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September 8, 2008

SENT VIA EMAIL TO: [uprsubmissions@ohchr.org](mailto:uprsubmissions@ohchr.org)

United Nations Office of the High Commission on Human Rights

RE: We Wai Kai Nation – UPR submission – Canada – September 2008

1. The following is respectfully submitted for consideration and inclusion by the Office of the High Commission on Human Rights (OHCHR) in its summary of stakeholder information as part of the Human Rights Council's Universal Periodic Review (UPR) of the fulfillment of Canada's human rights obligations and commitments.

I. Executive Summary

2. For nearly 20 years the We Wai Kai Nation (also known as the Cape Mudge Band) was involved in litigation made necessary by the Government of Canada's poor record keeping and lack of due care in respect of management of reserve lands. The We Wai Kai Nation is eager to put this chapter behind them so that they can continue to develop their community, and to exercise their Aboriginal rights to culture and self-determination.

3. Canada, however, in breach of both its domestic and international commitments, has acted in bad faith towards the Band. Canada has continually rejected an appropriate reconciliation of this issue that would respect the dignity of the We Wai Kai Nation and uphold the Honour of the Crown.

4. Having exhausted its domestic remedies, the We Wai Kai Nation has turned to the international community in order to air its grievances about Canada's failure to respect and seek reconciliation with an indigenous nation. No summary of Canada's conduct in fulfilling its obligations and commitments can be complete without consideration of this case – in which Canada has violated its commitment to seek a resolution with the We Wai Kai Nation.

5. The We Wai Kai Nation seeks a resolution to this conflict by traditional means – though a Big House ceremony – and through compensation by Canada for the costs of this protracted dispute. Only then will the We Wai Kai Nation be on the path to enjoy the fundamental freedoms guaranteed by international law and convention.

## II. Factual Background

6. Canada and the We Wai Kai Nation were in Court for 18 years in a case involving the ownership of two Indian Reserves on Vancouver Island, British Columbia. Canada's documents, for over a century, have indicated that both the Reserves were originally allotted to the We Wai Kai Nation but that one had been given over, without compensation, to another First Nation. The We Wai Kai Nation's case was based on the Canada's own historical documents.

7. Canada conceded, early in the litigation process, that both Reserves had been allotted to the We Wai Kai Nation. Ultimately, however, Canada changed its litigation strategy and argued that a century's worth of Crown documentation was incorrect and that the Reserves had actually been allotted to a broader tribal group and later subdivided between the two Bands. The Trial Judge accepted Canada's argument. The We Wai Kai Nation was unable to dislodge the Trial Judge's finding at either the Federal Court of Appeal or the Supreme Court of Canada.

8. Shortly after the Supreme Court of Canada issued its decision, the Department of Justice disclosed several documents indicating that Justice Binnie, who had written the unanimous Supreme Court of Canada decision, had been involved in this very litigation when he was a lawyer employed by Canada. After disclosing these documents, the Department of Justice applied to the Supreme Court of Canada for directions. Both of the Bands applied to the Court to have the earlier judgment vacated and a new hearing ordered.

9. Lawyers for Canada and the two Bands held discussions to resolve issues between the parties. Lawyers for the two Bands suggested that Canada should waive its claim to costs, that Canada should reimburse the litigation costs of the two Bands, and that all other issues should be put to rest at a traditional Big House ceremony. Lawyers for Canada obtained instructions from what they described as "the highest level" or "the most senior people in government". Those instructions were that they were not to address any of the matters raised prior to the Justice Binnie issue being concluded by the Court. Canada's lawyers advised that they had "equally strong instructions" from "the highest level" that after the Court had ruled, the government was prepared to sit down and explore possibilities for resolution of the issues identified.

## III. Attempts at Reconciliation

10. The Supreme Court of Canada found no reasonable apprehension of bias and denied the motion for a re-hearing. Since then, the We Wai Kai Nation has tried, on numerous occasions, to engage the government in the reconciliation discussions promised by the "highest level" of the Government of Canada. The Department of Indian Affairs refused to meet with the We Wai Kai Nation, insisting that these talks must be filtered through Canada's lawyers.

11. The refusal by the Department to meet directly with the representatives of the We Wai Kai Nation reflects continued unwillingness on the Department's part to accept even a modest level of responsibility for the litigation created by the Canada's own faulty records. Throughout the process that followed Canada remained completely intransigent; Canada was unwilling to offer any level of compensation for the We Wai Kai Nation's litigation costs. It refused to seriously consider any of the arguments, positions and suggestions put forth by the We Wai Kai

Nation. The dialogue was a one-way street with detailed We Wai Kai Nation submissions receiving no serious consideration and response from Canada. The commitment made at the "highest level" of the Government of Canada to the We Wai Kai Nation has not been honoured.

12. Ultimately, Canada did retreat from its position that the We Wai Kai Nation should pay nearly a million dollars to the Crown for the Crown's litigation costs. A far lower number was agreed upon. Canada, however, simply refused to negotiate the other issues: the We Wai Kai Nation's litigation costs and the need for a reconciliation ceremony.

#### IV. Impacts of Canada's conduct on the We Wai Kai Nation

13. The We Wai Kai Nation, forced into litigation to defend its home reserve, spent millions of dollars on the litigation. Ultimately, the We Wai Kai Nation did successfully defend its home reserve: a defence that would not have been necessary had Canada maintained proper records. The cost of the litigation, however, has been immense, as it set back the Band nearly 20 years in its attempt to reach economic self sufficiency, and to provide basic needs to its community.

14. Canada's conduct also imposed a psychological cost on the We Wai Kai Nation, a community already marked by mistrust for Canada because of the legacy of residential schools, Canada's violations of fiduciary duty, and the failure to protect and support its indigenous peoples. Canada's failure to uphold its commitment further damaged the relationship with the We Wai Kai community. Worse, the denial by Canada of an opportunity to reconcile through traditional means is an affront to the dignity of our Aboriginal Nation.

#### V. Canada's Conduct Violates the Principle and Spirit of International Law

15. On June 29, 2006 by way of resolution 2006/2, the Human Rights Council adopted the *United Nations Declaration on the Rights of Indigenous Peoples*. Canada's last minute intransigence towards that Declaration in attempting to stall its adoption, despite years of negotiation, indicates a general lack of respect for the human rights of Indigenous peoples both internationally and domestically.

16. Any summary of Canada's human rights record must be cognizant of the lack of respect that Canada has shown to its most vulnerable population. If Canada is allowed to continue its current course, then the international community will be sending a strong message that the rights contained in the Declaration are hollow when dealing with the conduct of a Council member nation.

17. Specifically, the We Wai Kai Nation asserts that Canada's conduct constitutes a breach of the following sections of the Declaration:

##### Article 1

*Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.*

Article 21

1. *Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.*
2. *Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.*

Article 39

*Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.*

Article 40

*Indigenous peoples have the right to have access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.*

18. Further, Canada has been a signatory to the International Covenant on Civil and Political Rights since August 19, 1976. The We Wai Kai Nation asserts that Canada's conduct threatens our rights as protected by Article 1 of that Covenant:

Article 1

1. *All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*
2. *All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.*

19. Further to this, Canada's failure to approach the reconciliation discussion in good faith displays a lack of respect for the Band's traditional and preferred method of reconciling issues and healing. The We Wai Kai Nation's proposal to reconcile this period of strained relations and commence an era of mutual respect and good will with a Big House ceremony was rebuffed by Canada. This decision by Canada fails to acknowledge the importance of traditional healing methods, and serves to increase tensions, rather than heal relationships.

20. In short, Canada's approach to this issue has not only violated the We Wai Kai Nation's right to have access to mutually acceptable dispute resolution methods but also demonstrates a

lack of sensitivity to the Band and a failure to admit any culpability for the impasse that has occurred.

## VI. Conclusion

21. In these short submissions, we have attempted to describe the tremendous costs borne by the We Wai Kai Nation, financially, socially, and psychologically, by Canada's failure to abide by its word and its failure to respect the traditions of our people.

22. The UPR presents an opportunity and a challenge for the Human Rights Council. If the UPR seeks an "improvement of human rights on the ground", it must analyze a Nation's commitment based on both larger principles and site-specific conduct. Canada's reaction to the Declaration on Human Rights indicates its lack of commitment to respecting and supporting its indigenous population. Its conduct in this instance demonstrates that its actions on the ground are similarly disrespectful and unsupportive. Canada had an opportunity to help build up our community, rather than further beat it down. It chose the latter, thereby denying our rights,

23. We ask the OHCHR and the Human Rights Council to address these long standing and pressing threats to the human rights of the We Wai Kai Nation. We urge that pressure be applied on Canada to comply with international law standards and to answer to this body regarding its conduct in this matter. At stake in this issue is no less than the honour of the Crown, Canada's international reputation and the ability of the international community to ensure that the rights of Indigenous Peoples are respected in accordance with the principles and spirit of international law.

Sincerely,



Ralph Dick  
Chief, We Wai Kai Nation