

The Whale, Inside: Ending Cetacean Captivity in Canada*

Katie Sykes**

Canada has just passed a law making it illegal to keep cetaceans (whales and dolphins) in captivity for display and entertainment: the Ending the Captivity of Whales and Dolphins Act (Bill S-203). Only two facilities in the country still possess captive cetaceans: Marineland in Niagara Falls, Ontario; and the Vancouver Aquarium in Vancouver, British Columbia. The Vancouver Aquarium has announced that it will voluntarily end its cetacean program. This article summarizes the provisions of Bill S-203 and recounts its eventful journey through the legislative process. It gives an overview of the history of cetacean captivity in Canada, and of relevant existing Canadian law that regulates the capture and keeping of cetaceans. The article argues that social norms, and the law, have changed fundamentally on this issue because of several factors: a growing body of scientific research that has enhanced our understanding of cetaceans' complex intelligence and social behaviour and the negative effects of captivity on their welfare; media investigations by both professional and citizen journalists; and advocacy on behalf of the animals, including in the legislative arena and in the courts.

* This article is current as of June 17, 2019. It has been partially updated to reflect the passage of Bill S-203 in June 2019.

** Katie Sykes is Associate Professor of Law at Thompson Rivers University in Kamloops, British Columbia. Her research focuses on animal law and on the future of the legal profession. She is co-editor, with Peter Sankoff and Vaughan Black, of *Canadian Perspectives on Animals and the Law* (Toronto: Irwin Law, 2015) the first book-length jurisprudential work to engage in a sustained analysis of Canadian law regulating the treatment of non-human animals at the hands of human beings. She is a graduate of the University of Toronto Faculty of Law, Harvard Law School, and the Schulich School of Law at Dalhousie University. From 2004 to 2010, she was an associate in the New York office of Cleary Gottlieb Steen & Hamilton LLP, and from 2002 to 2003 she was law clerk to Hon. Justice Louis LeBel of the Supreme Court of Canada.

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“The whale’s belly is simply a womb big enough for an adult. There you are, in the dark, cushioned space that exactly fits you, with yards of blubber between yourself and reality, able to keep up an attitude of the completest indifference, no matter *what* happens”.

— George Orwell, *Inside the Whale*

I. Introduction: Inside the Whale

Canada has just passed landmark legislation that will phase out cetacean captivity except for limited purposes related to the protection of the animals themselves, not to their exploitation for human ends: Bill

S-203, the *Ending the Captivity of Whales and Dolphins Act*.¹ This is the beginning of the end for those who keep cetaceans² in captivity for display and entertainment. Leading animal law scholar and Nonhuman Rights Project President Steven Wise, speaking of the fight for legal recognition of animal personhood, paraphrases Winston Churchill's wartime speech to say that this is not the end, and it is not the beginning of the end, but it is the end of the beginning.³ When it comes to cetacean captivity in Canada, however, we are already past the end of the beginning, and the end is actually in sight.

Keeping cetaceans in tanks for display has become an outdated practice that is out of keeping with this country's values. Canadians now

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1. Bill S-203, *An Act to amend the Criminal Code and other Acts (ending the captivity of whales and dolphins)*, 1st Sess, 42d Parl, 2018 [Bill S-203]. The Bill passed Third Reading in the House of Commons on June 10, 2019, and will now become law. The final formal step that will make the bill part of the law of Canada is Royal Assent, granted to legislation that has passed both Houses of Parliament in identical form.
 2. The term 'cetaceans' is colloquially used to refer to marine mammals classified as members of Order Cetacea, which consists of 88 species of whale, dolphin and porpoise. See Cameron S G Jefferies, *Marine Mammal Conservation and the Law of the Sea* (Oxford: Oxford University Press, 2016) at 11. The cetaceans currently in captivity in Canada are mainly whales (orcas and belugas) and dolphins.
 3. "Now this is not the end. It is not even the beginning of the end. but [sic] it is, perhaps, the end of the beginning". Winston Churchill, "The End of the Beginning" (10 November 1942) online: *The Churchill Society* <www.churchill-society-london.org.uk/EndoBegn.html>. This speech was delivered at the Lord Mayor's Luncheon following the victory at the Second Battle of El Alamein. For Steven Wise's use of the quotation, see his 2015 TED talk on the Nonhuman Rights Project's strategic litigation campaign for the recognition of legal personhood of certain nonhuman animals: Steven Wise, "Chimps Have Feelings and Thoughts. They Should Also Have Rights" (March 2015) at 14:05, online (video): *TED* <www.ted.com/talks/steven_wise_chimps_have_feelings_and_thoughts_they_should_also_have_rights/discussion#t-832610>.

oppose keeping cetaceans in captivity by a two-to-one margin.⁴ Now, we have national law that reflects that widespread public condemnation of the practice. Vaughan Black has rightly observed that the animal welfare movement has not often seen the kind of legal-reform milestones that have been won by other social liberation movements.⁵ But there are rare exceptions where real progress for animals is achieved. The end of cetacean captivity in Canada is one of them.

In George Orwell's essay "Inside the Whale", the image of a Jonah figure cocooned inside a whale's stomach is a metaphor for what Orwell saw as the moral and political quietism of his contemporaries.⁶ Being inside the whale, Orwell argues, means being without responsibility for participation in (or even awareness of) what happens outside; it means "remaining passive, *accepting*".⁷ Orwell was more concerned with

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4. See Angus Reid Institute, "Canadians See Value in Zoos, Aquariums, but Voice Support for Banning Whales and Dolphins in Captivity" (22 May 2018), online: *Angus Reid* <angusreid.org/cetacean-ban-marineland-vancouver-aquarium/> [Angus Reid Poll] (an Angus Reid poll in May 2018 found that 47% of respondents agreed with the statement "keeping cetaceans in captivity should be banned", 21% agreed with the statement "keeping cetaceans in captivity should be allowed", and 32% were not sure or did not express an opinion). By contrast, a 1992 Decima Research poll of Canadian public opinion on marine parks and whale captivity found 72% support for keeping beluga whales in captivity for education, 78% support for keeping beluga whales in captivity for research, and 61% support for keeping beluga whales in captivity for public viewing (but only 39% for keeping orcas in captivity for public viewing): Jon Lien, "A Review of Live-capture and Captivity of Marine Mammals in Canada" (Ottawa: Department of Fisheries and Oceans, 1999) at 21–22.
 5. Vaughan Black, "Traffic Tickets on the Last Ride" in Peter Sankoff, Vaughan Black & Katie Sykes, eds, *Canadian Perspectives on Animals and the Law* (Toronto: Irwin Law, 2015) 57 at 57–58.
 6. George Orwell, "Inside the Whale" in George Orwell, *Inside the Whale and other Essays* (Harmondsworth, Middlesex: Penguin, 1974) 9 [*Inside the Whale and Other Essays*]. "Inside the Whale" was originally published in 1940.
 7. *Ibid* at 43 [emphasis in original].

humanity than with animals,⁸ but his metaphor carries over aptly to social attitudes about animals. When it comes to the exploitation and suffering of animals, most of us, almost all of the time, are inside the whale: comfortable, passive, accepting, or simply (and complacently) unaware. But sometimes specific animal-use practices come into our consciousness in a much starker way than usual, and start to seem untenable. When that happens, significant changes in both social norms and law can result.

This article examines the phenomenon of cetacean captivity and relevant Canadian law (existing and proposed), as well as our evolving beliefs and understandings about how we should treat cetaceans. Our encounters with, and increasing knowledge of, cetaceans have moved us to start thinking — to invert Orwell’s metaphor — *outside* the whale, to leave behind the complacency and acceptance that the metaphor describes, to question the justifications put forward for cetacean captivity, and even to begin facing the profound challenges of sustainable long-term cetacean conservation.

Captive cetaceans in Canada today include beluga whales and dolphins, but the central characters in the story are orcas (or killer whales): above all, the Southern resident population that lives in the Salish Sea off the coast of British Columbia and Washington State. The first orca kept in captivity, Moby Doll, was caught from this population, more or less by accident, by the Vancouver Aquarium in 1964.⁹ Since then, our conception of orcas has changed profoundly — from savage, dangerous killer, to trainable and friendly entertainer, to symbol of a threatened natural world and a creature with intelligence and emotions — perhaps even rights — comparable to those of humans.

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8. John Griffin & George Orwell, *Animal Farm* (Harlow: Longman, 1989) may be the greatest animal-based allegory for human politics in English literature. In addition, Orwell’s 1936 essay “Shooting an Elephant,” describing a purportedly autobiographical episode from Orwell’s time as a colonial official in Burma, exhibits compassion and respect for the dignity of the elephant, and equates killing the elephant to murder. George Orwell, “Shooting an Elephant” in *Inside the Whale and Other Essays*, *ibid* at 91.
9. See detailed discussion in Part III.A. below.

Recurring themes in the account set out here include advances in scientific knowledge about the characteristics of cetaceans and the adverse effects of captivity on them; media exposés, both professional and activist, that have raised public awareness of the disturbing aspects of cetacean captivity; and advocacy by animal protection organizations, in particular Animal Justice Canada (“Animal Justice”),¹⁰ through legislative lobbying, public engagement, and participation in litigation.

II. Bill S-203: Outlawing Cetacean Captivity

Bill S-203 was introduced into the Senate in 2015 by Senator Wilfred Moore of Nova Scotia, who retired in 2017 on reaching the mandatory retirement age of 75. When Senator Moore retired, sponsorship of the bill in the Senate was taken over by Senator Murray Sinclair of Manitoba. Senator Sinclair is an eminent First Nations leader who was the first Indigenous judge to be appointed in Manitoba (the second in Canada) and chaired Canada’s landmark Truth and Reconciliation Commission. Bill S-203 was sponsored in the House of Commons by Elizabeth May, Leader of the Green Party of Canada.

Senator Moore, the bill’s original sponsor, first became committed to the cause of ending cetacean captivity after he and his family watched the 2013 documentary film *Blackfish*.¹¹ *Blackfish* exposes the detrimental effects of captivity on orcas, as well as injuries and fatalities suffered by some of the human trainers and staff who work with them, focusing on

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10. Animal Justice, incorporated as a not-for-profit corporation in 2008, is Canada’s only national animal law organization. It is made up of a charitable wing and a non-profit wing that focuses on legislative activity and lobbying. Its objectives include prevention of cruelty to animals through the enforcement of existing laws, education of the public on issues that affect animals, and advocating for the humane treatment of animals and for reform of Canada’s animal protection laws. See *e.g. R v DLW*, 2016 SCC 22 (Affidavit of Nicholas dePencier Wright, attached to Notice of Motion for Leave to Intervene filed by Animal Justice Canada, online (pdf): *Animal Justice* <www.animaljustice.ca/wp-content/uploads/2015/09/Animal-Justice-DLW-Motion-To-Intervene.pdf>). The author is a member of the volunteer board of advisors of Animal Justice.
 11. *Blackfish*, 2013, DVD (Los Angeles: Magnolia Pictures, 2013).

Tillikum, an orca who was held by SeaWorld of Orlando, Florida until he died in 2017.¹² After watching the film, Senator Moore's son Nicholas asked him to do what he could about the treatment of captive cetaceans in Canada. Senator Moore's response was Bill S-203. He also supports other initiatives to improve cetacean welfare, including a proposal to create an ocean sanctuary for whales and dolphins on the coast of British Columbia or Nova Scotia.¹³

A. What Bill S-203 Changes

Bill S-203 makes it illegal to hold cetaceans in captivity (except for those that are already captive); to breed them or acquire reproductive material; to put on shows involving performing cetaceans; to capture a live cetacean with the intent to keep it captive; and to import or export live or dead cetaceans and reproductive materials of cetaceans.

The legislation amends the *Criminal Code*¹⁴ to make it an offence to own or have custody or control of a captive cetacean; to breed or impregnate a cetacean; or to possess or seek to possess reproductive material of cetaceans.¹⁵ The captivity ban has exceptions for cetaceans which are already in captivity when the legislation comes into force, rehabilitation, keeping a cetacean in captivity for its own best interests pursuant to a permit, and research.¹⁶ It is also an offence to promote, arrange, conduct,

12. Senator Sinclair told the story of Bill S-203's origins in his speech moving third reading of the bill on May 29, 2018. "Bill S-203, An Act to amend the Criminal Code and other Acts (ending the captivity of whales and dolphins)" 3rd reading, *Senate Debates*, 42-1, Vol 150 No 210 (29 May 2018), online: *Senate of Canada* <sencanada.ca/en/content/sen/chamber/421/debates/210db_2018-05-29-e?language=e#85>.

13. For a description of this proposal, see Nina Corfu, "World's 1st Captive Whale Retirement Home could be in Nova Scotia or B.C." (17 November 2017), online: *CBC News* <www.cbc.ca/news/canada/nova-scotia/whale-sanctuary-project-retirement-facility-captive-whales-dolphins-cetaceans-1.3853957>. The sanctuary project is led by the Whale Sanctuary Project, online: <whalesanctuaryproject.org/>.

14. RSC 1985, c C-46 [*Criminal Code*].

15. Bill S-203, *supra* note 1, cl 2.

16. *Ibid.*

assist in, receive money for or take part in any meeting, competition, exhibition, pastime, practice, display or event at or in the course of which captive cetaceans are used for performance for entertainment purposes, except pursuant to a license.¹⁷ This prohibition on cetacean performances does not have a built in ‘grandfather’ exception for cetaceans already in captivity (as the prohibition on keeping captive cetaceans does), but facilities that hold captive cetaceans now will presumably be able to apply for permission to show them in performances.

Further, Bill S-203 amends the *Fisheries Act*¹⁸ to provide that “no one shall move a live cetacean...from its immediate vicinity with the intent to take it into captivity”,¹⁹ except if the cetacean is injured or in distress and is in need of assistance (in other words, rescue of sick or injured animals is still permitted). Finally, it amends the *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act*²⁰ to prohibit the import into Canada or export from Canada of cetaceans (whether live or dead) and sperm, tissue cultures and embryos of cetaceans.²¹ There is an exception for permitted imports and exports for scientific research, or for keeping a cetacean in captivity if it is in the best interests of the cetacean’s welfare.²²

Bill S-203 is a landmark step for cetacean protection because it will completely phase out cetacean captivity for display purposes. There are already some legal provisions that regulate and limit *how* captive cetaceans can be acquired and kept, but there is nothing that goes as far as outlawing captivity completely. For example, there are existing rules about how cetaceans can be captured from the wild for display purposes. Controversy first arose on this question in about the 1980s, tied to concerns about the impact of hunting on the sustainability of vulnerable populations, especially the orcas of the Pacific Northwest. In Canada, live capture of wild cetaceans for display was not, before Bill

17. *Ibid.*

18. RSC 1985, c F-14 [*Fisheries Act*].

19. Bill S-203, *supra* note 1, cl 3.

20. SC 1992, c 52.

21. Bill S-203, *supra* note 1, cl 4.

22. *Ibid*, cl 5.

S-203, prohibited outright in primary legislation; it was possible to do it legally by permit, but in practice permits have not been granted since the early 1990s.²³

Bill S-203 was introduced as a private member's bill, but the Liberal government was supportive of the legislation. The government also added provisions to its own sponsored legislation that would have furthered similar objectives. In 2018, the government introduced a suite of proposed changes to the *Fisheries Act* under Bill C-68, including stricter legislative limits on live capture of cetaceans. This amendment would prohibit capturing cetaceans with intent to take them into captivity, with authorizations allowed only if the Minister "is of the opinion that the circumstances so require, including when the cetacean is injured or in distress or is in need of care".²⁴ Even if it could not acquire cetaceans by hunting them in Canadian waters, however, the industry would still be able to replenish its supply through captive breeding and imports. The government's proposed *Fisheries Act* amendments would not have changed that; nor would they have changed very much in practical terms, given the reality that live capture in Canada for captivity purposes ended decades ago. Later, in 2019, when time appeared to be running out for Bill S-203 to pass before the end of the parliamentary session, the government also sponsored amendments to Bill C-68 incorporating the provisions of Bill S-203 restricting imports and exports of cetaceans (these amendments would also incorporate a ban on trade in shark fins that is proposed in another private member's bill, Bill S-238).²⁵ As this article goes to press, with Bill S-203 just having passed third reading, it is unclear what will become of the similar provisions in Bill C-68.

23. See discussion in Part IV.B. below.

24. Bill C-68, *An Act to amend the Fisheries Act and other Acts in consequence*, 1st Sess, 42d Parl, 2018, cl 15.

25. Jolson Lim & Marco Vigliotti, "Shark finning, cetacean captivity amendments could be folded into C-68," (15 May 2019), online: *iPolitics* <ipolitics.ca/2019/05/15/shark-finning-cetacean-captivity-amendments-could-be-folded-into-c-68/>.

B. Scientists, Their Evidence, and Bill S-203

Scientific evidence and argument have played an important role in making the case for Bill S-203, both in the Senate process and in public discourse. The witnesses who testified before the Committee, in its many hearings, included internationally recognized cetacean scientists Lori Marino, President and co-founder of the Whale Sanctuary Project; Hal Whitehead, a marine biologist at Dalhousie University in Nova Scotia; and Naomi Rose of the Animal Welfare Institute, all of whom supported the bill.²⁶ Marino is one of the world's foremost experts on cetacean cognition and on the effects of captivity on cetaceans.²⁷ Whitehead is a globally renowned cetacean researcher who studies wild whales and dolphins. He has advanced (both through sole-authored research and with co-author Luke Rendell) the proposition that whales and dolphins, with complex behaviours and communicative abilities that are transmitted through social learning, have culture — and that humans are not the only species that do.²⁸ Rose has been a cetacean biologist for twenty-five

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26. Marino and Whitehead were witnesses in the Committee hearing of March 30, 2017. Rose testified on April 4, 2017. The full list of Committee witnesses is available online: *Senate of Canada* <sencanada.ca/en/committees/pofo/studiesandbills/42-1>.
27. Lori Marino & Toni Frohoff, "Towards a New Paradigm of Non-Captive Research on Cetacean Cognition" (2011), online: *PLoS ONE* <journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0024121&type=printable> (summarizes scientific studies on the "large complex brains, impressive intelligence, and social and communicative sophistication" of cetaceans, indicating that "the complex sentience of other animals such as cetaceans must be recognized and their physical, psychological and behavioral needs appropriately protected" at 1). This article also surveys and summarizes the "copious scientific literature confirming the damaging effects of captivity on dolphin and whale physical health and psychological well-being" (at 3–4). The authors argue that "cetaceans possess a level of intelligence, awareness and psychological and emotional sensitivity that makes it unacceptable to continue to keep them in captivity if not necessary for their welfare, survival, or conservation" (at 2).
28. Hal Whitehead & Luke Rendell, *The Cultural Lives of Whales and Dolphins* (Chicago: University of Chicago Press, 2015).

years.

These witnesses described evidence of the harmfulness of captivity to cetaceans, and the mismatch between their welfare needs and the conditions they experience in captivity. Whitehead testified as follows:

captive whales and dolphins live in a space that is less than a millionth — and, in the case of killer whales, less than a billionth — of the area of their natural home ranges. Rather than facing a wide range of living prey, they are typically fed dead fish. These are extremely acoustic animals. That is how they sense their world and communicate. Concrete tanks are debilitating echo chambers.²⁹

Marino, similarly, stated that research shows cetaceans “are the type of animal that cannot thrive in a concrete tank”:³⁰

[t]he evidence is building that animals, wild animals like dolphins and whales, who are kept in displays, exhibit all kinds of abnormal behaviours, like stereotypies, repetitive behaviours, going back and forth with the head, et cetera. It’s something you see in humans all the time when they are emotionally disturbed and chronically stressed. We see this in dolphins and whales in concrete tanks all the time. We see them dying of infections that indicate or suggest that their immune systems are going down due to the chronic stress of living for years in a concrete tank.³¹

Rose explained that opposition to cetacean captivity in the early days was “largely ethical”,³² but with the increased information available from studies over the last few decades the arguments against keeping cetaceans in captivity are “science-based”.³³

The Committee also heard testimony opposing the bill from a scientist, Michael Noonan, Professor of Animal Behaviour, Ecology, and Conservation at Canisius College. However, Noonan also acknowledged that there had been poor welfare outcomes for some cetaceans in

29. Senate, Standing Committee on Fisheries and Oceans, *Evidence*, 42-1, No 12 (30 March 2017), online: *Senate of Canada* <sencanada.ca/en/Content/Sen/Committee/421/POFO/12ev-53197-e> [30 March Standing Committee].

30. *Ibid.*

31. *Ibid.*

32. Senate, Standing Committee on Fisheries and Oceans, *Evidence*, 42-1, No 13 (4 April 2017), online: *Senate of Canada* <sencanada.ca/en/Content/Sen/Committee/421/POFO/13ev-53212-e>.

33. *Ibid.*

captivity, and supported tighter regulations with better enforcement to ensure better standards for captive cetaceans.³⁴

The scientific evidence concerning cetacean intelligence, social lives, and welfare needs has played a significant part in the captivity debate because of the perceived authority and neutrality of science. Certainly, it would be fair to characterize researchers like Marino, Whitehead, and Rose, who have taken positions on normative questions like cetacean personhood³⁵ and cetacean culture, and who are actively involved in advocating for legal change, as not completely neutral participants in the debate themselves. But their positions are founded in their research, which is based on objective scientific methodology. Anti-captivity arguments are strengthened by their basis in the extensive and growing body of scientific knowledge about cetacean species.³⁶ Senator Sinclair's speech moving third reading of Bill S-203 referenced the evidence from the Committee witnesses concerning cetacean intelligence, emotions, social lives, family bonds and communication, and their almost incomprehensibly wide ranges in the wild; of the harms of captivity including "isolation, health problems, reduced lifespans, high infant mortality rates and extreme boredom, where they self-mutilate and end up with scars, wounds and damage to their teeth because they live in barren environments where everything of choice is removed";³⁷ and of the limited value of research on captive cetaceans.

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34. Senate, Standing Committee on Fisheries and Oceans, *Evidence*, 42-1, No 15 (9 May 2017), online: *Senate of Canada* <sencanada.ca/en/Content/Sen/Committee/421/POFO/15ev-53301-e>.
35. 30 March Standing Committee, *supra* note 29 (Marino supports the view that whales and dolphins are 'persons', defined, as she put it in her testimony before the Committee, as "any organism that has autonomy, self-awareness, emotions and a life to lead"). See further discussion of the international discussion concerning cetacean personhood in Part V.A. below.
36. *Ibid* (in his testimony, Whitehead described the abundance of research on wild dolphins and whales, especially the orcas of British Columbia — noting that "we have come to know those whales better than almost any other wild animals, and what we have learned is truly remarkable").
37. Sinclair, *supra* note 12.

C. Bill S-203's Stormy Voyage

The resemblance of the legislative process to the more unlovely types of industrial manufacture is well known, but it does seem that the process can be especially complex and dysfunctional when it comes to animal protection legislation.³⁸ That has been the case for Bill S-203. The legislation had strong popular and cross-party support from the start, and easily passed each legislative stage when it was put to a full vote. Nevertheless, it took four years for the bill to pass, and it passed only two weeks before Parliament was set to rise for probably the last sitting in the legislative session, meaning that it came very close to dying on the Order Paper. Bill S-203 faced long procedural delays during its slow progress through the Senate, and came close to expiration several times before its final triumph. The Conservative caucus critic on the bill, Senator Donald Plett of Manitoba, was especially vocal in his opposition to a captivity ban,³⁹ and has been accused by critics — including the well-known science broadcaster and environmental activist David Suzuki — of using procedural stratagems in an effort to delay and ultimately prevent the

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38. A notorious example is the multi-year history of successive attempts to update the *Criminal Code* animal cruelty offences that ended in 2008 with no change in the substantive provisions but an increase in maximum sentences — a saga recounted in Lesli Bisgould, *Animals and the Law* (Toronto: Irwin Law, 2011) at 87–96.
39. “Bill S-203, An Act to amend the Criminal Code and other Acts (ending the captivity of whales and dolphins)” 2nd reading, *Senate Debates*, 42-1, Vol 150 No 31 (3 May 2016), online: *Senate of Canada* <sencanada.ca/en/speeches/sen-plett-second-reading-bill-s-203-ending-captivity-whales-dolphins/> (speech of Senator Donald Plett on the second reading of Bill S-203, criticizing the ban on captivity as bad policy because it “denies us the opportunity to study and learn from a very small number of captive animals in a way that will permit us to understand and address those animals’ unique and special needs in much larger populations in the wild”).

adoption of Bill S-203.⁴⁰

Senator Sinclair noted that Bill S-203 was in committee “longer than any bill in the last 20, 25 years”,⁴¹ with 17 hearings and over 40 witnesses (by comparison, the legislation that brought in medical assistance in dying had five pre-study hearings and two committee hearings). When the bill faced the risk of being killed by procedural delay, Animal Justice and other advocacy organizations encouraged their supporters to contact senators and express their desire to see the bill passed; senators’ e-mail and voicemail inboxes were flooded with messages of support, and the bill survived.⁴² In June 2018, when the Senate rose for the summer without Bill S-203 proceeding to a vote, Members of Parliament from four federal parties held a joint press conference (coordinated by Animal Justice) urging an end to the deadlock on this and other pending animal protection legislation.⁴³

III. Cetacean Captivity in Canada

There are only two remaining facilities in Canada that have captive cetaceans: the Vancouver Aquarium, in Vancouver, British Columbia; and Marineland Canada (“Marineland”), in Niagara Falls, Ontario.

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40. David Suzuki, “Science Tells Us to End Whale and Dolphin Captivity. So What’s the Holdup?” (28 September 2017), online: *The Globe and Mail* <www.theglobeandmail.com/opinion/science-tells-us-to-end-whale-and-dolphin-captivity-so-whats-the-holdup/article36430136/>. David Suzuki argued that Senator Plett had “mounted a ferocious effort to obstruct Bill S-203” and that his “zeal for cetacean captivity is bewildering and unfortunate”.
 41. Holly Lake, “‘Free Willy’ Bill Report Adopted in Senate” (27 April 2018), online: *iPolitics* <ipolitics.ca/2018/04/27/free-willy-bill-report-adopted-in-senate/>.
 42. Holly Lake, “Wave of Support for Anti-Captivity Bill Swamps Senate E-mail System” (20 June 2017), online: *iPolitics* <ipolitics.ca/2017/06/20/wave-of-support-for-anti-captivity-bill-swamps-senate-email-system/>.
 43. “Advisory: Animal Justice Joins MPs to Call for End to Senate Deadlock on Animal Protection Bills” (19 June 2018), online: *Animal Justice Canada* <www.animaljustice.ca/media-releases/advisory-animal-justice-joins-mps-to-call-for-end-to-senate-deadlock-on-animal-protection-bills>.

A. Vancouver Aquarium

Vancouver Aquarium, in Vancouver's Stanley Park, opened in 1956.⁴⁴ It is Canada's largest aquarium and one of the five largest aquariums in North America.⁴⁵ Vancouver Aquarium is a nonprofit organization whose mission includes research, conservation, education and the rescue and rehabilitation of marine mammals.⁴⁶ It is the headquarters of Ocean Wise, "a new global ocean conservation organization focused on protecting and restoring our world's oceans"⁴⁷ that started in 2017. According to Ceta-Base, a non-profit organization that maintains a global database of cetaceans in captivity,⁴⁸ Vancouver Aquarium currently holds only one cetacean as of September 8, 2018: Helen, a Pacific white-sided dolphin.⁴⁹ Until recently the Vancouver Aquarium had a quite significant collection of beluga whales. Several belugas died at the aquarium in recent years; the last two, Aurora and her adult calf Qila, died within a few days of each other in November 2016.⁵⁰ In addition, a false killer whale, Chester, died

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44. Murray A Newman, *People, Fish and Whales: The Vancouver Aquarium Story* (Madeira Park: Harbour Publishing, 2006) at 19.
 45. "The History of Canada's Largest Aquarium" (2018), online: *Vancouver Aquarium* <www.vanaqua.org/about/history>.
 46. "About the Vancouver Aquarium" (2018), online: *Vancouver Aquarium* <www.vanaqua.org/about>; "Vancouver Aquarium Marine Mammal Rescue Program" (2018), online: *Vancouver Aquarium* <www.vanaqua.org/learn/aquafacts/the-aquarium/marine-mammal-rescue-program>.
 47. "Ocean Wise 2017 Annual Report" (2018), online (pdf): *Ocean Wise Conservation Association* <static1.squarespace.com/static/59cac35632601e88dbb17696/t/5adf629e70a6ad662793e3bd/1524589247160/OceanWise_AnnualReport2017.pdf>.
 48. "Our Mission" (2018), online: *Ceta-Base* <www.cetabase.org/site/mission>.
 49. "Cetaceans: Vancouver Aquarium" (2018), online: *Ceta-Base* <www.cetabase.org/captive/cetacean/vancouver-aquarium/>.
 50. Jon Azpiri, "Vancouver Aquarium Beluga Whale Aurora Dies at Age 30" (26 November 2016), online: *Global News* <globalnews.ca/news/3090310/vancouver-aquarium-beluga-whale-aurora-dies/>.

in November 2017, and a harbour porpoise, Daisy, died in June 2017.⁵¹

Vancouver Aquarium presents shows and educational programs involving live animals, including displays that are listed as “dolphin training”⁵² but might be described by a naïve observer as dolphin shows. These sessions also appear to be captured by the prohibition on cetacean performances under the new legislation.⁵³

Vancouver Aquarium was the first facility to capture and display a live orca. The extraordinary story of how that whale came to Vancouver is recounted in Mark Leiren-Young’s 2016 book *The Killer Whale Who Changed the World*.⁵⁴ In 1964, Dr. Murray Newman, the aquarium’s first director, wanted to have a life-size, anatomically accurate sculpture of an orca made for display at the aquarium. His idea originally was to have an orca killed so that its body could be used as a model for the piece. No one was thinking about bringing a live one back to the city. Orcas were known to be fearsome apex predators that would even kill and eat other whales; they were considered aggressive and terrifying, “bloodthirsty villains of the sea, dangerous to get near even in a boat”.⁵⁵ The orca’s impressive size, striking appearance, and fearsome reputation made it an ideal icon to attract and thrill visitors. Newman, who died in 2016, seems to have had a well-honed showman’s instinct, and to have relished comparisons of himself to PT Barnum — the first showman to put whales on display.⁵⁶

Newman hired a sculptor for the job: Samuel Burich, who was also an experienced fisherman. Burich and another local fisherman, Joe Bauer,

51. The Canadian Press, “A False Killer Whale at the Vancouver Aquarium Has Died” (24 November 2017), online: *Huffington Post* <www.huffingtonpost.ca/2017/11/24/a-false-killer-whale-at-the-vancouver-aquarium-has-died_a_23287719/>.

52. “See A Show Today” (2018), online: *Vancouver Aquarium* <www.vanaqua.org/experience/today>; see also “Caring for Dolphins” (2018), online: *Vancouver Aquarium* <www.vanaqua.org/experience/shows/caring-for-dolphins>.

53. Bill S-203, *supra* note 1, s 2 (see also discussion in Part II above).

54. Mark Leiren-Young, *The Killer Whale Who Changed the World* (Vancouver: Greystone, 2016).

55. Newman, *supra* note 44 at 51.

56. *Ibid* at 21; Leiren-Young, *supra* note 54 at 83.

set out to the waters off Saturna Island to harpoon and kill a killer whale for the sculpture. After two months without success, they were ready to give up the attempt when an orca pod approached their camp and one small, curious member of the group came close enough for Burich to harpoon it. This whale was small because he was young, probably about five years old.⁵⁷

Burich's harpoon strike did not kill the whale; it only pierced his skin and blubber.⁵⁸ He also tried shooting the orca, but still failed to kill him. Then something unexpected happened: Burich and Bauer watched as two larger orcas from the pod⁵⁹ lifted the injured young whale to the surface and supported him to prevent him from drowning, until he began to breathe and slowly swim on his own.⁶⁰ This behaviour had never been observed before. The orcas' gentleness and care for their hurt family member belied their reputations as vicious killers.

The young orca was still attached to the fishing boat by the harpoon and its line. Without intending to, Burich and Bauer had become the first people to capture a live orca. Watching the injured orca's pod-mates help and protect him had sparked their compassion; they had set out to kill him, but now they wanted to save his life.⁶¹ Newman and the two fishermen decided that that the orca should be brought back to Vancouver. They saw that their captive would offer an unprecedented

57. Leiren-Young, *ibid* at 121.

58. *Ibid* at 43.

59. We understand far more now about orcas' social and kinship groups than was known in the 1960s. Based on current understanding of orca social groupings, it is very likely that the whales who rescued Moby Doll after he was harpooned and shot were his family members, including, probably, his mother and/or grandmother.

60. Lieren-Young, *supra* note 54 at 42–44. As Leiren-Young's account documents, the orca's relatives remained steadfastly vigilant and devoted until he died. Older members of the pod followed him to Vancouver harbour and stayed there to the end. The Canadian military donated a hydrophone, which captured the sound of Moby Doll communicating with another killer whale that seemed to be about two miles away (at 77). On the day Moby died, "several whales clustered outside the pen" and seemed to be communicating with him (at 114).

61. Leiren-Young, *ibid*.

opportunity for research, enabling scientists to study killer whale physiology, communication and behaviour by observing a live specimen for the first time. Having the world's first live-captured orca would also prove to be a powerful driver of publicity and interest for the aquarium.

When they arrived at Vancouver Harbour with Moby Doll in tow, the young whale was housed first in a drydock in North Vancouver and then in a specially constructed pen at Jericho Beach. Newman chose the name Moby Doll for him.⁶² At the time, the consensus among the scientists who had observed him was that he was female, although after his death it was confirmed that he was in fact male — as Bauer, who had been able to get a good look at the relevant part of Moby's anatomy after harpooning him, had insisted all along.⁶³

Moby Doll lived for 87 days before he succumbed to infections and exhaustion and died on October 9, 1964.⁶⁴ During that short time, he became an international celebrity, the subject of media attention locally and around the world. When his pen at the Burrard Drydock was opened to the public, 20,000 people came to look at him.⁶⁵ At the beginning, Moby Doll swam listlessly in circles in the tank and refused to eat. Later on, he began eating, taking food from his caretakers' hands, playing, and letting caretakers rub his stomach and scratch his fins.⁶⁶ The people who observed and cared for the young whale evidently were enchanted by this intelligent, docile, sociable creature, and developed a strong bond with him. The image of the killer whale changed profoundly, from a ruthless and bloodthirsty killer to a gentle, intelligent, and powerfully attractive animal. All things considered, this image makeover may not have been to

62. *Ibid* at 82.

63. *Ibid* at 119–120.

64. Newman, *supra* note 44 at 54.

65. *Ibid.*

66. Leiren-Young, *supra* note 54 at 110–113.

the benefit of the orcas.⁶⁷

The Moby Doll episode started two developments, both of which are an important part of the historical background to the current legislative initiative to ban cetacean captivity. One of those developments is the phenomenon of cetacean captivity itself, which took off following Moby Doll's brief, tragic period of celebrity. The Vancouver Aquarium's experience with Moby Doll disproved the received wisdom that killer whales were aggressive and dangerous to humans, and demonstrated that these animals would bond with humans and could be trained to do entertaining tricks. It also proved that people were very, very interested in looking at them. As a 1987 *New York Times* story put it, "[a]quarium operators realized in 1964 that an orca on display meant money in the bank".⁶⁸ After Moby, there ensued what Leiren-Young calls a "blackfish gold rush".⁶⁹ Everyone wanted an orca. Seattle Aquarium got an orca, Namu;⁷⁰ then SeaWorld acquired its original Shamu;⁷¹ and then Vancouver Aquarium got its first killer whale, Skana, who was at the aquarium for thirteen years.⁷²

The second development was the beginning of opposition to captivity. The Vancouver branch of the British Columbia Society for the Prevention of Cruelty to Animals ("BC SPCA") and local animal activists criticized the aquarium for dragging the injured Moby Doll to shore from

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67. Not everyone would agree with this assessment. See Newman, *supra* note 44, who captures what is probably the most commonly invoked rationales for captive cetacean displays (a version of an argument used to justify zoos more generally) when he writes that "exhibiting a few rescued [*sic*] whales is justified if it contributes to the betterment of all whales, as it did in BC" at 63. Whales may now be more beloved and revered than they once were, and it seems reasonable to surmise that there is a connection to the fascination and sense of connection people experience when they visit captive cetaceans on display. But whether the condition of whales has really been 'bettered' from the 1960s to now is far more questionable.
68. Wallace Turner, "For Once-Hated Killer Whales, Changing Attitudes Mean New Friends" *The New York Times* (20 September 1987) 26.
69. Leiren-Young, *supra* note 54 at 117.
70. *Ibid* at 126.
71. *Ibid* at 129.
72. *Ibid* at 129–130; Newman, *supra* note 44 at 55.

Saturna and for keeping it imprisoned for people to look at.⁷³ As Leiren-Young observes, “the first killer whale in captivity had launched the first anti-captivity activists”.⁷⁴ In addition to these objections concerning the welfare of the animals, there were also environmental concerns. As the rush to capture orcas from the wild escalated, the destructive impact on the species eventually triggered widespread public opposition to taking cetaceans from the wild, which in turn led to legal restrictions on live-capture in both Canada and the US.⁷⁵ Greenpeace, one of the world’s first (and still one of the most prominent) environmental non-governmental organizations, began in Vancouver and shifted its focus from nuclear testing to protecting whales in this period.⁷⁶ Some of the earliest Greenpeace activists had personal connections and experiences with captive whales that profoundly shaped their environmental consciousness — Paul Spong, for example, worked with the orcas at Vancouver Aquarium and was convinced by his interactions with them that they were profoundly intelligent creatures and deserved to be free.⁷⁷ Colby argues that the orca capture controversy shaped the ecological consciousness and values of the whole Pacific Northwest region.⁷⁸

Vancouver Aquarium decided to discontinue taking orcas from the wild under a board policy adopted in 1992.⁷⁹ Acquiring them from other aquariums was prohibitively expensive, and attempts at in-house

73. Leiren-Young, *supra* note 54 at 61–63, 93.

74. *Ibid* at 93.

75. Leiren-Young, *ibid* writes that as a result of the live-capture boom of the 1960s and 1970s the southern resident killer whales of the Pacific Northwest “lost a generation” (at 131). On the history of environmentalist protest against orca captures in British Columbia and Washington State, see Jason Colby, “The Whale and the Region: Orca Capture and Environmentalism in the New Pacific Northwest” (2013) 24:2 *Journal of the Canadian Historical Association* 425.

76. Leiren-Young, *ibid* at 140–143.

77. *Ibid* at 139–140.

78. Colby, *supra* note 75 at 427–429.

79. Newman, *supra* note 44 at 62. In any event, it is unlikely that it could have done so legally in Canada at that time; see discussion in Part IV.B below.

breeding were unsuccessful.⁸⁰ A few years later, Vancouver Aquarium decided to stop displaying orcas and transferred its last captive orca to SeaWorld.⁸¹ The continuing controversy over the ethics of keeping and displaying cetaceans prompted Vancouver Aquarium to announce in February 2017 that it would phase out its beluga whale program, and to state in January 2018 that it planned in the future to stop housing and displaying all cetaceans.⁸²

Cetacean captivity at Vancouver Aquarium has also been an ongoing source of friction with its effective landlord, the Vancouver Board of Parks and Recreation (“Parks Board”). Vancouver Aquarium’s Marine Science Centre is situated in Stanley Park, which is administered by the Parks Board. The 1996 version of the licence agreement between the Parks Board and Vancouver Aquarium incorporated the aquarium’s commitment not to keep wild-caught cetaceans, as does the 1999 version (which remains in force).⁸³ In 2017, the Parks Board voted to prohibit the possession of any captive cetaceans on park lands,⁸⁴ a decision which would make the Aquarium’s voluntarily announced intention to phase out holding captive cetaceans into a legal obligation. Vancouver Aquarium challenged the by-law as invalid because it conflicted with the terms of the 1999 licence agreement, and initially succeeded in having it overturned on judicial review.⁸⁵ That decision was overturned in 2019 by the British Columbia Court of Appeal, which remitted the case to the Supreme Court of British Columbia for determination on whether the ban is invalid on additional grounds that were raised by the Aquarium

80. *Ibid.*

81. Leiren-Young, *supra* note 54 at 150.

82. Susan Lazaruk & Glenda Luymes, “Vancouver Aquarium Bows to Pressure to Ban Whales, Dolphins” (18 January 2018), online: *Vancouver Sun* <vancouver.sun.com/news/local-news/vancouver-aquarium-bows-to-pressure-to-ban-cetaceans>.

83. The relevant portions of the 1996 and 1999 agreements are excerpted in *Ocean Wise Conservation Association v Vancouver Board of Parks and Recreation*, 2018 BCSC 196 at paras 12, 34, respectively [*Ocean Wise*].

84. *Ibid.* at para 14.

85. *Ibid.*

but not addressed in the Supreme Court's 2018 judgment.⁸⁶ As this article goes to press, the Vancouver Aquarium has just announced that it is dropping the lawsuit challenging the by-law.

Vancouver Aquarium has also been the target of some (although generally not mainstream) media criticism. In 2015, Vancouver documentary filmmaker, Gary Charbonneau, released *Vancouver Aquarium Uncovered* using online hosting services Vimeo and YouTube.⁸⁷ The film questioned the Vancouver Aquarium's public image as a benign conservation and research organization, and (in a manner reminiscent of *Blackfish*) highlighted the harms associated with cetacean captivity. Somewhat surprisingly, the Vancouver Aquarium responded by suing the filmmaker for copyright infringement, and succeeded in obtaining an interlocutory injunction ordering the removal from the film of some images and footage over which the Vancouver Aquarium asserted copyright.⁸⁸ That injunction was set aside by the British Columbia Court of Appeal,⁸⁹ in a decision that recognized the importance of not allowing copyright claims to "silence criticism" and "stifle public debate on a topic of great interest to the community".⁹⁰

In both the *Ocean Wise* BC Supreme Court case that struck down the Parks Board by-law and the *Charbonneau* copyright case, Animal Justice was granted intervener status, giving it a unique ability to make arguments in court as an advocate for the interests of animals. In *Charbonneau*, Animal Justice highlighted the potential for aggressive copyright claims to be used by animal-use industries "to suppress production of unfavourable and critical publications"⁹¹ and the heightened risks that would create for

86. *Ocean Wise Conservation Association v Vancouver Board of Parks and Recreation*, 2019 BCCA 58.

87. Gary Charbonneau, "Vancouver Aquarium Uncovered" (2015), online (video): *Vimeo* <www.vancouveraquariumuncovered.com/vancouver-aquarium-uncovered/>.

88. *Vancouver Aquarium Marine Science Centre v Charbonneau*, 2016 BCSC 625.

89. *Vancouver Aquarium Marine Science Centre v Charbonneau*, 2017 BCCA 395.

90. *Ibid* at para 79.

91. *Ibid* at para 30.

an organization trying to expose animal abuse and change public opinion about the treatment of animals. In *Ocean Wise*, Animal Justice made submissions specifically with respect to Vancouver Aquarium’s argument that shutting down its captive cetacean program would unconstitutionally limit its freedom of expression, on the premise that whale and dolphin displays are a form of expression.⁹² The implications of that position for regulating animal-use industries would be very profound. Since the court decided in Vancouver Aquarium’s favour on other grounds, it did not find it necessary to address the constitutional argument. In both cases, then, the effect of Animal Justice’s presence as part of the proceedings was subtle — but, nevertheless, not insignificant. Because an animal advocacy organization was in the courtroom advocating on behalf of the animals, a novel development in Canadian litigation, the broader questions about cetacean captivity and human use of animals that formed the background and context of both cases were not forgotten.

B. Marineland

Marineland is a privately owned amusement park, zoo, and aquarium in the tourist town of Niagara Falls in Southern Ontario. In 1961, Marineland owner John Holer saw that there was a market for additional attractions for tourists to visit when they came to see the famous falls. Holder “welded two large steel tanks together on a one-acre plot on the current site of Marineland”,⁹³ installed three sea lions, and charged admission to view and feed the animals. Marineland opened on the site 1963.⁹⁴ From those humble beginnings, it has grown into a large theme park and tourist attraction, with about 4,000 land and aquatic animals

92. *Ocean Wise*, *supra* note 83 at para 22.

93. Liam Casey, “The Man Behind Marineland: 50 Years of Controversy” (3 October 2011), online: *The Toronto Star* <www.thestar.com/news/gta/2011/10/03/the_man_behind_marineland_50_years_of_controversy.html>.

94. Liam Casey, “OSPCA Responds to Lawsuit: Marineland ‘The Author of its own Misfortune’” (5 January 2018), online: *The Globe and Mail* <www.theglobeandmail.com/news/national/ospca-responds-to-lawsuit-marineland-the-author-of-its-own-misfortune/article37512576/>.

as well as rides.⁹⁵ Holer, a vivid and controversial character, remained the owner of Marineland until his death in June 2018.

Ceta-Base shows Marineland as having 60 cetaceans as of September 8, 2018: five bottlenose dolphins, 53 belugas (including five calves listed as born in 2018), and one orca (Kiska).⁹⁶ Marineland advertises “the largest collection of beluga whales in the world”⁹⁷ as one of its attractions. Shows featuring performing beluga whales, dolphins and walrus are presented at King Waldorf’s Stadium.⁹⁸ For anyone who has been near a television or a radio in Southern Ontario in the last few decades, Marineland is indelibly associated with its slogan and jingle: “Everyone loves Marineland”.

Public concern about the living conditions of the Marineland animals, including its cetaceans, may be the single most important force driving legislative action on captive cetaceans — both Bill S-203 at the federal level and (as set out in Part IV.C. below) law reforms at the provincial level in Ontario. Marineland has been the target of criticism by opponents of captivity since the 1990s.⁹⁹ But opposition to Marineland shifted into the mainstream much more recently, because of an extensive, multi-year investigation by *The Toronto Star* (“*Star*”) newspaper beginning in 2012. The *Star*’s findings were revealed in a series of articles beginning with a disturbing exposé published in August 2012, which opens with the plight of a seal named Larry:

Larry lies behind bars in a pen, his eyes red and swollen. The harbour seal with “an amazing little personality” who arrived at Marineland about eight years ago is now a shadow of his former self. After repeated exposure to unhealthy water,

95. *Ibid.*

96. “Cetaceans: Marineland Canada” (2018), online: *Ceta-Base* <www.cetabase.org/captive/cetacean/marineland-canada/>.

97. “Attractions” (2018), online: *Marineland* <www.marinelandcanada.com/attractions/arctic/>.

98. “Fun Filled Show” (2018), online: *Marineland* <www.marinelandcanada.com/attractions/shows/>.

99. Charlotte Montgomery, *Blood Relations: Animals, Humans, and Politics* (Toronto: Between the Lines, 2000) at 207–210.

he has gone blind.¹⁰⁰

The *Star's* Marineland coverage, led by reporters Linda Diebel and Liam Casey, was an exhaustive project that drew on whistleblower revelations from park employees and resulted in dozens of articles.¹⁰¹ Diebel and Casey set out an overview of how the story unfolded in a *Star Dispatches* e-book published in 2013.¹⁰²

Marineland was investigated both by the Ontario Society for the Prevention of Cruelty to Animals (“OSPCA”) and the self-regulatory organization Canada’s Accredited Zoos and Aquariums (“CAZA”), and agreed to make a number of changes to improve the living conditions of its animals.¹⁰³ It also fought back, suing the *Star* for libel,¹⁰⁴ the OSPCA for malicious prosecution,¹⁰⁵ and even a 19-year-old college student and seasonal Marineland employee who made an unreleased short film critical of cetacean captivity with some footage of Kiska the killer whale.¹⁰⁶

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100. Linda Diebel, “Marineland Animals Suffering, Former Staffers Say” (15 August 2012), online: *The Toronto Star* <www.thestar.com/news/canada/2012/08/15/marineland_animals_suffering_former_staffers_say.html>.
101. A search for ‘Marineland’ in *The Toronto Star* online archive on August 25, 2018 yielded 217 results (not all are from the investigative series).
102. Linda Diebel & Liam Casey, *Marineland: Inside the Controversy* (Toronto: Star Dispatches, 2013).
103. See detailed discussion in Part IV below.
104. Ray Spiteri, “Marineland Files Libel Suit Against Toronto Star” (23 April 2013), online: *Toronto Sun* <torontosun.com/2013/04/23/marineland-files-libel-suit-against-toronto-star/wcm/036cbcd3-d097-4c18-a880-10b611449312>.
105. The Canadian Press, “Marineland Sues OSPCA for \$21M, Alleges Agency Wanted to ‘Destroy’ Theme Park” (27 October 2017), online: *CBC News* <www.cbc.ca/news/canada/hamilton/marineland-sues-ospca-for-21m-alleges-agency-wanted-to-destroy-theme-park-1.4374712>.
106. The Current, “Marineland Sues College Student for \$1M Over Unreleased Orca Film” (20 May 2016), online: *CBC Radio* <www.cbc.ca/radio/thecurrent/the-current-for-may-20-2016-1.3590817/marineland-sues-college-student-for-1m-over-unreleased-orca-film-1.3590829>.

C. Carnival and Conservation: The Meanings of Marine Parks

Susan G Davis has described the dichotomy of cultural forces shaping the modern nature theme park, with its historical roots connected to the amusement park, the circus and the carnival — combining thrills for the masses with the display of exotic animals — together with its more modern, salubrious, self-presentation as an institution concerned with science, protection of the natural world, and public education.¹⁰⁷ Like zoos, aquariums or marine parks, as places for displaying exotic and fascinating captive wild animals often from faraway lands, have their antecedents in the menageries of European royalty and the collections of animals that Roman emperors amassed for public games.¹⁰⁸ The modern zoo, displaying animals to the public for education and associated with learning and scientific inquiry, was first seen in Europe in the eighteenth century and became widespread in Europe and North America by the nineteenth.¹⁰⁹ Zoos and aquariums still present themselves as scientific, educational, and serious, as distinguished from mere pleasure-gardens. It remains true that the main reason people visit these places is pleasure, and the experience offered must be enjoyable (at least as much as it is scientific, educational, and serious) to keep people coming through the turnstiles.

With the rise of popular environmental consciousness in the last few decades, zoos and aquariums have also become associated with the preservation of threatened nature. They conduct captive breeding programs to augment the numbers of species that are depleted in the wild, carry out research intended to support conservation of animals in their natural habitats, and, by providing people with a personal

107. Susan G Davis, *Spectacular Nature: Corporate Culture and the SeaWorld Experience* (Berkeley: University of California Press, 1997) at 20–39.

108. Dale Jameson, “Against Zoos” in Peter Singer, ed, *In Defense of Animals: The Second Wave* (Malden, Massachusetts and Oxford: Blackwell, 2006) 132 at 132.

109. *Ibid* at 132–133; Susan Margulis, “Zoos as Venues for Research” in Jesse Donahue, ed, *Increasing Legal Rights for Zoo Animals: Justice on the Ark* (Lanham: Lexington, 2017) 49.

connection with animals they would not be able to see in their natural habitats, encourage the public to appreciate the intrinsic value of wild creatures and develop a sense of custodianship for threatened nature.¹¹⁰ The environmentalist packaging of captive wildlife attractions is nowhere more emphasized than it is for captive cetaceans, probably because marine mammals generally, and whales and dolphins especially, have such powerful significance as symbols of a pristine and imperiled natural world.¹¹¹

The two remaining Canadian facilities that have captive cetaceans, Marineland and Vancouver Aquarium, illustrate the two threads in the history of these attractions (and also how intertwined they are). Marineland is closer to the carnival side of the genealogy. It is an amusement park with added animals, and it does not really pretend to be anything else. Because it is a private company, it is under no obligation to provide disclosure to investors, as SeaWorld must,¹¹² nor to portray itself

110. *Ibid.*

111. See Lien *supra* note 4 (Lien's 1999 review for DFO of live-capture and captivity of marine mammals in Canada notes that marine mammals "are of passionate interest to much of the Canadian public who care deeply about their conservation and welfare" because they are "a symbol of man's abuse of nature, of the health of the ocean ecosystem and a frontier for exploring the relationship between humans, animals and nature" at 13). See also Davis, *supra* note 107 (noting that cetaceans are associated in New Age philosophy with "expanding consciousness" and thought of as "spiritual healers and helpers" that "connect humans to a 'more aware' way of being" at 227).

112. SeaWorld Entertainment, Inc., Annual Report (Form 10-K) (April 25, 2018). SeaWorld Entertainment, Inc. is a public company that trades on the New York Stock Exchange under the ticker symbol SEAS. Its communications to investors emphasize education, care for animals and environmental responsibility alongside the profit-generating enterprise of providing consumers with enjoyable experiences. In its 2017 Annual Report to shareholders, the company states that its attraction for visitors is "a compelling combination of entertainment, education, and our exceptional ability to connect people and wildlife" (at 1), and describes itself as "a global leader in animal welfare, training, husbandry, veterinary care and marine animal rescue" that is "committed to helping protect and preserve the environment and the natural world" (at 3).

to investors as a socially responsible corporation. Unlike the nonprofit Vancouver Aquarium, Marineland faces no pressure to justify its existence with reference to a public interest mission. Like many of the circuses and sideshows of earlier times, Marineland is closely identified with a single dominant and colourful figure, owner John Holer. Vancouver Aquarium, by contrast, creates an impression that entertainment and the attraction of paying customers are mere afterthoughts to its primary functions of saving and rehabilitating injured animals, conducting scientific research, and raising public consciousness about ocean life.

At the same time, Marineland's marketing copy does evoke an association with research, education, and the environment. The "Message from the Owner" on Marineland's website tells readers that since the attraction opened:

we have hosted, educated and entertained literally millions of young people. We have heard from many marine biologists, veterinarians, conservationists and oceanographers that it was their childhood experience at Marineland that inspired them to learn more about the wonders of the ocean and its amazing aquatic life.¹¹³

And Vancouver Aquarium's financial disclosure suggests that attracting paying visitors is not an entirely subordinate priority to research, rescue, and conservation: the financial statement in its 2017 Annual Report indicates that 18% of total expenditures were for "conservation, research and education" and 11% for "animal care" (which would include all animals in the facility, not just those receiving rehabilitation). Other major expenditures include 9% for "retail operations", 12% for "marketing and external relations" and 14% for "general administration".¹¹⁴

In a way, the presentation of whales and dolphins to the public in displays and shows like those at Marineland and Vancouver Aquarium, although very successful and popular for many years, laid the foundations

113. "A Message From The Owner" (2018), online: *Marineland* <www.marinelandcanada.com/general/general_information/>.

114. "Ocean Wise 2017 Annual Report" (2017), online (pdf): *Vancouver Aquarium* <static1.squarespace.com/static/59cac35632601e88dbb17696/t/5adf629e70a6ad662793e3bd/1524589247160/OceanWise_AnnualReport2017.pdf>, at 5.

for the anti-captivity movement and for the demise of these very practices. As Charlotte Montgomery observes in her account of the controversy over Marineland and other captive cetacean facilities:

[t]here is a growing sentiment that the justification for keeping animals captive must include research, the conservation of rare species, or educational programs, all with natural settings and a consideration for the animals' behavioural needs, rather than simply showing them off to the curious. That conviction, moving beyond basic sympathy, has motivated demands for government regulation.¹¹⁵

Aquariums and marine parks that acquired and displayed cetaceans achieved what they wanted to: they made people fall in love with marine animals, and they made it possible for researchers to deepen our knowledge of them. And then people started asking hard questions about what was being done to these creatures whose intelligence and complexity we now understand so much more than we used to, and whom we have come to love and revere.

IV. Current Canadian Regulation

There are already some laws and regulations in Canada on cetacean captivity, having to do mainly with restricting the capture of cetaceans from the wild and regulating the conditions in which captive cetaceans are kept. The existing legal protections for cetaceans in captivity in Canada are limited, and weakened by regulatory gaps. The gaps are related partly to the division of powers in Canada's federal system of government, a division that animal protection straddles precariously,¹¹⁶ and also partly to the semi-privatization of animal welfare law enforcement.

115. Montgomery, *supra* note 99 at 207.

116. On the allocation of constitutional jurisdiction over animals and animal protection, see Monique Herbert, "Animal Protection: An Overview" (Ottawa: Library of Parliament, 1984).

A. Criminal Law

Under Section 91(27) of the *Constitution Act, 1867*,¹¹⁷ the federal government has jurisdiction to enact criminal law. The *Criminal Code*¹¹⁸ includes several offences related to harming or killing animals, including the offence of causing unnecessary suffering to animals, set out in section 445.1(1)(a) of the *Code*. The offence is committed if a person “wilfully causes or, being the owner, wilfully permits to be caused unnecessary pain, suffering or injury to an animal or a bird”.¹¹⁹

On the apparent meaning of this provision, it is possible — at least theoretically — that keeping cetaceans in captivity could be a criminal matter under the general animal cruelty provision, independent of the new amendment to the *Code* that specifically bans it. The scientific consensus at this time appears to be more or less clear that confinement in small spaces and isolation from normal social relationships does cause these animals to suffer.¹²⁰ Situations where animals endure painful health problems due to the conditions they are kept in — for example, the eye and skin injuries that numerous seals, walruses and belugas suffered at Marineland apparently because of water quality problems, revealed in the *Star* investigation — would yet more obviously meet the element of causing “pain, suffering or injury”.¹²¹ The question is whether in the

117. *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5 [*Constitution Act, 1867*].

118. *Criminal Code*, *supra* note 14.

119. *Ibid*, s 445.1(1)(a).

120. Marino & Frohoff, *supra* note 27. See also discussion in Thomas I White, “Dolphins, Captivity, and SeaWorld: the Misuse of Science” (2017) 122:1 *Business and Society Review* 119.

121. *Criminal Code*, *supra* note 14, s 445.1(1)(a).

circumstances suffering is unnecessary, and willfully caused,¹²² within the meaning of the statute. In practice, these requirements are very difficult to establish on a criminal standard of proof, and criminal prosecutions for animal cruelty are usually limited to situations of gratuitous violence and sadistic abuse.¹²³ Use of animals in a commercial context rarely triggers criminal liability, even in situations where there is little argument that the animals suffer (and could suffer less with improvements in their treatment).

Although criminal law does theoretically set outer limits on how owners and custodians of captive cetaceans can treat the animals they are responsible for, practically speaking the criminal law as it stood before Bill S-203 was essentially irrelevant to the regulation of cetacean captivity.

B. Fisheries and Oceans

The federal government has jurisdiction over coastal waters and inland fisheries pursuant to section 91(12) of the *Constitution Act, 1867*.¹²⁴ The *Fisheries Act*¹²⁵ is the main piece of Canadian legislation that governs fishing, including of marine mammals (which are defined as ‘fish’ under the statute).¹²⁶ Regulations promulgated under the *Fisheries Act*, the *Marine Mammal Regulations*,¹²⁷ set out the rules for hunting and capture

122. Proving the mental element is challenging due to the legal complexity of the required *mens rea* standard of wilfulness. An opportunity to clarify the law on this question was, regrettably, not fully taken advantage of by the British Columbia Court of Appeal in *R v Gerling*, 2016 BCCA 72 (where some of the analysis may risk making it more difficult for the Crown to establish wilfulness than appears to have been intended by the legislator). See discussion in Peter Sankoff, “The Mens Rea for Animal Cruelty After *R. v. Gerling*: A Dog’s Breakfast” (2016) 26 Criminal Reports (7th) 267, especially at 271.

123. Bisgould, *supra* note 38 at 71–75.

124. *Constitution Act, 1867*, *supra* note 117.

125. *Fisheries Act*, *supra* note 18.

126. *Ibid*, s 2 (the interpretation section provides that the term “fish” includes marine animals, any parts of marine animals, and the eggs and sperm of marine animals).

127. SOR/93-56.

of marine mammals. The federal government department responsible for these rules and for Canada's ocean policies is Fisheries and Oceans Canada, known by the acronym DFO (from its former title, the Department of Fisheries and Oceans).

The regime under the *Fisheries Act* and the *Marine Mammal Regulations* does not impose an outright ban on taking cetaceans from the wild to put them on display, but hunting or taking of marine mammals and transportation of marine mammals across provincial borders is legal only under a license granted by DFO.¹²⁸ DFO has not granted licenses to take cetaceans for captive maintenance in Canada since the 1990s.¹²⁹ But there are no prohibitions on importing live cetaceans or their reproductive material, or on captive breeding. Furthermore, DFO has no authority to monitor or direct the welfare conditions for cetaceans that are kept in captivity. This matter is really beyond the scope of federal jurisdiction over fisheries and, as discussed in Part IV.C, falls within provincial jurisdiction to regulate animal welfare standards. Thus, although DFO has the authority to regulate capture of cetaceans from the wild (and has effectively ended that practice in Canadian waters), it is not well equipped to address the ongoing ethical and animal welfare concerns that arise from keeping cetaceans in captivity.

128. Section 5 of the *Marine Mammal Regulations* provides that no person may fish for marine mammals except under the authority of a licence issued under the regulations (with exceptions for fishing pursuant to Aboriginal rights). 'Fishing' is defined in section 2 of the *Fisheries Act* as "fishing for, catching or attempting to catch fish by any method". Section 16(1) of the *Marine Mammal Regulations* prohibits the transportation of marine mammals or marine mammal parts from one province to another except under a marine mammal transportation licence issued by DFO. Section 15(c) requires the issuance of a marine mammal transportation licence, upon application, "in respect of any marine mammal or marine mammal parts to be used for experimental, scientific, educational or public display purposes".

129. Lien, *supra* note 4 at 5.

C. Provincial Animal Welfare Law

Under section 92(13) of the *Constitution Act*, Canadian provincial governments have authority to legislate with respect to “property and civil rights in the province”,¹³⁰ and under section 92(16) the provinces have jurisdiction over “matters of a merely local or private nature in the province”.¹³¹ Legally, nonhuman animals, including cetaceans, are property. Regulating the conditions in which animals are kept means regulating property and local concerns in the province and is thus a matter of provincial jurisdiction.¹³² In Ontario (where Marineland is situated) the main provincial animal welfare law is the *Ontario Society for the Prevention of Cruelty to Animals Act* (“*OSPCA Act*”).¹³³ In British Columbia (home of the Vancouver Aquarium) it is the *Prevention of Cruelty to Animals Act* (“*PCA Act*”).¹³⁴

A common feature of provincial animal welfare laws, which appears in both the Ontario and British Columbia statutes, is a generally applicable prohibition on subjecting animals to ‘distress’. This typically includes keeping an animal in a situation where it does not have adequate space, food, water, or veterinary care, or is in pain or suffering, together with more specific regulatory standards of care for the conditions in which animals must be kept (which can vary considerably between provinces and depending on the type of animal and the context).¹³⁵ These provisions are typically coupled with exemptions from liability for animal husbandry practices that are commonly followed or are the industry norm.¹³⁶

Section 11.2 of the *OSPCA Act* prohibits causing an animal to be in distress, or permitting an animal to be in distress if one is the owner or custodian. “[D]istress” is defined as “the state of being in need of proper care, water, food or shelter or being injured, sick or in pain or suffering or being abused or subject to undue or unnecessary hardship, privation

130. *Constitution Act, 1867*, *supra* note 117.

131. *Ibid.*

132. Herbert, *supra* note 116.

133. RSO 1990, c O.36 [*OSPCA Act*].

134. RSBC 1996, c 372 [*PCA Act*].

135. Bisgould, *supra* note 38 at 106.

136. *Ibid* at 107–109.

or neglect”.¹³⁷ Section 11.1(2) exempts from the distress prohibition all activities “carried on in accordance with reasonable and generally accepted practices of agricultural animal care, management or husbandry”¹³⁸ and, where regulations are specified for a class of animals, activities carried out in accordance with the regulations.

The *OSPCA Act* was amended in 2015, in the aftermath of the *Star* investigation of Marineland, to prohibit possession and breeding of orcas in Ontario.¹³⁹ Possession of orcas that were already in captivity when the amendment came into force is exempt.¹⁴⁰ Effectively, the statute now requires that orca captivity will be phased out in Ontario — but it permits Marineland to retain the single orca (Kiska) who is still living there.

In addition, after the Marineland scandal, Ontario brought in new regulations¹⁴¹ under the *OSPCA Act* establishing standards of care and administrative requirements specific to marine mammals kept in captivity (“Standards of Care”). These are the first, and so far the only, such standards to be adopted by a Canadian province.¹⁴² In the wake of the *Star* investigative series, the Ontario Ministry of Community Safety and Correctional Services, which is responsible for administering the province’s animal welfare laws, commissioned an expert report on captive marine mammal welfare from a panel chaired by University of British Columbia marine biologist, Dr. David Rosen.¹⁴³ The report was completed in 2014, and the government then drafted the new Standards of Care based on its recommendations. The new regulations were adopted in 2016.

137. *OSPCA Act*, *supra* note 133, s 1.

138. *Ibid*, s 11.1(2).

139. *Ibid*, s 11.3.1(1).

140. *Ibid*, s 11.3.1(2), (3).

141. O Reg 60/09.

142. O Reg 438/15, amending O Reg 60/09 [Standards of Care].

143. Ontario Ministry of Community Safety and Correctional Services, *Developing Standards of Care for Marine Mammals in Captivity and Recommendations Regarding How Best to Ensure the Most Humane Treatment of Captive Cetaceans* (30 May 2014), online (pdf): <www.mcscs.jus.gov.on.ca/sites/default/files/content/mcscs/docs/ec167997.pdf>.

The Standards of Care require anyone in possession of a marine mammal to establish a committee with expertise, experience, and independence¹⁴⁴ to be responsible for developing and maintaining an animal welfare plan for each captive marine mammal. The plan is required to address such matters as food, social interaction, environmental enrichment, air, breeding, and euthanasia.¹⁴⁵ The Standards of Care also establish detailed requirements for appropriate enclosures with sufficient space and features to meet the animal's needs,¹⁴⁶ and for monitoring and maintaining proper water quality.¹⁴⁷

In British Columbia, the basic statutory framework is similar, but there are no specific regulations tailored to the needs of marine mammals or cetaceans.

Section 9(1) of the *PCA Act* provides that “[a] person responsible for an animal must care for the animal, including protecting the animal from circumstances that are likely to cause the animal to be in distress”,¹⁴⁸ section 9.1(2) provides that “[a] person responsible for an animal must not cause or permit the animal to be, or to continue to be, in distress”,¹⁴⁹ and section 23.2(1) provides that no person may cause an animal to be in distress.¹⁵⁰ “[D]istress” exists if the animal is deprived of adequate

144. Standards of Care, *supra* note 142, s 7(3)–(4), (the committee must include a marine mammal veterinarian (who must chair the committee), a resident of the local community who is not an employee or independent contractor of the person in possession of the marine mammal, a person who has studied marine mammal biology and is not an employee or independent contractor of the person in possession of the marine mammal, a person who is responsible for the daily care of the marine mammal, and a person who is responsible for the maintenance of the location where the marine mammal is kept. For the relevant parts of the welfare plan the committee must consult with a person or persons with expertise in the social and enrichment needs of the marine mammal's species (s 8(2)).

145. *Ibid*, s 8(1).

146. *Ibid*, s 17.

147. *Ibid*, s 18.

148. *PCA Act*, *supra* note 134, s 9(1).

149. *Ibid*, s 9.1(2).

150. *Ibid*, s 23.2(1).

food, water, shelter, ventilation, light, space, exercise, care or veterinary treatment; kept in conditions that are unsanitary; not protected from excessive heat or cold; injured, sick, in pain or suffering; or abused or neglected.¹⁵¹ Section 24.02(c) exempts from offences, in relation to distress, activities “carried out in accordance with reasonable and generally accepted practices of animal management that apply to the activity in which the person is engaged”.¹⁵² Regulated activities are required to be carried out in accordance with the applicable regulations.¹⁵³

British Columbia has not adopted regulations establishing standards of care specifically for captive cetaceans, and it seems unlikely that the government will look to do so given Vancouver Aquarium’s announcement that it plans to phase out its captive cetacean holdings.

In British Columbia, therefore, the operative provincial legal standard concerning the conditions of cetacean captivity is by default the general requirement that animals not be subjected to ‘distress’ — meaning that they cannot be made to suffer, or kept without adequate food, space or veterinary care — but only if distress results from activities that diverge from the “reasonable and generally accepted practices”¹⁵⁴ followed in the activity of keeping captive cetaceans. This was also the relevant standard in Ontario before the adoption of the specific Standards of Care for captive marine mammals in 2016.

This imprecise legal standard, coupled with the exemption for reasonable and generally accepted practices, means that enforcing and applying the law is challenging. *Prima facie*, it may indeed seem that cetaceans kept in captivity experience distress, if they are subjected to poor welfare conditions (such as contaminated water or badly designed enclosures), or even because being in captivity in and of itself creates suffering — as the Committee witnesses on Bill S-203 argued — for animals who are used to swimming free over vast distances and being part of rich and complex social relationships. But, assuming there is suffering or distress, there would still be significant uncertainty about whether

151. *Ibid*, s 1.

152. *Ibid*, s 24.02(c).

153. *Ibid*, s 24.02 (b), (c).

154. *Ibid*, s 24.02(c).

legal liability would be triggered. There is only one entity in British Columbia that engages in the activity of keeping cetaceans in captivity: the Vancouver Aquarium. Arguably, whatever it does *is* the ‘generally accepted practice’ for that activity in the province (although that would not in itself establish that the practices in question are ‘reasonable’). As David Wolfson and Mariann Sullivan have argued (with respect to farming, but the observation applies to other animal-use industries as well), statutory exemptions for ‘customary’ or ‘generally accepted’ practices can have the effect — quite remarkable from a rule-of-law standpoint — of allowing animal-use industries to define through their own practices what constitutes cruelty, thus “delegating enforcement power to the industry itself”.¹⁵⁵

Another limitation on the effectiveness of animal welfare laws is the unique system of investigation and enforcement of those laws. Police powers over inspections, assessment, investigations and enforcement are shared between the public authorities and private animal protection organizations. These private animal protection societies have primary responsibility for overseeing compliance with animal protection law, including federal criminal law as well as provincial legislation.¹⁵⁶ In Ontario, the relevant body is the OSPCA,¹⁵⁷ and in British Columbia it is the BC SPCA.¹⁵⁸

155. David J Wolfson & Mariann Sullivan, “Foxes in the Henhouse: Animals, Agribusiness and the Law: A Modern American Fable” in Cass R Sunstein & Martha C Nussbaum, eds, *Animal Rights: Current Debates and New Directions* (Oxford: Oxford University Press, 2004) 205 at 215.

156. Bisgould, *supra* note 38 at 110–111; Animal Justice Canada, *OSPCA Act: A Better Way Forward: A Report on the Ontario Society for the Prevention of Cruelty to Animals Act* (2013), online (pdf): <animaljustice.ca/wp-content/uploads/2014/02/Animal-Justice-OSPCA-Act-A-Better-Way-Forward-FINAL-140119.pdf> [*A Better Way Forward*].

157. Sections 2 through 10 of the *OSPCA Act*, *supra* note 133, provide for the continuation of the OSPCA (which was incorporated under earlier legislation), set out its constitutive rules, and establish its police powers.

158. Sections 3 through 9 of the *PCA Act*, *supra* note 134, continue the BC SPCA and establish its constitutive rules; its powers and duties are set forth in other provisions throughout the statute.

There is much about this enforcement system that is anomalous and troubling, and that arguably weakens the practical effectiveness of laws that are supposed to protect animals.¹⁵⁹ With respect to cetacean captivity, two points in particular are worth noting. First, the private animal protection societies have combined responsibilities for both investigation and enforcement of animal protection law, and for providing shelter for lost, abandoned and seized animals. This means that their expertise and resources naturally tend to focus on the kinds of animals that they are most often responsible for sheltering and rehoming: domestic pets, especially cats and dogs.

Second, private animal protection societies receive a significant amount of their funding from private donors. For this reason, too, it is to be expected that they prioritize caring for animals whose plight strikes an emotional chord with donors. Again, that typically means pets. Private animal protection societies do not have (and cannot reasonably be expected to have) much specialized understanding of whale and dolphin biology or of their natural behaviours, of the way they live in the wild or of their welfare needs. Accordingly, the ability of the OSPCA and the BC SPCA to oversee compliance with animal welfare law for captive

159. A full discussion of the weaknesses of a system of oversight and enforcement through private animal protection societies is beyond the scope of this article, but it bears noting that this has been a significant area of concern for animal advocates for many years. For further information, see *e.g.* *A Better Way Forward*, *supra* note 156, the proposals of Animal Justice Canada concerning separation of the OSPCA's shelter and investigatory functions, and improved legislative oversight of the OSPCA. The Ontario Superior Court of Justice recently ruled in *Bogaerts v Attorney General of Ontario*, 2019 ONSC 41, that certain aspects of enforcement of animal welfare law by the OSPCA were a violation of the principles of fundamental justice under section 7 of the Charter of Rights and Freedoms. The OSPCA has announced its intention to end enforcement work. It is unclear what the province will do about enforcement of animal welfare law going forward.

cetaceans is inherently limited.¹⁶⁰ Furthermore, one of the tools in their enforcement portfolio, seizure of animals who are kept in distress or suffering, is of no practical use here; the OSPCA or BC SPCA could not feasibly seize or care for such large animals with such specialized needs.¹⁶¹

This is not to suggest that the societies have played no role in the controversy over cetacean captivity. The BC SPCA, as noted above, took an active role from the start of the Moby Doll incident, and is an active participant in the current debate over captivity. It has issued a position statement on marine mammal welfare stating its opposition “to the capture, confinement and breeding of marine mammals for entertainment or educational display”,¹⁶² because captivity is detrimental to the welfare of “wild animals who require large and diverse aquatic habitats to live”.¹⁶³ The OSPCA investigated allegations of abuse at Marineland, issued orders for changes at the park,¹⁶⁴ and later announced animal cruelty charges against Marineland (which were later dropped by prosecutors).¹⁶⁵ The argument is, rather, that this is not the system one would design, given a clean slate, for optimal monitoring and enforcement of legal standards for captive cetacean welfare. The animal protection societies are

160. Diebel & Casey, *supra* note 102, *The Toronto Star* reporters who had the most significant roles in investigating and reporting on animal suffering at Marineland, observed that the OSPCA had “no expertise on sea mammals or captive wild animals” and that OSPCA chair Rob Godfrey had said in a phone interview in the wake of the exposure of problems at Marineland that the society was “in over its head” at 38.

161. Bisgould, *supra* note 38 at 263.

162. “Position Statement on Marine Mammal Welfare” (2018), online: *BC SPCA* <spca.bc.ca/programs-services/leaders-in-our-field/position-statements/position-statement-marine-mammal-welfare/>.

163. *Ibid.*

164. Linda Diebel & Liam Casey, “OSPCA Investigation Ends as Marineland Complies with Orders” (30 April 2013) online: *The Toronto Star* <www.thestar.com/news/canada/2013/04/30/ospca_investigation_ends_as_marineland_complies_with_orders.html>.

165. The Canadian Press, “Marineland Sees Animal Cruelty Charges Dropped” (10 August 2017), online: *The Toronto Star* <www.thestar.com/news/canada/2017/08/10/animal-cruelty-charges-dropped-against-marineland.html>.

not specialists in this area, and have had to take it on as a responsibility that is peripheral to their main roles.

D. Canadian Council on Animal Care Guidelines

The Canadian Council on Animal Care (“CCAC”) is a peer review agency that establishes and maintains guidelines for the ethical use of animals in scientific research in Canada. It is not a government agency; it is a nonprofit corporation, independent of government, funded by public research programs (mainly the Canadian Institutes of Health Research and the Natural Sciences and Engineering Research Council of Canada) and by fees from research institutions that participate in the CCAC program.¹⁶⁶ Institutions are not legally bound to follow CCAC standards or to be assessed by the CCAC for compliance — but research institutions receiving federal public funding (mainly universities and government research institutions) must comply with the CCAC program as a condition of funding. In addition, private research facilities that are not publicly funded may opt into the program as a visible way of enhancing their legitimacy.

CCAC guidelines are for animals used in research, and do not apply to pure entertainment facilities like Marineland. But the Vancouver Aquarium collaborates with the University of British Columbia on marine mammal research and follows CCAC guidelines.¹⁶⁷

In 2014, the CCAC adopted a detailed, 73-page guideline on care and use of marine mammals (including cetaceans).¹⁶⁸ At present, the CCAC guidelines are not directly relevant to any cetaceans in captivity;

166. Bisgould, *supra* note 38 at 208–214; Montgomery, *supra* note 99 at 96–112.

167. Memorandum from General Manager–Parks and Recreation to Board Members–Vancouver Park Board (23 July 2014) “Review of Captive Cetaceans in Stanley Park” online (pdf): <parkboardmeetings.vancouver.ca/2014/140726/documents/REPORT-ReviewofCaptiveCetaceansinStanleyPark-2014-07-26.pdf>.

168. “CCAC guidelines on: the care and use of marine mammals” (Ottawa: Canadian Council on Animal Care, 2014), online (pdf): *Canadian Council on Animal Care* <www.ccac.ca/Documents/Standards/Guidelines/CCAC_Marine_Mammals_Guidelines.pdf>.

the sole cetacean remaining at Vancouver Aquarium, Helen the white-sided dolphin, does not appear to be used for research. The guidelines are, however, a good indication of current expert opinion on best practices for keeping cetaceans in captivity. Similar to Ontario's Standards of Care, they require oversight by an animal care committee, and an animal husbandry regime based on current evidence on the conditions that best support a good quality of life for the animals.

E. Canada's Accredited Zoos and Aquariums

CAZA is a private industry association that accredits facilities that opt into following its standards and policies.

Vancouver Aquarium is a CAZA member. It was the first aquarium to be accredited by the American Zoo and Aquarium Association, in 1975.¹⁶⁹ It became accredited by CAZA in 1987.¹⁷⁰

Marineland used to be CAZA-accredited, but is no longer. In 2012, CAZA inspected Marineland following complaints about low staffing levels and water quality problems by former Marineland trainer Phil Demers, who was one of the whistleblower sources for the *Star* investigative series.¹⁷¹ CAZA's Accreditation Committee released a decision in which it stated that:

at the time of the site inspection the animals in question in the Marineland collection, including the marine mammals were in overall good health and there was no evidence of animal abuse, that water quality in all the pools was very good, and it appeared that staffing levels were adequate.¹⁷²

At the same time, the statement noted that the investigation had

169. "The History of Canada's Largest Aquarium" (2018), online: *Vancouver Aquarium* <www.vanaqua.org/about/history>.

170. *Ibid.*

171. "Marineland Bows Out of CAZA" (4 May 2017), online: *Niagara Falls Review* <www.niagarafallsreview.ca/news-story/8194517-marineland-bows-out-of-caza/>.

172. The 2012 accreditation decision is no longer available on CAZA's website, but the complete text of the decision is included in a statement by Marineland that is still up on Marineland's site: "Statement regarding Canada's Accredited Zoos and Aquariums (CAZA) Findings" (3 October 2012), online: *Marineland* <www.marineland.ca/general/media_releases/>.

raised questions about how well water quality systems in some pools were working, and announced that Marineland had agreed to work on improvements, undergo further inspections (including unannounced inspections) and report on its progress to CAZA.¹⁷³ CAZA accreditation is for a five-year period. Five years later (in 2017), when Marineland was coming up for re-accreditation, the park announced that it was voluntarily withdrawing from CAZA membership.¹⁷⁴ This episode illustrates the inefficacy of voluntary self-regulatory regimes like CAZA. The process is ultimately toothless because the option to exit is always available.

F. Summary: A Regulatory Gap

In 1999, Jon Lien, a whale expert based at Memorial University in Newfoundland, conducted a review for DFO of marine mammal captivity in Canada. He observed that there are “serious inadequacies in regulating the captive maintenance of marine mammals in Canada”.¹⁷⁵ Lien summarized the inadequacies in a list:

DFO, or other regulatory authorities, do not have adequate powers to enforce conditions of captive care and welfare of marine mammals.

There are, at present, no recognized standards for captive marine mammal care for all holding facilities in Canada.

There is no independent, transparent inspection programme that is publicly accountable for ensuring appropriate captive care of marine mammals.

There are inadequate controls on the import and export of marine mammals to or from Canada.

Captive breeding programmes for cetaceans are operating on a small genetic base without adequate planning or coordination.

There are inadequate demonstrations of the educational value of exposure to captive marine mammals.¹⁷⁶

Twenty years later, all of this is still true. It is also true that there have been

173. *Ibid.*

174. “Marineland Bows Out of CAZA”, *supra* note 171.

175. Lien, *supra* note 4 at 78.

176. *Ibid.*

improvements. Ontario's new Standards of Care represent real progress in developing a regulatory framework tailored to the special needs of cetaceans in captivity based on scientific evidence. The restrictions on live capture of cetaceans for public display reflect environmentalist concerns about the destructive impact of the "blackfish gold rush"¹⁷⁷ on vulnerable populations.

Nevertheless, it is still the case that through a combination of the absence of law, ambiguity, or weakness in the laws that do exist, and inadequate oversight and enforcement, there is a lack of effective legal protection, and the whales and dolphins kept inside are for the most part at the mercy of their owners. Furthermore, apart from Ontario's ban on possessing captive orcas (limited to just that species), none of the laws, regulations and standards outlined above are concerned with limiting or prohibiting the practice of cetacean captivity itself. Experts like Whitehead, Marino, and Rose argue that it is inherently wrong to keep these large, cognitively and socially complex creatures in captivity for our enjoyment — and, as public opinion like the Angus Reid Poll¹⁷⁸ indicates, more and more Canadians agree. Until now, however, that position was not reflected in Canadian law. This is where Bill S-203 marks a fundamental change from the laws in place before.

In a sense, the significance of Bill S-203 could be said to be more symbolic than practical, measured by the number of animal lives it is likely to affect. Ontario has already enacted provincial legislation outlawing the captivity of orcas that is as strong (for those particular cetaceans) as Bill S-203, as well as groundbreaking legal standards to protect the welfare of marine mammals in captivity. Vancouver Aquarium has only one cetacean left and has announced its intention to voluntarily discontinue its captive whale and dolphin program. But this situation is contingent. Vancouver Aquarium could change its mind. Businesses in other provinces, where there are no rules like Ontario's, could look to acquire and display their own cetaceans, without any regulatory scheme forcing them to keep the animals in conditions designed with their welfare needs in mind. The

177. Leiren-Young, *supra* note 54 at 117.

178. Angus Reid Poll, *supra* note 4.

current regulatory gap leaves those possibilities open.

V. Global Context: Whaling, Captivity, and Controversy

The debate over cetacean captivity in Canada takes place against a background of discussion and evolving ideas about the moral and legal status of whales and dolphins around the world. The focus of this article is on Canada, so a full analysis of the developments in both international law and domestic law of other countries would be out of place here. A brief summary is, however, appropriate because it should illuminate how evolving public opinion and legislation on these matters in Canada connects to the global debate.

A. International Law: Cetacean Personhood?

The international discussion about cetaceans has foregrounded profound questions about the nature of these animals, their moral status, and how humans should treat them. At the heart of the debate is the question of whether cetaceans should be recognized as *persons*: beings endowed with innate moral or legal rights. The proposition that whales have an inherent right to life, inchoately expressed in public international law, was advanced by Antony D'Amato and Sudhir K Chopra in an influential 1991 law review article.¹⁷⁹ Neither the proposition that whales have the right to life nor the broader concept of cetacean personhood and rights is concretely reflected in law. But these ideas have gradually become more mainstream, at least as topics of debate and reflection.

At an interdisciplinary conference in Helsinki, Finland in 2010, a group of scientists, philosophers and legal scholars adopted a Declaration of Rights for Cetaceans, affirming that whales and dolphins are persons, that they have basic rights enumerated in the Declaration, and that “[n]o cetacean should be held in captivity or servitude; be subject to

179. Anthony D'Amato & Sudhir K Chopra, “Whales: Their Emerging Right to Life” (1991) 85:1 *American Journal of International Law* 21. For a critical view of D'Amato and Chopra's argument as based on limited and insufficiently rigorous science, see Jefferies, *supra* note 2 at 93.

cruel treatment; or be removed from their natural environment”.¹⁸⁰ An introductory note on the Declaration published in the *International Journal of Wildlife Law and Policy* in 2011 contends that the “moral and legal status” of cetaceans “should undergo radical change” in light of increasing evidence that “cetaceans possess a capacity for self-consciousness and refined mental skills, and live in societies in which culture plays a vital role”.¹⁸¹ In 2012, the Annual Meeting of the American Association for the Advancement of Science in Vancouver included a panel on the Declaration and cetacean personhood,¹⁸² indicating a degree of receptiveness to these ideas in mainstream scientific circles, at least as a topic of discussion.

If cetaceans have rights or personhood, then basic morality would require that the law concerning human interactions with them should go beyond merely reducing the ecological damage caused by taking them from the wild and mitigating the negative welfare impacts on cetaceans who are kept in captivity. Recognition of cetacean rights would require addressing the fundamentally normative question of whether it is inherently wrong to keep them in captivity for display and entertainment.

180. For a brief background discussion and abstracts of the conference presentations, see “Introduction to the Declaration of Rights for Cetaceans: Whales and Dolphins” (2011) 14:76–77 *Journal of International Wildlife Law & Policy* 76 [Introduction]. See also “Short Abstracts from the Conference: ‘Cetacean Rights: Fostering Moral and Legal Change,’ Providing the Collective Rationale for the Decision Issued at the End of the Meeting” (2011) 14:76–77 *Journal of International Wildlife Law & Policy* 78. Participants in the conference included Lori Marino and Hal Whitehead. The Declaration itself is appended to the latter article beginning at 80, and is also available online: <www.cetaceanrights.org/>.

181. Introduction, *ibid* at 77.

182. “Declaration of Rights for Cetaceans: Ethical and Policy Implications of Intelligence” (Session at Annual Meeting, 19 February 2012), online: *American Association for the Advancement of Science* <aaas.confex.com/aaas/2012/webprogram/Session4617.html>.

B. The International Whaling Regime

Decades before the captivity debate, the original international controversy about human use of whales concerned lethal commercial whaling. The beginning of the practice of keeping cetaceans in aquariums and marine parks overlapped with the end of whaling as a commercially significant enterprise.¹⁸³ During that period, there was a significant change in public awareness of and attitude towards cetaceans, which probably contributed (along with a decline in demand for whale products) to the decline of commercial whaling. Whaling was not the subject of much mainstream public discussion or controversy until the emergence of the global anti-whaling movement in the 1970s and 1980s.¹⁸⁴ Although some populations of whales had been hunted almost to extinction in the nineteenth century and the first half of the twentieth, passionate and widespread popular opposition to whaling emerged only when the industry was already in decline because demand for its products had fallen away. It is probably not a coincidence that this was also the time when more and more people were ‘meeting’ cetaceans, or encountering emotionally powerful images of them, in the context of captivity and entertainment. For example (as discussed above), leaders of the anti-whaling movement like Vancouver’s Paul Spong became convinced of the specialness of cetaceans because of personal experience with captive animals in aquariums.

The international legal regime regulating whale hunting has changed

183. Leiren-Young, *supra* note 54, highlights the contrast between the once-prevalent view in Vancouver of whales as a useful and unexciting natural resource, and the new romantic fascination with the creatures that began with Moby Doll (as well as the overlap in timelines between the end of the former and the start of the latter). For example, on the same day that Newman was appointed to head the Vancouver Aquarium, a local paper ran ads for fertilizer made from blue whale meal (at 27–28), and during the media frenzy over Moby Doll an editorial reminded people that cans of diced whale loin used to be available in local grocery stores for ten cents (at 84).

184. For an account of the clash between the whaling industry and the global anti-whaling movement written at the height of the conflict, see David Day, *The Whale War* (San Francisco: Sierra Club Books, 1987).

its focus over the years, from beginning as a mechanism for whaling nations to cooperate on sharing a finite resource in an organized way, then evolving over the years to reflect conservationist principles and, eventually, morally-grounded opposition to all consumptive whaling, as reflected in the International Whaling Commission's adoption of a moratorium on all commercial whaling in 1982. D'Amato and Chopra have argued that the international legal regime regulating whaling exhibits a series of five successive 'analytic stages', beginning with the 'free resource' stage (essentially without constraints on whaling) through "regulation, conservation, protection and preservation"¹⁸⁵ — possibly with a sixth, emergent stage reflecting on recognition of the whales' entitlement to basic rights.

Although the approach of much of the international community has shifted in the direction D'Amato and Chopra describe, the regulation of commercial whaling was still a matter of intense controversy when their article was written, and it remains so today.¹⁸⁶ Recently this conflict reached the International Court of Justice ("ICJ"), when Australia successfully challenged the legality of Japan's whaling program under the scientific research exemption to the moratorium under the *International Convention for the Regulation of Whaling*.¹⁸⁷ In that case, *Whaling in the*

185. D'Amato & Chopra, *supra* note 179 at 23. See also Werner Scholtz, "Killing Them Softly? Animal Welfare and the Inhumanity of Whale Killing" (2017) 20:1 *Journal of International Wildlife Law & Policy* 18 (arguing that animal welfare concerns have taken on increasing importance in the international whaling regime, potentially indicating a gradual paradigm shift towards an ethic of preservation and acknowledgment of the moral significance of animals).

186. See discussion of divergent ethical perspectives on whales and whaling in Cinnamon Pinon Carlane, "Saving the Whales in the New Millennium: International Institutions, Recent Developments and the Future of International Whaling Policies" (2005) 24:1 *Virginia Environmental Law Journal* 1 at 41–45.

187. *International Convention for the Regulation of Whaling of 1946*, 2 December 1946, 161 UNTS 74 (entered into force 10 November 1948).

Antarctic,¹⁸⁸ the ICJ found that the Japanese whaling program in place at the time exceeded the scope of the treaty exemption for research. The majority of the ICJ judges were careful to separate what they characterized as a fairly narrow legal and textual question from deeper, more far-reaching questions about the morality of whaling or the international community's policies regarding whales, which they declined to address.¹⁸⁹

The international whaling regime does not expressly address the question of cetacean captivity for public display — and, aside from the capture of animals (which may happen in international waters and/or affect migratory populations), this does appear primarily a domestic rather than an international matter. In many countries where commercial lethal whaling is just a historical memory, domestic law has changed, or changes are proposed, to end or at least limit captivity. The controversy over captivity of live cetaceans is a new battleground where ideas and beliefs about the moral and legal status of cetaceans play out.

C. Captivity and Legal Reform in the United States

Probably the most relevant comparison for Canada is to the United States, our immediate neighbour, with whom we share border-straddling cetacean populations — including the Southern resident orca community that Moby Doll belonged to. The US acted sooner than Canada to end live-capture for captivity. The *Marine Mammal Protection Act*,¹⁹⁰ passed in 1972 to prevent extinction and depletion of marine mammals due to human activities,¹⁹¹ imposed a moratorium on taking and importing marine mammals and marine mammal products.¹⁹² However, under an

188. *Whaling in the Antarctic (Australia v Japan: New Zealand Intervening)*, [2014] ICJ Rep 226, online (pdf): <www.icj-cij.org/docket/files/148/18136.pdf>.

189. *Ibid* (“[t]he Court observes that...it is not called upon to resolve matters of scientific or whaling policy. The Court is aware that members of the international community hold divergent views about the appropriate policy towards whales and whaling, but it is not for the Court to settle these differences” at para 69).

190. 16 USC § 1361 *et seq.*

191. 16 USC § 1361.

192. 16 USC § 1371.

exception to the moratorium, permits may be granted by the National Oceanic and Atmospheric Agency (“NOAA”) to take or import cetaceans for public display.¹⁹³ The NOAA has not granted such a permit in twenty-five years.¹⁹⁴ Effectively (rather like in Canada) there is a *de facto* but not a *de jure* prohibition on live capture for public display.

In 2012, the Georgia Aquarium applied for a permit to import eighteen wild-caught beluga whales from Russia — the first such application in twenty years.¹⁹⁵ The NOAA received extensive public comments opposing the permit, indicating a high degree of public opposition to the cetacean display industry.¹⁹⁶ After a year of deliberations, the agency denied the application, citing potential adverse effects on the wild population.¹⁹⁷ That decision was upheld by the US District Court of Atlanta in 2015.¹⁹⁸ The Georgia Aquarium subsequently announced that it would not appeal the District Court decision and would cease seeking to import wild-caught belugas.¹⁹⁹

There has been legislative action at the state level to restrict and

193. 16 USC § 1374.

194. Elizabeth Lewis, “Whale Wars: Reconciling Science, Public Opinion, And The Public Display Industry Under The Marine Mammal Protection Act” (2014) 66:4 *Administrative Law Review* 861.

195. *Ibid*; Kenneth Brower, “The Great White Whale Fight” (1 June 2013), online: *National Geographic* <news.nationalgeographic.com/news/2013/13/130531-beluga-whale-dolphin-marine-mammal-georgia-aquarium-capture-free-willie-narwhal/>.

196. Lewis, *supra* note 194.

197. “Georgia Aquarium Application to Import 18 Beluga Whales Denied (File No. 17324)” (5 August 2013), online: *National Oceanic and Atmospheric Administration* <www.fisheries.noaa.gov/national/marine-mammal-protection/georgia-aquarium-application-import-18-beluga-whales-denied-file-no-17324>.

198. *Georgia Aquarium, Inc v Pritzker*, 134 F Supp 3d 1374 (ND Ga 2014).

199. Bo Emerson, “Georgia Aquarium: Future of Belugas Questioned” (18 November 2015), online: *The Atlanta Journal-Constitution* <www.ajc.com/news/georgia-aquarium-future-belugas-questioned/mOVa0snqCw7BxVuFsEz2IL/>.

phase out cetacean captivity.²⁰⁰ Notably, in 2016 California passed the *Orca Protection and Safety Act*,²⁰¹ which bans breeding captive orcas and presenting orca performances for entertainment. It does, however, permit ‘educational presentations’ of orca performance displays. An educational presentation is defined as “a live, scheduled orca display in the presence of spectators that includes natural behaviors, enrichment, exercise activities, and a live narration and video content that provides science-based education to the public about orcas”.²⁰² Before this law was passed, SeaWorld (whose flagship location is in San Diego) had already announced a voluntary commitment to end its captive breeding program and phase out killer whale shows, following negative publicity and criticism in response to the *Blackfish* documentary.²⁰³

California’s example inspired a move to enact federal legislation that would phase out orca captivity throughout the US. In 2015 and then again in 2017 Representative Adam Schiff introduced the *Orca Responsibility and Care Advancement (ORCA) Act*,²⁰⁴ which would prohibit captive breeding, wild capture, and import and export of orcas, so that orca captivity would cease with the end of the current generation.²⁰⁵

200. In addition to the California law summarized here, similar bills have been introduced (but have not passed) in Washington and New York, a non-binding resolution was introduced in Hawaii, and South Carolina has banned the display of cetaceans in the state. See “Cetacean Anti-Captivity Legislation and Laws” (2018), online: *Animal Welfare Institute* <awionline.org/content/cetacean-anti-captivity-legislation>.

201. Fish and Game Code § 4502.5 (West 2016). See also summary in Kaci Hohmann, “2016 State Legislative Review” (2017) 23:2 *Animal Law* 521 at 536–537.

202. *Ibid.*, § 4502.5(d)(1) (West 2016).

203. David Kirby, “California Lawmakers Pass Bill Banning Orca Shows, Captive Breeding” (26 August 2016), online: *Takepart* <www.takepart.com/article/2016/08/26/california-lawmakers-pass-bill-banning-orca-shows-captive-breeding>.

204. US, Bill HR 1584, 115 Cong, 2017.

205. Congressman Adam Schiff, “Rep. Schiff Reintroduces ORCA Act to Phase Out Display of Captive Killer Whales” (17 March 2017), online: <schiff.house.gov/news/press-releases/rep-schiff-reintroduces-orca-act-to-phase-out-display-of-captive-killer-whales>.

D. Captivity Bans and Regulation in Other Countries

Some other nations have already taken more unequivocal steps to prohibit cetacean captivity. India's Central Zoo Authority issued a circular in 2013 announcing the government's decision not to allow dolphinariums in the country and advising state governments to reject all proposals involving "import, capture of cetacean species to establish for commercial entertainment, private or public exhibition and interaction purposes whatsoever" [*sic*].²⁰⁶ The introductory clauses of this circular assert that:

cetaceans in general are highly intelligent and sensitive, and various scientists who have researched dolphin behavior have suggested that the unusually high intelligence; as compared to other animals means that dolphin should be seen as 'non-human persons' and as such should have their own specific rights and is morally unacceptable to keep them captive for entertainment purpose [*sic*].²⁰⁷

Chile and Costa Rica banned cetacean captivity (with limited exceptions, not including public display) in the 2000s.²⁰⁸ The United Kingdom adopted very strict standards for cetacean captivity in the early 1990s; because the cost of compliance made existing dolphin exhibits commercially unviable, the last one closed in 1993.²⁰⁹ France banned captive breeding of orcas and dolphins in 2017, but the rule was overturned by the Conseil d'État, the highest administrative court, because the rule that the government brought in was stricter than the rule

206. Government of India, Ministry of Environment and Forests, Central Zoo Authority, *Circular: Policy on establishment of dolphinarium – Regarding* (17 May 2013), online (pdf): <cza.nic.in/ban%20on%20dolphanariums.pdf>.

207. *Ibid.*

208. "Marine Mammals: Guidelines and Criteria Associated with Captivity" (September 2006), online (pdf): *Whale and Dolphin Conservation Society* <www.car-spaw-rac.org/IMG/pdf/OVERVIEW_CAPTIVITY_MARINE_MAMMALS_WCR.pdf>.

209. "Whale and Dolphin Captivity in the EU – United Kingdom" (2018), online: *Whale and Dolphin Conservation Society* <uk.whales.org/whale-and-dolphin-captivity-in-eu-united-kingdom>.

it had proposed for public consultation.²¹⁰

The foregoing brief survey shows that many jurisdictions are grappling with the morality of cetacean captivity, and some have already taken more progressive and proactive steps than Canada.

VI. The Whale in Peril: Challenges Beyond Captivity

Bill S-203 and other similar existing and proposed legal reforms are really only following the changed situation on the ground (or in the water). Cetacean captivity is already on the way out, as illustrated by the dwindling numbers of captive cetaceans in Canada and the voluntary decision of one of the only two remaining captive facilities to discontinue the practice. But cetacean populations face threats much more challenging to their survival than the fact that a relatively immaterial number of them are still kept in tanks at aquariums and marine parks.

The main threats to marine mammals today include:²¹¹ global climate change, with consequences including prey reduction and ocean acidification; by-catch from fishing operations, which is estimated to cause hundreds of thousands of global marine mammal deaths each year;²¹² ship strikes, which appear to be going up as the amount of marine traffic and the size and speed of vessels increase;²¹³ environmental pollution, including contamination by persistent organic pollutants (which poses higher risks to marine mammals because they are long-lived apex predators who accumulate toxins in their bodies) as well as

210. CE, 29 January 2018, “Conseil d’État, 29 janvier 2018, Société Marineland, Société Safari Africain de Port-Saint-Père”, Nos 412210, 412256 (2018), online: <www.conseil-etat.fr/Decisions-Avis-Publications/Decisions/Selection-des-decisions-faisant-l-objet-d-une-communication-particuliere/Conseil-d-Etat-29-janvier-2018-Societe-Marineland-Societe-Safari-Africain-de-Port-Saint-Pere>. My thanks to Professor Olivier Le Bot for bringing this decision to my attention.

211. This brief summary is taken from the more detailed exposition in Jefferies, *supra* note 2 at 119–157. Jefferies proposes a new international management regime to address modern threats to marine mammal conservation.

212. *Ibid* at 125.

213. *Ibid* at 128.

anthropogenic noise pollution,²¹⁴ and whale watching, a well-intentioned form of interaction with marine wildlife which nevertheless can interfere with natural behaviours and cause disruption to reproduction, feeding, resting, and socializing.²¹⁵

In a sense, viewed in the context of these complex and pervasive threats to the survival of wild cetaceans, acting to end cetacean captivity is picking low-hanging fruit. It is not much of a sacrifice for us to stop going to look at whales in tanks or watch live orca and dolphin shows. By contrast, the changes human society would have to make to curtail the activities that threaten wild cetaceans and their ecosystem, many of which are central to our economies and ways of life, would be genuinely transformational. Dealing with climate change alone may be the most complex problem humanity faces, and marine transport of people and goods is crucial to modern globally connected economies. Protecting the long-term survival of cetacean populations would probably require human societies to give up some forms of consumption and ways of living that we value very much. The question we face now is whether that is a price we are willing to pay.

The conflict between cetacean conservation and the economic benefit of activities that detrimentally affect them was sharply illustrated in the recent ruling by the Canadian Federal Court of Appeal invalidating the federal government's approval of the proposed expansion of the Trans Mountain pipeline system from Alberta to the British Columbia coast.²¹⁶ The Trans Mountain approval was voided in part because the process involved a "critical error":²¹⁷ failing to consider increased marine tanker traffic associated with the project and its impact on the

214. *Ibid* at 131–132.

215. *Ibid* at 138.

216. *Tsilil-Waututh Nation v Canada (Attorney General)*, 2018 FCA 153. As this article went to press, the Canadian government had just re-approved the Trans Mountain pipeline expansion.

217. *Ibid* at para 5. The Court also found the approval invalid due to the government's failure to consult meaningfully with Indigenous peoples in accordance with constitutional requirements (at para 754).

endangered Southern resident orcas.²¹⁸ The National Energy Board, which approved the project, had in its own report noted the adverse impacts on the orcas' habitat from increased traffic, noise, risk of ship strikes, and the low-probability but potentially catastrophic risk of an oil spill.²¹⁹ But it had excluded the effects of increased marine traffic from its conclusion that the project would not be likely to cause significant adverse environmental effects.²²⁰ This was held by the Federal Court of Appeal to be an “unjustifiable”²²¹ error. The Trans-Mountain pipeline is a highly economically and politically significant project, and the decision that it must be put on hold — in part because of the potential adverse effects on a small, struggling group of killer whales — has had profound repercussions.²²² This episode put into stark focus the profound change of course that would be needed to achieve meaningful protection for wild cetaceans.

Just a few weeks before the Trans-Mountain decision, a tragic story drew the world's attention to the plight of the Southern resident orcas.

218. *Ibid* at paras 388–471.

219. *Ibid* at paras 423, 425, 427 (summarizing the National Energy Board's findings).

220. *Ibid* at paras 439, 468–470.

221. *Ibid* at para 468.

222. See *e.g.* Ainslie Cruikshank, David P Ball & Kieran Leavitt, “Federal Court of Appeal Quashes Trans Mountain Approval, Calling it ‘Unjustifiable Failure,’ in Win for First Nations, Environmentalists” (30 August 2018), online: *The Star Vancouver* <www.thestar.com/vancouver/2018/08/30/federal-court-of-appeal-calls-trans-mountain-approval-unjustified-failure-in-major-win-for-first-nations-environmentalists.html> (noting that the decision “will send ripple effects beyond British Columbia and Alberta, potentially forcing Trudeau's Liberal government to rethink its entire approach to pipelines, resource development, and reconciliation”); John Paul Tasker, “After Federal Court Quashes Trans Mountain, Rachel Notley Pulls Out of National Climate Plan” (30 August 2018), online: *CBC News* <www.cbc.ca/news/politics/trans-mountain-federal-court-appeals-1.4804495> (reporting that following the “bombshell” decision Alberta's Premier Rachel Notley announced her province's withdrawal from Canada's national climate plan).

A female from J Pod — the same kinship group that Moby Doll was taken from decades ago — gave birth to an emaciated calf who died only minutes after birth. The mother, known as J-50 or Tahlequah, carried her dead calf at the surface for 17 days, the longest documented such period, and was eventually helped by other members of the pod who took turns supporting the calf's body.²²³ This moving display of behaviour — strikingly reminiscent of the efforts of Moby Doll's family to save that young whale when he was harpooned and shot back in 1964 — is also unignorably similar to manifestations of grief and family feeling in human beings. Tahlequah's apparent mourning ritual symbolized the increasing peril to cetaceans in the damaged marine environment. The episode also highlighted the similarities between whale and human emotions and family bonds, the recognition of which has undermined human beings' confidence that we alone, of all the species that share the planet, are special because of our intelligence, feelings, communicative abilities, or other unique characteristics that mark us out as the sole bearers of rights.

VII. Conclusion: Outside the Whale

Keeping cetaceans in captivity has been justified as a way of enhancing our understanding of marine life, of bringing us delight in interacting with beautiful and charismatic animals, and of raising our environmental consciousness. But during the five decades since Moby Doll was harpooned, the knowledge we have acquired about cetaceans has increased so much that it is no longer possible for us, without willful blindness, to

223. See Susan Casey, "The Orca, Her Dead Calf and Us" (4 August 2018), online: *The New York Times* <www.nytimes.com/2018/08/04/opinion/sunday/the-orca-her-dead-calf-and-us.html>; Andrea Woo, "Off B.C. Coast, Grieving Mother Orca Risks her Own Life with Days of Devotion to Dead Calf" (1 August 2018), online: *The Globe and Mail* <www.theglobeandmail.com/canada/british-columbia/article-grieving-orca-off-bc-coast-that-wont-let-go-of-dead-calf-raises/>; Laura Geggel, "Orca Mother, Who Pushed Her Dead Calf for 1,000 Miles and 17 Days, Moves On" (13 August 2018), online: *Livescience* <www.livescience.com/63318-orca-mother-stops-pushing-dead-calf.html>.

ignore what it means for them: health problems, shortened life spans, and loss of the social connections, rich communications and extensive ranges that are the hallmarks of their life in the wild. The movement for anti-captivity legal reform comes from thinking beyond our own self-interest and facing sometimes uncomfortable facts about the suffering behind the cheerful public presentation of whales and dolphins in parks and aquariums. It comes from a different perspective from the kind of complacent quietism that Orwell described as being inside the whale.

In an opinion piece published in *The New York Times* in August 2018,²²⁴ Martha Nussbaum — perhaps the leading contemporary American moral philosopher — argues that philosophical enquiry needs to move past thinking only about the meaning of human life and to grapple with the ethical implications of sharing the planet with “billions of other sentient beings”, all of whom “have their own complex ways of being whatever they are”.²²⁵ She writes: “[a]ll of our fellow animal creatures, as Aristotle observed long ago, try to stay alive and reproduce more of their kind. All of them perceive. All of them desire. And most move from place to place to get what they want and need”.²²⁶

Nussbaum refers to the work of Hal Whitehead and Luke Rendell as enriching our understanding of a philosophical question that we have hardly begun to think about: what it is to be a whale. Perhaps this is a question we can only really engage with if we can manage to think *outside* the whale of Orwell’s metaphor, or beyond the anthropocentric narcissism that Nussbaum criticizes. From such a perspective, we already know too much about what it is to be a whale to be able to justify keeping them for our use as spectacle and entertainment any more. In concluding his speech in support of Bill S-203, Senator Sinclair invoked a concept similar to Nussbaum’s ‘fellow animal creatures’, as expressed in his own Anishinaabe culture:

224. Martha Nussbaum, “What Does It Mean to Be Human? Don’t Ask” (20 August 2018), online: *The New York Times* <www.nytimes.com/2018/08/20/opinion/what-does-it-mean-to-be-human-dont-ask.html>.

225. *Ibid.*

226. *Ibid.*

[T]he Anishinaabe recognize that we are all related, not just you and I, but you and I and all life forms of creation. As living things, we are connected to each other. We depend upon one another. Everything we do has an effect on other life forms and on our world.²²⁷

We are a long way from fully changing our actions and our laws so as to reflect this kind of relationship between ourselves and other animals. Ending cetacean captivity in Canada is a step in that direction, perhaps a small one, but not insignificant.

227. Sinclair, *supra* note 12.