

## Reconciling Aboriginal Fishing Rights in the Public Interest



The Nuu-chah-nulth fishing rights case recognized an aboriginal right to harvest multiple species.

On May 20, 2014, Dr. James Anaya made his final presentation as United Nations Special Rapporteur to the Permanent Forum on Indigenous Issues at its annual session in New York. His presentation included a recap of his recent report on Canada's treatment of indigenous people, originally published May 12.

"The numerous initiatives that have been taken at the federal and provincial/territorial levels to address the problems faced by indigenous peoples have been insufficient," he said.

"The well-being gap between aboriginal and non-aboriginal people in Canada has not narrowed over the last several years, treaty and aboriginal claims remain persistently unresolved ... and overall there appear to be high levels of distrust among indigenous peoples toward government at both the federal and provincial levels."

Appointed by the UN Human Rights Council in 2008, Dr. Anaya visited Canada in October 2013 to examine the human rights situation of Canada's indigenous peoples, including considering ways to overcome obstacles to the full and effective protection of human rights and fundamental freedoms.

NTC President Debra Foxcroft, Ahousaht Ha'wilth

Keith Atleo, and Hesquiaht elder Simon Lucas presented to Anaya about Nuu-chah-nulth aboriginal fishing rights during his hearings in Vancouver. They wanted to draw attention to Canada's unwillingness to implement the 2009 Court decision recognizing Nuu-chah-nulth aboriginal rights to fish and sell fish. Lisa Glowacki, lawyer with Ratcliff and Company, attended with the Nuu-chah-nulth delegation.

"The Nuu-chah-nulth case is unique because it's the only broad, multi-species aboriginal right to fish commercially in the country. I suspect that most of what Dr. Anaya heard was based on treaty or claimed rights. In terms of actual

modern litigation and recognition of rights, the Nuu-chah-nulth case does stand out," Glowacki says.

In his May 12 report, Anaya specifically mentions the Nuu-chah-nulth fishing rights case, its huge legal costs and long negotiation period as one example of Canada's adversarial approach to First Nations. "The Nuu-chah-nulth Nations' litigation over a commercial aboriginal right to fish has taken 12 years, including three years of trial and successive appeals. In the meantime, the Nuu-chah-nulth have been permitted to access very little of the fishery," he wrote.

For Glowacki and Nuu-chah-nulth Nations, this mention has great significance: "We have specific mention in his report and it comes out of what is an overarching theme: Canada is taking an adversarial approach, despite there being a constitutional framework that should allow for recognition of rights."

That adversarial approach includes appealing the fishing rights decision (also known as *Ahousaht et al vs. Canada*) to the Supreme Court level. It also includes narrowly defining the right, when it is

acknowledged at all. "There are five First Nations involved in the Nuu-chah-nulth court case and many species," Glowacki says. "There is a significant question around what will satisfy the right, but Canada is taking a very limited approach. Anaya notes that, generally, they take the most restrictive approach possible."

A recent ruling from the Federal Court over Nuu-chah-nulth opposition to a 2014 commercial herring fishery on the west coast of Vancouver Island echoed this sentiment. In that case, the judge needed to consider the balance of convenience and the public interest. Says Glowacki, "Justice Mandamin agreed that there is public interest in reconciling aboriginal

rights. That was one of the things that led him to grant the injunction."

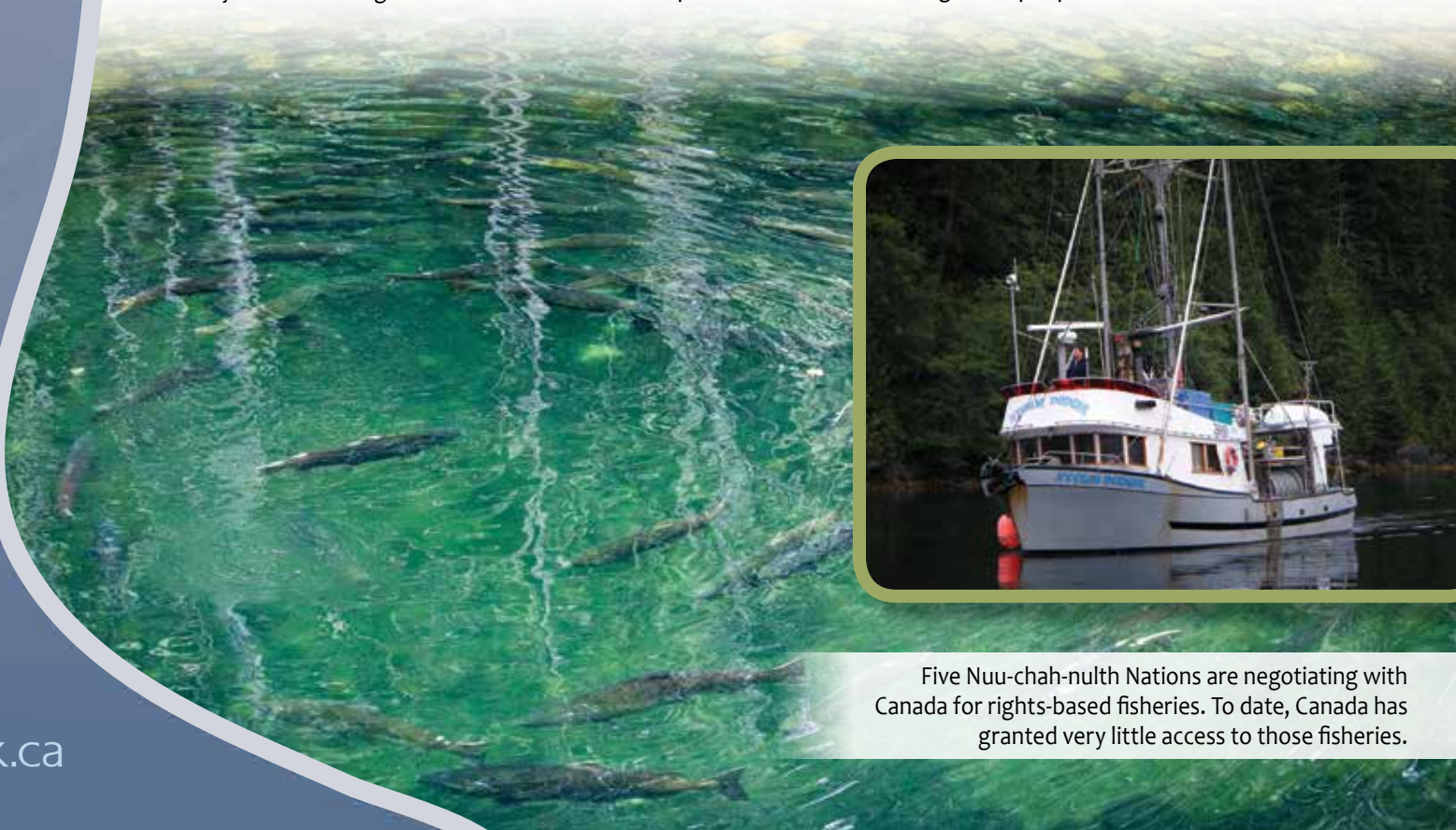
In the final pages of his report, Anaya summarized his recommendations for Canada, saying that, "Concerted measures should be adopted to deal with the outstanding problems that have impeded progress with the treaty negotiation and claims processes. Moreover...the Government should take a less adversarial, position-based approach in which it typically seeks the most restrictive interpretation of aboriginal and treaty rights possible. In this regard, the Government should instead acknowledge that the public interest is not opposed to, but rather includes, aboriginal concerns."

Nuu-chah-nulth Nations hope Canada will heed Dr. Anaya's recommendations.

To read the full report, visit <http://unsr.jamesanaya.org/country-reports/the-situation-of-indigenous-peoples-in-canada>

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—Dr. James Anaya



Five Nuu-chah-nulth Nations are negotiating with Canada for rights-based fisheries. To date, Canada has granted very little access to those fisheries.

Uu-a-thluk  
P.O. Box 1383  
Port Alberni, B.C.  
V9Y 7M2

Ph: 250.724.5757  
Fax: 250.724.2172  
info@uuathluk.ca

[www.uuathluk.ca](http://www.uuathluk.ca)