Licence Agreement at any time.

Analysis and Reasons

[78] Before addressing the arguments raised by the parties on the issues set out above I will address some preliminary matters.

Jurisdiction

[79] On the issue whether the Bylaw Amendment is valid this court has the jurisdiction to grant the relief sought pursuant to the following:

a) First, pursuant to s. 2(2) of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, which is as follows:

> 2(2) On an application for judicial review, the court may grant any relief that the applicant would be entitled to in any one or more of the proceedings for:
>
> (a) relief in the nature of mandamus, prohibition or certiorari;
>
> (b) a declaration or injunction, or both, in relation to the exercise, refusal to exercise, or proposed or purported exercise, of a statutory power;

b) And second, pursuant to s. 524 of the *Vancouver Charter*, which provides that on the application of a person interested in a bylaw, the Court may declare that bylaw void in whole or in part for illegality.

Standard of Review

[80] It is not disputed that the scope of the Park Board's ability to enact the Bylaw Amendment is a question of law, reviewable by this Court on a standard of correctness.

[81] As stated by Justice Bastarache in *United Taxi Drivers ' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485, on review of a licensing bylaw:

> Municipalities do not possess any greater institutional competence or expertise than the courts in delineating their jurisdiction. Such a question will always be reviewed on a standard of correctness: *Nanaimo (City) v. Rascal Trucking Ltd*., [2000] 1 S.C.R. 342, 2000 SCC 13, at para. 29.

[82] In *Nanaimo (City) v. Rascal Trucking Ltd.,* 2000 SCC 13 para. 31-33, Justice Major reviewed factors that militate against a deferential standard on questions of vires or jurisdiction. With respect to the rationale for a review of a municipal decision on the standard of correctness he stated as follows:

> [33]… municipalities exercise a rather plenary set of legislative and executive powers, a role that closely mimics that of the provincial governments from which they derive their existence. Yet, unlike provincial governments, municipalities do not have an independent constitutional status.

> [32]… council decisions are more often by-products of the local political milieu than a considered attempt to follow legal or institutional precedent. To a large extent council decisions are necessarily motivated by political considerations and not by an entirely impartial application of expertise.
>
> [33] The fact that councillors are accountable at the ballot box, is a consideration in determining the standard of review for *intra vires* decisions but does not give municipal councillors any particular advantage in deciding jurisdictional questions in the adjudicative context. As a result, the courts may review those jurisdictional decisions on a standard of correctness.

Onus

[83] The onus of establishing that the Bylaw Amendment is *ultra vires* the jurisdiction of the Park Board or is otherwise unenforceable as a result of the terms of the 1999 Licence Agreement is on the Vancouver Aquarium. (See *Caring Citizens of Vancouver Society v. Vancouver (City)*, 2018 BCSC 72; *Canada Mortgage and Housing Corp. v. North Vancouver (District)*, [1998] B.C.J. No. 677 at para. 29(4) (S.C.).

Principles of Statutory Interpretation

[84] The question of whether the Bylaw Amendment is *ultra vires* the Park Board or otherwise inapplicable to the Vancouver Aquarium in light of the terms of the 1999 Licence Agreement, requires an analysis of the Park Board's leasing and bylaw making powers in the *Vancouver Charter*. Accordingly, it is worthwhile to set out the general principles of statutory interpretation.

[85] The following principles were set out by the Court of Appeal in *Society of Fort Langley Residents for Sustainable Development v. Langley (Township)*, 2014 BCCA 271:

> [9] It is never trite law to recall a number of basic principles when approaching the construction of municipal legislation.
>
> [10] First, it is common ground that the standard of review to be applied to a consideration of the [heritage alteration permit] by the elected municipal council in the context of this matter is correctness …
>
> [11] Second, it is always salutary to remind oneself of the basic principles of statutory interpretation applicable in construing this species of delegated legislative authority.

[12] Counsel, of course, cited the Supreme Court of Canada's decision in *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, and then noted Tysoe J.A.'s reformulation of the direction in the context of a municipal law case in *North Pender Island Local Trust Committee v. Conconi*, 2010 BCCA 494 at para. 13:

> ... the words of an [enactment] are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the [enactment], the object of the [enactment], and the intention of [the legislative body that passed the enactment].

[13] Again, in the context of municipal empowering legislation and bylaws enacted pursuant thereto, this Court said in *Neilson v. Langley (Township)* (1982), 134 D.L.R. (3d) 550 (at 554 per Hinkson J.A.):

> In the present case, in my opinion, it is necessary to interpret the provisions of the zoning by-law not on a restrictive nor on a liberal approach but rather with a view to giving effect to the intention of the Municipal Council as expressed in the by-law upon a reasonable basis that will accomplish that purpose.

[14] In *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19, Mr. Justice Bastarache stated for the Court (at paras. 6 and 8):

> 6 The evolution of the modern municipality has produced a shift in the proper approach to the interpretation of statutes empowering municipalities. ... The "benevolent" and "strict" construction dichotomy has been set aside, and a broad and purposive approach to the interpretation of municipal powers has been embraced...
>
> ...
>
> 8 A broad and purposive approach to the interpretation of municipal legislation is also consistent with this Court's approach to statutory interpretation generally. ...

[15] These common law rules must be married with the expressions of intent by the Legislative Assembly.

[16] Generally, in s. 8 of the *Interpretation Act*, R.S.B.C. 1996, c. 238 we are told that:

> 8 Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

[17] Specifically, under s. 4(1) of the *Community Charter*, S.B.C. 2003, c. 26, we are directed so:

> 4(1) The powers conferred on municipalities and their councils under this Act or the *Local Government Act* must be interpreted broadly in accordance with the purposes of those Acts and in accordance with municipal purposes.

> [18] Frankly, the Court can take the hint – municipal legislation should be approached in the spirit of searching for the purpose broadly targeted by the enabling legislation and the elected council, and in the words of the Court in *Neilson*, "with a view to giving effect to the intention of the Municipal Council as expressed in the bylaw upon a reasonable basis that will accomplish that purpose".

[86] I would add the following additional considerations: to ascertain the present meaning of legislation a court is able to look at its legislative history (*Pacific National*, at para. 45); and, the court may have regard to various presumptions including that:

i. The legislature is presumed to avoid superfluous or meaningless words (R. Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham, Ont.: LexisNexis Canada, 2012) at 8.23-8.24);

ii. The legislature is presumed to have knowledge of practical affairs, including an understanding of commercial practices (*Sullivan*, 8.9);

iii. The legislature is presumed to say what it means and mean what it says (*Sullivan*, 8.14).

Principles of Contractual Interpretation

[87] Given that the parties do not agree that there are conflicts between the bylaw making provisions and the use and non-interference provisions in the 1999 Licence Agreement it is necessary to analyse and interpret the agreement. Accordingly, it is worthwhile to set out the general principles of contractual interpretation.

[88] The interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. Justice Rothstein described this approach in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, as follows:

> [47] …The overriding concern is to determine "the intent of the parties and the scope of their understanding"... To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be

> difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning …
>
> [48] The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement …
>
> [Citations omitted.]

[89] The nature of the evidence that forms part of the rubric of surrounding circumstances (or the "factual matrix") consists of objective evidence of the background facts at the time of the execution of the contract. That is, it is knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting. The goal of examining this evidence is to deepen a court's understanding of "the mutual and objective intentions of the parties as expressed in the words of the contract" (*Sattva*, paras. 57-58).

[90] Also, where there are apparent inconsistencies between different terms of a contract, the court should attempt to find an interpretation which can reasonably give meaning to each of the terms in question. "Only if an interpretation giving reasonable consistency to the terms in question cannot be found will the court rule one clause or the other ineffective": *BG Checo International Ltd. v. British Columbia Hydro & Power Authority*, [1993] 1 S.C.R. 12 at 24.

> **Reasons on Issue 1(a): Does the *Vancouver Charter* provide the Park Board with the statutory authority to contractually fetter its ability to enact bylaws which conflict with the non-interference and use provisions of the 1999 Licence Agreement?**

[91] The decision of the Supreme Court of Canada in *Pacific National* is the leading authority on the question of under what circumstances a municipality may fetter its legislative authority by way of contract. The case concerned a dispute arising from an agreement between the City of Victoria and private developer ("PNI") with respect to development of lands on the Victoria waterfront. The "Master Agreement" between the parties required the City to grant a subdivision of the lands and pass requisite zoning – which it did. PNI started developing the lands but ultimately, after concerns were raised by the public regarding building height along

the waterfront, Victoria City Council decided to rezone, reducing the allowable building height. PNI sued the City for breach of the Master Agreement arguing that it was an implied term of the agreement that the City of Victoria would not "downzone" the development area. In the end Lebel J., writing for the majority, found that PNI's claim must fail on the basis that it was not within the legislative authority of the City of Victoria to agree to such a term.

[92] Lebel J. stated that a municipality can, in certain circumstances have an implied power to bind successor municipal councils. He said as follows at para. 51 of his reasons:

> …Indeed, a municipality as a corporation arguably does have an implied power bind successor councils by a contract in the exercise of ordinary proprietary or business powers … But the form of British Columbia's municipal government legislation militates against extending this to the present situation.

[93] LeBel J. stated at para. 53 of his reasons that a municipal government statute could simply allow municipalities to "engage in contracts of whatever form served their proprietary or business purposes" but in the facts of that case British Columbia had not done so:

> It had set up a system of tight controls on long-term business and proprietary commitments. This scheme did not even refer to long-term commitments affecting the legislative power, as these powers were not envisioned.

[94] LeBel J. examined some of the case law with respect to the fettering of legislative power:

> 55 As the authorities make clear, a limitation on a municipality's legislative power is a very serious matter. As Rogers, *The Law of Canadian Municipal Corporations*, supra, puts it at para. 199.4, "Unless expressly authorized to do so local authorities have no power to enter into an agreement the effect of which will be to restrict or divest the legislative powers of succeeding councils in respect of any matter affecting the public at large." Rogers goes on to note that this does not mean that a council acting in its proprietary or business capacity cannot make contracts. But it does mean that a council cannot somehow give up its legislative powers: cf. *Birkdale District Electric Supply Co. v. Corporation of Southport*, [1926] A.C. 355 (H.L.), at pp. 364 and 371-72.

> 56 Eloquent echoes of this principle have rung out through Canadian case law:
>
> > Our municipal councils are just as truly legislative bodies within the ambit of their jurisdiction as Parliament or the Legislature; and any contract which would interfere with the due exercise of the discretion and judgment of a member of such a council must equally be void as against public policy.
> >
> > (*Town of Eastview v. Roman Catholic Episcopal Corporation of Ottawa* (1918), 44 O.L.R. 284 (S.C., App. Div.), at pp. 297-98)
> >
> > [M]unicipalities must be free to amend or alter their by-laws as circumstances dictate. They cannot bind themselves or their successors by contract with a third party to the *status quo*.
> >
> > (*Capital Regional District v. District of Saanich* (1980), 115 D.L.R. (3d) 596 (B.C.S.C.), at p. 605)
> >
> > [A] municipality cannot bargain away its legislative powers in advance.
> >
> > (*Re Galt-Canadian Woodworking Machinery Ltd. and City of Cambridge* (1982), 135 D.L.R. (3d) 58 (Ont. Div. Ct.), at p. 63, aff'd (1983), 146 D.L.R. (3d) 768 (Ont. C.A.))
>
> Municipal legislative powers are an integral part of governance that municipalities cannot give up. Municipal councils cannot fetter the discretion of successor councils to engage in the legislative process without undue influences.
>
> 57 An implication of this is that in the absence of provincial legislation implementing a different public policy, municipalities cannot sell zoning: D. P. Jones and A. S. de Villars, *Principles of Administrative Law* (3rd ed. 1999), at p. 181; *Vancouver v. Registrar Vancouver Land Registration District, supra; Ingledew's Ltd. v. City of Vancouver, supra*. They cannot agree to change zoning in return for particular consideration, and they cannot agree to keep zoning unchanged in return for particular consideration.

[95] At para. 65 of his reasons Lebel J provided the following key statement of the law with respect to a municipality's ability to fetter its bylaw making powers through a contract:

> 65 Contracts related to a municipality's business and proprietary functions might well affect the resources available to it and thereby hinder its legislative discretion (or bring hindrances of another kind, as in *Dowty Boulton Paul Ltd. v. Wolverhampton Corp.*, [1971] 2 All E.R. 277 (Ch. D.)). But they simply do not inject the same kind of outside consideration into the legislative process. The distinction between direct and indirect fettering, as PNI conceives it, is simply not a useful distinction. The distinction between legislative powers, adjudicative powers, and business or proprietary powers, accepted elsewhere in our Court's jurisprudence (e.g., *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231, at p. 273; *Nanaimo,*

> *supra*, at paras. 28 and 31), is the sole distinction that should apply (*William Cory & Son Ltd. v. London Corp.*, [1951] 2 K.B. 476 (C.A.), at p. 486). Unless there is legislation expressing a public policy permitting it to do so, a municipality may engage in business and proprietary contracts, but it cannot agree to terms that fetter its legislative power.
>
> [Emphasis added.]

[96] The only case to consider the issue of the validity of a contractual fetter on a park board's bylaw making power is *Kell-Erny's Enterprises Ltd. v. Dyck*. The plaintiff was the operator of a restaurant in Cultus Lake Park and had a contract with the Cultus Lake Park Board under which the board had agreed not to permit any concession or vending machine within 300 yards of its restaurant, other than those already in place. The board granted three leases alleged to breach this covenant: one for a water park, which had its own food operation; one for a Chinese restaurant; and one for a steakhouse.

[97] In *Kell-Erny's* the trial judge found the board liable for breach of contract. On appeal, the park board raised for the first time the argument that the covenant was an invalid fettering of the powers conferred on it by the *Cultus Lake Park Act*, S.B.C. 1932, c. 63. The Park Board argued that while it might have been able to covenant not to permit the specific kind of restaurant operated by the plaintiff, it could not grant a covenant as broad as it did.

[98] The powers under the *Cultus Lake Park Act* were similar to those granted to the Vancouver Parks Board under Part XXIII of the *Vancouver Charter*:

> 9 … The general grant of powers is in s. 3 by which the board has "... the regulation, management, maintenance and improvement of Cultus Lake Park". The other sections relevant to the issues on this appeal are:
>
> > 14. The Board shall have the power to: —
> >
> > (a) grant concessions and licences to any person or persons for any term or terms for any purpose or purposes that the Board considers conducive to the more convenient use of the park by the public and make changes therefor ...
> >
> > (f) To construct, operate, and maintain in the park such improvements, buildings, equipment, facilities, conveniences, amusements, and businesses as the Board considers conducive to

> the more convenient use of the park by the public and to make charges in respect thereof.
>
> 19 ...
>
> (2) The board shall have power to grant permission to any person to follow, practise, carry on, or exercise any trade, occupation, profession, business, or calling, and may fix the conditions under which such permission is granted ...

[99] Mr. Justice Esson, writing for the Court of Appeal, rejected the argument of the park board. At para. 14 of his reasons, he adopted the summary of the law set out in Wade, *Administrative Law*, 5th ed. (1982) at 335-336:

> Just as public authorities must have policies, so they must make contracts. Like policies, contracts may be inconsistent with the authorities' proper exercise of their powers. But, unlike policies, contracts are legally binding commitments, and therefore they present more difficult problems. The general principle is the same: an authority may not by contract fetter itself so as to disable itself from exercising its discretion as required by law. Its paramount duty is to preserve its own freedom to decide in every case as the public interest requires at the time. But at the same time its powers may include the making of binding contracts, and it may be most important that it should make them. Since most contracts fetter freedom of action in some way, there may be difficult questions of degree in determining how far the authority may legally commit itself for the future.

[100] Mr. Justice Esson analyzed the purposes of the grant of power to the park board, finding that its "statutory birthright" was to "regulate, manage and maintain the park" and that the power to grant concessions was merely "ancillary" (para. 18). The Court further emphasized that the board need not have exercised the power to agree to the restriction on development of other restaurants in the park, if it had not thought that the covenant was in the public interest and the effect of the covenant was that the lands would remain public park rather than be granted to private concession operators. For these reasons the covenant did not amount to giving up its statutory birthright.

[101] Mr. Justice Esson referred to the case of *Dowty Boulton Paul Ltd. v. Wolverhampton Corporation,* [1971] 1 W.L.R. 204 at 170:

> I refer to one other English authority which illustrates the principle. That is *Dowty Boulton* …. The corporation had granted to the company the right to

> use the municipal airport for 99 years. After 35 years, the corporation wished to discontinue operation of the airport so that the land could be used as a housing estate. The court held that it had no right to do so in breach of its commitment to the company.
>
> Professor Wade observed with respect to that case at p. 140:
>
> > In this case as in many others the court was pressed with the *Ayr* case. But it is quite evident that the doctrine of that case will not be extended to the point where it can be invoked by a public authority as a pretext for escaping from obligations which it has deliberately and properly contracted.

[102] The reasoning of the Court of Appeal in *Kell-Erny's* is not inconsistent with the later ruling of the Supreme Court in *Pacific National*. Where a public authority makes a clear and purposeful decision to enter into an agreement which has the effect of fettering its legislative discretion, and when its enabling statute expresses a public policy authorizing it do so it cannot subsequently invoke its legislative power to defeat the agreement.

[103] As Mr. Justice O'Ferrall put it in *A.R.W. Development Corporation v. Beaumont (Town)*, 2011 ABCA 382 at para. 34:

> Generally speaking, a municipal bylaw cannot abrogate a contract entered into by a municipality. Successor municipal councils are bound by the contracts of previous councils. In *The Law of Canadian Municipal Corporations*, looseleaf, 2nd ed. (Toronto: Thomson Reuters, 2009) Ian MacF. Rogers states at page 1063 "[a] municipality cannot lawfully make use of its legislative authority for the purpose of annulling a valid and subsisting agreement to which it is a party to deprive the other party of his vested rights…"

[104] I will now apply the law to the facts of this case.

[105] In my view the park board(s) in place when 1999 Licence Agreements and 2009 and 2011 amendments were drafted, had the power to contractually fetter the ability of successor park boards to pass bylaws which conflict with these agreements.

[106] Section 488(6) of Part XXIII the *Vancouver Charter* clearly provides the Park Board with the jurisdiction to determine how the lands in Stanley Park on which the

Marine Science Centre is situated are to be used – subject to the provisions of Section 490. In my view section 490(1) provides the Park Board with an express and broad power to enter into leases or licences for lands in permanent public parks under its jurisdiction on "such terms as to remuneration or otherwise as to the Board may seem expedient". The only limitation is that such leases or licences must terminate when the park ceases to be a permanent public park.

[107] Section 488(7) expands on the jurisdiction of the Park Board to provide the Park Board with the power to "prohibit the selling of anything, and the provision of services or performances of any type without the permission of the Board." Under this section, the Park Board is given the express authority to grant such permission on terms and conditions "as it deems appropriate".

[108] Of course the Park Board also has the power, under s. 491(1), to enact bylaws for the control, regulation, protection and government of Stanley Park including bylaws concerning the exclusion from any parks of cetaceans. At first blush it appears that sections 490(1) and 491(1) conflict.

[109] There is nothing in Part XXIII of the *Vancouver Charter* which suggests that the Park Board's Section 491(1) bylaw making power is superior to both its licencing power under Section 490(1) and its permission granting power in Section 488(7), or vice versa. As a result, it is necessary to enter into an exercise in statutory interpretation to resolve the apparent conflict between these two provisions.

[110] There is limited evidence available with respect to the intention of the Legislature regarding the Park Board's commercial and bylaw making powers under Part XXIII of the *Vancouver Charter*. The strongest evidence is the legislative change that was made through the enactment of the *Vancouver Charter Amendment Act*, 1978 which granted the Park Board the right to enter into licence agreements for any term, subject to termination only when a park ceased to become a public park and the addition of s. 488.(6) which made the Park Board's exclusive jurisdiction over parks "subject to" its leasing and licence making power in s.490.

[111] In my view if the Legislature had intended, as the Park Board argues, that the Park Board's bylaw power would be superior to the licencing power of the Park Board, it would have said so. An interpretation of Part XXIII in this way would make meaningless the provisions granting the Park Board the ability to enter into licences on terms it deems expedient and the ability to permit various types of activities on conditions it deems appropriate. A subsequent Park Board could simply override the terms of a licence agreement or withdraw permission for performance through the enactment of a subsequent bylaw. This could not have been what the Legislature intended.

[112] I have considered the Park Board's argument that in the absence of specific language in Part XXIII making its bylaw making power subject to its licencing power, that its bylaw making power should be considered paramount. There is no legal foundation for this proposition and in my view the absence of such a clause in Part XXIII does not provide a basis for me to infer that this was the Legislature's intent. With respect to one of the examples of a legislative carve-out put forward by the Park Board, Section 565.2, under which a bylaw consented to by a property owner is required in order to amend a housing agreement, I note that the housing agreement itself is a product of a bylaw. It makes sense in that case that a bylaw is required to override an earlier bylaw.

[113] There is a difference between the ability of Parliament, a provincial legislature and a municipality, on the one side, and an administrative board, elected or not, on the other, to fetter discretion. As we move farther away from senior governments the degree of deference owed, and therefore the lens through which the ability to fetter a "statutory birthright" is evaluated, needs to be refocussed in light of the purposes of the administrative body. Although during submissions counsel referred to the Park Board on occasion as the government, city or municipality, it is none of those. It is a democratically elected body but it has a more limited mandate than a municipal government and certainly a less broad political mandate than the City of Vancouver, the BC Legislature and Parliament – which are required at all times to be in a

position to act in the interests of their citizens. The Park Board's mandate is clearly to manage Vancouver parks for the benefit of all Vancouverites. In my view when an administrative body begins to trench into areas of ethics, morality, and perhaps even animal rights, it may overstep its bounds if it adopts a political position which conflicts with its core mandates.

[114] I find that it is not appropriate to consider the Park Board's bylaw making power as its primary, or only, statutory birthright. The Park Board's business or proprietary powers, which includes its leasing and licencing power are also important. I agree with the submissions of the Vancouver Aquarium that the case at bar does not involve a conflict between distinctive business and legislative interests. The legislative and business powers of the Park Board should not be considered to exist in silos. In my view there is nothing in the *Vancouver Charter* to suggest that this is the case.

[115] In summary, applying a broad and purposive evaluation to Part XXIII of the *Vancouver Charter* as a whole, and reading ss. 488(6), 488(7), 490(1) and 491(1) together in their grammatical sense and harmoniously and considering the history of Part XXIII, including the changes made to this part in 1978, I find that the *Vancouver Charter* created the statutory framework under which the Park Board was able to contractually fetter its bylaw making power. The next question to be addressed is – did the Park Board do so?

Reasons on Issue 1(b): Does the 1999 Licence Agreement contractually fetter the Park Board's ability to enact the Bylaw Amendment?

[116] Section 5(c) of the 1999 Licence Agreement is a specific covenant prohibiting the Park Board from interfering with the day to day administration of the Marine Science Centre – unless such interference is permitted or required by the agreement. Section 3 sets out the general right of the Vancouver Aquarium to use lands on Stanley Park to operate the Marine Science Centre until 2029. Section 4(m) requires the Vancouver Aquarium to comply with the bylaws of the Park Board and City of Vancouver which may be in force from time to time governing the conduct

and use of park property. As was the case with leasing and bylaw making provisions of the *Vancouver Charter*, on their face, these contractual provisions conflict.

[117] I have considered the Park Board's argument that there no inconsistency between the Bylaw Amendment and Section 5(c) of the 1999 Licence Agreement as the Bylaw Amendment does not concern "day-to-day administration" but rather implements a policy decision based in animal welfare and public ethics that has an indefinite time horizon. In this respect, the Park Board suggests that the words "day to day administration" should be given a narrow interpretation and taken to refer to office functions, such as human resources or financial management. I find this argument to be without merit.

[118] Day to day refers to the regular, routine activities carried out by a person or organization. What constitutes a day to day activity is fact driven. With respect to meaning of "administration" I consider that the ordinary and grammatical meaning of administration is much broader than that suggested by the Park Board. The Concise Oxford English Dictionary defines administration as "the organization and running of a business or system": Concise Oxford English Dictionary, Oxford University Press, 12th ed., 2011. I find that the activities prohibited in the Bylaw Amendment which concern the bringing, keeping and display of cetaceans, fall within the broad class of day to day administrative activities that the Park Board covenanted it would not interfere with.

[119] The Park Board says that the 1999 Licence Agreement does not fetter the Park Board's Bylaw power but to the contrary, it expressly preserves it by requiring the Aquarium in Section 4(m) to comply with bylaws in place from time to time. The problem with this interpretation is that it would make the Park Board's use and non-interference commitments in Sections 3 and 5(c) meaningless.

[120] The Bylaw Amendment will clearly prevent the Vancouver Aquarium from operating the Marine Science Centre in the way the parties contemplated when they entered into the 1999 Licence Agreement and the 2009 and 2011 amendments. It

will prevent the Vancouver Aquarium from bringing cetaceans to the Marine Science Center, keeping cetaceans at the Marine Science Centre that were not there prior to May 15, 2017 and from producing shows performance or other forms of entertainment which include one or more cetaceans. It effectively undoes the Park Board's approval of the Expansion Project in that, although the Vancouver Aquarium could in theory proceed with the work involved with the Expansion Project if it chose to, the Vancouver Aquarium will be prohibited from using the expanded facilities for the intended purposes. Finally, Bylaw Amendment conflicts with s. 4(o) of the 1999 Licence Agreement, which requires the parties to agree on financial viability before the Vancouver Aquarium is required to implement an alternative to keeping cetaceans in captivity, in that it amounts to a unilateral declaration by the Park Board prohibiting the Vancouver Aquarium from doing so.

[121] In my view, there is merit to the argument of the Vancouver Aquarium that the only logical interpretation which can be made, which gives effect to 1999 Licence Agreement, is that the Park Board's contractual bylaw making power under Section 4(m) is in effect, tempered by the use provision at Section 3 and the non-interference provision at Section 5(c). That is, these provisions prevent the Park Board from enacting bylaws which, in pith and substance, defeat the purposes of the 1999 Licence Agreement – such purposes including the continuing operation and expansion of the Marine Science Centre. The Park Board is not prevented from enacting any number of other bylaws which may impact the Vancouver Aquarium in other ways, such as for example, bylaws concerning public health and safety, traffic control and vehicle access.

[122] I have reviewed and considered the arguments of the parties with respect to whether or not the evidence establishes that the parties intended, at the relevant times, that the Park Board's bylaw making power under Section 4(m) of the 1999 Licence Agreement, as amended, would be constrained as suggested by the Vancouver Aquarium. In my view the evidence establishes that this was their intention.

[123] The comments made by Commissioner Chesman in September 1996 clearly indicate that the Park Board recognized the Vancouver Aquarium's requirement for commercial certainty and that the Vancouver Aquarium had a right to a secured lease term by "negotiating with the Aquarium those issues which have posed difficulties through the current lease". The 1997 Memorandum of Understanding included a contractual commitment on the part of the Park Board not to interfere in the day to day administration of the Aquarium and to negotiate, in an addendum or renewals to the agreement then in force, provisions dealing with the acquisition of wild cetaceans and to agree on alternatives to whale exhibition.

[124] Recital E(c) to the 1999 Licence Agreement includes the parties' express acknowledgement, as a governing principle, that the day-to-day administration of the Marine Science Centre shall always properly remain with the Vancouver Aquarium without interference by the Park Board. Although as a recital this provision is not binding as a contractual term, it is certainly instructive of the parties' intention. I reject the Park Board's argument that Recital E(a), which provides that the public has a bona fide interest in the purposes for which Stanley Park is used, signifies the parties' intention that the Park Board's bylaw making power would be superior to its licence commitments. It says nothing of the sort.

[125] Other than those terms already mentioned, I refer to the following additional elements in the 1999 Licence Agreement, as amended in 2009 and 2011, which support the Vancouver Aquarium's argument that the Park Board agreed to a long term arrangement for operation and expansion of the Marine Science Centre:

a) the licence term was extended first in 1999 to (as late as) October 30, 2015 and in 2009 for a further 20 years;

b) the Expansion Plan contemplated larger pools for dolphins and belugas and other enhancements;

c) the parties agreed that the Vancouver Aquarium would have to install suitable equipment and use the Marine Science Center for year-round

> display for public benefit, pay significantly increased fees (rents) to the Park Board and provide as many facilities as practicable for scientific research in cooperation with government and educational institutions.

[126] The Park Board approved the Vancouver Aquarium's $100 million expansion plan in 1996 and executed agreements in 1997, 1999, 2009 and 2011 which either included or did not remove the non-interference and use provisions or the commitment that the parties agree what constituted a financially viable alternative to cetacean captivity. In my view there is no basis for finding, as argued by the Park Board, that the Vancouver Aquarium was aware that the 1999 Licence Agreement, as amended, could be fundamentally altered by a bylaw passed under the Park Board's contractual bylaw making power.

[127] I have considered the Park Board's argument that the letter of Dr. Nightingale enclosing the 2009 Amendment Agreement indicates that he recognized that removal of the contractual "no-wild-capture" restriction from the 1999 Agreement, while it remained in the then Parks Control Bylaw, meant that other material adverse changes could be made going forward, through bylaw amendments. Having reviewed Dr. Nightingale's letter, I do not consider that it goes as far as the Park Board suggests. In my view it is equally possible that Dr. Nightingale was simply providing the Park Board advance notice of the financial consequences of the Park Board seeking to enact a restrictive bylaw in the future.

[128] The decision of the Park Board to agree to both the use and non-interference provisions into 1999 Licence Agreement, and the 2009 and 2011 amendments, is a manifestation of the exercise of both its legislative and business powers under the Vancouver Charter and a reflection of a decision made in the public interest. It remained within the Park Board's discretion in 1999, 2009 and 2011 not to enter into a contractual arrangement which diminished its bylaw making power. When the then Commissioners chose to do so, they did so under the authority of the *Vancouver Charter* and in their capacity as democratically elected officials. It is not open to the

current Park Board Commissioners, based on an argument that the public interest has changed, to ignore the Park Board's previous contractual commitments.

[129] In order to give meaning to each of Sections 3, 4(m) and 5(c), I find that the 1999 Licence Agreement prevents the Park Board from seeking to apply the Bylaw Amendment to the operations of the Vancouver Aquarium at the Marine Science Centre. I also find that the Bylaw Amendment, in pith and substance, defeats the purposes of the 1999 Licence Agreement, as amended – such purposes including the continuing operation and expansion of the Marine Science Centre.

Conclusion

[130] The Park Board was authorized to enact the Bylaw Amendment to the extent that it applies to parks and facilities not including the Marine Science Centre at Stanley Park. As a result, I decline to quash the Bylaw Amendment as a whole.

[131] As stated in my reasons above I find that the *Vancouver Charter* created the statutory framework under which the Park Board was able to contractually fetter its bylaw making power in lease or licence agreements for the use of lands within permanent public parks and that it did so when it entered into the 1999 Licence Agreement, as amended, with the Vancouver Aquarium. Further, as stated above, the decision of the Park Board to enact the Bylaw Amendment, without excluding from its application the operations of the Vancouver Aquarium at the Marine Science Centre, either constitutes, or will result in, a breach of the use and non-interference provisions of the 1999 Licence Agreement.

[132] Accordingly, pursuant to s. 2(2)(a) of the *Judicial Review Procedure Act* I order that the Park Board is prohibited from seeking to apply the Bylaw Amendment to the operations of the Vancouver Aquarium at the Marine Science Centre for the balance of the term of the 1999 Licence Agreement, as amended. In addition, pursuant to s. 2(2)(b) of the *Judicial Review Procedure Act* I declare that it was *ultra vires* the Park Board's powers to enact the Bylaw Amendment – to the extent that it applies to the operations of the Vancouver Aquarium at the Marine Science Centre.

Finally, pursuant to s. 524 of the *Vancouver Charter* I declare that the Bylaw Amendment is void to the extent that it applies to the operations of the Vancouver Aquarium at the Marine Science Centre for the balance of the term of the 1999 Licence Agreement, as amended.

[133] Costs are awarded to the Petitioner at Scale B.

"Mayer J."