THE ALEXANDER FIRST NATION POSITION PAPER CONCERNING THE CROWN IN RIGHT OF CANADA'S DUTY TO CONSULT AND ACCOCCOMDATE:

A. Purpose

This paper is set out to confirm Alexander's expectations on all matters relative to the Crown in Right Canada's legal duty to consult and accommodate. Furthermore, this paper is intended as a reminder to Canada that a legal duty to consult and has already been confirmed by the Courts which subsequently must be adhered to when legislative, policy and regulatory development or renewal has the potential to impact on Treaty No. 6, on the Alexander First Nation, its people, its existing reserve lands, and its traditional territory, among other equally important matters.

As a starting point, Alexander's submits that when Canada is required to carry out their legal duty to consult and accommodate, they must at all times premise their actions so as to achieve 'meaningful consultation' as set out in the *Mikisew* decision, to respect and recognize the *Alexander First Nation Position Respecting Treaty No. 6* and the *Unalterable Principles of Treaty No. 6* as indicated herein.

B. Introduction

In June of 1970, the First Nations from Treaty No. 6, Treaty No. 7 and Treaty No. 8 in Alberta, including the Alexander First Nation, submitted Citizens Plus as their viable alternative to the 1969 White Paper. The Preamble in the Citizens Plus paper is worthy of reference here as it relates to the matter of federal consultation. It states as follows:

"To us who are Treaty Indians there is nothing more important than our Treaties, our lands and the well being of our future generation. We have studied carefully the contents of the Government white Paper on Indians and we have concluded that it offers despair instead of hope. Under the guise of land ownership, the government has devised a scheme whereby within a generation or shortly after the proposed Indian Lands Act expires our people would be left with no land and consequently the future generations would be condemned to the despair and ugly spectre of urban poverty in ghettos.

In Alberta, we told the Federal Minister of Indian Affairs that we do not wish to discuss his White Paper with him until we reach a position where we can bring forth viable alternatives because we know that his paper is wrong and that it will harm our people. We refused to meet him on his White Paper because we have been stung and hurt by his concept of consultation.

In his White Paper, the Minister of Indian Affairs said, "this review was a response of things said by Indian people at the consultation meetings which began a year ago and culminated in a meeting in Ottawa in April." Yet, what Indians asked for land ownership that would result in Provincial taxation of our reserves? What Indians asked that the Canadian Constitution be changed to remove any reference to Indians or Indian Lands? What Indians asked that Treaties be brought to an end? What group of Indians asked that aboriginal rights not be recognized? What group of Indians asked for a Commissioner whose purview would exclude half of the Indian population in Canada? The answer is no Treaty Indians asked for any of these things and yet through his concept of "consultation", the Minister said that his White Paper was in response to things said by Indians.

We felt that with this concept of consultation held by the Minister and his department, that if we met with them to discuss the contents of his White Paper without being fully prepared, that even if just talked about the weather, he would turn around and tell Parliament and the Canadian public that we accepted his White Paper."

The deception of past governments must be protected against, especially in light of the attempts directly and/or indirectly to implement the 1969 White Paper. As Citizens Plus states, we were stung and hurt once before, it will never happen again. Especially since the courts have set out the parameters for which Canada must consult with First Nations on any and all legislative, policy and regulatory development or renewal.

In consideration of Citizens Plus, this position paper is presented on behalf of the Alexander Elders and Members as a means to set out their understandings on the nature of Treaty No. 6 and the fundamental principles set out to protect this sacred Treaty. The Crown in Right of Canada, again, is reminded and expected to continuously refer to the *Alexander Position Paper Respecting Treaty No. 6* and the *Unalterable Principles of Treaty No. 6* as the guide and direction in the ongoing development and implementation of their 'Aboriginal Consultation and Accommodation – Interim Guidelines for Federal Officials to Fulfill the Legal Duty to Consult'.

C. The Alexander First Nation Position Respecting Treaty No. 6

The following position paper was prepared and approved at a gathering of the Alexander Elders in November of 1991 and is intended to be a reminder to the Crown in Right of Canada of Alexander's origins and our position on Treaty No. 6.

The Alexander First Nation is situated approximately 40 miles northwest of the City of Edmonton. The First Nation membership of Alexander consists of Cree and Stoney descendency with the larger percentage of the population speaking the Cree language. The Alexander First Nation Chief and Council are selected according to the custom of the First Nation that governs approximately 1800 members. Alexander has a proud heritage of progress, and a strong sense of Treaty protection.

The Alexander First Nation entered into Treaty No. 6 in August of 1877 at Fort Edmonton. By entering into Treaty No. 6, Alexander agreed to peacefully coexist with the Queen's subjects, and the understanding that our people would be taken care of, forever.

We are Original Peoples Plus because of Treaty No. 6. We are the original Nations of People that existed at the time of Treaty No. 6, pursuing our traditional way of life. Alexander is an evolving Nation that was promised the means by which to advance our social and economic needs, and to continue to exist as an inherent Treaty First Nation.

Alexander views the protection of Treaty No. 6 as extremely critical, in light of the efforts of the Queens' representatives to the contrary. Treaty No. 6 is a solemn promise between Treaty First Nations and the Queen to live side by side for *"as long as the sun shines, the grass grows, and the rivers flow"*. Treaty No. 6 is the recognition of the inherent First Nation's exclusive authority and jurisdiction over our lands and our people. Treaty No. 6 guarantees our traditional way of life including the promises of full social and economic advantages

guaranteed by the Queen.

Alexander is in a situation of confirming that the promises made by the Queen to our Grandfathers have not been kept, insofar as there is no recognition of the inherent status of First Nations to develop and enforce laws on their territory. The Queen has unilaterally forced her own laws of interpretation on our Treaty No. 6, even while we maintain those views consistent with our Grandfathers understandings as our supreme testimony and understanding.

Our Grandfathers understood Treaty No. 6 in their way and passed this understanding down through successive generations. The Queen must always make every effort to understand the unwritten meanings and interpretations of these laws. Solutions to this ambiguity do not evolve out of established systems, but rather in the teachings of our Elders and their understandings of Treaty.

We now see the efforts by the Queen's representatives on the constitutional protection of "treaty rights', the *Royal Proclamation of 1763*, Federal/Provincial agreements, the *Indian Act*, and such other issues impacting on our Treaty No. 6, only to find their interpretations as being the supreme law over any other. These are not our laws; we must not be subjected to or expected to continually adhere to these foreign concepts.

We continually find ourselves in a position of arguing for, and justifying our Treaty No. 6 under these laws. As a result, we find these laws to be a complete denial of the recognition of our inherent rights and existence as a Treaty First Nation.

Never before, as is now the case, have we had to justify our Grandfathers authority to enter into Treaty No. 6. The Great Spirit created our existence, our nationhood, our land, and our laws. The Great Spirit gave our Grandfathers all the authorities necessary to enter into Treaty No. 6. The Queen did not give them the authority. She merely recognized this authority. The source of Indian title is in the First Nations occupation of land since time immemorial, and not the Crown.

Throughout our existence as a Treaty First Nation, we have experienced the Queen's legal system to deny the recognition of our capacity as a Treaty First Nation to be empowered by the Great Spirit. Yet, this is exactly the way in which non-First Nation laws derive their authority. The *Canadian Charter of Rights and Freedoms* in the *Constitution Act of 1982*, a non-First Nations declaration, opens with the statement:

> *"Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:"*

Our Treaty First Nation is founded upon the basis of those very same principles, which recognize the supremacy of the Great Spirit and the laws given to us. Despite repeated attempts by the Queens representatives to destroy our Treaty First Nations, we have managed to survive. While the laws of another Nation have been imposed upon us, we never gave up our laws. The Alexander First Nation maintains their existence by continuing to emphasize that the Treaty guarantees our inherency for the future.

To begin to acknowledge the wisdom of our Grandfathers, we must construe Treaty No. 6 in

the way our Grandfathers understood it by taking us beyond the strict technical meaning of the written word. There must be acceptance that Treaty No. 6 is sacred and is the supreme law of Alexander First Nation. Section 52 (1) of the *Constitution Act 1982*, reads:

> *"the Constitution of Canada is the supreme law of Canada, and any laws that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."*

The Queen made this law supreme by writing it into words. On the other hand, we confirm the supremacy of our laws by the sacredness of the pipe. Because the sacred pipe was present at the Treaty negotiations, only the truth was to be spoken by those present. The sacredness of our pipe is the great seal, which ensured our commitment in Treaty negotiations. Any promises made or words spoken while in the presence of the pipe must be respected and honored. It is for this reason that the oral testimony of our respected Elders is our law and our interpretation.

Our Grandfathers saw that our territory was being settled and developed by other Nations. They saw the need to guarantee our survival as an inherent Nation to protect our territory and our means of securing a livelihood. Our Grandfathers sought to retain control of our vast territory, and our future existence as an inherent First Nation. Our Grandfathers do not view Treaty No. 6 as a deed of sale, but rather as an alliance of peace and co-existence between the Alexander First Nation and the Queen, that is the foundation this country was built upon. Treaty No. 6 was premised on the understanding that the Queen would have laws for their territory, while we maintained our laws on our territory.

Our Grandfathers understood the protection of our territory as a guarantee under Treaty No. 6 by maintaining jurisdiction over this area. In the wisdom of our respected Elders, and as a responsibility to the Great Spirit, the protection of the lands is crucial. Our lands are a gift from the Great Spirit. Our Grandfathers did not have the intention, nor perception, of selling land and breaking it into small pieces. It is the common legacy of all, that the true owners of the lands are the unborn children. Our laws are founded in nature as a means to bridge the spiritual and physical worlds.

In discussions of Treaty No. 6 by the Queens representatives, much focus and attention has to be paid to the rights that accrue to an individual Treaty First Nation member. It is our understanding that the focus of our Grandfathers was on the protection and survival of the collective First Nation and our territory. However, many of the protections now found in the other Nations laws and legal processes focus on the protection of individual Rights.

Even the wording of the *Constitution Act 1982*, Section 35 (1) which reads that *"The existing aboriginal and treaty rights of the aboriginal people of Canada are hereby recognized and affirmed."* could be construed to mean that individual rights are protected rather than the collective rights of the Alexander First Nation. It is not surprising, therefore, that the legal systems of the other Nation would protect the individual rights over the collective rights of the Alexander First Nation. We perceive that this system does not see the world the same way that the Alexander First Nation does wherein the collective is always more than the individual. Nevertheless, individual Treaty Rights must be protected within the larger context of Alexander's inherent jurisdictions.

To reiterate our position, Alexander entered into Treaty No. 6 with Her Majesty the QUEEN

and not Canada. It is our position therefore that the Treaty is an alliance between two Nations and that Her Majesty the Queen has an obligation to ensure that the terms set out in Treaty No. 6 are honoured. Her Majesty the Queen may choose to have Canada act as her agent in the honouring of the promises made through Treaty No. 6, but Her Majesty the Queen must set up a forum to ensure that this happens.

It is Alexander's position that the Treaty No. 6 already recognizes that we were, and continue to be, a First Nation with our own form of government. Treaty No. 6 also outlines the way in which we are to interact with the Queen's government, and very clearly. It is now purely a matter to recognize these contents of the Treaty and protecting them. Treaty No. 6 places us in a different position than other aboriginal people. Under Section 35 of the *Constitution Act 1982*, Indian, Inuit and Metis are grouped together. Treaty No. 6 already established our constitutional relationship with the Queen. This may not be the case with other aboriginal people.

It is also Alexander's position that, as a Treaty First Nation, we must have our own separate discussions with Canada on any matter of constitutional reform. Section 35 (1) of the *Constitution Act 1982* commits governments to the principle that aboriginal peoples will participate in discussions relating to amendments of the provisions of the Constitution of Canada which relate directly to them. As the Alexander Treaty First Nation, we demand that governments discuss these issues directly with our Treaty First Nation alone. We are not only now beginning discussions as other aboriginal people may be; we are reaffirming and understanding the constitutional relationship that was set out in Treaty No. 6 over one hundred years ago.

However, we are not talking about provisions of the Constitution which governments believe relate to us. We are talking about the restructuring of the Constitution to reflect the agreements already made in our Treaty No. 6. The existing Treaty rights recognized and affirmed under Section 35 of the *Constitution Act 1982* do not even begin to address the nature and status of Treaty No. 6. It is Alexander's position that Treaty No. 6, as a whole, is not protected.

Specifically, Canada cannot give us the right to govern ourselves. We have always had this right. Treaty No. 6 between the Alexander First Nation and the Queen was set up so that our traditional ways would not be disturbed. This included our traditional governments and laws. It is purely a matter of what was agreed to by Treaty No. 6 being reaffirmed and recognized. The constitutional recognition of the right to our own government, in the way it is currently understood by governments only undermines Treaty No. 6. No government can give us this right to govern ourselves.

As a result of the way in which the amending formula is currently set up, government can amend at their pleasure. This would place Alexander, including all other Treaty No. 6 First Nations, in a place beneath government when in reality Treaty No. 6 made us equal Nations. Even more damaging, the Courts of Canada would interpret our right to govern ourselves. These courts are not our courts. These people do not understand our governments and our laws. As the Alexander First Nation, we state strongly that in Treaty No. 6, two nations agreed to understand one another. One Nation cannot unilaterally interpret for another Nation. This is what the courts do. This is not acceptable to us and we state that this is a violation of the Treaty No. 6 promise not to interfere.

Clearly, then, we cannot be subject to the *Canadian Charter of Rights and Freedoms* in federal and provincial laws of general application. This is interference. The Queen made promises in Treaty No. 6 to protect our traditional way of life, to protect our land, and to ensure our social and economic advancement. Only laws with these objectives can apply to us and only when there is agreement on the nature of these laws by Alexander. This is clearly in Treaty No. 6. Alexander states again that we have our own laws and governments that emphasize different principles and values than the Canadian government. Specifically, the *Canadian Charter of Rights and Freedoms* protects individual rights. In our way, collective rights take priority over individual rights.

A constitution sets out the rules by which peoples govern themselves. A constitution also sets out the values of the people. As the Alexander First Nation, we state that our values are different than those of the Canadian Constitution. Treaty No. 6 recognizes our values. Treaty No. 6 also recognizes the values of Her Majesty the Queen. Treaty No. 6 was an agreement of two nations to understand one another and to peacefully co-exist. Alexander cannot agree to any constitutional amendment that reflects anything less than this. To do this would be to breach our Treaty No. 6.

The Treaty is sacred. Such a breach would offend something much greater than man. It is in this spirit that we must now reaffirm discussions on Treaty No. 6 that was conducted a long time ago.

D. Alexander's Unalterable Principles of Treaty No. 6

Alexander firmly believes:

1. That the Creator created our people and gave us our land, our culture, and our traditional way of life. No man or government can grant or take away what the Creator has given.

2. The historic fact that our forefathers had the authority to enter into Treaty No. 6 with the Imperial Crown of Great Britain.

3. That Treaty No. 6 recognizes our Indigenous peoples living in harmony with the Laws of Mother Earth.

4. That Treaty No. 6 is a sacred trust, which cannot be broken. Any change to the sacred Treaty relationship would need our consent.

5. That Treaty No. 6 is to exist for "as long as the sun shines, the grass grows, and the rivers flow". Treaty No. 6 has no end, it is forever. The Treaty is not static, but it evolves over time.

6. That Treaty No. 6 guarantees to all of our people the protection of our traditional way of life, the protection of our lands and resources, and the assurance of our social and economic advancement.

7. That Treaty No. 6 sets out the special relationship between, and the obligations of, the two Nations who entered into Treaty No. 6.

8. That Treaty No. 6 is an alliance between two Nations to live side by side in peace and coexistence. Treaty No. 6 recognizes the values of Alexander and the values of the Canada. Treaty No. 6 is an agreement between two Nations to understand one another and not to interfere.

9. That the Imperial Crown assumed, by Treaty No. 6, binding obligations to preserve and protect Alexander as a Treaty No. 6 First Nation. These sacred trust obligations were placed in the hands of the Canadian State unilaterally by the Imperial Crown of Great Britain.

10. That Treaty No. 6 recognizes the continuing treaty making powers of Alexander.

E. <u>The Alexander View of Canada's Constitution</u>

Alexander Position	**Government Perception**
1. Bilateral Treaty Process arises from Treaty No. 6.	1. Bilateral Process set out in Constitution.
2. Treaty No. 6 confirms inherent right to determine own laws and government.	2. Negotiated inherent right to self-government within constitution [delegated jurisdiction and authority]
3. Any tribunals must be comprised of Treaty people and the federal government.	3. Canadian courts interpret inherent right to self-government.
4. Collective rights are paramount to any individual rights.	4. Charter of Rights applies [individual over collective rights].
5. All powers remain with Treaty First Nations [including Alexander].	5. More power will be granted to national organizations.
6. Treaty No. 6 sets out relationship with Canadian government.	6. Within Canadian confederation [Senate and House of Commons participation].
7. 91(24) originally sets out to protect the trust relationship with the Canadian government.	7. 91(24) to include all aboriginal people [including Metis rights].
8. Alexander as a Treaty First Nation is distinct.	8. Treaty First Nations would be grouped with all aboriginal people such as Metis, Inuit & Non-status [**melting pot approach**].
9. Treaty No. 6 retains international status	9. Domestication of Treaty.
10. Treaty acknowledges sharing of land and resources [depth of the plow]	10. Territorial integrity compromised [provinces claim ownership].

11. Financing [funding] arises from Treaty No. 6 commitments.	11. Financing will be negotiated through a process set out through constitutional direction [AFN as a 3rd Order of Government].

F. Proposed Developmental Infringement/Impacts

The Crown in Right of Canada's legal duty to consult must be paramount over the Crown in Right of Alberta's legal to duty to consult. The notion that federal law is subordinate to provincial law is now seen as clearly being a myth in its application. The recent Supreme Court of Canada decisions have quashed this notion and have set out that the Crown in Right of Canada now has the ultimate legal duty to consult on matters of resource, legislative and policy development infringing and impacting the on First Nations people, lands, and traditional territory.

This decision is supported by Alexander to the extent that Treaty No. 6 confirmed our Elders understandings of sharing of land and resources 'to the depth of the plough' and 'our inherent jurisdiction and authority to determine our laws and governments'. It must therefore be understood and recognized that:

1. Resource Development activity must be implemented in a manner as set out in the Alexander Position Paper on Consultation, Accommodation and Resource Revenue Sharing submitted to Premier Ed Stelmach on May 20, 2009;

2. Alexander must be consulted on all new legislation or legislative change that may impact on existing rights, title and interests in respect of the Alexander First Nation Position Respecting Treaty No. 6;

3. Alexander must be consulted on all new policy or policy change that may impact existing rights, title and interests;

4. Alexander fully and unequivocally sanctions the *United Nations Declaration on the Rights of Indigenous Peoples* which recognizes free, prior and informed consent on matters of development activity on our reserve lands and traditional territory, and in the development of legislative or administrative measures affecting our people and our laws and governments.

G. The Crown in Right of Canada Duty to Consult & Accommodate

As a result of various court decisions on aboriginal rights and title, the Government of Canada decided that they would be forced to comply with certain court directives and initiated an ad hoc approach on the duty to consult through their Aboriginal Consultation and Accommodation Interim Guidelines for Federal Officials to Fulfill the Legal Duty to Consult.

In these interim guidelines, the Government of Canada suggests that they have always consulted with Canadians on matters of interest and concern to them. They further suggest that they usually consult with First Nations (aboriginal) people for legal reasons to address

statutory, contractual and common law obligations. While Canada, in some respects, acknowledges the duty to consult, they have taken the interpretations of the Supreme Court of Canada decisions on *Delgamuukw, Haida, Taku River,* and *Mikisew Cree* and have set out their interim guidelines to be merely the trigger for when consultation happens, who is to be consulted, and how they are to be consulted.

While these interim guidelines are Canada's gauge on the duty to consult, it does not necessarily advocate those legal principles set out in Delgamuukw, Haida, Taku River, and Mikisew Cree for establishing the mechanism to ensure meaningful consultation on all federal government initiatives impacting Treaty and Treaty Rights.

Certain standards set by the courts relative to consultation, which Alexander understands to be:

1. The fiduciary duty of the Crown in Right of Canada means First Nations interests have priority over other interests.

2. The legal duty to consult and accommodate applies to resource development matters as well as for legislative, policy and regulatory development or renewal.

3. The Crown in Right of Canada must discharge their duty to consult and cannot delegate these duties.

4. The legal duty to consult and accommodate are separate and distinct processes and must be developed and implemented as such.

5. Based on the level of infringement and/or impact and the nature of a First Nations interest, there is consultation continuum form simple notification to full consent that must be inclusive.

6. Little direction has been provided on the nature of the legal duty to accommodate that must be implemented when meaningful consultation occurs and built by First Nation representation.

7. The ultimate objective of the legal duty to consult and accommodate is for reconciliation of the Crown sovereignty with pre-existing First Nations aboriginal title and rights.

8. Federal engagement must not be viewed as achieving the Crown in Right of Canada's legal duty to consult.

There are clearly a number of other factors to be considered in any consultation and accommodation legislation, policy or regulations contemplated by Canada, which Alexander concludes must be:

1. Both the Crown in Right of Canada and the Crown in Right of Alberta have a legal duty to consult when infringements and/or impacts on aboriginal title and rights and Treaty & Treaty Rights are created by legislation, policy, regulations, and resource development.

2. The Crown in Right of Canada cannot delegate their fiduciary duty to consult to any interest groups and/or third parties.

3. The Crown in Right of Canada's consultation must be meaningful and a genuine attempt must be made to address the First Nations concerns about the impact of an action on their rights, and must not have a predetermined outcome.

4. The Crown in Right of Canada must acknowledge that accommodation will reconcile the sovereignty of the Crown with the pre-existing rights of First Nations.

The government of Alberta recently introduced their consultation policy, and by virtue of the policy document, they finally realized that for a number of years they too had an obligation to consult with First Nations where aboriginal or treaty rights will or may be impacted by the actions of government and/or industry. Some of the basic principles of consultation established by the courts are vaguely recognized in Alberta's consultation policy as being minimum legal requirements.

It was found by legal opinion that one of the fundamental shortcomings of the consultation policy is that while Alberta sets out the 'minimum legal requirements' as established by the courts, which may include providing notice to the First Nations, they do not recognize or particularize the more rigid legal requirements and principles for consultation established by the courts. This same perception holds true for the Government of Canada's approach on the legal duty to consult as set out in their interim guidelines.

Understandably, each level of government has a different view of the legal principles that the courts have established to guide meaningful consultation between First Nations and the Crown. There must be a concerted effort by First Nations, the Crown in Right of Canada, and the Crown in Right of Alberta to now synchronize their respective consultation and accommodation law, policy and regulations.

Alexander requires that any consultation model utilized must be flexible and accommodate varying circumstances. The question to determine in each case will be the degree to which conduct contemplated by the Crown and/or industry might adversely impact Treaty and the Treaty Rights of Alexander so as to trigger the duty to consult (*Mikisew Cree*). The scope of the duty to consult must be proportionate to the seriousness of the potentially adverse impact on Treaty and the Treaty Rights of Alexander (*Haida Nation)*.

At the low end of the spectrum, it appears that the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice (*Haida Nation*). This is only a minimum. This may not be happening in most cases even though it is the minimum requirement. In retrospect, Canada has indicated on various legislative and/or policy development or renewal that they are engaging First Nations to secure support for change. Again, this is not even a legal duty to consult. Where the potential infringement or impact is of high significance to Alexander, and the risk of damage is high, deep consultation aimed at finding a satisfactory solution, is required.

The consultation required at this stage must include the opportunity to make submissions for consideration, formal participation in the decision making process, and the provision of written reasons by government to show that Alexander's concerns were considered and to reveal that impact they had on the decision. This list is neither exhaustive, nor mandatory for every case (*Haida Nation*). Between these two extremes lie other situations. Every case must be approached individually (*Haida Nation*).

Although the courts have indicated that First Nations do not have a veto over individual resource developments, the Supreme Court of Canada has indicated that in some cases, for example, on very serious issues, the full consent of a First Nation to a particular action may be required *(Delgamuukw).* While the Prime Minister, the Minister of Indian and Northern Affairs Canada, and the Premier of Alberta are prone to refer to the former principle [no

veto], there is little or no recognition given to the latter principle [full consent].

Canada's interim guidelines fall well short of their treatment of the accommodation aspect of the obligation on the Crown. While there is clearly an obligation on the Crown in Right of Canada to consult, there is also an obligation on the same Crown to accommodate the concerns of Alexander in appropriate circumstances. The courts have addressed various ways that the concerns of First Nations can be addressed when accommodation is required or appropriate.

In the case of Accommodation, the interim guidelines remain guarded as to when accommodation may be triggered. In the absence of a 'meaningful consultation' component, Canada will undoubtedly take the restricted approach on the principles of accommodation as set out in their Interim Guidelines to be that where accommodation may be required. Canada is prepared "to point to a number of situations where some form of accommodation has been implemented." It is unclear what this would mean.

The perceived criteria for accommodation as set out in these interim guidelines suggests that "major or minor change to the project plan, may involve lands transactions or exchanges; it could extend to compensation packages or impact-benefit agreements". While the interim guidelines established the criteria, First Nations criteria must also be included and recognized.

Unfortunately, the mention of the duty to accommodate in the interim guidelines was inadequate. The difficulty is that even if Canada concludes that accommodation is required, the interim guidelines do not give them adequate options to consider ways of meeting this constitutional obligation. This may have been the case because they were intended to reflect the "minimum legal requirements" established by the courts. Nevertheless, from a practical point of view, Government of Canada officials must be provided with a comprehensive list of the types of accommodations that are available, and direction to use them where Treaty and Treaty Rights may or will be affected by the actions of government. The approach of government officials who are accustomed to dealing with developments "the old way," where First Nations were not recognized as having an interest in the development of a project, must be changed and continually monitored.

Practical steps can be implemented to accommodate Alexander's interests and ambitions. The purpose of accommodation is to seek compromise in an attempt to harmonize conflicting interests and move further down the path of reconciliation. Balance and compromise are inherent in the notion of reconciliation. Canada's Interim Guidelines is virtually silent on the matter of accommodation, even though in many respects, it is more important than the obligation to consult.

H. Negotiation of a Consultation and Accommodation Process

Finally, and of the utmost importance at this stage are the legal principles that refer to the nature of the consultation process itself. As the courts have indicated, the first step in the consultation process is to discuss the process itself. To engage in an ad hoc series of meetings and correspondence fails to accomplish the first step in a consultation process. The Crown is

obligated to design a process for consultation that meets the needs for discharge of this duty before operational decisions are made (*Huu-Ay-Aht First Nation*).

Accordingly, and most importantly, Canada must realize that the consultation and accommodation processes to be used by Canada and Alexander as resource, legislative or policy development proceeds must be negotiated with Alexander. It will not be appropriate or acceptable for Canada to unilaterally decide on these developments. Negotiation of a consultation and accommodation process is of paramount importance to Alexander. Failure by Canada to engage in such negotiations, and a unilateral determination by Canada on how to meet its constitutional obligations to Alexander, will be viewed as a failure of Canada to live up to the standards that have been set by the courts for resolving these issues, and for attaining the reconciliation mandated by the Supreme Court of Canada.

I. APPLICATION OF CANADA'S DUTY TO CONSULT AND ACCOMMODATE

Alexander now requires that the Crown in Right of Canada reengage in the consultation process to synchronize those legal principles set out in the *Mikisew* decision so as to determine the full extent of the law for consultation and accommodation purposes. Furthermore, Alexander firmly believes that the relevance of the *Mikisew* decision to federal consultation is because of their understanding that the Supreme Court of Canada is the only authority that addresses the duty to consult and accommodate in the Treaty context. This case is an important benchmark because it articulates the minimum requirements of the Crown in Right of Canada's constitutional duty to consult and accommodate, including:

1. The Crown must provide notice of the proposed infringement or impacts and engage directly with the Treaty First Nation in question, at the earliest stage;

2. The Crown has a duty to disclose relevant information in its possession regarding the proposed development or decision;

3. The Crown is under an obligation to inform itself of the impact of a proposed development, decision or project on the Treaty First Nation in question;

4. The Crown must communicate its finding to the affected Treaty First Nation;

5. The Crown must, in good faith, attempt to substantially address the concerns of the Treaty First Nation;

6. The duty to consult does not give First Nation a veto, however, it is equally clear that the Crown cannot act unilaterally;

7. Administrative convenience is not an excuse for a lack of meaningful consultation;

8. The Crown must solicit and listen carefully to the expressed concerns and attempts to minimize adverse impacts on Treaty interests;

9. The concerns of the Treaty First Nations must be seriously considered by the Crown and "whenever possible, demonstrably integrated into the proposed plan of action";

These principles collectively represent the minimum standard or starting point for consultation in the Treaty context.

Alexander wants the spirit and intent of Treaty, and all rights arising out of Treaty to be

respected, recognized and implemented by the Crown in Right of Canada. Treaties are unique and *sui generis* and should always be the basis for moving forward. Furthermore, we want the legal principles on consultation and accommodation, as articulated by the highest court in Canada, to be implemented to the fullest extent of the law.