FIRST NATIONS SUMMIT

NEWS RELEASE

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FIRST NATIONS SUMMIT PLEASED BC COURT OF APPEAL DECISION FINDS ABORIGINAL FISHERIES STRATEGY IS NOT "RACE BASED"

Coast Salish Territory (West Vancouver) -- The First Nations Summit is pleased with today's 5-0 BC Court of Appeal decision in *R v. Kapp* where the Court has stated that the federal Aboriginal Fisheries Strategy is **not** a race based fishery.

"We are extremely pleased that the 5 Justices from the BC Court of Appeal who heard this case have unanimously agreed that the Aboriginal Pilot Sales Program and the Aboriginal Communal Licences did not constitute a "race based fishery" as contended by the appellants", said Grand Chief Edward John, a member of the First Nations Summit Political Executive.

"The Court clearly recognized in today's decision that the Pilot Sales Program under the Aboriginal Communal Fisheries Licences Regulations (ACFLR) is nothing more than a "method of allocation" administered by the Department of Fisheries and Oceans (DFO). The Court in effect recognized that First Nations' constitutionally protected rights to the fishery were being legally administered under the ACFLR", added Chief John.

In the Reasons for Judgment released today Mr. Justice Low stated;

> *"The simple answer to the appellants' contention is that the Musqueam-Burrard-Tsawwassen (MBT) communal licence did not create a separate fishery at all. The MBT licence was only one of the methods of allocation of the resource. The fishery was the entire stock of fish migrating to and up the Fraser River annually. Individual or group allocations of the available stock (after limitations for conservation purposes) were part of the management of the fishery. Each allocation did not create a separate fishery."*

"It is now time for First Nations to move forward and work with the DFO to implement the recommendations contained within the First Nations Panel Report on Fisheries", added Chief John.

In 2004 a panel of Aboriginal fisheries experts appointed by the First Nations Summit and the BC Aboriginal Fisheries Commission issued a far reaching and hard hitting report entitled "Our place at the table: First Nations in the BC Fishery". The report contains 7 recommendations including the call for an overhaul of the BC's fishery and immediate recognition of Aboriginal fishing and fisheries management rights. It further recommends an immediate moratorium on further introduction of Individual Fishing Quotas (IFQs) in the west coast fishery unless and until the legitimate Aboriginal share of all fisheries is addressed.

Background

In the summer of 1998 a number of commercial fishermen conducted a protest fishery. On July 28, 2003, Judge Kitchen of the Provincial Court of British Columbia entered a judicial stay of proceedings for all accused charged in the matter of *Regina vs. John Michael Kapp et. al.* The accused were commercial fishermen who had been fishing in order to protest the pilot sales program of the Department of Fisheries and Oceans (DFO). The pilot sales program allows

certain First Nations to sell all, or part of the fish they catch pursuant to their communal fishing licences. Judge Kitchen found that the pilot sales program was unconstitutional as it violated the Charter of Rights and Freedoms. He found that the equality rights of commercial fishermen had been violated, as they were not treated the same as the aboriginal fishermen fishing pursuant to the pilot sales program. Within twenty-four hours of Judge Kitchen's decision DFO cancelled all aboriginal communal licences issued pursuant to the Pilot Sales Program.

The Crown appealed Judge Kitchen's decision and several First Nations intervened in the appeal to argue that the pilot sales program was not unconstitutional. Chief Justice Brenner of the BC Supreme Court heard the appeal and issued his decision on Monday July 12, 2004. The Chief Justice has allowed the appeal and found that the pilot sales program and the aboriginal communal licences which allow the sale of fish caught do not violate the constitution or the equality rights of commercial fishermen. In giving his decision, the Chief Justice said that aboriginal people are disadvantaged in Canada and have been subject to historical inequality and prejudice. The Aboriginal Fishing Strategy of DFO (which included the pilot sales program) has provided an economic opportunity to First Nations. The Chief Justice further said that the pilot sales program did not result in denial or demeaning of the commercial fishermen. No commercial openings were displaced because of the pilot sales program. Hence, the Chief Justice found there was no breach of the *Charter* equality provisions. The appeal judge later sentenced the ten convicted accused. He suspended sentence for six months without conditions and he imposed a fine of $100 with respect to each of them."

The commercial fishermen appealed the decision of the BC Supreme Court to the BC Court of Appeals, and raised non-Chart constitutional issues concerning the creation of exclusive "race-based" fisheries that were not authorized by Parliamentary legislation or, if so authorized, were ultra vires the federal government. The appellants also argued that they were entitled to a stay of proceedings directed in the trial court because of the breach of their rights under s. 15(1) of the Charter. The BC Court of Appeals dismissed the appeal on June 8, 2006, all five judges agreeing that there is no merit to either the non-Charter constitutional issues argument, or the 15(1) Charter argument.

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The First Nations Summit speaks on behalf of First Nations involved in the treaty negotiation process in British Columbia. Background information on the Summit may be found at www.fns.bc.ca.

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