

Nuu-chah-nulth Fishing Rights Decision Upheld by Appeal Court



The recent decision once again confirms Nuuchah-nulth fishing rights for a variety of species.

Nuu-chah-nulth Nations were jubilant on July 2 when the BC Court of Appeal upheld its ruling in the *Ahousaht et al v. Canada* court case for a second time. The decision, released five months after the appeal hearing took place in Vancouver, confirmed what Nuuchah-nulth Nations have known all along: that we have an aboriginal right to fish and sell fish commercially.

“The judgement essentially says that the Appeal Court got it right the first time, and [the trial judge] got it right the first time, and there’s no need to change their minds at all,” said Matthew

Kirchner, legal counsel for the five Nuuchah-nulth Nations involved in the case.

Last fall the Supreme Court of Canada (SCC) rejected Canada’s request for leave to appeal the case to the country’s highest court. The SCC sent the case back to the B.C. Court of Appeal to be reconsidered in light of the recent SCC

aboriginal rights decision of *Lax Kw’alaams vs. Canada*, in which the SCC set out the test for aboriginal rights analysis in civil claims. In *Lax Kw’alaams*, the trial judge found that apart from eulachon grease, the Lax Kw’alaams people did not trade in fish on an economic scale. In *Ahousaht*, the trial judge found that large-scale trade in a diversity of fish was a defining feature of Nuuchah-nulth culture.

During the appeal hearing, lawyers for Nuuchah-nulth Nations argued that this key difference set the Nuuchah-nulth case apart from the *Lax Kw’alaams* case. They

also argued that the 2009 decision of the trial judge and the original 2011 decision of the Court of Appeal in *Ahousaht* properly followed the tests set out by the Supreme Court in *Lax Kw’alaams*, *Van der Peet*, and other leading decisions.

On reconsideration, the three-judge panel agreed.

“I do not know what more she could have done to demonstrate that she appreciated the requirements ordered by the Supreme Court of Canada in *Van der Peet* and reaffirmed in *Lax Kw’alaams*,” wrote Justice Hall for the majority, about the trial judge Madame Justice Garson. “Having reconsidered the reasons of the trial judge in light of the reasons of the Supreme Court of Canada in *Lax Kw’alaams*, I do not consider that any different result from the decision of the majority of this Court in 2011 is appropriate.”

The decision represents the third time the B.C. Courts have recognized Nuuchah-nulth aboriginal fishing rights. It also comes after 3½ years of difficult negotiations between the five nations involved in the case (*Ahousaht*, *Ehattesaht/Chinehkint*, *Hesquiaht*, *Mowachaht/Muchalaht*, and *Tla-o-qui-aht*) and the Department of Fisheries and Oceans. Despite direction from the trial judge to negotiate the details of a rights-based fishery within two years, Canada has been reluctant to engage in the negotiations in a meaningful way. The new decision provides further impetus to set negotiations and reconciliation on track.

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—Clifford Atleo, President, Nuuchah-nulth Tribal Council

“We are pleased that the B.C. Court of Appeal has again confirmed the rights of Nuuchah-nulth Nations to earn a living from the sea resources in our territories,” exclaimed Clifford Atleo Sr., President of the Nuuchah-nulth Tribal Council. “We expect the Government of Canada, through DFO, to now come to the negotiating table in a much more substantial way to work with the Nuuchah-nulth to implement these decisions, as the Courts have instructed Canada.”



On July 2, the BC Court of Appeal reconfirmed that five Nuuchah-nulth First Nations (*Ahousaht*, *Ehattesaht/Chinehkint*, *Hesquiaht*, *Mowachaht/Muchalaht*, and *Tla-o-qui-aht*) have aboriginal rights to harvest and sell all species of fish.

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NTC President Clifford Atleo addresses supporters of Nuuchah-nulth fishing rights at the Vancouver Law Courts.