

# INDIAN CLAIMS COMMISSION

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## JAMES SMITH CREE NATION TREATY LAND ENTITLEMENT INQUIRY REPORT ON ISSUE 9 AMALGAMATION

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### PANEL

Chief Commissioner Renée Dupuis  
Commissioner Alan C. Holman

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March 2005



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## SUMMARY

### **JAMES SMITH CREE NATION TREATY LAND ENTITLEMENT INQUIRY REPORT ON ISSUE 9: AMALGAMATION Saskatchewan**

This report may be cited as Indian Claims Commission, *James Smith Cree Nation: Treaty Land Entitlement Inquiry – Report on Issue 9: Amalgamation* (Ottawa, March 2005).

*This summary is intended for research purposes only. For a complete account of the inquiry, the reader should refer to the published report.*

**Panel:** Chief Commissioner R. Dupuis (Chair), Commissioner A. Holman

Treaty 6 – Treaty Land Entitlement – Amalgamation – Mandate – Scope of Inquiry

#### **THE SPECIFIC CLAIM**

On May 10, 1999, the James Smith Cree Nation (JSCN) requested that the Indian Claims Commission (ICC) conduct an inquiry into the Minister of Indian Affairs and Northern Development's rejection of its treaty land entitlement (TLE) claim. The Commission accepted the First Nation's request for an inquiry; however, prior to the first planning conference, Canada objected to the scope of the inquiry and argued that the First Nation was advancing new issues of land quality and lands occupied prior to treaty that had not been previously considered by the Minister. After hearing from the parties on the mandate of the Commission, the ICC ruled on May 2, 2000, that it would proceed with an inquiry into all issues raised by the First Nation but would provide adequate time for Canada to prepare and respond to the issues of land quality and lands occupied prior to treaty during the course of this inquiry.

By agreement of the parties, the ICC was asked to first decide upon the issue of the JSCN's amalgamation with the Cumberland Band 100A in 1902. Concurrently, Canada was given until April 2005 to respond fully to the issues of land quality and lands occupied prior to treaty.

This report addresses the issue of the alleged 1902 amalgamation. The ICC will deliver its final report on all other issues upon the receipt of Canada's submissions and upon hearing the arguments of counsel for the parties in an oral session.

#### **BACKGROUND**

In the early 1980s, the Federation of Saskatchewan Indian Nations (FSIN) on behalf of the JSCN submitted a claim to the Minister of Indian Affairs alleging an outstanding treaty land entitlement under Treaty 6. On May 22, 1984, Canada rejected JSCN's TLE, stating that the shortfall of land at the time of survey was fulfilled as a result of the amalgamation of the James Smith Band at IR 100 and the Cumberland Band at IR 100A in 1902.

#### **ISSUE**

Was there an amalgamation of the "Peter Chapman Band" and the James Smith Band?

#### **FINDINGS**

The "owners of the Cumberland Reserve No. 100A" were the whole of the Cumberland Band who had adhered to Treaty 5 in 1876. The whole of the Band included those resident at IR 20 and at IR 100A, and not just those resident at IR 100A. Canada relied upon two signatories, who had allegedly transferred into the Cumberland Band at IR100A, to amalgamate that Band with the James Smith Cree Nation. There is no

evidence to indicate that those members who were the “owners” of IR 100A and living at IR 20 and IR 100A voted to amalgamate.

In our view, the amalgamation agreement is invalid because its two signatories could not have given a joint and undivided interest in IR 100A, since they were not the “owners of Cumberland 100A.”

**RECOMMENDATION**

None.

**REFERENCES**

In addition to the various sources noted below, ICC inquiries depend upon a base of oral and documentary research that is fully referenced in the report.

**ICC Reports Referred to**

ICC, *Cumberland House Cree Nation: IR 100A Inquiry* (Ottawa, March 2005); ICC, *James Smith Cree Nation: IR 100A Inquiry* (Ottawa, March 2005).

**Treaties referred to**

Treaty 6

**COUNSEL, PARTIES, INTERVENORS**

William Selnes for the James Smith Cree Nation; Uzma Ihsanullah, Robert Winogron for the Government of Canada; Kathleen N. Lickers to the Indian Claims Commission.

## KEY HISTORICAL NAMES CITED

**Austin, W.A.**, Dominion Land Surveyor, surveyed IR 20 in Treaty 5 territory for the Cumberland Band in 1882.

**Ballendine, Peter**, Interpreter during the negotiation of Treaty 6.

**Big Head**, see Kahtapiskowat.

**Chekoosoo**, see Ma-twa-ahs-tin-oo-we-gin.

**Chief Chakastaypasin**, signed Treaty 6 in 1876 as Chief of the Chakastaypasin Band; remained Chief until he was deposed by the Department of Indian Affairs in 1885, following the North-West Rebellion.

**Chapman, Peter**, signed Treaty 5 in 1876 as headman of the Cumberland Band; later moved to Fort à la Corne in Treaty 6 territory, along with some other Cumberland band members; regarded by the Cumberland people living at Fort à la Corne as their leader until his death in 1892.

**Christie, W.J.**, Treaty Commissioner for Treaty 6.

**Cochrane, John**, signed Treaty 5 in 1876 as Chief of the Cumberland Band; held the office of Chief from 1876 until his death in 1880.

**Constant, Bernard**, signed Treaty 6 in 1876 as headman of the James Smith Band.

**Dewdney, Edgar**, Indian Commissioner, May 1879–August 1888; Superintendent General of Indian Affairs and Minister of the Interior, September 1888–October 1892.

**Erasmus, Peter**, Interpreter during the negotiation of Treaty 6.

**Flett, Albert**, signed Treaty 5 in 1876 as headman of the Cumberland Band; Chief of the Cumberland Band in 1880–86, 1889–92, and from 1895 until his death in 1902.

**Forget, A.E.**, Assistant Indian Commissioner, August 1888–October 1895; Indian Commissioner, October 1895–October 1898.

**Hart, Milner**, Dominion Land Surveyor, performed first survey of the James Smith reserve in 1878.

**Jackes, A.J.**, Secretary to Treaty Commissioners during the negotiation of Treaty 6.

**Kahtapiskowat**, also known as Big Head, signed Treaty 6 in 1876 as headman of the Chakastaypasin Band; signed the surrender of part of IR 100A and the amalgamation agreement between the Cumberland Band 100A and the James Smith Band in 1902.

**Laird, David**, Lieutenant Governor of the North-West Territories, 1876–81; Indian Superintendent for the North-West Superintendency, 1877–78; Indian Commissioner, 1879–88 and 1898–1914.

**Macdonald, John A.**, Prime Minister, October 1878–June 1891; Superintendent General of Indian Affairs, October 1878–October 1887; Minister of the Interior, October 1878–October 1883; Acting Superintendent General of Indian Affairs, May 1888–September 1888.

**Macrae, J. Ansdell**, Indian Agent for the Carlton District in 1884.

**Ma-twa-ahs-tin-oo-we-gin**, also known as Chekoosoo, signed Treaty 6 in 1876 as headman of the James Smith Band.

**McKay, James**, Treaty Commissioner for Treaty 6.

**McKay, (Reverend) John**, Interpreter during the negotiation of Treaty 6.

**McKenzie, R.S.**, Indian Agent for the Duck Lake Agency, 1887–1900.

**McLean, Jacob**, signed Treaty 6 in 1876 as headman of the James Smith Band.

**Morris, Alexander**, Treaty Commissioner for Treaty 6 and Lieutenant Governor of the North-West Territories in 1876.

**Nelson, John C.**, Dominion Land Surveyor, surveyed IR100A near Fort à la Corne for the Cumberland Band in 1887.

**Orr, W.A.**, official in the Lands and Timber Branch, Department of Indian Affairs.

**Patrick, Lorraine**, Dominion Land Surveyor, conducted township survey adjacent to the James Smith reserve in 1883.

**Ponton, A.W.**, Dominion Land Surveyor, surveyed IR 100 for the James Smith Band and completed the survey of IR 98 for the Chakastaypasin Band in 1884.

**Rae, J.M.**, Indian Agent for the Carlton District, 1880–83, 1885 to early 1886, late 1886 to 1887.

**Russell, Alexander**, In Charge of Dominion Lands Special Surveys in the Prince Albert area in 1878.

**Sanderson, George**, Chakastaypasin band member; son of headman Kahtapiskowat (Big Head); signed the surrender of part of IR 100A and the amalgamation agreement between the Cumberland Band 100A and the James Smith Band in 1902.



**Smith, James**, signed Treaty 6 in 1876 as Chief of the James Smith Band and held the office of Chief from 1876 until his death in 1902.

**Stewart, Elihu**, Dominion Land Surveyor, surveyed IR 98 for the Chakastaypasin Band in 1878.

**Vankoughnet, Lawrence**, Deputy Superintendent General of Indian Affairs, 1874–93.

**Walker, James**, Acting Indian Agent and Inspector of the North-West Mounted Police in 1877.



## TERMINOLOGY

The terms that follow relate to the James Smith Cree Nation (JSCN) and the Cumberland House Cree Nation (CHCN) claims to Indian Reserve (IR) 100A.

**band / camp** – As presented in community evidence, these terms refer to the social organization of the Swampy Cree people, including the Cumberland Band of Treaty 5. In general, “camp” appears to refer to the places in which smaller communities would live throughout most of the year. The camps would come together into one larger “band” to receive treaty payments or for other occasions during the year. The community evidence suggests that the camps would have a leader or a spokesman, although that person’s status in relation to his counterparts in other communities is unclear. It seems that all the communities would recognize one person as “chief” of the larger “band,” although the evidence is not entirely consistent on this point.<sup>i</sup> This description reflects the community evidence regarding the understanding of these terms, rather than the legal and technical definitions.

**Big Head and followers** – The remnants of the Chakastaypasin Band who lived at IR 100A. They were paid on the Big Head band payroll from 1892 until 1896, at which time they were formally “transferred” to the Cumberland Band 100A. They were often referred to as “Big Head’s Band.”

**Chakastaypasin Band** – The people who signed Treaty 6 with Chief Chakastaypasin in 1876 and were the owners of IR 98 on the south branch of the Saskatchewan River, approximately 50 kilometres west of IR 100A. The Band was scattered following the 1885 North-West Rebellion, its members dispersed to other reserves, and the Chakastaypasin was payroll discontinued in 1889. Most Chakastaypasin members moved to Cumberland IR 100A, where they were known as either the Chakastaypasin Band or Big Head’s Band until 1896.

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<sup>i</sup> ICC Transcript, November 20, 2001 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 18b, pp. 22–23, 26–27, 31, 45, 48–49, 73–75, 81–82, James Burns); Affidavit of Pierre Settee, October 7, 2002 (ICC, Cumberland House Cree Nation IR 100A Inquiry, Exhibit 12b, pp. 1–2); Affidavit of Joseph Laliberte, October 7, 2002 (ICC, Cumberland House Cree Nation IR 100A Inquiry, Exhibit 12c, pp. 2–3).

**Cumberland Band / Cumberland Band of Indians / Cumberland Indians** – These terms are used interchangeably in departmental correspondence and reports. They may refer either to the Cumberland people living on or near IR 20 within Treaty 5 territory or to the Cumberland people living on IR 100A near Fort à la Corne within Treaty 6 territory.

**Cumberland contingent** – Another term for those members of the Cumberland Band in Treaty 5 who migrated to Fort à la Corne in the 1880s, where IR 100A was later surveyed.

**Cumberland District** – This term is used to refer either to the vicinity where the Cumberland Band of Treaty 5 reside or to the entire Pas Agency (encompassing all the Treaty 5 bands residing on the Saskatchewan River and west of Lake Winnipeg – the Cumberland, Pas, Red Earth, Shoal Lake, Moose Lake, Chemawawin, Grand Rapids Bands, and others).<sup>ii</sup>

The Hudson’s Bay Company (HBC) and the Anglican Church used the term “Cumberland District” in a broader sense, to encompass the territory stretching east from the vicinity of Fort à la Corne in central Saskatchewan to Lake Winnipeg in central Manitoba.<sup>iii</sup>

The historical record is very unclear in its use of terminology respecting the location where the Treaty 5 “Cumberland Band” lived. The terms “Cumberland District,” the “vicinity of Cumberland,” or simply “Cumberland” were used interchangeably by Department of Indian Affairs officials to refer either to the immediate area around Cumberland Island (the location of the Cumberland Band’s reserve IR 20) or to the larger territory encompassing the various communities that made up the Cumberland Band in Treaty 5.

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<sup>ii</sup> Four Arrows, “‘The Cumberland District’: Its Use and Meaning in the North West Territories,” revised January 17, 2003 (Indian Claims Commission (ICC), James Smith Cree Nation IR 100A Inquiry, Exhibit 21a, pp. 11–14).

<sup>iii</sup> Four Arrows, “‘The Cumberland District’: Its Use and Meaning in the North West Territories,” revised January 17, 2003 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 21a, pp. 4–5, 7–8); Four Arrows, “‘The Cumberland District’: Its Use and Meaning in the North West Territories, An Additional Report of Importance,” revised January 17, 2003 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 21b, pp. 2–5); ICC Transcript, November 20, 2001 (ICC, James Smith Cree Nation IR 100A Inquiry, Exhibit 18b, p. 39, James Burns).

**Cumberland House Band** – The Cumberland Band that signed Treaty 5 in 1876 and has its reserves in the vicinity of the old HBC trading post at Cumberland House became known as the Cumberland House Band in 1930. The Band later renamed itself Cumberland House Cree Nation.

**James Smith Band** – The pre-1902 James Smith Band are those people who signed Treaty 6 with Chief James Smith in August 1876. The present-day (post-1902) James Smith Band incorporates descendants of the original James Smith and Chakastaypasin Bands of Treaty 6, as well as the Cumberland Band of Treaty 5. The James Smith Band, now known as James Smith Cree Nation, resides on IR 100 and IR 100A on the Saskatchewan River.

**La Corne Bands / La Corne Reserves** – These terms are often used to refer to the reserves located at Fort à la Corne, near the forks of the Saskatchewan River (James Smith IR 100 and Cumberland IR 100A), and to the residents of those reserves. The area is also referred to as “La Corne.”

**Peter Chapman Band** – A term used by the Department of Indian Affairs from approximately 1886 to 1892 to refer to those members of the Cumberland Band of Treaty 5 residing on IR 100A. The present-day descendants of those people are attempting to re-establish themselves as an independent Band, separate from the James Smith Band, and refer to themselves as the “Peter Chapman Band.”



## PREFACE

As a panel, we have proceeded concurrently throughout the Indian Claims Commission (ICC) Inquiries into the James Smith Cree Nation: Indian Reserve (IR) 100A Claim, the Cumberland House Cree Nation: IR 100A Claim, the James Smith Cree Nation: Chakastaypasin IR 98 Claim, and the James Smith Cree Nation: Treaty Land Entitlement (TLE) Claim. Although our decision in each inquiry reflects our consideration of the specific issues raised in each claim, we have, from the first planning conference to our final deliberations, worked towards gaining the most complete understanding of all events at issue. Thus, all historical documentation, expert reports, community evidence, and legal submissions have been thoroughly considered, not in isolation but as complementary elements. Each report presents the background needed for the matters at issue, but the James Smith Cree Nation: IR 100A and Cumberland House Cree Nation: IR 100A Inquiries present the most detailed historical background.

By agreement of the parties, the single issue to be determined in this report is the question of whether there was a lawful amalgamation of the “Peter Chapman Band” and the James Smith Band. We will therefore focus our analysis on this question.

The original inquiry panel was P.E. James Prentice, Commission Co-Chair; Elijah Harper, Commissioner; and Carole Corcoran, Commissioner. By 2001, the current panel took carriage of this inquiry.

It has taken this Commission, the First Nations, and Canada’s representatives five years to conclude our process, and we would like to thank all those involved for the dedication, commitment, and hard work that they have applied.





**PART I**  
**INTRODUCTION**

The James Smith Band (today referred to as the James Smith Cree Nation, or JSCN) entered Treaty 6 on August 28, 1876. Pursuant to the terms of this treaty, the James Smith Band was entitled to a reserve equivalent to one square mile (640 acres) for each family of five, or 128 acres per person. A reserve was surveyed for the James Smith Band in July 1884, and on May 17, 1889, by Order in Council PC 1151, Indian Reserve (IR) 100 was confirmed for the James Smith Band. It consisted of 27.8 square miles, satisfying the treaty land entitlement (TLE) for 139 people.

One hundred and forty-two individuals were paid annuities with the James Smith Band on October 6, 1884; two other band members were absent at the time of that payment but returned in 1886 and were paid arrears for 1884. Given the Band's population at the time of survey – 144 people – it was still entitled to at least one more square mile of land (640 acres).

A claim to an outstanding TLE was submitted on behalf of the JSCN in the early 1980s by the Federation of Saskatchewan Indians. In a letter dated May 22, 1984, then Minister of Indian Affairs John C. Munro rejected JSCN's TLE claim, stating that the shortfall of land at the time of first survey was fulfilled as a result of the amalgamation of the James Smith and "Cumberland 100A" Bands in 1902.<sup>1</sup>

On May 10, 1999, the JSCN requested that the Indian Claims Commission (ICC) conduct an inquiry into its TLE. The Commission accepted the First Nation's request for an inquiry; however, prior to the first planning conference, Canada objected to the scope of the inquiry requested by the JSCN. Canada argued that the request for inquiry included issues it had not previously considered in rejecting this claim. Specifically, Canada argued that claims the First Nation was advancing regarding land quality and lands occupied prior to treaty were "new claims" and, for this reason, should be excluded from the Commission's inquiry. After hearing from the parties on the mandate of the Commission to inquire into these "new" aspects of the claim, the panel ruled on May 2, 2000, that it would proceed with an inquiry into all issues raised by the First Nation and, in the course of

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<sup>1</sup> John C. Munro, Minister of Indian Affairs, to Chief Angus McLean, James Smith Cree Nation Band, May 22, 1984 (ICC Exhibit 4a, p. 1).

so doing, would provide adequate time for Canada to prepare and respond to these issues during the course of this inquiry. This ruling is reproduced as Appendix A to this report.

#### MANDATE OF THE COMMISSION

The mandate of the Indian Claims Commission is set out in federal Orders in Council providing the Commissioners with the authority to conduct public inquiries into specific claims and to issue reports on “whether a claimant has a valid claim for negotiation under the [Specific Claims] Policy where the claim was already rejected by the Minister.”<sup>2</sup> This Policy, outlined in the Department of Indian Affairs and Northern Development’s 1982 booklet entitled *Outstanding Business: A Native Claims Policy – Specific Claims*, states that Canada will accept claims for negotiation where they disclose an outstanding “lawful obligation” on the part of the federal government.<sup>3</sup> The term “lawful obligation” is defined in *Outstanding Business* as follows:

The government’s policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding “lawful obligation,” i.e., an obligation derived from the law on the part of the federal government.

A lawful obligation may arise in any of the following circumstances:

- i) The non-fulfillment of a treaty or agreement between Indians and the Crown.
- ii) A breach of an obligation arising out of the *Indian Act* or other statutes pertaining to Indians and the regulations thereunder.
- iii) A breach of an obligation arising out of government administration of Indian funds or other assets.
- iv) An illegal disposition of Indian land.<sup>4</sup>

By agreement of the parties and upon delivery of the First Nations’ submission on all issues, the panel was asked to decide first upon the issue of the James Smith Band’s amalgamation with the

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<sup>2</sup> Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991.

<sup>3</sup> Department of Indian Affairs and Northern Development (DIAND), *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 20; reprinted in (1994) 1 *Indian Claims Commission Proceedings* (ICCP) 171–85 (hereafter *Outstanding Business*).

<sup>4</sup> *Outstanding Business*, 20; reprinted in (1994) 1 ICCP 179–80.

Cumberland Band.<sup>5</sup> At the same time, Canada has been given until April 2005 to respond to the additional issues of land quality and lands occupied prior to treaty.<sup>6</sup> Further, the necessity to hear from the parties in an oral session on these additional issues may depend on the panel's decision regarding amalgamation.

A chronology of the written submissions, documentary evidence, transcripts, and the balance of the record in this inquiry is set forth as Appendix C to this report.

With this report, we set out our findings and conclusion regarding the single issue of amalgamation.

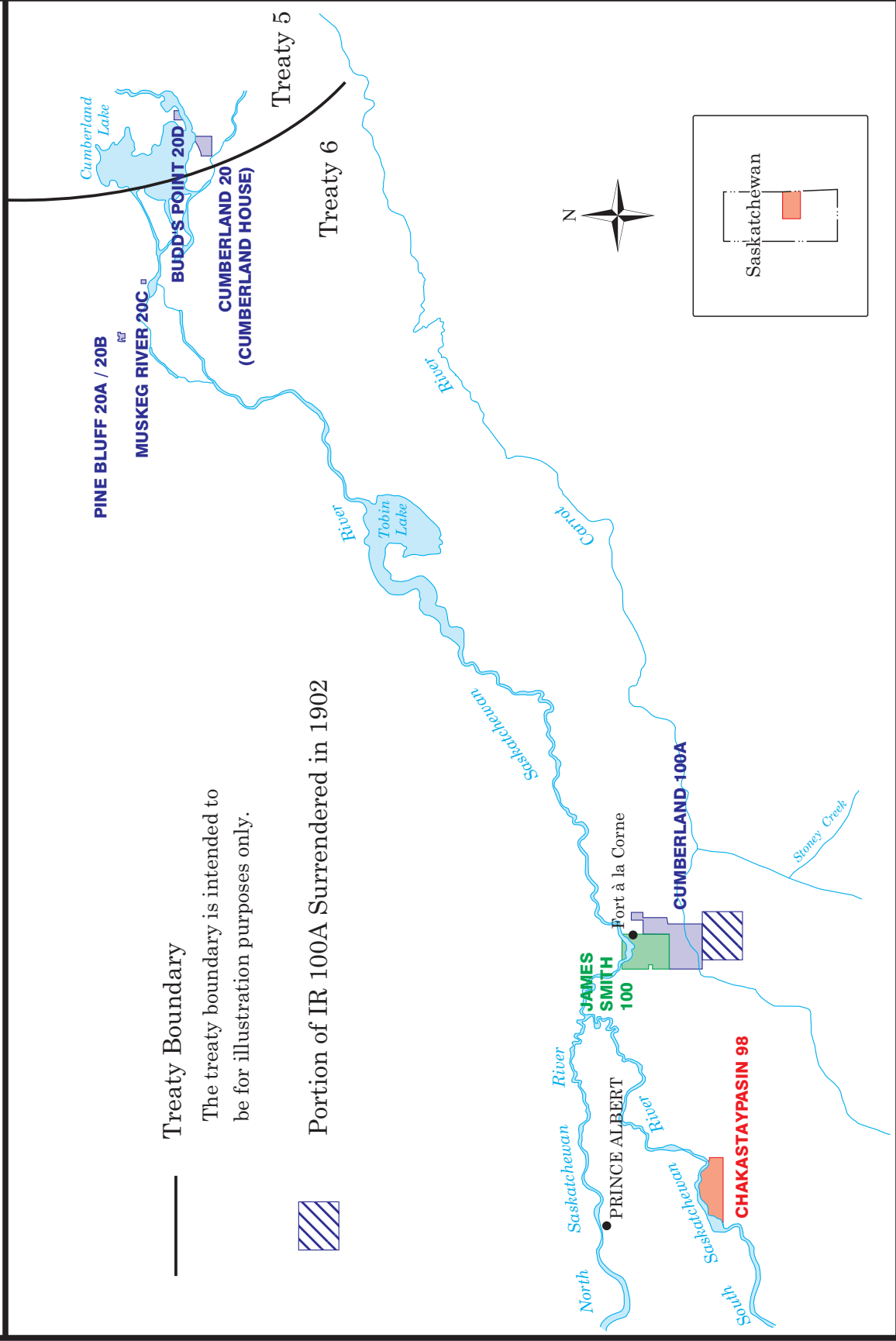
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<sup>5</sup> Denielle Boissoneau-Thunderchild, Associate Legal Counsel, to William Selnes and Robert Winogron, October 30, 2003.

<sup>6</sup> Kathleen N. Lickers, Legal Advisor to the Indian Claims Commission, to William Selnes and Robert Winogron, November 27, 2003, reproduced as Appendix B to this report.

Map 1

Claim Area Map



## **PART II**

### **HISTORICAL BACKGROUND**

#### **SURVEY OF JAMES SMITH IR 100**

##### **Before the Treaty**

The James Smith reserve straddles the Saskatchewan River, approximately 58 kilometres east of Prince Albert, Saskatchewan. On the reserve, archaeologists have found at least one arrowhead made about 8,000 years ago by some of the earliest people to occupy central Saskatchewan after the ice age. They have also located a prehistoric campsite near a spring on the reserve, and the large amounts of fire-cracked rock found there led them to conclude that it “was not a ‘normal’ camping place but a location in which sweat lodges and the accompanying ceremonial lodges were present.”<sup>7</sup>

This was an excellent location for a hunter/gatherer economy. The Saskatchewan River provided transportation, drinking water, fish, and fowl; buffalo ranged in the grasslands to the south and migrated to the more sheltered Saskatchewan River valley in the winter; elk, moose, deer, beaver, muskrat, and rabbit, as well as a variety of berries, flourished in the forests to the north of the river.<sup>8</sup> After the mid-1700s, various fur traders set up posts on or near the land that would eventually become the James Smith reserve. From 1794 to 1804, the North West Company traded from Fort St Louis on the Saskatchewan River just south of Peonan Creek, and in 1850 the Hudson’s Bay Company (HBC) established Fort à la Corne downriver. It maintained the fort at that location until 1886, when it was moved away from the river to a spot adjacent to where the James Smith reserve was surveyed.<sup>9</sup>

In the 1850s, the Anglican Church established a mission on the Saskatchewan River at Upper Nepowewin, close to the original location of Fort à la Corne. According to missionary Henry Budd, who was stationed there from 1853 to 1867, the Indians in the vicinity “lived among the buffalo,

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<sup>7</sup> David Meyer and Olga Klimko, “The James Smith Archaeological Survey,” Saskatchewan Research Council, February 1986, pp. 37, 44 (ICC Exhibit 10a, pp. 48, 55).

<sup>8</sup> ICC Transcript, October 29–30, 2002 (ICC Exhibit 5b, p. 52, Isaac Daniels); David Meyer and Olga Klimko, “The James Smith Archaeological Survey,” Saskatchewan Research Council, February 1986, p. 16 (ICC Exhibit 10a, p. 27).

<sup>9</sup> David Meyer and Olga Klimko, “The James Smith Archaeological Survey,” Saskatchewan Research Council, February 1986, figure 20, p. 60 (ICC Exhibit 10a, p. 71).

clothed themselves with their skins, and were ‘truly heathen and truly barbarian.’”<sup>10</sup> The area near the fort would have afforded a place to camp when furs were brought in to trade, and the mission became a place for the elderly and infirm to settle when they could no longer travel:

I guess the reason that a lot of these people made it home was they were elderly, they could not keep up with the hunting, fishing way of life, so they started utilizing the mission and the fort as home and a lot of the – like a lot of destitute people also started using that as a place for home.<sup>11</sup>

At the same time, non-Indians were moving into the area and turning to agriculture. In 1875, a group of “Europeans, Canadians and Half Breeds” sent a petition to federal officials, asking that some 1,500 square miles of land west and south of Fort à la Corne not be considered for use in future Indian reserves. The petitioners, some of whom had been resident there for “over 20 years,” had crops, cattle, and established homes and wanted the land kept open for agricultural settlement. For Indian reserves, they considered that the “large Tracts of land suited for the chase on the north and NE of us” were preferable.<sup>12</sup>

It is not clear how many Indians might have begun to farm, before the treaty, to supplement their traditional hunting and trapping way of life. The 1875 petition mentioned above stated that some Indians had recently built some shanties, but it does not suggest that they had begun farming:

Whereas certain Indians, who of late (within the last 2 years) seeing the advance made by settlers in this eligible part of the country, have begun to erect shanties and wish to put the settlers off said lands ...<sup>13</sup>

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<sup>10</sup> From Henry Budd’s correspondence and journals, quoted in Irene Spry’s introduction to Peter Erasmus, *Buffalo Days and Nights* (Calgary: Glenbow Institute, 1976), xix (ICC Exhibit 13d, p. 15).

<sup>11</sup> ICC Transcript, October 29–30, 2002 (ICC Exhibit 5b, p. 56, Isaac Daniels).

<sup>12</sup> Philip Turner and others to Indian Commissioner, November 1875, Library and Archives Canada (LAC), RG 15, vol. 235, file 4641, reel T-12183, as quoted in Four Arrows, “James Smith Cree Nation Treaty Band No. 100 – General History,” draft, January 25, 1995 (ICC Exhibit 11, pp. 2–3).

<sup>13</sup> Philip Turner and others to Indian Commissioner, November 1875, LAC, RG 15, vol. 235, file 4641, reel T-12183, as quoted in Four Arrows, “James Smith Cree Nation Treaty Band No. 100 – General History,” draft, January 25, 1995 (ICC Exhibit 11, pp. 2–3).

One of the petitioners, however, was Bernard Constant, identified on that document as a “Halfbreed” with a wife and six children, two head of cattle, two pigs, and ploughed land and buildings in progress.<sup>14</sup> The following year, Bernard Constant opted to take Indian status and enter Treaty 6 as a headman of the James Smith Band, and a township survey done in 1883 shows his buildings located within the reserve, in the southeast corner of section 5, township 48, range 20, west of the 2nd meridian (SE 5-48-20-W2M).<sup>15</sup>

There is no other pre-treaty reference to any other band member actually farming. When, at the ICC community session, the panel asked elder Mervin Burns if people were farming at treaty time, he answered:

I don’t think so. They had – there was a field over here not too far from here, the first area they farmed there was a small little field there, that’s what they used to point to. That’s where they first had a little field there of corn and some oats, they used to say.<sup>16</sup>

## **Treaty 6**

In August 1876, Lieutenant Governor Alexander Morris, James McKay, and W.J. Christie, acting in their capacity as Commissioners for the Crown, met with the Plains and Wood Cree and other tribes of Indians at Fort Carlton to negotiate the cession of a large tract of land in what is now central Saskatchewan and Alberta. As well as the usual report and correspondence from the Commissioners, there are two published first-hand accounts of the treaty negotiations: one is a “narrative of proceedings” written by the Commissioner’s Secretary, A.G. Jackes,<sup>17</sup> and the other is a memoir of

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<sup>14</sup> Philip Turner and others to Indian Commissioner, November 1875, LAC, RG 15, vol. 235, file 4641, reel T-12183, as quoted in Four Arrows, “James Smith Cree Nation Treaty Band No. 100 – General History,” draft, January 25, 1995, n.2 (ICC Exhibit 11, pp. 2–3).

<sup>15</sup> Lorraine Patrick, DLS, Field notes, April 2–18, 1883, Canada Lands Surveys Records (CLSR), Field book 3869, p. 32 (ICC Exhibit 8i, p. 21).

<sup>16</sup> ICC Transcript, October 29–30, 2002 (ICC Exhibit 5b, pp. 44–45, Mervin Burns).

<sup>17</sup> A.G. Jackes, “Narrative of Proceedings,” in Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (Toronto, 1880; facsim. repr., Toronto: Prospero Books, 2000), 196–244 (ICC Exhibit 13a, pp. 35–83).

the Chiefs' hired interpreter, Peter Erasmus, told some 45 years after the event.<sup>18</sup> The Erasmus account is especially important because he was at the conferences where the Chiefs discussed the terms of treaty offered to them. Some elders' interviews also shed light on what the Chiefs and their followers understood of these negotiations.

It should be noted that there were many interpreters at Fort Carlton in August 1876. One of the Commissioners, James McKay, was a Métis trader from Red River who was fluent in English and was familiar with a number of native dialects. The Commissioners had hired Peter Ballendine and the Reverend John McKay to act as interpreters, and the Chiefs had hired their own interpreter, Peter Erasmus. Erasmus was a well-educated guide, trapper, and independent trader who was fluent in five native languages – Swampy and Plains Cree, Ojibway, Blackfoot, and Stoney (Assiniboine). He had been educated at the Anglican mission at The Pas and St John's School in Red River, and could speak, read, and write English fluently; he also had experience translating religious texts into Cree.<sup>19</sup> Erasmus did not consider the two government interpreters to be up to the job. The Reverend Mr McKay, he wrote, knew only Swampy Cree and Saulteaux, and the Plains Cree at Fort Carlton would not be able to understand him, and, although Ballendine "was a good man to interpret personal talks," his voice would not carry sufficiently to be heard by such a large crowd.<sup>20</sup> Lieutenant Governor Morris later reported that Erasmus, even though he had been brought there by the Chiefs to act on their behalf, in fact "acted as chief interpreter, being assisted by the others, and is a most efficient interpreter."<sup>21</sup>

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<sup>18</sup> Peter Erasmus, *Buffalo Days and Nights* (Calgary: Glenbow Institute, 1976) (excerpts in ICC Exhibit 13d).

<sup>19</sup> Peter Erasmus, *Buffalo Days and Nights* (Calgary: Glenbow Institute, 1976), foreword by Hugh Dempsey, vii, and introduction by Irene M. Spry, xviii and xxiii (ICC Exhibit 13d, pp. 2, 13, 18).

<sup>20</sup> Peter Erasmus, *Buffalo Days and Nights* (Calgary: Glenbow Institute, 1976), 241–42 (ICC Exhibit 13d, pp. 43–44).

<sup>21</sup> Alexander Morris, Fort Garry, report dated December 4, 1876, in Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (Toronto, 1880; fascim. repr., Toronto: Prospero Books, 2000), 196 (ICC Exhibit 13a, p. 83).



The Fort à la Corne Indians were also at an advantage because at least one<sup>22</sup> of them was educated and could understand and read English and Cree. Bernard Constant, who was at Fort Carlton in August 1876 and signed treaty as one of James Smith’s headmen, was the grandson of Joseph Constant, a Montreal trader who had moved to The Pas area in the early 1800s. Bernard would later be a teacher, successful farmer, and influential councillor on the James Smith reserve.<sup>23</sup> Elder Mervin Burns told the ICC Commissioners that his ancestors “understood the treaty. These people, their spokesmen there had fairly good English.”<sup>24</sup>

When Chief James Smith and Councillors Bernard Constant, Henry Smith, Ma-twa-ahs-tin-oo-we-gin, and Jacob McLean signed Treaty 6 on August 28, 1876, on behalf of the Fort à la Corne Indians,<sup>25</sup> they agreed to provisions for annuities, schools, agricultural implements, animals, a medicine chest, and reserves. With regard to the reserves, government officials, in consultation with the Band, would select land for agricultural and other purposes, to measure in total one square mile for each family of five (which translates into 128 acres per person):

And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for farming lands, due respect being had to lands at present cultivated by the said Indians, and other reserves for the benefit of the said Indians, to be administered and dealt with for them by Her Majesty’s Government of the Dominion of Canada, provided all such reserves shall not exceed in all one square mile for each family of five, or in that proportion for larger or smaller families, in manner following, that is to say: that the Chief Superintendent of Indian Affairs shall depute and send a suitable person to determine and set apart the reserves for each band, after consulting

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<sup>22</sup> At the community sessions, elders also referred to Robert Burns as being able to speak English and translate. ICC Transcript, October 29–30, 2002 (ICC Exhibit 5b, p. 44, Mervin Burns). Robert Burns, however, took treaty with Mistawasis in 1876 and transferred to John Smith’s Band in 1880. Although an 1883 township survey (see Lorraine Patrick’s field book 3869, ICC Exhibit 8i, p. 21) shows a building belonging to Robert Burns within what would become the James Smith reserve boundaries, he did not transfer into the James Smith Band until 1888 (see Neil W. Vallance, “Treaty Land Entitlement Review for James Smith Cree First Nation,” December 2002, p. 83, ICC Exhibit 3b).

<sup>23</sup> See Constant Family Tree (ICC Exhibit 12) and testimony of elder Isaac Daniels, ICC Transcript, October 29–30, 2002 (ICC Exhibit 5b, pp. 59–60, Isaac Daniels).

<sup>24</sup> ICC Transcript, October 29–30, 2002 (ICC Exhibit 5b, p. 43, Mervin Burns).

<sup>25</sup> *Treaty No. 6 between Her Majesty the Queen and the Plain and Wood Cree Indians and Other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River with Adhesions* (Ottawa: Queen’s Printer, 1964), 5, 7 (ICC Exhibit 6b, pp. 5, 7).

with the Indians thereof as to the locality which may be found to be most suitable for them.<sup>26</sup>

From the various accounts of the treaty negotiations, it is evident that there was little discussion about the reserve provisions. In describing the initial presentation of the treaty terms, Peter Erasmus stated simply that “the Governor spoke for an hour or so explaining the purpose of the treaty and its objectives, and describing in some detail the terms. He especially emphasized the money each person would get.”<sup>27</sup> Secretary Jackes provided a more detailed account of the government’s offer. With regard to the reserves, he quoted Lieutenant Governor Morris as saying:

[W]e wish to give each band who will accept of it a place where they may live; we wish to give you as much or more land than you need; we wish to send a man that surveys the land to mark it off, so you will know it is your own, and no one will interfere with you. What I would propose to do is what we have done in other places. For every family of five a reserve to themselves of one square mile. Then, as you may not all have made up your minds where you would like to live, I will tell you how that will be arranged: we would do as has been done with happiest results at the North-West Angle. We would send next year a surveyor to agree with you as to the place you would like.

There is one thing I would say about the reserves. The land I name is much more than you will ever be able to farm ...<sup>28</sup>

After the presentation of the treaty terms, the negotiations were adjourned so that the Chiefs could discuss the proposal. When the meeting reconvened the following day, Erasmus described Poundmaker’s reaction to the reserve proposal:

Poundmaker, who was not a chief at that time but just a brave, spoke up and said, “The governor mentions how much land is to be given to us. He says 640 acres, one

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<sup>26</sup> *Treaty No. 6 between Her Majesty the Queen and the Plain and Wood Cree Indians and Other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River with Adhesions* (Ottawa: Queen’s Printer, 1964), 3 (ICC Exhibit 6b, p. 3).

<sup>27</sup> Peter Erasmus, *Buffalo Days and Nights* (Calgary: Glenbow Institute, 1976), 243 (ICC Exhibit 13d, p. 45).

<sup>28</sup> A.G. Jackes, “Narrative of Proceedings,” in Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (Toronto, 1880; facsim. repr., Toronto: Prospero Books, 2000), 204–5 (ICC Exhibit 13a, pp. 43–44).

mile square for each family, he will give us.” And in a loud voice he shouted, “This is our land! It isn’t a piece of pemmican to be cut off and given in little pieces back to us. It is ours and we will take what we want.”<sup>29</sup>

When the Indian leaders met in council to discuss the proposals, Poundmaker and his followers “were strong in their objections and refused to grant the possibility of existing by agricultural pursuits.”<sup>30</sup> The leading Chiefs of the assembled bands, Mistawasis and Ahtakakoop (Ahtakakup), however, reasoned that they had no choice but to accept change. Intertribal wars, sickness, and famine owing to the declining number of buffalo had reduced their numbers, and they would not be able to stop the white man from settling on the land. They argued that, with the help of the Queen, the Indians could adapt to a new way of life:

The mother earth has always given us plenty with the grass that fed the buffalo. Surely we Indians can learn the ways of living that made the white man strong and able to vanquish all the great tribes of the southern nations.<sup>31</sup>

Subsequent discussions focused on adding items to assist the bands when they turned to agriculture – items such as medical aid, and food and clothing during difficult times. There was only one further reference to reserves, and that was a request that the location of the reserves be left open until a survey, to which Morris agreed:

[Chiefs] If our choice of reserve does not please us before it is surveyed we want to be allowed to select another.

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<sup>29</sup> Peter Erasmus, *Buffalo Days and Nights* (Calgary: Glenbow Institute, 1976), 244 (ICC Exhibit 13d, p. 46).

<sup>30</sup> Peter Erasmus, *Buffalo Days and Nights* (Calgary: Glenbow Institute, 1976), 246 (ICC Exhibit 13d, p. 48).

<sup>31</sup> Peter Erasmus, *Buffalo Days and Nights* (Calgary: Glenbow Institute, 1976), 250 (ICC Exhibit 13d, p. 52).

[Morris] You can have no difficulty in choosing your reserves; be sure to take a good place so that there will be no need to change; you would not be held to your choice until it was surveyed.<sup>32</sup>

The treaty document, which the Commissioners and Chiefs signed as Treaty 6 at Fort Carlton on August 23, 1876, was written out on parchment before the negotiations, and the additional promises were added in the margins before it was signed.<sup>33</sup> The particular phrase in Treaty 6 – “reserves for farming lands, due respect being had to lands at present cultivated by the said Indians, and other reserves for the benefit of the said Indians” – is almost identical to the reserve provisions in Treaties 3 and 5 (but not Treaties 1, 2, and 4). There was no reference in any of the accounts of the treaty negotiations that indicated discussion of these principles.

### **Partial Survey, 1878**

Commissioner Christie interviewed the Chiefs of Treaty 6 in October 1876 to determine where they wanted their land. He noted first that James Smith’s Band of 17 families wanted a reserve “somewhere near Fort La Corne” and, secondly, that most of the bands were to some extent already engaged in agriculture:

With one or two exceptions, all these Bands are cultivating the soil and are already located on the places where they want their Reserves, and will be desirous to receive the Agricultural Implements and cattle as promised in the Treaty.<sup>34</sup>

When James Walker, a North-West Mounted Police Inspector and Acting Indian Agent, paid out the annuities in 1877, he interviewed the Chiefs regarding reserve location and made note of any farming in progress. He stated that the James Smith Band, which was “cultivating some 20 acres,” wanted

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<sup>32</sup> A.G. Jackes, “Narrative of Proceedings,” in Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (Toronto, 1880; facsim. repr., Toronto: Prospero Books, 2000), 215, 218 (ICC Exhibit 13a, pp. 54, 57).

<sup>33</sup> John Leonard Taylor, *Treaty Research Report, Treaty Six* (Ottawa: Treaties and Historical Research Centre, DIAND, 1985), 25 (ICC Exhibit 13c, p. 25).

<sup>34</sup> W.J. Christie, Indian Commissioner, Fort Garry, Memorandum, October 10, 1876, in LAC, RG 10, vol. 3636, file 6694-1 (ICC Exhibit 1, p. 3).

its land at Fort à la Corne, “as far up the river as Nepowewen Creek.”<sup>35</sup> In the same year, David Laird, the Indian Superintendent and Lieutenant Governor of the North-West Territories (NWT), told the Superintendent General of Indian Affairs (SGIA) in Ottawa that it was impossible to provide details for the tabular statements published in the department’s annual reports on each band, but that, generally, the bands in Treaty 6 had been supplied with some seed and were beginning to farm:

Several of the Bands living near Carlton and Prince Albert in Treaty No. 6 were supplied last spring with potatoes, grain and other seeds. These Indians are very much pleased and encouraged with the result of their exertions in planting these, and have broken up more new land in the expectations of receiving more seed and assistance next year. One band has nearly 100 acres under cultivation. ...

In Treaty No. 6 the Reserves, as you are aware, have not been allotted, and the Indians have made their improvements, generally speaking, on or near the site of their old gardens.<sup>36</sup>

On May 21, 1878, the Surveyor General sent Milner Hart, Dominion Land Surveyor (DLS), general instructions for the survey of Indian reserves for the upcoming season.<sup>37</sup> According to Hart’s diary, the journey from his home in Ontario to Fort Carlton took him exactly two months, and it was there on July 29, 1878, that he received orders from an unnamed official to proceed to Fort à la Corne. He “arrived at Ft a la Corne Indian Reserve” on August 5 and conferred with the Chief. On August 6, he held a meeting with the Chief and council, hired three band members, and spent the next three days running the east limit of the reserve. For part of August 8 and 9, he ran two trial lines, but on August 10, Hart noted: “Chief James Smith and Band not satisfied with proposed Boundary

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<sup>35</sup> James Walker, Acting Indian Agent, Battleford, NWT, to Lt Governor, NWT, Battleford, August 20, 1877, LAC, RG 10, vol. 2656, file 9092 (ICC Exhibit 1, pp. 10–11).

<sup>36</sup> David Laird, Indian Superintendent, to Superintendent General of Indian Affairs (SGIA), November 18, 1877, *Annual Report for the Department of Indian Affairs for the Year Ended June 30, 1877*, 45–46 (ICC Exhibit 1, pp. 12–13).

<sup>37</sup> Milner Hart, DLS, to Surveyor General, November 29, 1878, in CLSR, Field book 724, p. 29 (ICC Exhibit 8a, p. 30).

of Reserve.” On instructions from the Assistant Surveyor General, Hart discontinued the Fort à la Corne work and left for Prince Albert.<sup>38</sup>

Another surveyor, Elihu Stewart, was charged with laying out reserves for John Smith (brother to James Smith)<sup>39</sup> and the Sturgeon Lake people, and, in both cases, the Chiefs objected to the proposed boundaries and stopped the survey. On September 11, the Lieutenant Governor met with both those Bands and reached agreement with them regarding the limits of the reserve.<sup>40</sup> The Lieutenant Governor reportedly also met with James Smith, with the same results:

In an interview held with Chief James Smith in September last His Honor the Lt. Governor amended his former Instructions and has settled the Boundaries of the Reservation to the satisfaction of the Chief and Band, a separate Report of which I have the honor to transmit herewith.<sup>41</sup>

Unfortunately, none of the general instructions to Hart, the Lieutenant Governor’s former instructions, or Hart’s “separate Report” have been located. According to Hart’s report on the aborted survey, it was the *western* boundary to which the Chief objected (not the northern boundary, as later correspondence indicates):

Owing to a misunderstanding on the part of the Indians of the Fort a la Corne Band as to the Boundaries of their reservation I was able only to define permanently a part of the East Limit of the Reserve.

The other Lines shown in the accompanying notes are only Trial Lines which I ran to ascertain the position of the Mouth of Pa-ho-nan (or Waiting Place) Creek.

In the Memo of Instructions from His Honor the Lt. Governor of the N.W.T. the mouth of this Creek was to be the Western Limit of the Reservation.<sup>42</sup>

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<sup>38</sup> Milner Hart, DLS, “Field Notes, Diary and Reports of a Survey of part of the Indian Reserve at Fort a-la-Corne, N.W.T.,” CLSR, Field book 724 (ICC Exhibit 8a).

<sup>39</sup> See ICC Transcript, October 29–30, 2002 (ICC Exhibit 5b, p. 60, Isaac Daniels).

<sup>40</sup> E. Stewart, DLS, Indian Reserve Survey Diary, 1878–79, in CLSR, Field book 729 (ICC Exhibit 8c, p. 28).

<sup>41</sup> Milner Hart, DLS, St Marys, Ont., to the Surveyor General, Dominion Lands, Ottawa, November 29, 1878, in CLSR, Field book 724, pp. 29–30 (ICC Exhibit 8a, pp. 30–31).

<sup>42</sup> Milner Hart, DLS, St Marys, Ont., to the Surveyor General, Dominion Lands, Ottawa, November 29, 1878, in CLSR, Field book 724, pp. 28–30 (ICC Exhibit 8a, pp. 30–31).

If Pa-ho-nan Creek was also called Nepowewen Creek, this western limit corresponds with the limits described by James Walker the previous year. There is no indication as to whether a completed east boundary would have been extended to the north or south.

The “Plan of Partial Survey of Indian Reserve at Ft. a la Corne, Chief James Smith,” which Hart signed in December 1878, shows a block of land with the Saskatchewan River on the north, the surveyed “East Limit 3½ miles,” a “trial line 2½ miles” on the south, and another “trial line 2 miles 2.31 chains” on the west. The block is immediately to the west of the HBC reserve, although separated from it by a narrow strip of land.<sup>43</sup> The block is shown on a “Map of Part of the North West Territory shewing the Operations of the Special Survey of Standard Meridians and Parallels for Dominion Lands,” dated December 31, 1878, and published in the Surveyor General’s annual report.<sup>44</sup>

There is some evidence that farming was viable in the area. The settlers west of the HBC’s Fort à la Corne property who had petitioned the government in 1875 were of the opinion that the area was “well suited for agriculture ... this being a section of the country totally free of grasshoppers.”<sup>45</sup> Alexander Russell, who was in charge of the Dominion Lands’ special survey in and around Prince Albert in 1878, wrote very positively about the agricultural potential of the area:

The land to the south-east of Prince Albert Settlement, across the south branch of the Saskatchewan, is superior in many respects to that lying between the two Branches, which is rather rolling, light in places, and broken by ponds, whereas that in the east and south has gentle slopes and a uniformly excellent soil of about eight or ten inches of dark rich loam, underlaid by a not too stiff clay.

A large sample, dug at random, of this soil, showing a vertical section of two feet is herewith forwarded as visible proof of its excellence. A further evidence of the capability of the soil was given by the wheat crop, specimens of which collected from

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<sup>43</sup> Milner Hart, “Plan of partial survey of Indian Reserve at Ft. a la Corne, Chief James Smith,” CLSR, Plan A1029 (ICC Exhibit 8b).

<sup>44</sup> “Appendices to the Report of the Surveyor General of Dominion Lands,” in Canada, Parliament, *Sessional Papers*, 1879, No. 7, “Annual Report of the Department of the Interior for the Year ended 30th June 1878.”

<sup>45</sup> Philip Turner and others to Indian Commissioner, November 1875, LAC, RG 15, vol. 235, file 4641, reel T-12183, as quoted in Four Arrows, “James Smith Cree Nation Treaty Band No. 100 – General History,” draft, January 25, 1995 (ICC Exhibit 11, pp. 2–3).

a small settlement about ten miles south-west of La Corne, unfortunately became damaged on the journey in.

During the six years I have spent in surveys in various parts of Manitoba and the North-West, I have never seen greater luxuriance of growth than that here, nor do I consider the soil of the Province, which is frequently a stiff clay, as inviting to the farmer as the more friable soil of this section.<sup>46</sup>

Hart's plan and field notes of the partial survey of the James Smith reserve describes only the area near the east boundary where, for the most part, the soil ranges from "light," "good," and "rich" sandy loam to rich loam. However, there were large areas of swamp lands, especially along the southern trial line. Some of these areas are described as "hay swamps," which would have been an asset for livestock, but others are simply indicated to be "swamp with pond," "swamp with lake," or "muskeg." The east boundary area was covered with poplar and willow scrub.<sup>47</sup>

According to Hart's field notes, William Smith (James Smith, No. 9) had a house and three cultivated fields totalling approximately 12 acres about one and a half miles south of the river, along the east boundary. Other Indians may have had buildings and gardens in areas away from the boundary line, for Hart reported that

[t]he Indians on this Reservation have made considerable progress in farming and other Agricultural operations, and expressed a determination to settle on their lands and cultivate the soil more extensively.<sup>48</sup>

### **Request for Reserve Land, 1881**

Even though the Lieutenant Governor and Chief James Smith apparently resolved the problems that halted the survey in 1878, there is no report of any further work being done to define the boundaries. When the Governor General of Canada, the Marquess of Lorne, met with Chiefs and leading men

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<sup>46</sup> Alexander L. Russell, In Charge, Special Survey, Dominion Lands, to Lindsay Russell, Surveyor General, November 23, 1878, in Canada, Parliament, *Sessional Papers*, 1879, No. 7, "Annual Report of the Department of the Interior for the Year ended 30th June 1878," Part II, App. 3, pp. 13–14 (ICC Exhibit 1, pp. 20–21).

<sup>47</sup> See Milner Hart, DLS, "Field Notes, Diary and Reports of a Survey of part of the Indian Reserve at Fort a-la-Corne, N.W.T.," CLSR, Field book 724 (ICC Exhibit 8a), and Milner Hart, "Plan of partial survey of Indian Reserve at Ft. a la Corne, Chief James Smith," CLSR, Plan A1029 (ICC Exhibit 8b).

<sup>48</sup> Milner Hart, DLS, St Marys, Ont., to the Surveyor General, Dominion Lands, Ottawa, November 29, 1878, in CLSR, Field book 724, p. 29 (ICC Exhibit 8a, p. 30).



of the Carlton District on August 26, 1881, Chief James Smith was there and asked the Governor General to assist his Band in getting a survey of good agricultural land for his reserve:

I want that my Band and reserve may receive assistance. Then, that a survey be made to mark out my reserve as soon as possible, and what I desire is that it should be left to me where the survey runs to satisfy my people. I want good land not sand hills. I should like the land in my reserve divided and those who signed at time of treaty have left me, but I want to retain the land given me at that time. I want to take word back to my people what will be granted to me. I would like to tread on good soil.<sup>49</sup>

There is no report on any immediate follow up to this request.

### **Township Survey, 1883**

Between April 2 and April 18, 1883, DLS Lorraine Patrick and his crew did the subdivision survey of township 48, range 20, W2M.<sup>50</sup> In the course of this township survey, Patrick appears to have resurveyed Hart's 1878 lines, but what Hart clearly stated to be "trial lines," Patrick designated as the south and west boundaries of the reserve. Again, there is no indication that any land north of the river was considered in any way to be Indian reserve land.

In the field book, the surveyor was expected to record information about the soil, reporting on the number of inches of alluvial or fertile soil, the type of subsoil, and the class of land. Patrick indicated that the entire northwestern section of the reserve was class four land, mostly sand, with some muskeg. The rest of the township was mostly class one and two, with pockets of class three, and 4 to 12 inches of fertile soil over a clay or sandy-clay subsoil. The township was very broken up by swamps and marshes and high ridges.<sup>51</sup> Patrick's report, however, describes the area as generally unsuitable for agriculture:

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<sup>49</sup> L. Vankoughnet, DSGIA, to Sir John A. Macdonald, SGIA, November 16, 1881, LAC, RG 10, vol. 3768, file 33642 (ICC Exhibit 1, p. 86).

<sup>50</sup> Lorraine Patrick, DLS, Field notes, township 48, range 20, W2M, April 2–18, 1883, in CLSR, Field book 3869 (ICC Exhibit 8i).

<sup>51</sup> Lorraine Patrick, DLS, Field notes, township 48, range 20, W2M, April 2–18, 1883, in CLSR, Field book 3869 (ICC Exhibit 8i).

The land from the south Boundary of same, northwards to the reserve and northwards to Muskeg at West end of Township is of first class quality for timber it is covered with poplar and willow in patches enough for fence rails for years but not large enough for House logs. Northwards from 1 mile limit from south boundary and to join the Indian Reserve on the east to river land of poor quality sand or muskeg up the greater portion of same.

The remainder of this township lying on north side of River is utterly worthless for agricultural purposes with the exception of a flat claimed by the Bishop of the Saskatchewan Church of England being a portion of Section 25 & 26 lying north of Fort La Corne.

For timber this portion North of the river is cover [sic] with jack Pine and Poplar and would recommend to be reserved for fire wood.<sup>52</sup>

### **Survey of IR 100, 1884**

In the summer of 1883, Deputy Superintendent General of Indian Affairs (DSGIA) Lawrence Vankoughnet travelled to western Canada. During this visit, Chief James Smith complained about his reserve, and Indian Commissioner Edgar Dewdney was subsequently asked to investigate the situation (as well as Chief John Smith's reserve):

While at the Forks of the Saskatchewan this summer, I was met by Chief James Smith whose Reserve is in the vicinity of Fort a La Corne on the south side of the River.

It appears that only half of his Reserve has been surveyed, and the Chief claims that the balance of the Reserve should be added on the same side of the river, excepting a sufficient quantity on the north side opposite his Reserve to make his Reserve a square. He claims that his land should run 4 miles East and West on both sides of the River. M. Hart, D.L.S., who surveyed the one half on the south side likewise surveyed the balance of the Reserve on the north side,<sup>53</sup> but the Chief refused to accept the latter.

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<sup>52</sup> Lorraine Patrick, DLS, Field notes, township 48, range 20, W2M, April 2–18, 1883, in CLSR, Field book 3869 (ICC Exhibit 8i, pp. 26–27).

<sup>53</sup> There is nothing in Hart's 1878 field notes, plans, or reports to indicate any survey north of the river. As stated earlier, Hart reported that Chief James Smith objected to the location of the western boundary and the survey was halted. Officially, Hart had surveyed only "part" of the eastern boundary. All other lines on his partial plan are trial lines.

... [re John Smith]

Will you be good enough to look into these matters and have the proper steps taken, as soon as practicable to give effect to the wishes of the Chiefs.<sup>54</sup>

On December 21, 1883, Indian Agent J.M. Rae reported to Dewdney that, indeed, only half of the James Smith reserve had been surveyed and, in his opinion, the balance should be laid out south of the river, “as the land on the north side is very poor and not fit for cultivation.”<sup>55</sup> The Indian Agent visited the reserve in May 1884 and reported on the Band’s wish for a change in the boundary and a desire for timber land:

I have the honor to inform you that when I visited it in May, [James] Smith’s Band expressed a desire to have an alteration made in the lines which have been partially laid down for the definition of its reserve.

It is stated that an error occurred in the interpretation which the surveyor received of their wishes.

As the land on the north side of the river is of value only for its timber, it is recommended that the change be allowed, for it would be most undesirable to give them half their reserve in land unfit for cultivation, indeed the plotting of the old half-completed reserve is preposterous.

Timber of good quality can be obtained on the south side of the river, but not adjacent to the reserve, and I beg to be informed as to whether a wood lot including it may be set apart for them, a deduction being made in the area of the reserve equivalent in extent to that of the wood lot if so allowed them.<sup>56</sup>

In July 1884, surveyor A.W. Ponton, accompanied by Indian Agent Macrae, arrived to define the reserve for the James Smith Band. After lengthy discussions with the Chief and other members of the Band, Ponton laid out a reserve of 27.85 square miles, the boundary of which was “almost

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<sup>54</sup> L. Vankoughnet, DSGIA, Ottawa, to E. Dewdney, Indian Commissioner, Regina, November 20, 1883, in LAC, RG 10, vol. 3576, file 353 (ICC Exhibit 1, pp. 214–15).

<sup>55</sup> J. M. Rae, Indian Agent, Battleford, to the Indian Commissioner, Regina, December 21, 1883, in LAC, RG 10, vol. 3576, file 353 (ICC Exhibit 1, p. 227).

<sup>56</sup> J. Ansdell Macrae, Indian Office, Fort Carlton, [recipient not identified], June 11, 1884, in LAC, RG 10, vol. 3576, file 353 (ICC Exhibit 1, pp. 249–50).

coincident with the old arrangement of Mr. Russell.”<sup>57</sup> (This last reference must be to discussions surveyor Hart had in 1878 with either Lindsay Russell, who was Surveyor General at that time, or A.L. Russell, who was then in charge of the special survey in the area.) In August, Ponton reported on the various settlers’ claims within the reserve boundaries. One, Btd Scyiese, was in the northwest corner of section 6, township 48, range 20, W2M, and adjoined the west boundary, so it was simply omitted from the reserve. Three others, Edward Cook,<sup>58</sup> Charles Fiddler, and Alexander Fiddler,<sup>59</sup> were well within the area surveyed, but all indicated that they would give up their claims if compensated. A sketch attached to the report also shows the houses of Bernard Constant and Robert Burns.<sup>60</sup>

Ponton’s survey plan shows the outline of Hart’s 1878 survey as the “Old Reserve.” The new reserve is considerably larger and includes some land north of the river, but the majority of the additional land is south and west of the old reserve.<sup>61</sup> Agent Macrae reported that Ponton’s survey excluded “much of the poor land on the north side of the river, which it was originally intended should be embraced within its limits.”<sup>62</sup> Again, it is not known what additional lands north of the river were ever considered for a reserve.

By the time of the 1884 survey, it would appear that the James Smith band members were living almost entirely by the hunt, and, although they had houses on their chosen land, there was very

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<sup>57</sup> A.W. Ponton, IR Surveyor, Regina, to E. Dewdney, Indian Commissioner, Regina, December 31, 1884, in LAC, RG 10, vol. 3682, file 12628 (ICC Exhibit 1, p. 305).

<sup>58</sup> Edward Cook’s location was reported on by surveyor Hart in 1878. See Milner Hart, DLS, “Field Notes, Diary and Reports of a Survey of part of the Indian Reserve at Fort a-la-Corne, N.W.T.,” CLSR, Field book 724 (ICC Exhibit 8a), and Milner Hart, “Plan of partial survey of Indian Reserve at Ft. a la Corne, Chief James Smith,” CLSR, Plan A1029 (ICC Exhibit 8b).

<sup>59</sup> It was noted in August 1882 that Charles and Alexander Fiddler, No. 36 and No. 83, respectively, in the Cumberland Band, had left the Treaty 5 area and relocated to Fort à la Corne. See Treaty annuity payroll, Cumberland Band, Treaty 5, August 25, 1882, no file reference available (ICC Exhibit 1, pp. 152–53).

<sup>60</sup> A.W. Ponton, IR Surveyor, One Arrows Reserve, to E. Dewdney, Indian Commissioner, Regina, August 22, 1884, in LAC, RG 10, vol. 3576, file 353 (ICC Exhibit 1, pp. 273–77).

<sup>61</sup> A.W. Ponton, DLS, “Plan, Indian Reserve, Chief James Smith at Fort à la Corne, Treaty No. 6, Carlton District,” certified correct March 19, 1885, CLSR, Plan 269 (ICC Exhibit 8k).

<sup>62</sup> J. Ansdell Macrae, Indian Agent, Carlton Agency, to Superintendent General, August 11, 1884, *Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1884*, 83 (ICC Exhibit 1, p. 271).

little cultivation.<sup>63</sup> Ponton considered that the reserve he laid out, with its combination of good soil and abundance of fish and game, was well suited to the Band:

The Reserve is well situated to support the band, fish being plentiful in the river and moose meat abundant. The band being accustomed to hunt this kind of game seem to devote a considerable time to it and with good results. The soil is for the greater part from sand to sandy loam, but many spots of better land lie back from the river.<sup>64</sup>

At the ICC community session, Chief Walter Constant agreed that, given its hunting and trapping economy at the time of the survey, the land the James Smith Band received was appropriate: “that’s the land they were requesting.”<sup>65</sup>

Okay, the selection, what I was told was they wanted this land where it’s situated today because of the wild life. We have a river that runs through here which was good for fishing at that time. ... And on the other side of the river was the elk and the moose which provided food for the membership. And on this side there were a lot of lakes which generated food for the membership also, the ducks, the geese, the rabbits were on this side. So it was a well-situated place where James Smith was, and they wanted this piece of land. There was not too much farming in them days, they didn’t know too much farming, all they knew was trapping and hunting.

Then when we settled for farm-land, you look at it, you know our reserve is mostly sand and muskeg.

... They chose this land here, like I said before, it was suitable for them for hunting and fishing and that. It was good land, what they could depend on for their survival. Trapping was a good money business in them days. They were trappers, so they chose this land. And I believe they were satisfied because of what was here, the value that was here for them. They didn’t know there was going to be farming business in them days, at the signing of the treaties. So they were satisfied. To me

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<sup>63</sup> See Sir John A. Macdonald, SGIA, Annual Report, January 1, 1884, *Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1883*, lxvii (ICC Exhibit 1, p. 231), and J. Ansdell Macrae, Indian Agent, Carlton Agency, to Superintendent General, August 11, 1884, *Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1884*, 82 (ICC Exhibit 1, p. 270). In his report on the survey, Ponton also “noted some really good houses, the chief’s being large, neat and comfortable.” See A.W. Ponton, IR Surveyor, Regina, to E. Dewdney, Indian Commissioner, Regina, December 31, 1884, in LAC, RG 10, vol. 3682, file 12628 (ICC Exhibit 1, p. 305).

<sup>64</sup> A.W. Ponton, IR Surveyor, Regina, to E. Dewdney, Indian Commissioner, Regina, December 31, 1884, LAC, RG 10, vol. 3682, file 12628 (ICC Exhibit 1, p. 305).

<sup>65</sup> ICC Transcript, October 29–30, 2002 (ICC Exhibit 5b, p. 38, Chief Walter Constant).

they were satisfied, but then we look at it today, they showed us how to farm, now we look at the land, is it suitable for farming?<sup>66</sup>

Ponton's survey plan and field notes provide some detail about the soil conditions. Although on the plan the area north of the river is described as "barren sandy soil" with jack pine measuring 6 to 10 inches in diameter throughout, the soil along the entire east boundary and on the west boundary below the Scyiese claim is all described as being "1st class."<sup>67</sup> In his field notes, Ponton described the soil above the Scyiese claim as being sandy or sandy loam, except for one area opposite section 13, township 48, range 20, W2M, which he states is unfit for cultivation.<sup>68</sup> On the survey plan, the soil on the southern boundary is said to be "too wet for cultivation," but in the field notes, this description applies only to the very middle portion of the line (north of section 21, township 47, range 20, W2M), which is described as "drowned land throughout." The rest of the soil along the southern boundary is described as first-class black loam or sandy loam, although low in the far eastern section.<sup>69</sup>

Conversely, the Order in Council confirming the reserve, PC 1151, dated May 17, 1889 (which attaches a copy of Ponton's survey plan, without the outline of the "Old Reserve" and with different descriptions of the soil and timber, signed as approved by John C. Nelson, January 23, 1889), describes the land in the James Smith reserve as being unsuitable for farming:

The country within the boundaries of this reserve is generally level. The soil of the most southerly portion is composed of a rich black loam, but being low, wet and thickly interspersed with large shallow ponds of brackish water, is, in its present condition, of little value for agricultural purposes. The land immediately adjoining the right bank of the river, varies from arid sand, at the western, to sandy loam at the

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<sup>66</sup> ICC Transcript, October 29–30, 2002 (ICC Exhibit 5b, pp. 20, 24, Chief Walter Constant).

<sup>67</sup> A.W. Ponton, DLS, "Plan, Indian Reserve, Chief James Smith at Fort à la Corne, Treaty No. 6, Carlton District," certified correct March 19, 1885, CLSR, Plan 269 (ICC Exhibit 8k).

<sup>68</sup> A.W. Ponton, DLS, "100 Field Notes, Indian Reserve at Fort à la Corne, Treaty No. 6, Chief James Smith," no date [July–August 1884], CLSR, Field book 149, pp. 21–24 (ICC Exhibit 8j, pp. 16–17).

<sup>69</sup> A.W. Ponton, DLS, "Plan, Indian Reserve, Chief James Smith at Fort à la Corne, Treaty No. 6, Carlton District," certified correct March 19, 1885, CLSR, Plan 269 (ICC Exhibit 8k), and A.W. Ponton, DLS, "100 Field Notes, Indian Reserve at Fort a la Corne, Treaty No. 6, Chief James Smith," no date [July–August 1884], CLSR, Field book 149, pp. 11–14 (ICC Exhibit 8j, pp. 10–12).

eastern boundary the country is wooded with jack-pine and small poplar. North of the river the soil is sandy. It is covered with a growth of jack-pine, from four to ten inches in diameter, insuring a supply of excellent and valuable firewood, some good spruce is distributed along the southern side of the river, and poplar of sufficient size for building purposes can be cut at many points on the reserve.<sup>70</sup>

### **Treaty Land Entitlement Calculation at Date of First Survey**

According to Treaty 6, the James Smith Band was entitled to a reserve equivalent to one square mile (640 acres) for each family of five, or 128 acres per person. Therefore, the area confirmed by Order in Council PC 1151, 27.8 square miles, satisfies the treaty land entitlement for 139 people ( $27.8 \times 640 \div 128 = 139$ ). One hundred and forty-two individuals were paid annuities with the James Smith Band on October 6, 1884,<sup>71</sup> and two others were absent from that payment but returned in 1886 and were paid arrears for 1884.<sup>72</sup> The Band's population at the time of the 1884 survey, therefore, was at least 144, and the Band was still entitled to at least one more square mile of land ( $144 - 139 = 5 \times 128 = 640$ ). The James Smith Cree Nation's treaty land entitlement story does not end here, however.

## **BAND AMALGAMATION**

### **Survey of IR 100A, 1887**

On September 7, 1876, Chief John Cochrane, along with councillors Albert Flett and Peter Chapman, signed an adhesion to Treaty 5 on behalf of the "Cumberland Band" of Saulteaux and Swampy Cree Indians then living at "Cumberland Island, Sturgeon River, Angling River, Pine Bluff, Beaver Lake, and the Ratty Country." According to the terms of the adhesion, the Band was to receive reserve land, based on the formula of "one hundred and sixty acres to each family of five" (or 32 acres per person) at Cumberland Island, "and as the land fit for cultivation there is also limited

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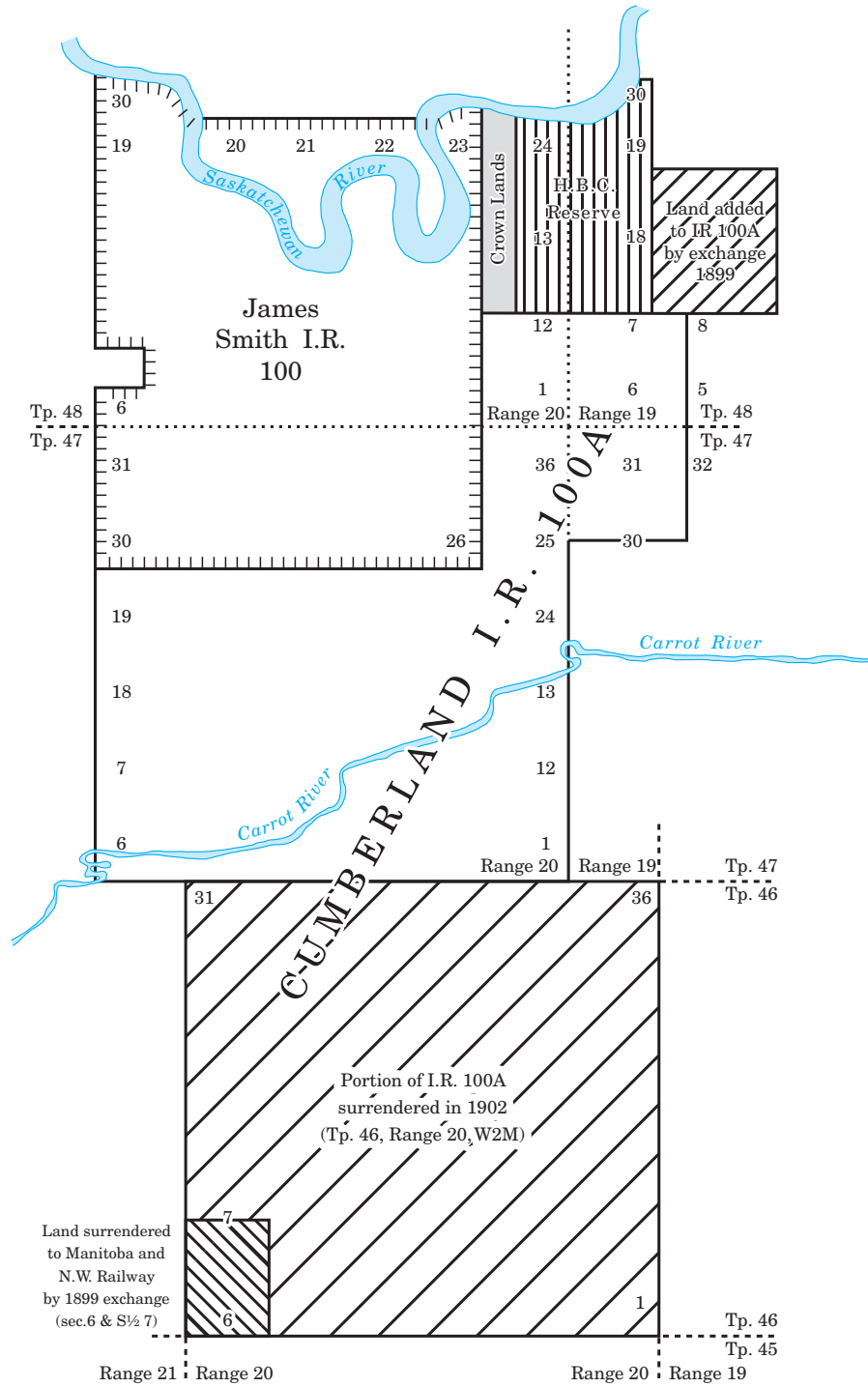
<sup>70</sup> Order in Council PC 1151, May 17, 1889, pp. 52–53 (ICC Exhibit 1, pp. 652–53).

<sup>71</sup> Treaty annuity payroll, James Smith Band, September 30, 1883, in LAC, RG 10, vol. 9416, and October 6, 1884, in LAC, RG 10, vol. 9417 (ICC Exhibit 1, pp. 292–93).

<sup>72</sup> John Hay, "James Smith Band TLE – Summary of Paylist Analysis," report with index, legend to tracing sheets, and tracing sheets, February 11, 2003, p. 20 (ICC Exhibit 2B), and Neil W. Vallance, Specific Claims Branch, "Treaty Land Entitlement Review for James Smith Cree First Nation," edited by Jos C. Dyck, December 2002, pp. 20–21 (ICC Exhibit 3b).

Map 2

Cumberland IR 100A and James Smith IR 100



Based on Sketch found in Bennett McCardle, "Cumberland Indian Reserve 100A: Report on the Land Surrender of 1902 and Related Land Sales and Trust Fund Management Issues," December 1984, with Additions by Roland Wright, August 1985 (James Smith Cree Nation: IR 100A Inquiry. Exhibit 6, p.4)



and insufficient to meet their requirements, that the balance of that reserve shall be at a point between the ‘Pine Bluff’ and ‘Lime Stone Rock’ on ‘Cumberland Lake.’”<sup>73</sup>

As early as 1880, the lack of agricultural land at Cumberland, along with a decline in fur and fish catches, caused some of the Cumberland band members to request that their reserve be located not at Cumberland Lake, but southwest of there, near Fort à La Corne.<sup>74</sup> In 1882, however, surveyor W.A. Austin was instructed to survey 11,040 acres for the 345 members of the Cumberland Band ( $345 \times 32 = 11,040$ ) in the location stipulated in Treaty 5, and, when the Band protested, it was told that “the Government would not grant to the Indians of one Treaty a Reserve in another Treaty, but were desirous of giving them the best land in their own Treaty.”<sup>75</sup> According to the survey plan filed in 1883, only 6.29 square miles of land (4025.6 acres) was set aside in the vicinity of Cumberland Lake,<sup>76</sup> land which the Superintendent General of Indian Affairs described the following year as a “miserable tract of sterile land.”<sup>77</sup> Some Cumberland people chose to stay on this land, but others had already begun to relocate to the more arable lands near Fort à la Corne, and they continued to do so after Austin’s survey.

In December 1883, DSGIA Vankoughnet advocated that land for all 345 Cumberland band members be secured on the Carrot River near Fort à la Corne. He calculated the amount needed to be 44,160 acres, based incorrectly on the 128 acre per person Treaty 6 reserve entitlement ( $345 \times 128 = 44,160$ ).<sup>78</sup> Despite the fact that only a portion of the Cumberland people moved south, in July

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<sup>73</sup> *Treaty No. 5 Between Her Majesty the Queen and the Saulteaux and Swampy Cree Tribes of Indians at Beren’s River and Norway House with Adhesions* (Ottawa: Queen’s Printer, 1969), 10–11 (ICC Exhibit 6a, pp 8–9).

<sup>74</sup> J.A. MacKay to James F. Graham, September 21, 1880, in LAC, RG 10, vol. 3555, file 10 (ICC Exhibit 1, pp. 38–40).

<sup>75</sup> W.A. Austin, DLS, to SGIA, April 1883, in *Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1883*, 161, 167 (ICC Exhibit 1, pp. 186, 192).

<sup>76</sup> W.A. Austin, DLS, “Plan of Part of Cumberland Indian Reserve showing Chief’s Island and part of Cumberland Island,” March 1883, CLSR, Plan 237 (ICC Exhibit 8h).

<sup>77</sup> John A. Macdonald, SGIA, January 1, 1885, in *Annual Report of the Department of Indian Affairs for the Year Ended December 31, 1884*, xli (ICC Exhibit 1, p. 311).

<sup>78</sup> L. Vankoughnet, DSGIA, to A.M. Burgess, Deputy Minister, Department of the Interior, December 6, 1883, in LAC, RG 10, vol. 311, file 68390 (ICC Exhibit 1, pp. 223–24).

1887 surveyor John C. Nelson surveyed IR 100A immediately south of the James Smith IR 100. It measured 65 square miles (41,600 acres) and was confirmed on May 17, 1899, by Order in Council PC 1151, “[f]or the Indians of Cumberland District (of Treaty No. 5).”<sup>79</sup>

It should be noted that, in 1899, the law clerk for the Department of Indian Affairs offered the opinion that Vankoughnet’s calculation using 128 acres per person might not have been an error, but an attempt to rectify the disparity between the land provisions in the two treaties, and that it could not be assumed that the reserve belonged only to the Indians living on it:

Although the size of the reserve is out of all proportions to the requirements of the persons residing thereon and although this disproportion may have arisen from a grave error in calculation shown on file, it is also shown on file that the Department of Interior in consenting to the appropriation of lands for the reserve was advised of the number of Indians for whom the reserve was required and of the quantity of land required by Treaty 5 to be allotted in proportion. There is therefore some reason to surmise that the Government of the day considered it proper to rectify to some extent the disproportionate terms of Treaties No. 5 and No. 6. To some extent the correspondence on file supports this view. According to the terms of Treaty No. 6, the reserve as stated by Mr. Bray contains sufficient land for 325 persons. As shown by the file, the population of the Cumberland Band for which the reserve was set apart numbered in 1883, 345 souls. As the Cumberland House Reserve comprises only 6.29 sq. miles, it will be seen that 71.69 sq. miles comprising the two reserves 20 of Treaty 5 and 100A of Treaty 6 are very little in excess of the proportion of land required to be allotted to 345 persons under Treaty 6. It is not to be assumed unless it can be clearly shown that the reserve was set apart upon such terms that Reserve 100A is held only for the 120 Indians resident thereon. The Order in Council of 17th May, 1889 and the schedule thereto, p. 54, support the conclusion that Reserve 100A is held for the Indians of Cumberland District, which would at least include those of Reserve 20 of Treaty 5.<sup>80</sup>

IR 100A is variously referred to as Cumberland IR 100A or Peter Chapman IR 100A.

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<sup>79</sup> Order in Council PC 1151, May 17, 1889, pp. 54–55 (ICC Exhibit 1, pp. 655–57).

<sup>80</sup> Reginald Rimmer, Law Clerk, Department of Indian Affairs, Memorandum re Cumberland Reserve 100A, May 18, 1899, in LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, pp. 878–79).

### **Chakastaypasin Members Move to IR 100A**

Chief Chakastaypasin and four headman including Kahtapiskowat, also known as “Big Head,” adhered to Treaty 6 at Fort Carlton on August 28, 1876. His reserve, IR 98, was surveyed on the south branch of the Saskatchewan River in 1878. In March 1885, the North-West Rebellion erupted across the Prairies, causing Chakastaypasin band members to flee their reserve. Indian Commissioner Dewdney prepared a “Notice,” stating:

Now, this is to give notice that all good and loyal Indians should remain quietly on their Reserves where they will be perfectly safe and receive the protection of the soldiers; and that any Indian being off his Reserve without special permission in writing from some authorized person, is liable to be arrested on suspicion of being a rebel, and punished as such.<sup>81</sup>

Whether Chakastaypasin and his followers left IR 98 before or after this notice was given is unknown. What is known, however, is that the Department of Indian Affairs initially regarded the entire Chakastaypasin Band as rebels and repeatedly recommended that the Band be broken up, that its reserve be surrendered, and that its membership be forcibly transferred to surrounding bands.<sup>82</sup> By the end of that summer, it was also decided that

[h]ereafter among the rebel Indians no Chiefs or Councillors are to be recognized, and any dealings had with them is to be with individuals, each case being treated on its own merits thus tending to abolish the tribal system.<sup>83</sup>

Thus, by 1886, Chief Chakastaypasin was effectively deposed in the eyes of the Department of Indian Affairs, while Kahtapiskowat, it was decided, “behaved himself in such a manner during the

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<sup>81</sup> Edgar Dewdney, Indian Commissioner, Notice, May 6, 1885, LAC, RG 10, vol. 3584, file 1130 (ICC Exhibit 1, p. 320).

<sup>82</sup> See, for example, Hayter Reed, Assistant Indian Commissioner, to Indian Commissioner, May 13, 1885, LAC, RG 10, vol. 3584, file 1130 (ICC Exhibit 1, pp. 321–26); Edgar Dewdney to SGIA, June 10, 1885, LAC, RG 10, vol. 3714, file 21888–2 (ICC Exhibit 1, pp. 342–49); and L. Vankoughnet to Edgar Dewdney, October 18, 1885, LAC, RG 10, vol. 3584, file 1130, Part 1B (ICC Exhibit 1, pp. 363–78).

<sup>83</sup> Hayter Reed, Assistant Indian Commissioner, to Indian Agents in Battleford, Carlton, Fort Pitt, and Victoria Districts, August 31, 1885, LAC, RG 10, vol. 1591 (ICC Exhibit 1, pp. 355–56).

Rebellion as to merit recognition” and would be added to “the list of those to be rewarded for loyalty.”<sup>84</sup>

By the spring of 1888, only 19 people remained on IR 98, now sometimes referred to as “Big Head’s Reserve,” and Kahtapiskowat had twice answered Indian Agent McKenzie that he and his followers were “prepared to relinquish the reserve at any time and join Peter Chapman’s Band,” so long as they received “something for doing so, no matter how small.”<sup>85</sup> By early May, Kahtapiskowat and most of his followers left IR 98 for Fort à La Corne.<sup>86</sup> In April 1889, Chief Chakastaypasin reportedly also decided to “come in onto the reserve [IR 100A],” as he “cannot support himself any longer.”<sup>87</sup> In this same year, it appears that most of the Cumberland band members were settled on the northern portion of IR 100A, while most of the Chakastaypasin members chose to settle separately on the southern portion. For administrative purposes, however, local department officials generally treated these groups as separate factions of the same band, rather than as two distinct bands from different treaties. In fact, the treaty payroll for Chakastaypasin Band was discontinued in 1889. The Chakastaypasin members living at IR 100A were then paid on the Cumberland Band payroll until 1891. From 1892 to 1896, they were paid separately on the payroll for “Big Head’s Band at IR 100A.” From 1896 on, they were paid with the Cumberland Band at IR 100A.

With the introduction of section 140 to the *Indian Act* in 1895, Indian Commissioner A.E. Forget instructed that all Chakastaypasin members should be transferred to the “Cumberland Band No. 100A,” and Big Head’s Band “done away with.”<sup>88</sup> In addition, Forget instructed that all the former Chakastaypasin members being paid with the James Smith Band should be transferred to the

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<sup>84</sup> Edgar Dewdney, Indian Commissioner, to Acting Agent, Prince Albert, May 25, 1886, LAC, RG 10, vol. 1591 (ICC Exhibit 1, pp. 425–26).

<sup>85</sup> R.S. McKenzie, Indian Agent, Duck Lake, to Indian Commissioner, March 31, 1888, LAC, RG 10, vol. 3793, file 46008 (ICC Exhibit 1, p. 530).

<sup>86</sup> R.S. McKenzie, Indian Agent, Duck Lake, to Indian Commissioner, Regina, May 23, 1888, LAC, RG 10, vol. 9098, book 4, p. 95 (ICC Exhibit 1, p. 541).

<sup>87</sup> R.S. McKenzie to Indian Commissioner, monthly report for April 1889, LAC, RG 10, vol. 3793, file 46008 (ICC Exhibit 1, p. 644).

<sup>88</sup> A.E. Forget, Indian Commissioner, to the Indian Agent, Duck Lake Agency, February 17, 1896, no file reference available (ICC, James Smith Cree Nation Chakastaypasin IR 98 Inquiry, Exhibit 1, p. 744).

Cumberland Band 100A as well, since they had “never ... formally transferred” to James Smith.<sup>89</sup> However, the Indian Commissioner later agreed that, “in the event of the Cumberland Band refusing to sanction the admission,” the Agent could try to obtain the approval of the James Smith Band if the transferees were willing to become members of that Band and live on that reserve.<sup>90</sup>

### **Consents to Transfer Signed by Cumberland Band 100A**

On May 18, 1896, Agent McKenzie wrote to the Indian Commissioner, enclosing “the consents of the members of the Cumberland Band No. 100A to accept into their Band the remnant of Chakastapasins Band No. 98.” McKenzie forwarded 22 Consent forms at this time, admitting 16 Big Head band families (on 15 forms) and seven James Smith families into the Cumberland Band 100A.<sup>91</sup>

The Consent to Transfer forms admitting the Chakastaypasin members into “Cumberland Indian Reserve No. 100A La Corne” are dated May 10, 1896, and read as follows:

We the undersigned Chief and Councillors of the Band of Indians owning the reserve situated in Treaty No. Six and known as “Cumberland Reserve,” do, by these presents certify that the said Band has by vote of the majority of its voting members present at a meeting summoned for the purpose, according to the rules of the band, and held in the presence of the Indian Agent for the locality on the tenth day of May 1896, granted leave to ... join our said band, and as a member thereof to share in all land and other privileges of the Band, to which admission we the undersigned also give full consent.<sup>92</sup>

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<sup>89</sup> F.H. Paget, for the Indian Commissioner, to the Indian Agent, Duck Lake Agency, April 27, 1896, LAC, RG 10, vol. 1594 (ICC, James Smith Cree Nation Chakastaypasin IR 98 Inquiry, Exhibit 1, p. 758).

<sup>90</sup> F.H. Paget, for the Indian Commissioner, to the Indian Agent, Duck Lake Agency, May 2, 1896, LAC, RG 10, vol. 1594 (ICC, James Smith Cree Nation Chakastaypasin IR 98 Inquiry, Exhibit 1, p. 774).

<sup>91</sup> R.S. McKenzie, Indian Agent, Duck Lake Agency, to the Indian Commissioner, May 18, 1896, enclosing 22 Consent of Band to Transfer forms dated May 10, 1896, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1, pp. 803–26).

<sup>92</sup> Consents of Band to Transfer, May 10, 1896, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1, pp. 805–26).

Sixteen of the forms have the words “Chief and Councillors” struck out and replaced with the word “members.” All the forms are certified by Agent R.S. McKenzie, witnessed by John S. Gordon and Angus McKay, and signed by seven Cumberland Band 100A members with an “X” mark.<sup>93</sup>

### **Application for Admission to IR 100A**

On October 15, 1896, at the time of the treaty payments, 27 former Chakastaypasin families applied for admission to the Cumberland Band at IR 100A, and another family applied for admission to the James Smith Band.<sup>94</sup> (Oddly, the applications for transfer were received after the Consents.) No information is available regarding the circumstances surrounding the signing of these applications or any meetings that may have taken place to discuss the transfers.

The application for admission to the “Cumberland Band No. 100A” is a single sheet signed by 27 Chakastaypasin members and dated October 15, 1896 (although June is crossed out). It reads as follows:

We, the undersigned, members of the Band of Treaty Indians known as Chacastapasin’s Band No. 98, formerly occupying the Reserve of that name situated in the Duck Lake Agency, but now resident on the Reserve of the Cumberland Band No. 100A, in the same Agency, do hereby make application to be admitted into membership in the said Cumberland Band No. 100A.<sup>95</sup>

The applications are witnessed by Agent R.S. McKenzie and Sandy Thomas, the Agency interpreter. Included among the applicants are all nine men who later signed the surrender of Chakastaypasin IR 98 on June 23, 1897.

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<sup>93</sup> Consents of Band to Transfer, May 10, 1896, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC Exhibit 1, pp. 805–26).

<sup>94</sup> Application for admission to “Cumberland Band No. 100A,” October 15, 1896, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC, James Smith Cree Nation Chakastaypasin IR 98 Inquiry, Exhibit 1, p. 836); Application for admission to the James Smith Band, October 15, 1896, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC, James Smith Cree Nation Chakastaypasin IR 98 Inquiry, Exhibit 1, p. 837).

<sup>95</sup> Application for admission to “Cumberland Band No. 100A,” October 15, 1896, LAC, RG 10, vol. 6663, file 109A-3-1, part 1 (ICC, James Smith Cree Nation Chakastaypasin IR 98 Inquiry, Exhibit 1, p. 836).

### **Amalgamation of James Smith 100 and Cumberland 100A, 1902**

Little is known about the amalgamation of the James Smith 100 Band and the Cumberland Band 100A. The first reference to it was in June 1902, when, in contemplation of a surrender of part of IR 100A, Indian Commissioner David Laird recommended a union of the two Bands:

In connection with the surrender, I think it would be well to consider the question of amalgamating the bands of James Smith and Cumberland No. 100A. The latter have no chief and the united bands would make a total population of 231 souls. If this suggestion meets with your approval and the consent of the both bands to the amalgamation can be obtained I think it would be a great gain to the Indians of James Smith's band as well as to those of Cumberland band, both of which are in a backward state.<sup>96</sup>

W.A. Orr, in charge of the Land and Timber Branch at the Department of Indian Affairs, approved Laird's suggestion regarding the amalgamation.<sup>97</sup>

On July 24, 1902, the day before the scheduled treaty annuity payments on the James Smith reserve, the "Cumberland Band of Indians resident on our Reserve No. 100A" surrendered 22,080 acres from the southern portion of its reserve, stipulating that the land was to be sold and the proceeds "placed to the credit of the amalgamated Bands James Smith and Cumberland." This document was signed by Kh-ta-pis-kowat, headman, and Geo. Sanderson, headman's son, on behalf of the Band.<sup>98</sup>

On the same day, an agreement was signed amalgamating the James Smith and Cumberland Bands:

THIS AGREEMENT made in duplicate and entered into this Twenty fourth day of July in the year of our Lord one thousand nine hundred and two, between the owners of James Smith's Indian Reserve No. 100, in the Provisional District of Saskatchewan,

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<sup>96</sup> David Laird, Indian Commissioner, Winnipeg, to Secretary, Department of Indian Affairs, Ottawa, June 19, 1902, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, pp. 935–36).

<sup>97</sup> W.A. Orr, [In Charge, Lands and Timber, Department of Indian Affairs], Memorandum to the Secretary, Department of Indian Affairs, June 25, 1902, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, pp. 937–38).

<sup>98</sup> Surrender, Cumberland Band of Indians, to the Crown, dated July 24, 1902, in DIAND Land Registry, Instrument no. X10691 (ICC Exhibit 1, pp. 941–43).

in the North West Territories and Dominion of Canada, as represented by their Chief and Headmen, hereinafter called the Parties of the First Part; and the owners of Cumberland Reserve No. 100A, also in the said Provisional District, as represented by their Headman, hereinafter called the parties of the Second Part.

Witnesseth that the Parties of the First part, for themselves and their descendants, agree to admit the Parties of the Second Part, and their descendants, into their Band, and allow them as members thereof, to have, hold and possess forever, an undivided interest in all land, moneys and other privileges now possessed and enjoyed, or which may at any time hereafter be possessed or enjoyed by the said Band.

In return for the above interest, rights and other privileges granted to them by the Parties of the First Part, the Parties of the Second Part agree for themselves and their descendants to give to the parties of the First Part, a joint and undivided interest in all land, moneys and other privileges now possessed and enjoyed or which may at any time hereafter be possessed or enjoyed by the said Parties of the Second Part.

In Witness whereof we, James Smith, Chief, and Bernard Constant, Che-koo-sis & Jacob McLean, Headmen of Reserve 100 and Kh-ta-piskowat, Headman of Reserve 100A & Geo Sanderson his son, have hereunto set our hands and affixed our seals on the day and year first above written.<sup>99</sup>

None of the government officials involved submitted detailed reports of the events surrounding the surrender or the amalgamation, but a transcript of a 1972 elder's interview with a James Smith band member provides some eyewitness observations. Angus Burns (James Smith, No. 29),<sup>100</sup> the son of Robert Burns, was 20 years old<sup>101</sup> at the time these events took place and 90 when he was interviewed by the Federation of Saskatchewan Indians. According to him, there had been a few meetings to discuss the sale of the land, and, although the Band was not eager to sell, it was persuaded to do so. He mentions that, on July 24, 1902, "the old men were having a meeting" and that "at this time there were a lot of old men." The meeting itself took place in the schoolhouse, and, although many band members gathered in the yard to learn whether there would be a sale, they were

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<sup>99</sup> Amalgamation Agreement, July 24, 1902, LAC, RG 10, vol. 2562, file 82, pt. 9 (ICC Exhibit 1, pp. 945–46).

<sup>100</sup> Angus Burns was given number 175 in 1901; in 1903, when the payroll was reorganized, he was assigned no. 29.

<sup>101</sup> See James Smith treaty annuity payroll, May 4, 1950, p. 105 (ICC Exhibit 3b, Supporting worksheets and paylists, vol. 4, tab T, p. 1603).



not privy to any of the discussion and were invited only to watch the signing of the document. His account says nothing about the merging of the Bands.

A. Burns – Right there they had a few meetings, no they didn't, the Indians didn't want to sell this land, nobody was eager to sell. Well all of a sudden, later on, I was already a mature young man, this was in Nineteen O Two, what I'm telling about.

...

A. Burns – Yeah, Oh, it was a big meeting, everybody went there, to go and see what was going to happen, Sale or no Sale. Well the old men were having a meeting, at this time there were a lot of old men. The Chief came and stood outside. "My People, he called, come here and listen to what I have come out to tell you, he said, inside this building they had a meeting all day. They want to sell our land. O.K. the time has come now, we are going to sell our land, this was how the meeting came out. So if you want to watch us, sign away this land, all of that can fit inside, come in inside here. We are giving up this land. That all, when I go inside here the papers will be signed to sell this land. so I ran over there but the school was already filled up. Then I saw that there was a window opened there so I went and leaned in there, so I was inside the building now from where I was leaning in. They were sitting at a table right close to me, these councillors and Chief. I saw him sitting there, also David Laird. And he started talking, now we have finished our meeting, your land here, the one that is South here, six miles square, this is the land we are going to sign away, somebody else will own it now. It will be sold, you are selling it. He was standing inside here, I was watching him from close, and he did this, look at these, they were white in color. They did not like these when I started working for the government. There were a lot of interpreters, you know Angus McKay and a Andrew McKay, Macdonald, they were chosen for this purpose for them to talk so they could be understood when they talked. They looked different when I started to work for the government, I was hired on purpose to work for the Indian Department, ever since then. I have worked for the Indian and I have always helped the Indian in their Indians way. Still today, even when my hair is white, I carry these ways. They [sic] way I understand it you people are giving me that land, like for me to own it, just like for me to sell it. I don't know how much I'll get for it. It is known how much we'll get for it. But as I understand it today, five dollars an acre the land is worth today. Young girl land, he said. What is it called now, Virgin Land.

G. Burns [the interviewer] – Yes Virgin Land.

A. Burns – Yes, virgin land that is what it is worth this is what I will promise you, but I will try to sell even for ten dollars an acre then I will sell it for a good price. If I can't do that, I will have to take that five dollars. This is what I promise you. So then the chief spoke Now you have heard the government officials. These high government officials, this is true what he has said. Now we are giving him this land, this is what we decided. We just gave him, just like it is his land to sell. When he

sells money will be given to us like they will be paying us. So then they called all the councillors right there, oh I was watching them from close. Not too many, our grandfather ...

G. Burns – Bernard.

A. Burns – Yes, he was the only one who was able to sign his name.

G. Burns – Those other ones X's.

A. Burns – They were held to the pen.<sup>102</sup>

There are no references to any other elders speaking about attending the meeting.

### **Annuities Paid, 1902**

The 1902 paylists for the James Smith Band and Cumberland Band 100A are dated July 25, 1902 – one day after the alleged surrender and amalgamation took place. They are important evidence because no voters list was made, and there are no minutes or other records of any meeting.

The two bands were paid separately that year under their normal ticket numbers. The payroll for the Cumberland Band 100A notes that 115 people, including 29 adult men were paid annuities “at James Smith’s reserve.”<sup>103</sup> The James Smith band payroll indicates 107 people were paid annuities that day, including 28 adult men.<sup>104</sup> Agent Jones’s annual report for that year notes 25 men in the James Smith Band and 27 in the Cumberland Band 100A.<sup>105</sup>

The Cumberland 100A annuity paylists were discontinued after the 1902 payments. All the band members appeared the following year on the reorganized James Smith band paylists with new ticket numbers.

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<sup>102</sup> Federation of Saskatchewan Indian Nations (FSIN), Transcript of an interview of elder Angus Burns, April 14, 1972 (ICC, James Smith Cree Nation IR100A Inquiry, Exhibit 23, pp. 2–3).

<sup>103</sup> Treaty annuity payroll, No. 100A Cumberland Band Paid at James Smith Reserve, July 25, 1902, no file reference available (ICC Exhibit 3b, supporting documentation, vol. 2, tab Q).

<sup>104</sup> Treaty annuity payroll, No. 100 James Smith Band Paid at Reserve, July 25, 1902, no file reference available (ICC Exhibit 3b, supporting documentation, vol. 4, tab T).

<sup>105</sup> W.E. Jones, Indian Agent, to SGIA, August 15, 1902, in *Annual Report of the Department of Indian Affairs for the Year Ended June 30, 1902* (ICC Exhibit, 1, p. 949).

**PART III**  
**ISSUES**

**JAMES SMITH CREE NATION – TREATY LAND ENTITLEMENT<sup>106</sup>**

**A     **Paylist****

- 1     What was the population of the James Smith Cree Band for the purposes of calculating land entitlement under Treaty 6, starting with the date of first survey of 1884?

**B     **Quality of Lands****

- 2     Does Treaty 6 obligate Canada to provide treaty lands of specified quality?
- 3     If so, what lands did Canada actually provide of specified quality?
- 4     Based on the answers to Questions 2 and 3, did Canada breach any obligation(s) in setting aside IR 100?

**C     **Lands Occupied Prior to Treaty****

- 5     Does Treaty 6 and/or the *Indian Act* of 1876 exclude lands occupied prior to treaty from treaty land quantum calculations?
- 6     If so, what land should have been excluded?
- 7     Based on the answer to Questions 5 and 6, did Canada breach any obligation(s)?

**D     **Alleged Amalgamation****

- 8     Did the Peter Chapman Band have a surplus of treaty lands at the time of the alleged amalgamation?
- 9     Was there an amalgamation of the Peter Chapman Band and the James Smith Band?
- 10    If the answers to questions 8 and 9 are positive, what effect if any did Peter Chapman's surplus treaty land have on the entitlement of James Smith?

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<sup>106</sup>     The James Smith Cree Nation reserves the right to make further arguments should the Supreme Court of Canada make a determination different from that of the Court of Appeal in the *Lac La Ronge Indian Band v. Canada* case. The James Smith Cree Nation also reserves the right to make further arguments if Canada's Specific Claims Policy changes at any time during this proceeding.

**E Sufficiency of Treaty Lands**

- 11 Considering the answers to questions under A, B, C and D, did Canada provide sufficient treaty lands to fulfill its obligations to James Smith Cree Nation under Treaty 6?

**PART IV**  
**ANALYSIS**

The single issue for determination in this report is the question of whether there was a lawful amalgamation of the “Peter Chapman Band” and the James Smith Band. We will therefore focus our analysis upon this question.

It is the position of the James Smith Cree Nation that no lawful amalgamation of the “Peter Chapman Band” and the James Smith Band took place on July 24, 1902. Further, the amalgamation if it did take place, as Canada argues, is, in the Band’s view, a breach of Treaty 6, the *Indian Act*, and Canada’s fiduciary duties to these First Nations. For the James Smith Cree Nation, the panel’s findings and recommendation on the issue of amalgamation are of significance for the singular reason that Canada’s rejection of JSCN’s treaty land entitlement claim is founded upon the validity of the amalgamation agreement. Specifically, in its letter of rejection dated May 22, 1984, then Minister of Indian Affairs John C. Munro said:

It appears that your band had a shortfall of land for five (5) persons when land was first surveyed for it in 1884. In 1887 Indian Reserve number 100-A was surveyed for the Cumberland House Indians, adjacent to the James Smith Reserve. In 1902 this reserve and the Indians living on it were amalgamated with the James Smith Band. The historical evidence reveals that this land was sufficient to fulfill the entitlement of the James Smith Band and the Indians who amalgamated with it in 1902. In fact, the James Smith Band had a surplus of land once the amalgamation was effected ...<sup>107</sup>

Canada takes the position that the evidence is clear that there was in fact, and in law, an amalgamation of the original James Smith Band and the “Peter Chapman Band.” Canada relies upon its royal prerogative as empowering it to amalgamate these two Bands, and Canada argues that the two Bands consented to that authority, as evidenced by their signature on the “Amalgamation Agreement” of July 24, 1902.

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<sup>107</sup> John C. Munro, Minister of Indian Affairs, to Chief Angus McLean, James Smith Cree Nation Band, May 22, 1984 (ICC Exhibit 4a, p. 1).

**AMALGAMATION OF THE “PETER CHAPMAN” AND THE JAMES SMITH BANDS**

Did an amalgamation of the “Peter Chapman Band” and the James Smith Band take place on July 24, 1902? The James Smith Cree Nation took issue with which event may have occurred first on July 24, 1902, the surrender or the amalgamation. Based upon our findings in the Cumberland House Cree Nation: IR100A Inquiry and James Smith Cree Nation: IR 100A Inquiry reports, that the July 24, 1902, surrender was invalid, we do not feel it necessary to decide upon the sequence of these events.

The parties agree that the first documentary mention of amalgamation of the “Peter Chapman” and James Smith Bands came in a letter from Indian Commissioner David Laird to the Secretary of Indian Affairs in regard to the proposed surrender of the southern portion of IR 100A. On June 19, 1902, Commissioner Laird said:

In connection with the surrender, I think it would be well to consider the question of amalgamating the bands of James Smith and Cumberland No. 100A. The latter have no Chief and the united bands would make a total population of 231 souls.

If this suggestion meets with your approval, and the consent of both bands to the amalgamation can be obtained, I think it would be a great gain to the Indians of James Smith’s Band as well as those of Cumberland band, both of which are in a backward state.<sup>108</sup>

Within one week of this correspondence, W.A. Orr in the Lands Branch of Indian Affairs wrote to the Secretary and reconfirmed that the reserve would be surrendered by the 100A Band; it would receive 10 per cent of the proceeds to buy agricultural implements, and “the two bands [would be] amalgamated as proposed.”<sup>109</sup>

We know from the historical documents that Indian Commissioner Laird wrote Indian Agent Jones on July 15, 1902, to inform the Agent that he, Laird, intended to meet “the Indians of James Smith and Cumberland Reserves” at the treaty annuity payday to be held nine days later, on July 24,

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<sup>108</sup> David Laird, Indian Commissioner, Department of Indian Affairs, to the Secretary, Department of Indian Affairs, June 19, 1902, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, pp. 933–36).

<sup>109</sup> W.A. Orr, In-charge Lands & Timber Branch, Department of Indian Affairs, to the Secretary, Department of Indian Affairs, June 25, 1902, LAC, RG 10, vol. 3736, file 27580 (ICC Exhibit 1, pp. 937–38).

“to obtain a surrender of the southern township of the Cumberland Reserve, and I think it would be better that I should discuss the question with them before you begin the payments.”<sup>110</sup>

Today the only evidence available regarding the surrender of IR 100A and the amalgamation of the Bands is the surrender document, affidavit, and amalgamation agreement dated July 24, 1902. We have no evidence of notice being given to the Bands prior to July 24, 1902. There are no contemporaneous minutes of the proceedings, which might have indicated the time and location of a vote, the number of persons present, and the vote taken. Further, none of the witnesses who appeared before us could recall any oral history with regard to the issue of amalgamation.

In the JSCN’s view, there is no provision in Treaty 6 for the amalgamation of Indian bands, just as there is no provision for the transfer of Indians from band to band; such decisions were left to the bands of Treaty 6. The language of Treaty 6 entitles its signatory bands to select their reserve lands, and any decision to join together would have been for the bands themselves to decide. The JSCN’s position is that the “Crown would neither have participated nor been expected to participate in the joining together.”<sup>111</sup> The JSCN maintains: “Canada sought to exert greater and greater control of membership of bands through the creation of informal, and then formal, statutory methods of transferring Indians. Equally, Canada sought to control band memberships through the amalgamation process.”<sup>112</sup> Finally, for the JSCN, Canada “casually” decided in 1902 to put James Smith and “Peter Chapman” together and gave directions for an amalgamation document to be prepared. In the words of counsel, “there is not even the pretence of consultation on the part of Canada.”<sup>113</sup>

If the treaty is silent on the matter of amalgamation then, what, if anything, was required by the *Indian Act*? The parties agree that the *Indian Act* makes no provision for the amalgamation of bands. For Canada, this leads to the conclusion that, absent a statutory limitation on its royal prerogative, it exercised its prerogative power to bring about the amalgamation. For James Smith,

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<sup>110</sup> David Laird, Indian Commissioner, Department of Indian Affairs, to W.E. Jones, Indian Agent, Department of Indian Affairs, July 15, 1902, LAC, RG 10, vol. 3562, file 82, pt. 9 (ICC Exhibit 1, p. 940).

<sup>111</sup> Submissions on Behalf of the James Smith Cree Nation, July 28, 2003, p. 66, para. 202.

<sup>112</sup> ICC Transcript, June 15, 2004, p. 26, lines 21-26 (William Selnes).

<sup>113</sup> ICC Transcript, June 15, 2004, p. 26, lines 3-8 (William Selnes).

in the absence of statutory authority, the Crown had no authority to amalgamate and cannot rely upon its prerogative power to create or amalgamate bands.

Without guidance from either the treaty or the *Indian Act*, we must ask whether principles of fiduciary law provide any assistance in determining the lawfulness of Canada's actions in this case. We will not review the general principles concerning fiduciary law here. We believe we have thoroughly reviewed these principles in many other inquiries.<sup>114</sup> We will, therefore, rely upon our synopsis of the case law in these other reports and categorically state here that the courts have clearly stated that the relationship between aboriginal people and the Crown is a fiduciary one; however, not every aspect of this relationship will give rise to a fiduciary duty. What will be required is a determination of whether a specific fiduciary duty arises on the circumstances of this case, after a meticulous examination of the facts.

The James Smith Cree Nation sees the question of the amalgamation of the "Peter Chapman" and James Smith Bands as analogous to the surrender of lands where Canada seeks to rely upon the quantity of land reserved for "Peter Chapman IR 100A," once amalgamated with James Smith, as satisfying the outstanding treaty land entitlement of James Smith IR 100. The JSCN notes that Canada cannot simply take land from an Indian band; a valid surrender process must be completed. Similarly, JSCN argues, once Canada decided to proceed with an amalgamation of these two Bands, it owed a duty to obtain the consent and approval of each Band. In JSCN's view, the issue of whether such consent was obtained must be analyzed in the same way that the Supreme Court of Canada analyzed the validity of consent to surrender land in *Apsassin*.<sup>115</sup> When viewed from this perspective, JSCN argues, Canada did not obtain this consent.

Canada's position is that there is an abundance of "clear, unchallenged, unequivocal evidence of informed consent to the amalgamation and aside from the [amalgamation] agreement itself ... [the

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<sup>114</sup> See (1998) 8 ICCP for the Commission's reports of the *Kahkewistahaw First Nation: 1907 Reserve Land Surrender Inquiry*; *Moosomin First Nation: 1909 Reserve Land Surrender Inquiry*; *Chippewas of Kettle and Stony Point First Nation: 1927 Surrender Inquiry*; and *Sumas Indian Band: 1919 Indian Reserve 7 Surrender Inquiry*.

<sup>115</sup> *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1996] 2 CNLR 25 (SCC).



evidence is] primarily in the post-amalgamation facts.”<sup>116</sup> In Canada’s view, it is this post-amalgamation conduct “which is completely consistent with informed consent.” Further, Canada argues that JSCN’s “attempt to equate an amalgamation with a surrender is not a proper question. Amalgamation[s] aren’t surrenders. There were detailed provisions for surrenders; there are no provisions for amalgamations ... A surrender – an amalgamation is not a surrender, [it’s] fundamentally different. On amalgamation the bands don’t surrender their land to third parties or at all, there’s no need for a surrender and that’s not what it’s about. On this amalgamation each band obtained an undivided interest in all land, monies and other privileges of the other band.”<sup>117</sup>

We agree with the parties that the fundamental question is whether there was informed consent to this amalgamation. To begin, we believe it is important to recite the first paragraph of the 1902 amalgamation agreement, which states:

THIS AGREEMENT made in duplicate and entered into this Twenty fourth day of July in the year of our Lord one thousand nine hundred and two, between the *owners of James Smith’s Indian Reserve No. 100*, in the Provisional District of Saskatchewan, in the North West Territories and Dominion of Canada, as represented by their Chief and Headmen, hereinafter called the Parties of the First Part; and the *owners of Cumberland Reserve No. 100A*, also in the said Provisional District, as represented by their Headman, hereinafter called the parties of the Second Part.<sup>118</sup>

The authority of “the owners of the James Smith’s Reserve No. 100” to have entered into this agreement has not been disputed by the parties. From JSCN’s perspective, the issue is whether, in the absence of other evidence, Canada can rely upon this document as *prima facie* evidence of JSCN’s consent. We believe the document is impugned by a more fundamental question: Who were “the owners of Cumberland Reserve No. 100A” upon whom Canada has sought to rely as having the authority to amalgamate with the James Smith Band? Based upon the totality of the evidence, reviewed and reported in direct answer to the matters before this panel in the *James Smith Cree*

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<sup>116</sup> ICC Transcript, June 15, 2004, pp. 111, lines 23–25, to 112, lines 1–2 (Robert Winogron).

<sup>117</sup> ICC Transcript, June 15, 2004, p. 129, lines 9–13, 25, p. 130, lines 1–7 (Robert Winogron).

<sup>118</sup> Amalgamation Agreement, July 24, 1902, LAC, RG 10, vol. 2562, file 82, pt. 9 (ICC Exhibit 1, pp. 945–46). Emphasis added.

*Nation: IR 100A Inquiry* and the *Cumberland House Cree Nation: IR 100A Inquiry*, we believe the “owners of Cumberland Reserve No. 100A” were the whole of the Cumberland Band, including those resident at IR 20, and not just those members resident at IR 100A. The Cumberland Band included members at IR 100A and at IR 20; yet, based on the evidence, Canada relied upon only those resident at IR 100A (including non-members of the Chakastaypasin Band, who allegedly had transferred into the Cumberland Band) to agree to the amalgamation with the James Smith Band. There is no evidence to indicate that those members living at IR 20, who were also “owners” of IR 100A, voted to amalgamate.

The “amalgamation agreement” further states:

... the Parties of the Second Part [the owners of Cumberland Reserve No. 100A] agree for themselves and their descendants to give to the Parties of the First Part [the owners of the James Smith’s Indian Reserve No. 100], a joint and undivided interest in all land, moneys and other privileges now possessed and enjoyed or which may at any time hereafter be possessed or enjoyed by the said Parties of the Second Part.<sup>119</sup>

The act, by certain residents at IR 100A, to amalgamate with the James Smith Band sought to transfer the right “to have, hold and possess forever, an undivided interest in all land, moneys and other privileges now possessed and enjoyed” by the “owners of Cumberland Reserve No. 100A.” In our view, the transfer of this right is a disposition of IR 100A under the terms of Treaty 5 and therefore required the consent of the whole of the Cumberland Band (including those resident at IR 20) to be valid. Canada’s failure to have sought the informed consent of the whole of the Cumberland Band is a breach of its treaty and fiduciary duties. We find the amalgamation agreement invalid because the signatories, Kahtapiskowat and George Sanderson, could not have given a joint and undivided interest as they were not the “owners of Cumberland 100 A.” They were two members of Chakastaypasin IR 98 who allegedly transferred to IR 100A in 1896 without the consent of the Cumberland Band, including the members resident at IR 20.

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<sup>119</sup> Amalgamation Agreement, July 24, 1902, LAC, RG 10, vol. 2562, file 82, pt. 9 (ICC Exhibit 1, pp. 945–46).

**PART V**  
**CONCLUSION**

We conclude, based on the totality of the evidence, that the *amalgamation* of the James Smith Band and the “Peter Chapman Band” was invalid.

**FOR THE INDIAN CLAIMS COMMISSION**



Renée Dupuis  
Chief Commissioner



Alan C. Holman  
Commissioner

Dated this 17th day of March, 2005.



**APPENDIX A**

**INDIAN CLAIMS COMMISSION**

**Interim Ruling**

**James Smith Cree Nation Inquiries**

**Treaty Land Entitlement and Cumberland 100A Reserve Claims**

**Ruling on Government of Canada Objections**

**PANEL**

Commission Co-Chair P.E. James Prentice, QC  
Commissioner Carole T. Corcoran  
Commissioner Elijah Harper

**COUNSEL**

For the James Smith Cree Nation  
Sylvie Molgat

For the Government of Canada  
Jeffrey A. Hutchinson

To the Indian Claims Commission  
David E. Osborn, QC / Kathleen N. Lickers

**May 2, 2000**

## **BACKGROUND**

The Commissioners have considered Canada's challenge to the mandate of the Commission to conduct an inquiry into aspects of the James Smith Cree Nation (JSCN) treaty land entitlement (TLE) claim and aspects of the JSCN claim concerning Peter Chapman Indian Reserve (IR) 100A.

The submissions of Mr Jeffrey Hutchinson of January 7, 2000, and March 10, 2000, and Ms Sylvie Molgat of February 25, 2000, were considered and discussed at length; the Commissioners are grateful to counsel for their cogent and exhaustive review of the matter. After due consideration, the Commissioners have decided to proceed with the inquiry, in all aspects, as requested by the JSCN. The principle of fairness was (and is) the governing factor in deciding to proceed with this inquiry. Our reasons follow.

The JSCN originally submitted three (3) claims to the Specific Claims Branch, Department of Indian Affairs. These claims relate to the validity of the surrenders of Chacastapasin IR 98 and Peter Chapman IR 100A, respectively, and the JSCN's outstanding treaty land entitlement. It is the Commission's mandate to conduct an inquiry into aspects of the Peter Chapman IR 100A and JSCN's TLE claim that are today at issue. Canada has raised no challenge to the Commission's mandate to inquire into the surrender of Chacastapasin IR 98.

## **THE TREATY LAND ENTITLEMENT**

A claim for TLE was submitted on behalf of the JSCN in the early 1980s by the Federation of Saskatchewan Indians. Under cover of May 22, 1984, then Minister of Indian Affairs John Munro rejected JSCN's TLE, stating that the shortfall of land at the time of first survey was fulfilled as a result of the amalgamation of the James Smith and Peter Chapman Bands in 1902. Unfortunately, neither the original nor a copy of the TLE submission can today be found.

By a Band Council Resolution dated May 10, 1999, the JSCN requested that the Indian Claims Commission conduct an inquiry into the rejected TLE claim. In advance of the Commission's first planning conference, the First Nation prepared a summary document, entitled "James Smith Cree Treaty Land Entitlement: Legal Submissions." In this submission, Canada argues, the First Nation raised claims pertaining to land quality and land occupied prior to treaty, claims which Canada argues were not raised in the original submission. As such these claims are "new claims" not

previously rejected by the Minister and therefore are not properly before the Commission. Canada maintains that “there is a distinction between a Band simply presenting new legal argument or relying on different evidence to prove the claim originally submitted and ... a Band submitting entirely new grounds for a claim.” The TLE claims based upon land occupied prior to treaty and land quality are, Canada submits, entirely new grounds for a TLE claim.

The First Nation argues that, as a result of the original submission now being lost, neither party is in a position to show conclusively what comprised the original treaty land entitlement submission. In addition, the First Nation submits that “a First Nation’s claim to TLE cannot be considered in a vacuum and it would be grossly unfair to the First Nation to employ simple arithmetic to calculate TLE while ignoring Canada’s broader or other obligations under Treaty.”

#### **PETER CHAPMAN IR 100A**

The First Nation also submitted a claim to the Specific Claims Branch alleging breaches by the Crown of its statutory, treaty, trust, and fiduciary obligations to the Peter Chapman Band in relation to the taking of a surrender in 1902 and the subsequent sale of those lands. This claim was partially rejected in a letter of March 13, 1998, from then Assistant Deputy Minister John Sinclair to then Chief Eddie Head, JSCN.

By a Band Council Resolution dated May 10, 1999, the First Nation requested that the Indian Claims Commission conduct an inquiry into the validity of the 1902 surrender and the propriety of the subsequent land sales.

In advance of the Commission’s first planning conference, the First Nation also prepared a summary document entitled “Peter Chapman/Cumberland 100 A: Legal Submissions” which, Canada argues, raised for the first time a claim regarding unalienated mineral rights (hereinafter referred to as the “minerals issue”) thereby raising a “new claim” not previously reviewed or rejected by the Minister and therefore not properly before the Commission.

The First Nation argues that, in its original submission, it made arguments that the Crown “breached its statutory, treaty, trust and fiduciary duties in the taking of a surrender and for Canada to now distinguish various sub-issues which may or may not have been considered in the rejection

and characterize them as “substantively new claims” is engaging in legalistic and specious argument based on a narrow and restrictive interpretation of the Commission’s mandate.”

### ISSUE

The Order in Council establishing this Commission provides:

AND WE DO HEREBY advise that our Commissioners on the basis of Canada’s Specific Claims Policy, ... by considering only those matters at issue when the dispute was initially submitted to the Commission, inquire into and report on:

- (a) whether a claimant has a valid claim for negotiation under the Policy where that claim has already been rejected by the Minister.<sup>1</sup>

The issue to be decided by the Commission is whether or not, by introducing issues of minerals, lands occupied prior to treaty, and land quality, the First Nation has raised “substantially new claims,” and if so, whether the Commission has jurisdiction to continue its inquiry into these claims.

### RULING

To begin, we note counsel for Canada’s reference to the Supreme Court of Canada’s decision in *U.E.S., Local 298 v. Bibault*<sup>2</sup> and agree that the Commission has the authority to interpret its mandate and therefore determine its jurisdiction. The Commission views its mandate, as it has in previous rulings and most recently in the Sandy Bay First Nation Inquiry, in a broad and remedial manner and we see no reason to restrict this interpretation on the facts of this case. As we stated in the *Lax Kw’alaams* report, “this Commission was created to assist parties in the negotiation of specific claims.”<sup>3</sup> We have also recently stated that “to restrict the mandate of the Commission to

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<sup>1</sup> Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991 (Consolidated Terms of Reference).

<sup>2</sup> *U.E.S., Local 298 v. Bibault*, [1988] 2 SCR 1048.

<sup>3</sup> ICC, *Lax Kw’alaams Indian Band Inquiry* (Ottawa, June 1994); reported [1995] 3 ICCP 99 at 158.



a narrow and literal reading of the Specific Claims Policy would prevent First Nations in certain circumstances from having their claims dealt with fairly and efficiently.”<sup>4</sup>

By interpreting our mandate in this remedial manner we are mindful that each claim must be viewed in its own unique circumstances. In the case of the JSCN TLE claim, owing to the fact that the original submission cannot now be found, neither party is in a position to show conclusively what the original submission was comprised of and what it did, or did not, contain. Canada cannot confirm with certainty what issues were reviewed by it, save and except that which is specifically mentioned in Minister John Munro’s letter of May 22, 1984. Moreover, the consequences of adopting Canada’s reasoning would, we believe, result in a multiplicity of proceedings in a claim that is already very complex and could result in prolonging the final resolution while the First Nation awaits a response from Specific Claims on the questions of land quality and lands occupied prior to treaty.

In the result, we cannot accept Canada’s argument that the issues surrounding lands occupied prior to treaty and the quality of those lands are “new claims.” They are more properly aspects of the claim that may give rise to new legal issues, but they do not constitute new claims. In any event, we would not be able to conclude that these claims are “new” without first knowing what was originally submitted and reviewed. In the absence of knowing this, the Commission accepts the JSCN’s request for a full inquiry into all aspects of what the First Nation has consistently argued to be an outstanding treaty land entitlement.

As regards the minerals issue, the First Nation admits that in its original submission and in the partial rejection of this claim “the matter of mineral rights was not specifically addressed.” We also accept Canada’s argument that “the Band alone has the responsibility to bring forward its own case” and that Canada is obliged to consider that case. We do not accept however, the consequence of Canada’s argument on the facts of this case. That consequence, we believe, would result in further unfairness to the First Nation.

Simply put, the First Nation requested that the Commission inquire into the validity of the 1902 surrender of Peter Chapman IR 100A and the propriety of the sale of those surrendered lands. The First Nation has framed the issues surrounding the surrender and sale of IR 100A as a breach

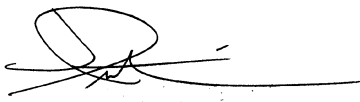
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<sup>4</sup> ICC, “Interim Ruling: Alexis First Nation Inquiry, Transalta Utilities Rights of Way Claim,” p. 8; see (2003) 16 ICCP 47 at 59.

of the Crown's statute, treaty, trust, and fiduciary duties and the First Nation presents the issue of unalienated mineral rights as further evidence of the Crown's breach of duty. In the interests of fairness, we are prepared to proceed into the inquiry of the surrender and sale of the Peter Chapman IR 100A lands, including consideration of the mineral rights. To do otherwise, we believe, would result, not in a thorough inquiry into all matters at issue, but in a piecemeal inquiry, with some aspects of the claim before the Commission and others at various stages of review within the Specific Claims Process. This, we believe, runs counter to our remedial mandate and would result in unfairness to the First Nation.

In agreeing to inquire into all aspects of JSCN's TLE, including lands occupied prior to treaty and the quality of those lands, and the issue of mineral rights in the Peter Chapman IR 100A claim, we are mindful of the effect our decision may have on the course of this inquiry in so far as Canada may not have had an adequate opportunity to consider the issues or may need more time to prepare, or because additional research is needed (a fact already admitted by Canada as regards the population analysis of JSCN's TLE). The Commissioners are, as previously stated, "firmly of the view that they must strive to be fair to both parties, not only the claimants, and will attempt to avoid any unfairness the government feels their decision to proceed with the inquiry causes."<sup>5</sup> We therefore invite the parties at the next planning conference to discuss a timetable that will accommodate any needs for additional research or preparation time.

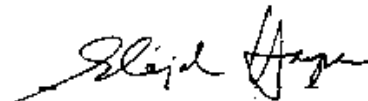
FOR THE INDIAN CLAIMS COMMISSION



P.E. James Prentice, QC  
Commission Co-Chair



Carole T. Corcoran  
Commissioner



Elijah Harper  
Commissioner

Dated this 2nd day of May, 2000.

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<sup>5</sup> ICC, "Interim Ruling: Lac La Ronge Indian Band Inquiries, Candle Lake and School Lands Claims," see (2003) 16 ICCP 13 at 19.

## APPENDIX B

### INTERIM RULING TO DELIVER INTERIM REPORT

November 27, 2003

William Selnes  
Kapoor, Selnes, Klimm & Brown  
417 Main Street  
Melfort, SK  
S0E 1A0

- And -

Robert Winogron  
DIAND, Department of Justice  
10 Wellington Street, 10<sup>th</sup> Floor  
Gatineau, QC  
K1A 0H4

*Via facsimile*

Dear Sirs:

**Re: James Smith Cree Nation - [T.L.E.]**

**Our File: 2107-39-02**

I write further to our conference call wherein I advised of the Panel's decision regarding the timetable for this inquiry, and further to my undertaking to place the Panel's decision in writing to the parties.

The Panel has decided to convene a first hearing on **May 12, 2004** regarding James Smith Cree Nation's TLE inquiry solely on the amalgamation issue. The Panel will deliver its findings and recommendations on the issue of amalgamation in an *interim* report following the May 2004 hearing. The Panel will provide Canada 18 months to prepare its final position on payroll analysis, land quality and lands occupied prior to treaty, which will therefore be due **no later than April 2005**. Following receipt of Canada's submission in April 2005, the Panel will convene a second hearing on the remaining issues of payroll analysis, land quality and lands occupied prior to treaty. The Panel is of course open to receiving Canada's submission on payroll analysis, land quality and lands occupied prior to treaty before April 2005, should it be ready.


In coming to its decision, the Panel has reviewed the parties' exchange of correspondence on the matter of timetable, and the Commission's summaries of the conference call discussions held

between the parties. In the Panel's view, the issue of amalgamation is a discreet issue which is common to all three of the James Smith Cree Nation's inquiries. Proceeding in the manner as set out by the Panel represents a compromise answer to the parties' positions on timetable for this inquiry.

The timetable for the remaining submissions from the parties solely on the issue of amalgamation is as follows: Canada's Response will be due **February 2, 2004**; the James Smith Cree Nation's Reply will be due **March 8, 2004**.

The Commission appreciates the hard work and dedication of the parties in trying to resolve the issue of timetable, and we look forward to moving this inquiry forward.

Yours truly



Kathleen N. Lickers  
Legal Advisor

cc: Jos Dyck, DIAND, Specific Claims Branch  
Jerry Kovacs, DIAND, Department of Justice  
Chief Walter Constant, James Smith Cree Nation - T.L.E.  
Rarihokowats, Researcher, James Smith Cree Nation



**5 Written legal submissions***Mandate challenge*

- Submissions on Behalf of the Government of Canada, January 7, 2000
- Submissions on Behalf of the James Smith Cree Nation
- Reply Submissions on Behalf of the Government of Canada.

*Written submissions*

- Written Submissions on Behalf of the James Smith Cree Nation, July 28, 2003
- Written Submissions on Behalf of the Government of Canada, February 2, 2004
- Reply Submissions on Behalf of the James Smith Cree Nation, March 15, 2004

**6 Oral legal submissions**

Saskatoon, June 15, 2004

**7 Content of formal record**

The formal record for the James Smith Cree Nation: Treaty Land Entitlement Inquiry consists of the following materials:

- the documentary records (4 volumes of documents, with annotated index) (Exhibit 1)
- Exhibits 2–13 tendered during the inquiry
- transcript of community sessions (2 volumes) (Exhibits 5a and 5b)
- transcript of expert session (1 volume) (Exhibit 5e)
- transcript of oral session (1 volume)

The report of the Commission and letter of transmittal to the parties will complete the formal record of this inquiry.