Great Lakes Fishery Commission
La Commission des Pêcheries des Grands Lacs

November 12, 2024

Standing Senate Committee on Fisheries and Oceans
The Senate of Canada
Ottawa, Ontario
Canada, K1A 0A4
Attention: Sara Gajic, Clerk

Dear Ms. Gajic,

We have been following the Committee's work as it relates to the study on the Great Lakes Fishery Commission (Commission) and we thank you, and all Committee Members, for the diligence and interest demonstrated throughout the study process. We are pleased to provide whatever additional information and documentation needed to ensure the Committee can conclude its important study. While we have found the testimony to be broadly interesting and informative, we are puzzled with the October 22nd, 2024, testimony offered by representatives of the Department of Fisheries, Oceans and the Canadian Coast Guard (DFO). Specifically, there were several comments placed on the public record during DFO's testimony that conflict with our understanding of the same matters. As such, we offer the Committee this counter/correction to the official record for the consideration of Senators.

During his testimony, Niall O'Dea, Senior Assistant Deputy Minister, Strategic Policy, Fisheries and Oceans Canada stated:

> "In the Great Lakes, the department [DFO] has the responsibility to manage the impacts on fish and their habitat through the habitat protection provisions of the Fisheries Act, the implementation of the Aquatic Invasive Species Regulations, administering the Species at Risk Act, managing the Asian Carp Program, and most relevant to our discussion today, the delivery of the Canadian portion of the Great Lakes Fishery Commission's sea lamprey control program."

While we are not qualified to provide comment on the legislative authority used by DFO to manage their domestic responsibilities for the implementation of the Aquatic Invasive Species Regulations, administering the *Species at Risk Act*, and managing the Asian Carp Program, the Commission is pleased to offer feedback on the authority by which the sea lamprey control program in the Great Lakes is conducted: DFO carries out certain elements of the sea lamprey control program as a contractor for the Commission rather than under an authority granted to the Minister by the *Fisheries Act*.

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According to Section 4 of the *Department of Fisheries and Oceans Act*:

(1) The powers, duties and functions of the Minister extend to and include all matters over which Parliament has jurisdiction, **not by law assigned to any other department, board or agency of the Government of Canada**, relating to

a) sea coast and inland fisheries;
b) fishing and recreational harbours;
c) hydrography and marine sciences; and
d) the coordination of the policies and programs of the Government of Canada respecting oceans. [Emphasis added]

This provision makes it clear that the Minister's powers, duties, and functions do not extend to matters assigned by law to any other department, board, or agency. With the above in mind, please note that Article I, Article IV(d), and Article V(b) of the *Convention on Great Lakes Fisheries between the United States of America and Canada* (the Convention) provide the authority and responsibility for sea lamprey control in the Great Lakes, and in all tributaries within the Basin, to the Great Lakes Fishery Commission. In fact, Article X of the Convention expressly states that the various jurisdictions involved in the Convention cannot pass laws or regulations that preclude the Commission from carrying out the Commission's duties. This may seem like a distinction without a difference, but it speaks to the heart of the matter at hand. In the days before the Convention, as stated during the testimony of the Commission's Executive Secretary and the Director of Policy and Legislative Affairs, the various sub-national groups worked independently and often at cross purposes. This federal overreach, characterized by a failure to consult and coordinate, permitted a Great Lakes crisis to emerge that threatened the fisheries, and the entire Great Lakes ecosystem. The Convention sought to remedy this by ending this era of divided governance by drawing clear lines of authority and responsibility for critical tasks, such as sea lamprey control. If DFO is claiming to undertake the sea lamprey control program by virtue of its own legislative authority, it would necessarily undermine the binational role of the Commission, threaten a return to the era of divided governance, and return us to the difficulties the Commission encountered for decades before the welcomed action by the Prime Minister to move our file to Global Affairs Canada (GAC). DFO may resist the notion that the *Fisheries Act* is not the authority under which sea lamprey control is done, but the law speaks for itself: the authority for sea lamprey control flows from the Convention, not the *Fisheries Act*. Any effort to distort or minimize this reality would represent a foundational threat to the progress made on binational sea lamprey control over the past 70 years and continuing to the present.

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In the same vein, in response to a question from Senator Colin Deacon, asking:

> "But there is an agreement up front between DFO and GLFC for the provision of certain services in return for payment?",

Mr. O'Dea replied:

> "**No.** We see that in the case of the U.S., where the U.S. Fish and Wildlife Service does have a contractual relationship with the GLFC. It's how the U.S. appropriation system works differently, the way that their arrangement with the U.S. Fish and Wildlife Service operates differently. In the Canadian context, for many decades, the difference has been that the DFO delivers sea lamprey control on behalf of the GLFC and retains an agreed portion of its appropriation for that purpose and flows the rest of that funding to the GLFC, and where that agreed amount of appropriation in a given year is underspent, the balance is flowed as well to the GLFC." [Emphasis added]

Contrary to Mr. O'Dea's assertion, there is indeed an up-front agreement between DFO and the Commission for the provision of certain services in return for payment. That memorandum of agreement (MOA) is attached. Consistent with all Commission business, the Commission views this MOA as a formal contract, as the document sets out the work to be done and the amount of payment required for the services described. We are confused by DFO's apparent assertion that this is not the case, even while section 2(h) of a separate memorandum of understanding (MOU, attached) that was signed by DFO and the Commission in 2023 formally acknowledges that one purpose of the MOU is to note the "amount that will be expended by the Department (DFO) for a specific purpose on account of services **contracted** by the Commission." [Emphasis added].

It is also worth noting that Mr. Richard Goodyear, Assistant Deputy Minister and Chief Financial Officer, Fisheries and Oceans Canada, seemed to understand that the MOA is a contract/agreement. In his reply to a question from Senator Colin Deacon, Mr. Goodyear stated,

> "The way it works, Senator, is every year there is a discussion and work plan that's created. Based on that work plan, there's a determination of how much sea lamprey control will cost. That's a negotiated amount with the Great Lakes Fishery Commission."

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Mr. Goodyear is clearly aware that there is a contract in place; we are unclear why Mr. O'Dea would claim otherwise. Our intent herein is to provide clarification to the Committee on these matters but also to assure the Committee that the Commission operates under strict financial rules, which require binding contracts for nearly all services rendered, big or small.

We are further puzzled by the claim that the DFO/Commission relationship in Canada is structurally different than the structure and function between the U.S. Fish and Wildlife Service (FWS) and the Commission, as asserted by Mr. O'Dea. In fact, these relationships are fundamentally the same, as the authority by which the relationships are premised is the Convention itself, without distinction by country. The Commission's relationship with DFO is not special or even distinct from the relationship between the Commission and the FWS, and claims to the contrary are erroneous.

The unfounded claim of DFO's exceptionality also appears to be rooted in Mr. O'Dea's comments regarding Article VI of the Convention. Mr. O'Dea implied that Article VI required the Commission to use DFO for sea lamprey control purposes, but this is inaccurate, as the article does not require—only encourages—action, and even then, the article is not specific to any agency, entity, or level of government. Article VI is clear when it says that the Commission shall,

> "...in so far as feasible, make use of the official agencies of the Contracting parties and of their Provinces or States and may make use of private or other public organizations, including international organizations, or of any person."

Article VI clearly indicates that the Commission is urged to use existing resources (when it makes sense to do so), but it is not bound to do so. Moreover, Article VI states that the Commission may use existing resources from a broad range of sources, public or private. The provision does not convey any special status on DFO, or any entity, as a provider of sea lamprey control services to the Commission. The Commission's ability to select its sea lamprey control agents is a matter of public record. For example, in the minutes of the first organizational meeting of the Commission, held April 23-26, 1956, the minutes read,

> "The United Sates Department of the Interior, Fish and Wildlife Service **was selected** to carry out the [sea lamprey] control program in the United States and the Department of Fisheries in Canada." [Emphasis added.]

From this historical reference, it is again clear that the way the Commission interacts with DFO on sea lamprey control is consistent with how the Commission interacts with the US Fish and Wildlife Service.

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In his testimony, Mr. Goodyear referenced the funding formula rooted in the treaty. Mr. Goodyear stated,

> "Senator, the formula is 61% and 39%. Of that, once the budget is negotiated, it determines how much is Canada's share, how much is the U.S. share."

Please note that the correct funding formula is as follows:

- 31% of sea lamprey control costs are to be paid by Canada;
- 69% of sea lamprey control costs are to be paid by the United States; and
- All other costs (science, coordination etc.) are to be shared equally.

In addition to correcting the formula details, it is critical to note that the Commission's Convention mandate contains much more than sea lamprey control. As per the testimony provided by Dr. Muir, Dr. Dettmers, and Dr. Siefkes on October 24, 2024, in addition to sea lamprey control, the Commission is tasked with a science mandate and a cross-border collaboration mandate to "establish and maintain working arrangements". These three primary functions each provide significant support to the other, and without any one element, the overall success of the Commission's programs is certain to fail.

DFO's ongoing failure to recognize the full scope of the Convention was illustrated quite starkly during the hearing, when neither Mr. Goodyear nor Mr. O'Dea hardly recognized any other Commission function beyond sea lamprey control or discussed funding beyond the 69/31 split. That historical failure to recognize the Commission's scope was a primary factor in the U.S. Section's 2022 walkout referenced during our testimony. While during their testimony, Mr. Goodyear and Mr. O'Dea primarily referenced the sea lamprey control mandate, we felt it prudent to underscore the other items, and the funding Canada provides for the undertaking of these items.

Also, on the matter of Canada's adherence to the funding formula, Mr. Goodyear stated,

> "Over a number of years, we did fall short. There were also a number of years where we overfunded somewhat, not as often as we underfunded over the 20-year period. There were several years where we exceeded the requirement of the treaty."

We are unable to find an occasion when Canada overcontributed to the Commission based on the established formula. We would be happy to provide a detailed breakdown of the annual allocations received from Canada for past years should that be helpful to the

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Committee. Moreover, as an indication of the long-standing nature of Canada's under contributions, we have attached a February 23, 1998, letter from Members of the U.S. Congress in which they appeal to the Canadian Ambassador in Washington to increase Canada's funding level to the Commission to satisfy the nation's obligation under the treaty. While we are immensely pleased that the current Government of Canada has addressed the serious and long-standing funding shortfall, we cannot permit the challenges of the past to be understated or forgotten, as we would never want to return to the inoperable state of relations experienced by the Commission in recent years.

On the matter of funding, Mr. Goodyear testified,

> "Every year, there is a review of all of our operational requirements, whether it be conservation and protection, the Canadian Coast Guard, since the Canadian Coast Guard has been part of the department, across the full gamut of our operations. We look at available funding. We have privilege funding where we feel the operational requirements are the most important and pressing. Resources are allocated. In some cases, tough decisions are made. Not everything gets the full suite of funding it requires. In those years, I doubt it would have been just GLFC that didn't receive the funding the equation required as a part of the Convention. There probably would have been other aspects of the department affected as well. These decisions are made every year."

This may well be a true statement from Mr. Goodyear's perspective, but we must underscore that the sea lamprey control program is not a Canadian domestic program. The program is a Convention-based, annual contractual obligation of the two Parties. It seems hard to imagine that successive governments over so many years would have simply fallen short of the promises made on such a critical file. We understand from Global Affairs and other international legal experts that it is typical for financial commitments articulated in conventions and treaties to be protected. Any notion that Canada was unable to deliver full funding to an international organization for reasons of domestic austerity for such an extended period would seem to be at odds with this typical practice.

In response to a question from Senator Aucoin, relating to the possible conflict-of-interest that a DFO Commissioner (or Alternate Commissioner) would face in the event a DFO official would serve as a Commissioner (or Alternate Commissioner), Mr. O'Dea stated in French,

> "No, we do not think that will be the case. Even with the Commission's arguments, the fact of holding the role of trust and being a Commissioner, they saw a conflict-of-interest challenge. Now that the trust exists elsewhere, we do not think that

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there is still a risk or a perceived risk of conflict of interest in having a commissioner from Fisheries and Oceans."

As per the attached legal opinion, and as formally found in the 11th Report of the House of Commons Standing Committee on Fisheries and Oceans, the Commission continues to assert that a DFO official would be in a potential conflict-of-interest while serving as both a commissioner and as a representative of the sea lamprey control service delivery agent. The Commission is hopeful that the Senate Committee will concur with this view and seek to address this matter in the recommendations of the report associated with this study.

Thank you for permitting us to provide this clarification. Please do not hesitate to contact the Commission should you have any questions, or if you require additional information or details.

We look forward to reading the Committee's report once it is finalized.

Sincerely,

Hon. Ethan Baker
Chair

Earl Provost
Chair, Canadian Section

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