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Chair

Mr. Ken McDonald

Standing Committee on Fisheries and Oceans

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•(1530)

[English]

The Chair (Mr. Ken McDonald (Avalon, Lib.)): Good afternoon, everyone.

Welcome to your fisheries and oceans committee meeting this afternoon, pursuant to the standing order of reference of Friday, February 1, 2019, Bill S-203, an act to amend the Criminal Code and other acts, in regard to ending the captivity of whales and dolphins.

We have some witnesses here today, in case there are any questions as we go through.

From DFO, we have Mr. Burns, who is the director general of fisheries resource management. We also have, from the Department of the Environment, Ms. Caceres, who is the manager of international biodiversity for the Canadian wildlife service. From the Department of Justice, we have Ms. Klineberg, who is senior counsel with the criminal law policy section.

Before I start, I have a short statement to read, based on some things that happened over the past few days. I want to let all members around this table know that I was advised, as chair, that there was an article published yesterday morning about this bill. Within this article there were details that address the amendments package that was distributed to members of this committee in confidence.

I would just remind all members that any confidential documents that are circulated and the information that is within them are to remain confidential until they are moved or made public by this committee. They are not to be seen by any journalist, member of the public or other parliamentarian who is not entitled to have access to them. I want this simply to serve as a reminder to all members of this committee.

We'll start clause-by-clause consideration.

Pursuant to Standing Order 75(1), consideration of clause 1, the short title, is postponed.

(On clause 2)

The Chair: On amendment CPC-0.1, Mr. Doherty.

Mr. Todd Doherty (Cariboo—Prince George, CPC): Mr. Chair, I'm just adding that, as the welfare aspect to the bill, there could be instances where the cetacean should be taken into custody or moved to a safe area if there is a chance it could be harmed. This amendment was suggested by Ocean Wise to catch live births where

the mother is in distress or injured, which could ultimately put the calf in danger.

The Chair: Is there any debate?

Mr. Colin Fraser (West Nova, Lib.): I don't know whether we can ask Ms. Klineberg for her opinion on the elements of this amendment.

Ms. Joanne Klineberg (Senior Counsel, Criminal Law Policy Section, Department of Justice): I don't believe I have a copy of this amendment.

Mr. Todd Doherty: We are suggesting that clause 2 be amended by replacing line 6 on page 2 with the following:

jury or another state of distress or because its welfare would otherwise be jeopardized; or

•(1535)

Ms. Joanne Klineberg: It seems to be a clarification. It doesn't seem as though it would change the substance of what is intended to be provided.

An hon. member: I would like a recorded vote.

(Amendment negated: nays 6; yeas 3)

The Chair: Next is amendment CPC-1.

Mr. Doherty.

Mr. Todd Doherty: This amendment creates an additional exemption to Bill S-203 that is consistent with the subclause 3(a) exception, but recognizes the birth of a new cetacean to a captive cetacean that was lawfully pregnant prior to the passage of Bill S-203. I know that legal officials told us that they didn't think there would be an issue, but no one could actually say with any certainty that this would not happen. So, the amended clause 2 would read, after line 12 on page 2:

(d) comes to own, have the custody of or control a cetacean that is born to a cetacean that is kept in captivity and pregnant on the day on which this subsection comes into force.

The Chair: Does anybody have any questions on the proposed amendment?

Mr. Fraser.

Mr. Colin Fraser: I don't have a question; I just have a comment. I won't be supporting the amendment. I understand the rationale for why it's being put forward. However, I know that at the committee we heard from Ms. Klineberg on this point that this is a very specific sort of issue, and the problem is that what the criminal law tries to do is prohibit human beings from either acting or omitting to do something. This seems to go beyond that scope by criminalizing something outside of that. So, for that reason, it seems unnecessary, and based on Ms. Klineberg's testimony to the committee at the hearings, I won't be supporting the amendment.

The Chair: Mr. Nicholson.

Hon. Rob Nicholson (Niagara Falls, CPC): I just want to make it clear that when this bill comes into effect and then there is a birth afterwards, that wouldn't be caught up in this bill. There would be no offence or anything. I think that's all it is. It's just saying that if the cetacean was pregnant at the time it was kept in captivity. We wouldn't want this bill to come into effect and then six months later a cetacean is born. To me it seems it would run afoul of the wording of the bill.

Do you agree?

The Chair: Ms. Klineberg.

Ms. Joanne Klineberg: I think this amendment is fairly clear in what it's intending to do. So, with respect to the possession of cetaceans, it would make clear that, yes, the cetaceans that are born, but that had already been conceived before the coming into force, would be grandfathered in. I also think that there is a way to interpret the grandfathering clause so that it could include the unborn cetaceans as well, but this would be clearer.

The Chair: Mr. Doherty.

Mr. Todd Doherty: With regard to Mr. Fraser's comments, I will say that this paragraph deals with the exemptions to the law. That is why we want to be specific because there was some ambiguity with this Bill S-203 around cetaceans that are born after this bill comes into force. This just offers, as Ms. Klineberg says, some clarity around that.

• (1540)

Mr. Colin Fraser: From the Department of Fisheries and Oceans officials who testified, I understand that it would not affect the pregnant cetaceans currently in captivity. There are none.

Mr. Todd Doherty: Quite the contrary, Mr. Fraser. They said that there was ambiguity around the law.

Mr. Colin Fraser: Yes, around the law itself. My understanding of it is that it's unnecessary because it can be interpreted quite easily to already include those that may be affected that are born after the fact. So, I don't think it's a necessary amendment, and I'm not going to be voting for it.

The Chair: Is there any further discussion?

Hon. Rob Nicholson: Can I ask for some clarification on that, Mr. Fraser? You said that there are no pregnant cetaceans at the present time. Is that what the fisheries department said? That's not my understanding. There are a number in captivity that are, in fact, pregnant now, and this is just clarification.

Mr. Colin Fraser: The official from the department indicated that Bill S-203 would not affect pregnant cetaceans currently in captivity; that is what I'm saying.

Hon. Rob Nicholson: Well, all this is saying is that if they are, in fact, born, they are not caught up in this. I agree with Ms. Klineberg here that this would actually provide some clarification. I don't think this is controversial.

(Amendment negated)

The Chair: Now on CPC-2, Mr. Doherty.

Mr. Todd Doherty: Mr. Chair, essentially, on CPC-2, we're looking to broaden the definition of the research to include conservation work. Ex situ conservation literally means off-site conservation. It is a process of protecting an endangered species outside its natural habitat by, for example, removing part of the population from a threatened habitat and placing it in a new location, which may be a wild area or within the care of humans.

With that, I propose that Bill S-203, in clause 2, be amended, by replacing line 14 on page 2 with the following:

Conducting scientific research or participating in an *ex situ* conservation program pursuant to a licence is-

(Amendment negated)

The Chair: We will move to CPC-3.

Mr. Doherty.

Mr. Todd Doherty: Mr. Chair, we've heard, from testimony, concern that someone visiting a show with cetaceans present could be unwittingly breaking the law. This amendment and CPC-3.1 are just two different ways to deal with this concern. If the committee has a preference as to which amendment works better, I will move the appropriate amendment and withdraw the other.

With that, we propose that Bill S-203, in clause 2, be amended, by replacing lines 18 to 27 on page 2 with the following:

(4) Every one commits an offence who promotes, arranges, conducts, assists in, receives money for or takes part in any meeting, competition, exhibition, pastime, practice, display or event at or in the course of which captive cetaceans they own, have custody of or control are used for performance for entertainment purposes.

(4.1) Subsection (4) does not apply if the performance is authorized pursuant to a licence issued by the Lieutenant Governor in Council of a province or by any other person or authority in the province that may be specified by the Lieutenant Governor in Council.

(Amendment negated)

The Chair: We now move on to CPC-3.1.

Mr. Doherty.

Mr. Todd Doherty: Mr. Chair, in this version we're only adding the word "knowingly". Again, we're just trying to avoid catching people who unwittingly attend events that include proscribed activities. I will bring us back to the testimony we heard previously with Justice Sinclair. In his final answer to the question I asked, he said, "I think so," in terms of reading this piece of legislation.

I also asked Ms. Klineberg about that, and her comment was similar, in terms of ambiguity. Also, in terms of viewing, or knowingly selling or gifting animals to facilities outside of our country that participate in this, it would seem reasonable to not authorize the export of the animal. We're saying that there's ambiguity, and reasonable concern that Canadians could unwittingly take part and attend events that may be in contravention of S-203.

With that, Mr. Chair, we propose that S-203, in clause 2, be amended, by replacing line 18 on page 2 with the following:

(4) Every one commits an offence who knowingly promotes, ar-

We're inserting one word: "knowingly".

● (1545)

The Chair: Mr. Nicholson.

Hon. Rob Nicholson: I think that's a pretty reasonable amendment. You want to make sure that anybody who might get charged under this is somebody who really is participating in this for the exact wrong reason. The amendment proposed by my colleague is saying that if somebody has to knowingly get involved with something like this, then somebody who's just being part of an entertainment package, or just wanders into something, shouldn't be convicted of a criminal offence on that.

This will help clarify that. This is good.

The Chair: Mr. Calkins.

Mr. Blaine Calkins (Red Deer—Lacombe, CPC): At the heart of the question on this amendment is the issue of *mens rea*. I wonder if Ms. Klineberg can give us her advice on this. In an amendment to the Criminal Code, usually there has to be a wilful intent or intent to be shown in order for serious convictions or prosecutions to proceed.

Without the word "knowingly", does that change the level of the bar for a criminal charge being laid and prosecuted, and would we indeed actually capture people who, without knowledge, are committing either negligence, recklessness, wilful blindness or the other types of *mens rea*?

Ms. Joanne Klineberg: While in our view it's always good drafting for Parliament to expressly articulate the mental element for particular offences, there are certainly examples in the Criminal Code of offences that don't have a particular *mens rea* articulated. The Supreme Court has made clear that when we're in the domain of criminal law, even if Parliament hasn't seen fit to articulate what the mental state is, the courts will determine what mental state is required, but it wouldn't be possible to convict someone who didn't have some blameworthy state of mind.

That said, though, sometimes one of the things we look to is the action verbs in a particular offence. Sometimes action verbs imply a mental state in and of themselves. It's difficult to conceive of someone promoting something or receiving money for something when they didn't know what they were promoting or what they were receiving money for.

There's a good argument that "knowingly" for sure makes the law clearer, but without "knowingly", the sorts of action verbs that you have in this offence imply a subjective, knowing state of mind in any event.

Mr. Blaine Calkins: Thank you.

The Chair: Hearing no further discussion, I will call the vote on the proposed amendment.

(Amendment negated)

The Chair: Shall clause 2 carry?

Mr. Fraser.

Mr. Colin Fraser: I thought we were voting on that.

(Clause 2 agreed to)

(On clause 3)

The Chair: On clause 3, we have amendment LIB-1.

Mr. Finnigan.

Mr. Pat Finnigan (Miramichi—Grand Lake, Lib.): Mr. Chair, at this time I will withdraw my amendment.

(Clause 3 agreed to)

● (1550)

The Chair: On new clause 3.1, amendment LIB-2, Mr. Finnigan.

Mr. Pat Finnigan: Mr. Chair, I wish to withdraw my amendment.

The Chair: Okay.

On new clause 3.2, amendment LIB-3, Mr. Finnigan.

Mr. Pat Finnigan: Mr. Chair, I wish to withdraw my amendment.

(On clause 4)

The Chair: On clause 4, we have amendment CPC-3.2.

Mr. Blaine Calkins: Do you want me to explain the French?

Mr. Todd Doherty: Mr. Chair, I will turn it over to our colleague Mr. Nicholson.

As we heard during testimony on March 18, there was clearly an oversight in the Senate and the French language translation does not match the English version. Both this amendment and the subsequent CPC-3.3 are two different ways of tackling the same problem. If the committee has a preference as to which one they would like to see, I have no problem withdrawing one of the amendments.

With that, I will turn it over to our colleague, whose French is far better than mine.

Hon. Rob Nicholson: Thank you very much.

Colleagues, obviously both language versions have to be completely in line with each other. It's not easy to draw up legislation. As our official from the Department of Justice knows, you have two systems of law, civil law and common law, and you have French and English. Getting it right is always a bit of a challenge.

In fact, there are some legal words such as the word "mortgage" in English, in the common law or something, that are not quite the same thing *en français*. At the same time, this bill has two different versions here, and the amendment is just to try to align them.

I'm not sure if you got this, but there's a letter here from a former justice of the Supreme Court, Justice Major, who had a look at this and said we should make sure we align it.

As it stands now, the version in one language refers to a specific section of the bill and the other one doesn't. Therefore, all we have done here, in collaboration with Mr. Doherty and our colleagues, is come up with a way they will mean the same in both official languages.

It is straightforward, and certainly I hope there is support for it. As I say, it is agreed to by the Honourable Justice Major, formerly of the Supreme Court of Canada. He's the one who was saying, yes, we have to do this.

It sometimes happens. We've all encountered this, but a simple amendment here to make it coordinate is all we're asking for at this point in time and it's an important thing to do. We can't have a bill that's different in each of the official languages.

The Chair: Would you like to read it out?

Hon. Rob Nicholson: The amendment is that Bill S-203, in clause 4, be amended by replacing, in the French version, line 8 on page 3 with the following:

[*French*]

7.1 Il est interdit, sans licence délivrée en vertu du paragraphe 10(1.1) ou contrairement à celle—

[*English*]

The Chair: We've heard it in French, very fluently. Is there any discussion?

Mr. Fraser.

Mr. Colin Fraser: I'm understanding this submission by my friend, but we've heard from Jacqueline Yost, legislative counsel on this very issue, that:

...there is no discrepancy between the two language-versions of the proposed section 7.1. You will frequently see an explicit cross-reference in the English version of a section where there is none in French. The French language generally relies on the implicit, or notional, reference to the concept being referred to rather than the location of the object of the reference. In this case, the English version refers the reader to subsection 10(1.1), which is the subsection under which a licence is issued, whereas the French version relies on the inherent link between having a licence and being issued a licence.

While adding a cross-reference in the French version would add to the "structural" parallelism of the section, it would not respect the "génie de la langue" and so I would recommend against making an amendment in this case.

That was helpful to my determination that no amendment is required in this case, and I thank Elizabeth May who worked with the legislative counsel in having that forwarded to our committee. Therefore, I won't be supporting the amendment.

• (1555)

The Chair: Mr. Nicholson.

Hon. Rob Nicholson: I just want to read you one paragraph for the record, and I'd like to hear the opinion of Ms. Klineberg.

The letter from Justice Major says:

Section 7.1 of Bill S-203 is an enforcement provision under the Act. Given the conflict in the English and French versions of the proposed legislation its passage without a clarification amendment would, in the event of an illegal violation and subsequent prosecution, present a dilemma to the court. An obvious example being that an application under the English version would be required to meet the

conditions set out in s. 10(1.1) whereas an application adhering to the French version would not. In the result the same law would be different depending on the site of the application. Should a charge be laid under the proposed Section 7.1 the difficulty described would be left to the court then to attempt a reconciliation of the conflict in the language and if not possible to strike down the section and order an acquittal.

I think that's very clear.

Ms. Klineberg, I don't know whether you have had a chance to compare both versions here, but Justice Major is saying that we should do what we have to do to make them coincide with each other and not just take a chance and have this dilemma presented to the courts.

Ms. Joanne Klineberg: I'm not going to be able to provide very much helpful information on this because my expertise is in criminal law. This is really a question about the conventions related to legislative drafting more generally. However, I can say that in my experience drafting legislation, sometimes the English and the French don't look the same. What matters is that they have the same meaning rather than they look exactly the same. I would only say that on a question like this, I would defer to experts in legislative drafting.

Hon. Rob Nicholson: Don't you think, though, it's a bit unusual that in the English version it specifically references a particular section in an act, yet there is no reference in the French? Whether we're drafting things through the Criminal Code or policy and everything else, wouldn't it make sense that, if the English refers to a specific section that has to be adhered to, the French be amended to say the same thing?

Ms. Joanne Klineberg: I can only say that at first blush, that does sound like a reasonable proposition. However, the explanation from my colleague at the Department of Justice, who is a legislative drafter, sounded exactly like the sort of thing that she would be an expert in and it also sounds reasonable to me.

Hon. Rob Nicholson: Who is that expert?

Ms. Joanne Klineberg: Jacqueline Yost.

Hon. Rob Nicholson: Well, you heard what Justice Major says, and he—

An hon. member: What does he know?

Hon. Rob Nicholson: Well, when you've been on the Supreme Court for quite a time, you do develop some expertise or you bring your expertise to the role here. It seems to me a fairly straightforward thing just to make sure they both coincide with the exact wording. I don't know.

(Amendment negated)

The Chair: Now we will go to CPC-3.3.

Mr. Todd Doherty: Mr. Chair, this amendment adds a greater degree of precision in determining who may make the determination and assessment of animal welfare by specifying it must be a competent scientific team operating on a federal mandate. It adds species conservation, writ large, as an additional ground for approval consistent with the principle of animal welfare. The amendment proposes that Bill S-203, in clause 5, be amended by replacing line 23 on page 3 with the following, “interests of the cetacean's welfare, as determined by a panel of veterinarians and marine scientists designated by the Minister of Fisheries and Oceans—”

•(1600)

The Chair: Which one are you moving? We're doing CPC-3.3.

Mr. Todd Doherty: I thought we dealt with CPC-3.3.

The Chair: No.

Mr. Todd Doherty: All right.

The Chair: We dealt with CPC-3.2, which was defeated, so therefore we move to CPC-3.3. If it had been approved, we wouldn't bring forward CPC-3.3. I think you jumped ahead a little bit.

Mr. Todd Doherty: Well not really, because I thought the argument was pretty straightforward in terms of the French language issue that we had in terms of clause 4, but I'll go through it.

Mr. Chair, as you heard during the testimony previously, there is some confusion in clause 4 between the French and English. What we are suggesting now is that Bill S-203, in clause 4, be amended by replacing, in the English version, line 9 on page 3 with the following:

with a permit, im-

Hon. Rob Nicholson: Again, the differences between the French and English are referring to subsection 10(1.1), All we would be doing is removing that from the English version so that it would be identical to the French version here. I'm not quite sure why that would be controversial for anyone, but there you have it. It would bring them both into line.

That's all we were trying to do with the previous one, but this is the English version of it. Okay, remove subsection 10(1.1) from there so it will be identical. This is, I think, our job. That's what we have to do.

(Amendment negated)

(Clause 4 agreed to)

(On clause 5)

The Chair: We are now on clause 5, CPC-4.

Mr. Doherty.

Mr. Todd Doherty: Mr. Chair, it's funny you should ask. This amendment adds a greater degree of precision in determining who may make the determination and assessment of animal welfare by specifying it must be a competent scientific team operating on a federal mandate. It adds species conservation, writ large, as an additional ground for approval consistent with the principle of animal welfare.

We are suggesting that Bill S-203, in clause 5, be amended by replacing line 23 on page 3 with the following:

interests of the cetacean's welfare, as determined by a panel of veterinarians and marine scientists designated by the Minister of Fisheries and Oceans, to do so; or
(c) conservation efforts relating to the protection of a vulnerable species.

(Amendment negated)

(Clause 5 agreed to)

(Clause 6 agreed to)

The Chair: On proposed new clause 7, amendment LIB-4, Mr. Finnigan.

Mr. Pat Finnigan: I wish to withdraw my amendment.

The Chair: On amendment CPC-5, Mr. Doherty.

Mr. Todd Doherty: Mr. Chair, I'm sure this is just an oversight on the part of the drafter, but I believe it's important to allow businesses and marine research organizations a chance to comply with the new law after it has been passed. I know that Marineland has asked for more a year, but I think 12 months is a reasonable time frame.

As you heard from the Marineland testimony, they are concerned about cetaceans that are currently pregnant and those that could be pregnant just before this bill becomes law. The intent here is to ensure that the owners of cetaceans that become pregnant prior to passage of Bill S-203 are not considered to commit a crime simply by owning, having the custody of, or control of a cetacean that is born to a cetacean that was lawfully pregnant before the act.

We propose that Bill S-203 be amended by adding after line 3 on page 4 the following new clause:

Coming into Force

7. This Act comes into force on the first anniversary of the day on which it receives royal assent.

•(1605)

The Chair: Mr. Nicholson.

Hon. Rob Nicholson: Mr. Chair, if you don't mind, I'd like to propose a subamendment to that and I'm sure this will be well received by the committee, “That this act come into force on January 1, 2021.”

The reason for that is if this bill comes into effect in the next month or so, the pregnancy period of these cetaceans is, many times, about 18 months. If you're going to ask them to start splitting up, as they do in a place such as Marineland, where you have to start separating them all so none of them gets pregnant, that will be the law and that's fine. However, for those times that the whale or dolphin is pregnant already, they need 18 months, so we don't want to have a situation where charges are being laid because a cetacean is born 14 or 15 months from now.

That would be helpful. It wouldn't be inconsistent with the intent of the bill, but it would come into effect on January 1, 2021.

That is my subamendment.

The Chair: Okay. We have heard the amendment and the subamendment. The difference is that the subamendment gives a definite date of January 1, 2021.

(Subamendment negated)

(Amendment negated)

The Chair: Shall the short title carry?

Some hon. members: Agreed.

The Chair: Shall the title carry?

Some hon. members: Agreed.

The Chair: Shall the bill carry?

Some hon. members: Agreed.

An hon. member: On division.

The Chair: Shall the chair report the bill to the House?

Some hon. members: Agreed.

The Chair: It's done. Thank you.

Hearing no further business—

Mr. Robert Morrissey (Egmont, Lib.): Gord was much more persuasive.

The Chair: Yes.

The meeting is adjourned.

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